OUTLINES OF CRIMINAL LAW

BASED ON LECTURES DELIVERED IN THE UNIVERSITY OF CAMBRIDGE

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Sontibus unde tremor, civibus inde salus

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PREFACE TO THE THIRTEENTH EDITION

THE present volume embodies the lectures which I gave at Cambridge, in the course of some forty years. When reducing them into the form of a book, I kept in view the needs of two classes of readers. For a general outline of Criminal Law may prove useful not only to young men preparing for academical or professional examinations, but also to many older men when called upon to undertake, without previous legal training, the duties of a justice of the peace. Both these classes find it important, moreover, to familiarize themselves with the foundations of the law of Evidence; and I therefore included that subject.

I have aimed at making the range of topics no wider than may be grasped upon a first perusal, even by a reader previously unfamiliar with law. But I have tried to treat each individual topic with such fulness as may serve to fix it effectually in the reader's memory. Yet the susceptibility of his memory must depend very much (as all lecturers soon discover) upon the extent to which the matter in hand arouses his interest. Fortunately the law of Crime—when once the preliminary difficulties attendant upon the chaotic form which it still retains in England have been faced and surmounted—is a branch of jurisprudence peculiarly capable of being rendered interesting. It is closely linked with history, with ethics, with politics, with philanthropy. My endeavour has been to supply illustrative examples that may give vividness and reality to the abstract principles of our Criminal Law; and to explain, by its connexion with the past, the various historical anomalies which still encumber it; and, moreover, to suggest the most

important controversies—psychological, social, juridical—that it is likely to arouse in the near future. Partly for the last-mentioned purpose, and partly because their importance even for present-day practice seems to me to be greater than is often supposed, I have given more than usual prominence to the subjects of Malice, Responsibility, and the Measure of Punishment. I also have made frequent use of the official statistics of our courts and prisons; in the hopes of presenting a precise idea both of the present administration of criminal justice in this country, and of the comparative importance of the various forms of its procedure.

To readers who have time to utilize the references given in the footnotes, it may be well to explain that the cases cited as from "K. S. C." will be found in my volume of *Select Cases in Criminal Law.*

Should any one find Chapter I, which attempts to define the nature of Crime, to be at all difficult, I advise him to postpone its perusal until after reading the rest of the work. Definitions belong indeed rather to the end of our knowledge than to the beginning of it.

I am glad to know that this book was thought worthy of adaptation by an American editor for use in the University of Yale. An admirably rendered French translation of it has already been published.

In the last (the twelfth) edition I made extensive changes; parts of it were entirely re-written. In preparing the present issue, my endeavour has been to keep pace with the current of new enactments and new decisions. I have also added a Supplement; giving notes upon some topics which, though only subsidiary, are sufficiently important or interesting to deserve attention.

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BOOK I

GENERAL CONSIDERATIONS

CHAPTER I

THE NATURE OF A CRIME

THROUGHOUT forty years' experience as an academical lecturer upon various legal subjects, I found criminal law to be usually regarded, both by its students and by its teachers, as one of the most attractive portions of their work. It has of course a great practical importance; on account of the large number of our criminal tribunals and, consequently, of the persons who have to take part in their administration. For to young counsel and solicitors these criminal courts offer the readiest access to professional employment and thus to experience, instructive if not lucrative, in the practical details of advocacy. And even persons who have no professional interest in legal matters often find themselves engaged, as jurymen or Justices of the Peace, in discharging public duties in which a knowledge of the criminal law is of great assistance to them. Again, without any such call either of public duty or of professional activity, the plainest private citizen may easily have direct personal cause to realise the value of this kind of knowledge. For our civilisation is not yet so perfect that a man can be sure that even the most prudent administration of his affairs will save him from having to invoke the protection of the criminal law, or that even the highest moral rectitude will remove all risk of his having to defend himself against groundless and malicious criminal accusations. But there are also other causes, less utilitarian than any of these,

which nevertheless play a still greater part in giving the criminal portion of our law that special attractiveness which it unquestionably has, not only for professional students but even for ordinary readers. For this branch of study is rendered attractive to all thoughtful men by its direct bearing on the most urgent social difficulties of our time and on the deepest ethical problems of all times. And almost all men, whether thoughtful or thoughtless, are fascinated by its dramatic character—the vivid and violent nature of the events which criminal courts notice and repress, as well as of those by which they effect the repression. Forcible interferences with property and liberty, with person and life, are the causes which bring criminal law into operation; and its operations are themselves directed to the infliction of similar acts of seizure, suffering, and slaughter. The utmost violence which administrators of civil justice have power to inflict ranks only amongst the gentlest of those penalties by which the criminal courts do their work. Hence of all branches of legal study there is no other which stirs men's imaginations and sympathies so readily and so deeply.

The interest thus aroused tends naturally to facilitate the progress of law students through the difficulties of this subject; and has done much to produce the impression, which happily prevails in the minds of most of them, that this branch of their work is peculiarly easy. That impression is erroneous; though, no doubt, the beginner may acquire such a knowledge of criminal law as suffices for ordinary needs, either of examination or of everyday practice, without having to face so many points of intrinsic difficulty as he will usually find it necessary to master, whether for practice or for examination, in any other leading branch of our law.

But there is one grave—if not indeed insoluble—difficulty which has to be faced in studying the law of crime. And this difficulty comes at the very outset of the subject[1]. For it

[1] If a student find the present chapter too difficult, he should postpone it until after reading the rest of the book.

consists of the fundamental problem—*What is a Crime?* Clearly the criminal law is concerned with crimes alone, not with illegal acts in general. But how are we to distinguish those breaches of law which are crimes from those which are merely illegal without being criminal[1]?

Many attempts have been made to answer this question, and to propound a general definition of crime which shall distinguish wrongs which are criminal from those which are merely "civil." Moreover, as the distinction between criminal and non-criminal law is not peculiar to England but is familiar in every civilised country, attempts have naturally been made to go a step further, and to look for such a definition of crime as will express this difference in a form so general as to be applicable, not merely to England, but to all countries in which this distinction between criminal and civil prevails.

