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THE CRIMINAL CODE (1879).

IN the late session the Attorney-General introduced a Bill entitled the Criminal Code (Indictable Offences) 1879, which was prepared by a Commission, consisting of Lord Blackburn, Mr. Justice Barry, Mr. Justice Lush, and myself. After the introduction of the Bill, but before the publication of the Report of the Commission, the Lord Chief Justice of England wrote a letter to the Attorney-General on the subject, which was published as a Parliamentary Paper on the 16th of June. The publication of this letter makes me desirous of offering to public consideration some remarks on the general scope of the Code, and on the principles on which it was framed.

I do not propose to notice the detailed criticisms on the Code put forward in the letter in question. Many of them relate to matters of technical detail of greater or less importance, which ought to be carefully considered by those who have charge of the measure before it is reintroduced into Parliament, but which can hardly be discussed to advantage by any numerous body of persons or be made intelligible to unprofessional readers. Others relate to questions of a more general kind, on which there will always be two opinions, and which must, no doubt, be made the subject of Parliamentary discussion. By way of illustration I may observe that the question whether the section of the Code which defines the extent of its application to foreigners is properly worded or not is a question for experts. The question whether the prisoner should be a competent witness is a question to be decided by Parliament.

I may perhaps, in a separate article, be able to offer a few remarks on some of these more general points, with the view of contributing something to the Parliamentary discussion of the measure. The sole object of the present article is to give explanations as to the general scope of the measure. I may observe that the greater part of what I have to say is either stated expressly or assumed in the Report of the Commissioners, but it is practically impossible to get people to read blue books, and many things are of necessity omitted from the report of a Commission which an individual member, writing in his own name, may naturally wish to say. The Lord

Chief Justice's letter was written, and I think published, before the publication of the Report, which, for some reason unknown to me, was delayed till long after it had been signed. It is, I think, to be regretted that when the letter was written, the author had not the Report before him, as it would no doubt have led him either to modify or to develop at greater length the criticisms to which I propose to address myself. This, however, is a misfortune for which neither the Commission nor the Lord Chief Justice is responsible.

The observations made by the Lord Chief Justice upon the Code regarded as a whole are as follows.

After saying that he is a 'firm believer in not only the expediency and possibility, but also in the coming necessity of codification,' he proceeds to say that he sees 'in the present Bill every encouragement to persevere in the attempt to codify the criminal law,' and he adds the following observations:—

It is impossible not to appreciate the vast amount of labour which has been bestowed on the work by the Commissioners, or the great learning and research displayed in it. I am indeed astonished that they should have done so much in so short a time. It was impossible they should do more. And a serious mistake was, I cannot but think, made in supposing that so great and difficult a work as that of stating the criminal law in all its voluminous details, with a due regard to arrangement and classification, in language carefully selected—avoiding on the one hand the cumbrous, prolix, inartificial, and bewildering phraseology of our statutes, and on the other hand taking care that the terms used shall be sufficiently comprehensive to embrace every case which is intended to come within it—could possibly be effected in the comparatively short time for which, consistently with a due regard to their judicial duties, two members at least of the Commission could devote themselves to the work. I am not, therefore, surprised at the signs of haste which are apparent in many parts of the Bill, and more particularly the latter part of it, relating to procedure. We have to thank the Commissioners for having collected abundant materials for a complete and perfect Code. But I cannot concur in thinking that they have as yet presented us with such a Code; and I am bound to say that in my opinion a great deal remains to be done to make the present Code a complete and perfect exposition, or a definitive settlement, of the criminal law.

Whatever may be the value of the Bill of 1879, I do not think that the mistake referred to by the Lord Chief Justice was in fact made. The Commissioners were not required to codify the criminal law. They were required to inquire into, consider, and report upon the draft Code of 1878, upon which, in the language of the Report, the Bill of 1879 'was founded throughout.' The history of the Bill of 1878 was related with characteristic generosity by the Attorney-General in the speech in which he introduced it into Parliament. The materials for that Bill were collected by me, and were

There were three judicial members of that Commission, Lord Blackburn, Mr. Justice Barry, and Mr. Justice Lush. They were relieved from all judicial duty, with small exceptions, whilst the Commission sat. Almost the whole of my time and of the time of Mr. Cowie, the secretary, was devoted to the work of the Commission, which sat for five months and more from day to day.

contained in my *Digest of the Criminal Law*, published in 1877. The Bill of 1879 thus represents not the labours of a Commission of four members which sat for five months, but the judgment formed by such a Commission on a work adopted by the Attorney-General after most careful study, and on which I had expended a considerable part of the work of twenty-five years. I do not think any Commission, however able, could collect all the materials for a Criminal Code and draw the Code in five months, but I do not see why such a body should not be able in that time to criticise a Code already prepared for them. As to the criticism which the Code actually did receive, I will say only that I doubt whether any draft was ever subjected to such a test. Every section, every sentence, every word was weighed again and again. Every authority for each proposition was carefully examined. Though the real difference between the Bill of 1878 and the Bill of 1879 is not great, and though they coincide almost exactly in extent and, with only two exceptions of any importance, in arrangement, the form of expression is modified more or less in almost every section. This is of importance only because it shows that more time and pains were expended on the work than the Lord Chief Justice's language would imply, and I need insist on the matter no further. The criticisms which I wish to examine at length are those which affect the principles on which the Bill was framed. They occur in the following passages.

We have next a section (s. 5) which I cannot contemplate without much regret, as it proceeds upon a principle which I cannot help thinking fatal to the completeness of the Code, and seriously detrimental to its utility. While the Act abrogates the whole of the common law with reference to offences being proceeded against under it, which was of course necessary, it keeps alive statutes, or parts of statutes, relating to the criminal law; the whole of which in the present Code should cease to have a separate existence, and, so far as it is desirable to keep these enactments alive, should be embodied in it. It is of the very essence of a perfect Code that it shall contain and provide for whatever it is intended shall be the law at the date of its formation; so that both those who have to administer the law, whether in its preliminary or after stages, and those who have to obey it, should have it before them as a whole, without having to search for it in Acts of Parliament scattered over the Statute Book, and which most persons, at least so far as the laity are concerned, are ignorant of, and know not where to find. The main purpose of a codification of the law is utterly defeated by leaving the Code to be supplemented by reference to statutes, and, what is still worse, to parts of statutes, which are still to remain in force, but are not embodied in it. On turning to the second Schedule of the Bill, which deals with the repeal of existing statutes, I find that, out of 83 Acts of Parliament therein dealt with, no less than 39, some of them very important ones, are thus partially repealed and partially left standing. Nor, in dealing with the latter class, is any system adopted. Sometimes a whole Act is repealed with the exception of a section; sometimes a single section, or one or two sections, of a voluminous Act are abolished. I have no hesitation in saying that the course thus pursued is radically wrong, and can only lead to embarrassment and confusion. Whatever is intended to form part of our penal law, whether derived from the common law or statute law, should be embodied in, and form part of, the intended Code, not by reference to Acts of Parliament to be found in the statutes at large,

but by its actual presence in the Code. After a careful study of the law, as exhibited in the proposed Code, a person would still remain ignorant of many important parts of it contained in the portions of the statute law thus remaining unrepealed and omitted from the Code. Is this the fitting result of codification? I cannot think so; and would earnestly recommend that the statutes thus partially repealed should be entirely got rid of, and that the parts retained, so far as they relate to the offences dealt with by the Code, should be introduced into the present statute, and form part of the Code, a matter easy of accomplishment at the expense of a very little time and trouble.

