CHAPTER XXX.

OFFENCES RELATING TO TRADE AND LABOUR.

CH. XXX.

THOUGH the Consolidation Acts of 1861 provide for the punishment of most of the common offences against the person and property of individuals, they do not provide for all of them. Offences relating to trade form a separate group, which I now proceed to examine.

As might have been expected, there is no department of the law in which greater changes have taken place. When England was mainly a pastoral and agricultural country, and when commerce was still in its infancy, the trade offences which in our days are most important were unknown; when there was no such thing as bankruptcy there could be no fraudulent bankrupts. On the other hand, proceedings which we now regard as part of the common course of business were treated as crimes. Usury, forestalling and regrating, continued to be so regarded at all events in theory till very modern times. As time went on, and commerce became more and more important, the old view as to the criminality of usury died away, but the possibility of whole classes of frauds unknown in earlier and simpler times was proved by experience, and punishments were provided for them. Again, in early times it was thought both possible and desirable to provide by law for many matters connected with trade, which we think it wiser to leave unregulated. Laws, for instance, were passed which prescribed the terms as to apprenticeship on which people should be permitted to work at given trades. This legislation came to be regarded

as opposed to the principles of political economy, and it was abolished; but considerations not usually recognized or regarded with favour by political economists have induced the legislature of our own times to pass a large number of acts regulating particular branches of trade and manufacture, and containing a greater or less number of penal clauses. Such in general is the nature of the offences connected with trade.

More particularly, they may be divided into three classes, which, if we take them according to the antiquity of the roots from which they spring, are as follows:—

1. Offences consisting in a supposed preference of private to public interest. These are usury, forestalling, and regrating, and conspiracies in restraint of trade.

2. Offences against laws regulating particular trades.

3. Commercial frauds, and in particular the offences of fraudulent debtors, and fraudulent officers of companies.

The first class of offences connected with trade and labour are those which were supposed to consist in a preference of private to public interest. Our older legislation laid upon the use of property many restrictions, which have in the course of time been almost entirely removed under the influence of the principle that the State should as a rule protect individuals against nothing but actual force, or the threat of such force, and the grosser kinds of fraud—a principle against which there has for some years past been a reaction of considerable importance. In early times, however, the principle itself was not admitted. On the contrary, it was supposed to be the duty of the king and the parliament to provide directly, and by many kinds of interferences with private affairs, for the general well-being of the whole community, and of all the classes of which it was composed. Whether, as has been usually asserted, these attempts were at all times and at all places mischievous failures is a question which it would be curious to examine if any one with the proper qualifications for such a task were to undertake it. The assertions to the contrary which have been made, or rather suggested, by a few writers of a peculiar temper, who dislike the existing state of things,

CH. XXX. appear to me to express rather the sentiments of their authors than inferences from evidence.

Whatever may have been the policy of the ancient laws about trade, there can be no doubt either of their nature or of the spirit in which they were conceived. They all proceed upon the principle that the interests of individuals may be pursued to an extent which is injurious to the public, and that such an abuse ought to be restrained by law. This sentiment was nowhere so fully expressed as in the laws relating to usury, which was in this and many other countries punished both as a sin and as a crime. Usury was defined and forbidden by the [1] laws of the Twelve Tables, though there is a controversy as to what the meaning of the definition "unciario fœnore amplius" was, some persons understanding it to mean more than 1 per cent. per annum, others more than $8\frac{1}{3}$, others more than 10, and others more than cent. per cent.; but "unciarium fœnus," whatever that may have been, was regarded as legitimate.

[2] A variety of ecclesiastical writers, and the canons of different councils spoke in terms of more or less explicit condemnation of all usury, understanding by that expression every loan made in consideration of receiving back more than was lent, and for a considerable time usury was regarded all over Europe as an infamous pursuit which was abandoned to the Jews. [3] This view was attacked at the Reformation by various authors, and was defended amongst others by Bossuet. His treatise is specially directed against the views of Grotius, who characteristically drew a distinction between interest and usury which Bossuet shows to depend upon no principle at all, but to be a practical evasion of an established principle. Whether it was any the worse for that is a question which different persons will answer in

[1] See Vol. I. p. 10.

[2] The ecclesiastical or theological history of the subject is given in Bossuet's "Traité sur l'Usure," *Works* (Versailles edition of 1817), vol. xxx. pp. 643-698. The sixth proposition (p. 676) is: "La doctrine qui dit que l'usure "selon la notion qui en a été donné" (*i.e.* "tout profit qu'on stipuloit ou "qu'on exigeoit au-delà du prêt," p. 648) "est défendue dans la loi nouvelle "à tous les hommes envers tous les hommes est de foi."

[3] "Bucer est le premier auteur que je sache, qui eut écrit que l'usure n'étoit "pas défendue dans la loi nouvelle. Calvin a suivi, Saumaise après."—Bossuet, *ut sup.* p. 677.

different ways, according to the view which they may take of the nature and limits of such speculations. It is no doubt like the distinction between liberty and license—a distinction which gives two names to one thing because the person who makes use of it does not know how otherwise to distinguish between what is to be praised and what is to be blamed. CH. XXX.

It is easy to trace in Bossuet's argument, and in the authorities which he quotes, the line of thought which led to an absolute condemnation of usury in the only broad and fully intelligible sense of the word. Usury, according to this view, is hard, bad in itself, and essentially unjust. It enables the rich man to make a profit out of the misfortunes of the poor. The lending of money ought to be an act of charity to one's neighbour, not a matter of business. The lender is to look for no other profit than the borrower's gratitude. Apart from this appeal to sentiment an appeal was also made to reason. Usury was regarded as essentially unjust upon various grounds, the best-known and most commonly quoted of which was the opinion of [1] Aristotle that usury is against nature.

The decay of the moral and religious objections to usury I need not trace. Bentham's celebrated tract on the subject (the *Defence of Usury*, written about 1785) may be regarded as marking the point at which the older sentiment theoretically expired, though for some practical purposes it is still as vivacious as ever. At this day, when a professional moneylender comes (as they often have occasion to do) into a court of justice, juries will nearly always find against them if they have any sort of excuse for doing so, and I have known cases where, in defiance of strong evidence, and in spite of adverse

[1] See *Politics*, i. ch. 3 (at the end of the chapter). "ἐνλογώτατα μισεῖται "ἡ ὀβολοστατικὴ διὰ τὸ ἀπ' αὐτοῦ τοῦ νομίσματος εἶναι τὴν κτῆσιν, καὶ οὐκ ἐφ' "ὅπερ ἐπορίσθη· μεταβολῆς γὰρ ἐγένετο χάριν· ὁ δὲ τόκος αὐτὸ ποιεῖ πλέον· ὄθεν "καὶ τοὔνομα τοῦτ' εἴληφεν· ὅμοια γὰρ τὰ τικτόμενα τοῖς γεννῶσιν αὐτά ἐστιν· "ὁ δὲ τόκος γίνεται νόμισμα νομίσματος· ὥστε καὶ μάλιστα παρὰ φύσιν οὗτοι τῶν "χρηματισμῶν ἐστίν." It is strange indeed that so great a man as Aristotle should have used language implying that, if a gold coin is lent by A to B for a year, the interest payable by B to A is produced by the gold coin in any sense remotely resembling that by which a seed produces an ear of wheat. What happens is that at the end of the year B pays A a different gold coin of the same value as the first, and a silver coin bearing a certain proportional value to it. Suppose, however, that it was possible by sowing a sovereign to grow a guinea, why not do so?

CH. XXX. summings-up, persons have been acquitted of perjury, conspiracy, and the obtaining of money on false pretences, because the prosecutor was a money-lender. Indeed, though there can be no doubt that the old theological view of the subject was wrong on every sort of ground, and especially in laying down rules which would make commerce and the investment of capital impossible, the sentiment upon which it was founded had much to recommend it. It is to a certain extent recognized by law, as, for instance, by the Pawnbrokers Acts, and by [1] the very insufficient provisions of the Bill of Sales Acts against what is substantially fraud. It seems to me that the trade of the scoundrels who live by pandering to the folly and vice of the young, and driving with ignorant people in difficulties bargains so hard that no one in their senses would enter into them if they understood their provisions, might be stopped with no great difficulty and without interfering with anything which could by courtesy be called a real commercial operation. The general principle of free trade and free contract is so firmly established, that those who believe in it ought not to be afraid of making such apparent or real exceptions to it as are necessary to prevent either fraud or public inconvenience.

However this may be, the history of the law of usury in England is as follows. The earliest notice of the subject with which I am acquainted occurs in the [2] laws of Edward the Confessor: "Usurarios etiam defendit Edwardus, ne "esset aliquis in regno suo. Et si aliquis inde probatus "esset omnes possessiones suas perderet et pro exlege habere-"tur. Hoc autem dicebat sæpe se audisse in curia regis "Francorum, dum ibi moratus esset nec immerito usura "enim summa radix viciorum interpretatur." According to [3] Glanville usurers forfeited all their property to the king, but subject to this singular rule, "Vivus autem non solet "aliquis de crimine usuræ appellari nec convinci: sed inter "cæteras regias inquisitiones solet inquiri et probari aliquem in "tali crimine decesisse per duodecim legales viros de vicineto

[1] This was written before the act of 1882 (45 & 46 Vic. c. 43) amending the act of 1878 (41 & 42 Vic. c. 31) was passed. It is to be hoped that it will prove more successful than its predecessor.

[2] Law xxxiv. Thorpe, i. 461.

[3] Book vii. c. 16.

" et per eorum sacramentum. Quo probato in curia omnes " res mobiles et omnia catalla, quæ fuerunt ipsius usurarii " mortui ad usus domini regis capientur, penes quemcun- " que inveniantur res illæ." Glanville, however, says that if an usurer repented of and desisted from his usury before death his goods were not forfeited afterwards.

This singular law must have converted usurers other than Jews into sponges, collecting treasure for the king during life which was forfeited on their death. The provision as to their repentance, however intended, would probably have the effect of preventing them from repenting of or concealing their trade. A man would naturally carry on his business with the hope and intention of repenting in time to save his family from the forfeiture, but would probably seldom carry out his intentions. One of the articles of eyre mentioned in [1] Bracton is in exact accordance with Glanville. The justices were to inquire, "De usurariis Christianis mor- " tuis, qui fuerunt, et quæ catalla habuerunt, et quis ea " habuerit."

Usury was an ecclesiastical offence, and in Hale's *Precedents* [2] several cases of prosecution for it are noticed. This led in 1341 to a kind of compromise between the king and the bishops. By 15 Edw. 3, c. 5, passed in that year, it was enacted "that the king and his heir should have the con- " isance of the usurers dead, and that the ordinances of " Holy Church have the conisance of usurers on life as " to them appertaineth, to make compulsion, by the censures " of Holy Church for the sin, to make restitution of the " usuries taken against the laws of Holy Church."

These laws upon the subject were, as might have been expected, found altogether ineffective, and they appear to have been evaded by fictitious sales and other devices, to which 3 Hen. 7, cc. 5 and 6, and some earlier statutes to which they refer, seem to have applied.

[1] Bracton, ii. p. 244, fo. 116B.

[2] *E.g.* No. div. p. 166, A.D. 1578. "Dominus objecit quod detectum est " offitio, that he is suspected to be a usurer. Dictus Simpson fassus est that " he lent owte a little money, and had 11s. of the pound, after the rate of " tenne in the hundred; but he did not urge the same, but only the parties " themselves whom he lent his money to did of their own good will give him " after the same rate; but not by compulcion he did urge the same."

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Upon the Reformation a great change took place in the laws relating to usury.

In 1545, by 37 Hen. 8, c. 9, a bill was passed reciting that usury was "a thing unlawful" and that the[1] law on the subject was exceedingly obscure, and enacting that all usurious contracts should be void, and that all offenders against the act should be liable to various forfeitures, including imprisonment, fine, and ransom at the king's pleasure. Incidentally, usury is defined as taking more than 10 per cent. per annum. The legislature thus adopted the view put forward by Calvin and Bucer as to the lawfulness of interest as distinguished from usury. This act was repealed by Edward VI. (5 & 6 Edw. 6, c. 20) but revived in 1570 by 13 Eliz. c. 8, which added to it, and amongst other things provided (14) that "all brokers, "solicitors, and drivers of bargains for contracts" of an usurious character, "shall be to all intents and purposes judged, "punished, and used, as counsellors, attornies, or advocates, "in any case of præmunire." The act also provided (s. 9) that "inasmuch as all usury being forbidden by the law of "God is sin, and detestable," those who took 10 per cent. usury or less, should forfeit the usury. It provided also in substance (s. 9) that all persons who took more than 10 per cent. should be liable to be punished by the ecclesiastical courts as well as under the statutes, but that those who took 10 per cent. or less should "be only punished by the pains and forfeitures "appointed" (for them) "by this act." The legal effect of these provisions seems to have been to declare all taking of interest for money to be illegal, and a detestable sin, but not punishable otherwise than by a forfeiture of the interest taken unless it exceeded 10 per cent., in which case it was both a temporal and a spiritual offence. The enactment forbidding the taking of all interest must have been a dead letter. It was not repealed till 1854, but it seems never to have been enforced or indeed noticed. In 1623, was passed an act (21 Jas. 1, c. 17) which fixed the rate of interest at 8 per cent. It contained a proviso (s. 5) "that no words

[1] "Which acts, statutes, and laws have been so obscure and dark "in sentences, words, and terms, and upon the same so many doubts, "ambiguities, and questions have arisen and grown, and the same acts, "statutes, and laws been of so little force or effect," &c.

" in this law contained shall be construed or expounded " to allow the practice of usury in point of religion or " conscience,"—which may be regarded as the last vestige of the old views to be found in our law. The 8 per cent. was reduced to 6 under the Commonwealth, and by an act passed in 1660 (12 Chas. 2, c. 13). It was further reduced to 5 per cent. by 12 Anne, c. 16, passed in 1713. Finally, "all existing laws against usury" were repealed by 17 & 18 Vic. c. 90, passed in 1854. This act enumerates the statutes before noticed, and its words extend to usury regarded as an ecclesiastical offence.

Forestalling, ingrossing, and regrating was the offence of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up so as to be able to command what price he chose when he got to the market. The ingrosser or regrator—for the two words had much the same meaning—was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime. [1] "It was upon conference and mature deliberation resolved " by all the justices that any merchant, subject, or stranger, " bringing victuals or merchandise into this realm may sell " them in gross, but that vendee cannot sell them again in " gross, for then he is an ingrosser according to the nature of " the word, for that he buy in gross and sell in gross, and may " be indicted thereof at the common law as for an offence that " is *malum in se*. That no merchant or any other may buy " within the realm any victual or other merchandise in gross " and sell the same in gross again, for then he is an ingrosser, " and punishable *ut supra*, for by this means the prices of " victual and other merchandises shall be enhanced to the " grievance of the subject, for the more hands they pass " through the dearer they grow, for every one thirsteth after " gain." This resolution was come to, according to Coke, in the 44 & 45 Elizabeth, or 1602; but the law was far older, though it is rather implied by early statutes than expressly stated anywhere. [2] Coke quotes an ancient statute which is not in the printed statutes, and to which his reference is

[1] Coke, *Third Inst.* p. 195. [2] *Ib.* p. 194.

CH. XXX. not very clear. It begins, "Nullus forstellarius in villa pa-
" tiatur morari, qui pauperum sit depressor manifeste, et
" totius communitatis et patriæ publicus inimicus qui bladum
" pisces, allec, vel res quascunque venales . . . obviando præ
" cæteris festinat lucrum sitiens vitiosum," &c. A somewhat similar provision occurs in the "Judicium Pillorie," 51 Hen. 3, st. 6 (A.D. 1266). The jurors are to inquire "de forstal-
" lariis, qui ante horam debitam et in villa statutam aliquid
" emant contra statutum villæ et mercati." In later times a long list of statutes was passed, some of which prohibited forestalling in general terms and under various penalties, while others fixed the prices of particular kinds of merchandise, and prohibited any dealings in them which might enhance their price. Thus in 1350 it was enacted that all forestallers of wines, and all other victuals, wares, and merchandises, should be liable to forfeiture, and in default of payment to two years' imprisonment (25 Edw. 3, st. 4, c. 3); and this was strengthened in 1363 by an act (1 37 Edw. 3, st. 1, c. 5) entitled, "Merchants shall not engross merchandises
" to enhance the prices of them, nor use but one sort of
" merchandise."

The latest general act against regrators and forestallers was passed in the reign of Edward VI., A.D. 1552 (5 & 6 Edw. 6, c. 14). It contains an elaborate definition of the offence, the principal points of which are buying goods on their way to market, contracting to buy goods before they come to market, "making any motion by word, letter, mes-
" sage, or otherwise, to any person or persons for the en-
" hancing of the price or dearer selling of any" goods, dissuading people from bringing their goods to market, buying up dead victuals of any kind in one market in order to sell them at a higher price in a later market at the same place or at any other market within four miles. The punishment of these offences was, on the first conviction, two months' imprisonment and forfeiture; on the second, half a year's imprisonment and forfeiture of double the value of the goods; and on the third, pillory, forfeiture of all the offender's goods and cattle, and imprisonment at the king's pleasure. As a

[1] See also 38 Geo. 3, st. i. c. 2, which repeals part of it.

single instance of laws relating to particular trades, I may refer to 15 Chas. 2, c. 8 (A.D. 1663), which forbad butchers to sell fat cattle, obviously to prevent butchers from using their trade as a pretext for speculating in cattle. This was founded on an earlier act, 3 & 4 Edw. 6, c. 19.

These statutes were, as might have been expected, either ineffectual or mischievous; and, as political economy came to be better understood, this was recognised, first by the cessation of such legislation, and afterwards by its repeal. The first considerable step towards the repeal of the old laws was made in 1772, just four years before the publication of the *Wealth of Nations*. This was effected by 12 Geo. 3, c. 71 (passed, according to [1] Lord Kenyon, "in an evil hour"), which recites that it has been found by experience that the restraints "laid by several statutes upon dealing in corn, "meal, flour, cattle, and sundry other sorts of victuals, by "preventing a free trade in the said commodities, have a "tendency to discourage the growth and to enhance the "price of the same; which statutes, if put in execution, "would bring great distress upon the inhabitants of many "parts of this kingdom." It then proceeds to repeal five such acts, the most important of them being the act of Edward VI. above referred to. This act left the common law against forestalling and regrating, and all the statutes upon the subject older than Edward VI., in full force, nor did these laws become by any means a dead letter. Prosecutions for forestalling and regrating lasted into the present century. At last, however, the opinions of the political economists fully prevailed, and were carried completely into effect by 7 & 8 Vic. c. 24 (A.D. 1844), "An Act for abolishing the "offences of forestalling, regrating, and engrossing, and for "repealing certain statutes passed in restraint of trade." This act puts an end to the common law offences of "badger- "ing, engrossing, forestalling, and regrating," which it says, "shall be utterly taken away and abolished." It also repeals specifically all the statutes upon the subject already referred

[1] See his summing-up in R. *v.* Rusby, quoted in Campbell's *Lives of Chief Justices*, iv. 131, from Peake, *N. P. Cas.* 189. There were no such prosecutions after Lord Kenyon's time (*Lives of Chief Justices*, iv. 207).

CH. XXX. to, and many others which I have not noticed, and which were left untouched by the act of 1772.

The last offence of the first of the three classes into which I have divided offences against trade is the offence of a conspiracy in restraint of trade. The law as to this matter has been the subject of vehement controversy in our own days, and has indeed attracted a degree of attention bearing some sort of analogy to the attention attracted in earlier times by the law relating to political libels. The general effect of the legislation and litigation which has taken place may, I think, be described in a word as the ascertainment of the limits within which trade unions are lawful. The history of the law upon the subject is extremely curious, as it is connected with various important periods of our general history, and it cannot be properly understood without reference to many branches of the law, some of which have long since been forgotten.

In our own days, and indeed for nearly sixty years past, the doctrine that the wages of labour should be regulated by competition has been generally accepted and expressed by saying that there should be a free course of trade in labour. As is usual when the word "free" is used it has meant different things to different people. In the mouths of employers, and those who sympathise with them, it has commonly meant "a course of trade free from pressure exerted by trade "unions for the increase of wages." In the mouth of workmen, and those who sympathise with them, it has commonly meant "a course of trade free from all legal restrictions upon "the operations of trade unions." In order to understand the law apart from all questions of sympathy, it is necessary to go back to very remote times, and to follow downwards a course of legislation arising out of views very different from our own.

It has been said by several [1] judges and writers of eminence that "a free course for trade has been carefully maintained "from the earliest times," and there no doubt is a sense

[1] See Sir W. Erle on the law relating to trade unions, p. 11 and following. Lord Bramwell's judgment in R. v. Druitt contained similar language.

in which this is true. It was recognised in very early times as a matter of great importance that merchants should carry on their pursuits securely. This is provided for expressly by Magna Charta (ch. xxx.) and at a later date by 9 Edw. 3, ch. 1 (A.D. 1333), which provides that all merchants, "within franchise and without, may freely without "interruption sell them" (many things enumerated) "to "what persons it shall please them, as well to foreigners as to "denizens." This statute was considered so important, and was also probably so much violated, that it was confirmed, reenacted, and somewhat extended in 1350 by 25 Edw. 3, st. 4, c. 2. But, although freedom of trade in the restricted sense of its freedom from downright violence and local jealousies was regarded as highly important, it is no less true that freedom of trade in the wide sense, namely, its freedom from all legislative interference, the doctrine that each individual man and every body of men, however constituted, is the best judge of his or their own interests, and ought to be allowed to pursue those interests by any method short of violence or fraud, is quite a modern doctrine. It was for many centuries opposed to the whole current of English legislation. Till very recent times, the statute-book contained a long series of enactments passed upon a diametrically opposite principle. Till within living memory, it was considered to be the special duty of the legislature to regulate all the most important matters connected with trade and labour.

It is impossible to understand the law relating to conspiracies in restraint of trade without some observations upon the leading features of this mass of legislation.

The first act to which I shall refer is the Statute or the Statutes (for there were two) of Labourers, passed in 1349 and 1350 (23 Edw. 3, and 25 Edw. 3, st. 1). These statutes provide, amongst many other things, "that every man and "woman of what condition he be, free or bond, able in body, "and within the age of threescore years," and not having means of his own, "if he in convenient service (his estate "considered) be required to serve, he shall be bounden to "serve him which so shall him require." They are to serve

CH. XXX. under pain of imprisonment; they are to take the customary rate of wages and no more. By the act of 1350 the wages of the most important classes of mechanics were fixed. A master carpenter was to have 3*d.* and a master free mason 4*d.* a day, from Easter to Michaelmas, "and from that time less, "according to the rate and discretion of the justices." Strict provisions were made for the execution of the act, and amongst other things it is remarkable that the courts of quarter sessions for counties originated in a chapter of this statute (cap. 7) requiring the justices then lately appointed to hold sessions four times a year to put it into execution.

The main object of these statutes was to check the rise in wages consequent upon the great pestilence called the black death. They not only regulated the wages of labourers and mechanics, but [1] confined them to their existing places of residence, and required them to swear to obey the provisions of the statute. It has been [2] suggested with much plausibility that the object of this legislation was to provide a kind of substitute for the system of villainage and serfdom, which was then breaking down, though it still retained vigour enough to be a principal cause of Wat Tyler's insurrection.

However this may have been, the Statute of Labourers was for 200 years on [3] several occasions confirmed, amended, extended, and modified. Special care was taken for its rigorous execution by giving wide authority on all the matters dealt with to the county and borough justices, and in at least one instance attempts to evade or neutralise their provisions were made highly penal. I refer to the statute 3 Hen. 6, c. 1 (A.D. 1424), which enacted that, "whereas by

[1] "If any of the said servants, labourers, or artificers, do flee from one "county to another because of this ordinance, that the sheriffs of the county "where such fugitive persons shall be found shall do them to be taken at the "commandment of the justices of the counties from whence they shall flee, "and bring them to the chief gaol of the same county, there to abide till the "next sessions of the same justices."—25 Edw. 3, st. i. c. 7.

"And that none of them go out of the town where he dwelleth in the "winter to serve the summer, if he may serve in the same town, taking as "before is said."—*Ib.* ch. ii.

[2] Nicholls's *History of the Poor Laws*, i. p. 45.

[3] See 12 Rich. 2, cc. 3, 4, 5, 6, 7, 8, 9, 10 (1388); 7 Hen. 4, c. 17 (1405); 2 Hen. 5, c. 4 (1414); 6 Hen. 6, c. 3 (1427) (this statute authorises the justices in quarter sessions to fix the wages of artificers, and gives similar powers in towns to mayors and bailiffs); 6 Hen. 8, c. 3 (1514).

"the yearly congregations and confederacies made by the "masons in their general chapiters and assemblies the good "course and effect of the statutes of labourers be openly "violated and broken," the chapters should not be holden, those that cause them to be assembled and holden should be "judged for felons," and all masons coming to such congregations should be punished by imprisonment, fine, and ransom.

In 1548 a more general statute was passed, namely, 2 & 3 Edw. 6, c. 15, which forbade all conspiracies and covenants of artificers, workmen, or labourers, "not to make or do their "work but at a certain price or rate," or for other similar purposes, under the penalty, on a third conviction, of the pillory and loss of an ear, and to "be taken as a man "infamous."

The greater part of the earlier legislation on the subject was reviewed, to some extent repealed and amended, and consolidated into a longer act by 5 Eliz. c. 4, passed in 1562. This is entitled, "An Act containing divers orders for artificers, "labourers, servants of husbandry, and apprentices." It is most elaborate. It repeals many of the earlier provisions, and contains a considerable number of enactments in favour of labourers and artificers. Its leading provisions in reference to the particular matter under consideration are as follows:— All persons able to work as labourers or artificers and not possessed of independent means or other employments are bound to work as artificers or labourers upon demand. The hours of work are fixed; power is given to justices in their next sessions after Easter to fix the wages to be paid to all mechanics and labourers; elaborate rules are laid down as to apprenticeship, and it is provided (s. 31) that for the future no one is to "set up, occupy, use, or exercise any craft, "mystery or occupation now used" in England or Wales, unless he is serving or has served an apprenticeship of seven years to it. This statute remained in force practically for a long period of time. It was not formally repealed till the year 1875. To trace the history of its administration, and in particular to give the steps by which it became to a great extent a dead letter, would be in the highest degree curious and interesting; but it is a task which I cannot

CH. XXX. undertake, and which cannot be treated incidentally in such a work as the present. I may observe, however, that it has a close connection with the history of the Poor Laws, which were consolidated, revised, and improved by the memorable act of 1601, 43 Eliz. c. 2, passed just thirty-nine years after the statute relating to artificers. Throughout the whole of the seventeenth and the greater part of the eighteenth century no act was passed for the general regulation of trade and labour in any degree comparable in importance to the 5 Eliz. c. 4. A considerable number of acts, however, were passed bearing more or less on trade offences. They were, for the most part, acts relating to particular trades, and prohibiting combinations in respect to the wages payable in those trades. Thus for instance in 1720 was passed 7 Geo. 1, st. 1, c. 13, "An Act for regulating the journeymen tailors within the "bills of mortality." This act declared all agreements between journeymen tailors "for advancing their wages, or "for lessening their usual hours of work" to be null and void, and subjected persons entering into any such agreement to be imprisoned with or without hard labour for two months. The hours of work were to be from 6 A.M. to 8 P.M. less an hour for dinner, and "one penny halfpenny a day for breakfast." The wages were to be any sum not exceeding two shillings a day from March 25th to June 24th, and for the rest of the year not exceeding one and eightpence. The courts of quarter sessions had power to regulate these rates both as to time and as to wages. Similar enactments were passed with respect to the woollen manufactures in 1725 (12 Geo. 1, c. 34), the hat trade in 1749 (22 Geo. 2, c. 27), the silk weavers in 1777 (17 Geo. 3, c. 55), and the paper trade in 1795 (36 Geo. 3, c. 111). This last-mentioned act fixes the hours of work at twelve, with one hour for refreshment. It says nothing as to wages, but enters into much detail as to the suppression of the combinations which it prohibits.

In the year 1799 a general act was passed (39 Geo. 3, c. 81), for the suppression of all combinations by workmen for the purpose of raising wages. It remained in force, however, only for a year, being repealed and replaced in 1800 by 40 Geo. 3, c. 60. There was hardly any substantial differ-

ence between the two acts, except that the latter contained a series of clauses empowering masters and men to refer their disputes to arbitration, and intended to facilitate that operation. The later act made also a few small alterations in the procedure for the recovery of penalties provided by the earlier acts. The later act remained in force till the year 1824. The most important of its provisions were as follows :—

It declared that all contracts theretofore entered into between journeymen manufacturers or other persons for obtaining an advance of wages for themselves or others, or for shortening hours of work or decreasing the quantity of work, should be void, [1] except only contracts between any master and any journeyman as to the wages, &c., of that journeyman.

[2] The same declaration was made as to all contracts "for "preventing or hindering any person from employing whom-"soever he thinks proper, or for controlling or any way "affecting any person carrying on any manufacture, trade, "or business, in the conduct or management thereof."

[3] Any journeyman who enters into any such contract is to be liable to imprisonment up to three months without hard labour, or two months with hard labour.

[4] The same penalty is appointed for every journeyman workman or other person who "enters into any combination "to obtain an advance of wages, or to lessen or alter the "hours of work, or for any other purpose contrary to the "act, or who, by giving money, or by persuasion, solicitation, "or intimidation, or any other means, wilfully and maliciously "endeavours to prevent any unemployed person from taking "service; or who, for the purpose of obtaining an advance of "wages, or for any other purpose contrary to the provisions of "the act, wilfully and maliciously [5] induces, or tries to induce, "any workman to leave his work; or who hinders any "employer from employing any person as he thinks proper, "or who being hired refuses without any just or reasonable

[1] This exception was not made in the earlier act, probably by a slip in drafting.

[2] S. 1, last part. [3] S. 2. [4] S. 3.

[5] "Decoy, persuade, solicit, intimidate, influence, or prevail, or attempt or "endeavour to prevail on," &c.

CH. XXX. "cause to work with any other journeyman or workman "employed or hired to work."

[1] The same penalty is inflicted upon all persons who attend meetings for any of the purposes declared to be illegal, or persuade people to attend such meetings, or collect money for the purpose of furthering such efforts.

[2] Lastly, it is made an offence (to put it shortly) to assist in maintaining men on strike.

These were the Combination Laws. It is remarkable that in the parliamentary history for 1799 and 1800 there is no account of any debate on these acts, nor are they referred to in the *Annual Register* for those years. It is, however, obvious that whatever may have been the immediate occasion of the laws in question, they carried out and developed to their natural and legitimate conclusion a great mass of earlier legislation, going back to the Statute of Labourers, which again has a relation to the still earlier period when a considerable part of the population were serfs. First, it is enacted that labourers and mechanics are to work at certain wages and to reside at certain places. In process of time this became inconsistent with the altered circumstances of society, and a system is substituted for it under which wages are still to be fixed, and all mechanics are to go through a regular apprenticeship for seven years, all the conditions as to the taking of apprentices being carefully regulated by Act of Parliament. Incidentally, combinations to raise wages are forbidden, but with no detail. This system also breaks down as new trades spring up, and numbers of workmen are collected in manufacturing towns and brought into a proximity to each other which cannot but make them feel their own power, and suggest to them that, as against their employers, they have common interests which may be promoted by combinations. The difficulties which arise from this conflict between the existing law and the new facts are at first provided for by particular statutes relating to particular trades. At last they are made the subject of a general act, which applies in the most detailed, specific, uncompromising way the principle upon which all the earlier legislation had

[1] S. 4. [2] S. 5

depended. Workmen are to be contented with the current rate of wages, and are on no account to do anything which has a tendency to compel their employers to raise it. Practically, they could go where they pleased individually and make the best bargains they could for themselves, but under no circumstances and by no means, direct or indirect, must they bring the pressure of numbers to bear on their employers or on each other.

So far the statute law was clear and consistent. I should not myself describe it as a system specially adapted and designed to protect freedom of trade. The only freedom for which it seems to me to have been specially solicitous is the freedom of the employers from coercion by their men.

Before continuing the history of the statute law it is necessary to say something as to the common law upon the subject of offences against trade by way of conspiracy or combination. Hardly any legal question has in our days been discussed more earnestly or with greater research than this. In particular, one of the greatest judges of our day, the late Sir W. Erle, wrote, when chairman of the Trade Union Commission which reported in 1869, an elaborate [1] memorandum on the law relating to trade unions, and Mr. R. S. Wright, in a [2] work of remarkable learning and ability, collected and commented, with a special view to this particular subject, upon every case ever decided upon the subject of conspiracy. The matter has been also fully discussed in many other works. The result is that the following statement as to the result of the authorities upon the subject may be depended upon:—

1. No case has ever been cited in which any person was, for having combined with others for the raising of wages, convicted of a conspiracy in restraint of trade at common law before the year 1825. There is indeed one case, that of the [3] journeymen tailors of Cambridge, which may perhaps be an authority the other way, but [4] this appears doubtful.

2. There are some dicta to the effect that such combinations would be unlawful. The most important of these is the

[1] Separately published by Messrs. Macmillan in 1869.
[2] *The Law of Criminal Conspiracies and Agreements*, Butterworth, 1873.
[3] 8 *Modern Rep.* p. 10.
[4] See remarks in Wright on *Conspiracies*, p. 53.

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dictum of Grose, J., in [1] R. *v.* Mawbey: "In many cases an "agreement to do a certain thing has been considered as "the subject of an indictment for a conspiracy, though the "same act, if done separately by each individual without "any agreement among themselves, would not have been "illegal. As in the case of journeymen conspiring to raise "their wages; each may insist on raising his wages if he "can, but if several meet for the same purpose it is illegal, "and the parties may be indicted for a conspiracy." This dictum is an illustration not necessary to the decision of R. *v.* Mawbey, and founded as it seems to me upon the case of the Cambridge tailors.

3. [2] "Some traces may be found in the ancient books of a "doctrine that it may be criminal, independently of combina-"tion, for one man to oblige another (by bond or otherwise) "to abstain from the exercise of his proper craft or employ-"ment." These traces, however, are very faint, though it is clear enough that the attempt to create monopolies by royal grants or by bye-laws made by bodies corporate or the like, or to restrain people by contract from exercising their trade, were always held to be illegal (except under certain limitations which do not affect this matter) in such a sense as to be void.

I must add that I am quite unable to understand why, if all combinations to raise wages were at common law indictable conspiracies, it should have been considered necessary to pass the long series of acts already referred to. These acts are not in their form declaratory, nor do they even assume that contracts between workmen for the purpose of raising their wages are illegal in the sense of being void and so incapable of being enforced by law. On the contrary, they enact that they shall be void. Sir W. Erle observes that whilst the ancient statutes [3] "were in force they tended to prevent a "resort to the common law remedy for conspiracy." The inference from the existence of the statutes appears to me to be that until they were passed the conduct which they punish was not criminal.

On the other hand, the cases and dicta to which I have

[1] 6 T.R [2] Wright on *Conspiracies*, p. 43. [3] P. 37.

referred explain the undoubted fact that in the year 1825 an impression prevailed that a combination to raise wages would constitute an indictable conspiracy at common law.

Apart from merely legal considerations, it ought, in approaching the study of the later statutes and cases on the subject, to be borne in mind that trade unions were condemned, at all events by the rich and by employers of labour, on grounds altogether independent of any legal theory whatever. This condemnation proceeded upon two totally distinct grounds. The political economists, in many instances at least, wrote as if an attempt to alter the rate of wages by combinations of workmen was like an attempt to alter the weight of the air by tampering with barometers. It was said that the price of labour depended, like the price of other commodities, solely upon supply and demand, and that it could not be altered artificially.

On the other hand, it was said that, whatever might be the ostensible or even as far as they went the real objects of trade unions, their members habitually obtained those objects by unlawful means,—by intimidating workmen who proposed to work at a lower price than the one sanctioned by them; by acts of annoyance of greater or less atrocity; by personal violence, amounting in some cases to murder; and by the destruction of machinery, buildings, and other property by fire or gunpowder.

Further it was said that many of the proceedings of trade unions were secret and illegal in themselves, that the members often swore obedience to secret committees, and under the compulsion of such oaths committed crimes in order to carry out their purposes. [1] This was no doubt true to a considerable extent—to what extent must always be a question, and it is not surprising that the terror and indignation excited by the means employed should have been transferred to the bodies connected with such proceedings. The undoubted

[1] As instances in which such facts were judicially proved, I may refer to the trial of the Glasgow cotton-spinners at Edinburgh in 1838, and the proceedings before the Commission which sat at Sheffield in June and July, 1867, under 30 Vic. c. 8 (Trades Union Commission Act, 1867). Under the Combination Laws the irritation and violence of the workmen was, I believe, greater than after the acts of 1824 and 1825. See "Resolutions of Select Committee of "the House of Commons," May 21, 1824, Hansard, xi. p. 811.

fact that in their capacity of benefit societies, and societies for assisting workmen in obtaining employment, the trade unions had rendered valuable services to artisans was perhaps not as fully present as it ought to have been to many of those who felt strongly on the subject.