In attempting, whether for this general purpose or merely with reference to English law, to frame a definition of crime which shall separate the illegal acts that are criminal from those which must be treated in another branch of the law of Wrongs, the first course which naturally occurs to us is to see if some peculiarity, which may serve as a basis for our definition, can be found in the very nature of the criminal act itself.

(1) This was a course adopted by Sir William Blackstone when writing the great classical text-book of English law. The fourth volume of his *Commentaries on the Laws of England* is devoted to "Public Wrongs," or crimes; and his definition of a public wrong is given at the outset of it, though in two somewhat dissimilar forms. Of these the first is, "an act committed or omitted in violation of a *public law* forbidding or commanding it[2]." This answer, however, only drives us to the further question, What is meant by "public" law? That phrase has several well-accepted senses, but none of them seems applicable here. For if, with Austin[3], we take public to be identical with constitutional law, then Blackstone's

[1] See Salmond's *Jurisprudence*, 7th ed., § 27.
[2] 4 Bl. Comm. 5. [3] *Jurisprudence*, Lecture xliv., p. 770.

definition will cover political offences alone, though they are only an extremely small portion of the whole field of crime. If again, with the Germans, we take public law to include, along with constitutional law, criminal law itself[1], the definition ceases to define. And if, finally, we adopt the only other familiar sense, and consider public law as equivalent to what is now more commonly called "positive law" or "municipal law"—that is to say, all law which has been made by the public authorities of a State[2]—the definition will obviously become too wide; for it will cover every legal wrong.

(2) We must therefore pass to Blackstone's next definition. According to this, a crime is "a violation of the *public* rights and duties due to the whole community, considered as a community[3]." Blackstone, of course, does not intend to suggest by this that crimes violate no other rights besides public ones; for obviously every theft violates some private right of property. What he meant is expressed more clearly in the form given to this definition by Serjeant Stephen in editing, or rather reconstructing, the Commentaries: "A crime is a violation of a right, considered in reference to the evil tendency of such violation as regards the community at large." It may be remarked, in passing, that this form of words introduces a new error, by limiting crimes to violations "of rights"; whereas, as Blackstone had well pointed out, a crime may be a violation either of a right or only of a duty. For one remarkable difference between criminal and "civil" (*i.e.* non-criminal) law lies, as we shall subsequently see, in the fact that, whilst breaches of the latter always involve an infringement of some person's right, the criminal law makes it our duty to abstain from various objectionable acts although no particular person's rights would be invaded by our doing them. Instances of crimes which do not violate any one's right may be found in the offences of engraving upon any metal plate (even when it is your own) the words of

[1] Holland, *Jurisprudence*, ch. ix., ch. xvi.
[2] Austin, pp. 781, 787.
[3] 4 Bl. Comm. 5.

a bank-note, without lawful excuse for so doing[1]; or of being found in possession of house-breaking tools by night[2]; or of keeping a live Colorado beetle[3].

The idea which Blackstone and Stephen are here attempting to embody is one of great importance, if only on account of the wide currency it has obtained; and it deserves a very close scrutiny. Crimes, according to this idea, are such breaches of law as injure the community. Now there can be no doubt that if we make a merely general contrast between crimes, taken as a mass, and the remaining forms of illegal conduct, taken similarly as a mass, the amount of harm produced by the former group will be much greater and much more widespread than that produced by the latter. This fact was observed even so early as in the days of the Roman Empire. Roman jurists who noted this specially strong tendency of crimes to injure the public, supposed it to be the reason why their forefathers had called crimes "delicta *publica*" and criminal trials "judicia *publica*." As a matter of actual history, those phrases were not suggested originally by this; nor even, as Justinian fancied (Inst. 4. 18. 1), by the rule that any member of the public can prosecute a criminal; but by the fact that in early Rome all charges of crimes were *tried* by the public itself, *i.e.* by the whole Roman people assembled in comitia centuriata (see p. 24 *infra*). Long after this form of trial had become obsolete, and the origin of the epithet consequently obscure, crimes still continued to be called "public." And the phrase did not end with the Roman law; but, as we have seen, plays a prominent part in the classifications and the definitions of our own Blackstone. Its survival was doubtless due to the recognition of the unmistakable public mischief which most crimes produce. Were only a rough general description to be attempted, this public mischief ought undoubtedly to be made the salient feature. But can we accept it as sufficient foundation for the precise

[1] Forgery Act, 1913, s. 9 (*c*).
[2] 24 and 25 Vict. c. 96, s. 58.
[3] 40 and 41 Vict. c. 68.

accuracy necessary in a formal definition? Such a definition must give us "the whole thing and the sole thing"; telling us something that shall be true of every crime, and yet not true of any conceivable non-criminal breach of law. Clearly then we cannot define crimes by mere help of the vague fact that "they usually injure the community." For every illegal act whatever, even a mere breach of contract, must be injurious to the community, by causing it alarm at least, if not in other ways also. Indeed had not this been the case, the community would not have taken the trouble to legislate against the act. Moreover we cannot even make the question one of degree, and say that crimes are always *more* injurious to the community than civil wrongs are. For it is easy to find instances to the contrary[1]. Thus, until 9 Geo. I c. 22, English law made it no crime to kill another person's horses, though it was a crime to steal them; yet the former wrong, since it involved the actual destruction of wealth, was obviously the more injurious to the community.

Similarly, even at the present day, it is possible that, without committing any crime at all, a man may by a breach of trust, or by negligent mismanagement of a Company's affairs, bring about a calamity incomparably more widespread and more severe than that produced by stealing a cotton pocket handkerchief, though that petty theft is a felonious crime. Indeed a person's conduct may amount to a crime even though, instead of being an evil to the community, it is, on the whole, a benefit; as where a defendant was held guilty of the offence of a common nuisance, because he had erected in Cowes Harbour a sloping causeway which to some extent hindered navigation, though by facilitating the landing of passengers and goods it produced advantages which were considered by the jury to more than counterbalance that hindrance[2].