Further on, in some remarks on the repealing schedule, the Lord Chief Justice observes with reference to certain sections of the Larceny Act which are left unrepealed:—

It is obvious that the reason for the retention of these sections is the intended omission from the Code of all offences punishable on summary conviction; and herein, as it seems to me, is to be found a radical defect, which must necessarily mar the completeness of the work, namely, that when dealing with offences, its operation is limited to such offences when the subject of indictment; but surely, whatever constitutes an offence against the penal law should properly find its place in a code which can only be complete if it sets forth that law in its entirety. The offence being established, the mode in which, under different circumstances, the offender may be proceeded against, and the punishment which, according to the degree of guilt, may be awarded, should be set forth. It is all-important to those who have to administer the penal law in its subordinate departments, to have the law before them as an entire and unbroken whole. The present Code does that for them when, as magistrates, they are called upon to take the information against a party accused; why should it not do so when they are called upon to deal with offences summarily as judges in a judicial capacity? It would no doubt be impracticable to enumerate all the instances in which penalties are resorted to for the purpose of enforcing the performance of duties, or the observance of police or sanitary regulations, or the like; but we are here dealing with acts which the proposed law constitutes crimes, and which are so dealt with in the Code. It is exclusively to these that my observations apply; it seems in the highest degree illogical to omit all mention of them, and all reference to the procedure applicable to them, when dealt with otherwise than by indictment, simply because the degree of guilt is less, or the circumstances are such that the fuller and more formal methods of proceeding may be dispensed with. The offences being, as they necessarily must be, specified, it would occupy but comparatively little space, and cause little additional trouble, to say under what circumstances such of them as it is intended to make the subject of summary proceeding shall be so subject, and what in such case shall be the method of proceeding and the measure of punishment.

Elsewhere he says:—

I pass on to Part III., which deals with the matter of 'justification and excuse for acts which would be otherwise offences,' a most important part of the law. Great indeed was my astonishment on reading the first clause (Section 19), which is in these terms: '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.' Such a provision appears to me altogether inconsistent with every idea of codification of the law. If it is worth while to codify at all, whatever forms a material part of the law should find its place in the Code. The circumstances under which acts, which would otherwise be criminal, will be excused or justified, form an essential part of

the law, whether unwritten or written. If the unwritten law is, as part of the law to be embodied in a Code, so material a part of it as that with which we are dealing ought certainly to be carried into the Code, and should not be left at large, to be sought for in the unwritten and traditional law, which, the Code once established, it will be worth no one's while to study, and which will speedily become obsolete. We have done with the common law so far as relates to criminal matters. No one is henceforth to be indicted under it. Why then is this particular part of it to be kept alive? Why should not its rules, which it is thus proposed to make applicable to offences under the Code, be ascertained, as the enactment in question assumes them to be capable of being, and carried into the code, and thereby this part of it rendered complete?

I have given these extracts at length in order that the reader may have before him all that their distinguished author has to say on the subjects to which they relate. In a summary form they may be stated thus.

The Bill laid before Parliament is neither complete nor perfect. It is not perfect because it is open to many objections in detail. It is not complete because it does not express the whole of the criminal law, but leaves still existing many statutes which create offences, and some parts of the common law relating to matters of excuse and justification. If, therefore, the Code should become law, it would not contain the whole of the criminal law. There would still be statutory offences in other Acts of Parliament unrepealed by it, and there would still be a certain quantity of common law which would be contained in no authoritative written document. The result is that the so-called Code is not properly entitled to that designation, which ought to be reserved for Acts reducing to writing the whole of the body of law to which they apply.

Taking so very deep an interest in the success of the measure as I do, I think I ought to give such explanations on the subject of these remarks as I am able to afford. I will deal with them in the order in which I have quoted them, which is also the order in which they occur in the Lord Chief Justice's letter.

The Code, it is said, is neither perfect nor complete. First as to perfection. Absolute perfection cannot, of course, be required of any human undertaking. If Parliament, before accepting a Criminal Code, waits till one is laid before it to which no objection at all can be taken, and which is open to no criticism in any of its details, it may wait for ever. The absence of such perfection, therefore, cannot be the fault with which the Lord Chief Justice charges the Code. I suppose, therefore, that he refers to those detailed objections which, for the reasons already given, I do not propose to deal with on the present occasion. I will, however, make one general observation upon them. I think Parliament would make a serious mistake if it were to delay the enactment of a Code otherwise satisfactory, because it was alleged, even on high authority, to contain mistakes in detail. In the first place the existence of such mistakes is almost

always a matter of uncertainty. Expressions which to one person appear ambiguous, are to another clear. Difficulties of interpretation which, before an Act passes, are pronounced to be insuperable, are overcome when they arise in actual practice. The reason is that the minds of the critic and the judge are, and indeed ought to be, in attitudes essentially different. The critic is trying to detect faults. The judge is trying to do justice. The one, in other words, is intent on showing that this or that expression is incomplete, or capable of being misunderstood. The other is trying in good faith to ascertain the real meaning of the words before him.

In the second place the existence of a great number of unquestionable defects of detail is a matter of practically little importance in comparison with the advantages of comprehensive legislation. Endless instances of this might be given, but I will content myself with one or two. The nearest approach which we now possess to a Criminal Code is to be found in the Consolidation Acts of 1861. I suppose no one will deny either their want of any approach to completeness, or that they are full of faults of detail. They contain little more than half the whole mass of the criminal law. They assume the existence of all the common law definitions of crime, and of the other common law doctrines relating to it. Some parts of them are so drawn as to be scarcely intelligible,² and the critical examination of them which formed part of the labours of the Criminal Code Commission, brought to light, I think in every one of them, errors in drafting about the existence of which there could hardly be two opinions.

True, however, as all this is, there can, I think, be equally little doubt of the extreme practical utility of these acts. They cleared the Statute Book of the whole or part of 107 statutes, and brought the most important and most commonly used part of the criminal law into a moderate compass. The great bulk of the offences committed during the last eighteen years have been dealt with under their provisions, and I calculated two years ago that in the course of sixteen years less than thirty decisions had been given by the Court for Crown Cases Reserved on the meaning of any part of them.³

I might illustrate the same point from the history of the Indian Penal Code. I do not believe that any measure could have met with more complete practical success, but I could, if it were necessary to do so, point out all sorts of imperfections in it. A Penal Code was in force in the Bombay Presidency from 1828 down to 1861, which, though assuredly very imperfect, answered all practical purposes exceedingly well. The same might be said of a similar law enacted by Lord Lawrence and his colleagues for the Punjab.