However this may have been, two acts were passed in 1824 and 1825 which set the whole of the law on the subject on an entirely new basis. They represented and were based upon the view that labour, like other commodities, was to be bought and sold according to the ordinary rules of trade; every one was to be free, not only to buy and sell as he chose, but to consult with others as to the terms on which he would do so. This was the essence of the act 5 Geo. 4, c. 95, which was introduced into parliament by Mr. Joseph Hume, and [1] passed after singularly little discussion—so far as appears from Hansard's debates. The act begins with a long repealing section which has considerable historical value. This section repeals all the acts noticed above, so far as they relate to combinations of workmen. It then proceeds to enact (s. 2), "That journeymen, workmen, or other persons, who "shall enter into any combination to obtain an advance, or "to fix the rate of wages, or to lessen or alter the hours or "duration of the time of working, or to decrease the quantity "of work, or to induce another to depart from his service "before the end of the time or term for which he is hired, or, "not being hired, to refuse to enter into work or employ-"ment, or to regulate the mode of carrying on any manu-"facture, trade, or business, or the management thereof, shall "not therefore be subject or liable to any indictment or pro-"secution for conspiracy, or to any other criminal information "or punishment whatever, under the common or the statute "law."

The following section (3) gave a similar exemption to

[1] I have traced the progress of the bill through Hansard. It was introduced by Mr. Hume, February 12, 1824. It was referred to a Select Committee, which reported on the subject, May 21, and it seems to have become law without any further debate of much importance in either house of parliament. The attempt to ascertain from Hansard the true grounds and history of acts of Parliament is often disappointing. Moreover, the earlier volumes are often imperfect. In the *Annual Register* for 1825 there is a far better report of Mr. Huskisson's speech about the Trade Union Bill of that year than is to be found in Hansard.

masters entering into any combination for the purpose of lowering or fixing the rate of wages, or increasing hours of work, or regulating the mode of carrying on business.

On the other hand, s. 5 made it an offence punishable by two months' hard labour,

"(*a*) By violence to person or property, by threats, or "by intimidation, wilfully [1] or maliciously to force another "to depart from his hiring or work before the time for "which he is hired, or to return his work before it is finished;

"(*b*) Wilfully or maliciously to use or employ violence to "the person or property, threats or intimidation towards "another on account of his not complying" with trade union rules;

"(*c*) By violence to the person or property, by threats, or "by intimidation, wilfully and maliciously to force any master "or mistress manufacturer, his or their foreman or agent, to "make any alteration in their mode of carrying on their "business;

"(*d*) Combining for any of the purposes before mentioned."

This act continued in force for one year only. It appears from the debates on the 6 Geo. 4, c. 129, by which it was repealed and replaced, that it was considered to have encouraged every sort of combination of workmen. Mr. Huskisson said that the second section read like an invitation to workmen to combine for all trade purposes which were not expressly punishable by the act; and he said that they had accordingly combined for many purposes which he regarded as unjustifiable, *e.g.* to dictate to masters as to how they should conduct their business, to determine whether or not they should take apprentices, to prevent workmen from working, to secure an equal rate of pay for all workmen whether good or bad. Instances were also referred to, in the course of the debate, of violence exercised by trade unions against persons working independently of their rules. The different speakers appear to have thought that the act of 1824 repealed the common law as well as the statutes

[1] It is difficult to see how any of these acts could be done involuntarily or unintentionally, or how, if intentional, they could be otherwise than malicious, according to the meaning of the act. The words are omitted in the act of 1825.

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expressly mentioned, in support of which it might have been argued that it repealed so much of 33 Edw. 1, st. 1 (the Statute of Conspirators), "as relates to combinations or con-"spiracies of workmen or other persons" for trade purposes, which are enumerated at great length. As the statute of Edward I. does not in any way refer to trade, this is intelligible only on the supposition that 5 Geo. 4, c. 95, intended to repeal the common law rule supposed to have applied that statute to such combinations. At the time when the statute of 1824 was passed great uncertainty prevailed as to the extent of the common law upon this subject. Mr. Hume [1] said that Mr. Scarlett thought "that if all the penal laws against com-"binations by workmen were struck out of the statute book "the common law of the land would still be amply sufficient "to prevent the mischievous effects of such combinations."

The act of 1825 (6 Geo. 4, c. 129) differed considerably from the act of 1824. It repealed the act of 1824, with a proviso that all the statutes repealed by it should be repealed, for which purpose it re-enacts verbatim, or almost verbatim, the repealing section of the act of 1824.

Instead of beginning with general sections authorising combinations of workmen and masters, it begins with a penal section forbidding a variety of offences, which is qualified by two narrowly-guarded provisoes answering in some measure to the second and third sections of the act of 1824. The penal section (s. 3) is worded far more elaborately than the penal section of the act of 1824. The offences are punishable with two months' imprisonment and hard labour, and are as follows:—

[2] If any person shall—

(*a*) By violence to the person or property, or

By threats or intimidation, *or*

By molesting or in any way obstructing another,

Force, *or endeavour to force,* any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business,

[1] Hansard, x. p. 146.

[2] I have italicised the additions made in 1825 to the corresponding section in the act of 1824.

To depart from his hiring, employment, or work, or

To return his work before the same shall be finished;

(*b*) [[1] By any of the means aforesaid]

Prevent, or endeavour to prevent, any journeyman, manufacturer, or other person, not being hired or employed, from hiring himself to or from accepting work or employment from any person or persons;

(*c*) Use or employ violence to the person or property of another, or

Threats or intimidation, *or*

Shall molest or in any way obstruct another,

For the purpose of forcing or inducing such person (shortly) to belong to any trade union or to observe any trade union rule;

(*d*) By violence to the person or property of another, or

By any threats or intimidation, or

By molesting or in any way obstructing another,

Force or endeavour to force any manufacturer or person carrying on any trade or business,

To make any alteration in his mode of *regulating, managing, conducting, or* carrying on his business, *or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants.*

The act contains no section corresponding to the provision in s. 6 of the act of 1824, which punishes separately combinations to commit the offences created by sections 4 and 5 of that act. No doubt it was considered that any such conspiracy would be indictable at common law under the general rule that a conspiracy to commit an offence is an indictable misdemeanour.

In the place of the general permission to combine contained in ss. 2 and 3 of the act of 1824, the act of 1825 contains two sections (4 and 5) which come in by way of carefully guarded provisoes upon the offences created by s. 3.

Section 4 provides that the act shall not extend to subject any persons to punishment who meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meetings

[1] This, I think, is the true construction of the sentence.

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shall demand for their work, or the hours for which they shall work; or who enter into any agreement among themselves for the purpose of fixing the wages or prices which the parties entering into such agreement shall demand for their work, or the hours during which they will work.

A corresponding section (5) applies to similar meetings amongst masters for the converse objects.

Such was the legislation of 1824 and 1825 on trade offences. Several observations occur upon it which are necessary in order to understand the later history of the subject. In the first place it is natural to ask why an act of parliament was necessary to punish "violence to the person" for the purposes specified by the two acts? All violence to the person is and always was a battery, and all attempts to offer such violence an assault. Hence it may be asked why special punishments should be required for assaults committed for a particular purpose? The answer is, that in 1825 magistrates had no summary jurisdiction over assaults in general (as they have now). There were a few statutes which gave summary jurisdiction over particular kinds of assaults; as, for instance, assaults on persons carrying certain goods to market, or assaults with intent to hinder or prevent seamen from working at their business. Other assaults were punishable only on indictment, and then not with hard labour. The acts of 1824 and 1825 thus gave a summary remedy for what was at common law an indictable offence.

The really important additions to the common law made by the act of 1825 were those which made men liable to summary punishment for the employment of threats, intimidation, molestation, and obstruction directed to the attainment of the objects of trade unions.

It is remarkable that the act of 1825 contains no such section as occurs in the act of 1824 subjecting to summary punishment persons conspiring to commit the summary offences created by other parts of the act. Probably it was considered that as such conspiracies would by common law be punishable, and as they would be more serious offences than isolated acts of intimidation or obstruction, it would be the best course to leave them to be punished by indictment.

Moreover, at the time when the act was under discussion, an opinion certainly prevailed that conspiracies in restraint of trade were offences at common law apart from the old combination laws and the new statutory provisions.

However this may have been, many cases came in course of time to be decided upon the common law as to conspiracies in restraint of trade, and as to the effect of the statute of 1825.

Mr. Wright has laboriously collected every case bearing upon the subject, and mentions [1] fourteen, to which reference is made in the note, as having been decided since the act of 1825. I will refer to the most important of those in which the doctrines of the common law upon the subject are fully discussed. The earliest is the case of [2] R. *v.* Rowlands, which was tried before Sir W. Erle at Stafford in 1851. He gives an account of it and of the trial of one Duffield (which took place on the same occasion) in the Appendix to his work upon trade unions.

No complete statement of the facts is given in the various authorities to which I have referred, though the indictment and the material parts of the summing-up of Sir W. Erle are there set forth. The sufficiency of the indictment was contested on highly technical grounds, and the summing-up was also called in question but was upheld. The general nature of the case seems to have been as follows: The leaders of a trade union in London, who had no immediate personal interest in the matter, insisted that an employer at Wolverhampton should pay his men a certain rate of wages, and, in order to compel him to do so, prevailed on his men to leave his employ until he did so and prevailed on others not to enter his employment. This, said Erle, J., was an indictable conspiracy. Workmen may, if they think proper, combine

[1] R. *v.* Dixon, 6 C. & P. 601 (1834); R. *v.* Harris, C. & M. 661, *n.* (1842); R. v. Selsby, 5 Cox, 495, *n.* (1847); R. *v.* Rowlands, 2 Den. 364 (1851); Hilton *v.* Eckersley, 8 E. & B. 47 (1856); R. *v.* Perham, 5 H. & N. 30 (1859); Walsby *v.* Anley, 3 G. & E. 516 (1861); O'Neill *v.* Longman, 4 B. & S. 376 (1863); O'Neill *v.* Kruger, 4 B. & S. 389 (1863); Wood *v.* Bowron, L.R. 2 Q.B. 21 (1866); R. *v.* Skinner, 10 Cox, 493 (1867); R. *v.* Druitt, 10 Cox, 592 (1867); Farrer *v.* Close, L.R. 4 Q.B. 602 (1869); R. *v.* Bunn, 12 Cox, 316 (1872).

[2] 2 Den. *Cr. Ca.* 364; and see the summing-up of Erle, J., in 5 Cox, *C.C.* 460, and also in 3 *Russ. Cr.* 172-173; see also Erle on Trade Unions, p. 13, and Appendix A.

CH. XXX. together ' for their own protection, and to obtain such wages "as they choose to agree to demand, but" a combination for the "purpose of injuring another is a combination of a "different nature directed personally against the party to be "injured; and the law allowing them to combine for the "purpose of obtaining a lawful benefit to themselves gives "no sanction to combinations which have for their imme-"diate purpose the hurt of another." He went on to say, "If you should be of opinion that a combination existed for "the purpose of obstructing the prosecutors in carrying on "their business, and forcing them to consent to the book of "prices, and in pursuance of that concert they persuaded the "free men and gave money to the free men to leave the "employ of the prosecutors, the purpose being to obstruct "them in their manufacture and to injure them in their "business, and so to force their consent, with no other result "to the parties combining than gratifying ill-will, that would "be a violation of the law." The summing-up contains more to the same effect.

Reading Sir W. Erle's summing-up in this case and his memorandum on trade unions together, it seems that his view of the subject of conspiracies in restraint of trade was this: At common law all combinations of workmen to affect the rate of wages were illegal. A limited exception was introduced by the statute 6 Geo. 4, c. 129. But the ordinary operations of a strike which do not fall definitely within those narrow exceptions are still illegal conspiracies. It is hardly too much to say that the result of this view of the law was to render illegal all the steps usually taken by workmen to make a strike effective. A bare agreement not to work except upon certain specified terms was, so long as this view of the law prevailed, all that the law permitted to workmen. If a single step was taken to dissuade systematically other persons from working, those who took it incurred the risk of being held to conspire to injure the employer or to conspire to obstruct him in the conduct of his business. It is difficult to see how, in the case of a conflict of interests, it is possible to separate the two objects of benefiting yourself and injuring your antagonist. Every strike is in the nature of an act

of war. Gain on one side implies loss on the other; and to say that it is lawful to combine to protect your own interests, but unlawful to combine to injure your antagonist, is taking away with one hand a right given with the other.

The case of [1] Hilton *v.* Eckersley, decided in 1856, five years after R. *v.* Rowland, sets in a strong light the extreme difficulty of giving a consistent rational account of the law as it then stood. The case was as follows: Eighteen Lancashire cotton-spinners signed a bond binding themselves severally to carry on their business according to the resolutions of the majority, the bond reciting that the object of the obligors was by means of this combination to counteract certain combinations of workmen whereby "persons otherwise willing to be "employed are deterred, by a reasonable fear of social perse-"cution and other injuries, from hiring themselves," &c. The question was whether this bond could be enforced. Of three judges of the Queen's Bench before whom the case was argued, Crompton, J., thought that the bond was void because the act of entering into it was an indictable misdemeanour, as being a conspiracy in restraint of trade. Erle, J., thought that the bond was good, being rendered lawful by the exception contained in 6 Geo. 4, c. 129, s. 5. Lord Campbell, C.-J., thought that the deed did not constitute an indictable conspiracy, but that it was void because it was opposed to public policy. The Court of Exchequer Chamber (consisting of [2] six judges) thought that the deed was void because it was in restraint of trade, but expressed no opinion as to the question whether or not it was an indictable conspiracy.

The views of Crompton, J., and Lord Campbell, C.-J., on the subject of conspiracy in restraint of trade, are thus expressed. Crompton, J., [3] said, "I think that combinations like those "disclosed in the pleadings in this case were illegal and in-"dictable at common law, as tending directly to impede and "interfere with the free course of trade and manufacture." His chief authority for this proposition was the dictum of

[1] 6 E. & B. 47.
[2] Williams, Crowder, Willes, J.J., and Parke, Alderson, and Platt, B.B.
[3] 6 E. & B. 53.

CH. XXX. Grose, J., in R. *v.* Mawbey, referred to above. Lord Campbell, on the other hand, after referring to this dictum, and stating that "other loose expressions may be found in the books to "the same effect," [1] says, "I cannot bring myself to believe, "without authority much more cogent, that if two workmen "who sincerely believe their wages to be inadequate should "meet and agree that they would not work unless their wages "were raised, without designing or contemplating violence or "any illegal means for gaining their object, they [2] would be "guilty of a misdemeanour, and liable to be punished by fine "and imprisonment." The result is that the three judges of the Court of Queen's Bench each took a different view of the law on this subject, and that the six judges of the Court of Exchequer Chamber took a fourth view, which excused them from pronouncing an opinion on the question whether such conduct as Lord Campbell described was at common law an indictable conspiracy or not.

[3] Several cases subsequent to Hilton *v.* Eckersley throw a further but a somewhat partial light on the subject. They turn upon the meaning of the word "threat" in the statute 6 Geo. 4, c. 129, s. 3, and arose upon appeals from the decisions of magistrates by which different workmen were convicted of threats. Without going minutely through the cases, the general result is, I think, somewhat as follows: A "threat" means the expression of an intention to do something illegal in order to force an employer, by fear of its execution, to do or not to do something which he has a right to do. But an agreement between workmen to do any act in restraint of trade is an illegal conspiracy. Therefore, an intimation of such an agreement made in order to force the master, *e.g.* to dismiss a particular man or not to take more than so many apprentices, is a threat within the meaning of

[1] 6 E. & B. p. 62. The phrase "loose expressions" seems to me to undervalue the authorities already referred to, especially the case of the Cambridge tailors.

[2] He means would have been at common law, before the statute 6 Geo. 4, c. 129, s. 4, excused them from punishment.

[3] R. *v.* Perham, 5 H. & N. 30 (1859); Walsby *v.* Anley, 30 L.J.M. c. 120 (1861); O'Neill *v.* Longman, 4 B. & S. 376; O'Neill *v.* Kruger, 4 B. & S. 388 (1863); Wood *v.* Bowron, L.R. 2 Q.B. 21 (1866). The three cases last mentioned show what difficulties might arise in the application of the rule laid down.

the act. This sometimes raised delicate questions of fact. As for instance, A. B. C. and D. tell Z. that they will not work for him unless he dismisses E. If from whim, or because E. has an unpleasant temper, or for any other such reason, they have made up their minds that they prefer leaving Z.'s service to working with E., there is nothing illegal in this. They have a right to take such a course either jointly or severally, and it is an act rather of kindness than otherwise to give Z. the opportunity of choosing between them and E. If, on the other hand, their object is to coerce Z. in carrying on his business, their agreement is an indictable conspiracy, and the intimation of it to Z. a threat within the statute.

The effect of these cases was to some extent mitigated by an act (22 Vic. c. 34) passed in 1859, which provided that workmen were not to be considered to be guilty of "molesta-"tion" or "obstruction" under the act of 1825, by reason only of entering into agreements for the purpose of fixing the rate of wages, or hours of labour, or of endeavouring peaceably to persuade others to cease or abstain from work in order to produce the same effect.

Before referring to the alteration of the law to which these cases led, I may mention the case of [1] R. v. Druitt, which certainly stated the law in a far stronger and broader form than it had ever been stated in before, so far as I am aware. Persons having been indicted before Lord (then Baron) Bramwell at the Old Bailey for what was known as [2] "picket-"ing," he said, in charging the jury, "The liberty of a "man's mind and will to say how he should bestow himself "and his means, his talents and his industry, is [3] as much a "subject of the law's protection as that of his body. Generally "speaking, the way in which people have endeavoured to "control the operation of the minds of men is by putting "restraints on their bodies, and therefore we have not so

[1] 10 Cox, 600 (1867).

[2] "Picketing consists in posting members of the union at all the approaches "to the works struck against, for the purpose of observing and reporting the "workmen going to or coming from the works, and of using such influence as "may be in their power to prevent the workmen from accepting work there." —*Report*, p. xxi.

[3] The report is in the historical or newspaper reporter's imperfect tense, "was," &c. I have altered this.

CH. XXX. " many instances in which the liberty of the mind is vindi-
" cated as that of the body. Still, if any set of men agreed
" amongst themselves to coerce that liberty of mind and
" thought by compulsion and restraint, they would be guilty
" of a criminal offence, namely, that of conspiring against the
" liberty of mind and freedom of will of those towards whom
" they so conducted themselves. I am referring to coercion
" and compulsion—something that is unpleasant and annoy-
" ing to the mind operated upon; and I lay it down as clear
" and undoubted law that, if two or more persons agree that
" they will by such means co-operate together against that
" liberty, they are guilty of an indictable offence."

If this is correctly reported and is good law, it would follow that if two brothers, having a sister who was about to contract a marriage which they disliked, agreed together to exclude her from their society if she did so, in order by the threat of so doing to prevent the marriage, they would be guilty of an indictable conspiracy. This seems to me to show that the law was laid down far too widely on the occasion in question.

However this may have been, the decisions already referred to were felt by a large number of working men to have the practical effect of reducing to a nullity the degree of liberty to combine for the raising of wages which they thought had been, or ought to have been, conferred upon them by the repeal of the Combination Laws. This feeling was strengthened by [1] decisions that the objects of a trade union were illegal in such a sense that the embezzlement of their funds was not an offence against one of the provisions of the Friendly Societies Act (18 & 19 Vic. c. 63, s. 24), and this created great dissatisfaction with the law. On the other hand, the murders and other crimes committed by the Sheffield trade unions, produced a strong feeling against trade unions.

The result was that a commission was issued in 1867 to inquire into the whole subject. They reported in 1869, the report being based to a great extent upon the memorandum

[1] Hornby v. Close, L.R. 2 Q.B. 153; Farrer v. Close, L.R. 4 Q.B. 602; but see also R. v. Stainer, L.R. C.C.R. 230, which, however, is subsequent to 32 & 33 Vic. c. 61.

as to the state of the law upon the subject drawn up for the guidance of the commission by Sir W. Erle, to which I have already made many references.

It is written with consummate skill and knowledge of the subject, and will be found on examination to resolve itself shortly into the following result: The author conceives of the common law as including, though not entirely consisting of, a set of principles intuitively perceived to be good and just by jurists who flourished at almost any time, and who managed to get other jurists to accept their statements. From these principles flow rules which it is the duty of courts of justice to put into force, when and so far as facts brought under their notice require them so to do. That there should be a free course of trade is one of these principles. That combined efforts to defeat it in particular instances should be indictable conspiracies is one of the rules. The principle and the rule alike were thrown into the shade by the statutes collectively described as the Combination Laws; but upon the repeal of those laws they came forth in full force, and were rather declared than re-enacted by 6 Geo. 4, c. 129, which was founded upon and in its main provisions declaratory of the common law, though it provided summary modes of procedure unknown to that law. The act was to be interpreted in the light of these principles, as in fact it had been by the cases to which I have referred. In one sense this no doubt is perfectly true. It is a correct description of the way in which, as a fact, the courts did construe the act of 1825, and it puts forward, in justification of the course which they took in so construing it, a view of the common law which is attractive to many people, but which seems to me almost entirely imaginary. I think that the law was, in fact, vague and uncertain to the last degree before 1825, except so far as it was embodied in statutes which were repealed by that act; and I agree with Lord Campbell that such authorities as still remain are too weak to support the conclusion that an agreement to combine to raise or depress the rate of wages was an indictable offence apart from the statutes which were so long in force. No doubt, however, the opposite opinion was common enough in 1825, to explain the insertion into the act

CH. XXX. of that year of the clauses which permit such combinations in some cases.

The objections to the law as it stood in 1867 were considered and reported upon. The report of the majority of the commission recommended some degree of relaxation of the law, but proposed to qualify it by a variety of elaborate provisoes, which if adopted would have made the law intricate to an extreme degree, whatever might have been their value. [1] The minority proposed a much wider measure, resembling in its main features what was finally adopted.

The recommendations of the commission of 1867 led to the enactment in the year 1871 of two acts, namely, 38 & 39 Vic. c. 31, "An Act to amend the law relating to trade "unions," and 38 & 39 Vic. c. 32, "An Act to amend the "criminal law relating to violence, threats, and molestation." The Trade Union Act enacted (s. 2) that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

The act amending the criminal law (38 & 39 Vic. c. 32) repealed the act of George IV. and the act of 1859 which amended it, and substituted for them an enactment inflicting imprisonment with hard labour up to three months on every one who, with a view to coerce another for trade purposes (carefully defined in s. 1), should do any of the following things:—

(1) Use personal violence.

(2) Threaten so as to justify a magistrate in binding the threatener over to keep the peace.

(3) Molest or obstruct in any of the following ways—

(*a*) By persistently following any person about from place to place.

(*b*) By hiding his tools, clothes, or other property.

(*c*) By watching or besetting his house, or following him along any street or road with two or more other persons in a disorderly manner.

[1] Mr. Frederick Harrison and Mr. Thomas Hughes. Lord Lichfield, to a certain extent, agreed with their proposals, but not with their reasons.

It was further provided that no one should be liable to any punishment for doing or conspiring to do any act, on the ground that such act restrains or tends to restrain the free course of trade, unless it was one of the acts above mentioned.

Under this state of the law it was commonly supposed that the ordinary procedure in a strike was legalised, but this was held not to be the case.

In 1872 certain gas-stokers struck, the result of which was that a great part of London was for a time involved at night in complete darkness. They were indicted for a conspiracy to coerce or molest their employers in carrying on their business, and it was held that this was on two grounds an indictable conspiracy, though no offence was committed under the act last mentioned. The first ground was that it was an indictable conspiracy to force the company to carry on their business contrary to their own will by an improper threat or molestation. It seems to have been considered that the great public inconvenience which such a strike would cause, and the nature of the employers' known engagements, might cause a threat to strike suddenly to be an improper molestation. Also a threat of a simultaneous breach of contract was regarded or was pointed out to the jury as conduct which they had a right to regard as a conspiracy to prevent the employer from carrying on his business. Upon this second charge the defendants were convicted and sentenced to eight months' imprisonment.

This case substantially decided, as far as its authority went, that, although a strike could no longer be punished as a conspiracy in restraint of trade, it might, under circumstances, be of such a nature as to amount to a conspiracy at common law to molest, injure, or impoverish an individual, or to prevent him from carrying on his business.

This decision caused great dissatisfaction amongst those who were principally affected by it, and was perhaps the principal occasion of the repeal of the act of 1871, and the enactment in its place of "the Conspiracy and Protec-"tion of Property Act, 1875," 38 & 39 Vic. c. 86. This act provides first that "An agreement or combination by two "or more persons to do or procure to be done any act in

CH. XXX. "contemplation or furtherance of a trade dispute between "employers and workmen shall not be indictable as a con- "spiracy if such act committed by one person would not be "punishable as a crime," *i.e.* as an offence for which a man may be imprisoned. It was also enacted in general terms (s. 7) that every person who, with a view to compel any other person to abstain from doing or to do any act which such person has a legal right to do or abstain from doing, wrongfully and without legal authority [1] uses violence to or intimidates such person, follows him about, hides his tools, watches or besets his house, or follows him through the streets in a disorderly way, shall be liable to three months' hard labour.

The same punishment is provided by ss. 3 and 4 for every one who wilfully and maliciously breaks a contract to work under a person who is to supply gas or water, or any contract of hiring or service, when he knows or ought to know that such breach of contract is likely to endanger life, cause serious bodily injury, or expose valuable property to destruction or serious injury.

Such for the present is the final result of the long history which I have been relating. It is one of the most characteristic and interesting passages in the whole history of the criminal law.

First there is no law at all, either written or unwritten. Then a long series of statutes aim at regulating the wages of labour, and end in general provisions preventing and punishing, as far as possible, all combinations to raise wages. During the latter part of this period an opinion grows up that to combine for the purpose of raising wages is an indictable conspiracy at common law. In 1825 the statute law is put upon an entirely new basis, and all the old statutes are repealed, but in such a way as to countenance the doctrine about conspiracies in restraint of trade at common law. From 1825 to 1871 a series of cases are decided which give form to the doctrine of conspiracy in restraint of trade at common law, and carry it so far as to say that any agreement

[1] The language of the act is a good deal abridged here. These provisions closely resemble certain sections in the Indian Penal Code hereinafter referred to; namely, s. 490, as to criminal breach of contract, and s. 503, as to criminal intimidation.

between two people to compel any one to do anything he does not like is an indictable conspiracy independently of statute. In 1871 the old doctrine as to agreements in restraint of trades being criminal conspiracies is repealed by statute. But the common law expands as the statute law is narrowed, and the doctrine of a conspiracy to coerce or injure is so interpreted as to diminish greatly the protection supposed to be afforded by the act of 1871. Thereupon the act of 1875 specifically protects all combinations in contemplation or furtherance of trade disputes, and, with respect to such questions at least, provides positively that no agreement shall be treated as an indictable conspiracy unless the act agreed upon would be criminal if done by a single person.

This remarkable history sets in a clear light all the most characteristic features of English criminal law,—its continuity; the way in which the existing law connects itself with the past history of the country, and in particular with the history of its opinions and theories; the character of the common law, and the nature of what is described as its elasticity; and, finally, the extremely detailed gradual nature of the changes in the law which are effected by acts of parliament eagerly advocated and eagerly opposed. In a legal point of view, no part of the whole story is so remarkable as the part played by the judges in defining, and, indeed, in a sense creating, the offence of conspiracy. They defined it, I think, too widely; but that their definition was substantially right is proved by the fact that the act of 1875 has made provision for punishing practically all the acts which they declared to be offences at common law.

OFFENCES AGAINST ACTS REGULATING TRADE.—The second class of offences relating to trade are offences against laws for the regulation of particular branches of trade and labour.

I have incidentally referred to many of these acts in connection with the subject of conspiracies in restraint of trade. To go no further back, all the acts of the eighteenth century which forbid combinations in particular trades for the increase of wages, contained also provisions for the regulation fo the trade, and they frequently provided for the punishment

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by a summary procedure of particular offences, such as trifling thefts by workmen of the materials entrusted to them to work up. There would be no particular interest in giving an account of a great number of laws of this kind, nearly all of which have long since become obsolete. I may mention, however, by way of specimen, a single offence which for many centuries was theoretically capital. This was [1]owling or the exportation of wool. This was a felony punishable by 11 Edw. 3, c. 1 (A.D. 1337), by "forfeiture "of life and member," and so grievous was the offence considered that in 1565 it was enacted by 8 Eliz. c. 3, that any one who should export a living ram, sheep, or lamb, should forfeit all his goods, be imprisoned for a year, and at the end of the year "in some open market town, in the "fulness of the market on the market day, have his left hand "cut off, and that to be nailed up in the openest place of such "market." A second offence was felony. The first of these enactments remained in force nominally till 1863, when it was repealed by the Statute Law Revision Act of that year. The statute 8 Eliz. c. 3 was repealed by 3 Geo. 4, c. 41, s. 1.

In very modern times indeed the policy of regulating particular trades, not with a view to any object connected with political economy, but in order to promote the interests of those who are employed in them, has been adopted to a considerable extent, and has in certain cases been enforced by penal enactments. The acts relating to mines and factories afford illustrations of this remark, but the strongest illustration is supplied by the various acts which have since 1854 [2]punished as misdemeanours various breaches of duty by employers towards seamen and by seamen towards their employers or towards each other, and by the master of a vessel when a collision occurs towards the vessel with which he has been in collision.

COMMERCIAL FRAUDS.—The last class of offences relating to trade are commercial frauds. Of these there are two classes which deserve special notice. They are offences

[1] I suppose this means 'ooling, *i.e.* woolling.
[2] See my *Digest*, arts. 394-398.

against the Fraudulent Debtors Act, and frauds by directors and other officers of companies.

The Fraudulent Debtors Act is the modern representative of a long series of enactments against fraudulent bankrupts, and to understand it, it is necessary to go back to the ancient laws relating to imprisonment for debt. Till our own time the general law relating to arrest for debt was so severe that it is no exaggeration to say that a debtor was treated as a quasi-criminal. To say nothing of arrest on mesne process, a judgment creditor could arrest his judgment debtor upon a writ of *capias ad satisfaciendum*, and keep him in prison till he paid, or if he did not pay, for an indefinite time, indeed for his life. The first great relaxation of this excessive severity (which, as I have already observed, must be borne in mind when we remember the laxity of the common law in punishing many kinds of commercial frauds) was the establishment of the law of bankruptcy, the object of which was to enable a person ruined by misfortunes in trade to be freed from his debts by delivering up for rateable distribution amongst his creditors whatever property remained to him. A long series of statutes were passed upon this subject, the earliest of which was 34 Hen. 8, c. 4, passed in 1542. It was followed by 13 Eliz. c. 7 (1570), and the 1 Jas. 1, c. 15 (1604). These acts provided for the issuing of commissions of bankruptcy to persons who were to realise the bankrupt's estate and divide it. They are slight and imperfect in many respects, and are very lenient towards fraud by bankrupts. As the difficulties and intricacies of the subject manifested themselves by degrees, the legislation on the subject became more elaborate. The first act which punished fraudulent bankruptcy with any severity was 21 Jas. 1, c. 19, s. 7 (1623). The marginal note to the section gives its effect concisely and pointedly: "The bankrupt that fraudu-"lently concealeth his goods" (to the value of £20) "or "rendereth not some just reason why he became bankrupt, "shall be set upon the pillory" (for two hours) "and lose one "of his ears." This continued to be the statutory penalty for fraudulent bankruptcy till the year 1732, when by 5 Geo. 2, c. 30, s. 1, an omission to surrender for six weeks,

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non-compliance with the requisitions of the statute, and in particular the concealment of property to the value of £20, or of papers and books of account, was made felony without benefit of clergy. It is remarkable that Blackstone more than thirty years afterwards observes upon this law, [1] "It is "allowed in general by such as are most averse to the inflic- "tion of capital punishment that the offence of fraudulent "bankruptcy, being an atrocious species of the *crimen falsi*, "ought to be put upon a level with those of forgery and "falsifying the coin."

There is, however, reason to believe that in practice the excessive severity of the law prevented its execution. In 1819, [2] a Select Committee reported on capital punishment, and received the evidence, amongst others, of Mr. Basil Montague. He said that since the act of 5 Geo. 2 had passed—a period of seventy-seven years—"with nearly "40,000 bankrupts I doubt whether there have been ten "prosecutions: I believe there have been only three execu- "tions; and yet fraudulent bankrupts and concealment of "property are proverbial, are so common as to be supposed "almost to have lost the nature of crime."

All through the eighteenth century and down to our own days the law relating to bankruptcy has been elaborated by successive statutes. To say nothing of amending acts and acts which established different courts for the purpose of adjudicating upon bankruptcy cases, the law has been consolidated and re-enacted upon principles more or less differing from each other three several times, namely, first in 1825 by 6 Geo. 4, c. 16; next in 1849 by the 12 & 13 Vic. c. 106, which, in 1861, was so much amended as to be half repealed by 24 & 25 Vic. c. 134, and lastly, in 1869, by 32 & 33 Vic. c. 83, which is still in force. The penal part of the bankruptcy law consisted of provisions for the punishment of bankrupts who did not comply with the provisions of the law in force for the time being. These provisions differed slightly as the system of administering the bankrupt's estate differed,

[1] 4 Bl. *Com.* p. 156.

[2] See extracts from its reports in the *Annual Register* for 1819, p. 336; Mr. Montague's evidence is at pp. 356-359.

but the offences remained substantially unchanged. They consisted in a refusal to submit to the jurisdiction of the court the concealment of property and the concealment or destruction of books and papers. In short, fraudulent bankruptcy, as defined and redefined down to 1861, differed little in substance from fraudulent bankruptcy as defined in 1732. The punishment, however, became by degrees much less severe. By 1 Geo. 4, c. 115, s. 1, the offence ceased to be a capital felony, and became punishable by transportation for life, or any other term not less than seven years, or by imprisonment with or without hard labour up to seven years. This punishment was re-enacted in the first Bankrupt Consolidation Act (6 Geo. 4, c. 16, s. 112), and again in the act of 1849 (12 & 13 Vic. c. 106, s. 251). The act of 1849 for the first time made it an offence punishable with a maximum imprisonment of three years with hard labour to destroy or falsify books, and to obtain goods on credit under the false pretence of carrying on business within three months of bankruptcy, and with intent to defraud the creditor.

The act of 1861 (24 & 25 Vic. c. 134, s. 221) defined the offences which a bankrupt might commit much more elaborately than the earlier acts, but greatly reduced the severity of the punishment, repealing the provisions of the act of 1849 as to felony, and making the offences punishable by three years' imprisonment as a maximum. In 1869, [1] two acts were passed, which not only recast for the third or fourth time the law relating to bankruptcy, but by abolishing imprisonment for debt, and making elaborate provisions for the punishment of fraudulent debtors, added a new head to the criminal law and put an end to the offence of fraudulent bankruptcy properly so called. It must, however, be remarked that the greater part of the offences punishable under the Debtors Act consist in omissions to comply with the provisions of the Bankruptcy Act. All the offences against the act are misdemeanours, except a bankrupt absconding with property, which is felony (s. 12). The maximum punishment in each case is two years' imprisonment and hard labour. [2] Some of

[1] 32 & 33 Vic. c. 62 (the Debtors Act, 1869); c. 71 (the Bankruptcy Act, 1869). See my *Digest*, arts. 387-389. [2] See sec. 13 in my *Digest*, art. 384.

CH. XXX. the offences defined by the act have no reference to bankruptcy proceedings, but consist in obtaining credit by false pretences, and dealing with property intended to defraud creditors.

The old law upon this subject was certainly too severe; but the existing law, I think, is not severe enough. Cases not unfrequently occur in which seven or even ten years' penal servitude would not be too severe a punishment. Fraudulent removal or concealment of property may have all the effects of wholesale robbery or theft, and the very fact that it looks a less outrageous offence and is one which an apparently respectable person may be tempted to commit, is a reason, I think, for punishing it with special severity.

Reckless trading and extravagance involve loss to others, and ought to be punished on the same principle as manslaughter by negligence, and also in order to stigmatize as a crime a dangerous vice. A fraudulent bankrupt should be treated like the worst kind of thief—for such he really is. The provisions of the French law upon this subject seem to me to deserve careful attention. The *Code de Commerce* distinguishes traders unable to meet their engagements into three classes. [1] "Tout commerçant qui cesse ses payements "est en état de faillité." Mere failure involves no penal consequences. The "failli" must, however, be declared a bankrupt if he has lived extravagantly, or speculated rashly, or tried to avoid failure by raising money by buying goods to sell them again under their value, or "si, dans la même "intention, il s'est livré à des emprunts, circulation d'effets, "ou autres moyens ruineux de se procurer des fonds;" or if he has made what we should call a fraudulent preference. [2] In other cases of rash or irregular commercial conduct—for instance, if he has not kept books—an insolvent may be declared a bankrupt. A fraudulent bankrupt is thus defined:— [3] "Tout commerçant failli qui aura soustrait ses livres, "détourné ou dissimulé une partie de son actif, ou qui, "soit dans les écritures, soit par des actes public ou des "engagements sous signature privée, soit par son bilan, se "sera frauduleusement reconnu débiteur de sommes qu'il ne

[1] *Code de Commerce*, 437. [2] *Ib.* arts. 585-6. [3] *Ib.* art. 591.

"devait pas." Simple bankruptcy is punishable by the *Code Pénal* (art. 402) with imprisonment for from one month to two years. Fraudulent bankruptcy must be punished with penal servitude for from five to twenty years.

Of the other offences relating to trade, little need be said. They consist of [1] a series of provisions as to fraudulent directors and other officers of public companies who apply to their own use the property of the company, or keep fraudulent accounts, or destroy books or publish fraudulent statements. These provisions, which experience had shown to be necessary, were first enacted by 20 & 21 Vic. c. 54, in 1857 —Sir Richard Bethell's act for the punishment of fraudulent trustees. They now form a part of the Larceny Act.

[1] 24 & 25 Vic. c. 96, s. 81-84. See my *Digest*, art. 350.