Hence we cannot say, with anything like that unvarying precision which a definition requires, that a legal wrong is a

[1] Cf. p. 10, n. 1 *infra*. [2] *Rex* v. *Ward*, 4 Ad. and E. 384.

crime if it tends to cause evil to the community. Nay, it does not necessarily become a crime even when this public evil tendency is expressly recognised by law, and made the sole ground for legally prohibiting the hurtful conduct. For there exists a well-known class of proceedings called "penal actions," by which pecuniary penalties can be recovered—in some cases[1] by any person who will sue for them—from the doers of various prohibited acts; these acts being thus prohibited, and visited with penalties[2], solely on account of their tendency to cause evil to the community at large, "considered as a community." For example, a person who, in advertising a reward for the return of lost property, adds that "no questions will be asked," incurs by the Larceny Act a penalty of £50 recoverable by anyone who will sue for it[3]. In like manner, the County Courts Act, 1888, provides that if any officer of a county court shall act as a solicitor in any suit in that court, he shall be liable to a penalty of £50[4] similarly recoverable[5]. Yet the litigation by which an informer enforces such a penalty against a wrong-doer is not treated by English law as a criminal, but as a "civil," proceeding; and the wrong-doing itself is not regarded as a crime[6]. This anomalous method of checking ill-doing has long been discredited; but

[1] Styled "Popular" actions. In 1912 an informer sued Sir S. Samuel, M.P., for £46,500 as penalties. The words "Henslow, common informer," still legible on the front of Corpus Christi College at Cambridge, are a wrong-doer's protest against a Professor's public-spirited attempt thus to punish bribery at a Parliamentary election; see *The Times*, March 23, 1835.

[2] But "penalty" is *primâ facie* a criminal term; so express words in the Statute are necessary to make a penalty recoverable by civil proceedings, or, even then, by an unofficial informer.

[3] 24 and 25 Vict. c. 96, s. 102. See L. R. [1901] 2 K. B. 564.

[4] 51 and 52 Vict. c. 43, s. 41.

[5] Similarly by 31 Eliz. c. 6, at every election of a fellow or scholar in a College the statutes relating thereto must be publicly read to the meeting, or a penalty of £40 may be recovered from each defaulter "by any person that will sue for the same." Yet this penalty is far from having secured habitual obedience.

[6] *Atcheson* v. *Everitt*, 1 Cowp. 382 (K. S. C. 4). Yet in Private International Law the proceeding is included amongst "penal" actions; and therefore cannot be brought in the courts of a foreign country.

in the early part of the nineteenth century it was so popular with Parliament that every session saw new instances of it enacted[1].

Hence to speak of crimes as those forms of legal wrong which are regarded by the law as being especially injurious to the public at large, may be an instructive general description of them; but it is not an accurate definition.

(3) The same may be said of a way of distinguishing them which is often adopted in the course of political discussions, and which probably is the one that most naturally suggests itself to an ordinary man's mind—the limitation of the idea of crime to those legal wrongs which violently offend our moral feelings. Here again, however, we only find a rough test; it holds of *grave*[2] crimes in the mass, as contrasted with civil wrongs in the mass, but breaks down when we come to apply it with the universality of a definition. It is in recognition of the fact that many crimes involve little or no ethical blame that Natal and West Australia, when legally prohibiting the immigration of convicted criminals, limited the prohibition to those whose offences "involved moral turpitude." Thus, for example, Treason is legally the gravest of all crimes, yet often, as Sir Walter Scott says, remembering Flora Macdonald and George Washington[3], "it arises from mistaken virtue, and therefore, however highly criminal, cannot be considered disgraceful";—a view which has received even legislative approval, in the exclusion of treason and other political offences from international arrangements for extradition. Again, to take a very different example, the mere

[1] It is still popular in the legislatures of the United States.

[2] *E.g.* of nearly all indictable offences; but not of more than a tenth of the petty offences that are punished summarily, like cycling offences, or selling bread "otherwise than by weight," or paying wages in a public-house (46 and 47 Vict. c. 31, s. 3). Hence even the official statistics distinguish the "fully, really, and strictly criminal" offences from the mere "quasi-criminal" ones which, though they affect public convenience, involve no dishonesty or violence. Cf. p. 19 n. 2 *infra*; and L. R. [1915] 1 K. B. 600.

[3] These historical references were unfortunately reproduced to me in a Tripos paper thus: "The conduct of Flora Macdonald towards George Washington, was treasonable, yet quite praiseworthy."

omission to keep a highway in repair shocks nobody, but it is a crime[1]; whilst many grossly cruel and fraudulent breaches of trust are mere civil wrongs. Directors of a company may ruin it by the grossest negligence, bringing many shareholders to poverty; and yet incur no criminal liability. Conduct may, indeed, be grossly wicked and yet be no breach of law at all. A man who should callously stand by and watch a child drowning in a shallow pond, would arouse universal indignation; but in England (unlike France) he would have committed neither a criminal nor even a civil wrong[2]. Cf. p. 121 *infra*.

This failure of the most approved tests of criminality that are based on the nature or the natural consequences of the criminal acts themselves, may lead us to suspect that there exists no intrinsic distinction between those acts which are crimes and those which are not. It may nevertheless be possible to trace some extrinsic one. For there may be some unmistakable difference between the respective legal consequences of these two classes of acts. It would, indeed, be purely technical; amounting merely to a distinction between criminal procedure and civil procedure. But it would at any rate enable us to distinguish between these two, and then to define a crime as being "an act which gives rise to that kind of procedure which is styled criminal."

(4) Some writers have laid stress upon a difference between the respective degrees of activity manifested by the State in the two cases. In "civil" matters, say they, the State does not interpose until actual wrong has been done; and, even then, it does not interpose unless some private person institutes litigation; and no person is allowed to institute it except the one who has been directly injured by the wrong. In criminal matters, on the other hand, every fully civilised

[1] Yet indictments for it have become rare since 1894, when the Local Government Act empowered the local Road Authority to effect the repairs and recover the cost from the person liable to repair.

[2] Unless he had some *special* duty to the child. A father would have; a grandfather usually would not; *Reg.* v. *White*, L. R., 1 C. C. R. 311.