The French Code Pénal has been in force for just seventy years,

² See particularly the Forgery Act, 24 and 25 Vic. c. 98.

³ See the Introduction to my *Digest of the Criminal Law*, p. xvi.

and regulates all the most important French criminal trials. Yet it is drawn in many places with what an English lawyer would regard as most dangerous latitude. Take, for instance, the following provision. 'Il n'y a ni crime ni délit lorsque le prévenu était en état de démence au temps de l'action, ou lorsqu'il aura été contraint par une force à laquelle il n'a pu résister' (art. 64).⁴ The first part of the article seems to imply that a man who is under a delusion that A has injured him, may with impunity forge B's acceptance to a bill of exchange, though there is no connection between the delusion and the forgery. The latter part of the article may either mean that no compulsion which leaves a physical possibility of resistance excuses what would otherwise be a crime, or that any compulsion which from weakness of character or otherwise the person over whom it is exercised is in fact unable to resist, will excuse any offence. The importance of this latitude of expression is increased by the fact that the decisions of the highest French courts have no binding authority, so that the Cour de Cassation of to-day may interpret an article differently from the Cour de Cassation of ten years ago.

In general my observation upon the charge that the Criminal Code is imperfect would be that that is a reason not for rejecting but for amending it, either during its passage through Parliament, or after its imperfections have been brought to light by the only conclusive test, namely, judicial decisions.

The Lord Chief Justice seems to take a different view. He says that the Commissioners have 'collected abundant materials for a complete and perfect Code,' an expression which seems to imply that the Code should be redrawn. I cannot agree with this view, if indeed it is suggested. No one of course would claim finality for any Act of Parliament, whether it is called a Code or not; but if a Code can be enacted satisfactory in its general scheme and in the most important part of its provisions, it would be better to pass it, and to amend it afterwards if necessary, than to throw it aside that some persons other than its original authors may use it as 'materials' for something which they consider more perfect. A finished work which is a whole in itself may of course be amended in detail to any extent, but if it is treated merely as 'materials' for something else, the result will never be satisfactory. It will be a hybrid for which neither the original authors nor the persons who recast their work will be really responsible, and the confusion engendered by the employment of different styles and the mixture of different principles of arrangement is likely to produce greater defects than the introduction of additional matter can remedy. If the Commissioners have only 'collected abundant materials for a complete and perfect Code,' it would be

⁴ This article seems never to have been altered or modified. (See 'Codes et Lois usuelles.' Roger et Sorel, 1879.)

important to know how, and by whom, that complete and perfect Code is to be framed. Parliament in enacting a Code must, from the nature of the case, place much confidence in some one. They were asked in this instance to place that confidence in a bill introduced by an Attorney-General who had had exceptionally wide experience in criminal cases, and approved by the Lord Chancellor; a bill representing the labour of many of the best years of my life; a bill which had been revised and settled by three eminent judges. I think that something more than imperfection ought to be proved against such a work before it is rejected on that ground. It ought to be shown to be a failure, to be so faulty that no confidence can be placed in it, or so incomplete as not to deserve the title which it claims.

The phrase may, however, be employed in a different sense from that which I have ascribed to it. If the expression means only that the draft of the Commissioners may, without being redrawn, be made both 'complete and perfect' by amendments in substance and arrangement which the Lord Chief Justice is prepared to suggest, I accept his statement as embodying high praise proceeding from one of the greatest of living authorities. It has always been a subject of regret to me that the Lord Chief Justice was not himself a member of the Commission. If he is willing to undertake the labour of minute criticism, nothing but good can result from his exertions, and both the public and the Commissioners will, in my opinion, be greatly indebted to him.

I now proceed to examine the statement that the Code is incomplete. Upon Section 5 of the Code,⁵ the Lord Chief Justice makes the observations already quoted in full. The gist of them lies in the following words:—

The Act . . . keeps alive statutes, or parts of statutes, relating to the criminal law; the whole of which, in the present Code, should cease to have a separate existence, and, so far as it is desirable to keep those enactments alive, should be embodied in it. It is of the very essence of a perfect Code that it shall contain and provide for whatever it is intended shall be the law at the date of its formation. . . . The main purpose of a codification of the law is utterly defeated by leaving the Code to be supplemented by reference to statutes, and, what is still worse, to parts of statutes, which are still to remain in force, but are not embodied in it.

* Every one who, after this Act comes into force, is a party to any indictable offence shall be proceeded against under some provision of this Act, or under some provision of some statute not inconsistent therewith and not repealed, and shall not be proceeded against in England or Ireland at common law. Provided that when any offender is punishable, both under this Act and under any other statute, every such offender may be tried and punished either under this Act or such other statute; and when any offender is punishable under two or more sections of this Act, he may be tried and punished under any of such sections; 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 privilege of peerage to be tried therein, or to affect the privilege of peerage in any way whatever.

In a word, the Code does not include all statutory offences, and is therefore incomplete. I admit the fact, but I deny the conclusion. If the Lord Chief Justice had had the Report of the Commissioners before him when he made this observation, he would no doubt have thought it right to notice the matters stated at pp. 12, 13, under the heading, 'What a Criminal Code should contain.' The matter contained in the passage referred to is quoted below, but some further explanations may be necessary to enable unprofessional readers to appreciate its importance.

The enterprise of codification is hampered by two opposite sets of objections. On the one hand, the process is declared to be impossible, and objectionable if possible. On the other hand, it is not at all uncommon to speak highly of the importance of codification, but at the same time to prescribe to the codifier an unattainable standard of perfection. The result of the two ways of treating the subject is identical. Codification upon either view is impossible. One objector proves this *à priori*. The other admits its theoretical possibility, but is prepared to prove that any given Code is not worth having. The objections urged against all codification, and the criticisms made on particular Codes, thus throw light on each other.

The objections against codification commonly relied upon are these. The laws of all countries, and above most others the laws of England, have a history. They have been enacted by degrees, as circumstances rendered them necessary, and unless you are prepared to revolutionise them altogether, you will never be able to reduce them to an exact symmetrical system. You can no more give to an ancient body of law the symmetrical completeness which might perhaps be attained in legislating for a new country, than you can give to an ancient house, built at various periods, in different styles, and with a view to different habits of life, the simplicity and unity of plan which you expect in an entirely new house.

It is commonly added that to reduce the whole of the law to a definite written form would, if possible, be undesirable. Such a process, it is said, would 'deprive the common law of its elasticity.' An unwritten law can, it is said, be moulded by the courts so as to suit the wants of different generations, and to meet social changes. A written law can be altered only by the Legislature. The best and most useful part of the law of England is unwritten, and the process by which this unwritten law was produced must necessarily be brought to an end if the law is, once for all, reduced to writing.