CHAPTER XXXI.

MISCELLANEOUS OFFENCES.

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I HAVE now gone through all the principal classes of offences which have a history of their own worth relating. There are many other offences of which it would not be worth while to relate the history, but there are some actions the treatment of which as crimes is of interest because it throws light on different historical events, and on the feelings which prevailed at particular periods of our history. To some of these I will refer in the present chapter. Those which I shall mention are the following, arranged in the order of the date of the times when they were first treated as crimes: maintenance, perjury, slave trading, interference in hostilities between foreigners, bribery.

MAINTENANCE.—The crime of maintenance may be described in general terms as consisting in interfering with the due course of justice. Its more [1] technical definition is narrower though exceedingly vague. It has been the subject of a number of statutes which are still in force, though no prosecution for the offence has taken place within living memory. By the 3 Edw. 1, c. 28 (1275), it is provided "qe nul clerk de justice ne de visconte ne meintenge parties "en quereles." The 13 Edw. 1, c. 49 (1285), is similar. The statute or "ordinance concerning conspirators" (33 Edw. 1, 1305) throws light on the same subject. "Conspirators be "they that do confeder or bind themselves by oath, covenant

[1] See my *Digest*, art. 141. "Maintenance is the act of assisting the "plaintiff in any legal proceeding in which the person giving the assistance "has no valuable interest, or in which he acts from any improper motive." See too Appendix, note viii. p. 346.

" or other alliance, that every of them shall aid and bear the " other falsely and maliciously to indite or cause to indite or " falsely to move or maintain pleas; and also such as cause " children within age to appeal men of felony whereby they " are imprisoned and sore grieved, and such as return men in " the country with liveries or fees for to maintain their " malicious enterprises, and this extendeth as well to the " takers as to the givers; and stewards and bailiffs of great " lords which by their seigniory office or power undertake to " bear or maintain quarrels, pleas, or debates, that concern " other parties than such as touch the estate of their lords or " themselves." The statute 1 Edw. 3, s. 2, c. 14 (1326), hints at least by its recitals at the nature of the offence: " Because the king desireth that common right be adminis- " tered to all persons, as well poor as rich, he commandeth " and defendeth that none of his counsellors nor of his house, " nor none other of his ministers, nor no great man of the " realm by himself nor by other, by wording of letters, nor " otherwise, nor none other in this land, great nor small, shall " take upon them to maintain quarrels nor parties in the " country to the let or disturbance of the common law." The statute 4 Edw. 3, c. 11 (1330) also throws some light on the subject. " Where in times past divers people of the " realm, as well great men as other, have made alliances con- " federacies and conspiracies to maintain parties, pleas, and " quarrels, whereby divers have been wrongfully disinherited, " and some ransomed and destroyed, and some, for fear to be " maimed and beaten, durst not sue for their right nor com- " plain, nor the jurors of inquests give their verdicts, to the " great hurt of the people and [1 slander] of the law and " common right" the justices are to "inquire, bear, and " determine of such maintainers, bearers, and conspirators."

The provisions of this last statute are substantially repeated by 20 Edw. 3, c. 4 (1346) entitled " Ordinance for " the justices." In 1377 it was enacted by 1 Rich. 2, c. 4, that none of the king's " counsellors, officers or servants, nor " any other person within the realm of England, of whatsoever " estate or condition they be, shall from henceforth take

[1] See in *Revised Statutes.*

CH. XXXI. "nor sustain any quarrel by maintenance in the country "nor elsewhere upon a grievous pain." It was thought necessary to confirm this act in 1383 by 7 Rich. 2, c. 15.

Another set of statutes were passed in the reign of Richard II. closely connected with the statutes against maintenance. These were the statutes of liveries. The first of these was 1 Rich. 2, c. 7 (1377). It recites that "divers "people of small revenue of land rent or other possessions "do make great retinue of people, as well of esquires as "of other, in many parts of the realm, giving to them hats "and other liveries, of one suit by year, taking of them "the value of the same livery or percase the double value "by such covenant and assurance that every of them shall "maintain other in all quarrels, be they reasonable or un- "reasonable, to the great mischief and oppression of the "people." It then enacts that "henceforth no such livery "be given to any man for maintenance of quarrels or other "confederacies upon pain of imprisonment and grievous "forfeiture to the king, and the justices of assize shall dili- "gently inquire of all them that gather them together in "fraternities by such livery to do maintenance." In 1392 it was enacted by 16 Rich. 2, c. 4, "that no yeoman nor "other of lower estate than an esquire from henceforth shall "not use or bear no livery called livery of company of any "lord within the realm if he be not menial and familiar, con- "tinually dwelling in the house of his said lord," and in 1396 these statutes were affirmed by 20 Rich. 2, c. 1. This act also confirmed the statute of Northampton (2 Edw. 3, c. 3, 1328), which enacted that no one should go armed except on certain specified occasions.

The state of society to which these laws applied is fully described in one of the most interesting passages in Mr. Stubbs's [1] *Constitutional History*. "The English of the middle "ages," he says (I have no doubt with perfect truth), "were "an extremely litigious people." A man who wished to maintain his own rights or attack his "neighbours could "secure the advocacy of a baron, who could and would

[1] Vol. iii. pp. 532-540.

"maintain his cause for him, on the understanding that he "had the rights of a patron over his clients." This led, amongst other consequences, to "the gathering round the "lord's household of a swarm of armed retainers, whom the "lord could not control, and whom he considered himself "bound to protect." This state of things gave the utmost importance to livery. Heraldry was, under Edward III., at its height, as appears from the institution of the Order of the Garter. Less eminent persons followed the king's example by giving badges and liveries, and different kinds of livery were distinguished as livery of company and [1] livery of cloth. Mr. Stubbs [2] observes, "Viewed as a social rather "than a legal point, whether as a link between malefactors "and their patrons, a distinctive uniform of great households, "a means of blunting the edge of the law or of perverting "the administration of justice in the courts, as an honorary "distinction fraught with all the jealousies of petty ambition, "as an underhand way of enlisting bodies of unscrupulous "retainers, or as an invidious privilege exercised by the lords "under the shadow of law or in despite of law,—the custom "of livery forms an important element among the disrup-"tive tendencies of the later middle ages." [3] Mr. Stubbs proceeds to show how the social arrangements of this period rendered maintenance easy and formidable. "In their great "fortified houses the barons kept up an enormous retinue "of officers and servants arranged in well distinguished "grades, provided with regular allowances of food and "clothing, and subjected to strict rules of conduct and account. "A powerful earl like the Percy, or a duke like the Stafford, "was scarcely less than a king in authority, and much more "than a king in wealth and splendour within his own house. "The economy of a house like Alnwick or Fotheringay was "perhaps more like that of a modern college than that of

[1] As a strange instance of the persistence of old customs, I may observe that the Recorder of London still receives—at least the late Recorder, Mr. Russell Gurney, received—from the Corporation of London a certain quantity of scarlet cloth annually, a privilege expressly reserved by 8 Hen. 6, c. 4. See Stubbs's *Constitutional History*, iii. 535, for a summary of the statutes.

[2] *Constitutional History*, iii. p. 536.

[3] *Ib.* vol. iii. pp. 539-541.

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"any private house at the present day." The lord had his council, his legal advisers, his domestic officers, his exchequer, his retainers. His house was a school for the sons of neighbouring knights and squires, who were themselves frequently bound by express agreements to serve him. They were thus kings, and had courts on a small scale. So long as all these little kingdoms were well and virtuously ruled, they secured to the age in which they existed many social advantages which are altogether wanting in our times; but they were singularly liable to abuse, and when they were abused they threw everything into confusion.

This explains what the offence of maintenance was when the statutes referred to were passed. It was neither more nor less than chronic organised anarchy, striking at all law and government whatever. The history of the times shows how vigorous were the associations by which the members of the small courts described bound themselves to maintain and uphold each others' interests on all occasions against all comers. A king like Edward I. or Edward III., or Henry IV. or Henry V., might by force of character or by great military success enforce the law and put down the breakers of the law; but a weak king—Edward II., Richard II., Henry VI.—was powerless before them, whatever statutes he might pass. The offence of maintenance, or armed anarchy was not finally suppressed till the days of the Tudors, and it is very remarkable that it was then put down, not by new laws, but by the vigorous, unflinching execution of the old ones by a severe court acting under the orders of a succession of kings of unusual force of character, who put themselves at the head of the great movement of the age in which they lived.

The statute 3 Hen. 7, c. 1 (1487), to which I have already referred, provided the means by which the Court of Star Chamber asserted the royal authority so effectually as utterly to put an end to what our ancestors understood by the offence of maintenance. It enacted no new offence, but its first recital is that the king "remembereth how by un-
" lawful maintenances, giving of liveries, signs and tokens,
" and attainders by indentures, promises, oaths, writings or

" otherwise embraceries of his subjects, untrue demeanings " of sheriffs in making of panels and other untrue returns, " by taking of monies, by juries, by great riots and unlawful " assemblies, the policy and good rule of this realm is almost " subdued." The act then goes on to make the provisions as to the Court of Star Chamber, on which I have already remarked. There is one subsequent statute which relates to maintenance. It is 32 Hen. 8, c. 9 (1540). The change which had been effected by the vigorous administration of the law during the interval of fifty-three years which had passed since the 3 Hen. 7, is strikingly exemplified by the provisions of this statute. It confirms all the old statutes of maintenance, and directs them to be put in force and proclaimed at the assizes, but the whole turn of the statute shows that the type of the crime had changed. Instead of references to conspirators, liveries, and badges, and other forcible perversions or open defiances of the law, the statute deals with the importance of " true and indifferent trials of such titles and " issues as been to be tried according to the laws of this " realm." This object is greatly hindered by " maintenance, " embracery, champerty, subornation of witnesses, sinister " labour, buying of titles and pretensed rights of persons not " being in possession, whereupon much injury hath ensued " and much inquietness, oppression," &c. Provisions are then made against buying and selling " pretensed rights or titles." The old conflict between the law and those who wish to break it by open force is at an end, and fraud, perjury, and chicanery have taken the place of violence.

An exact parallel to this presented itself in every part of India upon, and as the consequence of, the establishment of the British authority. Under native rule a question as to a watercourse, for instance, and irrigation rights would perhaps be languidly carried on before one of the old Zemindari Courts, to a great extent by the agency of punchayats, which had many features in common with juries. The decision of the dispute would be greatly influenced by violence, and it would frequently be settled for a time by a pitched battle between the parties and their friends, which might or might not lead to a blood feud. The invariable result of the establishment of a

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government strong enough to put an end to open violence was to produce an outbreak of litigation and a regular trade in suits, "wherefrom" (as in England) "much perjury "ensued," besides "unquietness and oppression" of a different and less formidable type than the old one, but still of considerable importance. It was a common saying in the Punjab some years ago, that the English had set up "pleaderke raj," the rule of the pleaders in the place of the old rule of open violence.

Although maintenance in the old sense of the word is a thing of the past, the name still survives in law books as the name of a crime, but in practice the genus has been lost in the species. The cases of maintenance with which we in these days have to deal are [1] conspiracies to defeat justice which sometimes occur, dissuading witnesses from testifying and perjury—an offence which has a curious history of its own which I now proceed to relate.

[2] PERJURY.—There are a few references to the offence of perjury in the laws of the early kings, but they are very vague and general, though oaths held a prominent place in their scheme of government. These, as appears from the forms [3] given, were oaths asserting not the existence of particular facts, but the goodness of the swearer's cause. "By the Lord, I am guiltless both in deed and counsel of "the charge of which N. accuses me." "By the Lord, the "oath is clean and unperjured which N. has sworn" The minute examination of testimony as to facts stated in detail was not the method by which questions were in those days investigated. Hence the kind of offence to which we in the present day give the name of perjury differs entirely from the perjury which is mentioned in the early laws.

The language used against perjury is extremely general and vague. [4] "Let every injustice be carefully cast out from this "country as far as it can be done, and let fraudulent deeds and "hateful illegalities be earnestly shunned, that is, false weights

[1] See my *Digest*, art. 142, p. 87.
[2] The greater part but not the whole of this account of the law of perjury is taken from Note VII. to my *Digest*, p. 340.
[3] Thorpe, i. 179-185.
[4] *Ib.* 311.

"and wrongful measures, and lying witnesses, and shameful "fights, and horrid perjuries, and diabolic deeds in 'morth,' "works, and in homicides, in theft and in plundering," &c., say the laws of Ethelred and several other legislators with variations. The most definite provision which I have noticed as to perjury is in the [1] laws of King Edward the Elder: "Also we have ordained concerning those men who were "perjurers if that were made evident or an oath failed to them" (*i.e.* if they failed to produce the legal number of compurgators; or when one of the persons produced refused to join in the oath), "that they afterwards should not be oath-worthy "but ordeal-worthy."

Perjury thus appears in very early times to have been not so much a lie told about a specific matter of fact in a witness box, as a false oath taken in a case in which the matter at issue was decided by the oaths of the persons interested and their compurgators. As I have shown in the earlier part of this work the decision of cases by the detailed examination of witnesses, and the crimes which arise out of that mode of procedure, were unknown until a comparatively modern period in our history, and, on the other hand, the process of deciding cases by ordeal, by compurgation, or by combat, left deeper traces in our history than is usually supposed.

After the Conquest the ordeal and compurgation were gradually superseded by the institution of the jury, who, as I have shown at length, were at first witnesses rather than judges. The twelve men of the vicinage who swore before the justices that such a person was guilty or not of such an offence, were a step in advance of compurgators or the proceedings of an ordeal, but they differed widely from modern jurymen. We find, accordingly, that in early times, and indeed for several centuries, the only perjury of which the common law took notice was the perjury of jurors, and this was punished, not as a substantial offence, but as an incidental result of the process called "attaint," the main object of which was to set aside a false verdict in certain kinds of actions. It thus affords an instance of the blending of civil and criminal

[1] Thorpe, i. 161. Edward the Elder, 3.

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consequences in a single proceeding, which, as I have already observed, was not an uncommon characteristic of our early criminal law. Three curious passages in [1] Bracton, [2] Fleta, and [3] Britton, are to much the same purpose. The passages are too long to quote, but they contain careful distinctions between verdicts which are merely mistakes and those which are wilfully false, those in which the blame attaches to the jury and those in which it attaches to the judge. Incidentally they throw great light on the respective provinces of the judge and the jury. They assume, however, throughout that the proper function of the jury was that of established and, so to speak, representative witnesses, who, of course, would be guilty of a grave offence if they perjured themselves. The punishment, accordingly, if their verdict was set aside on the ground of perjury, was, as stated by Fleta, very severe. "Imprimis capiantur et in gaolam detrudantur, et omnes "terræ et omnia catalla in manum Regis capiantur, et extra "manum suam capiantur cum perpetua infamia, per quam "lege libera deincips non poterint congaudere, quorum sacra-"mentis veredictis nunquam erit aliquatenus fides adhibenda." Lord Coke, who refers to these passages in a cursory and unintelligent way, observes that this punishment "was so severe "as few or no juries were upon just cause convicted." The fact probably is that the process of attaint, was objectionable on many obvious grounds. In the first place no one jury would ever attaint another lest they might be themselves attainted; moreover, as the juries, by the steps already described, ceased to be witnesses and became judges of the fact, attaints would obviously become inapplicable and inappropriate. Moreover the process of attaint, which was at all times intricate and clumsy in the extreme, fell into disuse, and other ways of reversing a verdict were adopted.

The real singularity is, that for several centuries no trace is to be found of the punishment of witnesses for perjury. The only passage in an early book bearing on this offence which I have been able to find, besides those in Bracton and

[1] Bracton, lib. iv. ch. iv. pp. 288b-290b (in Sir H. Twiss's edition, vol. iv. pp. 368-415.)
[2] Fleta, 22.
[3] Britton, lib. iv. tract v. ch. ix. vol. ii. p. 212 (Nicholls' ed.)

Fleta already referred to, is in the *Mirror*. The passage is as follows: [1] "Perjury is a great offence of which ye are, to "distinguish either of perjury of false testimony, or by breach "of faith, or by breach of the oath of fealty: Of the first "perjury ye are to distinguish either of perjury mortal or "venial: if of mortal, then the judgment was mortal to the "example of apparent murderers." This passage, however, stands alone. In an earlier [2] chapter the author treats perjury as consisting exclusively of breaches of promissory oaths by the officers of the king's house to do their duty. It is difficult to prove a negative as to the contents of the Year Books, but I do not think they contain any reference to this offence. There is no such title as "Perjury" in Broke's Abridgment. One case only is referred to in Fitzherbert, under the title "Parjure." In this instance a man was fined and imprisoned for representing his property as greater than it really was when he offered himself as bail, which might be regarded as a contempt of court. The subject is not mentioned either by Staundforde or Lambard, nor in the original edition of Dalton's *Justice*. Perjury was no doubt regarded as a spiritual offence. [3] Several cases of prosecutions for it are to be seen in Archdeacon Hale's *Ecclesiastical Criminal Precedents*. Most of them refer to matters of ecclesiastical cognizance, such as incontinence, but one relates to a common transaction of business. "Johannes Traford "notatur super crimine perjurii, eo quod non solvit M. R. "Spencer [blank in the original], quos promisit solvere." This procedure was jealously watched by the courts of common law. [4] Two cases occur in the Year Books in which a prohibition went to the spiritual court to restrain them from inquiring into false oaths, or rather breaches of promissory oaths relating to temporal matters, upon the ground that such an inquiry was an indirect way of determining spiritual questions. In the second of the cases referred to the report says, "It happened in the King's Bench that a man had "sworn to make a feoffment of land, and for not doing so he

[1] Bk. ii. s. 19, p. 208. [2] Ch. i. s. 5, p. 18.
[3] Nos. 75, 77, 93, 131, 146, 147, 200.
[4] 2 Hen. 4, p. 10, No. 45; and 11 Hen. 4, p. 88, No. 40.

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It is not at all improbable that this strange defect in the law may have had an influence upon the prevalence of perjury, which Mr. Hallam notices as one of the most characteristic vices of the middle ages.

The first statutory reference to perjury, as far as I know, is to be found in the statute 3 Hen. 7, c. 1, on which I have already remarked.

This statute recites the bad effects of various crimes, and enumerates "the increase of murders, robberies, perjuries, "and unsureties of all men living" as their effect. It then proceeds to give the court power to call before them "the "said misdoers." The Star Chamber considered that this authorised them to punish perjury, though the words seem not to bear that interpretation. It certainly did not authorise them to punish murders or robberies. Temporal penalties were first imposed upon the offence by the statute 32 Hen. 8, c. 9, s. 3 (1540), which punished subornation of perjury in certain cases by a fine of £10, but left perjury itself unpunished. The money was to be sued for by a common informer. This was followed in 1562 by the 5 Eliz. c. 9, which punishes subornation of perjury in certain special cases and courts with a penalty of £40, and perjury itself with a penalty of £20. In each case there is an alternative punishment of six months' imprisonment and pillory in case of nonpayment, besides certain incapacities. These enactments obviously regard perjury simply as a branch of the general offence of maintenance or oppression by iniquitous lawsuits.

An account of the law upon perjury as it stood in the tenth century is given in the case of Devonport *v.* Sympson, Cro. Eliz. 520, decided in 1596. This was an action against a man who falsely swore that the value of certain plate was only £180, and not £500, whereby the plaintiff recovered less damages for the loss of the plate than he was entitled to.

The jury gave £300 damages. "And it was moved in arrest "of judgment that the action lay not; for the law intends the "oath of every man to be true; and, therefore, until the statute "of 3 Hen. 7, c. 1, which gives power to examine and punish "perjuries in the Star Chamber, there was not any punishment "for any false oath of any witness at the common law: and "now there is a form of punishment for perjury provided by "the statute of 5 Eliz. c. 9. And if this action should be "allowed, the defendant might be twice punished, viz., by the "statute, and by this action, which is not reasonable. And of "that opinion were Walmsley, Beaumond, and Owen, that this "action lies not; for at the common law there was not any "course in law to punish perjury: but yet before the statute "of 3 Hen. 7, c. 1, the king's council used to assemble and "punish such perjuries at their discretion. And if he should "be punished by law by this action, there would be some pre-"cedent of it before this time: but being there is not any "precedent found thereof it is a good argument that the action "is not maintainable. And it appears by Dyer, 242, that at "the common law there was no punishment for perjury but in "case of attaint; but in the spiritual court *pro læsione fidei* in "cases spiritual they used to punish them; and here they "would in this action draw in question the intent of the jurors "what greater damages they would have given, unless for this "oath, which is secret, and cannot be tried; and therefore "to punish a man for his oath upon a secret intent would be "hard; and if this might be suffered, every witness would be "drawn in question. Wherefore upon these reasons they held "that this action lay not, and gave judgment for the defendant, "against the opinion of Anderson, who conceived the action "was maintainable."

The present law upon the subject, which is to be found in all the common text-books, is represented by article 135 in my *Digest*. It originated entirely as far as I can judge in decisions by the Court of Star Chamber. Since writing the note to my *Digest*, from which the preceding observations on perjury are taken, I have found an account of this remarkable instance of judicial legislation in [1] Hudson's account of

[1] Hudson's Treatise, pp. 71-82.

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the Court of Star Chamber, which seems to me extremely curious. Hudson begins by saying that the case quoted above from Dyer is wrong. "I cannot but marvel that so "learned and reverend men should light upon so fond an "opinion, whereas I dare undertake to show them that the "common law of England had a punishment for perjury "before the Conqueror, and when a certain number of learned "men, to the number of twelve, in every shire, were ap-"pointed to set down their laws, which they performed "accordingly, and declared the punishment of perjury, as "Roger Hoveden remembereth."

As I have already observed, there are some references to perjury in the ancient laws, but Hudson mentions no other case in which perjury was punished before the reign of Henry VIII. He observes, however, that "in the reigns of "Henry VII., Henry VIII., Queen Mary, and the beginning "of Queen Elizabeth's reign, there was scarcely one term "pretermitted, but some grand inquest or jury was fined for "acquitting felons or murderers, in which case lay no attaint." He then gives nine instances, the earliest 4 Hen. 8 (1513), and the last in 22 Eliz. (1580), in which jurors were fined by various courts for what were regarded as wrongful acquittals, one of the cases being that of Throckmorton. He concludes, "all which (it must be agreed) were injuriously "punished contrary to the law of the land, if their opinion "were true that there was then no law to punish perjury; "besides the horrible imputation which should be upon the "government that so detestable a crime as perjury should be "privileged in this kingdom with impunity." It would be impossible to give stronger proof than Hudson's own statements supply of the truth of the proposition which he denies, for in the first place only one of the cases which he mentions is a case of perjury by a witness. Nearly all the rest are cases of alleged perjuries by jurors. In one a man was punished for a false oath, which was regarded as a contempt of court; in another case, "Buckett, being examined in "open court upon a question asked him, and his oath "being afterwards disproved, was sentenced to the pillory." Moreover, all these cases were punished, not by the known

law of the land, and according to a regular course of proceeding, as for a known offence, but by an arbitrary punishment imposed by the court, which was offended at the verdict or false oath.

Hudson goes on to give some curious records of long forgotten classes of cases which show by what slow degrees the conclusion that all perjury in a judicial proceeding is a crime was arrived at. It came to be established by successive steps that perjury in an ecclesiastical court, perjury in the Stannary Court, and perjury in the Court of Chancery were punishable in the Star Chamber. "A long "debated question hath been whether perjury committed "by any witnesses upon indictments for the king shall be "examined and punished in the Star Chamber. And the "reason yielded hath been for that it will deter the king's "witnesses to yield their testimonies in all cases." After noticing some cases in 1574 and 1582 to the contrary he says: "But later times and manifest corruptions of witnesses "in the king's case hath had a settled course of punishing "perjury, even in witnesses for the king." There was, he says, some doubt whether "after sentence given upon the "testimony of witnesses those witnesses shall be afterwards "questioned for perjury? for that if their depositions be false "it overthroweth the sentence." It was, however, decided in the affirmative, "for that otherwise wicked and perjured "persons might ruinate any man." This wholesome rule was, however, subject to what, according to our ideas, seems a monstrous exception. "Another perjury not punishable nor "examinable is perjury committed against the life of a "man for felony or murder whereof the party accused is con-"victed by verdict and judgment, and this perjury hath not "been allowed to be examinable; and one reason is lest it "should deter men from giving evidence for the king, and "another lest it should bring a public scandal upon the justice "of the kingdom if the cause of a person so committed should "receive new examination; the nature of man being to com-"passionate the worst men in such extremities and to pick "small occasions to try a witness in any circumstance that "might tend to make a guilty man seem innocent." He

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thinks, however, that as witnesses may be tried for perjury committed even before the Star Chamber itself, "so in "strictness of reason the other" (viz., perjury by which a man is hanged) "may after sentence receive examinations, and it "is forborne, but only in discretion, that when a man is "executed the truth of his accuser's testimony may not be "examined, because the execution cannot be reversed." This is all summed up by [1] Coke, who says shortly that "in Mich. "10 Jas. (1613) in the Star Chamber in the case of Rowland "ap Eliza" (Hudson calls him Ap Ellis) "it was resolved "that perjury by a witness was punishable by common law." Coke's account of the law of perjury is a good illustration of the unintelligent patchwork way in which he writes on all subjects.

For the modern doctrine on the subject I must refer to my *Digest*. The offence is [2] punishable under 2 Geo. 2, c. 25, s. 2.

The doctrine connected with the subject, that the matter falsely sworn must be material to the issue, has a curious history. It is part of the definition of the offence given by Coke. In explaining that part of his definition which says that the false oath must be "in a matter material to the issue or cause in question," he adds, "for if it be not material, then "though it be false, yet it is no perjury, because it concerneth "not the point in suit, and therefore in effect it is extra-"judicial. Also this act" (he seems to refer to 5 Eliz. c. 9, which, however, does not contain the words introduced into his definition) "giveth remedy to the party grieved, and if the "deposition be not material, he cannot be grieved thereby. "And Bracton says, '*Si autem sacramentum fatuum fuerit,* "'*licet falsum, tamen non committit perjurium.*'" Coke misunderstands Bracton, for Bracton goes on to say, "quia jurat "secundum conscientiam eo quod non vadit contra mentem," which shows that he was not speaking of wilful falsehood in an immaterial point, but, as appears from many other places in the same passage, of cases of honest mistake. Bracton's authority, therefore, does not warrant Coke's observation, besides which it refers not to witnesses but to jurors.

[1] *Third Institute*, pp. 162-167.

[2] See my *Digest*, art. 137.

Probably this part of Coke's definition was an adaptation of a part of the old law of attaint, which is thus expressed in the case of Foster *v.* Jackson (Hobart, 53), also decided in 1613: "If the jury find anything that is merely out of the "issue, that such a verdict for so much is utterly void . . . . "If that extravagant part of the verdict be false, it is no "perjury, neither doth any attaint lie upon it, for there is no "party grieved, nor anything to be restored, neither can it be "used as evidence in any other trial, because there is no "redress if it is false." This is intelligible and rational, but the modern doctrine of materiality is a mere distortion of it. It is one thing to say that a verdict is not to be treated as false because an immaterial part of it is false, and quite another to say that a wilful perjury about a particular fact is not to be punished because the fact is not material to the issue. However, upon this passage of Coke's a variety of cases were decided (see 1 Hawkins, *P. C.* 433-5), which introduced a doubt whether perjury could be committed about a fact which, though relevant to the issue, was not essential to its determination, and the doctrine became so well recognised as a part of the law, that an averment of the materiality of the matter on which perjury is assigned forms a necessary part of every indictment for the offence. [1] Of late, however, the judges have given so wide an interpretation to the word "material" that the rule has ceased to do much harm. It is difficult to imagine a case in which a person would be under any temptation to introduce into his evidence a deliberate lie about a matter absolutely irrelevant to the case before the court. A way of interpreting the law as to materiality was suggested by Maule, J., in [2] R. *v.* Phillpot which would practically get rid of the doctrine altogether. He said, "Where the defendant by means of a false oath "endeavours to have a document received in evidence, it "is, therefore, a false oath in a judicial proceeding. *It is "material to that judicial proceeding, and it is not necessary "it should have been relevant and material to the issue being "tried.*"

I may observe in conclusion that many enactments provide

[1] See particularly R. *v.* Gibbons, L. & C. 109. [2] 2 Den. 306.

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that the making of false declarations upon oath or affirmation in relation to particular matters shall be deemed to be perjury. It does not fall within the plan of this work to notice them.

BRIBERY.—The offence of bribery and the manner in which it has from time to time been dealt with are subjects of considerable interest, as they mark the steps by which corruption descended in the social scale, and from having been practised by great officers of state came to be the characteristic offence of voters for boroughs and counties. It is a subject of legitimate pride that at no time of our history has it been found necessary to make any definite provision against judicial corruption, though there can be no doubt that such conduct is an offence at common law and would, if committed, be deservedly followed by severe punishment. There is, however, no statute against it. It was, indeed, enacted by the 8 Rich. 2, c. 3 (1384), that no judge of the King's Bench or Common Pleas, or Baron of the Exchequer, should take from thenceforth "robe, "fee, pension, nor reward of any but the king, except reward "of meat and drink of small value," nor "give counsel to "any, great or small, in things and affairs wherein the king "is party or which in anywise touch the king, and that they "be not of any man's counsel in any cause, plea, or quarrel "hanging the plea before them, or in other of the king's "courts." This statute was repealed in 1881 by the [1] Statute Law Revision Act; why, I cannot say. [2] Coke quotes a statute from the Parliament Roll of 11 Hen. 4 (1410), which provides that "Nul chancelor, treasorer, garden del privie seal, "counselor le roy, serats, a councell del roy, ne nul auter "officer, judge, ne minister le roy pernants fees ou gages de roy "pur lour ditz offices ou services, presigne en nul manner en "temps a vener ascun manner de done ou brocage de ulluy "pur lour ditz offices et services a faire." This, he says, was never printed.

[1] 44 & 45 Vic. c. 59. The same act opens a door to oppressions by the "constable and marshal of England," but as these officers no longer exist, it does not much matter.

[2] *Third Institute*, p. 146. It is printed in 3 *Rot. Par.* 626 with this marginal note: "Resp'atur" (I suppose "respectatur," it is respited or adjourned) "per D'num principem et Concilium."

He gives two instances in which judges were punished for taking bribes, namely, Sir William Thorpe in 1351, who took sums amounting in all to £90 for not awarding an exigent against five persons at Lincoln Assizes, and certain commissioners (probably special commissioners) of Oyer and Terminer, who were fined 1000 marks each for taking a bribe of £4; I have [1] elsewhere referred to the impeachment of the Chancellor Michel de la Pole by Cavendish, the fishmonger, for taking a bribe of £40, three yards of scarlet cloth and a quantity of fish, in the time of Richard II.

These authorities show that, rare as the offence was, judicial corruption was regarded as an offence long before the case of Lord Bacon.

[2] Lord Bacon's case is of great historical interest, but regarded merely as a legal precedent it shows only that judicial corruption is an offence punishable on impeachment. He pleaded guilty to corruption in plain unequivocal terms, and was sentenced to a fine of £40,000, imprisonment during the king's pleasure, incapacity to be employed, and exclusion from parliament.

Bacon's case was followed at an interval of four years by

[1] Vol. I. p. 151.

[2] "Upon advised consideration of the charge descending into my own "conscience, and calling my memory to answer, so far as I am able, I do "plainly and ingenuously confess that I am guilty of corruption; and do "renounce all defence, and put myself upon the grace and mercy of your "lordships."—Spedding's *Life of Bacon*, vii. 252. Mr. Spedding's remarks on the case I cannot here discuss, but they seem to me to proceed upon an entire misconception of the law, and upon a rule as to estimating the facts altogether arbitrary and unreasonable. "Corruption includes acts of various "complexions, varying from violations of universal morality of the blackest "dye, to violations only of artificial and conventional regulations, made to "defend the outworks of morality, acts illegal rather than immoral; and as "the judges neither made any attempt themselves to draw such distinctions, "nor placed on record any of the evidence which would enable us to do so, "*we are compelled to fall back upon Bacon himself as being really our only "authority, and to hold him guilty to the extent of his own confession and no "further. From the manner in which the case was tried it is impossible to re-"gard anything else as proved.*" It seems to me, that the strong probability is, that Bacon did the best he could for himself, and that the very object of his general admission of corruption was to get the opportunity of giving an account of the details which it would not be worth while to contradict. I have no doubt that he took bribes in the plain sense of the words, *i.e.*, that he allowed himself to be influenced in his judgments either by gifts or by the expectation of receiving them. If his statement did not mean that, it was an act of abject cowardice. If it did, his account of the details must be a disingenuous, incomplete statement, a conclusion which is in no respect improbable.

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that of the Earl of Middlesex, Lord High Treasurer, who, for refusing to hear petitions referred to him till he had been bribed, was fined £50,000 and sentenced to be imprisoned during pleasure.

Lord Macclesfield was also [1] impeached and removed from his office for bribery in 1725. The cases of Lord Melville, of Mrs. Clark's charges against the Duke of York, and the scandals which led to the retirement from office of Lord Westbury in 1865, cannot be called cases of bribery, but are illustrations of the extreme, though by no means excessive, importance attached in this country to everything which remotely suggests a suspicion of corrupt practices in persons of high station, especially of high judicial station, or even in persons connected with them. The matter is indeed one as to which it is impossible to be too jealously and scrupulously sensitive. One remarkable instance of the length to which this sentiment has been carried is supplied by an [2] enactment still in force which provides that "the "demanding or receiving any sum of money or other valuable "thing as a gift or present . . . . by any British subject "holding any office under his Majesty . . . . in the East "Indies shall be deemed and taken to be extortion and a mis-"demeanour at common law." These words are wide enough to make it a misdemeanour to give a wedding present to an Indian civilian, or for an author to send to a civilian a presentation copy of a new book. Of course the act would not be so interpreted, but there might be some difficulty in explaining it away, especially as s. 63 provides that barristers, medical men, and chaplains may, nevertheless, take fees in the way of their respective professions. If, but for this, such fees would have been forbidden, it is hard to say that any presents were not intended to be included.

The kind of corruption against which the greatest amount of legislation has been directed is corruption at parliamentary elections. Bribery at [3] parliamentary elections is said to have been an offence at common law, but, if it was, the common law has long since been superseded by statutes which by

[1] 16 *State Trials*, p. 767.
[2] 33 Geo. 3, c. 52, s. 62.
[3] 1 Hawkins, p. 415.

very slow degrees have defined the offence clearly and completely. The growth of the definition is of interest, both because of its connection with the subject of parliamentary elections, and because it would be difficult to find anywhere a better illustration of the care and experience necessary in so defining offences as to include all conduct of substantially the same character and nothing else. It is a matter which ought to be carefully borne in mind by those who suppose that such an offence as murder, for instance, can be defined in a single short sentence by a few pointed words.

The first statute directed against bribery in parliamentary elections was 2 Geo. 2, c. 24, passed in 1729. Section 7 of this act subjected to a penalty of £500 (1) every voter who asked, received, or took any money, or other reward, by way of gift, loan, or other device, or who agreed for any gift, office, employment, or other reward whatsoever, to give his vote or abstain from voting; and (2) every person who, by himself or through an agent, by any gift or promise corrupted or procured any person to vote or abstain from voting. This provision left unpunished all payments for having voted and all corrupt practices except giving or promising "money or "other rewards," and all gifts to other persons than voters. It remained unaltered, however, for eighty years, when it was reinforced by 49 Geo. 3, c. 118, passed in 1809. This act recites that it is not bribery within the act of George II. to give or to procure to be given, or to promise to give or procure to be given, any sum of money, gift, or reward, or any office, place, employment, or gratuity in order to procure the return of any member to serve in parliament, unless the consideration is given to a returning officer or voter. It then proceeds in two elaborate sections to subject to a penalty of £1,000 all persons who directly or indirectly give any such consideration to any one in order to procure the return of any person to parliament, and all those who receive it to a penalty of £500. This act did not cover the case of retrospective payments. It was not provided for till 1842, when it was enacted by 5 & 6 Vic. c. 102, s. 20, that the payment or gift of any sum of money or other valuable consideration whatsoever, to any voter before, during, or after any election,

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or to any person on his behalf, or to any person related to him by kindred or affinity, on account of his having voted or having refrained from voting, or being about to vote or refrain from voting, whether under the name of head-money or otherwise, should be deemed to be bribery. No special penalty for bribery was provided by this act, though the effect of the section quoted was to render void the election of any person guilty of the practice in question.

At last, in 1854, was passed the Corrupt Practices Act now in force, 17 & 18 Vic. c. 102. The penalties imposed by it have been by some regarded as insufficient, but no fault can be found with the definitions which it contains. It begins by defining bribery under five separate heads, of which I quote the first as a specimen.

"The following persons shall be deemed guilty of bribery "and shall be punishable accordingly:—

"1. Every person who shall directly or indirectly, by himself "or by any other person on his behalf, give, lend, or agree "to give or lend, or shall offer, promise, or promise to "procure or to endeavour to procure, any money or valuable "consideration, to or for any voter, or to or for any person "on behalf of any voter, or to or for any other person, "in order to induce any voter to vote or refrain from "voting, or shall corruptly do any such act as aforesaid on "account of such voter having voted or refrained from voting, "at any election."

I do not think it would be possible to define either more completely or in fewer words the particular forms of bribery intended to be forbidden by this provision. It may strike a hasty or superficial reader as wordy or tautologous, but if any one tries the experiment he will find that not a word of it could be spared.

