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A PENAL CODE.[1]

by J.F. Stephen

It has often been to me a subject of great surprise, that while the slightest alteration in the machinery by which laws are made excites intense interest, the laws themselves, when they are made, are treated not as a subject of liberal study and education, but as a mystery known only to a few students, and incapable of being communicated to the world at large. I have long been of opinion that such subjects as the criminal law, the law of contracts, and the law of wrongs are in themselves quite as interesting as the subject of political economy; and I think that if the law were thrown into an intelligible shape the result would not only be of the greatest possible public convenience, but would constitute a new branch of literature and of public education. But, without further dwelling upon these generalities, and assuming that it is generally agreed that the codification of the law is upon various grounds desirable, I will come to the subject of this paper—the Codification of the Criminal Law.

It divides itself into two parts: the first is the question how to draw a Penal Code, and the second is the question how to pass it into law.

The second question is extremely difficult, for this reason: the reduction of any branch of the law to a set of definite systematic propositions is just as much a work of art as the writing of any other book. If it is to be done well, it must, in the first instance, be the work of one mind, although that work ought to be carefully corrected and checked by other minds. Now Parliament never would, and never ought, to put such confidence in any one person as to intrust him with a work of that kind. On the other hand, it is a work which Parliament can no more do for itself than it could have built the house in which it sits.

In short, I am disposed to think that the difficulties of codifying the law are for the present practically insuperable. Its form must be changed by private enterprise, and the public and the legal profession must be accustomed to it in a new and improved form, before legislation can be undertaken with much advantage. To codify the law in a hurry would do irreparable mischief. It would be like stereotyping a crude ill-arranged book. At all events, I am not prepared to suggest any answer to my second question. I pass the matter by with the remark, that it is for Parliament in its wisdom, and not for private persons, to determine upon the proper manner of throwing the law into its proper form.

Upon the other subject, the nature and contents of a Penal Code, a private person may say something to the purpose.

First I must define what the subject is, because, although the

(1) This paper contains the substance of a lecture delivered to the Trades Union Congress at the hall of the Society of Arts, Feb. 6, 1877.

words "criminal law" form a simple and familiar phrase, it is no easy matter to separate that part of the law from other parts of it. All laws run into each other. Thus, before the law of theft can be understood, a good deal must be known about the law of property; before the crime of bigamy can be understood, you must know what constitutes a valid marriage. Hence the first difficulty in drawing a Penal Code is to define the subject matter to which it is to relate, a difficulty considerable, but by no means insuperable.

Speaking generally, a crime is an act which is in point of fact punished by the law, whether it ought to be punished or not. In order that an act may be punished it must first be forbidden, and next proved to have been done. Hence comes the first division of the subject. One branch of the criminal law defines crimes and allots punishments to them, and another points out the mode of proceeding to be followed upon the assumption that a crime has been committed, and follows the person who has committed it from the moment when he is suspected, to the moment when he is either acquitted or punished. In other words, the first division of the subject is this:—

(*a*) The law of crimes and punishments;

(*b*) The law of criminal procedure.

If the law were codified, two codes would correspond with this distinction, namely, first a Penal Code, defining crimes and attaching punishments to them; and next a Code of Criminal Procedure, pointing out the constitution of the different criminal courts, and defining the manner in which a person suspected of crime was to be arrested, tried, and punished. On the present occasion I propose to confine myself to the first branch: the subject, namely, of the Penal Code.