These are the standing objections to codification. The true answer to them appears to me to supply an answer at the same time to the criticisms made by the Lord Chief Justice on this particular proposed Code. The answer is that each of them ascribes to the advocates of codification pretensions which ought not to be, and which, if they understand the subject, are not, advanced by them. It

is perfectly true that the legislation of a nation so ancient, and composed of such varied classes and interests as our own, can never be deprived of its historical character and reduced to mathematical regularity; but it is no less true that large departments of it, perhaps in time the whole of it, may be far more distinctly, conveniently, and systematically arranged than they are at present, though that arrangement ought always to have reference as well to past history, and to proved convenience, as to theoretical symmetry.

It is also perfectly true that no part of the law is better entitled to respect, or more carefully and skilfully adapted to public convenience, than that part of it which is contained in decided cases, or (to use an expression which I think incorrect, though it is very common) which is due to the elasticity of the common law. But it is not inconsistent with this to be of opinion, that, when a sufficient number of judicial decisions have clearly defined a principle or laid down a rule, an authoritative statutory statement of that principle or rule superseding the cases on which it depends, is a great convenience on many well-known grounds, and especially because it abbreviates the law and renders it distinct to an incredible extent. The definition of the crimes of theft and murder would probably supersede many volumes of law reports.

It seems to me to follow, upon the whole, that in preparing a code of any given branch of the law, composed partly of statutes and partly of common law, the proper course is to have regard, in consolidating the statutes, not merely to their position in reference to any particular theory or system, but to their history; and in codifying the common law to put the result of the existing judicial decisions and other authorities into the most convenient and systematic form that can be devised, but to take care not to impair the exercise of judicial discretion (or, in other words, the elasticity of the common law) on points at which it may still be needed. I will now proceed to show that the charge of incompleteness against the draft Criminal Code really amounts to this, that its authors have had a careful regard to these considerations.

First, I will refer to the statutes which they have not thought it expedient to incorporate in the Code, although some of their provisions create indictable offences.

They ought, it is said, to have collected into one body all statutory provisions creating crimes intended to be in force for the future. This is no doubt true in general terms, but it requires limitations which are suggested by the question, What is a crime? I suppose that in strict theory it would be impossible to define a crime otherwise than as an act or omission punished by law, and hence it may be inferred that a complete Criminal Code ought to contain a complete specification of all acts or omissions punished by law, or, to use the Lord Chief Justice's expression, that upon its enact-

ment all statutory offences should cease to have a separate existence. If, however, we refer either to the common use of language, or to the history and present state of English legislation, it will be found that this definition is too wide for practical purposes, and that the result of taking it as the basis of a Criminal Code would be to produce an Act clumsy, heterogeneous, and practically inconvenient. The reason is that Parliament has for many reasons, at different times, subjected to punishment various acts which would not usually be described as crimes. These acts may be reduced to four well-marked classes enumerated below.

If, on the other hand, for a rigid definition of a crime, we substitute a description sufficiently accurate for practical purposes, we shall arrive at a different result. For this purpose a crime may be said to be an act or omission punished either because it disturbs the public peace or interferes with some well-known and commonly recognised public interest, or because it inflicts injury on the person, or property, or reputation, of an individual. A Criminal Code, founded on this description of a crime, would include all the offences against the public or against individuals with which the common criminal courts—the assizes and the quarter sessions—are usually concerned; it would, in a word, include all indictable offences. Such a Code would, if well drawn, be sufficient for all the ordinary purposes of judges, counsel, magistrates, solicitors, and others engaged in the common run of criminal business. It would, no doubt, omit some offences, some ‘crimes’ in the widest sense of the word, at each end of the scale. It would not interfere, on the one hand, with the ‘high crimes and misdemeanours’ which once or twice in a century may require a parliamentary impeachment. It would not provide, on the other hand, for offences usually dealt with by magistrates in the exercise of their summary jurisdiction.

Parliamentary impeachments and acts of attainder obviously lie out of the province of what is commonly understood by the criminal law. It would be idle to attempt to define such offences as were imputed to Warren Hastings⁶ or Lord Strafford. The two Houses of Parliament in such cases act rather as *ex post facto* legislators than the one as an accuser and the other as a judge. I suppose, however, that no one will seriously maintain that the Code is incomplete, because it does not deal with this matter. I need not therefore enlarge upon it.

As to the omission of summary offences some remarks may be

⁶ It is exceedingly difficult to find a copy of the articles of impeachment against Hastings, and when they are found it is almost impossible to disentangle from the cloud of words, and the angry rhetoric which pervades them, any distinct or pointed charge such as would be required in an indictment. There have been little more than fifty impeachments in the whole course of English history, and four only since 1725—namely, those of Lord Macclesfield in 1725, Lord Lovat in 1746, Warren Hastings in 1785, and Lord Melville in 1806.

needed. I think that this omission is approved (subject to some exceptions) by the Lord Chief Justice himself. He says, in one of the passages already quoted, that 'it would be impracticable to enumerate' (*i.e.* in the Code) 'all the instances in which penalties are resorted to for the purpose of enforcing the performance of duties, or the observance of police or sanitary regulations, or the like.' This is unquestionably true. A Criminal Code would be a strangely cumbrous and heterogeneous production if it contained not only provisions relating to treason, murder, theft, and forgery, but provisions taken from the Poor Laws, the Vagrancy Acts, the Local Government Act, the Police and Highway Acts, the Acts for the protection of sea-fowl, and the regulation of salmon rivers, the greater part of the Game Laws, Acts regulating the sale of explosive substances, and other provisions upon an infinite variety of other subjects too numerous to mention. There are several hundred provisions of this kind in the Statute Book. Many of them (the Game Laws for instance) could not be re-enacted without rousing most acrimonious discussions. Many of them stand greatly in need of reconsideration.' I think it would be hardly possible to devise any arrangement which would find appropriate places in one Code for both summary and indictable offences. Nor do I think there would be any advantage in doing so. Summary offences and indictable offences are adjudicated upon by different courts, and according to a different system of procedure. The practitioners usually concerned with them are different; and, above all, the offences themselves are, generally speaking, not what in popular language would be described as crimes. A man may be fined, but would hardly be described as a criminal, for not sweeping the snow from the pavement in front of his house, or for shooting a sea-gull in breeding time. A Code of Summary Offences would, I have no doubt, be a most useful undertaking, and it would form a proper supplement to the Summary Jurisdiction Act passed last session, but to attempt to make it a part of a Criminal Code would be to introduce into the law confusion instead of symmetry.

As I have already observed, I do not think that the Lord Chief Justice would dissent from these observations, though, if hastily read, some of his criticisms would appear to imply that he would. The objection which he does make to the Code on this particular matter is in part, I think, due to a slight and natural oversight, and is in part of a somewhat technical nature.