State maintains an elaborate staff of police to prevent offences from being committed; and, if one be committed, a prosecution may always[1] be—indeed in many countries, it can only be[2]—instituted by public functionaries, without any co-operation on the part of the person injured; and possibly the law may[3] give every person in the community, whether injured or not, a right to institute a prosecution. This contrast is a genuine and a vivid one; and the tendency of modern criminal legislation is to intensify it. Yet it cannot be applied with such unvarying precision as to afford the basis for a definition. For, on the one hand, civil proceedings are often taken in order to obtain an "injunction" against some anticipated wrong which has not yet been actually committed; and, on the other, many offences that are undeniably criminal are so trivial that the police would not interfere beforehand to prevent them. Again, there are some few crimes for which, even in English law, a prosecution cannot be initiated by any private person, even though it be the victim himself, except by direct permission from the State[4]; whilst, as we have seen, those "penal actions" which may be instituted by any private person who chooses to turn informer, are classed amongst civil proceedings. And the fact that there still survive many old local "Associations for the Prosecution of Felons" serves at least to shew that the activity of the State

[1] Though in eastern lands, *e.g.* India and China, there still survive a few offences for which only the injured party can prosecute; a curious link between Crime and Tort.

[2] Thus in France the Code d'Instruction Criminelle provides (Art. 1) that "L'action pour l'application des peines n'appartient qu'aux fonctionnaires." In Scotland, though it is theoretically possible for an injured person to prosecute, such private prosecutions, except in mere petty complaints, are obsolete. *Coats* v. *Brown* (Sessions Cases, 1909, p. 29) was the first for very many (some say four hundred) years past. The Lord Advocate must prosecute; or at least authorise the prosecution. Hence actions for Malicious Prosecution, familiar in England, are unknown in Scotland.

[3] It does so in England; *X* can prosecute *Y* for assaulting or libelling *Z*; even though *Z* forbid the prosecution.

[4] *E.g.* the crimes specified in the Vexatious Indictments Act; see p. 471. For prosecutions that require the consent of the Attorney-General, see Halsbury's *Laws of England*, IX, 293; and see p. 537 *infra*.

in instituting criminal prosecutions has not always been found adequate.

(5) It might, again, be expected that the two procedures could be distinguished by a difference in the tribunals in which they are employed. But this is not so; for as we shall hereafter see, it often happens, alike in the case of the humblest and of the most dignified tribunals, that both criminal and civil proceedings may be taken in the same court.

(6) But between the two kinds of proceedings themselves various points of contrast have been remarked. It is evident, for instance, that the object of criminal procedure always is *Punishment*; the convicted offender is made to undergo evil which is inflicted on him not for the sake of redress but for the sake of example[1]. The infliction does not provide compensation to the person who has been injured by the crime, but is simply a warning—a *documentum*, as the Roman lawyers called it—to persons in general not to cause such injuries. In civil proceedings, on the other hand, the order which is made against an unsuccessful defendant is usually concerned with no interests but those of the parties to the litigation; the defendant is forbidden to infringe the plaintiff's rights or, still more frequently, is directed to pay him a sum of money in reparation of some right which he already has actually infringed. In assessing that sum of money, the tribunal will usually be guided by the amount of loss the plaintiff has sustained through the wrong, without considering whether or not that amount is large enough to render the payment of it so inconvenient to the defendant as to be a lesson to him. Even where the wrong complained of is an adultery, the damages given to the injured husband must (it is now settled) be no greater against an adulterer who is rich than they

[1] The conditional Evil which persons will incur if they break a law, and which thus renders that law binding, (*sancit*) is called by jurists its Sanction. Hence they say (paradoxical though it sounds to non-legal hearers) that "Punishment is the Sanction of crimes."

would be were he poor[1]. And even in those cases where civil proceedings result, not in a payment of money, but in the defendant's being sent to prison, a similar distinction is traceable. For he will be set free as soon as he is willing to do what the court has ordered; civil imprisonment being only "coercive," and not, like criminal imprisonment, "punitive." At first sight, therefore, it may seem to be quite easy to distinguish civil proceedings from criminal ones, by saying that punishment is always the aim of the latter but never the aim of the former. But when we take a more comprehensive view of civil litigation, we find that there are cases in which a part of its object—and indeed others in which the whole of its object—is to punish. Thus there is a large class of ordinary civil cases in which "exemplary" damages are permitted[2]. Where, for example, a plaintiff has been assaulted or slandered or defrauded, the jury need not limit the damages to such an amount as suffices to make good his loss; they may also take into account the degree of violence or oppressiveness or malice of which the defendant has been guilty, and give more liberal damages in retribution of it. Thus in a case of assault, as much as £500 damages have been given for knocking off a man's hat, and a higher court has refused to treat the amount as excessive[3]. Moreover that peculiar class of proceedings called penal actions belong, as we have seen, to civil procedure; and yet they exist solely for the purpose of inflicting punishment. When in such an action, an informer recovers a penalty from some one who—for instance—has opened a place of amusement on a Sunday (cf. p. 16 n.), the money is not exacted because the informer has suffered by the wrong-doing, but only because the community desires to prevent such wrong-doings from being repeated. The law inflicts these penalties from precisely the same motive which

[1] L. R., 11 P. D. 100. Divorce proceedings, like those in Bankruptcy, are civil, despite the immorality of their causes and the gravity of their results; L. R., 2 P. & M. at p. 141. Hence they can be brought against an insane person; and they can lawfully be "compounded."

[2] Pollock on Torts, Bk. I. ch. 5. [3] Cited in 5 Taunton 442.

leads it to send thieves to gaol or murderers to the gallows. We are brought, then, to the conclusion that, whilst punishment is admittedly the object of all criminal proceedings, it sometimes is the object of civil ones also. If the aim of the legislature, in creating any particular form of litigation, clearly was to punish, this raises a strong probability that the litigation ought to be treated as a criminal proceeding. But it gives us a probability only; and not that positive certainty which a definition requires.