A further limitation of the subject here becomes necessary. No penal code ought to aim at defining every act which can in any event be the subject of legal punishment, for if it did it would contain nearly the whole law on all subjects. In one point of view every law is a criminal law, because every law is in the nature of a command addressed to some person or persons, and every command involves a penalty if it is broken. I believe that as a matter of theory this might be shown to be universally true. But it is not mere theory. There are scattered over every part of the Statute Book enactments which no one would describe as parts of the criminal law, but which, nevertheless, do forbid a great variety of acts under pain of punishment. For instance, no one would describe the law relating to the registration of births and deaths as a branch of the criminal law; but the statutes on these subjects contain provisions for the punishment of persons who make false declarations for the purpose of obtaining the registration of a birth or death. Again, there is a distinction between crimes and acts which expose those who do them to a penalty; that is, to the payment of a sum of

money sued for as a debt either by the person injured, or in some instances by a common informer. To take one illustration amongst ten thousand: if a person commits literary or artistic piracy he is liable to be sued for certain sums of money; in some cases by the author, in others by any person who chooses to sue him. We do not, however, regard the law of copyright as part of the criminal law. Setting aside, on the one hand, mere sanctioning enactments, and penalties on the other, we come to what forms the bulk of the criminal law, that is to say, acts which it is thought necessary to prevent, as far as possible, by the threat of legal punishment, because they are regarded on some ground or other as dangerous or injurious to the public, or to individuals. A Penal Code ought to consist of a collection of definitions of these acts carefully classified according to their nature, and specifying the punishments to be incurred by those who commit them.

Almost every act highly injurious to the public at large, or to the public peace, or to the public morals, and also every act by which the body, or the reputation, or the parental or conjugal rights, or any proprietary right of any person is seriously infringed, is a crime, and will continue to be so, however the law is arranged or expressed, and whether it is codified or not. It would be a great mistake to suppose that the codification of the law would involve radical changes in it. A person wishing to codify the law would propose to take it as it is, to throw it into as clear and rational a form as possible, and having done so, to ascertain both its merits and defects, to affirm the one and to remove the other. No one who understands anything about such matters would propose to sit down and write a code of laws which the public at large could be expected to obey, out of his own head, and without reference to the existing institutions of the country. We must start from what we have got; we must begin by rearrangement, by improving forms of expression, by ascertaining what is objectionable, what is technical, what belongs to a past age and generation; and, finally, we must adapt the result bit by bit to the present state of knowledge and feeling. That is the object which those who wish to codify the law propose to themselves, and I think I may say that it is one which ought to appeal to men of all political opinions. It must appeal to Conservatives, because nothing can more strengthen what is good in the law than putting it before the public in a plain and intelligible form. It must appeal to Liberals, because nothing can tend more strongly to the reformation of abuses than setting those abuses in the clearest possible light. Therefore, in order to construct such a penal code as would reflect the good sense and orderly temper of the present day in a fitting manner, it is necessary first to ascertain clearly what the law of the land is; then to consider what it ought to be; and lastly, to ascertain how to take the step from that which is to that which ought to be.

The first point then to be considered is what the law is. In reference to this I may say a word both as to its substance, and as to its form. As to its substance, I feel no hesitation in saying that at the present day the greater part of it—the part which comes commonly into use in the ordinary criminal courts—is eminently rational, humane, and complete; and the more it is studied, the more the true nature of its principles and procedure is understood, the more will it be seen to be upon the whole a system to be proud of. I am bound to confess, however, that the character which I venture to claim for it is not of old date. Within living memory it was disgraced by great cruelty, and also by strange technicalities, by which, in some instances, that cruelty was evaded and neutralised. Its present condition is one of the results of the great efforts to improve our institutions, which have been made in the course of the last half-century. The subject is obscure and technical, and I do not wish to dwell upon it, but if the criminal law of England, as it was even fifty years ago, is contrasted with the law as it is now, the difference would be seen to be at least as striking as the difference between the Parliament of England fifty years ago, and the Parliament of England as it is now.

So much for its substance.

As to its form, though I do not wish to speak disrespectfully of a system with which I have had so much to do, I think that the form of the English criminal law is as confused, intricate, and objectionable in every possible way, as it could well be made. If the object had been to conceal its substantial merits and to make it thoroughly unpopular upon good grounds, I should say that excellent means had been taken for that purpose. This, however, is a mere generality. I will come closer to the subject, and explain more in detail the nature of this great intricacy and confusion.

The law is composed of three distinct elements.