In the passage quoted above he observes that 'when dealing with offences' the operation of the Code 'is limited to such offences when the object of indictment;' and he appears to be under the impression that the effect of the Code would be that a person tried for theft (say) upon an indictment would have to be brought within the definition of that offence given in the Code, whereas, if he were proceeded

E.g. the Vagrancy Act, the Police Acts, the Highway Act.

against in a summary way for the same offence, the magistrates must be guided by the common law definition. This difficulty was foreseen and provided against by the Commissioners in Section 552. As it is the very last provision in the Code, it may probably have escaped the attention of the Lord Chief Justice. I am not sure that the section is not too narrowly worded, but this is a small matter which could easily be set right. There can be no doubt that in principle the Lord Chief Justice is perfectly right. Every offence defined in the Code ought to be defined for all purposes.

Part of the criticism quoted applies to a more technical and intricate matter. The Lord Chief Justice seems to think that too many of the sections of the Consolidation Acts of 1861 which create summary offences are left unrepealed. I do not propose to enter here upon this matter. The remarks made by the Lord Chief Justice on the repealing schedule are extremely valuable, and ought to be carefully considered before the Bill is reintroduced. I think that the schedule might be considerably enlarged with no real risk, and to the great advantage of the Statute Book. However this may be, the legislation of the last session, and especially the Summary Jurisdiction Act, will make several alterations in the Code necessary. This, however, is a matter not likely to be interesting to any except professional readers.

The way in which the Code deals with summary offences is, however, only one of the omissions on the ground of which it is charged with incompleteness. There are other statutory offences which it leaves unrepealed without re-enacting the provisions which create them. This the Lord Chief Justice considers radically wrong.

He observes :—

The main purpose of a codification of the law is utterly defeated by leaving the Code to be supplemented by reference to statutes, and, what is worse, to parts of statutes, which are still to remain in force, but are not embodied in it. And (he adds) whatever is intended to form part of our penal law should be embodied in and form part of the intended Code, not by reference to Acts of Parliament to be found in the statutes at large, but by its actual presence in the Code.

It may, I think, be shown that these propositions, though their general soundness is unquestionable, require some qualification. An enumeration of the classes of enactments omitted is given in the Report (pp. 12, 13), and will, I think, be found to justify the course taken. It is as follows :—

1. A certain number of statutes create indictable offences, which are rather historical monuments of the political and religious struggles of former times than part of the ordinary criminal law. As instances, we 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 and 3 Edw. VI. c. 1, which inflicts the like punishment on clergymen who refuse to use the said book (these

statutes are applied to the existing Prayer Book by 14 Ch. II. c. 4, s. 20); 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 and 10 Vic. c. 59); the 13 Ch. II. 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 which cannot perhaps be said to be obsolete, but which 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. We propose, therefore, to leave them untouched. As instances of statutes of this class, we may mention the Royal Marriage Act, 12 Geo. III. c. 11, which subjects persons present at the celebration of certain marriages to a *præmunire*; the 21 Geo. III. 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. III. c. 79, which subjects the members of certain societies to seven years' penal servitude; the 57 Geo. III. 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. IV. c. 7, ss. 28, 29, &c.), which bring Jesuits, monks, &c., under extremely severe penalties, extending, under some circumstances, to penal servitude for life.^a

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. IV. c. 113, 36 and 37 Vic. c. 88); the Foreign Enlistment Act (33 and 34 Vic. c. 90); the Corrupt Practices Acts (17 and 18 Vic. c. 102, and some others); the Customs Act (39 and 40 Vic. c. 36); the Post Office Act (7 Will. IV. and 1 Vic. c. 36); the Merchant Shipping Acts (17 and 18 Vic. c. 104, and several others). 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

^a My personal opinion is that all the Acts mentioned under this and the preceding head might be properly put in the repealing schedule; but this is rather a question of general policy than of the codification of the criminal law. I would also take the opportunity of repealing the criminal jurisdiction of the Ecclesiastical Courts over the laity. It is practically obsolete, and might be made the subject of great abuse.

amount of matter which would render it inconveniently cumbersome without any corresponding advantage.⁹

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. VIII. 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. IV. c. 76) and 1837 (6 & 7 Will. IV. 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.¹⁰

I would confidently ask (1) which of these classes of statutory offences the Commissioners ought to have included in the Code? and (2) what statutory offence not falling under one of these heads they have excluded from it? If neither of these questions admits of an answer, I maintain that the Code, as regards statutory offences, is complete, that it contains all the statutory offences which could properly be introduced into it, and omits those only which would have made it cumbrous and inconvenient, and which are more conveniently placed elsewhere. I would further observe that it is inconsistent to say first that the Code ought to contain all penal enactments, and next that it ought to contain no partial repeals. If it is to contain all penal enactments, it must contain, *e.g.*, the penal clauses of the Merchant Shipping Act. If it is to contain no partial repeals, it cannot repeal those sections. The only way by which this could be avoided would be by making the whole of every Act which contains any penal clause a part of the Criminal Code; but this would have the absurd

⁹ As a special illustration I may observe that the Foreign Enlistment Act consists of thirty-three sections, ten of which define indictable offences. Of the remaining twenty-three, twenty contain provisions as to procedure, and confer special powers upon officers of customs, the Secretary of State, and other official persons. The two sets of sections imply each other's existence. If part only were transferred to a Criminal Code, a cross reference to the others would be necessary. If the whole Act were embodied in a Criminal Code, it would be out of keeping with the rest.

¹⁰ I may add that a great number of special provisions are to be found in different Acts punishing the forgery of particular documents the use of which is prescribed by the Act, or the making of false declarations in cases in which the Act requires a declaration to be made. All these cases would be provided for by ss. 122 and 123, or some one of the provisions as to forgery.

effect of making the Criminal Code contain the whole of the Merchant Shipping Acts, the Customs Act, the Post Office Act, and many others.

In concluding my remarks upon this point I may observe that one criticism of the Lord Chief Justice is either founded on a misconception or at least suggests one. Some of the phrases already quoted suggest that the Criminal Code embodies in itself other statutes by way of reference. This mode of legislation is no doubt attended with some inconveniences, though I think they are often exaggerated; but, however this may be, the number of references to other Acts in the Criminal Code is so small, that it may be said to be substantially complete in itself. I give in a note a complete list of the exceptions.¹¹

I may add in connection with this subject, that a comparison between the Bill of 1878 and the Bill of 1879 will show that though the Bill of 1879 omits a variety of statutes which I had included in the Bill of 1878 (the acts relating to the Slave Trade, the Foreign Enlistment Act, and the Corrupt Practices Act were the most important), it contains, I think, only two statutory offences which I had overlooked, namely, 23 & 24 Vic. c. 75, s. 12, which punishes the offence of aiding the escape of a criminal lunatic, and 50 Geo. III. c. 59, s. 2, which punishes public officers making false statements in their accounts. The Commission checked the contents of the Bill by reference to a variety of indexes to the statute book, and to catalogues of indictable offences of more or less authority, amongst which I may particularly mention lists prepared by Mr. R. S. Wright for the Statute Law Revision Committee.