The four remaining heads of the offence relate to (2) bribery by offices or employments; (3) bribery to induce persons to procure the return of a member or the vote of a voter; (4) the acceptance of bribes; (5) advancing or paying money to be used in bribery.

The fourth and fifth heads of the definition are carried somewhat further by the following section.

Bribery by this act is made a misdemeanour. In 1872 the provisions of the act were extended to municipal elections by 35 & 36 Vic. c. 60.

[1] Treating was by the same act subjected to a penalty of £50, recoverable in a penal action, and intimidation (widely defined) was made a misdemeanour by s. 5. I do not think that this practice had been ever before subjected to any statutory punishment.

SLAVE TRADING.—The crime of slave trading has, in a legal point of view, hardly any history, but the suppression of the slave trade was a memorable transaction, and the laws by which it was branded as a crime of the greatest enormity form an essential part of that history.

Of the long agitation against first the slave trade, and then slavery itself, I shall say only a few words. It is said that in 1786 there were in the trade 130 ships, which carried 42,000 slaves. In 1787 was formed the Society for the Suppression of the Slave Trade. The matter was debated in parliament in 1791, and again in 1798, but Mr. Wilberforce, who brought the matter forward, failed to get a majority. Down to 1806, the slave trade continued to be legal, but from that time a series of acts was passed, which by singularly rapid steps changed its character from that of a lawful trade to a capital crime.

The first act for the abolition of the slave trade was passed in 1806 (46 Geo. 3, sess. 2, c. 52). The act forbids in an elaborate way, and subject to some temporary exceptions, all trading in slaves either between Africa and the West Indies, or between one West Indian colony and another, or between colonies and foreign countries, the penalty being forfeiture of the ship, and of £50 a head for the slaves on board. All slave trading contracts, and the insurance of slave ships were forbidden under heavy money penalties.

In 1807, an act (47 Geo. 3, sess. 1, c. 36) was passed which greatly increased the severity of the act of 1806, including a larger number of cases and inflicting much heavier

[1] 17 & 18 Vic. c. 102, s. 4. It had been made a corrupt practice by 5 & 6 Vic. c. 102, s. 22, and 4 Geo. 4, c. 55, s. 79, and had been forbidden by 7 Will. 3, c. 4, s. 1 (referred to by mistake as 7 & 8 Will. 3, c. 25, in 5 & 6 Vic. c. 102, s. 22).

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penalties in respect of them. It declared that from May 1, 1807, "the African slave trade . . . . shall be . . . . abolished, "prohibited, and declared to be unlawful."

In 1811, a still more severe act was passed (51 Geo. 3, c. 23), which made slave trading felony, punishable with fourteen years' transportation, and the serving on board a slave ship or insuring the vessel a misdemeanour punishable with imprisonment up to two years. After [1] several administrative provisions, and [2] acts of parliament intended to carry into effect treaties for the suppression of the slave trade made with Spain, Portugal, and the Netherlands, the then existing law was consolidated and amended by [3] 5 Geo. 4, c. 113. This is a most elaborate and comprehensive act. It enumerates every sort of act or contract which can in any way be regarded as constituting or as being auxiliary to slave trading. It first declares all such acts and contracts to be illegal, and then in a series of clauses imposes ruinous money penalties in the way of fine and forfeiture on all persons who are concerned in any of them in any capacity, and on all their "procurers, counsellors, aiders, and abettors." It then proceeds to declare in equally comprehensive language that every person guilty of slave trading at sea "shall be deemed "and adjudged guilty of piracy, felony, and robbery, and, "being convicted thereof, shall suffer death without benefit "of clergy, and loss of lands, goods, and chattels, as pirates, "felons, and robbers upon the sea ought to suffer." The amplitude, energy, and indignation of the words are very characteristic of their author. Many other acts of slave trading are declared to be felony, and punished by fourteen years' transportation; and serving on slave ships is made a misdemeanour, subjecting the offender to two years' imprisonment. Capital punishment for this offence was taken away

[1] 54 Geo. 3, c. 59; 55 Geo. 3, c. 172; 58 Geo. 3, c. 49; 59 Geo. 3, c. 120, and c. 97.

[2] 58 Geo. 3, c. 36 (Spain); 58 Geo. 3, c. 85 (Portugal), and see 59 Geo. 3, c. 98; 59 Geo 3, c. 16 (Netherlands).

[3] An imperfect act to the same effect was passed in the same session, c. 17. The act 5 Geo. 4, c. 113, was drawn by my father, and was dictated by him in one day and at one sitting. It consists of fifty-two sections, and fills twenty-three closely-printed octavo pages. Many of the sections are most elaborate. For the effect of the act, so far as it creates offences, see my *Digest*, arts. 113-117.

in 1837, by 1 Vic. c. 81, s. 1, but in other respects the law has remained unaltered since 1824.

It is remarkable that the offence of kidnapping is not punishable otherwise than under this act or as a common law misdemeanour, except in the case of children under fourteen (see 24 & 25 Vic. c. 100, s. 56), in which case it is punishable with seven years' penal servitude as a maximum. This, I think, is a real defect in the law. The Draft Criminal Code did not propose to punish it.

Two acts, called the Kidnapping Acts, 1872 (35 & 36 Vic. c. 19), and 1875 (38 & 39 Vic. c. 51), relate only to the kidnapping of natives of the Pacific Islands; and though the first-mentioned act (s. 9) makes certain offences felony, punishable with the highest secondary punishment, it seems doubtful whether the offenders can be tried in England, as the act says they may be tried in any "Supreme Court of "Justice" in Australia or New Zealand, to which the act of 1875 (s. 8) adds Fiji.

INTERVENTION IN FOREIGN HOSTILITIES.—The history of the law relating to the offence of private interference in foreign hostilities possesses considerable interest, and connects itself in a striking way with the changes which have in course of time taken place in the views taken of war by the public opinion of this country.

I am not aware of any evidence to show that till modern times the act of taking part in foreign hostilities was regarded as criminal [1] unless the act involved some breach of duty towards the king. Indeed, the whole spirit of the feudal system was favourable to the notion that it was right and natural for soldiers to seek service wherever they could find it. The case of the Free Companies which ranged all over Europe in the latter part of the fourteenth and early in the fifteenth century is well known, and [2] Froissart is full of such stories.

[1] For an instance, see the case of Nicholas de Segrave, referred to in Vol. I. p. 146.

[2] The most striking perhaps is the account which he gives of the adventures of Le Bastot de Mauléon, whom he met in 1388 at the Court of the Count of Foix. This story clearly shows that at that time natives of all countries took part in wars, and often carried on war on their own private account, all over Europe.—Froissart, by Johnes, ii. pp. 101-106.

At a later time, and especially through the wars of the sixteenth and seventeenth centuries, all countries had mercenary troops in their service, and there is abundant proof that large numbers of English, Scotch and Irish, took part, without being supposed to do anything objectionable legally or morally, in the wars then in progress. There were, for instance, a large number of British, and especially of Scotch, troops in the army of Gustavus Adolphus.

The first occasion on which parliament recognised and interfered with such practices was in the year 1605, when was passed 3 Jas. 1, c. 4, "An Act for the better discovery and "repressing of Popish recusants." This was one of the most severe acts ever passed against the Roman Catholics, and was one of several statutes produced by the excitement caused by the gunpowder treason. The eighteenth section begins by a recital that it is found "by late experience that such as go "voluntarily out of this realm of England to serve foreign "princes, states, or potentates, are for the most part perverted "in their religion and loyalty by Jesuits and fugitives with "whom they do most converse." It went on to enact that every one who should go out of the realm to serve any foreign prince, state, or potentate, should be a felon, unless he first took the oath of obedience—an elaborate test provided by the act for many purposes—and entered into a bond not to be reconciled to the pope, or plot against the king, but to reveal to him any conspiracies which should come to his knowledge. This statute assumes that to take foreign service is in itself lawful, though it attaches conditions to it which were at that time considered necessary.

In 1736, an act was passed (9 Geo. 2, c. 30) which made it felony without benefit of clergy to enlist, or procure any person to go abroad to enlist, in the service of any foreign prince, state, or potentate, as a soldier. In 1756, an act was passed (29 Geo. 2, c. 17) which somewhat enlarged the terms of the act of 1736, in order to bring within it practices by which it had been evaded. It also specifically enacted in addition that it should be felony without benefit of clergy to [1] "enter into the military service of the French

[1] Like Roderick Random, for instance.

"king." [1] In the debate on the Foreign Enlistment Act of 1819, Sir James Mackintosh said that "these acts were "merely intended to prevent the formation of Jacobite armies "in France and Spain." It was also asserted by [2] Sir Robert Wilson that the acts "remained during all times a dead letter "on the statute book." He stated that prisoners taken from the Irish brigade at Fontenoy, Dettingen, Minden, and Culloden, were treated not as criminals, but as prisoners of war. He also said that "at one period, out of 120 companies of "Austrian grenadiers, seventy were commanded by Irish "officers," and that, when the officers of the Irish brigade refused to serve the republic after the revolution, they were received into the British service, and five or six regiments were embodied and put under their command. In short, down to the end of the eighteenth century it was not in practice considered improper for persons who were so disposed to seek military service where they pleased, and writers on international law maintained that neutral nations were under no obligation to belligerents to prevent neutral subjects from engaging in the service of either belligerent as they might feel disposed.

The first great instance in which a different view was acted upon by any nation was in the case of the United States upon the outbreak of the war of 1793. [3] Mr. Jefferson in his letter to M. Genet justified the refusal of the United States to allow any of the belligerent powers to equip, arm, or man vessels of war, or to enlist troops in the neutral territory, on the ground that the States were at peace with all the belligerents, and that therefore the citizens of the States were not at liberty to exercise acts of war against any of them. "For the citizens of the United States, then, to commit "murders and depredations on the members of other nations, "or to combine to do it, appeared to the American Govern-"ment as much against the laws of the land as to murder or "combine to murder or rob their own citizens."

An act of Congress was passed in 1794, and was revised and re-enacted in 1818, which gave effect to these principles by

[1] *Ann. Reg.* for 1819, p. 72. [2] Hansard, xl. 869-870, June 3, 1819.
[3] Wheaton, by Boyd, 1878, p. 508, quoting from American *State Papers*, vol. i. p. 155.

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making it a misdemeanour to do acts within the United States intended to aid belligerents in their operations. It is obvious that this view of the subject rests upon quite a different conception of war from that which had moulded the views of most European states—the law of England in particular—up to that time. Jefferson's despatch regards the act of an American who joins the French or English in fighting the English or French in the same light as that of an American citizen who kills an Englishman or Frenchman whilst there is peace between the United States and France and England.

These views were not recognised or acted upon in England for a considerable length of time. The law remained unaltered till the year 1819, when a bill was introduced into parliament by Lord Liverpool's government closely resembling the one passed in America in 1818. It was to some extent defended, especially [1] by Mr. Canning, on grounds somewhat similar to those just stated, but its immediate practical object was to prevent the enlistment of men, and the equipment of ships in England, in aid of the South American Spanish colonies, then in revolt against old Spain, and on this ground it was strenuously opposed by Sir James Mackintosh, Lord Brougham, and other liberal members of parliament.

Apart from the generalities of the subject, it was urged that the law as it stood was in a strange and objectionable position, inasmuch as the act of George II. made it a capital crime to engage in the service of the king of Spain, as he was within the words, "foreign prince, state, or potentate," whereas these words did not comprehend the revolted colonies. The answer to this was that the act of George II. should be repealed and the common law restored. The bill, however, [2] passed as 59 Geo. 3, c. 69. It forbad enlistment for foreign service, the fitting out of armed vessels for foreign service, and equipping or increasing the equipment of armed vessels for foreign service, and it extended not only to enlisting for the service of "foreign princes, states, and potentates," but also to enlisting for the service of any "colony, province,

[1] See his speech, June 10, 1819, Hansard, vol. xl. pp. 1102-1110.
[2] The second reading was carried by 248 to 174.

"or part of any province, or people, or for, or under, or in "aid of, any person or persons exercising, or assuming to "exercise, any powers of government over any such colony," &c. The act is extremely elaborate and verbose. It continued in force till the year 1870, and its effect was elaborately discussed in connection with the events of the American civil war.

During that contest there were built and equipped in English ports ships, especially the *Alabama*, which left our harbours and cruised against the ships of the United States, many of which were taken and destroyed. It was contended by the Americans, and denied by the English, that according to international law the English were bound to prevent what were described as breaches of neutrality, and it seems to me that the controversy supplied a good illustration of the worthless, inconclusive nature of such discussions. The real question was, whether the Americans thought the inconvenience of the English assistance to the Confederate States serious enough to go to war about; and whether the English thought the advantage of being able to build and sell such ships worth fighting for. To suppose that a great nation would submit to having its commerce ruined or would suppress an important branch of trade because Vattel had said something implying the one inference or the other appears to me to be absurd. The utmost that writers on international law can really do in such cases is to furnish decorous and plausible excuses for foregone conclusions. As for the Foreign Enlistment Act, it was obvious enough that it had nothing to do with the question between the two nations. The American complaint was equally well or ill founded whether the Foreign Enlistment Act did or did not enable the government to prevent British harbours from being turned into naval stations for the Confederates. If it did, their complaint was that it was not used. If it did not, their complaint was that it was ineffectual. If your fire burns my house it matters little whether you have a bad fire-engine, or having a good one neglect to use it. My complaint is that your fire burns my house. The efficiency of your fire engine is a matter not for me but for you.

The discussion, however, produced one [1] decision which, whether right or wrong showed that the Foreign Enlistment Act of 1819 did not fulfil its object. A ship called the *Alexandra* was seized by the Customs authorities, which was, no doubt, built for the Confederate States, and intended to be used as a ship of war, but she was not fully equipped as a ship of war, nor was it in the opinion of the jury proved that she was intended to be so equipped in any English port. The court was divided in opinion as to whether an offence had been committed; but held in substance that an incomplete equipment was not an offence within the act.

This decision and the claims made by the United States against the British Government in respect of the damages done by the *Alabama* led to the repeal of the act of 1819, and the enactment of the Foreign Enlistment Act of 1870 (33 and 34 Vic. c. 90). This acts forbids, in very [2] elaborate language, all enlistments for the service of any foreign state, in terms closely resembling those of the act of 1819, but its provisions as to providing ships of war for foreign belligerents are much more stringent than those of the act of 1819. The act of 1870 forbids building, or causing to be built, any ship with intent or knowledge, or having reasonable cause to believe, that the same will be employed in the military or naval service of any foreign state at war with any friendly state. The act of 1819 forbade only equipping, furnishing, fitting out, and arming, or endeavours to do so; and this, as interpreted by R. *v.* Sillem, meant a complete equipment. Moreover, extensive powers to seize suspected ships were given under the act of 1870 (see sections 19—29), whereas the act of 1819 dealt with the subject slightly, and in a manner shown by experience to be inadequate (see s. 7, end).

[1] A.-G. *v.* Sillem, 2 H. & C. 431. The report and the notes to it contain a mass of authorities upon the whole subject of the Foreign Enlistment Act and of the mass of international law supposed to be connected with it.

[2] See my *Digest*, arts. 100-103, for its effect.

CHAPTER XXXII.

POLICE OFFENCES PUNISHABLE ON SUMMARY CONVICTION.

THE only offences which remain to be noticed are police offences punishable on summary conviction. I do not propose to go into any minute detail upon this subject. The number of offences punishable upon summary conviction has, of late years, been so very large, and the offences themselves are so numerous, and of such a varied character, that it would be practically impossible in such a work as this to give anything like a full account of them within any moderate compass. They form, however, far too characteristic and important a part of our whole legal system to be passed over in silence.

I have [1] already observed upon the summary jurisdiction exercised by magistrates over theft and many other crimes, especially when committed by the young, but this is a question of jurisdiction only, and not of definition.

A child who is tried for stealing, before a magistrate, is tried under the same definition of theft, and all the same doctrines are applicable to his offence, as if he were a man being tried at the assizes.

There are, however, a vast number of offences which are defined and created by the acts which give justices of the peace summary jurisdiction over them. Of these I will try to give some account.

Most of the offences over which the magistrates exercise a summary jurisdiction consist in the breach of regulations laid down by act of parliament, in order to prevent petty nuisances or to enforce the execution of administrative

[1] Vol. I. pp. 120-124.

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EDUCATION.—The legislation which has provided a general system of education accessible to all, and to some extent compulsory upon all, is modern. It is all founded upon the Elementary Education Act of 1870 (33 & 34 Vic. c. 75). This act is made compulsory by [1] provisions which render parents liable to fines for not sending their children to school, and [2] which impose penalties on employers of labour who take children into their employment otherwise than upon the terms which the act allows.

There are also provisions in the Industrial Schools Act of 1866 (29 & 30 Vic. c. 118, ss. 14-19), which enable justices to send certain classes of children to schools which partake to some extent of the character of prisons.

The importance of these provisions, simple and short as they are, needs no remark. They form the sanctioning clauses of one of the most characteristic and most important sets of laws enacted in our days. As yet they cannot be said to have any history. The steps which led to the present state of the law has a history of the deepest interest, but this is not the place in which to relate it.

POLICE OFFENCES.—In the [3] first volume of this work I have given an account of the establishment of the police force throughout England. The acts which established it created a large number of petty offences, all of which are punishable on summary conviction, generally speaking by small fines, with the alternative, in some cases, of imprisonment.

These acts vary considerably in their provisions according to the places to which they apply. I will give a few illustrations, but they are only illustrations. The act 2 & 3 Vic. c 47 (August 17, 1839), which is one of the principal acts

[1] 33 & 34 Vic. c. 75, s. 74, and see 39 & 40 Vic. c. 79, ss. 11 and 12.
[2] 39 & 40 Vic. c. 79, s. 7.
[3] Vol. I. pp. 182-199.

relating to the Metropolitan Police contains a great number of provisions as to offences in the Metropolitan District and on the Thames which are punishable upon summary conviction. Thus sections 26-37 relate to offences upon the Thames, such as cutting ropes or other parts of the tackle of vessels, wilfully throwing things into the river to avoid seizure, breaking casks with intent to spill the contents, and many others. Sections 54-60 create a number of offences committed in the streets, such as discharging fire-arms, wantonly ringing bells, using profane or indecent language, and a great number of other things.

The 10 & 11 Vic. c. 89 (1847), contains a number of clauses which it was usual to insert in the improvement acts which from time to time are passed for towns and populous districts. They are here enacted in one body so that they can be and usually are embodied by reference in the special acts which are passed from time to time. [1]A large number of these sections create offences. One of them (s. 28) specifies thirty. They resemble those which are punished by the Metropolitan Police Act.

The Highway Act (5 & 6 Will. 4, c. 50) is full of penalties and summary offences, offences committed by surveyors, by collectors, by owners and drivers of carts, by persons using the highway or injuring it, or committing any sort of nuisance upon it.

Various general acts relating to railways, and the special act of every railway, create many offences by servants of the railway, by passengers, and by other persons. There are many other offences of the same sort, but for the purposes of illustration these are enough.

PUBLIC HEALTH AND SAFETY.—The summary offences against the Public Health Act are summarized in Oke's *Magisterial Synopsis* under the following heads:—Sewerage and drainage, privies, waterclosets, &c.; scavenging and cleaning, water supply; cellar dwellings and lodging houses; common lodging houses; houses let in lodgings; nuisances; offensive trades; unsound meat; infectious diseases and

[1] Ss. 21-31.

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hospitals; highways and streets; and miscellaneous. The mere enumeration says all that need here be said.

The following are a few additional illustrations:—Offences under the explosive acts (38 Vic. c. 17); offences relating to gasworks (22 & 23 Vic. c. 66); offences relating to the adulteration of bread (6 & 7 Will. 4, c. 37), or of food and drugs (38 & 39 Vic. c. 63); and offences relating to waterworks in towns (10 & 11 Vic. c. 17).

REVENUE OFFENCES.—Many of the administrative departments of State exercise their powers by means of penalties which can be imposed by justices. A good instance of this is to be found in the Customs Laws Consolidation Act, 1876 (39 & 40 Vic. c. 36), which is full of penalties for different revenue offences, all of which may be recovered before justices (42 & 43 Vic. c. 21, s. 11, 1879).

MISCELLANEOUS.—A great number of offences may be tried before justices which it is difficult to reduce under any general head. As instances I may mention fishery offences, cruelty to animals, unlawful gaming, offences by keepers of canal boats.

Probably all the acts which regulate particular trades or branches of business, such as the factory acts, the acts for the regulation of mines, the companies acts, and many others, create offences punishable on summary conviction.

I pass over these large subjects in a cursory and summary way because the offences in question do not form part of the criminal law properly so called, but are merely the sanctions by which other branches of the law are, in case of need, enforced.

Besides these offences, there are two sets of offences which are usually punished by courts of summary jurisdiction, each of which has a history of its own, and each of which may be regarded as a part of the criminal law. These are vagrancy and poaching.

VAGRANCY.—Vagrancy may be regarded to a great extent as forming the criminal aspect of the poor laws. I do not propose to enter upon the history of the poor laws in general, though it may be proper to remark here that the great mass of legislation which passes under that name is sanctioned at

every step by penalties enforceable before courts of summary jurisdiction. For instance, in the 43 Eliz. c. 2 (1601), the act which lies at the foundation of the whole system, penalties are imposed upon overseers who neglect to meet (s. 1) or refuse to account (s. 4), and on justices who make default in appointing overseers (s. 10), all of which may be levied and imposed by a warrant from two justices (s. 11). In the Poor Law Amendment Act of 1868 (31 & 32 Vic. c. 122, s. 37), parents neglecting their children in various ways are made liable to punishment on summary conviction, and I have little doubt that of the vast number of acts relating to the poor which have been passed from 1601 to our own time, all of any importance would be found to contain provisions of this kind.

I shall confine myself here to the offences known collectively as vagrancy.

I have already related in connection with offences relating to trade and labour the history of the Statute of Labourers. It was closely connected with the first appointment of justices of the peace, who were originally directed to hold Quarter Sessions in order to administer it. Shortly the leading points of that legislation and its connection with the poor law was this:—First came serfdom, next came the Statute of Labourers which practically confined the labouring population to stated places of abode, and required them to work at specified rates of wages. Wandering or vagrancy thus became a crime. A man must work where he happened to be, and must take the wages offered him on the spot, and if he went about, even to look for work, he became a vagrant and was regarded as a criminal. This, if they had been able to tell it, would, no doubt, have been the labourers' account of the matter. The statute book tells the story from the employers' point of view, and no doubt with a great deal of truth. [1] Statute after statute passed in the reign of Richard II. referring to the number of persons who wandered about the country and committed all sorts of crimes, leaving their masters, associating in bands and overawing the authorities.

1 Rich. 2, c. 6 (1377); 2 Rich. 2, c. 6 (1378); 7 Rich. 2, c. 5 (1383).

CH. XXXII. The last of the statutes referred to (7 Rich. 2, c. 5), says, "And "moreover it is ordained and assented to restrain the malice of "divers people, feitors and wandering from place to place, "running in the country more abundantly than they were "wont in times passed, that from henceforth the justices of "assizes in their sessions, the justices of peace, and the "sheriffs in every county, shall have power to inquire of all "such vagabonds and feitors and their offences, and upon "them to do all the law demandeth."

In 1388 an elaborate statute (12 Rich. 2) was passed containing many provisions as to labourers' wages and justices. It provided ([1] c. 3) that no servant should leave the hundred in which he dwelt without a letter patent from the king stating the cause of his going and the time of his return. There was to be a seal in every hundred for the purpose of giving these letters, and any one found wandering without such a letter was to be put in the stocks and kept till he found surety to return to his service. This was to be done by "the mayors, bailiffs and stewards of lords and constables "of towns." Besides which it is said that the artificers, labourers, and servants are to be "duly justified by the "justices of peace," whether at the sessions or in a summary way is not stated. Another chapter (7) forbids begging, and makes a distinction between beggars "able to labour," who are to be treated like those who leave the hundred, and "beggars impotent to serve," as to whom it is enacted that they "shall abide in the cities and towns where they be "dwelling at the time of the proclamation of this statute, "and if the people of cities or other towns will not or may "suffice to find them, that then the said beggars shall draw "them to other towns within the hundred, rape or wapentake, "or to the towns where they were born within forty days "after the proclamation made, and there shall continually "abide during their lives." What they are to do if the inhabitants of those towns "will not or may not suffice to "find them" does not appear. This act, however, is the first which recognises the impotent poor as a class distinct from

[1] Many of the chapters into which the statute is divided correspond to the sections of a modern act.

the able-bodied poor, and may thus be regarded as in some sense the origin of the later poor law. Chapter 10 of the statute provides that "in every commission of the peace "there shall be assigned but six justices with the justices of "assizes." They are to inquire diligently whether the mayors, bailiffs, stewards and constables have duly done execution of the ordinances of servants and labourers.

Some analogous statutes were passed in the reign of Henry IV. which I pass over, but in the reign of Henry V. was passed a remarkable act, 2 Hen. 5, c. 4 (A.D. 1414). It recites that "the servants and labourers of the shires of the realm do flee "from county to county because they would not be justified by "the ordinances and statutes by the law for them made, to the "great damage of gentlemen and others to whom they should "serve because that the said ordinances and statutes for them "ordained be not executed in every shire." It then empowers the justices of the peace to "send their writs for such "fugitive labourers to every sheriff in the realm of England," who are to take them and send them back to the place whence they came. The act concludes by enacting that the "justices of the peace from henceforth have power to "examine, as well all manner of labourers, servants, and their "masters, as artificers, by their oaths, of all things by them "done contrary to their said ordinances and statutes, and 'upon that to punish them upon their confession after the "effect of the ordinances and statutes aforesaid as though "they were convicted by inquest." The statute thus gave the justices summary jurisdiction over all offences by labourers and artificers. It is possible that the predominance of the clergy in Henry V.'s reign may have had something to do with the establishment of a mode of procedure which has a good deal of resemblance to the *ex officio* oath of the ecclesiastical courts.

Some [1] acts were passed in Henry VII.'s time, which authorised constables and others to put vagrants into the stocks instead of committing them to gaol; but the next act of much importance on this subject was passed in 1530: it was

[1] 11 Hen. 7, c. 2 (1494); 19 Hen. 7, c. 12 (1503).

CH. XXXII. [1]22 Hen. 8, c. 12, and imposed most severe penalties on vagrants. The impotent poor were to be licensed by the magistrates to beg within certain local limits. Out of those limits begging was to be punishable by two days and nights in the stocks with bread and water. Begging without a letter was to be punished by whipping. Vagrants "whole and "mighty in body, and able to labour" were to be brought before a justice, high constable, mayor, or sheriff, "who at "their discretion shall cause every such idle person to be had "to the next market town, or other place most convenient, "and to be there tied to the end of a cart naked, and be "beaten with whips throughout the same town or other place "till his body be bloody by reason of such whipping." After this he was to be sent back to labour, being liable to more whipping if he did not go straight home. "Scholars of the "universities of Oxford and Cambridge, that go about begging, "not being authorised under the seal of their universities," were to be treated as "strong beggars." "Proctors and par-"doners going about without sufficient authority," people pretending to knowledge in "palmistry or other crafty "science," and some others of the same sort, were to be even more severely handled. For the first offence they were to be whipped for two days together, for the second offence "to be "scourged two days, and the third day to be put upon the "pillory from 9 till 11 A.M.," and to have an ear cut off. For the third offence the same penalty—the other ear being cut off. This act had defects which are thus described in the preamble of an act to amend it, passed five years afterwards (27 Hen. 8, c. 25, A.D. 1535-6). "It was not provided in the afore-"said act how and in what wise the said poor people and "sturdy vagabonds should be ordered at their coming into "their counties, nor how the inhabitants of every hundred "should be charged for the relief of the same poor people, "nor yet for setting and keeping in work and labour the "aforesaid valiant vagabonds." The act goes on to say that the valiant beggars and sturdy vagabonds are to be set to

[1] This act is abstracted in Nicholas's *History of the Poor Law*, i. pp. 119-124. It is not printed in Pickering and the other common editions of the Statutes, but is to be seen in the *Statutes of the Realm*.

work, and the poor people to be "succoured, relieved, and "kept," and that the churchwardens and two other persons of every parish are to collect alms for the purpose of providing expenses. This act refers to a new description of vagabonds, namely, "ruttelers," calling themselves serving men, but having no masters. They, when taken, are to be whipped, and "to have the upper part of the gristle of the right ear "cut clean off, so as it may appear for a perpetual token that "he hath been a contemner of the good order of the common-"wealth." If any person so marked offends again in the same way he is to be committed to the quarter sessions, and upon conviction to be hanged.

In 1547 all these statutes were repealed by 1 Edw. 6, c. 2, as not being sufficiently severe. This act provides that every loitering and idle wanderer who will not work, or runs away from his work, is to be taken for a vagabond, branded with a V, and adjudged a slave for two years to any person who demands him; to be fed on bread and water and refuse meat, and caused to work in such labour "how vile "soever it be as he shall be put unto by beating, chaining, "or otherwise." If he runs away he is to be branded in the cheek with the letter S, and adjudged a slave for life, and if he runs away again he is to be hanged. If no one will take the vagabond, and if he has been a vagabond three days, any justice of the peace may "cause the letter V to be marked "on his or her breast with a hot iron," and send him to the place where he was born, there to be compelled to labour in chains or otherwise on the highways or at common work or from man to man as the slave of the inhabitants, who are to keep him to work under penalties. If the vagabond misrepresents the place of his birth he is to be branded in the face, and remain a slave for life.

This act lasted only two years, for in 1549 it was repealed by 3 & 4 Edw. 6, c. 16, and the acts of Henry VIII. were revived. In 1552, by 5 & 6 Edw. 6, c. 2, these statutes were confirmed, but licenses to beg upon certain terms were permitted to be given.

In 1555, by 2 & 3 Phil. & Mary, c. 5, provision was made for weekly collections for the poor, and provisions as to the

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quantity of licenses to beg were enacted, which were in substance the same as those of the act of 1552, though rather more detailed. In 1572 all these statutes were repealed by 14 Eliz. c. 5, which provided that all beggars should be "grievously "whipped and burnt through the gristle of the right ear," for a first offence, and be guilty of felony for the second.

This act, with all the others then in force against rogues and vagabonds, was repealed in 1597 by 39 Eliz. c. 4, which remained in force with some alterations for more than a century. It provided that the justices of counties should have power to erect houses of correction for the reception of rogues and vagabonds and sturdy beggars till they are either put to work or banished to such places as may be assigned by the privy council. Any such persons found begging, wandering, or misordering themselves shall, by the appointment of any justice, constable, headborough, or tithing man, "be "stripped naked from the middle upwards, and be openly "whipped until his or her body be bloody," and be then sent to their birthplace or place of residence by a fixed route, being whipped upon every deviation from it. They are thence to be taken to the house of correction, there to be kept till they are employed or banished. The act defines rogues and vagabonds as "all persons calling themselves "scholars going about begging, all seafaring men pretending "losses of their ships and goods on the sea; all idle persons "going about either begging or using any subtle craft, or "unlawful games and plays, or feigning to have knowledge "in physiognomy, palmistry, or other like crafty science, or "pretending that they can tell destinies, fortunes, or such "other fantastical imaginations; all fencers, bearwards, "common players, and minstrels; all jugglers, tinkers, and "petty chapmen, all wandering persons and common la-"bourers, able in body and refusing to work for the wages "commonly given; all persons delivered out of gaols that "beg for their fees or travel begging; all persons that wander "abroad begging, pretending losses by fire or otherwise, and "all persons pretending themselves to be Egyptians."

This statute was slightly amended by 1 Jas. 1, c. 7 (A.D. 1604) which added to the other penalties mentioned in the

act that such rogues "as shall by the said justices be adjudged incorrigible or dangerous shall be branded in the left "shoulder with a hot burning iron of the breadth of a "shilling with a great Roman R upon the flesh." Thus amended, the law received no further alteration till the year 1713, when the 12 Anne, st. 2, c. 23, repealed all laws as to rogues and vagabonds, but re-enacted the act of 1597 with a few omissions and alterations which relate rather to the parish by which the rogue or vagabond is to be maintained than to his treatment. This act authorized the justices to commit incorrigible rogues to the custody of any persons who would receive them as servants or apprentices (practically as slaves), and set them to work either in Great Britain or in any colony for seven years.

In 1737 this act was explained by 10 Geo. 2, c. 28, to extend to persons acting plays in any place (out of Westminster) where they had not a legal settlement, or were not licensed by the Lord Chamberlain. These acts were repealed and re-enacted by 13 Geo. 2, c. 24, passed in 1740, which continued in force for four years only. In 1744 a new and most comprehensive act was passed (17 Geo. 2, c. 5) which gave the law much of the form which it has since that time retained. It distinguished offenders into three classes, namely, (1) idle and disorderly persons, (2) rogues and vagabonds, and (3) incorrigible rogues, and regulated in minute detail all proceedings to be taken for their arrest, return to their place of settlement, and punishment. The most noticeable additions made by the act to the law as it stood under the act of Anne was the inclusion under its penalties of persons running away from their wives and children. This act was amended in 1792 by 32 Geo. 3, c. 45. It was [1] repealed by 3 Geo. 4, c. 40 (1822), which was intended to consolidate the law upon the subject. This act, however, lasted for two years only, having been repealed by 5 Geo. 4, c. 83 (1824), which is now in force. This act greatly extends the definition of a rogue and vagabond, including under it many offences against public decency, and many acts characteristic of criminals

[1] The repeal is only by general words. By the Statute Law Revision Act (1867), 30 & 31 Vic. c. 59, the act is expressly repealed, except s. 32.

CH. XXXII. though not actually criminal, as, *e.g.*, being armed with intent to commit felony, being found in dwelling-houses, yards, &c. for any unlawful purpose, reputed thieves frequenting rivers, canals, streets, with intent to commit felony, and many others. These provisions have been so much extended by more recent legislation, that it may now be almost stated as a general proposition, that any person of bad character who prowls about, apparently for an unlawful pupose, is liable to be treated as a rogue and vagabond. I omit the details because they are given in my [1] *Digest.*

In order to appreciate fully the importance and significance of the law as to vagrancy it is necessary to bear in mind the law as to the relief and settlement of the poor of which it is to some extent the complement. To attempt to relate that history in anything approaching to detail would be impossible, but in shortly summing up the history of the law of vagrancy I will shortly notice the corresponding stages in the history of the poor law.

In the times when serfdom was breaking down, and when the statutes of labourers provided what might be regarded as a kind of substitute for it, provisions as to vagrancy were practically punishments for desertion. The labourer's wages were fixed; his place of residence was fixed; he must work where he happened to be. If he went elsewhere he must be taken and sent back. By degrees the order of ideas which this view of the subject represented died away. The vagrant came to be regarded rather as a probable criminal than as a runaway slave. He must be made to work or else be treated as a criminal. If he cannot work he may have a licence to beg. Social and economical causes of various kinds increase the number of vagrants, and the law becomes so severe that for a short time vagrants are condemned to slavery, branding, and death. As time goes on it becomes obvious that mere punishment on the one hand, and mere voluntary charity on the other, will not meet the evil admitted to exist. An elaborate system of poor law relief is founded by the famous act of 1601, and in anticipation of it the act of 1597 treats the offence of vagrancy no doubt with what we should regard

[1] Chapter xx. arts. 192-195.

as extreme severity, but still with less severity than had been formerly applied to it. Through the seventeenth century little change was made in the law; but in the eighteenth century the whole system of poor law relief was elaborated, and the law of vagrancy was recast so as to punish those persons only who really preferred idleness to parish relief. This process was nearly completed by the Act of 1824 which is now in force. The new Poor Law of 1834 and the acts subsequent to it have not altered the law of vagrancy, though it has been made more searching and stringent as the efforts to suppress crime by a vigorous system of police have increased in energy and stringency.

OFFENCES RELATING TO GAME.

The law as to offences relating to game has attracted so much attention and fills so large a space in political discussion, that some account of its history may be interesting.

It is commonly supposed to reach back to and to be derived from the forest laws, but I am by no means satisfied that this is correct, though [1] Blackstone goes so far as to call the game laws "a bastard slip" from the forest laws.

Under the Norman kings, a man might not even in his own land, and out of the king's forest, kill beasts or birds of chase or warren, unless he had from the king a grant of chase or free warren, but what was to happen if he did so does not appear. Probably he might be liable to fine. The principal provisions of the forest laws, however, applied to the forests themselves, and of them and of the courts by which they were put in force I have already spoken. Well known passages in the chronicles preserve the recollection of the cruelties of William the Conqueror and Henry I. against those who killed their deer. The earliest actual law on the subject which remains is the [2] Assize of Woodstock in 1184.

[1] 4 Blackstone, *Com.* p. 409. "From this root has sprung a bastard slip, "known by the name of the Game Law, now arrived to and wantoning in its "highest vigour." This is one of the few cases in which Blackstone expresses contempt of any part of the law. There is probably in his contempt a good deal of the damning of sins we have no mind to.

[2] Stubbs, *Const. Hist.* i. p. 403. See for the assize itself, Stubbs's *Charters*, pp. 156-159.

CH. XXXII. The parts of it which bear on the subject of the punishment of offences are the first and last sections.

In the first, the king "defendit quod nullus ei foris faciat de "venatione suâ nec de forestis suis in ulla re." Transgressors are not to expect to be dealt with, as he had been in the habit of dealing with them, by fine. If any one transgresses in future, "plenariam vult de illo habere justitiam qualis fuit facta "tempore regis Henrici avi sui." This reads like a threat not intended to be carried into execution, for the last section (16) says expressly, "Item rex præcipit quod nullus de cætero "chaceat ullo modo ad capiendas feras per noctem infra "forestam nec extra ubicunque feræ suæ frequentant, vel "pacem habent aut habere consueverunt sub pœnâ impri-"sonamenti unius anni, et faciendo finem et redemtionem ad "voluntatem suam." By the [1] charter of the forest it is enacted that "no man from henceforth shall lose either life or "member for killing of our deer." The punishment is to be "a grievous fine if he have anything whereof;" if not, a year's imprisonment.