1. A large proportion of it exists in the form of unwritten rules and principles, which are, it is commonly said, handed down by tradition from one generation of lawyers and judges to another. The meaning is, that the books in which these principles are written down are not in themselves authoritative; they are merely an avowedly incomplete record of the opinions of the writers as to the law as they knew and understood it. The principles and rules contained in them are, in short, nowhere authoritatively or completely stated.

2. The second element consists of Acts of Parliament, of which I will say more hereafter.

3. The third element consists of reports of cases decided, in some instances on unwritten principles, and in others upon the meaning of Acts of Parliament. The result of the whole is, that the law forms an enormous mass of Acts of Parliament, text books, and

reports of decided cases. When a man studies them as I have done for many years (a thing which is not given to every one to do), he will perceive at last that the total mass put together represents an extraordinary amount of experience, solid good sense, great shrewdness, and a desire upon the part of judges for some hundreds of years to adapt the unwritten law to the wants of successive generations. On the other hand, this valuable matter is contained in a shape which is almost enough to drive the most patient student to distraction.

A work has lately been republished which I suppose may be regarded as the great authority upon all questions of criminal law, and as the reservoir from which all judges and all barristers are apt to draw their learning. It is called "Russell on Crimes." It has been edited by various very learned persons; Sir William Russell, the original author of it, published his book more than fifty years ago. Subsequent editions have been brought out by Mr. Greaves and Mr. Prentice, the latest of which has appeared within the last few weeks. It may be regarded as a collection of all the authorities which I have been referring to. It contains altogether 2,886 very large octavo pages: it fills three enormous volumes, and it costs five guineas and a half. If I were to describe the way in which the matter is arranged, I could easily show that the mere dimensions of the book give an inadequate notion of the degree of labour that there is in making out what its contents are, and in reducing the matter contained in it to an intelligible shape. The first step towards a good Penal Code would be to take the authorities from which that book has been compiled, and to which it serves as an elaborate index and abridgment, and boil them down into a small compass so as to get at the net result.

This operation consists of two parts, extracting principles from cases and text writers, and redrawing the statute law so as to give its effect accurately, but in a shorter and clearer form.

I will illustrate each of these operations. The law as to the cases in which the appropriation by the finder of lost property amounts to theft may be stated as follows:—

"A finder of lost goods who appropriates them to himself commits theft if, at the time when he takes possession of them, he intends to appropriate them to himself, knowing who the owner is, or having reasonable grounds to believe that he can be found. But if at the time when he takes possession of them he has not such knowledge or grounds of belief, he does not commit theft by appropriating the goods to himself, even if he acquires that knowledge or those grounds of belief after he has taken possession of the goods, and before he resolves to appropriate them."

That is at the present moment the law upon that subject; but, in order to entitle myself to say so, I have had to read a number of

reports of decided cases, an abstract of which, given in "Russell on Crimes," fills twenty-two octavo pages. The actual reports of the thirty-four cases there cited or referred to must fill, perhaps, two hundred pages, scattered over twenty-three different volumes. Of these histories a large number repeat each other with slight and unimportant variations, whilst others are found upon careful examination to be really immaterial, because they simply affirm the application of well-established principles to some odd state of facts, or set at rest doubts which never need have been entertained at all. Many of the earlier cases, for instance, show merely that Serjeant Hawkins stated the law on this subject far too widely, and that even if his statement was assumed to be right, ways of evading it in most cases might be discovered.

The business of going through vast masses of matter of that sort, and of deducing from it the short rules which the decided cases establish, is one, and the most difficult, part of the business of codifying either the criminal law or any other law; but when it is done, you get in half-a-dozen lines the net result of perhaps hundreds of pages. If the short rule above stated were enacted by Parliament into law, the result would be that the cases from which it is drawn might all be forgotten, and the rule itself, which is by no means a good one, might be much improved.