So very close a correspondence between the results arrived at by myself in the Bill of 1878 and by the subsequent independent inquiries of the Commission is, I think, a strong proof of the completeness of the Bill of 1879 so far as statutory offences are concerned.

It is, however, objected that the Code is incomplete in relation to the common law, as well as in relation to the statute law. Part III. deals with matter of justification and excuse for what would otherwise be offences, and begins with a section¹² which the Lord Chief Justice says he 'read with astonishment,' and which appears to him 'inconsistent with every idea of a codification of the law.' 'If

¹¹ §§ 8 and 75 refer to the Act for private executions. §§ 411, 413, and 414 refer to the English and Irish Bankruptcy Acts. § 421 refers to the Conspiracy Act, 1875. § 432 refers to the Habeas Corpus Acts for England and Ireland. § 473 refers to 11 and 12 Vic. c. 42, and the corresponding Irish Act. § 478 refers to the English and Irish Juries Act. It will be seen on reference to these sections that in no case is any act incorporated with the Code. In nearly every instance the reason for the reference is obvious on inspection. In a single instance (that of s. 473) its necessity appears to me doubtful.

¹² § 19. 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 hereby altered or are inconsistent herewith.

it is worth while to codify at all, whatever is a material part of the law should find its place in the Code;’ and he goes on to ask why, if all common law definitions of crimes are abolished, the part of the common law which relates to matter of excuse or justification is kept alive.

In order to answer this question fully, it will be necessary to consider what the common law relating to crime is.

The expression ‘common law’ has two perfectly distinct meanings. It means in the first place those parts of the known and ascertained law which are to be found in decided cases and in the works of authoritative writers like Coke or Hale, but which have never been reduced to the form of a statute. It means in the second place not a part of the law actually existing, but law which has only a potential existence—that which, if the case should ever occur, the judges would declare to be the law. In this case the expression ‘common law’ means the qualified power which the judges possess of making new law, under the fiction of declaring existing law in cases unprovided for by existing statutes or other authorities. The qualification upon this power is that the new law must be so made as to develop, and not otherwise to innovate upon, the law which already exists. The judges must be guided in making it not by their own views of expediency or justice solely, but mainly by carrying established principles and analogies a step further than they have hitherto been carried.

Nearly the whole of the existing common law (in the first of these two senses) has been made by the common law in the second sense, that is to say by the exercise of this modified power of legislation. This process of reproduction is often described as ‘the elasticity of the common law,’ a form of expression which conceals a power vested in human beings by describing it as a quality inherent in a collection of words.

This fiction leads to much misunderstanding. Amongst other things, it suggests that that part of the law which, though well ascertained, is contained not in the Statute Book, but in the Reports, is less determinate than that which is contained in the Statute Book. This is not the case. On the contrary, when any proposition has once been solemnly held to be a part of the common law, it becomes as inelastic as if it were embodied in an Act of Parliament, and neither the judges nor any other authority except that of Parliament can alter it. So long as it is doubtful whether the judges will decide this way or that, their judicial discretion or qualified legislative authority is still unexhausted upon that matter, and the common law is to that extent elastic. For instance, before the decision in *R. v. Keyn* (the ‘*Franconia*’ case) the common law was elastic as to the question, or, in other words, the judges had a qualified legislative authority to decide in case of need the question, Whether a foreigner committing a crime on board a foreign ship within three miles of the coast was liable to

be tried in an English court. The case of *R. v. Keyn* exhausted the legislative authority of the judges on that point, and answered the question in the negative. As soon as that decision was pronounced, the common law upon the subject became as rigid as if it had never been elastic at all.

The parts of the criminal law on which this power can be exercised are two, namely,¹³ The definition of offences, and Matter of justification or excuse for what would otherwise be offences. The effect of the two sections¹⁴ of the Code referred to by the Lord Chief Justice, when taken together, is this. The judges shall no longer have power to declare any act or omission which is not within the words of the Code or some other Act to be an indictable offence, but in cases not expressly provided for by the Code they shall continue to have the same power as they possess at present, of declaring circumstances to form an excuse or justification for what would otherwise be an offence. The Lord Chief Justice considers that the first part of this provision is right, but that the second gives up the whole principle of codification.

It appears to me that the two proposed enactments stand on entirely different principles. After the experience of centuries, and with a Parliament sitting every year, and keenly alive to all matters likely to endanger the public interests, we are surely in a position to say the power of declaring new offences shall henceforth be vested in Parliament only. The power which has at times been claimed for the judges of declaring new offences cannot be useful now, whatever may have been its value in earlier times.

On the other hand it is hardly possible to foresee all the circumstances which might possibly justify or excuse acts which might otherwise be crimes. A long series of authorities have settled certain rules which can be put into a distinct and convenient form, and it is of course desirable to take the opportunity of deciding by the way minor points which an examination of the authorities shows to be still open. In this manner rules can be laid down as to the effect of infancy, insanity, compulsion, and ignorance of law, and also as to the cases in which force may lawfully be employed against the person of another; but is it therefore wise or safe to go so far as to say that no other circumstances than those expressly enumerated shall operate by way of excuse or justification for what would otherwise be a crime? To do so would be to run a risk, the extent of which it is difficult to estimate, of producing a conflict between the Code and the

¹³ It must also of course apply to the interpretation of statutes, but upon this it is unnecessary to say anything, as no question arises upon it. I may however point out that it is just as much an act of legislation, a making of a new law, to say '*Aio te Æncida, &c.*' shall from henceforth be held to mean that the Romans can conquer Pyrrhus, and not that Pyrrhus can conquer the Romans, as to lay down any other rule not previously existing.

¹⁴ § 5 and § 19.

moral feelings of the public. Such a conflict is upon all possible grounds to be avoided. It would, if it occurred, do more to discredit codification than anything which could possibly happen, and it might cause serious evils of another kind. Cases sometimes occur in which public opinion is at once violently excited and greatly divided, so that conduct is regarded as criminal or praiseworthy according to the sympathies of excited partisans. If the Code provided that nothing should amount to an excuse or justification which was not within the express words of the Code, it would, in such a case, be vain to allege that the conduct of the accused person was morally justifiable; that, but for the Code, it would have been legally justifiable; that every legal analogy was in its favour; and that the omission of an express provision about it was probably an oversight. I think such a result would be eminently unsatisfactory. I think the public would feel that the allegations referred to ought to have been carefully examined and duly decided upon.

To put the whole matter very shortly, the reason why the common law definitions of offences should be taken away, whilst the common law principles as to justification and excuse are kept alive, is like the reason why the benefit of a doubt should be given to a prisoner. The worst result that could arise from the abolition of the common law offences would be the occasional escape of a person morally guilty. The only result which can follow from preserving the common law as to justification and excuse is, that a man morally innocent, not otherwise protected, may avoid punishment. In the one case you remove rusty spring-guns and man-traps from unfrequented plantations, in the other you decline to issue an order for the destruction of every old-fashioned drag or life-buoy which may be found on the banks of a dangerous river, but is not in the inventory of the Royal Humane Society.