In 1275, it was provided by 3 Edw. 1, c. 20 (the Statute of Westminster the First), that any one trespassing in parks or ponds should pay heavy damages to the party and be imprisoned for three years, and pay fine and give security, or if he cannot find security abjure the realm. This statute remained nominally in force till 1827, when it was repealed by 7 & 8 Geo. 4, c. 27.

In giving the history of the law of theft, I have referred to several cases in the Year-books, which show that in the fifteenth century the theory prevailed that the owner of land had a modified transient property in the wild animals which were upon it for the time being, and that he might sue those who infringed his rights; though the property was not, according to Coke, such that the takers of the animals were guilty of larceny. This may not be absolutely inconsistent with what is considered by Blackstone to have been the principle of the forest laws, but the two are, to say the least, very unlike each other, and the courts would hardly have laid down the doctrine

[1] 9 Hen. 3, c. 10. It was originally of even date with Magna Charta.

of the property of the owner of the land in the wild animals, unless the old theory as to the universal right of the king had been in practice at least obsolete.

This makes it probable that the earliest game laws were not a "bastard slip" from the forest laws, but rather the result of a new order of ideas. The first act upon the subject (13 Rich. 2, c. 13, A.D. 1389) was in fact passed at the time when the rising of the commons had been put down, and when the vagrancy laws already referred to were beginning to be enacted. Its preamble is remarkable. It recites that "divers artificers, labourers, and servants, and persons keep "greyhounds and other dogs, *and on the holy days, when good "Christian people be at church hearing divine service,* they go "hunting in parks, warrens, and connigries, of lords and "others, to the great destruction of the same, and sometimes "under such colour they make their assemblies, conferences, "and conspiracies, for to rise and disobey their allegiance." It then enacts that no one who has not land to the value of 40*s.* a year shall keep a greyhound or dog to hunt, or use ferrets, nets, &c., to take or destroy deer, hares, or conies, "nor other gentleman's game," under pain of a year's imprisonment. It is curious to observe how at his first appearance on the English statute-book the poacher is conceived of as a low person, a radical, and more or less of a dissenter. Between 1389 and 1832, or 443 years, about twenty acts were passed relating to game; and these collectively constituted the game laws when the present statute, 1 & 2 Will. 4, c. 32, which replaced all but one of them, was passed into law. It would be tedious to give an account of all of them, but I will describe their general character.

In the first place, it is to be observed that though several of the acts were obviously meant to be what we should now call consolidation acts, and as such to supersede their predecessors, none of the old acts were ever repealed. On the contrary, they were referred to, re-enacted, and directed to be put in force, subject only to the proviso that a person should not be punished under more than one act for any one offence. The 13 Rich. 2, just referred to, was in force theoretically till 1832.

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In the second place, the objects aimed at by the acts are quite distinct from each other. Some of them are obviously intended in good faith only or mainly to preserve the game itself from waste or destruction. Such, for instance, are 14 & 15 Hen. 8, c. 10 (1522), to prevent the tracking of hares in the snow, and 25 Hen. 8, c. 11 (1533), "to "avoid destroying of wild fowl;" but most of them form a system by which the amusement of sporting was made the monopoly of a small class of persons possessed of a high property qualification. This idea is to be traced in the original act of Richard II., but it becomes by degrees fully developed. I will mention the principal statutes on the subject. The first is 11 Hen. 7, c. 17 (1494), which recites that many persons having little substance to live upon take and destroy pheasants and partridges upon the lands of "owners and possessioners," whereby such owners and possessioners "leese not only their pleasure and "disport,". . . "but also they leese the profit and avail that "by that occasion should grow to their household." The statute then enacts that any person who takes any pheasants or partridges upon the freehold of any other person without the license of the owner or possessioner shall be liable to a penalty of £10, half to the informer and half to the owner or possessioner. This penalty, when we have regard to the value of money, seems monstrous. It would be equivalent perhaps to a penalty of £150 to £200 in our own time, and it must have exposed any small yeoman who killed a partridge off his own ground to utter ruin at the suit of any informer. This statute remained in force nominally till 1832, but was probably not enforced, for eighty-seven years after it passed it was recited by 23 Eliz. c. 10 (1581) that the game of "pheasants and partridges is within these few years in "manner utterly decayed and destroyed in all parts of "this realm, by means of such as take them with nets, "snares, and other engines and devices, as well by day as by "night, and also by occasion of such as do use hawking in "the beginning of harvest, before the young pheasants and "partridges be of any bigness." It then imposes a forfeiture of twenty shillings for every pheasant and ten shillings for

every partridge taken in the night-time, and of forty shillings for hawking in the standing corn, the fines to be recovered before a justice of the peace, and to go half to the lord of the manor and half to the informer. These penalties are heavy enough, but are so much lighter than those of the earlier statute that the latter must have been forgotten. It applies only to night poaching.

In 1604 was passed 1 Jas. I, c. 27, which recited, amongst other things, that the earlier acts had failed because the poachers were usually too poor to pay the penalties or costs, and it accordingly enacted that every one who shot or shot at "any pheasant, partridge, house-dove or pigeon, hearn, "mallard, duck, teal, widgeon, grouse, heathercock, moregame, "or any such fowl, or any hare," was to be imprisoned for three months unless he paid twenty shillings for every bird or hare so killed. The terms of the section are absolute, and forbid all shooting "with any gun, cross-bow, stone-bow, or "long-bow," at any of the birds mentioned, and at hares.

It permits coursing to certain persons qualified by estate or birth, and the netting of pheasants and partridges to a [1] rather more restricted class. It also forbids the selling and the buying to sell again of deer, hares, partridges, and pheasants.

In 1609 the property qualification was greatly raised, and the right conferred by it was altered from a right to net pheasants and partridges on the land of the qualified person to a right to take pheasants and partridges on their own land in the day-time, "between the feast of St. Michael the "Archangel and the birth of our Lord God, yearly." This was effected by 7 Jas. I, c. 11. It also forbade hawking for pheasants and partridges between the 1st of July and the 31st of August. I suppose "take" in the act of 1609 was construed to include "shoot," otherwise the shooting of partridges and pheasants continued to be unlawful, and to subject all sportsmen to a fine of twenty shillings for each bird or hare down to 1832. The act of 1604 seems to proceed on

[1] "The son or sons of any knight, or of any baron of parliament, or of "some person of higher degree, or the son and heir apparent of any esquire," might keep greyhounds for coursing, and nets for partridges and pheasants, but might not, apparently, net partridges or pheasants, unless they possessed certain other qualifications. Cf. ss. 3 and 6.

CH. XXXII. the principle that the only proper and sportsmanlike way of killing game was by hawking or coursing, that shooting was to be altogether illegal, and netting permitted only to qualified owners. The act of 1609 abolishes netting and restricts hawking.

In 1670 (22 & 23 Chas. 2, c. 25) the appointment of game-keepers was first authorized, and all persons with less than £100 a year freehold, £150 leasehold for 99 years, except the heir apparent of a squire and others of higher degree, were forbidden to have guns, bows, or sporting dogs, and game-keepers were authorized to search houses for them. Killing rabbits by night was made punishable by ten shillings fine. By 5 Anne, c. 14, A.D. 1706 (see, too, 28 Geo. 2, c. 12), the sale of game was put under further restrictions, and by [1] other statutes various regulations were made as to the season for different kinds of game, and [2] others made provisions as to the manner in which penalties were to be sued for, but no act of sufficient interest to be here noticed was passed till 9 Geo. 4, c. 69 (1828), which is still in force. There were, however, provisions as to deer-stealing and killing rabbits and hares in warrens to which I have [3] already referred.

The act of George IV. is still in force. It is far severer than any of its predecessors, except one or two which were practically obsolete. It is the first act which punished poaching as a crime, instead of treating it as an offence of which a money penalty was the primary and natural consequence. It punishes taking or destroying game or rabbits by night, or being unlawfully on any land by night for the purpose of so doing, for the first offence with imprisonment and hard labour up to three months; for the second offence up to six months; and for the third offence with transportation for seven years, or imprisonment and hard labour up to two years. Owners or their keepers may arrest offenders, and if the offender offers resistance with any offensive weapon, he may be punished, whether it is his first, second, or third offence, with seven years' transportation as a maximum. If three persons, of whom any one is openly armed, are on

[1] 2 Geo. 3, c. 29; 39 Geo. 3, c. 34; 43 Geo. 3, c. 112.
[2] 8 Geo. 1, c. 19; 26 Geo. 2, c. 27.
[3] *Ante*, p. 148.

land by night in order to destroy game or rabbits, each of them is liable to fourteen years' transportation as a maximum punishment.

All the acts to which I have referred, except only the act of 1828, were repealed in 1832 by 1 & 2 Will. 4, c. 32. It established the present system, by which qualifications for sporting and the prohibition of the sale of game were abolished, and new penalties for poaching by day were substituted for the old ones. Those penalties are [1] as follows:—

For a trespass in pursuit of game by day, a fine of £2 and costs; if the poachers are to the number of five or more, £5 and costs; trespassers may be required to give their names and addresses and to leave the land, and if they refuse may be arrested. If they endeavour by violence or intimidation to prevent any authorized person from approaching them, or refuse to give their names, they are liable to a fine of £5.

Some slight alterations and amendments in the law have been made of late years, but I need not refer to them specifically. The general effect of the history I have related is as follows:—A series of statutes extending over 317 years (13 Rich. 2, 1389, to 5 Anne, 1706) erected the right to kill game into the privilege of a class at once artificial and ill defined. The game itself became incapable of being sold. The result of this was that, on the land of an unqualified freeholder, partridges, pheasants, and hares were in an extraordinary position. The owner could not kill them because he was not qualified, and if any one else did so without the owner's leave he committed a trespass. As I have shown, it was theoretically doubtful whether from 1604 to 1832 any one could lawfully shoot a pheasant, partridge, or hare whatever qualification he possessed. The penalties by which this privilege was protected were not (except in the case of deer-stealers) severe, consisting principally in a moderate money fine, which might, in default of payment, be converted into imprisonment. This system lasted for something over 120 years (1706—1828), when it was sanctioned by an act (9 Geo. 4, c. 69) which turned night poaching into a

[1] 1 & 2 Will. 4, c. 32, ss. 30-32.

CH. XXXII. serious crime, punishable on a third conviction with transportation. Four years after this the old system was swept away, and a new one was substituted for it, by which the right to game became an incident of the ownership or right to possession (as might be arranged between the owner and occupier) of land, and game itself was allowed to be sold like any other produce of the soil, subject to a few restrictions of no interest. Lastly, the severe penalties which had formed the crowning point of the old privilege became the sanction of the new incident of property.

Upon a full review of the whole subject, it seems to me that the act of George IV. is needlessly severe. No doubt it ought to be a serious offence severely punishable to form part of an armed gang of night poachers, because, as a fact, the offence leads to desperate acts of violence. For many years, when I was on the Midland Circuit, every or almost every Spring Assize produced cases in which life had been lost, or desperate injuries inflicted, in fights so occasioned; but I think that the liability to penal servitude might be made to depend on the conduct of the poachers when challenged to surrender. If they did so quietly, or even if they ran away quietly, they ought not to be liable to any specially severe punishment. I think too that to make a man liable to seven years' penal servitude on a third conviction for mere night poaching is cruelly severe, nor do I understand why an assault with a stick on a keeper in order to resist apprehension is made punishable by seven years' penal servitude, when an assault on a police constable in the execution of his duty is punishable only by two years' imprisonment and hard labour. If the keeper is unlawfully wounded, or if grievous bodily harm is inflicted on him with intent to avoid a lawful apprehension, the offence can be dealt with under the general provisions of the law.

A considerable number of acts have been passed in very recent times for the protection of salmon and other fish, of sea-fowl and other birds; but they are of no legal or historical interest.

CHAPTER XXXIII.

INDIAN CRIMINAL LAW.

IN the first chapter of this book I said that the criminal law of England resembled that of Rome in the circumstance that it had been adopted in many countries other than that of its origin. To omit all notice of these systems would be to give an inadequate idea of the interest and extent of the subject. To give anything like an adequate outline of them would not only require knowledge which I do not possess, but would swell this work to an unmanageable size.

The criminal law of England has been reproduced in various shapes in nearly all the thirty-eight States which form the United States of America. It has also been introduced into most of the [1] forty-five colonies which form part of the British Empire. There are thus seventy or eighty versions of the English criminal law. In some cases the law has been codified. In others it remains as it was at the time of its introduction, subject to such modifications as it has received by local legislation.

A favourable instance of the way in which the criminal law of England is reproduced in the colonies is supplied by the act which in the colony of Victoria serves the purposes of a Penal Code. This is "The Criminal Law and Practice "Statute of 1864," [2] which came into force January 1, 1865. It re-enacts, with almost servile minuteness, the Consolidation Acts of 1861. It contains no definition of murder, theft, or

[1] Counting the eight colonies which make up the Dominion of Canada as one.

[2] 27 Vic. No. 233.

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other common law offences, but assumes that the common law definitions are in force. It retains all the clumsy enactments to which I have referred in detail as to attempts to murder. It also retains (which is singular) the provisions of the Larceny Act as to deer stealing, and the minute and technical distinctions of the same act as to housebreaking and burglary. The most noticeable difference between the English and Australian law lies in the number of cases in which the latter has retained the punishment of death, which may still be inflicted for attempts to murder, for rape, and for some other offences. In all such cases the court may order sentence of death to be recorded. It would be difficult to give a better instance of the way in which a known, fixed system of law has a tendency to reproduce itself, with all its imperfections, simply because it is known and fixed. Enactments of a similar kind, more or less skilfully framed, are in force in many other colonies.

Far superior in interest to any of these versions of the English criminal law is the system of criminal law established in British India. Happening to have a special acquaintance with it, I will give some account of its history and its contents. It consists substantially of two acts—the Indian Penal Code (Act XLV. of 1860), and the Indian Code of Criminal Procedure (Act X. of 1882), which is to come into force January 1, 1883. There are some few provisions of minor importance, but these two acts may be said to constitute the criminal law of British India, and as such they constitute one of the most important bodies of law in the world, applying as they do to a population of nearly 200,000,000 persons of many different races and languages, and regulating the most important part of the proceedings of the officers by whom they are governed.

It would require a separate work to give a full account of the different events which led to the introduction and gradual establishment of these two memorable enactments, or to give an adequate idea of their contents. I will, however, give a short sketch of both.

The laws now in force in British India sprang from many distinct roots, and were enacted upon different occasions, by

bodies possessing very different degrees of legislative power. I will first sketch the history of the criminal law of Bengal. CH. XXXIII.

The criminal law of Bengal in force when the English power first rose was that version of the Mohammedan criminal law which was taught by the leading doctors of the Sooni Mohammedans—Aboo Huneefah, and his two disciples, Aboo Yoosuf and Imam Mohammed. It was introduced into India by the Mogul conquerors, whose power culminated in the latter half of the 16th century under [1] Akbar. The administration of the system was, when the English power was first established, a matter of much greater importance than the system itself, and was organized as follows.

On the 12th of August, 1765, Clive obtained from the Emperor of Delhi, whose power was fast falling into decrepitude, a grant of the diwani of Bengal, Bahar, and Orissa, which gave the Company power to collect the revenues of those provinces, and thus, according to the views there prevalent, invested them with powers not substantially distinguishable from those of sovereigns.

For a considerable period they were extremely reluctant to assume ostensibly the authority which they really possessed, finding it far more convenient for their purposes to leave the superintendence of all the business of government and the administration of justice as much as possible in the hands of the natives whom they found in the exercise of it.

The native system for the administration of justice, if such it deserved to be called, was as follows. The head of the system was the Nawab Nazim, whom the Company kept up as nominal subadar or governor under the nominal Emperor of Delhi. His capital was Moorshedabad, where there were three criminal courts, whose functions are thus [2] shortly described. "The Nazim, as supreme magistrate, presides per-"sonally in the trial of capital offenders; the deputy of the "Nazim takes cognizance of quarrels, frays, and abusive "names; the Foujdar is the officer of police, the judge of "all crimes not capital—the reports of these last are taken "before him, and reported to the Nazim for his judgment

[1] His reign extended from 1556-1605, almost exactly coinciding with that of Queen Elizabeth.

[2] Beaufort, i. p. 4, quoting from the report of the Committee of Circuit.

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" and sentence upon them; the Mohtesib has cognizance of " drunkenness, and of the vending of spirituous liquors and " intoxicating drugs, and the examination of false weights " and measures; and the Cotwal is the peace-officer of the " night, dependent on the Foujdaree."

These were the courts of the capital, but in the rest of the country the whole administration of justice both civil and criminal was in the hands of the zemindars. [1] "The Zemin- " dar, who was formerly the great fiscal officer of a district, " commonly exercised both civil and criminal jurisdiction " within the territory over which he was appointed to pre- " side. In his Foujdary, or criminal court, he inflicted all " sorts of penalties—chiefly fines for his own benefit; even " capital punishments, under no further restraint than that " of reporting the case at Moorshedabad before execution." . . . . . "His discretion was guided or restrained by no " law, except the Koran, its commentaries, and the customs " of the country, all in the highest degree loose and indeter- " minate. Though there was no fixed and regular course of " appeal from the zemindary decisions, the government in- " terfered in an arbitrary manner as often as complaints were " preferred to which, from their own importance or from the " importance of those who advanced them, it conceived it " proper to attend."

Great efforts were made for a length of time to reform these institutions without taking them out of the hands of the native officials by whom they were managed. For this purpose [2] a variety of experiments were tried. In 1769, European supervisors were appointed. In 1770, two councils were established, one at Moorshedabad and another at Patna, with authority over the supervisors. In 1772, new courts were set up. In each district there was a Foujdaree Adaulut, or criminal court, composed of Mohammedan officers. In each was a [3] Kazi, and a Mufti, and two mulvis, who tried all criminal cases, in the presence however of a collector, being a servant of the Company, whose duty it was to see that the trial was fairly conducted according to the law by

[1] Mill's *India*, iii. p. 467. [2] Beanfort, i. p. 4.
[3] The "Cadi" of the *Arabian Nights*.

which it professed to be guided. A superior court was established at Moorshedabad, called the Nizamut Sudder Adaulut (chief criminal court), the officers of which were natives, namely, a Daroga, the chief Kazi, the chief Mufti, and three mulvis. They formed a court of revision as to the proceedings of the Foujdaree Adaulut, and in capital cases signified their approval or disapproval of convictions and prepared the sentence for the warrant of the Nazim.

These courts were for many reasons altogether inefficient. For one thing there was almost no police. [1] In 1774, Warren Hastings attempted to supply that defect by reviving old native institutions which had fallen into decay, but experience proved that they would not work, and they were accordingly abolished in 1781, when the English judges of the civil courts "were invested with the power as magistrates of "apprehending dacoits" (gang robbers) "and persons charged "with the commission of any crimes or acts of violence." They were not however to try their prisoners, but were to send them to the daroga, or head judge, of the nearest foujdaree court for trial. These officers were supine and indifferent, and when they received prisoners frequently detained them in prison for an unreasonable time and subjected them to great cruelties. Various attempts were made to reform these evils, but they all failed. [2] It was at that time regarded as a first principle, that the administration of criminal justice should be left in the hands of the Mohammedan officers, "who were not to be interfered with, beyond "what the influence of the British Government might effect "through occasional recommendations of forbearance to in-"flict any punishment of a cruel nature."

This policy proved altogether abortive, and at last an entirely different one was adopted, which was carried into effect by [3] regulations first passed in 1790, and afterwards in a more permanent and extended form in 1793. These were the regulations famous as Lord Cornwallis's Judicial Regulations. They formed the foundation of the existing system, though they were brought into that condition by a long

[1] Beaufort, i. p. 6.

[2] Beaufort, i. p. 9, quotes a passage from the Instructions of the Directors to Lord Cornwallis to this effect.

[3] Beaufort, i. p. 11.

CH. XXXIII. series of changes in detail which need not be here described.

[1] The system was at first as follows:—

In each district or zillah was a European judge with an establishment, of which native officers qualified to expound. Hindoo or Mohammedan law were important members.

There were in Bengal four Courts of Appeal—one at Calcutta, one at Patna, one at Dacca, and one at Moorshedabad. Each court consisted of three judges and three native expounders of the law, a Kazi, a Mufti, and a Pundit. These courts were all subject to a court at Calcutta called the Sudder Diwani Adaulut, or Supreme Civil Court, which consisted of the Governor-General and his Council, with the principal native law officers.

The judges of the four Courts of Appeal went circuit for criminal business twice a year to every zillah in their provinces, besides holding sittings at the cities in which they sat.

The substance of the procedure before the circuit courts was as follows. The judge tried the case, much as an English judge without a jury might try it, a written record being made of every part of the trial and especially of the evidence. The Kazi or Mufti, who was always present at the trial, wrote at the bottom of the record the sentence required by the Moslem law. If the judge agreed, judgment was given accordingly. If not, the matter was referred to the Nizamut Adaulut or Supreme Criminal Court, which consisted of the same persons as the Diwani Adaulut, or Supreme Civil Court. Capital cases were also referred for approval to the Nizamut Adaulut.

These were the first courts presided over by English judges established under the authority of the Company for the adminstration of civil and criminal justice to the natives of India. As the British territory has increased, and as our views of the extent to which legislation ought to be carried have extended, great modifications have been gradually introduced into the scheme devised by Lord Cornwallis, but its essential features can still be traced.

The district or zillah is still the unit of administration and of judicial organization, but the establishment of a

[1] Mill's *India*, v. pp. 422-432.

district in the present day is very different from what it was in Lord Cornwallis's time, and the other parts of the system both judicial and executive differ still more widely. It would be a laborious and not very interesting task to trace out in detail the different steps by which the present system was established. It will be sufficient to say that whilst the East India Company still existed it was modified to the following extent. The constitution of the Nizamut Adaulut was completely changed. Instead of consisting of the Governor-General in Council, it was composed of civilian judges, who sat at Calcutta, though outside the Presidency limits. They constituted two Courts of Appeal, the Sudder Diwani Adaulut, or supreme civil court, and the Sudder Nizamut Adaulut, or supreme criminal court.

The provincial circuit courts were also abolished. The districts were arranged in groups called divisions, each under a commissioner who in practice had little to do with the administration of justice, though I believe he was *ex officio* a sessions judge, which might be a relic of the authority of the old provincial circuit courts; but the powers of those bodies as criminal courts were transferred to the district or zillah judges, whose jurisdiction was originally exclusively civil. The district judge thus became civil and sessions judge, the latter being the title under which he acted as a criminal court.

During the same time the criminal jurisdiction of the magistrates who were also collectors was largely increased. They had possessed some degree of judicial authority from the year 1787 [1] when they were authorized to hear and determine petty offences such as assaults, and to punish them with imprisonment up to fifteen days or fifteen strokes of a rattan. They were invested by degrees with larger and larger judicial powers subject or not to an appeal to the sessions judge.

Thus the final form of the criminal courts of the East India Company was—the Sudder Nizamut Adaulut, the sessions judges, the magistrates.

These courts had jurisdiction over natives of India only. Side by side with this existed a system designed for the double purpose of administering English law to the Europeans

[1] Beaufort, i. p. 8.

CH. XXXIII. in India and of serving as a counterpoise in their interest to the great powers vested in the Governor-General and his council. These institutions were the Supreme Courts and the justices of the peace. They were introduced gradually. When the British establishments in India were mere factories the President and Members of Council were simply local officers of the chairman and board of directors of a joint-stock company. Being out of the reach of English law and in the absence of any foreign law to which they could submit, they were intrusted with powers which were gradually increased as their operations became more extensive. [1] At first their authority as masters over their servants (and their servants constituted the bulk of the European population) was sufficiently extensive for all practical purposes. They were afterwards empowered by charter to seize and send back to Europe Europeans not in their service. They had also judicial powers of a very vague kind under a charter of Charles II. in 1661. [2] In 1726 Madras, Bombay, and Calcutta were incorporated by charter, a mayor and aldermen being appointed in each, and constituted into a court of record for civil cases. The Governor and certain members of the council were to be justices of the peace and commissioners of oyer and terminer and gaol delivery. They were to hold courts of quarter sessions and try all offences except treason. This charter was varied by another granted in 1753.

In 1773 the concerns of the East India Company had become so important that it was considered necessary for Parliament to interfere upon a large scale with their management. This was effected by the Regulating Act (13 Geo. III. c. 63) which [3] authorised the Crown to establish at Calcutta a Supreme Court consisting of a Chief Justice and [4] three puisne judges. The court was to be a court of record and of oyer and terminer and gaol delivery in and for Calcutta. The charter was to extend to all British subjects in Bengal Behar and Orissa. The Court was to have power to hear and determine all complaints against any of them for any

[1] Mill's *India*, iii. pp. 16, 17.

[2] See Laws relating to India, 1855, p. 477; see too 13 Geo. 3, c. 63, ss. 13 and 20.

[3] Ss. 13, 14.

[4] Reduced to two by 37 Geo. 3, c. 142, s. 1.

[1] "crimes, misdemeanours, or oppressions committed" by them. The charter granted under this act gave to the Supreme Court within its limits all the authority of the Court of King's Bench in England. As to the law to be administered, the charter provided in reference to criminal justice that it should be administered "in such or the like manner, and "form, or as nearly as the condition and circumstances of "the place and the persons will admit of as our courts of "oyer and terminer and gaol delivery do or may in that part "of Great Britain called England." Power to reprieve was given as "cases may arise wherein it may be proper to remit "the general severity of the law."

The effect of this was to confirm, for it had been introduced in 1726, the criminal law of England as a local law binding on all persons in Calcutta and to subject to it as a personal law all European British subjects throughout Bengal, Behar and Orissa. Practically one consequence was to secure complete impunity to all Europeans who committed crimes out of Calcutta, for there were no justices of the peace in all India except the Governor-General and the members of his council and the judges of the Supreme Court, so that if an offence was committed, say at Dacca or Patna, the only mode of proceeding against the offender was for the prosecutor to bring his witnesses to Calcutta, get a bill found before the Calcutta grand jury, and procure a Bench warrant with which he might return to Patna or Dacca and arrest the accused person. To a very slight extent this was remedied in 1793 by 33 Geo. 3, c. 52, ss. 152-155, which gave power to the Governor-General and Governors of the three Presidencies to appoint justices of the peace who were to have the same powers as English justices. I think, however this applied only to powers to take evidence and commit for trial,—at all events no power of summary punishment was given to the justices in India till 1813, when it was enacted by 53 Geo. 3, c. 155, s. 105 that any native might summon any European before any mere magistrate for "any assault, forcible entry, "or other injury accompanied with force not being felony."

[1] Felonies are not mentioned by name, but were no doubt included in the word "crimes."

CH. XXXIII. The magistrate might fine the offender up to R500. Till very recent times, indeed, this was the only penalty which could be inflicted on a European for an offence committed in India out of the Presidency Towns, unless the injured party was prepared to travel hundreds—perhaps in later times thousands—of miles to indict him.

So far I have spoken of the courts of justice established in India for the administration of criminal justice to the natives and to European British subjects by the East India Company and by Act of Parliament respectively. I must now say something of the laws which those courts administered.

The criminal law of Northern and Southern India (in Western India it prevailed less distinctly) was the Mohammedan law introduced by the Mogul conquerors whose power culminated under Akbar in the second half of the sixteenth century. The most authoritative written exposition of the version of this system current in India was the Hedaya or guide, which expresses the views of Aboo Huneefah and his disciples Aboo Yoosuf and Imam Mohammed, who were regarded by the Sooni sect as the principal commentators on the Koran. The Mohammedan criminal law classified all offences as incurring one of these classes of punishments, namely (1) Kisas, or retaliation including diyut—the price of blood; (2) Hud, specific penalties; and (3) Tazeer, or discretionary punishment. Kisas or retaliation applied principally to offences against the person; hud or specific punishment (consisting, in the case of robbery, of mutilation) applied to robbery, theft, adultery, and some other offences; and Tazeer, also called seasut (or discretionary punishment) applied to all other cases. It consisted of public and private reprimands, exposure, sequestration of property, stripes, imprisonment, and even death in extreme cases. The Mohammedan criminal law as stated in the Hedaya presents a curious mixture of great vagueness and extreme technicality. As an instance of its vagueness I may refer to its statements as to political offences. They consist of a few vague words as to the destruction of rebels. As an instance of its technicality it specifies five kinds of homicide. (1) *Katl ámd*, or wilful

homicide by a deadly weapon, the nearest equivalent to our murder. (2) *Katl-shabah-âmd*, homicide like wilful homicide, where the instrument used was not likely to cause death. (3) *Katl-Khata*, erroneous homicide, killing under a mistake either as to the person or the circumstances. (4) Involuntary homicide by an involuntary act, as where a man falls on another from the roof of a house. (5) Accidental homicide by an intervenient cause, as where a man unlawfully dug a well into which another person fell and was drowned.

All sorts of singular rules were laid down by the Mohammedan lawyers as to these five kinds of homicide. Poisoning for some reason was not regarded as "Katl-âmd" or intentional homicide. There was a question whether strangling was or was not, inasmuch as a rope was not a weapon commonly used for the purpose of killing. There were endless refinements as to the cases in which retaliatory punishment (Kisas) was or was not incurred by homicide, and as to the payment of the diyut or blood-fine.

The Mohammedan criminal law was open to every kind of objection. It was occasionally cruel. It was frequently technical, and it often mitigated the extravagant harshness of its provisions by rules of evidence which practically excluded the possibility of carrying them into effect. [1] Thus, for instance, immoral intercourse (*zina*) between a woman and a married man was in all cases punishable by death, whether violence was used or not; but "punishment is barred "by the existence of any doubt on the question of right, "or by any conception in the mind of the accused that "the woman is lawful to him, and by his alleging such idea "as his excuse." Moreover, the evidence of women in such an accusation was rejected. "The law is not satisfied with "less than the positive testimony of four men eye-witnesses "to the fact, and of ascertained credit."

Objectionable in all respects as this system was it was considered necessary to make it the foundation of the criminal law administered by the Company's courts, though its grosser features were removed in some cases by Regulations, in others by decisions of the Sudder courts, and in others by circulars

[1] Beaufort, ii. p. 839.

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and orders of various kinds. It became necessary in many instances besides correcting the law to supply its defects, and for this purpose all sorts of expedients were devised, the law of England, instructions from the government, general ideas of justice, analogies, in short almost anything which occurred to those by whom the system was administered were resorted to for that purpose. The result was a hopelessly confused, feeble, indeterminate system of which no one could make anything at all.

A memorial of it survives in the shape of Beaufort's *Digest*, the second edition of which, published in 1857, consists of 1158 4to pages, made up of all the discordant elements to which I have referred. The author was a man of remarkable industry and great talent, but to throw such materials into anything like a rational shape was hopeless.

Of the English criminal law practised in India it is needless to say more than that it was regarded as the English criminal law as it stood in 1726, when the charter was granted by which the Mayor's Court and the Court of Quarter Sessions already referred to were established. How far subsequent acts in which India was not mentioned were in practice held to apply to the presidency towns I am not prepared to say, but however this may have been an exceedingly elaborate act (9 Geo. 4, c. 74) was passed in 1828 which in a characteristically clumsy and unsystematic way extended to India many of the reforms introduced into English criminal law by the legislation of Sir Robert Peel. It abolishes clergy,[1] it provides that indictments are not to be vitiated by the omission of "as appears by the Record," or "with force and arms," nor for putting "statute" for "statutes" nor *vice versâ*. [2] It abolishes benefit of clergy, and [3] questions of course, and it re-enacts verbatim for India many of the provisions of the various consolidation acts then lately passed for England by Sir Robert Peel. It contains in all 137 sections.

Such in substance were the laws and such the courts of justice both for natives and Europeans in Bengal down to 1858, when the government of India was transferred from the Company to the Crown.

[1] S. 12. [2] S. 19. [3] S. 14.

I will now make some remarks as to the laws of the other provinces. The Bengal regulations were introduced as the conquests of the Company increased the extent of their dominions into the greater part of Upper India and in particular into what are now the North-West Provinces. They were also introduced into Madras with few if any material variations, and Supreme Courts similar in all respects to the Supreme Court of Calcutta were established in Madras in 1800 and in Bombay in 1823. Of Madras and the North-West Provinces nothing need in this place be said. The law in force there resembled the law in force in Lower Bengal and so closely as not to require special notice.

Bombay was the first province in India in which a Penal Code was enacted. This was done while Mountstuart Elphinstone was governor by a regulation dated in 1827. The Code is extremely simple and short, and is written more in the style of a treatise than in that of a law. It was, I believe, successful and effective, and it remained in force for upwards of thirty years, till it was superseded by the Indian Penal Code. It applied only to the Company's Courts.

The history of the Criminal Law of some of the other provinces, especially that of the Punjab, is most remarkable though hardly any one is aware of it. The Punjab was annexed to the British Empire by Lord Dalhousie on the 29th March, 1849, in consequence of the defeat of the Sikhs in the second Sikh War. There were a variety of legal and other difficulties as to the manner in which its government was to be provided for. It was absolutely necessary that some kind of legal system should be introduced as the government which had been sufficiently arbitrary under Runjeet Singh (who died in 1839) became absolutely lawless under the various persons who exercised the powers of government after his death. The Mohammedan law which supplied a sort of guide in Bengal was not recognised by the Sikhs, who had habits and customs of their own, and who formed the most important part of the population. When the North-West Provinces were annexed to Lower Bengal the regulations in force in Lower Bengal were introduced into the new districts by a regulation which re-enacted them simply,

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Such a course was considered impracticable as regards the Punjab for many reasons, but particularly because the regulations formed an extremely complicated system which could be administered only by persons specially acquainted with it. It was also expensive on account of the separation which it involved between judicial and executive officers. The services of a number of officers sufficient to administer such a province were not to be had, and the legislative council of the Governor-General was naturally incapable of devising and passing at once any other code of laws for the government of the Punjab.

In this state of things the Governor-General took the responsibility of acting upon a view of his powers, the legality of which admitted of much discussion. Regarding the Punjab as a colony acquired by conquest and himself as the representative of the Crown, he, by a simple despatch authorised three Commissioners, namely, Lord Lawrence, Sir Henry Lawrence, and Mr. Maunsell to govern the country according to their own discretion, taking as their general guide the regulations in force in the North-West Provinces. The three commissioners formed at first a Board of Government, but Lord Lawrence was subsequently appointed first Chief Commissioner and afterwards Lieutenant-Governor of the province. First the three commissioners and afterwards Lord Lawrence proceeded to cause short treatises, which acted as codes, to be drawn up by some of the officers under their orders, by which codes the work of governing the province was carried on. They were simple and rational works put together somewhat roughly, but laying down in a distinct way all the leading points necessary to be determined for such a purpose. The first Code was the work of Sir Richard Temple, afterwards so well-known for his eminent services in [1] all the highest positions in India. It related as well to criminal as to civil matters, but some time after its publication the part which related to criminal law and procedure was recast and developed by Sir Charles Aitchison, now (1882) Lieutenant-Governor of the Punjab,

[1] He was at different times Resident at Hyderabad, Chief Commissioner in the Central Provinces, Financial Member of Council (when I had the honour to be his colleague as Legal Member), Lieutenant-Governor of Bengal, and Governor of Bombay.

then one of the first set of civil servants who won their places by competition.

The validity of these laws might possibly have been successfully disputed had there been any means of testing it, but they were all confirmed by the Indian Councils Act of 1861 (24 & 25 Vic. c. 67, s. 25). They afford a memorable instance of the truth that extremely short and simple provisions, drawn with no particular skill by young men totally unpractised in parliamentary drafting may be instruments of government quite as efficient for all practical purposes as the most elaborate codes prepared by the most skilful draftsmen with the greatest exactness and precision of which language is capable.

Such was the position of the Criminal Law in the most important parts of India when the government was taken over by the Crown from the East India Company in 1858.

In order to explain the legislation of the new government it is necessary to go back to the year 1834. The great defects of the old system, its weakness, its confusion, its utter want of principle and unity had long been recognised by all who had to do with Indian administration, though I have been told by persons well able to judge that the older generation of civilians had a positive liking for the disorderly system which they administered, that they regarded the Mohammedan law as being in a way the birthright of the natives, and the existence of Mohammedan law officers in the courts as a piece of preferment which the Mohammedans as a class greatly valued, which last opinion was unquestionably well founded. Different views, however, prevailed when the Charter Act of 1833 (3 & 4 Will. 4, c. 85), the last, as it turned out, of the Charter Acts, was passed. It came on for consideration in the year which followed the Reform Bill, and at a time when much attention had been drawn to the subject of Law Reform in general, and to Reform of the Criminal Law in particular by Sir Robert Peel's legislation and by the works of many writers. None of these had been more conspicuous than Bentham, and by no one had Bentham's doctrines been preached and applied so zealously as by his favourite disciple James Mill, who had written his history of British India under the influence of Bentham's writings—an influence

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traceable in the most unmistakable manner whenever he refers to any subject connected with law or lawyers. It was considered that the time had arrived for legislation on a large scale in India, and this certainly was a great opportunity for it.