The codification of statute law means giving the effect of the statutes as amended by subsequent statutes, and as expounded by judicial decisions, in an improved form. As the statutes relating to the criminal law define with great precision and elaboration the different offences which it is intended to punish, it is natural to say, "How can you shorten or abbreviate an Act of Parliament in any way without altering it? The Act says certain things. If you do not reprint it as it stands, you alter it. If you do reprint it as it stands, you get an enormous intractable mass which it is almost impossible for any one to understand. How is this matter to be dealt with?" This is best answered by an illustration. First I will take a section from an Act of Parliament in the exact words in which it stands, and I will then give its meaning in other words, which I say are identically the same, only that they are arranged in a different manner, and that advantage has been taken of what may almost be called typographical devices for saving space. The section is the 11th section of the 24th and 25th Victoria, cap. 97, the Act upon malicious injuries to property. It is as follows:—

"If any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish or pull down or destroy, or begin to demolish, pull down or destroy, any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof,

or any building other than such as are in this section before mentioned, belonging to the Queen or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or orna. ent, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement."

That section contains twenty-one lines of print, and it is all one sentence. This is nothing remarkable. Formerly the whole of every statute was a single sentence. Full stops were legalised for the first time by an Act passed in June, 1850 (13 & 14 Vic. c. 21, s. 2), which provided 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 introductory words." The principles of composition indicated by this reform still continued to be followed, and are not yet entirely obsolete, though Acts of Parliament are now much better drawn than they used to be even in 1861, when the section just quoted became law.

Here is the same section expressed in a different manner:—

"All persons are guilty of felony, and on conviction are liable to penal servitude for life as a maximum punishment, who being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish, or pull down, or destroy any of the buildings,[1] public buildings,[2] machinery,[3] or mining plant[4] mentioned in the notes hereto, or begin to do so."

"(1) Any church, chapel, meeting-house, or other place of divine worship, any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof.

"(2) Any building not mentioned in note (1) belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution.

"(3) Any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof.

"(4) Any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine."

The meaning of these two statements is identically the same, if we assume that the expression "maximum punishment" is understood, but the one is perfectly clear and can be understood in a moment; the other leaves on the mind only a confused impression of a multitude of words. The difference between the two is as follows:—In the one the verb follows the nominative case.

"Every one commits felony who," &c. In the other the mind is kept in suspense till the end of an interminable sentence before it learns what is to be the consequence if persons riotously assembled do any one of a vast number of things specified. In the one the reader learns at once that the classes of things upon which the offences specified may be committed are buildings, public buildings, machinery, and mining plant, whilst he is referred to notes if he wishes to know in greater detail what particular things are referred to. In the other the mind is bewildered by an immense array of words, which, though really classified, do not at once appear to be so. The difference of style, however, is only a part of the matter to be noticed by any one who wishes to understand how Acts of Parliament may be condensed. The shorter form has the advantage of suggesting to the mind the possibility of dispensing with the notes altogether, reading "building" for "buildings," and striking out the words "of the," "public buildings," and "mentioned in the notes hereto." This would make the law much shorter and clearer, and would make no practical difference. Again, the section quoted is not correct as it stands. It says that offenders may be sentenced to penal servitude for any term not less than three years. Owing to a change in the law which has since taken place, that ought to be five years. The section, therefore, must be corrected by altering "three" into "five," so as to represent the effect of a later Act. This alteration does not appear in the section as redrawn, but would appear in an explanation of the expression "maximum punishment" prefixed to the Penal Code. Again, the words about the punishment, "shall be guilty of felony, and upon conviction thereof shall be liable," &c., and so on, occur in that particular Act seventeen times in connection with different offences. Sixteen repetitions of that form are saved, and a great economy of space is effected. If all the offences which may be punished in that manner are collected together and put under one heading, thus:—

"Every one is guilty of felony, and upon conviction thereof is liable to penal servitude for life as a maximum punishment, who does any of the following things, that is to say,

(*a*) Who sets fire to any place of divine worship;

(*b*) Who, by the explosion of gunpowder, damages any dwelling house, &c.," and so on.