This indeed does not put the matter strongly enough. The continued existence of the undefined common law offences is not only dangerous to individuals, but may be dangerous to the administration of justice itself. By allowing them to remain, we run the risk of tempting the judges to express their disapproval of conduct which, upon political, moral, or social grounds, they consider deserving of punishment, by declaring upon slender authority that it constitutes an offence at common law; ¹⁵ nothing, I think, could place the bench in a more invidious position, or go further to shake its authority.

¹⁵ The right to do so has been distinctly claimed on several occasions. In *Jefferys v. Boosey* (4 H. L. C. 936), Lord Chief Baron Pollock quoted the dictum of Mr. Justice Willes (Lord Mansfield's colleague): 'Justice, moral fitness, and public convenience, which when applied to a new subject make common law without a precedent' (see *Millar v. Taylor*, 4 Burr. 2312); and added, '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.'

This is the main and leading reason, at least in my opinion, for the course taken by the Commission. If it is said that it involves a confession of weakness, and that the attempt to codify the law at all implies on the part of those who undertake it a conviction that they are acquainted with the whole of the law, and can reduce it to writing, I reply that such a remark appears to me to involve a misconception, not only of the nature of codification, but also of the nature of law itself. Law, like every other branch of human knowledge or subject of human study, never can be complete as long as it is the law of a living and growing nation. The organ by which it is developed is the discussion—in this country the discussion before courts of justice—of the new problems which from time to time present themselves. The duty of the codifier (as I understand it) is to study, to express, to arrange, and to amend the ascertained law as it stands, but it would be a great mistake if he thought it his duty to try to arrest its further development by judicial decision on points of delicacy and importance as to which there are at present no materials, or scanty materials, for the enactment of express rules.

Those who wish to see this matter fully developed may be referred to Savigny's treatise on the vocation of our age to legislation and jurisprudence, and to Austin's criticism on it (ii. 698, &c.). Savigny was in favour of the codification of existing law, but thought it dangerous to try to anticipate future cases. My view nearly coincides with this, though I think that, where the existing authorities clearly show both sides of a disputed question, it is generally better to decide it one way or the other than to leave it doubtful. I would not, for instance, preserve the doubt which at present exists whether a man who, believing in good faith and on reasonable grounds that his wife is dead, marries again within seven years of the time when he last saw her, commits bigamy if she is alive.

This view of the subject is, I think, both illustrated and confirmed by a more special consideration of the parts of the common law relating to crime which would be kept alive by the provision objected to by the Lord Chief Justice. It must be observed that the common law is kept alive only in those cases to which the express words of the Code do not apply. In point of fact those words cover every part of the common law which is at present sufficiently well ascertained to be stated in the form of rules. The only parts of it of which I am aware, which are not replaced by the Code, fall under three heads.

1. Besides the well-known matters dealt with by the Code, there are a variety of speculative questions which have been discussed by ingenious persons for centuries,¹⁶ but which could be raised only by

¹⁶ *Plenus est sextus liber de Officiis Hecatonis talium questionum. . . . Si tabulam de naufragio stultus arripuerit, extorquebitne eam sapiens si potuerit? negat, quia sit injurium. Quid dominus navis eripietne suam? Minime: non plus*

such rare occurrences that it may be thought pedantic to legislate for them expressly beforehand, and rash to do so without materials which the course of events has not provided.¹⁷ Such cases are the case of necessity (two shipwrecked men on one plank), the case of a choice of evils (my horses are running away, and I can avoid running over A only by running over B), and some others which might be suggested. Suppose, for instance, a man were to injure or even kill another under a sincere belief that the person killed or injured was bewitching him, and that the charm could be broken in no other way; or suppose death were to be caused by a poison administered with the full knowledge and consent of the person taking it, in order to prove the efficacy of a supposed antidote. Any ingenious person may divert himself, as Hecato did, by playing with such questions. The Commission acted on the view that in practice the wisest answer to all of them is to say, 'When the case actually happens it shall be decided;' and this is effected by the preservation of such parts of the common law as to justification and excuse as are not embodied in the Code. Fiction apart, there is at present no law at all upon the subject, but the judges will make one under the fiction of declaring it, if the occasion for doing so should ever arise. This is open no doubt to the remark that it is a fiction to describe as common law a rule which does not exist at all, and which probably never will exist. I admit this, but it would be pedantic to attempt to alter by legislation a well established form of expression. The meaning of the provision in question might no doubt be expressed somewhat as follows: 'It shall be lawful for any court before which any matter may be proved which is not expressly provided for by the enactments hereinafter contained, to declare that such matter amounts to a justification or excuse for any offence, if that court is of opinion that such matter is closely analogous to the matters which are hereby declared to amount to a justification or excuse for what would otherwise be an offence.' But would it be worth while to employ such a novel form of expression, and one so likely to give offence, when precisely the same purpose may be

quam si navigantem in alto ejicere de navi velit quia sua sit. Quoad enim perventum sit eo quo sumpta navis est non domini est navis sed navigantium. Quid si una tabula sit, duo naufragi, aequae sapientes; sibi, uterque rapiat an alter cedat alteri? Cedat vero; sed ei cujus magis intersit vel sui vel reipublice causâ vivere. Quid, si hæc paria in utroque? nullum erit certamen sed quasi sorte, aut micando victus, alteri cedet alter.—Cicero *de Officiis*, lib. iii. ch. xxiii. In the American case of *Commonwealth v. Holms* (1 Wall Jr. 1), the court held that if it was necessary to the common safety to throw overboard one of a shipwrecked crew, the sailors ought to go first; but at all events the victim should be chosen by ballot. I do not know whether the passage quoted above was cited in argument.

¹⁷ In the Bill of 1878 there was a provision on this subject. There is in the Indian Penal Code a provision as to a choice of evils. It seems to me to be a matter of very little practical consequence whether a Code does or does not provide for such cases, but surely it ought not to provide negatively that no such circumstances shall ever amount to an excuse.

effected by retaining the well-known language about the common law? Would it be worth while to try to teach people to say that the rotation of the earth brings the sun into the range of our eyes in order to avoid the fiction that the sun rises?

2. Some other questions may occur which it would on all accounts be better to leave to be decided according to established legal principles and analogies when they arise, than to prejudge by a rule resting on little or no authority.