By the Act of 1833 the Governor-General of Bengal was converted into the Governor-General of India. [1] He was empowered for the first time to legislate for the whole of India, the legislative powers of the other Indian governments being abolished. In order that this power might be properly exercised it was provided by s. 40 of the Act that a fourth ordinary member should be added to the Council who, however, was not to be "entitled to sit or vote in the said Council "except at meetings thereof for making laws and regulations." [2] Lord Macaulay was appointed to fill this office. Another section of the Act of 1833 (s. 53) had provided for the appointment by the Governor-General of a Law Commission for the purpose of establishing a set of courts and of laws suitable for all persons, Europeans or others, resident in the said territories.

On Lord Macaulay's arrival in India a Commission was accordingly appointed consisting of himself, Mr. Millet, and Sir John M'Leod. During the four years (1834—8) of his

[1] The power under which the regulations were enacted is by no means clear. By 13 Geo. 3, c. 63, ss. 36 and 37, the Governor-General in Council is empowered to make "rules, ordinances, and regulations not being repug-"nant to the laws of this realm," and to impose "reasonable fines and for-"feitures" for the breach of them, but they are to be made "for the good "order and civil government of the Company's settlement at Fort William in "Bengal, and other factories and places subordinate, or to be subordinate, "thereto," and not for "the kingdoms of Bengal, Behar, and Orissa," which is the description (see sec. 7) of the territories to be governed by them. In short, they give power to make bye-laws for Calcutta and its dependent factories. The regulations enacted by Lord Cornwallis, which had a far wider scope, are, however, recognised by 37 Geo. 3, c. 142, s. 8. This act recites that "certain regulations for the better administration of justice among the "native inhabitants and others, being within the provinces of Bengal, Behar, "and Orissa, have been from time to time framed by the Governor-General in "Council in Bengal." It then goes on to enact that all regulations passed by the government affecting the rights, properties, and persons of the subjects "shall be formed into a regular Code, and printed with translations in the "country languages, and that the grounds of every regulation shall be prefixed "to it." This assumes the existence of the legislative power of the Governor-General in Council, but does not directly grant it to him. The Provincial Courts are ordered to "regulate their decisions by such rules and ordinances "as shall be contained in the said regulations." I suppose that in 1797 a delicacy was still felt in giving the Indian Governor-General direct power to legislate for part of the dominions of the Great Mogul.

[2] It is somewhat singular that it was offered in the first instance to my father, the late Sir James Stephen.

residence in India, the Commission settled the draft of what long afterwards became the Indian Penal Code, of which draft Lord Macaulay was either the sole or the principal author. I am conscious of being a partial critic of this work for many reasons. But it seems to me to be the most remarkable, as I think it bids fair to be the most lasting, monument of its principal author. There is a fashion in literature which may diminish the influence and popularity of his other writings, but the Penal Code has triumphantly supported the test of experience for upwards of twenty-one years during which time it has met with a degree of success which can hardly be ascribed to any other statute of anything approaching to the same dimensions. It is, moreover, the work of a man who, though nominally a barrister, had hardly ever (if ever) held a brief, and whose time and thoughts had been devoted almost entirely to politics and literature.

The draft remained in the shape of a draft for no less than twenty-two years. This is probably to be accounted for by the extreme aversion which for a long time before the mutiny was felt by influential persons in India to any changes which boldly and definitely replaced native by European institutions. It appeared in every way the safer course to alter and interfere as little as possible, although the success of a policy conceived in a totally different spirit and triumphantly carried out in the Punjab might have taught a different lesson. The suppression of the mutiny and the transfer of the government from the Company to the Crown made a great change and gave an extraordinary impetus to legislation. Amongst other measures the Penal Code was passed into law as Act XLV. of 1860, and was followed a year afterwards by Act XXV. of 1861—the first of three successive versions of the Code of Criminal Procedure.

The Penal Code did not become law precisely in the shape in which it was drawn. It underwent minutely careful and elaborate revision at the hands of the Legislative Council, established under the last of the acts regulating the powers of the East India Company (16 & 17 Vic. s. 95, 1853). Sir Barnes Peacock, afterwards the last Chief Justice of the Supreme Court of Calcutta, and now (1882) a

CH. XXXIII. Member of the Judicial Committee of the Privy Council, was then the Legal Member of Council, and had charge of the Bill. The long delay in the enactment of the Penal Code had thus the singular but most beneficial result of reserving a work which had been drawn up by the most distinguished author of the day for a minutely careful revision by a professional lawyer, possessed of as great experience and as much technical knowledge as any man of his time. An ideal code ought to be drawn by a Bacon and settled by a Coke.

The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India. I do not believe that it contains any matter whatever which can have been adopted from the Mohammedan law. The code consists of 511 sections, and it deserves notice as a proof of the degree in which the leading features of human nature and human conduct resemble each other in different countries, that about the same number of enactments are contained in three other works of the same sort. The part of the Draft Criminal Code of 1879, which related to substantive law, contained 426 sections; the French *Code Pénal*, 484; and the German Criminal Code, 370, of which a good many are subdivided. The English codes are much longer than the others, for a reason to which I shall refer hereafter; but if the number of sections or articles is taken to indicate roughly the number of acts regarded as offences the correspondence between the four is remarkable.

The arrangement of the Indian Penal Code is substantially similar to that of other penal codes. Indeed the arrangement of the subject is obvious and natural in itself. The general principles which apply to the whole subject naturally come first, and are naturally followed by crimes affecting the public, crimes affecting the person, and crimes affecting the property of individuals. This mode of dealing with the subject is so natural that it can hardly fail to suggest itself to every one who treats the matter systematically. It is accordingly followed by

The style in which the Indian Penal Code is written is remarkable in many ways. In a literary point of view parts of it have much in common with Lord Macaulay's more popular compositions, though parts of it, as it now stands, could never have come from his pen. The love of direct explicit statement, the taste for expressing distinctions by the juxtaposition of sentences similarly constructed but with different leading words, are common to both. The following section could hardly have been written by any one else :—

"DEFAMATION, 499.—Whoever, by words either spoken or "intended to be read, or by signs, or by visible representa- "tions, makes or publishes any imputation concerning any "person, intending to harm, or knowing or having reason to "believe that such imputation will harm the reputation of such "person, is said, except in the cases hereinafter mentioned, to "defame that person.

"EXPLANATION 4.—No imputation is said to harm a per- "son's reputation unless that imputation directly or indirectly, "in the estimation of others, lowers the moral or intellectual "character of that person, or lowers the character of that "person in respect of his caste or of his calling, or lowers "the credit of that person, or causes it to be believed that "the body of that person is in a loathsome state, or in a "state generally considered as disgraceful."

The way in which "that person" is brought in five times over without being once represented by a pronoun, personal or possessive, is eminently characteristic, and there is a plain-spoken emphasis in the concluding lines about "the body of that person" which must have given the author real pleasure. It is easy to fancy him asking himself whether "loathsome" was explicit enough, and thinking that it would lose nothing by a little variation. Any one who takes the trouble to try the experiment will, I think, be of opinion that any alteration in the order of the different clauses of these sentences, or in their words, would either alter the sense intended to be conveyed or make it less easy of apprehension or less pointed in expression. In Lord Macaulay's essays and historical writings these qualities are sometimes carried so far as to be out of keeping with the subjects discussed. You cannot truthfully describe the

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qualities of a remarkable man or the details of a historical event with a definite precision which makes each quality and each incident fit together like the squares of a chessboard, but the absence of shading, which is unnatural and unpleasing in a picture, is indispensable in a mathematical diagram, and the sharp contrasts which sometimes pall upon the reader of a history are just what are wanted in a penal code.

Whatever may be the literary characteristics of the style of the Penal Code, its style has claims to notice of a much more important kind. It is as unlike an Act of Parliament on the one side as it is unlike an Indian Regulation on the other. When Lord Macaulay was in India [1] the act had not been passed which enables Parliamentary draftsmen to use full-stops, and from about 1820 to 1830 was, I think, the period in which statutes were lengthier, more drawling and tedious, more crammed with surplusage and tautology than they ever were either before or since.

The Indian Regulations were composed in a totally different style. They always began (in compliance with the statutory provision already quoted), with a statement of the reason why they were enacted, and these statements are written fully in simple natural language, like that of a careful despatch. The same may be said of the enacting part, though the natural difficulties of the subject dealt with are often too much for the [2] draftsmen.

The Penal Code was the first specimen of an entirely new and original method of legislative expression. It has been found of the greatest possible use in India, and has been employed in all the most important acts passed since the Penal Code. The mode adopted is as follows:—In the first

[1] 13 & 14 Vic. c. 21, s. 2 (1850). "Be it enacted that all acts shall be "divided into sections if there be more enactments than one, which sections "shall be deemed to be substantive enactments without any introductory words." Before this act was passed every act was one interminable sentence, thus: "An act" &c.; "whereas," &c.; "Be it enacted," &c.; "and be it en- "acted," &c. The draftsmen were apparently invariably under the impression that if they once really stopped they would never be able to go on again.

[2] A good illustration is afforded by the famous Regulation VII. of 1822, which was for about fifty years to the North-West Provinces what Lord Cornwallis's Permanent Settlement still is to Lower Bengal. It instituted the North-West system of land settlement, and was one of the most important laws ever passed in India. It was difficult to understand to a degree which no one unacquainted with the subject could appreciate.

place the leading idea to be laid down is stated in the most explicit and pointed form which can be devised. Then such expressions in it as are not regarded as being sufficiently explicit are made the subject of definite explanations. This is followed by equally definite exceptions, to which, if necessary, explanations are added, and in order to set the whole in the clearest possible light the matter thus stated explained and qualified is illustrated by a number of concrete cases.

For instance the leading definition as to defamation is given in the terms just quoted. This is followed by four explanations, the first as to imputations on deceased persons, the second on companies or collections of persons, the third as to imputations by way of irony, and the last as to the limits of the word "imputation." Six exceptions follow stating the cases in which imputations may lawfully be cast upon particular persons, two of which are the subjects of further explanation, most of them are specifically illustrated by examples.

The result is that it is practically impossible to misunderstand the Penal Code, and though it has been in force for more than twenty years, and is in daily use in every part of India by all sorts of courts and amongst communities of every degree of civilization, and has given rise to countless decisions no obscurity or ambiguity worth speaking of has been discovered in it.

I have occasionally heard this feature in the Penal Code spoken of with a kind of contempt by English lawyers. They say that it may be excused as being suitable for India because the Code has to be administered by magistrates, most of whom are not lawyers. The same is true of the Criminal Law of England, but apart from this it is surely obvious to remark that if perfect clearness is a quality to be desired in penal law it seems unwise to undervalue or neglect methods of obtaining that result which have been so successful as to prevent even unprofessional persons from mistaking the meaning of an extensive body of law. To do so implies that the law ought to be fully intelligible to trained lawyers only. It would seem strange to say by way of depreciating a

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particular kind of telescope that it enabled people with bad eyes to distinguish objects at a great distance.

I admit, however, that I do not think that this method of legislative expression could be advantageously employed in England. It is useful only where the legislative body can afford to speak its mind with emphatic clearness, and is small enough and powerful enough to have a distinct collective will and to carry it out without being hampered by popular discussion. A criminal code drawn in the style of the Indian Penal Code could never be passed through Parliament, and even if it could I do not think English judges and lawyers would accept and carry out so novel a method of legislating.

In several points affecting the whole of the Indian Penal Code, warning has been taken from the defects of the English criminal law. The Code, wisely, as I think, for reasons already assigned, makes no attempt at the classification of crimes. It knows nothing of either felony or misdemeanour. It carefully avoids the use of words which have been the occasion of much misunderstanding and confusion in English law. It does not for instance contain the word "malice" or its derivatives. Such words, involving moral considerations, as it does employ, are defined with extreme exactness. For instance, "dishonestly," which frequently occurs, is [1] defined to mean doing anything with the intention of causing wrongful gain to one person, or wrongful loss to another. [2] "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled. "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

I will now proceed to notice the principal matters contained in the Code itself which appear interesting in connection with what has already been said as to the law of England.

The Code begins with a preliminary chapter setting forth the extent of the Code, and the time when it is to come into operation. [3] One of the sections by which this is effected deserves notice because it might be useful as a precedent if the criminal law of England should ever be codified. The

[1] S. 24. [2] S. 23. [3] S. 2.

existing criminal law of India was not specifically repealed by the Penal Code, but it provided that every person should be liable to punishment under it, *and not otherwise*, for every act to which it applied. The effect of this was that if after the Penal Code came into force any one were to do an act which would have been criminal before it passed, and which was not forbidden by its provisions, he would still be liable to punishment under the old law. I never heard that any such act ever took place, though it is just possible that in the Presidency towns, where before the Penal Code came into operation the law of England was in force, the common law as to seditious words and seditious libel might be wider than the Penal Code, and so continue in force to some limited extent. Such a provision would be useful rather as an answer to any cry which might be raised as to the danger of a general repeal of the unwritten common law than upon any more serious grounds.

The second chapter is entitled not very happily "General Explanations," and consists partly of a series of definitions of the senses in which words are used, and partly of a statement of certain general doctrines of more or less importance. The idea by which the whole Code is pervaded, and which was not unnaturally suggested by parts of the history of the English law, is that every one who has anything to do with the administration of the Code will do his utmost to misunderstand it and evade its provisions; this object the authors of the Code have done their utmost to defeat by anticipating all imaginable excuses for refusing to accept the real meaning of its provisions and providing against them beforehand specifically. The object is in itself undoubtedly a good one, and many of the provisions intended to effect it are valuable as they lay down doctrines which may be needed in order to clear up honest doubts or misunderstandings. For instance, it is perfectly right to say, [1] "a person is said to cause an "effect 'voluntarily' when he causes it by means whereby "he intended to cause it, or by means which at the time of "employing those means he knew or had reason to believe "to be likely to cause it." It is also quite right [2] to define

[1] S. 39.

[2] S. 30.

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the expression "valuable security," and [1] the word "document," for the extent of these expressions might well be matter of reasonable doubt in good faith.

I think, however, that to go beyond this, and to try to anticipate captious objections, is a mistake. Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are determined to do so, and over-definition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove. If too fine a point is put upon language you suggest a still greater refinement in quibbling. This I think is a not uncommon fault in Indian legislation, and the Penal Code was the first example of it. For instances it [2] defines "life" as the life of a human being unless the contrary appears from the context. So of death. [3] "Animal" is also defined as "any living creature other than a human being," a definition not only superfluous, but of doubtful correctness. It would include an angel, frog spawn, and probably a tree.

This introductory chapter is followed by a chapter headed "On Punishments." The punishments inflicted by the Indian Penal Code are death by hanging, transportation for life, imprisonment with or without hard labour, which may extend to fourteen years, forfeiture of property, and fine. Whipping is inflicted not under the Code, but under the provisions of an act passed in 1864. Death is the punishment of waging war against the Queen, murder, attempts to murder by convicts under sentence of transportation for life, false evidence causing the execution of an innocent man, and of all members of gangs of robbers (dacoits) numbering five or more, of

[1] S. 29. [2] Ss. 45 & 46.

[3] S. 47. The most singular definition in the whole Code is the definition of "force" in s. 349. "A person is said to use force to another, if he causes "motion, change of motion, or cessation of motion to that other; or if he "causes to any substance such motion, or change of motion, or cessation of "motion as brings that substance into contact with any part of that other's "body, or with any thing which that other is wearing, or carrying, or with "any thing so situated that that contact affects that other's sense of feeling, "provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, cessation of motion, or change of motion in "one of the three ways hereinafter described: first. by his own bodily power; "secondly. by disposing any substance in such a manner that the motion, or "change or cessation of motion, takes place without any further action on his "part, or on the part of any other person; thirdly, by inducing any animal "to move, to change its motion, or to cease to move."

whom any one in committing robbery commits murder. In no case, however, is the punishment of death absolute. The court has always a discretion to sentence to transportation for life, and in the case of dacoity to rigorous imprisonment up to ten years as an alternative. The punishment of transportation is inflicted only where the sentence is for life, except in cases of what we should describe as treason felony, where the sentence may be for any term. There is in nearly every case an alternative power of sentencing to imprisonment up to ten or in some cases fourteen years. The maximum sentences of imprisonment vary according to the offence from fourteen years to a month. There is only one case, so far as I know, in which a minimum term of imprisonment is prescribed. This is the case of robbery accompanied by the use of a deadly weapon, or causing grievous hurt or attempting to cause such hurt, or to murder, in which case the offender must be imprisoned for seven years at least (s. 397). In all this the English law is closely followed, especially in the rejection of minimum punishments, and in the wide discretion left to the judges.

The chapter on punishments is followed by one entitled "General Exceptions," which deals with the question of responsibility. The title of the chapter is meant to imply (see s. 6) that all the exceptions contained in it are to be considered to be embodied in every definition of crime in the body of the Code. These general exceptions embody the law of England as it stands more simply, and in a manner which in my opinion is more satisfactory in several respects, than the corresponding part of the Draft Criminal Code of 1879. It goes at great length into the subjects of consent and compulsion, and at considerable length into the subject of the right of private defence. I do not, however, agree with its provisions as to compulsion. One provision might well be adopted in this country. [1] It says in substance that the causing of "harm so slight that no person of ordinary sense "and temper would complain of such harm is not an offence."

The preliminary part concludes with a chapter on abetment and the concealment of offences which is not very unlike the

[1] S. 95.

CH. XXXIII. English law as to accessories before and after the fact, but it contains nothing of special interest.

These matters are followed by the definitions of offences. I shall notice such of these only as afford occasion for some special remark.

[1] The provisions as to offences against public tranquillity comprise all breaches of the peace from waging war against the Queen (s. 121) to an affray (s. 159). The only [2] offence corresponding to high treason punished by the Penal Code as it originally stood was waging war against the Queen, preparing to wage such war, and concealing a design to wage such war. Conspiring to wage war and making use of seditious language and writing were not included in the original Code. An act amending the Code was passed whilst I was Legal Member of Council which in substance inserted in the Code the equivalent of the English Treason-Felony Act. It was found to be required by circumstances. A mere conspiracy to wage war was not an offence against the Code unless some act or illegal omission was done in pursuance of it. [3] The law relating to riots and unlawful assemblies is very full and elaborate, but it is remarkable that the Penal Code contained no provision at all as to seditious offences not involving an absolute breach of the peace. It says nothing of seditious words, seditious libels, seditious conspiracies, or secret societies. The additions made in 1870 provide to a certain extent for the punishment of such offences, but they do so very imperfectly. During the rule of the East India Company there was always a reluctance on the part of the Company to behave and to legislate as unqualified sovereigns would naturally behave and legislate, and upon the assumption of the government by the Crown it was not considered necessary apparently to make any change.

[4] Offences relating to public servants naturally form a very important part of the Indian Penal Code, as the official body in India occupies a position and is charged with functions of far greater importance than those which belong to any corresponding body of officials in the world, possibly with the exception of Russia. On the one hand, any approach to

[1] Ss. 121-160. [2] Ss. 121-124. [3] Ss. 141-161. [4] Ss. 161-190.

corruption of any sort, or to oppression, or to official misconduct prompted by any indirect motive, is forbidden under heavy penalties by [1] enactments of the most minute and comprehensive character. On the other hand, their lawful authority is upheld by an equally elaborate [2] series of provisions punishing every sort of unlawful resistance or disobedience to it. For instance, [3] "whoever being legally bound "to state the truth on any subject to any public servant "refuses to answer any question demanded of him touching "that subject by such servant" may be imprisoned for six months and fined a thousand rupees. [4] To give a public servant false information in order to cause him to use his public authority to the injury or annoyance of any person renders the offender liable to the same punishment The widest of these enactments is [5] one which provides that it is an offence punishable with fine and imprisonment to disobey any order lawfully promulgated by any public servant. [6] To threaten a public servant in order to affect him in the discharge of his duty is punishable with imprisonment up to two years, and to threaten any person in order to deter him from applying for protection to any public servant is punishable with imprisonment up to one year.

[7] The provisions relating to the giving of false evidence, fabricating false evidence, destroying documents to prevent their production in evidence, and similar offences, are characteristically elaborate. Probably there is no country in the world in which they are so much needed as in India, though I must own that I am less impressed with the supposed contrast between England and India in this respect than persons who have had less experience of the quantity of perjury which is committed every day with practical impunity, or at most very inadequate punishment, in England. One [8] section punishes with death the giving or fabrication of false evidence in a capital case by reason of which an innocent person is condemned and executed. If the innocent person is not condemned and executed the punishment is transportation for life. [9] In all other cases of perjury, intended to cause a person to be

[1] Ss. 161-168. [2] Ss. 172-182. [3] S. 179. [4] S. 182. [5] S. 188.
[6] S. 189. [7] Ss. 191-204. [8] S. 194. [9] S. 195.

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convicted of crime punishable with transportation for life or imprisonment for seven years, the punishment of the false evidence is that of the offence of which the subject of the false evidence is accused.

The subject of public nuisances is very fully provided for in sections 268-289, which provide punishment for a great number of offences which in England would not be punishable at all, and would not in some cases afford ground even for a civil action. For instance, a person is [1] liable to six months' imprisonment and fine who negligently does any act which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life. The punishment is [2] extended to two years' imprisonment if the act is done "malignantly." The authors of the Code would not say "maliciously," and wanted to say something more than "voluntarily and without justification or excuse." I think this is the only instance in the whole Code in which an adverb making undefined moral guilt an element of a crime is made use of.

Many of the sections referred to punish negligent acts dangerous to human life whether death or bodily harm is caused or not. This is highly characteristic of the Code. Its authors have throughout been much impressed with the theory that neither the motive nor the result, but the intention of an act ought to be the measure of its criminality. Hence they have never referred to the motive for an offence except in the single instance just mentioned; and on the other hand they punish in a [3] series of sections mere carelessness irrespectively of the results which it may produce. Thus [4] to ride or drive so rashly as to endanger life, or to be likely to cause hurt or injury to any other person, is punishable with six months' imprisonment, even if no harm is done to any one. The same punishment is awarded to similar carelessness as to [5] poison, [6] fire, [7] explosives, [8] machinery, [9] repairing buildings, and the care of [10] animals. The section as to machinery is of the most sweeping kind. It extends to every one who "knowingly or negligently omits to take such order with any

[1] S. 269. [2] S. 270. [3] Ss. 279-289. [4] S. 279. [5] S. 284.
[6] S. 285. [7] S. 286. [8] S. 287. [9] S. 288. [10] S. 289.

" machinery in his possession or under his care as is sufficient " to guard against any probable danger to human life from " such machinery." This goes far beyond any provisions as to fencing machinery in our factory acts. For instance, the Factory and Workshop Act, 1878 (41 Vic. c. 16), contains elaborate directions as to fencing machinery in motion, dangerous vats and structures, grindstones, and cleaning machinery in motion (ss. 5-9), but the utmost consequence of not observing these rules is liability to an inspector's order to fulfil the requirements of the law, in default of which the owner may (s. 81) be fined £10. If death were caused by an omission to perform any of the duties imposed by the act, the offender would be guilty of manslaughter, and liable to any secondary punishment from penal servitude for life downwards. If bodily injury short of death were caused, he would be liable to an action for damages to the injured person. In India the leaving of any dangerous machinery unfenced would render the person in default liable to six months' imprisonment, but no further consequence would follow if death were caused.

The scheme of the Indian Penal Code thus excluded the crime of manslaughter by negligence. This appeared to me to involve neglect of a matter which ought to be taken into account in penal legislation,—the effect which an offence produces on the feelings and imagination of mankind. I accordingly carried through the Legislative Council an act which added a section (304A) to the Code, punishing specifically the causing of death by negligence. If two persons are guilty of the very same act of negligence, and if one of them causes thereby a railway accident, involving the death and mutilation of many persons, whereas the other does no injury to any one, it seems to me that it would be rather pedantic than rational to say that each had committed the same offence, and should be subjected to the same punishment. In one sense each has committed an offence, but the one has had the bad luck to cause a horrible misfortune, and to attract public attention to it, and the other the good fortune to do no harm. Both certainly deserve punishment, but it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm, and the effect in the way of preventing

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a repetition of the offence is much the same as if both were punished.

Another reason for making the addition above referred to was that though the sections under consideration punish many kinds of negligence dangerous to life, many others, just as dangerous, are omitted. The sections in question would not meet the case of carelessness in a railway servant. I do not think they would meet the case of negligence in the ventilation of a mine, and though s. 288 has reference to carelessness in pulling down buildings it is silent as to carelessness in erecting them. The section as to causing death by rash or negligent acts covers every case of negligence which causes death.

The next series of [1] sections requiring notice are contained in chapter xv., headed "Of Offences relating to Religion." They present an extraordinary contrast to the English law on that subject as it stood in early times, though they reflect precisely the tone of modern English sentiment. All the offences forbidden are in the nature of insults to existing creeds. They appear to me to carry the principle of tolerating and protecting all religions whatever to a length which cannot be justified, and which might lead to horrible cruelty and persecution if the government of the country ever got into Hindoo or Mohammedan hands. Section 298 renders every one liable to a year's imprisonment who, "with the deliberate "intention of wounding the religious feelings of any person, "utters any word or makes any sound in the hearing of that "person, or makes any gesture in the sight of that person, or "places any object in the sight of that person." To say nothing of the ease with which any one might falsely accuse another of uttering a word or making a sound or a gesture of an offensive nature, this would surely cover every attempt made to convince any one that his religious opinions are untrue. It is impossible to convince any one that he is in error upon religious subjects without causing him great pain if he really believes in his creed, and the act of addressing cogent and earnest arguments to him on the subject must of

[1] Ss. 295-298.

necessity involve a deliberate intention of wounding his feelings. A man who tries to tear from another beliefs which colour the whole of life intends to wound his religious feelings as deliberately as a surgeon who prepares to perform a terrible operation intends to wound his flesh. In each case the motive may be good, but in each the intention is to inflict a wound. Of course this was not the meaning of the authors of the Code, and the section in question would, in the hands of modern English magistrates, be interpreted to apply only to wanton insults. It could be very differently interpreted by natives. It is characteristic of English people to consider their modern liberalism as not only true but self-evident, and certain to be popular at all places and in all times. In fact, it is a very modern growth, and extends over a small part of the world. I suspect that the true feelings of a large part of the native population of India were expressed by a Hindoo of considerable position and ostentatiously English tastes, who one day confidentially observed to a high English official, after looking round to see that nobody was listening, "For my part, "Sahib, I think everybody who changes his religion, whatever "it happens to be, ought to have seven years' rigorous imprison- "ment. Don't you?" Instances might be given to show that English civilians are by no means always free from a wish of this kind. The line taken by some prominent official persons in reference to a proposal made and carried to provide a form of marriage for those who had ceased to be Hindoos or Mohammedans without becoming Christians threw light upon this. They saw no hardship at all in the conclusion that a man, who was neither a Christian, a Mohammedan, a Hindoo, nor a Buddhist, should be unable to contract a valid marriage.

The offences against the public are followed in the Indian Penal Code by offences affecting the human body, the first of which is homicide.

The definitions of culpable homicide and murder are, I think, the weakest part of the Code. They are obscure, and it is obvious to me that the subject had not been fully thought out when they were drawn. "Culpable homicide" is first defined, but homicide is not defined at all, except

CH. XXXIII. by way of explanation to culpable homicide. Moreover, culpable homicide, the genus, and murder, the species, are defined in terms so closely resembling each other that it is difficult to distinguish them. The definitions are these:—

[1] "Whoever causes death by doing an act with the intention "of causing death, or with the intention of causing such "bodily injury as is likely to cause death, or with the know- "ledge that he is likely by such an act to cause death, "commits the offence of culpable homicide." Having regard to the definition of "voluntarily" in s. 39, already quoted, this would be more shortly expressed by saying, "whoever "voluntarily causes death is guilty of culpable homicide."

Murder is thus [2] defined:—

"Except in the cases hereinafter excepted, culpable homicide "is murder if the act by which the death is caused is done "with the intention of causing death; or,

"2. If it is done with the intention of causing such bodily "injury as the offender knows to be likely to cause the death "of the person to whom the harm is caused; or,

"3. If it is done with the intention of causing bodily "injury to any person, and the bodily injury intended to be "inflicted is sufficient in the ordinary course of nature to "cause death; or,

"4. If the person committing the act knows that it is so "imminently dangerous that it must in all probability cause "death, and commits such act without any excuse for incur- "ring the risk of causing death or such injury as aforesaid."

Then follow five exceptions.

The difficulty of these sections is that the definitions of culpable homicide and murder all but repeat each other; but not quite, or, at least, not explicitly. The effect of the whole would be little altered if it was stated thus:—

"Whoever voluntarily causes the death of any person is "guilty of murder, except in the cases hereinafter mentioned."

"Whoever voluntarily causes the death of any person in "any of the cases hereinafter mentioned is guilty of culpable "homicide."

This appears from the fact that it is difficult, though perhaps

[1] S. 299. [2] S. 300. To begin with an exception is extremely clumsy.

not impossible, to suggest any case of culpable homicide, other than the five excepted cases, which is not murder.[1]

The excepted cases are, (1) homicide under provocation, as to which the English law is somewhat enlarged; (2) homicide by an act done in excess of the right of self-defence; (3) homicide by a public servant in the discharge of a duty, by acts which he believes to be necessary for its due discharge, but which are not so in reality; (4) homicide upon a sudden quarrel; (5) homicide by consent on a person over eighteen years of age. This would cover duelling and suttee.

[1] Expressed in a tabular form the two crimes are thus related :—

Culpable homicide is causing death by doing an act with any of the intentions undermentioned :—	Culpable homicide is murder if the act by which death is caused is done with any of the intentions undermentioned :—
1. An intention to cause death.	1^1. An intention to cause death.
2. An intention to cause bodily injury likely to cause death.	2^1. An intention to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused.
	3^1. An intention to cause bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.
3. Knowledge that he is likely by such act to cause death.	4^1. If the person committing the act knows that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death by such injury.

Cases 1 and 1^1 are identical. Case 2 appears to me to be exactly equivalent to Cases 2^1 and 3^1 taken together, for the element of knowledge which is included in 2^1 and absent from 2 is also absent from 3^1, so that 2^1 and 3^1 together are equal to 2. Case 3 and Case 4^1 differ only in the circumstance that 4^1 is more explicit. Murder under 4^1 requires the absence of any excuse for running the risk, but homicide could hardly be intended to be culpable if such an excuse was present, especially as the general exception in s. 81 appears to meet the case exactly.

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Homicide by consent is the only case in which the Indian Penal Code is less rigorous than the English law. It ought, however, to be observed that though murder in India is usually punished with death, the judge may sentence the offender to transportation for life.

It is remarkable that these provisions do not meet the case of causing death by personal injuries not likely or intended to cause it, or by negligence. Of negligence I have already spoken. The remarks I have made will also apply to the offence of causing death by comparatively unimportant injuries, such as a blow with a fist or with a slight stick, or by throwing a man down in wrestling. Under the Penal Code the death in such cases is regarded as accidental, and the blow or other injury as an offence to be punished under one or other of the provisions relating to "Hurt," or criminal force, which I now proceed to consider.

Hurt is [1] defined as causing "bodily pain, disease, or in- "firmity, to any person," and is divided into "grievous hurt" and hurt simply. [2] "Grievous hurt" includes emasculation, permanent privation of the sight of either eye, or the hearing of either ear, privation, destruction, or permanent impairing of any member or joint, disfiguration of the head or face, fracture or dislocation of a bone, anything which endangers life or disables the sufferer from pursuing his ordinary avocations for twenty days. This provision is adopted from the French *Code Pénal*, article 309. I do not think it happy, as it attempts to define what is essentially indefinite. The English "grievous bodily harm" is far better. The artificial and arbitrary character of the enactment may be illustrated in many ways. A slight injury to an artist's forefinger, or to a surgeon's wrist, might easily prevent him from following his usual pursuits for three weeks, and so amount to grievous hurt, while an injury which caused a man to be afflicted with tic douloureux for the rest of his life would not be considered grievous.

The punishments for the infliction of hurt are varied in all manner of ways, according as the hurt is grievous or not, and

[1] S. 319. [2] S. 320.

caused voluntarily, rashly, and negligently, with or without provocation, and with or without any bad ulterior object.

[1] Assault and criminal force are most elaborately defined, but call for no particular notice.

[2] The provisions as to kidnapping, abduction, slavery, and forced labour, are also most elaborate, and form a singular contrast to the meagreness of the law of England on these subjects. The reason is obvious: the offences in question were common in India and almost unknown in England.

Of the other offences against individuals I will mention a few only, as they are for the most part substantially the same as those punished by the law of England, and present few variations of much interest. The following observations, however, may be made.

The law relating to theft represents the law of England in its maturity, and freed from most of the intricacies which distorted it so strangely.

The three forms of the offence on which I have already dwelt are thus distinguished in the Indian Penal Code :—

"S. 378. Whoever intending to take dishonestly any "moveable property out of the possession of any person, "without that person's consent, moves that property in "order to such taking, is said to commit theft.

"S. 403. Whoever dishonestly misappropriates or converts "to his own use any moveable property shall be punished, &c.

"S. 405. Whoever being in any manner intrusted with "property, or with any dominion over property, dishonestly "misappropriates or converts to his own use that property, "or dishonestly uses or disposes of that property, in violation "of any direction of law prescribing the mode in which such "trust is to be discharged, or of any legal contract, express "or implied, which he has made touching the discharge of "such trust, or wilfully suffers any other person to do so, "commits criminal breach of trust."

These three sections cover all the ground which is covered in English law by theft, embezzlement, and the various breaches of trust which are punished, besides covering other breaches of trust and misappropriations which are not so

[1] Ss. 349-359. [2] Ss. 359-374.

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punished. I think that the law would bear further simplification by rejecting the distinction between theft and criminal misappropriation, which turns upon the obscure idea of possession, and corresponds to no substantial difference either in the moral guilt or the public danger of the acts defined. As, however, the whole subject was provided for at once, the elaborate discussions and many technicalities connected with the subject which have disfigured the law of England have not been transplanted into India.

I need say nothing of the aggravations of theft into robbery and extortion which are similar in England and in India.

Passing over several matters which require no remark, I come to s. 497, which punishes adultery with imprisonment up to five years. The husband only can prosecute for this offence. This is one of the strongest instances in the whole Code of a concession to native ideas. Adultery has never in England been treated as a crime, though it is an ecclesiastical offence; and when the Divorce Act of 1858 was under discussion, the suggestion that it should be so treated was decisively and perhaps finally rejected. It seems to me that, the more marriage is recognised as a state of life into which two persons enter upon equal terms, and the less the wife is looked upon as being the husband's property, the less will people be inclined to punish as a crime this most grievous and disgraceful of all private wrongs. The prosecution of a European for adultery is, I believe, almost, if not altogether, unknown in India; the remedy taken in such cases being almost invariably proceedings for a divorce.

[1] The enactments relating to defamation are remarkable. I have already referred to them as supplying an illustration of Lord Macaulay's style as a draftsman. They also are a good illustration of the temper in which the Code was drawn. On one side they are extremely severe, far more severe than the law of England. On the other they are singularly liberal, permitting to every kind of discussion considered to be advantageous to the public complete liberty from all restraint whatever. They proceed throughout on the double supposition that, on the one hand, a man's character is to be protected by

[1] Ss. 499-502.

the law as much as his person and reputation; that, on the other hand, there are many occasions on which it is necessary for the public good that the character of particular things and persons should be the subject of unrestrained discussion. The doctrine that libel is an offence because it tends to breaches of the peace had no influence at all upon the provisions of the Indian Penal Code.

As to the protection afforded by the Penal Code to private character, it will be enough to refer to the [1] definition of defamation: "Whoever by words either spoken or intended to "be read, or by signs, or by visible representations, makes "or publishes any imputation concerning any person, intend- "ing to harm, or knowing or having reason to believe that "such imputation will harm, the reputation of such person, "is said, except in the cases hereinafter excepted, to defame "that person." By s. 500, whoever defames another is liable to be imprisoned for two years. This definition goes infinitely beyond the law of England, for it applies to words as well as to writings, and the explanation already quoted, while in words it narrows it, really sets its extent in the most striking colours. "No imputation is said to harm a person's reputation unless "that imputation directly or indirectly, in the estimation of "others, lowers the moral or intellectual character of that "person, or lowers the character of that person in respect of "his caste or calling, or lowers the credit of that person, or "causes it to be believed that the body of that person is in "a loathsome state, or in a state generally considered as "disgraceful."

If strictly carried out, this would subject a man to two years' imprisonment for telling his wife that he considered someone whom they had met at dinner no better than a fool, and they would subject to the same punishment every lady who indulged in the least morsel of scandal tending to lower the moral character of any person of her acquaintance. No one of the ten exceptions would have any application to such a case. They are:—(1) Imputations both true and such that their publication is for the public good; (2) opinions as to the public conduct of public servants; (3) imputations on

[1] S. 499.

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the conduct of any person as to public questions; (4) true reports of legal proceedings; (5) criticisms made in good faith on legal proceedings and the conduct of those concerned in them; (6) criticisms on public performances, or matters submitted to public criticism; (7) answers by an inferior to a superior; (8) accusations made to a superior in good faith; (9) imputations made in good faith for the protection of the character of the defamer; (10) cautions given in good faith to a party interested, for his protection or the public good. None of these exceptions protect a man who says carelessly, "She is a silly woman," "He is a pompous old fool."

Practically, I do not think these sections have had much effect. Conversation in India is certainly not more insipid, as far as my experience goes, than in other parts of the world, and people talk scandal much as they do elsewhere.