Again, the Act in which that section occurs, contains seventy-nine sections, of which about half ought properly to be put not in a Penal Code at all, but in a Code of Criminal Procedure; where they would apply not to the offences defined in that Act only, but to many others as well. Thus, sec. 61 enables persons committing offences against the Act to be arrested without warrant. A section in nearly identical words is contained in an Act relating to coinage offences passed in the same year, and in several others. In short, by going through all the Acts and all the cases, and by packing the results

judiciously, it is possible to state the net result in a compass small in comparison with the bulk of the books which have to be consulted. When this has been done it will be possible to say, "There is the existing law of the country. Look at it. See where it is wise and just. See where it is antiquated and technical. Enact once for all so much of it as deserves to be enacted. Alter the remainder."

Until this is done we may talk for ever about reforming the law, but we shall never really do it.

Having tried to give some notion of my idea of what a Code should be, I cannot very well avoid saying something of a work to which I have devoted such leisure as my profession has left me for several years past. I have made several attempts to promote the codification of the law. In 1873, under the instructions of Lord Coleridge, then Attorney-General, I drew a bill for the codification of the Law of Evidence, which we settled in consultation. Owing to parliamentary obstructions, and not to any want of interest felt by Lord Coleridge in his work, the bill never got further than being mentioned in Parliament on, I think, the very last day of the session of 1873. In 1874 I attempted, in connection with the Recorder of London, to codify the law relating to homicide. As before, I drew and we settled a bill for that purpose. That bill did get as far as a Select Committee, and the Select Committee made a report in which they said in substance that it would be a very good thing to codify the law about homicide, but they did not quite see their way to it. I will not discuss the criticisms to which that bill was exposed from various quarters. I may say in passing that they satisfied me that the process of codification was unfamiliar even to the most eminent judges in England. But one of the objections made was I thought unanswerable. It was that it was undesirable to attempt to codify so small a part of the law, because it could not be done without touching upon subjects which would affect the rest of it; and that codification must, if attempted at all, be undertaken on a considerable scale.

That and other objections prevailed with the committee, and there the matter rested. In that state of things it occurred to me that little was to be expected from Parliament, but that there was one thing which a private person might do without asking Parliament or anybody else for assistance. He might do the preparatory work which I have been describing upon a branch of the law large enough to be treated as a whole, and might reduce it to the shape to which as I say every part of the law might be reduced by proper means. Such a performance would not only prove the possibility of codification, but would also prepare the way for it. Accordingly I have employed my leisure for some years past in performing this operation upon the Criminal Law. I have now practically completed it, and hope to publish the result in

a few weeks. I am reluctant to describe a work of my own for obvious reasons; but I have undertaken this work partly in the hope that it may be of some public service, and I publicly state what I have done, in order that my work may be made use of by those who have means of so using it which I have not. Having then to the best of my ability travelled through all the authorities and sifted out the wheat from the chaff, and having arranged the result in a consecutive manner and upon a scheme which I will explain, the net result is that the law as it now stands, with all its imperfections on its head, and with all the various drawbacks to its merits distinctly recorded, can be stated, and subject to correction I say I have stated it, in the shape of a book of about three hundred octavo pages. The difficulties of the subject are so great, that it is hazardous to say that any work of such a kind is complete; but I should be prepared at a proper time and place, and before any body of persons specially acquainted with the subject, to show that that book contains practically the whole of the criminal law of England as I have defined it, as it stands at this moment, and that it may be safely taken as a starting point for subsequent legislation.