(7) If, however, we pass from the purpose with which (in either case) the unsuccessful defendant is made to undergo some evil, or "sanction," to the differences perceptible between the respective sanctions themselves, a more plausible ground of distinction is reached. For it may be said that, on the one hand, all civil sanctions, even those of penal actions, directly enrich some *individual* (whether by awarding him money or by securing him the specific performance of some act to which he has a right); whilst criminal sanctions inflict a loss or suffering that never enriches any individual—though occasionally, as in the cases of fines or confiscations, it may enrich the State. This is almost precisely true, but not quite. For in "penal actions," unless the statute expressly authorises private persons to act as informers, the State alone can sue and recover the penalty; and yet there is full authority for ranking such suits by it as merely civil proceedings[1]. And, conversely, mere civil actions for debt used, in former days, often to end not in enriching the plaintiff, but merely in imprisoning the debtor; for if the defendant had no property out of which the amount for which judgment had been given could be realised, he himself could generally be seized in execution. And even now, although the Debtors' Act, 1869[2], has abolished the old matter-of-course imprisonment for debt, yet even under it (sec. 5), if the non-payment of a judgment

[1] See *Rex* v. *Hausmann*, 3 Cr. App. R. 3: *Att. Gen.* v. *Bradlaugh*, L. R., 14 Q. B. D. 667 (K. S. C. 7); *Att. Gen.* v. *Bowman*, 2 B. and P. 532.

[2] 32 and 33 Vict. c. 62.

debt is wilful, the debtor may be committed to prison; as also may those who disobey various kinds of orders made at petty sessions for payment of money, *e.g.* for rates, or for maintenance of wives. Several thousands of such orders of commitment are made every year. Such imprisonment of course is, as we have seen, not punitive but only coercive; for the debtor will be at once released if he consents to pay what he owes.

(8) But a real and salient difference between civil and criminal proceedings may be discovered, if we look at the respective degrees of control exercised over them by the Sovereign; not so much in respect (as we have already said) of their commencement as of their termination. Austin[1] has established that the distinctive attribute of criminal procedure, in all countries, lies really in the fact that "its sanctions are enforced at the discretion of the Sovereign." This does not mean that the Sovereign's permission must be obtained before any criminal proceedings can be taken, but that he can at any time interfere so as to prevent those proceedings from being continued, and can even grant a pardon which will release an offender from all possibility of punishment. Thus the "sanctions," the punishments, of criminal procedure are remissible by the Crown. Moreover they are not remissible by any private person. Such a person may be the sole victim of the crime, he may even have taken the trouble to commence a prosecution for it, yet these facts will not give him any power of final control over the proceedings; and no settlement which he may make with the accused offenders will afford the latter any legal immunity. The prosecution which has been thus settled and abandoned by him may at any subsequent time, however remote, be taken up again by the Attorney-General or even by any private person. Thus in *Rex* v. *Wood*[2] a man had begun a prosecution against the keeper of a gaming house, and em-

[1] *Lectures on Jurisprudence*, Lect. xxvii.
[2] 3 B. and Ad. 657. Cf. *Smith* v. *Dear*, 88 L. T. 664.

ployed a particular solicitor to conduct the proceedings. He afterwards changed his lawyer; and subsequently arranged matters with the defendant and dropped the prosecution. Thereupon the original solicitor took it up, and brought it to trial. The former prosecutor protested against this activity, but in vain; the Court of King's Bench insisted that the case must proceed. All this is in striking contrast to the rules of civil procedure, where the party injured usually has an absolute legal power of settling the matter and of remitting the sanction, alike before he has commenced proceedings and after he has commenced them; whilst the Sovereign, on the other hand, has usually no power to interfere, and no pardon granted by him could relieve the offender from his liability to make redress to the injured person.

Austin here has suggested a true principle of demarcation; (though, to avoid including actions for recovery of the Crown's debts or other civil rights, we should add that all criminal sanctions "are imposed with a punitive purpose"). But he suggested it only in general terms: so that, for any particular system of criminal law, some difficulty may arise in expressing it with the completeness locally necessary. Thus in English law two exceptional rules must not be overlooked. One is that the Crown's power of pardon, though nearly universal, is not absolutely so (*infra*, pp. 502–3). For by the common law a public nuisance, whilst still unabated, cannot be pardoned; and by the Habeas Corpus Act, another offence, that of sending a man to prison outside England, is also made unpardonable, lest politicians obnoxious to the Crown should be kidnapped by Crown servants with impunity. Accordingly the punishment of these two offences is not remissible; (except, of course, by passing a special Act of Parliament, an anomalous interference with the rules of law such as would equally suffice to remit any non-criminal sanction). We must therefore modify Austin, and not say more than that "crimes are wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the

Crown alone, *if remissible at all.*" The other qualification in English law arises from the anomalous character of those penal actions by a "common informer" which in this country complicate so artificially the natural boundary between criminal and civil law. Were it not for them, it would be sufficient to say simply, with Austin, that the sanctions of civil procedure are always remissible by the party suing and are never remissible by the Crown (unless it be itself that party). But penal actions have long ceased to be remissible quite freely by the party suing; for 18 Eliz. c. 5 requires him to obtain leave from the court before compromising the action. Moreover they have always been to some extent remissible by the Crown; for, even at common law, the Crown always had power to give a valid pardon before any informer had commenced an actual suit; (though not after he had commenced one and so secured to himself a vested interest in the penalty). And under some statutes, like the Lord's Day Act, 1875, the power is not terminated even by a suit being brought[1]. Hence, to allow for the peculiarities of this form of civil procedure, we must modify Austin's account of civil wrongs, and say that a wrong is civil if *any* power of remitting its sanction can be exercised, whether freely or even under restrictions, by any private person. The Crown may, as we have seen, though only in one rare and peculiar class of cases, have the power of remitting a civil sanction. But no private person can ever grant a valid remission of any criminal sanction. Herein lies the only ultimate and unvarying distinction between the two kinds of procedure; (though, as we have seen, the familiar everyday instances of both are characterised by other and more conspicuous, though less indispensable, distinctions). For the judicial proceedings taken against a wrong-doer may produce a variety of results. There may be:

[1] See for instance the effect of this Act (38 and 39 Vict. c. 80) in extending the Crown's power of pardoning offences committed against Bishop Porteus' Act (21 Geo. III c. 49) which restrains the holding of concerts and other public entertainments on Sunday.

1. Civil proceedings producing merely restitution or compensatory damages. Plaintiff is actually out of pocket by paying his own costs.