The last [1] chapter but one of the Penal Code is extremely curious. It is headed "Of Criminal Intimidation, Insult, "and Annoyance." It fills up what no doubt was till lately a noticeable gap in the law of England—the absence of any provision for the punishment of threats of injury as distinguished from actual injuries. This gap is filled up in the most complete way by s. 503, which defines criminal intimidation as threatening another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom he is interested, with intent to cause alarm to the person threatened, or to cause him to do any act which he is not legally bound to do, or to omit any act which he is legally entitled to do. The [2] offence is punishable with two years' imprisonment, or, if the threat is to cause death or grievous hurt, and in some other instances, with imprisonment up to seven years. This provision might be carried to great lengths. It has been copied or imitated to a certain extent in the "Conspiracy and Protection of "Property Act, 1875" (38 & 39 Vic. c. 86, s. 7), which punishes every person who intimidates any other person with a view to compel him to abstain from doing or to do any act which the person intimidated has a legal right to do or abstain from doing. The real meaning of this enactment

[1] Chapter xxii. ss. 503-510.

[2] S. 506.

was to prevent workmen on strike from forcing others to join them by annoying them, but in deference to a rather silly cry against "class legislation"—silly, because the whole act obviously refers to workmen as a class—the section was expressed in such terms that, if a brother told his sister that if she married a man whom he did not like they would never speak to her again, he would probably be within the act.

Section 508 is perhaps the most singular article in the whole of the Indian Penal Code. It punishes with imprisonment up to a year every one who tries to intimidate another by inducing him to believe that by some act of the offender he will become an object of divine displeasure unless he acts as the offender wishes. The practice at which this section is levelled is that of "sitting dhurna," the nature of which is that the person who "sits dhurna" sits outside his enemy's door till he, the sitter, is starved to death, the result of which is supposed to be to involve a curse upon the hard-hearted enemy. A similar practice is described in Beaufort's *Digest*—I know not whether it still exists or not—as prevailing amongst the Brahmins. They used to injure themselves in various ways, in order to bring on their enemies the guilt of having injured a Brahmin. [1] "The devices occasionally put in "practice under such circumstances by these Brahmins are—"lacerating their own bodies either more or less slightly with "knives or razors; threatening to swallow, or sometimes "actually swallowing, poison or some powder they declare to "be such; or constructing a circular inclosure called a kurh, "in which they raise a pile of wood or other combustibles, "and betaking themselves to fasting, real or pretended, place "within the area of the kurh an old woman with a view to "sacrifice her by setting fire to the kurh on the approach of "any person to serve them with any process, or to exercise "coercion over them on the part of Government or its "delegates."

Such are the provisions of the Indian Penal Code. Since its enactment it has been substantially the only body of criminal law in force in India, though a few other statutes

[1] Beaufort, part ii. p. 780.

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contain penal provisions on various special subjects. It has superseded the old Mohammedan law; the regulations which qualified it; the Bombay Code; the Punjab Code; various other orders applicable to non-regulation districts in different parts of India; and the criminal law of England as administered in the Presidency towns, and to Europeans in other parts of the country by the old Supreme Courts.

I have already expressed my opinion that the Indian Penal Code has been triumphantly successful. The rigorous administration of justice of which it forms an essential part has beaten down crime throughout the whole of India to such an extent that the greater part of that vast country would compare favourably, as far as the absence of crime goes, with any part of the United Kingdom except, perhaps, Ireland, in quiet times and apart from political and agrarian offences. Apart from this it has met with another kind of success. Till I had been in India I could not have believed it to be possible that so extensive a body of law could be made so generally known to all whom it concerned in its minutest details. I do not believe that any English lawyer or judge has anything like so accurate and comprehensive and distinct a knowledge of the criminal law of England as average Indian civilians have of the Penal Code. It is hardly an exaggeration to say that they know it by heart. Nor has all the ingenuity of commentators been able to introduce any serious difficulty into the subject. After twenty years' use it is still true that any one who wants to know what the criminal law of India is has only to read the Penal Code with a common use of memory and attention.

One further remark concludes what I have to say on the subject. Speaking with singularly little qualification, the Penal Code is simply the law of England freed from technicalities, and systematically arranged according to principles of arrangement so simple and obvious that they cannot fail to suggest themselves to any one who considers the subject. The defects of the Code certainly lie on the side rather of excess than of defect. Yet the system from which it was adapted was originally crude and defective in the highest conceivable degree, consisting of little more than a few undefined names for common offences. The history of its gradual development

I have related at length and in detail. The Indian Penal Code seems to me to supply a demonstration of the extraordinary fulness, richness, and completeness of the system from which it was framed. The adaptation of the system to the wants of two countries, so dissimilar in all ways as England and the collection of nations and races which are included under the name of India, is also a proof that the resemblances between men are far greater than their differences.

From the Penal Code I turn to the Code of Criminal Procedure, by which the Penal Code is enforced. I have already described the principal steps by which courts of justice, more or less modelled upon those of England, were introduced into India. I have, however, mentioned only the principal and leading points in what was in reality a long and elaborate process. All through the period of the Company's existence, knowledge as to the proper mode of administering justice amongst the natives was being carefully and very gradually acquired by experience. Innumerable experiments were tried with various degrees of success, and a great deal of detailed legislation took place in consequence. To go into all these matters would require a separate work.

The system established throughout India was not, and to this day is not, entirely uniform, though it has a strong tendency to become uniform. The principal difference was between what were called the regulation and the non-regulation systems. This was popularly supposed to be equivalent to a distinction between technicality and its absence, strict propriety and rough efficiency. As far as I could learn or judge, these notions were as delusive and ill-founded as somewhat similar notions derived from the supposed opposition between law and equity. The great difference between the [1] regulation and non-regulation systems was, that the

[1] The regulation provinces were those in which the Bengal, Madras, or Bombay regulations were, and to some extent still are, in force, viz. Bengal, the North-West Provinces, Madras, and Bombay. There are parts, however, of each of these provinces into which the regulations have never been introduced. The non-regulation provinces were those into which the regulations never were introduced, viz. the Punjab, Oudh, the Central Provinces, and Burmah. I think Sindh was also a non-regulation province. I speak in the past tense, because the term has really been obsolete since a single legislature

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non-regulation system was the cheaper of the two, and required fewer officers. In the regulation districts there were separate sessions judges. In the non-regulation provinces the commissioners, who had also important executive duties, acted also as sessions judges, and the deputy-commissioners, who answered to the magistrates of the district in regulation provinces, had a greater amount of judicial power. To some small extent this difference still exists, but it has been almost entirely removed.

When the Penal Code was passed into law it was felt that a Code of Criminal Procedure would be a natural, not to say necessary, addition to it. Such a Code was accordingly prepared and passed into law as Act XXV. of 1861. It brought together a large part of the laws and regulations then in force, more or less in the manner of an English consolidation act; but it was incomplete, and was also obscure and confused in its arrangement. During my tenure of office as Legal Member of Council, this Code was re-drawn, re-arranged, and made to include a considerable number of subjects which, up to that time, had been omitted from it or provided for by other enactments. The new Code became law as Act X. of 1872. The only considerable omission from it of which I am aware was that it did not apply to the procedure of the High Courts. In the present year (1882) a third edition of the Code of Criminal Procedure has become law as Act X. of 1882. It is to come into force on the 1st of January, 1883. It differs from the act of 1872 principally in the circumstance that it does apply to the High Courts as well as the other criminal courts in India, and that [1] certain alterations have been made in the arrangement of the act of 1872, besides some few alterations in its substance.

The first point necessary to be understood with respect to Indian criminal procedure in the present day is the territorial distribution of the country. British India is composed

was provided for all India, first in 1833, and more effectually in 1861. The distinguishing mark of a non-regulation province or district is the use of the name "Deputy-Commissioner" for "Magistrate of the District."

[1] I do not consider these alterations as improvements. One or two of them are noticed below.

of [1] ten provinces under separate local Governments. In each of four of these—Bengal, Madras, Bombay, and the North-West Provinces—there is a High Court, the High Courts being situated at Calcutta, Madras, Bombay, and Allahabad (whither it was removed from Agra), respectively. In the Punjab there is a Chief Court. In Burmah, the Recorder of Rangoon is, for some purposes, the High Court, and the Judicial Commissioner occupies the same position for other purposes. In the other provinces Judicial Commissioners, or other officers, discharge similar functions. [2] Each province is subdivided into sessions divisions, in each of which there is at least one sessions judge. There may be additional sessions judges, joint sessions judges, and assistant sessions judges, where the state of business requires it. The sessions division must consist of one or more districts (the old zillahs), and they may or may not be subdivided into subdivisions. [3] In each district there is a staff of magistrates, the principal magistrate being called the district magistrate. All magistrates are divided into three classes. The Governments have power to vary and alter the limits of these districts and divisions as they think proper, and also to vary the ordinary duties of the magistrates. Each of these has jurisdiction, speaking generally, over the district to which he belongs, but [4] elaborate precautions are taken to prevent any inconvenience which might arise from this rule. These precautions are adapted to a great extent from those which have been taken in England for the purpose of getting rid of the difficulties connected with the law of venue. The relation in which these courts stand to each other will appear from the

[1] The Provinces are as follows :—

1. Madras	Under Governors.
2. Bombay	
3. Bengal	Under Lieutenant-Governors.
4. North-West Provinces (with Oudh)	
5. Punjab	
6. Central Provinces	Under Chief Commissioners.
7. Burmah	
8. Scinde	
9. Assam	Under a Commissioner.
10. Coorg	

I believe there are some other Chief Commissionerships, smaller and of less importance—*e.g.* at Ajmere.

[2] C.C.P. ss. 7 and 9. [3] C.C.P. ss. 10-16. [4] C.C.P. ss. 177-190.

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account given of the proceedings in the cases which come before them; but before entering upon that subject it is necessary to explain a matter which is not included in the Code of Criminal Procedure, because it is settled by Act of Parliament. This is the constitution of the High Courts. These courts were established by the High Courts Act (24 & 25 Vic. c. 104), passed in 1861. This act abolished the Supreme Courts and the Sudder Courts already described, and substituted for them the High Courts. They are composed partly of English barristers and partly of civilians and pleaders. They are courts of appeal from all the civil and criminal courts under their jurisdiction, besides exercising original jurisdiction, both civil and criminal, within the limits in which such jurisdiction was formerly exercised by the Supreme Courts. Three High Courts for Calcutta, Madras, and Bombay replaced the Supreme and Sudder Courts previously established in those cities respectively, with original jurisdiction within the limits of the three Presidency towns. A fourth High Court was established at Agra (it was soon afterwards removed to Allahabad) for the North-West Provinces. The High Courts preserved all the powers which had been conferred upon the Supreme Courts, and though the Penal Code applied within the limits of their local original jurisdiction and to European British subjects throughout India, the English procedure was still maintained in respect of them, subject to some modifications provided by certain Indian acts. Under the new Code of Criminal Procedure, each of the Presidency towns forms a district, and each of the three High Courts in them is the Sessions Court for that district. The High Court of Allahabad is not a court of sessions, but has, like the other High Courts, jurisdiction over European British subjects within its jurisdiction to the extent to be hereafter mentioned.

There are many parts of India over which the authority of these courts does not extend, but courts which for many purposes have a similar character are established by the legislative authority of the Government of India in each of the provinces. Thus in the Punjab there is a Chief Court. In the other provinces there are Judicial Commissioners.

All these High and Chief Courts exercise functions, in the administration of both civil and criminal justice, to which we have nothing analogous in England. Besides the powers of appeal and reference to be described hereafter, which are exercised according to legal rules, and generally upon the application of parties interested, they have a power of general superintendence and inspection over the inferior courts which is possessed by no authority in England over any court whatever. Every act of every court in India is elaborately recorded in writing, and a system is established by which all judicial officers send up at fixed periods returns to their superiors, showing precisely how they have been employed during the past period (generally, I believe, a month); how many cases they have tried and with what results; and a variety of other matters. At all the High Courts, and courts discharging the functions of a High Court, are officers whose business it is to examine these returns and to bring to the notice of the judge who has to discharge the duty of superintendence anything unusual or which appears to require notice. The judge of the High or Chief Court thereupon causes a letter to be written to the judge of the inferior court calling for explanations. For instance, if too small a number of cases seems to have been disposed of, the reason will be asked, and the reply may probably be that some of them were unusually long or difficult.

The check on judicial neglect or misbehaviour, which is secured in England by the interest taken by the public in the administration of justice and by the comments of the Press, is supplied in India partly by the power of appeal in the hands of the parties, and partly by the powers of revision vested in the High Courts.

I now return to the powers of the courts.

[1] The High Courts may try any case and pass any sentence authorised by law. The sessions judges, and additional and joint sessions judges may do the same, but if they pass sentence of death it is subject to confirmation by the High Court. The assistant sessions judge may try any case and pass any sentence up to seven years' imprisonment, but his

[1] C.C.P. ss. 29 and 31.

CH. XXXIII. sentences require the confirmation of the sessions judge if they exceed three years' imprisonment.

[1] The Courts of Magistrates may try those cases only which they are authorised to try by a schedule annexed to the Code of Criminal Procedure which goes through every section of the Penal Code, stating with respect to every one whether persons accused of it may be arrested or not without warrant, whether they are entitled to be bailed, and by what courts they may be tried,—a very laborious, I will not say a needlessly laborious, way of giving the information. With regard to offences under any law other than the Penal Code, it is provided that magistrates of the first class are not to try offences punishable with imprisonment for more than seven years, second-class magistrates are not to try offences punishable with imprisonment for more than three years, and third-class magistrates are not to try offences punishable with imprisonment for more than one year. If it is added that magistrates cannot try offences punishable with death or penal servitude, this rule indicates pretty fairly, though it does not describe with complete accuracy, the nature of the provisions of the schedule as to offences under the Penal Code. The magistrates, however, are not permitted to pass the maximum sentences authorised by the Penal Code for the offences which they are allowed to try. [2] They are restricted as follows: First-class magistrates may sentence up to two years' imprisonment, a fine of R1,000, or whipping. Second-class magistrates to imprisonment up to six months, and fine up to R200, and (if specially authorised) whipping. Third-class magistrates to imprisonment up to one month, and fine up to R50. [3] The Deputy Commissioners in the non-regulation provinces may be authorised to try all offences not capital, and to sentence up to seven years' imprisonment.

Apart from the differences in their judicial powers, the magistrates of the three classes mentioned possess very different powers in respect of the apprehension of offenders and the various steps to be taken in preparing cases for trial. These powers are scheduled in a characteristically elaborate manner. A magistrate of the third class has eleven ordinary

[1] C.C.P. s. 29. [2] C.C.P. s. 32. [3] C.C.P. ss. 30 and 34.

powers. A magistrate of the second class has all these eleven and one more. A magistrate of the first class has all the twelve powers of a magistrate of the second class, and nine additional powers. A subdivisional magistrate has the twenty-one powers of a first-class magistrate, and thirteen others. A district magistrate has the thirty-four powers of a subdivisional magistrate, and ten more of his own, making forty-four.

In addition to these, a magistrate of the first class may be invested with twelve more powers by the local government and six by the district magistrate. A magistrate of the second class may be invested with eight powers by the local government and five by the district magistrate. A magistrate of the third class may be invested with six powers by the local government and five by the district magistrate, and a subdivisional magistrate may be invested by the local government with one additional power. The minute precision of all this seems almost grotesque; but in truth it is of the greatest importance to define with the utmost precision the powers of men many of whom are beginners and are learning by practice the details of a system the importance of which is equalled only by its elaboration. An instance or two of these powers will illustrate this. No magistrate under the first class can bind a man over to keep the peace. None but the magistrate of the district can issue a search-warrant directed to the postal or telegraph authorities.

Such are the Courts and Officers by whom the administration of criminal justice in India is managed. I proceed to describe the manner in which offenders are brought to justice.

The right to prosecute for criminal offences is not, properly speaking, left in India, as it is in England, in the hands of private persons. A person who wishes to prosecute another may complain to a magistrate, but there is no body like a grand jury before which he can send up a bill, and if he does complain and his complaint is admitted [1] he is not entitled without the magistrate's permission, to conduct the prosecution. The magistrate may appoint any one he pleases,

[1] C.C.P. ss. 492-495.

CH. XXXIII. except a police officer under a certain rank, to act as counsel for the Crown, and the Governor-General in Council and local governments may appoint public prosecutors to act in such districts and cases as they think proper. All cases tried at a court of sessions must be conducted by a public prosecutor, and if a private prosecutor instructs a pleader, the pleader must act under the direction of the public prosecutor. The public prosecutor has, however, no other duties than those of an ordinary counsel for the Crown. He has nothing to do with getting up the case.

Public prosecutors were not mentioned in the Code of 1861. They were mentioned, but no more, in the Code of 1872. The powers given to them in the Code of 1882 might, I should suppose, be liable to abuse, for it is easy to conceive cases in which it would not be the obvious interest of the Government to prosecute vigorously. Suppose, *e.g.*, that witnesses on whose testimony a person had been convicted, say of murder, were prosecuted for giving false evidence.

[1]There are some cases in which a prosecution cannot be instituted without previous sanction. Thus, offences against public servants cannot be prosecuted without the sanction of the public servant concerned or his superior officer; false evidence (in many cases) without the sanction of the court before which it is given; offences against the State without the sanction of the Governor-General in Council or the local government; charges against judges, and public servants as such, without the sanction of the government to which they are subordinate; and cases of breach of contract, defamation, or adultery, except upon the complaint of the injured party.

The only matter connected with the administration of criminal justice not dealt with in the Code of Criminal Procedure is the organisation of the police. This was omitted from the Code of 1872 from the fear of making it too cumbersome, and the same view appears to have been taken in 1882. It may be stated generally, however, that the whole or nearly the whole of India is now divided into police districts, in each of which is a station under the charge of an inferior

[1] C.C.P. s. 195.

officer, the general arrangements of the system resembling in most respects those of the English police. The superior officers of police are not part of the staff of the magistrates of the districts. They form a separate branch of the service, and are in many cases military officers.

The smallness of the number of the European magistrates makes the police more important and relatively far more powerful in India than they are in England, and I was led by many circumstances to the opinion that no part of the institutions by which India is governed required more careful watching in order to prevent what is designed for the protection of the people from becoming a means of petty oppression. The Code of Criminal Procedure is full of provisions intended to guard against this and at the same time to make the police efficient for their purpose.

There are four separate steps, each of which may form the commencement of criminal proceedings. [1] They are—(1) by arrest without warrant; (2) a police investigation; (3) a complaint before a magistrate which may result in a summons or a warrant; (4) the magistrate may also proceed upon his own knowledge or suspicion that an offence has been committed.

The schedule, to which I have already referred, states with respect to every offence against the Penal Code whether or not the offender may be arrested without warrant. The offences for which a person may be arrested without warrant are called by the somewhat ill-chosen name of cognizable offences. [2] A police constable may arrest without warrant any person who has been concerned, or whom he suspects on reasonable grounds of having been concerned, in a cognizable offence, and some other persons. [3] A private person may arrest without warrant any one who in his view commits a cognizable offence which is also not bailable. [4] As some offences are cognizable and also bailable, this seems likely to introduce some confusion. Practically, however, such arrests would be made only in cases of gross outrages against person or property.

[1] C.C.P. s. 191, c. [2] C.C.P. s. 54. [3] C.C.P. s. 59.
[4] *E.g.* offences against I.P.C. s. 269.

[1] A magistrate may arrest for any offence committed in his presence, or he may direct such arrest to be made in his presence. [2] He may take the same course as to any person against whom he might issue a warrant. Every particular connected with this subject is provided for with the utmost minuteness in a long [3] series of sections. Perhaps [4] the most important of them provides that no police officer shall detain any person in custody for more than twenty-four hours before taking him before a magistrate.

The second way in which proceedings may begin is by a police investigation. [5] This process is unknown in England. It is not altogether unlike part of the French procedure, but it is still more like what would exist in England if the course usually taken in fact by the police were to be taken under a legal sanction, the police being invested by law with special powers to take evidence for their own information and guidance. Every step to be taken by the police in regard to investigations is laid down with the most minute detail in the sections of the Code of Criminal Procedure last referred to. It is impossible to abridge, and it would be tedious to extract them. The general effect of them is as follows: The officer in charge of a station may on his own responsibility investigate cognizable cases, but not non-cognizable cases unless by the order of a magistrate of the first or second class. The investigation may be made when he has reason to suspect that an offence has been committed. The officer who makes it has power to require the attendance of witnesses and to question them, and they are bound to answer him truly, which in case of refusal or falsehood brings them under the provisions of the Penal Code already referred to. The police are to hold out no inducements to suspected persons to confess, but are not to [6] "prevent by any caution or otherwise any "person from making any statement he may be disposed to "make of his own free will." The police may also make searches.

The abuse of these powers is guarded against most elaborately. When an investigation is begun the officer who

[1] C.C.P. s. 64. [2] C.C.P. s. 65. [3] C.C.P. ss. 54-67.
[4] C.C.P. s. 61. [5] C.C.P. ss. 154-172. [6] S. 163.

undertakes it is to "forthwith send a report of the same to "a magistrate." He is to enter in a diary every step he takes, and a note of all the information he receives, [1] but such notes are in no case to be signed by the informant or used as evidence, their object being to enable the magistrate and the superior officers of police to check the proceedings of the police constables. [2] If any person makes a confession, a magistrate not being an officer of police may record it.

[3] If the officer in charge of the police station thinks there is sufficient evidence, he may take the accused person into custody (if he has not been previously arrested) and bring him before a magistrate. [4] If he has been already arrested, and if upon the investigation it appears to the police officer that there is not sufficient evidence to forward him to a magistrate, the police officer may discharge him on bail, to appear before the magistrate when required.

[5] A person may also be brought before a magistrate upon a complaint made which answers to an information in England. Upon such a complaint a summons or a warrant may issue, according to the provisions of the schedule of offences, which particularly prescribes a warrant in more serious and a summons in less serious cases. The magistrate however is never bound to issue a warrant if he thinks a summons will be sufficient. [6] If a person against whom a warrant has been issued absconds, the magistrate may issue a proclamation requiring him to come in within thirty days, failing which his property may be attached.

When by any of these means the prisoner is brought before the magistrate, the magistrate proceeds to hear evidence.

Most careful provisions are contained in the Code on the manner in which this is to be done in all inquiries and trials. They differ, in some particulars which I need not notice, according to the rank of the judge or magistrate and the character of the court, but, speaking generally, [7] they provide that in all trials and inquiries the judge or magistrate shall take down with his own hand the evidence of every

[1] S. 162. [2] S. 164. [3] S. 170. [4] S. 169.
[5] C.C.P. ss. 200-205. [6] C.C.P. ss. 87-89. [7] C.C.P. ss. 353-365.

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witness in the form of a narrative, and shall sign it when taken down, and that the evidence so taken down shall form part of the record. If the magistrate or judge does not take down the evidence in his own hand (which usually happens if it is not given in his own language), it must be taken down in his presence and hearing, and he must, as the evidence is given, make a memorandum of the substance of it. The evidence is also to be read over to the witness in a language which he understands, and if he wishes to make any correction, the judge may either correct it accordingly or note the fact that the witness desired to correct it. [1] The judge is also to make such remarks as he thinks fit as to the demeanour of the witness.

I have often heard officers complain of the stiffness of the Code of Criminal Procedure and of its not being suitable to the purposes of rough and wild districts; and in such cases I have invariably made the following remarks,—first that the complainants, on being asked which parts of the Code they objected to, always referred to the provisions as to taking evidence in their own hands and signing it; next that these complaints were usually made by the less energetic officers. [2] In former times the evidence of witnesses in criminal and other cases was not taken by magistrates, though it was taken in their presence. The magistrate might hear what the witness said, but three or four *mohurrirs* (native clerks) would take down simultaneously the evidence of as many witnesses, and the notes of the *mohurrirs* put together made up the record. Of course this saved the magistrates infinite trouble, and enabled them to get through an immense number of trials, but it was practically a denial of justice. A careful record of the evidence by the person responsible for acting upon it is an absolutely indispensable security for the justice of the decision, and it seems to me that if a trial takes place in a wild district, and amongst rough, uncivilized people, the necessity for such a record is greater than it would be under other circumstances, for the chance of injustice is greater.

[1] C.C.P. s. 363.
[2] There is a curious and vivid account of this in Sir John Shore's *Notes*.

At all inquiries or trials [1] "for the purpose of enabling the "accused to explain any circumstances appearing in the "evidence against him, the court may at any stage of the "inquiry or trial, without previously warning the accused," question him. The court must, "for the purpose aforesaid, "question him generally on the case after the witnesses have "been examined." [2] The examination must (except in the High Courts and the Chief Court of the Punjab) be recorded in question and answer, and read over to the accused, who may explain or add to his answers. His examination is to be signed by the magistrate or judge, who, if he does not actually record the examination, is at all events to take a memorandum of it as it proceeds.

The words specifying the purpose for which questions are to be asked were not in the Code of 1872, which authorised the examination of the accused without assigning any reason for it. Perhaps the expression was introduced in the Code of 1882 in order to soften what many people consider a harsh proceeding. For my own part I regret the alteration. It will either be inoperative or most embarrassing, and it looks like an apology for what does not require one. It is, however, hypocritical, for the Code contains no provision as to what is to happen if the questioning does not conform to the directions of the Code, and it specifically enacts that "the "court and jury (if any) may draw such inference from" the refusal of the accused to answer or from his answers as they please. Besides, in practice, every question any one could want to ask might be justified by the terms of the section; *e.g.*—"The witnesses say they saw you at this place. "Were you there or not, and, if not, where were you?" The words thus make hardly any difference.

The effect of the evidence given before the magistrate may differ according to the nature of the offence imputed.

The case may be one which the magistrate is competent to dispose of himself, and which he thinks would be sufficiently punished on conviction by the exercise of his judicial powers. In this event he may proceed to try the case. The trial of

[1] C.C.P. s. 342.

[2] C.C.P. s. 364.

summons cases and warrant cases is provided for in [1] separate chapters of the Code, but the only differences between them are, that a formal charge is made in warrant cases and not in summons cases, and that in summons cases but not in warrant cases if the magistrate regards the charge as frivolous and vexatious he has power, not only to dismiss it, but to award compensation up to R50 against the person by whom it is made. The trial itself takes the same course as an English trial. The case is opened, the witnesses for the prosecution are heard, the prisoner examined as above mentioned. He is then heard in his defence. His witnesses are called, and the prosecutor replies, after which the magistrate acquits or convicts and sentences.

In [2] some cases of minor importance the magistrate of the district is allowed to try in what is called a summary way. In such cases the evidence is not recorded, but a short form is filled up, similar to those in use in small cases in Ireland. Sentence may not be passed of more than three months' imprisonment, accompanied, if the law permits it, by fine or whipping. [3] If the sentence is simple, there is no appeal. If it is compound, there is an appeal, and, in order that there may be something to appeal from, a judgment, "embodying "the substance of the evidence" and also certain particulars specified, must in such cases be recorded before sentence is passed.

[4] The magistrate, however, may not be competent to try the charge brought against the accused, or may consider that the case ought to be sent for trial before the court of sessions. If so, he hears the evidence on both sides, examines the accused, and either dismisses him or commits him for trial.

I pass over many details provided for in the Code as to the manner in which the prisoner's witnesses are to be summoned, and other matters of no general interest. The only point which I need notice is that in India there are no grand juries. There used to be such bodies in the High Courts till 1865, when they were abolished by an act which was introduced by Sir Henry Maine. The committing magistrate is now the

[1] Summons cases, ch. xx. ss. 241-250; warrant cases, ch. xxi. ss. 251-259.
[2] C.C.P. ss. 260-265. [3] C.C.P. s. 264. [4] C.C.P. ss. 206-220.

accuser, and it is his duty to draw and forward the charge, which answers to our indictment. [1] The law relating to charges is laid down at considerable length in the Code. Its provisions are intended to provide that the charge shall give the accused full notice of the offence charged against him, but that the only result of any defect in the charge shall be an amendment in terms as to delay, or a new trial if the accused seems to have been misled.

Various matters as to the joinder of different charges, variances between the charge and the evidence, and the charging of more persons than one, are dealt with, which I pass over as too detailed to be here noticed. The following is a specimen taken from the schedule of forms of an Indian indictment for high treason:—

(*a*) "I" (name and office of magistrate) "hereby charge you" (name of accused person) "as follows—

(*b*) "That you on or about the day of , at , waged war against Her Majesty the Queen, Empress of India, and thereby committed an offence punishable under Section 121 of the Indian Penal Code, and within the cognizance of the Court of Session.

(*c*) "And I hereby direct you to be tried by the said Court on the said charge."

When committed, the prisoner is tried by the High Court if the committal is by a Presidency magistrate, or by the Court of Session as the case may be. The trial must be either by jury or with the aid of assessors.

Much the commoner case of the two is trial with the aid of assessors. I am unable to say how matters stand at present, but when I left India in 1872 trial by jury was unknown, except in the Presidency towns, in a few districts, principally in Bengal, in which it applied only to minor cases, and in the case of European British subjects. The local governments may introduce it in such districts and with regard to such classes of cases as they think fit. [2] In both cases the trial follows the same course as in England. The prisoner pleads guilty or not guilty, or if he refuses to plead

[1] Ss. 221-240. I drew these sections in the Code of 1872. They are re-enacted with little alteration.

[2] C.C.P. ss. 266-307.

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the court proceeds without a plea—a more rational course than entering a plea of not guilty. [1] He may also, I suppose, plead that he has been previously convicted or acquitted, in terms similar to those in force in England as to pleas of *autrefois acquit* and *convict*. The prosecutor opens his case and calls his witnesses. The prisoner is examined. If he does not call witnesses, the prosecutor sums up. The prisoner makes his defence and calls his witnesses, and the prosecutor replies. If there is a jury the judge sums up. If there are assessors he may sum up, and must require the opinion of the assessors, which is recorded, but does not bind the judge. There are two assessors.

[2] The number of the jury is in the High Courts nine, and in the Courts of Session where there are juries, three, five, seven, or nine, as the local government may direct. Eight peremptory challenges are allowed to both the prosecutor and the prisoner, and any number for cause. [3] The functions of the judge and jury respectively are the same as in England, but are expressed with more emphasis than would be considered right in England. "It is the duty of the jury "(*a*) to decide which view of the facts is true, and then to "return the verdict which under such view ought, according "to the direction of the judge, to be returned."

ILLUSTRATION.

A. is tried for the murder of B.

It is the duty of the judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what view of the facts A. ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the judge, whether that direction is right or wrong, and whether they do or do not agree with it.

[4] If the jury are unanimous in the High Court, their verdict must be taken. If six of them agree, and the judge agrees with the six, the judge must give judgment accordingly. If the judge disagrees with the six, or if a

[1] C.C.P. s. 403. This section seems misplaced. It is put in a chapter by itself after Execution and Pardon. There ought to be a chapter, or at least provisions, as to Pleas following the provisions as to Charges. S. 403 says that persons previously acquitted or convicted are not to be tried again, but it does not say, as it ought, how this defence is to be made.

[2] C.C.P. ss. 274-283. [3] C.C.P. s. 299. [4] C.C.P. ss. 303-305.

majority of less than six agree, the jury must be discharged. [1] If in the sessions court the judge "does not "think it necessary to express disagreement with the verdict "of the jurors, or of a majority of the jurors, he" must "give "judgment accordingly." If the judge "disagrees with the "verdict of the jurors, or of a majority of the jurors, so "completely that he thinks it necessary for the ends of "justice to submit the case to the High Court," he may do so, recording the grounds of his opinion, whether the verdict with which he disagrees is one of acquittal or conviction. The effect of such a submission is the same as that of an appeal.

The next step in the proceeding is the judgment. [2] The judgment must be written by the presiding officer of the court, either in the language of the court or in English. It must state the reasons for the decision. If the offence is capital and any sentence other than death is passed, the judgment must state the reason why sentence of death was not passed. The prisoner is to have a copy, in his own language, of the judgment, and in trials by jury in courts of session a copy of the heads of the judge's charge.

These provisions for recording the evidence given before the courts, and their reasons for their decision, are made with a view to the elaborate system of proceedings by way of appeal, which forms perhaps the most characteristic part of Indian criminal procedure.

The first proceeding of the sort is [3] confirmation. This takes place in two cases only,—namely, first, when sentence of death is passed by a sessions court, and next when an assistant sessions judge passes a sentence of more than three years' imprisonment. In the first case the sentence has to be confirmed by the High Court. In the second, by the sessions judge. The confirming authority may make further inquiry, and may either confirm or alter the sentence, or acquit the person convicted.

The [4] system of appeals, properly so called, is next to be considered. It is extremely elaborate, and applies to the

[1] C.C.P. s. 307.
[2] C.C.P. ss. 366-373.
[3] C.C.P. ss. 374-380.
[4] C.C.P. ss. 404-431.

CH. XXXIII. sentences of all the courts except the High Courts. This is best shown by the following table :—

Appeals lie from	To
Magistrates of second or third classs .	= District magistrate, or a first-class magistrate, subordinate to and authorised by him.
Assistant sessions judge, district magistrate, or first-class magistrate.	= Court of Session.
Sessions judge, or additional or joint sessions judge	= High Court.
Presidency magistrate	= High Court.

The appeal, except in cases tried by jury, may be either on fact or on law. In cases tried by a jury, on law only. The local government may direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court, but in all other cases the appeal is given only to a person convicted.

The Court of Appeal may reject the appeal in a summary way, if satisfied upon perusing it that there is no ground to interfere. This course is rendered necessary by the unlimited facilities given for appealing, for the appeal consists only of a petition in writing, which may, and frequently does, state no reason at all beyond some vague complaint that the sentence is wicked and unjust.

If the repeal is not thus rejected it is argued. The court may order further inquiry, and may in the case of an appeal from an acquittal confirm the acquittal, order a new trial, or convict and sentence the person acquitted. In an appeal from a conviction it may either maintain, reverse, or alter the finding and sentence or either of them, but not so as to enhance the sentence. Power to enhance was given to the Courts of Appeal in 1872.

[1] Reference and revision are proceedings confined to the High Courts. Reference is a process copied from the English procedure as to reserving cases for the Court for Crown Cases Reserved. A judge of the High Court may refer any

[1] C.C.P. ss. 432-434.

question of law to a bench of the High Court, and a Presidency magistrate may do the same.

[1] The system of revision I have already described to a certain extent. The High Court may call for the record of any case which it chooses to call for. It may go into any matter, and hear any parties, and order any further inquiry it thinks fit, and it may not only exercise upon revision all the powers of a Court of Appeal, but may [2] enhance sentences, though it may not reverse acquittals. [3] It may, however, order a commitment for trial if it thinks a case has been improperly dismissed.

[4] Besides these general powers of revision, the High Courts have power in various cases to transfer cases for trial from court to court, or to call them up for trial before themselves. The Governor-General of India in Council has a similar power, and so have district and subdivisional magistrates as regards cases which come before their subordinates.

Hitherto I have referred chiefly to proceedings against natives. A distinction however is made in the Code between proceedings against natives of India and proceedings against European British subjects. As I have already pointed out, European British subjects till the year 1872 could be prosecuted only in a High Court, except for very trivial offences. In the Code of 1872 this privilege was considerably abridged, and provisions were enacted which are in substance re-enacted by the Code of 1882. The important part of the [5] provisions in question is that charges against European British subjects can be inquired into and tried only by justices of the peace being also magistrates of the first class and European British subjects, except in the Presidency towns, where native justices of the peace may perform those duties.

European British subjects can be sentenced by magistrates competent to try them only to imprisonment up to three months and fine to a thousand rupees, or both. If a heavier sentence seems to be required, they must be tried before a sessions judge being himself a European British subject. The

[1] C.C.P. ss. 435-424. [2] C.C.P. s. 439. [3] C.C.P. s. 436.
[4] C.C.P. ss. 526-528. [5] C.C.P. ss. 443-459.

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sessions judge may try the European British subject for any offence not punishable with death or transportation for life, but he cannot sentence him to more than one year's imprisoment and fine, in reference to which it must be remembered that imprisonment is in India a far more serious punishment to a European than it is to a native, or to a European in Europe. It is probable that a year's imprisonment in India is as heavy a sentence as two years would be in England, and two years is the limit in England of the kind of imprisonment awarded here. If the sessions judge considers this an inadequate punishment, he must transfer the case to the High Court. The High Courts, the Chief Court of the Punjab, and the Recorder of Rangoon, can try European British subjects for any crime, and pass upon them any sentence sanctioned by law.

These are the principal provisions of the Code of Criminal Procedure; but I have by no means exhausted its contents. It deals with a great variety of subjects, some of which are, though others are not, closely connected with criminal proceedings. Of the former class I may mention [1] provisions as to the examination of witnesses on commission; and [2] very careful and elaborate provisions as to the cases in which irregularities shall and shall not vitiate the procedure in which they occur.

Of matters not obviously connected with criminal procedure dealt with by the Code, I may refer to [3] part iv., "Of the "Prevention of Offences." This, instead of being treated as it was in the Code of 1872 as a separate matter, is in the Code of 1882 awkwardly interposed between provisions as to summonses, warrants, and other processes to compel the appearance of suspected persons, and the powers of the police to investigate such offences. A further defect in the arrangement of this matter is that the law relating to the making of orders for the maintenance of wives and children, which ought to be put in this part as it is a mode of preventing vagrancy, or at least of preventing its consequences, is put [4] near the end of the Code, between prosecutions directed by

[1] C.C.P. ss. 503-508.
[2] C.C.P. ss. 529-538.
[3] C.C.P. ss. 106-153.
[4] C.C.P. ch. xxxvi. ss. 488-490.

certain courts in some special cases, and a chapter relating to proceedings in the nature of a Habeas Corpus. A code ought to be so arranged that it may be read through consecutively, like any other book, without any interruption in the natural order of the subject.