I will now shortly describe the contents of the criminal law thus classified, because I wish to give those who are capable of judging upon the subject a definite notion of what I mean when I say that the whole criminal law can be put into such a book. The criminal law is of all departments of the law the easiest to arrange in an intelligible systematic manner. It naturally begins with a preliminary division defining the nature of the various punishments inflicted by law, and the general conditions of criminality. This division deals with such matters as the laws regulating penal servitude and the different kinds of imprisonment, the consequences of a previous conviction, the detention of children in reformatory schools, and the like. Next come such matters as childhood, insanity, ignorance, compulsion, and necessity, which under certain circumstances excuse acts which would otherwise be crimes. This part also defines what constitutes participation in a crime. Is the man who orders another to commit a murder as guilty as the murderer himself? Is the man who tells a person facts which he thinks will induce him to murder another to be regarded as ordering him to murder him? and so on. It also defines the point at which a crime begins. An attempt to commit a crime is itself a crime; but what is an attempt? Where is the line drawn between forming an intention of which no human authority can judge, and such a beginning of the crime itself as the law will punish?

This preliminary matter is followed by definitions of different classes of crimes; they may be divided into crimes which principally and in the first instance affect the public at large, and crimes which principally and in the first instance affect particular indivi-

duals. Of those which affect the public at large, the first are disturbances of public order, and these disturbances may be either attended with open violence, as in the case of high treason, unlawful assemblies, and riots; or they may be without violence, as by unlawful oaths, illegal associations, seditious conspiracies, and the like. Again, the public order which is to be protected is not only public order within the United Kingdom; the relations between this country and foreign nations, and the peace of nations, must be protected as well, and they are invaded by offences against the Foreign Enlistment Act, Piracy, and Slave-trading.

Next come the offences connected with public authority. On the one hand, oppression, extortion, negligent performance of duties by public officers; and on the other hand, acts of disobedience to the lawful commands of public officers, attempts to corrupt them by bribery, the sale of offices, and a variety of other matters connected therewith. To this class belong more particularly all the offences which tend to pervert the administration of justice, such as perjury, corrupting jurors, and a variety of other matters which I pass over because I wish to give merely a general idea of the contents of the law.

Next follow a large class of offences consisting of acts regarded as being injurious to the public at large, such as public nuisances; various acts of gross impropriety; everything that is offensive to public decency; everything that injures the public health; everything that interferes with things which the public has a right to use, such as highways or rivers. Those three heads, namely, offences against public order; offences connected with public officers; and acts in the nature of nuisances, or injuries to the public at large, comprise all the crimes which more particularly affect the public.

Passing to the crimes which more particularly affect individuals, a broad distinction presents itself between offences against the persons, the reputation, and the parental and conjugal rights of individuals, and offences against their proprietary rights. To the first class belong murder, manslaughter, the infliction of bodily injury, bigamy, abduction, libel, and some others. The second class—offences against proprietary rights—divides itself into three well-marked divisions. It is one thing to take away a man's goods without his leave, which is either theft or robbery, according as it is done with or without violence. It is another thing to cheat him by inducing him to part with his property by fraud. It is a third thing to injure his property maliciously, without stealing it; as, for instance, by burning his house. There are some other acts so fraudulent in their nature that people are punished for doing them irrespectively of any actual damage which they may cause; such are forgery and offences relating to the coin.

Lastly, there are some few cases in which a breach of contract is regarded as an offence. Every one remembers the discussions which have taken place very lately, and which I hope have resulted in putting on a moderately satisfactory footing the law of conspiracy and master and servant. In the case also of the contract between the ship-owner and the sailor, the Legislature has interfered in certain instances, and has punished as crimes certain breaches of the duty of masters to seamen, and of seamen to masters, and also in some cases of the seamen to each other. All the law upon all these subjects, I say, may be compressed into about three hundred octavo pages; and although it is, practically speaking, very difficult, not to say impossible, for any man to make so broad an assertion as that he has completely exhausted any legal subject, I say that I would undertake to prove, if a proper means of proving it were given, that the whole law upon all the subjects I have mentioned is contained in the volume referred to. If I have succeeded in doing this (whether I have or not is a question for professional lawyers technically acquainted with the subject), then I say this book may be used as a first step, at all events, towards the reduction of the law into a shape in which any one can understand it who will take a moderate degree of trouble, and spend a moderate amount of time. It must not be supposed that a subject of that kind can ever be made easy. No one has any idea of the difficulty of it until he tries to understand it in exact minute detail, nor until he tests his knowledge of it by putting to himself particular cases. When that process has been gone through, and not before, some kind of notion may be obtained as to the interest, and at the same time the difficulty and extent, of the study of law. For whatever may be its defects in point of form, every article of the criminal law is full of meaning, and has its own special history. The whole system represents the result of an extraordinary amount of labour, ability, ingenuity, and experience upon subjects of high interest.