2. Civil proceedings producing efficient redress (*i.e.* both damages and also costs, or specific redress, or prevention). A "documentum" to defendant; but plaintiff is not enriched.

3. Civil proceedings producing exemplary damages. A documentum to defendant, and an actual profit to plaintiff.

4. Civil proceedings in which an informer receives or shares a penalty. A documentum to defendant, and an actual profit to plaintiff. See instances on p. 7.

5. Civil proceedings in which the Crown receives the whole of a penalty[1]. A documentum to defendant, but a profit to the State alone[2].

6. Criminal proceedings. A documentum to the defendant; either a profit to the State alone, or, more usually, no profit even to it.

In recent years the question as to the dividing line between civil and criminal proceedings has assumed great practical importance, and has occupied the attention of the English courts with unusual frequency. For many controversies have arisen under the Judicature Act, 1873, which, when creating a general Court of Appeal for *civil* cases, enacted (by s. 47) that no appeal to it should lie "in any criminal cause or matter[3]."

In dealing with these cases, the courts have recognised that a matter may be criminal even though it be too trivial to

[1] These are now decided to be civil (and even when the penalty is enforceable by an imprisonment, if it be a Coercive—not a Punitive—one). See p. 13 n. (1), *supra*.

[2] *E.g.* proceedings against an M.P. for voting before taking the Parliamentary oath. Or proceedings for smuggling. Or for making a false return of income for the purpose of income tax (here the offender may also be prosecuted *criminally*, under s. 5 of the Perjury Act, *infra*, p. 301).

[3] The question whether proceedings are criminal or civil is of practical moment also as affecting the rules of Evidence, the parties' power of compromising the dispute or of waiving the rules of procedure, the Crown's power of pardon, and the risk of an action for malicious prosecution.

end in trial by a jury or in an imprisonment. Thus it is a "crime" not to send your child to school[1]; though it cannot be prosecuted in any higher tribunal than a police-magistrate's, and the utmost possible punishment for it is a fine of a sovereign. Similarly they recognise that a matter may be criminal without involving any moral turpitude; as where a limited company omits to send to the Registrar of Joint Stock Companies the annual list of its members[2]. Up to the present time, they have found it a practically sufficient test to inquire whether the object of the proceedings is punitive or not. They regard any proceedings as "criminal" which may terminate in the infliction of a Punishment; even though it be merely a pecuniary fine; and even though this fine be not inevitable but only alternative, *e.g.* where the defendant might either have been ordered to pay a fine or to abate the nuisance complained of, and in fact only the abatement was ordered, so that no fine was imposed[3]. For proceedings which are not punitive cannot (*supra*, p. 11) be criminal, and proceedings which are civil are very seldom punitive; so that in the vast majority of cases this simple test, punitiveness or nonpunitiveness, will answer the question as to who has the legal power of remitting the sanction[4]. But it is upon this last and fundamental question that, as we saw (p. 14), the criminal or civil character of the proceedings finally depends.

Inasmuch as the difference between crimes and civil injuries does not consist of any intrinsic difference in the nature of the wrongful acts themselves, but only in the legal proceedings[1] which are taken upon them, the same injury may be both civil and criminal; for the law may allow both forms of procedure if it like. And, in this very way, the distinction between civil wrongs and crimes was formerly much obscured in England, when our civil courts were allowed to try "Appeals of Felony." The sole object of such a proceeding was to inflict capital punishment upon a man guilty of heinous crime. Yet the proceeding was taken in a civil court; and was conducted by civil rules of procedure (the accused, for example, being defended by counsel, though none would have been allowed to him in a criminal court); and, whilst it might be compromised by the plaintiff[2], it could not be defeated by any pardon from the Crown. This anomalous remedy was not formally abolished until 1819; and so late as in 1818, in *Ashford* v. *Thornton*[3], an accuser actually instituted an "Appeal." Even then the abolition was resisted by some of the most progressive politicians, on the ground that such proceedings afforded the only sure means by which over-zealous soldiers or constables, who acted with an illegal excess of violence, could be brought to punishment without the possibility of their being shielded by the Crown[4]. From this point of view, no less eminent a judge than Lord Holt had eulogised Appeals as "a true badge of English liberty."

But, though Appeals have been abolished, it still remains possible that the same wrongful act may be followed up by both civil and criminal proceedings. For almost every crime admits of being treated as a "tort," *i.e.* as a civil injury, so

[1] *Mellor* v. *Denham*, L. R., 5 Q. B. D. 467.

[2] 25 and 26 Vict. c. 89. s. 26.

[3] *Reg.* v. *Whitchurch*, L. R., 7 Q. B. D. 534. As non-civil imprisonment may follow (*infra*, ch. XXIX.) in default, sometimes even non-wilful default, of payment of a punitive fine, the essential mark of Crime is usually spoken of as being liability (either immediate or on default)—not to *Punishment*, in general, but—to such imprisonment. Cf. *Robson* v. *Biggar*, L. R. [1908] 1 K. B. 672; where the penalty imposed on a distrainor who overcharges, though it can be recovered only by the party aggrieved, was held to be criminal; because imprisonment could be inflicted in default of payment. See also *Seaman* v. *Burley*; L. R. [1896] 2 Q. B. 344.

[4] *E.g.* if a commitment for contempt of court was meant to be a punitive one, the Sovereign (or similarly a colonial governor acting on his behalf) can release the offender; *Moseley's Case*, L. R. [1893] A. C. 133.

[1] Thus proceedings to enforce payment of rates are (1) for a general district rate, civil (L. R. [1899] 1 Q. B. 273); yet (2) for a poor-rate, criminal (L. R. [1896] 2 Q. B. 344); though the ethical guilt and the evil to the community are alike in both cases.

[2] "An 'appeal' is a private suit, wholly under the control of the party suing. *Execution is at his option.* His sole object may be to get money"; (Bayley, J.)

[3] 1 B. and Ald. 423. For the details of this remarkable case see *All the Year Round* for May, 1867.