The contents of the part relating to the prevention of offences are highly important, though their place is needlessly altered from the one assigned to them in the Code of 1872. They comprise the following subjects: Taking security for the keeping of the peace, the dispersion of unlawful assemblies, the making of orders as to the removal of public nuisances, and the making of orders as to disputes relating to immoveable property. Of them I may observe that the [1] provisions as to the dispersion of unlawful assemblies (which were first enacted in 1872) are founded upon, and embody in express terms, the principles laid down in the charge of Chief Justice Tindal to the grand jury of Bristol, in 1832, as to the duty of soldiers in dispersing rioters. They carry the law somewhat further than it has yet been carried in England, as they expressly indemnify all persons who act in good faith under the directions of the sections in question, and forbid any prosecution of such persons except with the previous sanction of the Governor-General in Council.

[2] The provisions as to disputes about immoveable property empower magistrates to decide who as a fact is in actual possession of the subject matter of the dispute, and to make an order that he shall continue in possession until ejected in due course of law. This represents one of the old regulations, and is a power highly important, and indeed necessary, in a country where disputes as to boundaries, water-courses, the possession of land altered in its character by changes in the course of rivers, and the like, used commonly, and still do not unfrequently, lead to frays which, if allowed to continue, might degenerate into blood feuds.

These are the principal contents of the Code of Criminal Procedure. The system which it contains is far more original and more directly the result of Indian experience than the

[1] C.C.P. ss. 127-132.

[2] C.C.P. ss. 145-148.

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system of criminal law embodied in the Indian Penal Code. The Penal Code, as I have already observed, is almost entirely a new version of the law of England. The Code of Criminal Procedure consists of enactments which were devised in slow detail, as occasion required, in order to meet the actual wants of a vast society, which, when English superseded native rule, was almost in a state of anarchy. In course of time it became a most elaborate, minute, and yet comprehensive system, adapted by the most anxious care and solicitude to the purposes which it was intended to fulfil. It has now been arranged and methodized, or codified, three successive times. On each occasion its scope was extended, and the last Code, the Code of 1882, is important chiefly because it extends the system to the whole of India, including the Presidency towns, thus superseding entirely the English system which had formerly prevailed there. English institutions have, no doubt, served in a general way as a model for those of India. In each there are police, the Indian being modelled on the English pattern. In each there are committing magistrates, and in each there are superior criminal courts; in each, also, there is, in certain cases, trial by jury, though in India this is a rare exception, and the trial proceeds on a different principle; but the grading of the different classes of magistrates, the extent of their judicial powers, and, above all, the minute and elaborate system by which the different courts are subordinated to each other, both in the way of discipline and in the way of appeal, and by which all are superintended in every detail of their procedure by the High Courts, is characteristically and exclusively Indian. Even the foregoing imperfect account of the system will show how true it is that the Indian civilians are, for the discharge of all their duties, judicial or otherwise, in the position of an elaborately disciplined and organized half-military body.

If it is asked how the system works in practice, I can only say that it enables a handful of unsympathetic foreigners (I am far from thinking that if they were more sympathetic they would be more efficient) to rule justly and firmly about 200,000,000 persons, of many races, languages, and creeds, and, in many parts of the country, bold, sturdy, and warlike.

In one of his many curious conversations with native scholars Mr. Monier Williams was addressed by one of them as follows: "The sahibs do not understand us or like us, but "they try to be just, and they do not fear the face of man." I believe this to be strictly true. The Penal Code, the Code of Criminal Procedure, and the institutions which they regulate, are somewhat grim presents for one people to make to another, and are little calculated to excite affection; but they are eminently well calculated to protect peaceable men and to beat down wrongdoers, to extort respect, and to enforce obedience.

Of the extremely careful adaptation of every word and line of the Code of Criminal Procedure to the purposes for which it was designed, I am able to give from my own personal knowledge somewhat important testimony. I had charge of the Code of 1872, and carried it through the Legislative Council. My own personal share in the work consisted mainly in making the first draft, and especially in devising the arrangement of the Code, presiding at the committees to which it was referred, and studying the information respecting it which was supplied by others. The Code was considered and passed according to the routine followed in the Indian Legislative Council on all occasions. In the first place, the Code, having been drawn and introduced into the Legislative Council, was published in the *Gazette* and circulated throughout India, every local government being required to have it thoroughly examined by experienced officers, and to return it to the Government of India with such observations and suggestions as they considered proper. The result of this was to produce a great amount of official criticism, embodying the experience of officers in all parts of the country, and bearing upon every, or nearly every, provision of any importance which the Code contained.

When all these suggestions were received, the Code was referred to a Committee of the Legislative Council, consisting, I think, of fourteen or fifteen members, comprising [1] men of the largest experience and highest position from every part

[1] Sir George Campbell, then Lieutenant-Governor of Bengal, Sir R. Temple and Sir J. Strachey, were three.

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of India. The committee met five days in the week, and sat usually for five hours a day. We discussed successively both the substance and the style of every section, and different members assigned for the purpose brought before the committee every criticism which had been made on every section, and all the cases which had been decided by the High Courts on the corresponding sections of the Code of 1861. These discussions were all by way of conversation round a table, in a private room. When the report was presented the Code was passed into law after some little unimportant speaking at a public meeting of the Council. This was possible because in India there are neither political parties nor popular constituencies to be considered, and hardly any reputation is to be got by making speeches. Moreover, every one is a man under authority having others under him.

The point which made an ineffaceable impression on my mind was the wonderfully minute and exact acquaintance with every detail of the system displayed by the civilian members of the committee. They knew to a nicety the history, the origin, and the object of every provision in the Code which we were recasting. Such a section, they would say, represented such a regulation or such an act. It was passed in the time of such a Governor-General in order to provide for such and such a state of things, and we must be careful to preserve its effect. To be present at, and take a part in, these discussions was an education not only in the history of British India, but in the history of laws and institutions in general. I do not believe that one act of parliament in fifty is considered with anything approaching to the care or discussed with anything approaching to the mastery of the subject with which Indian acts are considered and discussed.

CHAPTER XXXIV.

THE CODIFICATION OF THE CRIMINAL LAW.

I HAVE now described in full detail every part of the criminal law as it is, comparing or contrasting its provisions with the corresponding provisions of three other systems; namely, those of France, Germany, and British India. Apart from such permanent historical interest as may attach to these matters, their principal practical importance lies in the degree in which they conduce to, and prepare the way for, the permanent improvement of the law itself. The only great improvement which appears to me at once desirable and practicable is its codification, which, when fully understood, means only its reduction to an explicit systematic shape, and the removal of the technicalities and other defects by which it is disfigured.

In the study which I have bestowed upon this subject, I have frequently been led to consider the question, What is a technicality? How does it come to pass, on the one hand, that technicalities should be regarded with so much contempt, and on the other, that they should exercise such a despotic influence?

The answer is that technicalities, generally speaking, are unintended applications of rules intended to give effect to principles imperfectly understood, and that they are rigidly adhered to for fear departure from them should relax legal rules in general. The principle that when a man kills another by great personal violence criminally inflicted the crime is as great as if death were expressly intended is sound. Express it in the rule that it is murder to cause death in committing

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However this may be, the time has now unquestionably come at which it is possible to express the criminal law of this country without resorting to any technicalities whatever,

and in a compact and systematic form. That this can be done is proved by the fact that it actually has been done in the Draft Criminal Code published by the Commission of 1878-79.

I have pointed out and discussed in the course of this work the principal alterations which the Code proposed to make in the existing law, and the draft speaks for itself; and I still hope that it may become law when parliament has time to attend to the subject.

I cannot, however, more fitly conclude this work than by giving some short account of the general scope and characteristics of the proposed measure. In doing so, I shall reproduce, though with some variations and additions, part of the Report of the Commissioners. I have not thought it necessary to distinguish my extracts from it as quotations, or to mark the alterations which I have introduced. By far the greater part both of the Code and of the Report was my own composition. In order to mark the fact that for what follows in its present shape I alone am responsible, I have substituted throughout the first person singular for the first person plural employed by the commissioners.

In the first place, then, I think it expedient to make an attempt to remove certain misconceptions relating to codification which affect the judgment formed by many persons upon the possibility and the utility of the undertaking. These misconceptions seem to originate in a wrong estimate of what can be, and is proposed to be, effected by codification.

It is assumed that the object of the process is to reduce to writing the whole of the law upon a given subject in such a manner that, when the Code becomes law, every legal question which can arise upon the subject with which it deals will be provided for by its express language. When any particular attempt at codification is judged by this standard, it is easy to show that the standard is not attained.

It is also common to argue that, even if such a standard were attained, the result would not be beneficial, as it would deprive the law of its "elasticity"; by which is understood the power which the courts of justice are said to possess of adjusting the law to changing circumstances by their decisions

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on particular cases. It is said that the law of this country is in a state of continual development; that judicial decisions make it more and more precise and definite by settling questions previously undetermined; and that the result is to adjust the law to the existing habits and wants of the country. To this process it is said that codification, so far as it goes, would put an end, and that the result would be to substitute a fixed, inelastic system for one which possesses the power of adjustment to circumstances.

These observations may be answered by pointing out the object and limits of codification, and by examining the real nature of the change which codification would produce.

In the first place, it must be observed that codification means merely the reduction of the existing law to an orderly written system, freed from the needless technicalities, obscurities, and other defects which the experience of its administration has disclosed. The process must be gradual. Not only must particular branches of the law be dealt with separately, but each separate measure intended to codify any particular branch must of necessity be more or less incomplete. No one great department of law is absolutely unconnected with any other. For instance, bigamy is a crime; but, in order to know whether a person has committed bigamy, it is necessary to know whether his first marriage was valid. Thus the definition of the crime of bigamy cannot be completely understood by any one who is unacquainted with the law relating to marriage. The definition of theft, again, involves a knowledge of the law relating to property, and this connects itself with the law of contract, and many other subjects.

There are, moreover, principles underlying every branch of the law which it would be impracticable to introduce into a code dealing with a particular branch only. The principles which regulate the construction of statutes supply an illustration of this. A criminal code must of course be construed like any other act of parliament, but it would be incongruous to embody in a criminal code the general rules for the construction of statutes, even if it were considered desirable to reduce them to a definite form.

It is, however, easy to exaggerate the degree of this

incompleteness. The great leading branches of the law are to a great extent distinct from each other; and there is probably no department which is so nearly complete in itself as the criminal law. As I have shown, the experience of several foreign countries and of British India has proved that the law relating to crimes is capable of being reduced to writing in such a manner as to be highly useful. Indeed, far the larger and more important part of the criminal law of this country is already reduced to writing in statutes, and in particular the portion dealt with by the Consolidation Acts of 1861. There is no distinction in the nature of the subject between the parts of the criminal law which are written and the parts which are not written. High treason is defined by statute, and so is bribery. Why should it be impossible to define murder or theft?

The unwritten portion of the criminal law includes the three following parts: (1) Principles relating to matter of excuse and justification for acts which are *primâ facie* criminal; (2) the definitions of murder, manslaughter, assault, theft, forgery, perjury, libel, unlawful assembly, riot, and some other offences of less frequent occurrence and importance; and (3) certain parts of the law relating to procedure. To do for these parts of the criminal law what has already been done for the rest of it is no doubt a matter requiring labour and care; but when so much of the work has been already done, it seems unreasonable to doubt, either that the remaining part of the criminal law can be reduced to writing, or that when it is written down and made to form one body with the parts already written, the whole will be improved.

The objection most frequently made to codification—that it would if successful deprive the present system of its "elasticity"—has exercised considerable influence; but, when it is carefully examined, it will turn out to be entitled to no weight. The manner in which the law is at present adapted to circumstances is, first by legislation, and secondly by judicial decisions. Future legislation can of course be in no degree hampered by codification. It would, on the other hand, be much facilitated by it. The objection under consideration applies, therefore, exclusively to the effects of

codification on the course of judicial decision. Those who consider that codification will deprive the common law of its "elasticity" appear to think that it will hamper the judges in the exercise of a discretion, which they are at present supposed to possess, in the decision of new cases as they arise.

There is some apparent force in this objection, but its importance has been altogether misunderstood. In order to appreciate the objection, it is necessary to consider the nature of the discretion which is vested in the judges.

It seems to be assumed that, when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas, on the contrary, he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are to no previous judicial decisions or in books of recognised authority. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so far as a code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present.

For example, it never could be suggested that a judge in this country has any discretion at the present day in determining what ingredients constitute the crime of murder, or what principles should be applied in dealing with such a charge under any possible state of circumstances; but, as my history of it shows, the law has been brought into its present condition by a long series of judicial decisions and statements by text-writers. There is at present almost no elasticity or uncertainty about it, though the form in which it is expressed is to the last degree cumbrous and inconvenient.

In fact, the elasticity so often spoken of as a valuable quality would, if it existed, be only another name for uncertainty. The great richness of the law of England in principles and rules, embodied in judicial decisions, no doubt involves the consequence that a code adequately representing it must be elaborate and detailed; but such a code would not (except perhaps in the few cases in which the law is obscure) limit

any discretion now possessed by the judges. It would simply change the form of the rules by which they are bound.

The truth is that the expression "elasticity" is altogether misused when it is applied to English law. One great characteristic of the law of this country, at all events of its criminal law, is, that it is extremely detailed and explicit, and leaves hardly any discretion to the judges. This precise and explicit character of our law is one of its most valuable qualities, and one great advantage of codification would be that it would preserve this valuable quality by giving the result of an immense amount of experience in the shape of definite rules.

This may be shown by comparing our own law with the law of France. The criminal law of France is founded upon the *Code Pénal*, but the decisions of the courts as to the meaning of the Code do not form binding precedents; and the result is that French courts and juries can (within the limits prescribed by the words of the *Code Pénal*) decide according to their own views of justice and expediency. In the exercise of this discretion they are of course guided, though they are not bound, by previous decisions. The result is that French criminal law under the *Code Pénal* is infinitely more elastic than the criminal law of England is or ever has been, although the latter is founded on unwritten definitions and principles. For instance,[1] it is stated in a work of great authority that, after holding for twenty-seven years that to kill a man in a duel did not fall within the definition of "*meurtre*" given in the *Code Pénal*, the Court of Cassation decided in 1837 that such an act did fall within that definition. The authors of the work in question argue at great length that the earlier decisions were right and ought to be followed.

Again, the whole method of legislative expression adopted in France and England respectively shows that the French Code is far more elastic than the English law as it stands. This is not commonly understood; on the contrary, the generality of language common in continental codes raises a false impression that they are specially complete and

[1] Adolphe et Hélie, *Théorie du Code Pénal*, iii. pp. 487-489, ed. 1861.

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"Il n'y a ni crime ni délit lorsque le prévenu était en état de "demence au temps de l'action, ou lorsqu'il aura été contraint "par une force à laquelle il n'a pas pu résister." These matters were dealt with in separate sections of the Draft Code as follows:—

"SECTION 22.—INSANITY.—If it be proved that a person "who has committed an offence was at the time he committed "the offence insane, so as not to be responsible for that offence, "he shall not therefore be simply acquitted, but shall be found "not guilty on the ground of insanity.

"To establish a defence on the ground of insanity, it must "be proved that the offender was at the time when he com-"mitted the act labouring under natural imbecility or disease "of or affecting the mind, to such an extent as to be incap-"able of appreciating the nature and quality of the act or "that the act was wrong.

"A person labouring under specific delusions but in other "respects sane shall not be acquitted on the ground of in-"sanity, unless the delusions caused him to believe in the "existence of some state of things which if it existed would "justify or excuse his act: Provided that insanity before or "after the time when he committed the act, and insane "delusions though only partial, may be evidence that the "offender was at the time when he committed the act in "such a condition of mind as to entitle him to be acquitted "on the ground of insanity.

"Every one committing an offence shall be presumed to be "sane until the contrary is proved.

"SECTION 23.—COMPULSION.—Compulsion by threats of "immediate death or grievous bodily harm from a person

" actually present at the commission of the offence shall be an " excuse for the commission of any offence other than high " treason, as hereinafter defined in section 75, subsections (*a*) " (*b*) (*c*) (*d*) and (*e*), murder, piracy, offences deemed to be piracy, " attempting to murder, assisting in rape, forcible abduction, " robbery, causing grievous bodily harm, and arson: Provided " that the person under compulsion believes that such threat " will be executed: Provided also that he was not a party to " any association or conspiracy the being party to which " rendered him subject to such compulsion."

I have discussed fully the subjects of insanity and compulsion as excuses for crime, and I do not mean to return to the discussion; but, whatever may be thought of the value of these sections, it cannot, I think, be denied that they do, and that the French provisions do not, supply a definite rule for the judge and the jury in every case likely to come before them for decision.

The extreme completeness and minuteness of the English criminal law is all the more remarkable because it was in its origin, and on some particular points still is, singularly vague. Its present condition arises from the fact that it was put together slowly and bit by bit by parliament on the one hand and the judges of the superior courts on the other.

It thus represents, like the other branches of the law of England, the result of the labours of the most powerful legislature and the most authoritative body of judges known to history. In no other country in the world has a single legislature exercised without dispute and without rival the power of legislating over a compact and yet extensive nation for anything approaching to so long a period as the parlialiament of England. In no other country has a small number of judges exercised over a country anything like so extensive and compact the undisputed power of interpreting written and declaring unwritten law, in a manner generally recognized as of conclusive authority.

Any code which was not founded upon and did not recognize these characteristics of the law of England would give up one of its most valuable characteristics. The generality of language which is characteristic of the foreign codes would be

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wholly unsuited to our own country, and it would necessitate the re-opening and fresh decision of a great number of points which existing decisions have settled. There is no doubt something attractive at first sight in broad and apparently plain enactments. Further acquaintance with the matter shows that such enactments are in reality nothing but simple and therefore deceptive descriptions of intricate subjects. If an attempt, for instance, is made to dispose in a few words of such a subject as homicide or madness, the result is, either a vague phrase, such as, "murder is unlawful killing with "malice aforethought," which has to be made the subject of all sorts of intricate explanations, and the source of endless technicalities, or else a rule like "l'homicide "commis volontairement est qualifié meurtre." This rule has no doubt the merit of being short and, if "volon- "tairement" means "intentionally," clear, but is quite inadequate, and if it is acted upon produces bad results. Homicide, considered as a crime, does not admit of a short definition. The subject must be carefully thought out, and all the questions which it raises must be explicitly and carefully dealt with, before the matter can be satisfactorily disposed of. There is, however, abundant proof that when subjects are thus carefully thought out the definitions of crimes may be made quite complete and absolutely perspicuous. To take a single instance, I may refer to the definition of bribery in the Corrupt Practices Act of 1854 (17 & 18 Vic. c. 102, s. 2). It consists of five principal heads,—namely, firstly, paying money for votes; secondly, giving offices for votes; thirdly, doing either of these things with intent to get any person, not to vote for, but to procure the return of, any member to parliament; fourthly, acting upon any such consideration; and lastly, paying money with intent that it shall be employed in any of these ways. [1] Each of

[1] I give a single illustration. The first head of the definition of bribery is as follows:—"Every person who shall, directly or indirectly, by himself, or by "any other person on his behalf, give, lend, or agree to give or lend, or shall "offer, promise, or promise to procure or to endeavour to procure, any money "or valuable consideration to or for any voter, or to or for any person on "behalf of any voter, or to or for any other person in order to induce any "voter to vote, or refrain from voting, or shall corruptly do any such act as "aforesaid, on account of such voter having voted, or refrained from voting,

these five general heads is carefully elaborated, so that every additional word strikes at some conduct not exactly covered by any other phrase in the whole section, till at last the whole taken collectively, embraces every conceivable case of, what would popularly be described as bribery. After being in force for nearly thirty years, one question only, and that a small one, has arisen as to what acts do or do not fall within the statute. It must, on the other hand, be admitted that such definitions are not pleasant reading, nor can the public at large be expected to follow all their details. As, however, laws are intended mainly for the actual administration of justice, I emphatically prefer our own way of drawing them up.

This particularity is not always necessary. Where precise and definite propositions are to be conveyed, elaboration and detail in the structure of a code are required; but where the principles of law admit of any matter being left to the discretion of the judge or jury, as the case may be, this discretion can be preserved in a code by the use of general language. An illustration is supplied by the Extradition Act (33 & 34 Vic. c. 52, s. 3), which enacts amongst other things that "a fugitive criminal shall not be surrendered if "the offence in respect of which his surrender is demanded "is one of a political character." As I have shown, the employment of the expression "an offence of a political "character" might, under circumstances easy to imagine, impose upon the tribunal the necessity of deciding questions of extreme delicacy and difficulty, towards the decision of which the mere words of the legislature would contribute little or nothing. Another illustration may be found in section 39 of 33 & 34 Vic. c. 9, where a crime is referred to as "of the character known as agrarian." Numerous instances occur in the Draft Code in which such general language has been designedly and of necessity employed. In the part on "Matter of Excuse and Justification," such expressions as the following frequently occur :—"Force reason-

"at any election." Compare with this Article 177 of the *Code Pénal*, the defining words of which are, "Tout fonctionnaire," &c., "qui aura agréé "des offres ou promesses, ou reçu des dons ou promesses pour faire un acte de sa "fonction ou de son emploi, même juste," &c. The history of the definition is given above, see pp. 252-255.

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"ably necessary for preventing the continuance or renewal of "a breach of the peace;" "Force not disproportioned to the "danger to be apprehended from the continuance of the riot." In the provision relating to provocation, are the words, "an "insult of such a nature as to deprive an ordinary person of "the power of self-control;" and there are many other expressions of the like kind. All of them leave, and are intended to leave, a considerable latitude to the jury in applying the provisions of the Draft Code to particular states of fact. In other cases a considerable amount of discretion is given to the court. Thus, for instance, it is declared to be a question of law whether a particular order given for the suppression of a riot is "manifestly unlawful"; whether the occasion of the sale, publishing, or exhibition of certain classes of books, engravings, &c., is such "as might be for "the public good"; and whether there is evidence for the jury of "excess." Again, all the provisions relating to libel are so drawn that wide latitude would be left to the jury in determining whether a given publication is or is not libellous.

Upon the whole, a detailed examination of the Draft Code will show that in respect of elasticity it makes very little if any change in the existing law. It clears up many doubts and removes many technicalities, but it neither increases nor diminishes to any material extent, if at all, any discretion at present vested in either judges or juries.

Section 5 constitutes an exception to this general remark. It provides that for the future all offences shall be prosecuted either under the Code or under some other statute, and not at common law. The result of this provision would be to put an end to a power attributed to the judges, in virtue of which they have (it has been said) declared acts to be offences at common law, although no such declaration was ever made before. And it is indeed the withdrawal of this supposed power of the judge to which the argument of want of elasticity is mainly addressed. It is worth while to give instances of the manner in which at different times this doctrine has been put forward and acted upon. Of the vagueness and crudity of the common law; the weakness of

the administration of justice in the Middle Ages; the impediments opposed to it by what was then called maintenance; the establishment of the Court of Star Chamber to remedy its defects, and the abuses which led to the abolition of that court in Charles I.'s reign, I have written at length and in detail, but I have not yet illustrated in detail the more modern claims made by or on behalf of the judges to declare new offences, though I have referred to some particular cases in which it has been done.

The principle was stated in very wide terms in discussions upon the law of copyright, first by Mr. Justice Willes (Lord Mansfield's colleague), and afterwards by Lord Chief Baron Pollock. Mr. Justice Willes spoke of [1] "justice, moral fitness, "and public convenience, which when applied to a new "subject make common law without a precedent." Lord Chief Baron Pollock, many years afterwards, referring to this passage, observed, [2] "I entirely agree with the spirit of this "passage so far as it regards the repressing what is a public "evil, and preventing what would become a public mischief." In the observations made by the judges on a scheme of codification prepared in 1854, the same view was stated. The following are the words of Mr. Justice Crompton:—"I "think it unadvisable to lose the advantage of the power of "applying the principles of the common law to new offences "and combinations arising from time to time, which it is "hardly possible that any codification, however able and "complete, should effectually anticipate." In Sir William Erle's [3] *Treatise on the Law relating to Trades Unions*, already referred to at length, there are several passages bearing on this subject. Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it at the present day; and any such attempt would be received with great opposition, and would place the bench in an invidious position. The last occasion on which such a course was taken was the treatment of conspiracies in restraint of trade as a common law misdemeanour. I

[1] Millar *v.* Taylor, 4 Burr. 2312.
[2] Jeffreys *v.* Boosey, 4 H.L.C. 396.
[3] See pp. 31—36 and 47—53.

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have given the history of this matter, and it is by no means favourable to the declaration by the bench of new offences.

In times when legislation was scanty, the powers referred to were necessary. That the law in its earlier stages should be developed by judicial decisions from a few vague generalities was natural and inevitable. But a new state of things has come into existence. On the one hand, the courts have done their work; they have developed the law. On the other hand, parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, parliament will soon supply them. If parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish. Besides, there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought to be left in the hands of parliament.

I do not believe that any offence known to the common law is unintentionally omitted from the Code. If any such offence exists, it must be one which, after the most careful search and inquiry, was unknown to every member of the Criminal Code Commission, and is unmentioned in any of the voluminous text-books which we carefully searched from end to end. Such an offence, if it exists, can scarcely be of any real danger to society.

The case with regard to matter of excuse and justification is somewhat different. It is one thing to say that no one shall be convicted of a crime unless his conduct is explicitly condemned by a written law. It is another thing to say that no excuse for what would otherwise be a crime shall be admitted unless it is explicitly provided for by a written law. The matters of excuse provided for in the Draft Code include all those in which the present law of England provides

materials for codification, but cases may be imagined in which an accused person ought to have the benefit of a full discussion upon principle and analogy before he was convicted of a crime. The case of necessity supplies one illustration; the case of acts of State, or acts done during an invasion or a civil war, might supply others. It is far better to decide such cases as and when they arise, and with the light which may then be thrown upon them both by circumstances and by the ingenuity and research of counsel, than to attempt to lay down rules beforehand, for which no definite materials exist. Much might be lost by doing so. Nothing could be gained by it except a fallacious appearance of completeness to a Code, which ought to be based upon the principle that it aims at nothing more than the reduction to a definite and systematic shape of results obtained and sanctioned by the experience of many centuries. On these grounds, s. 19 of the Code provided that all rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this act, except in so far as they are thereby altered or are inconsistent therewith.

Assuming then that the criminal law is to be codified, or reduced to writing, the next question which arises is as to the limits of the undertaking. The Bill which I drew in 1878 and the Draft Code appended to the Commissioners' Report in 1879 deal only with indictable offences, and it is essential to a full comprehension of the scope of both the Bill and the Draft Code to bear in mind the fact that neither of them is intended to embody the whole of the law relating to all indictable offences whatever. The object is to frame a Code, including, as far as practicable, all those crimes, whether at common law or created by statute, which in the ordinary course of affairs come to be tried in the courts of criminal justice.

Crimes may be punished by parliamentary impeachment; and some crimes, if committed by persons having privilege of peerage, must be tried in a peculiar court. Neither case is of frequent occurrence, and the code did not propose any

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alteration in either mode of procedure, or as to offences cognizable by impeachment only. Such at least was the intention of [1] the concluding words of section 5, which might perhaps be somewhat more plainly expressed. Nor was it thought expedient to interfere with those statutes by which official persons in the colonies and in India may be tried in this country for offences connected with their office.

But besides, there are many existing statutes under which persons may be indicted which it was thought best to leave untouched by the proposed Code. They are of different classes, and are left out for different reasons.

1. A certain number of statutes create indictable offences which are rather historical monuments of the political and religious struggles of former times than parts of the ordinary criminal law. As instances, I may refer to 1 Eliz. c. 2, which punishes "depraving or despising the Book of Common Prayer," on a third conviction by imprisonment for life; the 2 & 3 Edw. 6, c. 1, which inflicts the like punishment on clergymen who refuse to use the said [2] book; the 13 Eliz. c. 2, which makes it high treason to "use or put in ure" certain kinds of Papal Bulls (as to which, however, see 9 & 10 Vic. c. 59); the 13 Chas. 2, c. 5, which punishes with fine and imprisonment all persons who collect more than twenty signatures to a petition to parliament without leave from certain specified authorities.

2. A certain number of statutes create indictable offences

[1] "Provided also that nothing in this act shall extend to any proceeding by way of parliamentary impeachment, or to affect the Court of the Queen in Parliament, or the Court of the Lord High Steward, or the right of any person entitled by the privilege of peerage to be tried therein, or to affect the privilege of peerage in any way whatever." Upon these words as they stand, it might be argued either that no one could be impeached for any act not forbidden by the express words of the Code, or that if a peer was tried for murder he must be tried, not according to the definition in the Code, but according to the present common law definition, which, in other cases, is abolished by the Code. The intention was that the power to impeach for undefined offences should remain as it is, and that the procedure of the courts mentioned should in no case be interfered with, but that, if any such court tried any person for an offence defined by the Code, he should be tried according to the definitions contained in the Code. The words do not make this absolutely clear, but it would not be difficult to do it.

[2] These statutes are applied to the existing Prayer Book by 14 Chas. 2, c. 4, s. 20.

which cannot perhaps be said to be obsolete, but were passed under special circumstances, and which are seldom if ever enforced. To propose either to re-enact or to repeal them would be to revive, without any practical advantage, controversies which would probably be both bitter and useless. These accordingly were left untouched. As instances of statutes of this class, I may mention the Royal Marriage Act, 12 Geo. 3, c. 11, which subjects persons present at the celebration of certain marriages to a *præmunire;* the 21 Geo. 3, c. 49, the Lord's Day Observance Act, which declares certain places opened for amusement or discussion on Sundays to be disorderly houses; the 39 Geo. 3, c. 79, which subjects the members of certain societies to seven years' penal servitude; the 57 Geo. 3, c. 19, which forbids political meetings within a mile of Westminster Hall during the sitting of Parliament or the Courts of Justice; the clauses of the Catholic Emancipation Act, 10 Geo. 4, c. 7 (sections 28, 29, &c.), which bring Jesuits, monks, &c., under extremely severe penalties, extending under some circumstances to penal servitude for life.

3. Many statutes which create indictable offences are of so special a nature, and are so closely connected with branches of law which have little or nothing to do with crimes, commonly so called, that it seems better to leave them as they stand than to introduce them into a Criminal Code. The following are the most important statutes of this class:—The Acts for the Suppression of the Slave Trade (5 Geo. 4, c. 113, 36 & 37 Vic. c. 88), the Foreign Enlistment Act (33 & 34 Vic. c. 90), the Corrupt Practices Acts (17 & 18 Vic. c. 102, and some others), the Customs Act (39 & 40 Vic. c. 36), the Post Office Act (7 Will. 4 and 1 Vic. c. 36), the Merchant Shipping Acts (17 & 18 Vic. c. 104, &c.). These acts are complete in themselves; and, though each creates indictable offences, each would be mutilated and rendered far less convenient than it is at present if the parts which create offences were separated from the parts which deal with other matters; whilst, if the offences were transferred to the proposed Code in a form intelligible and complete, they would necessitate the introduction of an amount of matter which

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4. A large number of statutes contain clauses of a penal nature intended to sanction their other provisions, and scarcely intelligible apart from them. Thus the 25 Hen. 8, c. 20, provides for the election of archbishops and bishops by deans and chapters upon the king's license, and section 6 enacts that persons refusing to elect shall be liable to a *præmunire*. The Marriage Acts of 1823 (4 Geo. 4, c. 76) and 1837 (6 & 7 Will. 4, c. 85) both punish the celebration of marriages otherwise than in certain specified ways. The acts which regulate lunatic asylums create several special offences (*e.g.* 8 & 9 Vic. c. 100, s. 56, 18 & 19 Vic. c. 105, s. 18). The acts, which establish certain prisons, give special powers to the keepers of the prisons, and subject the prisoners to special punishments for particular offences. (See as to Parkhurst Prison, 1 & 2 Vic. c. 82, s. 12; Pentonville, 5 & 6 Vic. c. 29, s. 24; Millbank, 6 & 7 Vic. c. 26, s. 22). It is obvious that many clauses of this sort are more conveniently placed in the special acts than they would be in a general Criminal Code.

The Commissioners considered that there were other acts dormant on the statute book the repeal of which seemed more properly to belong to the Statute Law Commissioners than to themselves. I have on several occasions examined the statute book with great care, and I think that the number of these acts not belonging to any of the other classes omitted from the Criminal Code must be small indeed. The only one which occurs to me are the statutes relating to champerty and maintenance. They might as well be repealed, but it is a matter of little importance. As champerty and maintenance would, if the Code became law, cease to be offences apart from the statutes, and as the statutes assume the existence of a common law offence, the enactment of the Code might perhaps repeal them by implication.

Lastly, the Code did not include temporary or exceptional provisions relating to Ireland, except in a few cases in which they forbid what ought to be offences at all times

and in all countries, and authorize proceedings which may be found advantageous in any time and any country.

The most important of the specific alterations in the existing law, relating both to procedure and to the definitions of crimes, I have already described and discussed in the earlier chapters of this work, and I need not here refer to them.

I will make one observation only upon the manner in which, in my opinion, the subject should be dealt with by parliament. No single man or body of men could, without presumption, say to parliament, "If you touch my or our work you will "spoil it;" but there is no presumption in pointing out that whatever value the Code possesses is due to its unity and coherence. If it were enacted into law as it stands, it would practically, though not absolutely, solve the problem which has so often been alleged to be insoluble, of condensing into a single volume, of [1] very moderate compass, the whole of the law relating to the definition and to the prosecution of indictable offences, expressed in a form so explicit and definite as practically to require no exposition, though it would admit, no doubt, of comment and illustration. The effect of such a work would depend principally on its unity, and I would acordingly suggest that if (as was proposed in the session of 1882) it is passed into law piecemeal, no one part should come into force till the whole had been completed. The parts might then be repealed, and the whole enacted as a single measure.

A reason of great weight for taking this course is to be found in the fact that the definitions and the procedure imply each other. Great confusion would be made if crimes continued to be legally defined and classified as being either felonies or misdemeanours whilst the procedure for trying them was based upon the assumption that this classification had been given up. There would, on the other hand, be no difficulty at all in passing different parts of the measure in

[1] The enacting part of the Code consists of 144 folio pages, including all the schedules excepting the repealing schedule. I think that it would fill about 250, or at the outside 300, such pages as those of Lord Wolseley's *Soldier's Pocket Book*, which contains in all 531 pages.

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different sessions, their operation being suspended till all had become law, and in then uniting them into a single measure, all the details of which would have been settled in the previous discussions. The matter is one which does not press. A Code would be a great convenience in the administration of justice, but the existing law is perfectly well understood, and is administered without the smallest difficulty or confusion. The principal difference made by the Code would be that of giving literary form to an existing system, and unity is obviously essential to the Code regarded as a literary work.

I may not unnaturally exaggerate the importance of such a contribution to the serious literature of the country as the enactment of a Criminal Code would constitute, but I think that others may equally naturally underrate it. It would represent nothing less than the deliberate measured judgment of the English nation on the definition of crimes and on the punishments to be awarded in respect of them, that judgment representing the accumulated experience of between six and seven centuries at least. I do not think that the immense moral importance of such a judgment is sufficiently appreciated, yet the criminal law may be described with truth as an expansion of the second table of the Ten Commandments. The statement in the Catechism of the positive duties of man to man corresponds step by step with the prohibitions of a Criminal Code. Those who honour and obey the Queen will not commit high treason or other political offences. Those who honour and obey in their due order and degree those who are put in authority under the Queen will not attempt to pervert the course of justice, nor will they disobey lawful commands, or violate the provisions of acts of parliament, or be guilty of corrupt practices with regard to public officers or in the discharge of powers confided to them by law. Those who hurt nobody by word will not commit libel or threaten injury to person, property, or reputation, nor will they lie in courts of justice or elsewhere, but will keep their tongues from evil speaking, lying, and slandering. Those who hurt nobody by deed will not commit murder, administer poison, or wound or assault others, or burn their

houses, or maliciously injure their property. Those who keep their hands from picking and stealing will commit neither thefts, nor fraudulent breaches of trust, nor forgery, nor will they pass bad money. Those who keep their bodies in temperance, soberness, and chastity, will not only not commit rape and other offences even more abominable, but will avoid the causes which lead to the commission of nearly all crimes. Those who learn and labour truly to get their own living will not be disorderly persons, cheats, impostors, rogues, or vagabonds, and will at all events have taken a long step towards doing their duty in the state of life to which it has pleased God to call them. The criminal law may thus be regarded as a detailed exposition of the different ways in which men may so violate their duty to their neighbours as to incur the indignation of society to an extent measured not inaccurately by the various punishments awarded to their misdeeds. I think that there never was more urgent necessity than there is now for the preaching of such a sermon in the most emphatic tones. At many times and in many places crime has been far more active and mischievous than it is at present, but there has never been an age of the world in which so much and such genuine doubt was felt as to the other sanctions on which morality rests. The religious sanction in particular has been immensely weakened, and unlimited license to every one to think as he pleases on all subjects, and especially on moral and religious subjects, is leading, and will continue to lead, many people to the conclusion that if they do not happen to like morality there is no reason why they should be moral. In such circumstances it seems to be specially necessary for those who do care for morality to make its one unquestionable, indisputable sanction as clear, and strong, and emphatic, as words and acts can make it. A man may disbelieve in God, heaven, and hell, he may care little for mankind, or society, or for the nation to which he belongs,—let him at least be plainly told what are the acts which will stamp him with infamy, hold him up to public execration, and bring him to the gallows, the gaol, or the lash.