Assuming that this book constitutes a short systematic and intelligible statement of the law, the next question which naturally suggests itself is, would you propose to make it, or anything like it, into an Act of Parliament? And to that I would say emphatically, Most assuredly not. I think it would be a public misfortune to re-enact the criminal law of England just as it stands, and to confer upon it the sanction of Parliament in its present condition. I think it requires a great amount of change, both in form and in substance. It contains some things which are obsolete, some things which are excessively technical and intricate, and a great amount of matter very clumsily arranged. In order to make such a Penal Code as the nation ought to expect, and ought to have, it would be necessary that the person who prepared that

Penal Code should have full liberty to suggest extensive amendments in the law itself.

I will mention one or two points in illustration of what I mean by obsolete laws, technicalities, and clumsiness of arrangement.

First as to obsolete laws. This country has a long history, and it has been a stormy one. At different times the different parties who have gained the upper hand have stamped the marks of their own passions upon the laws of the country. Such laws have often come to be forgotten, but they are still law; and although while they are in that dead-alive condition they do no harm, yet, if they were sought out and re-enacted, they might do a great deal of harm. Such laws always remind me of rusty blunderbusses left loaded in an old loft where they may stay without hurting anybody for years, but where they may happen to go off and produce deplorable results at any moment. I will give an instance or two of what I mean. At the Reformation many Acts were passed in order to give the force of law to the change in religion which then took place, and amongst other things King Edward VI.'s Acts of Uniformity set forth a Book of Common Prayer, and inflicted tremendous penalties upon all sorts of persons who said or did anything disrespectful in regard to it. One enactment affects everybody "who in any interlude, play, song, rhymes, or in other open words, declares or speaks anything in derogation of any part thereof." There are many other penalties upon clergymen who will not read the Book of Common Prayer, and so on. That Act is still kept alive, and is applied to the present Book of Common Prayer by an Act of Charles II.; and the punishment is fine and imprisonment; and for the third offence forfeiture of all goods and chattels, and imprisonment for life. These are curiosities rather than practical matters, but there are a great many of them, and they might be exceedingly injurious. There is one which, I must confess, was utterly unknown to me till I found it in writing my book, and now that I have read it, it seems to me as if there must be some mistake upon the matter. However, there is the Act. It is the 39th George III. chapter 79, which is an "Act for the Suppression of Unlawful Societies." There is another similar Act, 57th George III. c. 19. These two Acts together were intended to punish all persons who belong to societies described in the Act as unlawful. Everybody who is a member of any such society is liable to penal servitude for seven years. The Act gives an elaborate definition of an unlawful society; it contains a great many clauses of which I will give one, because it filled me with amazement when I read it. A society is unlawful if it "is composed of different divisions or branches, or of different parts acting in any manner separately or distinct from each other, or of which any part has any separate or distinct secretary, treasurer, president, delegate, or other officer, elected or appointed by or for such part, or to act as an officer for

such part." There is another section which says that the Act is not to apply to Quakers, nor to any meeting or society assembled for the purposes of a religious or charitable nature only; nor to certain lodges of Freemasons, although it apparently applies to others. The exception shows the extent of the rule, the words of which would include not only trade unions, but all sorts of political, scientific, and professional associations, which every one regards as perfectly innocent. It is difficult to say why they do not apply to the Law Society, which I believe has branches in every considerable town in England. I feel as if there must be some mistake, but I do not know what it is. The Act speaks for itself, and I should be exceedingly sorry to re-enact or codify, or to do anything at all with it except repeal that and several other parts of it.