[4] See Bentham's *Works*, VIII. 539.

that the person wronged by it can sue the wrong-doer for pecuniary compensation. Blackstone even goes so far as to say, universally, that every crime is thus also a private injury[1]; but of course this cannot be the case with those offences which do not happen to injure any particular private individual. Of such offences there are three groups. There are the cases in which a crime affects the State alone; as where a man publishes a seditious libel or enlists recruits for the service of some foreign belligerent. Again, there are the cases in which, though the crime is aimed against a private individual, its course is checked before it has reached the point of doing any actual harm; as where an intending forger is charged only with "having in his possession a block for the purpose of forging a trade-mark," or with possessing bank-note paper without lawful excuse, or with engraving a bank-note plate without lawful excuse. And, thirdly, there are cases in which though a private individual does actually suffer by the offence, yet this sufferer is no other than the actual criminal (who, of course, cannot claim compensation from himself); as in cases of attempted suicide, or (under 34 and 35 Vict. c. 108) of a tramp's "wilfully destroying" his own clothes whilst receiving shelter in the casual ward of a workhouse.

In, however, the vast majority of cases, he who commits a crime does thereby cause actual hurt to the person or property of some other man; and whenever this is so, the crime is also a tort[2]. But though most criminals are thus liable to be sued, in civil proceedings, for pecuniary compensation for the harm which they have done, such proceedings are rarely brought. For most crimes are committed by persons so poor that no compensation could be obtained from them. Hence libel and assault, since they are the crimes least unlikely to be committed by rich people, are the only crimes for which a resort to civil proceedings is at all common in practice; but they are very

[1] 4 Bl. Comm. 5.

[2] Thus after acquittal when indicted for assault, a man may still be sued civilly for damages for it; 12 East 415.

far from being (as is sometimes hastily inferred) the only crimes where it is possible. The victim of a rape has brought an action for damages against her ravisher[1]; and the circumstances which give rise to a prosecution for bigamy would often support civil proceedings for the tort of Deceit. Criminal wrongs and civil wrongs thus are not sharply separated groups of acts; but are often one and the same act as viewed from different standpoints, the difference being one not of nature but only of relation. To ask concerning any occurrence, "Is this a crime or is it a tort?" is—to borrow Sir James Stephen's apt illustration—no wiser than it would be to ask concerning a man, "Is he a father or a son?" For he may well be both.

If we know any particular occurrence to be a crime, it is easy—as we have seen—to ascertain whether or not it is also a tort, by asking if it damages any assignable individual. But there is no corresponding test whereby, when we know an occurrence to be a tort, we can readily ascertain whether or not it is also a crime. We cannot go beyond the rough historical generalisation that Torts were erected into crimes whenever the law-making power had come to regard the mere civil remedy for them as being inadequate. Inadequate it may have been on account of their great immorality, or of their great hurtfulness to the community, or of the greatness of the temptation to commit them, or of the likelihood of their being committed by persons too poor[2] to pay pecuniary damages. The easiness of the legal transition from tort to crime is vividly illustrated by the ancient Norman custom of the "Clameur de Haro," still surviving in our Channel Islands, by which a person who is suffering from a tort may cause any further continuance of that tort to become an actual crime, by merely uttering, in the wrong-doer's presence, an archaic invocation of the protection of Duke Rollo[3].

By a paradox, familiar to all readers of Sir Henry Maine's

[1] *S.* v. *S.*, 16 Cox 566.

[2] Thus the Musical Copyright Act, 1906, was enacted to check the sale of pirated music by penniless street-hawkers.

[3] See M. Glasson's article on the Clameur, in *La Grande Encyclopédie.*

Ancient Law, the codes of archaic civilisations may equally well be described as utterly ignoring crime or as being mainly occupied with it. For whilst the chief task of a primitive lawgiver is to cope with those acts of serious violence which mature civilisations repress by criminal punishment, yet his only means of coping with them is by exacting the claims of the private individuals who have been injured. The idea of repressing them by a further sanction, imposed in the collective interests of the community, is not reached until a late stage of legal development. The process of evolution may sometimes be traced through successive periods. In the earliest, the State recognises the need for redress, but only as for a merely private wrong; and so the amount of redress, and sometimes even the mode of redress, are left to the discretion of the injured person or his relatives. Even the Mosaic legislation left this primitive Bedouin rule in force for every homicide that was wilful, and bade the elders of the murderer's own city "fetch him and deliver him into the hands of the Avenger of Blood" (Deut. xix. 12). Even within living memory popular sentiment in Corsica recognised these vendettas as permissible, if not even obligatory. In Abyssinia the penalty for manslaughter is death; but the family of the victim may (A.D. 1923) waive it by accepting money instead[1]. A decided advance in civilisation is made when the penalty of any given class of crimes is specified and limited; a fine of sheep or cattle, it may be. The injured persons still retain the privilege of exacting it, but it is all that they can exact. A good instance is that law ascribed to Numa Pompilius which mitigated in this way the vengeance for mere manslaughter: "Si quis occidisset hominem, pro capite occisi agnatis ejus in concione offerat arietem[2]." And, nearer home, a more familiar instance may be found in the Anglo-Saxon wér-gild, claimable by the kinsmen of a murdered man, and nicely graduated according

[1] Rey's *Unconquered Abyssinia*, p. 117. Similarly in Tunis the first French code allowed (s. 216) a *prix du sang*, accepted by the victim's family, to release even a murderer.

[2] Clark's *Early Roman Law*, 44–50.

to his status; twelve hundred shillings for a thegn, but only two hundred for a villein, and forty for a slave, and less for a Welshman than for a Saxon[1]. Later on, again, it comes to be perceived that when one member suffers the community suffer; and hence that a compensatory expiation is due not only to the victim and his kindred but also to the State. So perhaps a fine is exacted on behalf of the community, either in addition to or instead of the private one; and probably some person is specified who shall exact it. The fourth and final stage of the process[2] is reached when the State realises that her interest in the preservation of order is so great that she must no longer remain content with saying that those who violate order shall afterwards compensate her; she must now by severer threats deter them from committing any such violation. The idea of a true Punishment is thus made to supersede all idea of compensation to the community. It overshadows even the idea of compensation to the injured; though for some time the consent of the injured may perhaps be thought necessary, at the outset of prosecutions, to enable the public punishment to take precedence of the private penalty or supersede it. (Traces of that conception are traceable even now in our own English criminal courts when, in dealing with some slight offence, they mitigate the punishment "because the prosecutor does not press the case[3]," or they even give him leave to settle the matter and withdraw the prosecution.) A good example of the introduction of true punishment is afforded by the law, attributed to Numa Pompilius, which punished murder: "Si quis hominem liberum dolo sciens morti dedit, paricidas esto[4]." But no additional example is afforded by early Roman legislation, even when we come down to the XII Tables; unless it be in the penalty

[1] Pollock and Maitland's *Hist. Eng. Law*, I. 26, II. 448. Maitland's *Domesday Book*, p. 31. Cf. Homer's "blood-price," Pope's *Iliad* ix. 632 and xviii. 497; and the dissertation in Butcher and Lang's *Odyssey*, p. 408.