There is a class of cases in which the sovereign power is entitled by law to authorise what but for such authority would be crimes. Such acts possibly may, though it is not probable that they ever should, come before the criminal courts, and if they did it would be far more satisfactory that the matter should be solemnly debated *ex post facto* before a court of justice than that a rule should be laid down beforehand which might either authorise great hardship to individuals, or cripple public servants in emergency, to the great injury of the public interests. The following cases will illustrate this. Captain Denman (see the case of *Buron v. Denman*, 2 Ex. 167), acting in the discharge of what he conceived to be his duty, landed on the west coast of Africa and burnt certain barracoons or depôts for slaves. His act was adopted by the executive Government, and it was held that this ratification was equivalent to an order, and that no action would lie against him by the persons injured. If life had been lost in the affray, and if Captain Denman had been indicted for murder, I suppose he would have been entitled to an acquittal. No doubt the same would be the case if a man-of-war were ordered to enforce our neutral rights, and sacrificed life in doing so. During the American Civil War one of the Northern and one of the Southern cruisers were both anchored in the same English harbour. Whichever of the two left last was compelled to wait till the other had had twenty-four hours' start. Suppose she had attempted to force a passage, had been fired into, and had returned the fire, and life had in consequence been lost on both sides: I suppose that neither the captain nor the crew of the vessel which fired into her, nor her own captain or crew, would have been guilty of murder; and I should think it probable that a similar rule would apply to a prisoner of war shooting or being shot in an attempt to escape from confinement, and possibly to a foreign marine who, by his officer's orders, took life in resisting an attempt to execute process on board a foreign ship of war in an English harbour.

It would be extremely difficult, not to say impossible, to think beforehand of all the cases of this sort which might arise, and of all the circumstances which might have to be taken into account in framing a rule in respect to them; and it therefore appears better to leave them to be dealt with when they happen, if they ever do.

3. There are a certain number of maxims relating to the criminal law which are in themselves too indefinite to be stated in the form of categorical propositions, but which are useful guides to the courts on a variety of matters connected with crime, and more particularly in the interpretation of statutes bearing on the subject, and in deciding questions as to the effect and admissibility of evidence. The nearer we are able to approach to a complete codification of the whole of the criminal law, the less frequently will there be occasion to resort to the use of such maxims; but I should be sorry to introduce into a general Criminal Code negative and exclusive words which, whilst they rendered the Code theoretically complete, might be thought to impair the authority of such maxims. The following are the cases which occur to me at the moment. There may be more. There is a maxim which says, *Actus non facit reum nisi mens sit rea*, a maxim which is a great deal less instructive than it looks at first sight. It is often supposed to mean that nothing is legally a crime unless it is morally wrong, which is obviously untrue, unless the powers of the legislator are to be bounded by the conscience of the judge. It may also mean that the complete definition of every crime includes, either expressly or by implication, one or more mental elements; and this is no doubt, generally speaking, true. If, however, all crimes are expressly defined by statute, this fact will always be apparent on the face of the definition, and in regard to such offences the maxim will be superfluous. Thus, for instance, in Part XXXIV. of the Code, which corresponds to the Malicious Mischief Act (24 & 25 Vic. c. 97), the word 'wilfully' forms part of every definition. 'Fraudulently and without colour of right' forms part of the definition of theft. Murder is defined to be an unlawful killing, accompanied by certain specified intents. In other cases the word 'knowingly' is introduced. In every such case the mental element necessary to constitute the offence being specified in the enactment which creates it, there is no room for the application of the maxim. It is, however, possible that there may be cases, either in the Code itself or in other statutes not repealed by it, in which this rule of interpretation might be found useful, and if that is so, its preservation can do no harm.

A maxim closely allied to it, and I think practically identical with it, is, *ignorantia facti excusat*. It indeed expresses the only part of the maxim about *mens rea* which is ever likely to come into use. Its application was lately much discussed in *R. v. Prince* (L. R. 1 C. C. R., 154), where the question was whether a man who abducted a girl who in fact was fifteen, though he upon reasonable grounds believed her to be seventeen, could be punished under a statute which protects girls under sixteen only. The provision in the Code relating to abduction was drawn with an eye to the decision in *R. v. Prince* and the principle established by it. It is possible, however, that the principle might still be needed for the decision of some

possible though improbable cases;¹⁸ but it is difficult to express the principle shortly and simply, and it is of such rare application, and the decisions upon it are so few, that it would probably be unwise to try to do so. An attempt at such a statement was made in the Draft Code of 1878, but I must own that the result was not satisfactory.

It is possible that a general declaration that the whole of the common law on the subject of excuse and justification was contained in the Code might be held to interfere with some applications of the principle of the presumption in favour of innocence, though I am not prepared to give any specific illustrations upon this point.

Upon all these points I would observe that the condition which makes codification at once practicable and expedient is that the principles, definitions, and rules to be reduced to the form of definite propositions, should already be held in suspension or solution (if I may be allowed such an expression) in recognised authorities. Where no such materials exist, the common law should be left alive, or, to speak without metaphors, and legal fictions, where a legal question has been solved by authority the solution should be enacted as law; but legal questions for the solution of which the existing authorities provide either no materials or scanty materials, should not be disposed of by rules made beforehand, but should be left to be decided by the judges when, if ever, circumstances occur which raise them for solution. To say that this is to give up the principle of codification appears to me like saying that constitutional principles are inconsistent with monarchy, and that our choice lies between anarchy and despotism. Surely it is the part of wisdom to recognise the number and the intricacy of the principles which ought to be taken into account in devising any measure of importance, and all that I have been saying comes to this: that although in the present state of the law its most striking want is definite and systematic statement and re-arrangement, a place ought still to be left for judicial discretion, and that though it is certainly most important to bring the whole of the statute law upon given subjects into single, well-arranged Acts of Parliament, it will in practice be found impossible to make such an arrangement absolutely complete.

Having said this much in explanation and justification of the course taken by the Commissioners as to the omission from the Code of certain parts both of the statute and of the common law, I ought in conclusion to observe that I hope that nothing written by me will suggest that I do not perceive or appreciate the importance of the service rendered to the public by the Lord Chief Justice in under-

¹⁸ A goes down from London to Penzance to commit a robbery. Wishing to stop short of burglary and confine himself to housebreaking, he sets his watch by the railway clock, and does not break into the house till 6.10 A.M. by his watch. He forgets that the night (9-6) is measured by local mean time, and that the railway clock is set to London time. Hence his crime is actually committed at 5.50. According to *R. v. Prince* he would be guilty of burglary.

taking a criticism of the Code which can hardly fail (especially if it is completed in a reasonable time before the next session of Parliament) to improve it in many particulars, and to make up for his not having been a member of the Commission. In some points I differ from him, but I feel that the connection of his great name, almost unequalled experience, and splendid abilities with the Criminal Code will go far to assure the public that it is what it ought to be.

On a subsequent occasion I hope to make some observations on some of the leading characteristics of the Code, and especially on the more important changes in the administration of criminal justice proposed to be effected by it. The object of this will be to facilitate in some measure Parliamentary discussion, by showing which parts of the Bill it would be wise to take on trust, as being substantially re-enactments of the existing law, and which parts suggest changes the expediency of which may be considered without any technical legal knowledge.

JAMES FITZJAMES STEPHEN.