I may mention another remarkable Act which has been forgotten, and which seems to me to be extraordinarily hard upon solicitors. It is the 12th George I. cap. 29, sec. 4. It enacts in substance that "Every person who practises as a solicitor or agent in any suit or action after having been convicted of forgery, or of wilful and corrupt perjury, or subornation of perjury or common barratry," (which means stirring up quarrels) is liable to be transported for seven years upon the order of any judge or judges of the court in or before which the offence is committed, who may examine the matter in a summary way in open court. So that without a jury, and simply upon the judge's order, a man may be sent to seven years' penal servitude under that extraordinary Act of Parliament. I could give many other instances of that kind, but two are enough.

As to technicality, it is difficult to give just ideas upon this subject, on account of the extreme difficulty of explaining how legal technicalities arose; but there are to be found, for instance, in relation to the law of theft most extraordinary provisions. The explanation of many of them probably is this, that by the common law, stealing anything above the value of twelve pence was a capital crime for which a man might be hanged. Humane persons, in order to evade this, restricted the definition of theft in a way which enabled a vast number of thieves to get off altogether; and although the barbarous cruelty of the punishment has since been done away with, and theft is now punished in a moderate and rational manner, the old definition (with a good many alterations and amendments) still survives, and has produced all sorts of extraordinary results, far too intricate to be explained here.

I will give a single instance which will show what queer twists and eddies, so to speak, are sometimes to be found in an ancient system of law. There is an Act which says that anybody who obtains any money, chattel, or valuable security by a false pretence is to be punished. A man obtained two pointers worth £10 by a false pretence, and it was held that owing to the strange

definition of theft which originally prevailed, and by which the modern Act had to be construed, that man had committed no offence.

As to clumsiness of arrangement. There is an Act which punishes the crime of attempting to commit murder in this remarkable manner. It says that you are to be liable to penal servitude for life if you attempt to murder a man by administering poison to him, or by wounding him, or by shooting at him, or by attempting to shoot at him, or by attempting to drown him, or by destroying any building in which he is by the explosion of gunpowder, or by setting fire to any ship, or by casting away or destroying any vessel; and after enumerating those seven ways of attempting to murder a man, it is provided that if you attempt to murder him in any other way, you are to be liable to the same punishment; that is to say, there are no less than six sections of an Act of Parliament covering, I dare say, two pages, which might all be reduced by proper management to one line, "Whoever attempts to murder anybody is to be punished in such a way." It is exactly as if it were enacted that you are not to hit a man either with your thumb or your forefinger, or middle, second, or little finger, nor with your right or left hand, nor are you to hit him in any other way, nor to kick him with either foot. I could point out, if space permitted, that extreme intricacy is caused by the way in which punishments for the same sort of offences are varied quite capriciously. Thus, for instance, if a man steals a deed relating to land, the utmost punishment he can get is five years' penal servitude. If he steals anything whatever out of a ship, he may have fourteen years' penal servitude. If, being a lodger, he steals a chattel worth £5 from his lodging, then he may have seven years' penal servitude.

One word upon the conclusion of the whole matter. What, it may be said, would you suggest? I would suggest this: Go through this statement of mine, or some other and better statement of the criminal law, remedy one by one the different defects which I have referred to, take out the strange principles which lead to these curious technical results, repeal the parts of the law which are obsolete, and then, at all events, we shall have gained something. But the advantage will not be limited to the mere improvement of the existing law. We shall have acted the part of a man who pulls stakes around which weeds have collected out of the bed of a river. The weeds will be set loose, and the stream will by degrees run clear. In other words, we shall be able afterwards to recast and re-enact the whole of the criminal law in a very much shorter form than that in which, by any degree of screwing and pressing, it can be stated now. I believe, if that course were taken, considerable improvements in the law might at once be effected; and within a moderate time a new code might be drawn worthy of the country and of the time.

J. F. STEPHEN.