[2] The stages of evolution are well illustrated in the Babylonian code of Hammurabi; see Dr Johns' cheap and excellent translation.

[3] 8 Cr. App. R. 271.

[4] Clark's *Early Roman Law*, p. 42.

of retaliation for a "membrum ruptum," but even this was perhaps regarded by the lawgivers rather as a source of gratification to the party originally maimed, than as a punishment by which the State sought to deter men from maiming its citizens. In like manner, the English conquerors of Ireland superseded the ancient fines for homicide by the punishment of death. They pronounced those Brehon fines to be "contrary both to God's law and man's"; yet it was only late in the twelfth century that such fines had been superseded in their own England[1]. Punishments thus instituted in the interests of the State would at first be imposed by direct action of the State itself or its delegate; thus in early Rome each sentence was pronounced by a special lex of the great national assembly, the Comitia (see p. 5, *supra*). As time went on, the function of administering criminal justice would come to be delegated to representatives. Sir Henry Maine[2] has shewn how, in the typical case of Rome, the Comitia came to delegate criminal cases, one by one, each to a special committee (quaestio), nominated for the particular occasion; and later on, to adopt the practice of appointing these quaestiones for a period, with power to try all cases, of a given class, that might arise during that time; whilst, ultimately, they were appointed permanently, as true forensic Courts.

Even in England the process of turning private wrongs into public ones is not yet complete; but goes forward year by year, whenever any class of private wrong—or even of acts that have never yet been treated as wrongs at all—comes to inspire the community with new apprehension, either on account of its unusual frequency or of some new discovery of its ill effects. Thus it was not until Hanoverian reigns that the maiming or killing of another man's cattle, or the burning of his standing corn, were made crimes; though they were wrongs as injurious to the owner as theft, and to the community still more injurious than theft. It was not until 1857 that it was made a crime for a trustee to commit a breach

[1] Pollock and Maitland, II. 458. [2] *Ancient Law*, ch. x.

of trust[1]; and not until 1868 that it was made a crime for a partner to steal the partnership property[2]. Every year sees Parliament create some new crime[3]; though, in most cases, of a character much more trivial than such instances as those just now quoted. Probably the multiplication of crimes would have gone on even more rapidly than it has done, but for the fact that various forms of misconduct, which otherwise would naturally have come to be restrained by criminal prohibitions, were already under an adequate deterrent sanction in the shape of some abnormal form of civil proceedings, such as an action for "exemplary damages[4]," or, again, for a penalty recoverable by the first informer[5].

Whilst a quickened public conscience thus extends the criminal law, that law in its turn stimulates the public conscience; as has been vividly shewn during the past century in the instances of duelling, of cruelty to animals, and of bribery at elections. And the same advance in civilisation which expands the law of crime should see crime itself diminish—more forms of evil prohibited, but fewer evil acts committed.

As criminal law developes, it moreover scrutinises more closely the mental condition of offenders; both for the punishing and for the preventing of crimes. Primitive lawgivers looked to physical conduct; and concerned themselves very little with its physical cause. They punished an injury even if it were merely accidental; but ignored evil endeavours that fell short of accomplishment. We shall see, in Chapters III, IV, V, how great a contrast in this respect is presented by modern law.

[1] 20 and 21 Vict. c. 54. [2] 31 and 32 Vict. c. 116.

[3] Cf. the Prevention of Corruption Act, 1906, making criminal certain acts of bribing commercial agents; the Public Health Act, 1907, s. 59, punishing any person who, when he knows he has an infectious disease, borrows a book from a public library; the Public Meeting Act, 1908, punishing any one who disturbs a public meeting in order to prevent the transaction of its business; the Coal Mines Regulation Act, 1908, punishing any coal-miner who remains underground, for the purpose of work, for more than eight hours in one day; the Copyright Act, 1911, making the violation of a known copyright a crime.

[4] *Supra*, p. 12. [5] *Supra*, p. 7.

CHAPTER II

THE PURPOSE OF CRIMINAL PUNISHMENT

THE inquiry will naturally suggest itself: Under what circumstances does it become wise thus to issue a new criminal prohibition? All modern legislatures are constantly being requested to pass enactments punishing some prevalent practice which the petitioners consider to be injurious to the community and which, whether from selfish or from philanthropic motives, they desire to see repressed. But Bentham[1] has vividly shewn that a lawgiver is not justified in yielding to such appeals merely because it is established that the practice in question does really injure his subjects. Before using threats of criminal penalties to suppress a noxious form of conduct, the legislator should satisfy himself upon no fewer than six points.

1. The objectionable practice should be productive not merely of evils, but of evils so great as to counterbalance the suffering, direct and indirect, which the infliction of criminal punishment necessarily involves. Hence he will not make a crime of mere Lying; unless it has caused a pecuniary loss to the deceived person and thereby become aggravated into Fraud.

2. It should admit of being defined with legal precision. On this ground, such vices as ingratitude, or extravagance, or gluttony (unlike drunkenness), do not admit of being punished criminally.

3. It should admit of being proved by cogent evidence. The untrustworthiness of the only available evidence has been one great cause of the reluctance of experienced legislators to deal criminally with offences that are purely mental, like heresy and conspiracy and the "compassing" of treason;

[1] Bentham's *Principles of Morals and Legislation*, chap. xv.; and his *Principles of Penal Law*, II. 1. 4. Cf. *Quarterly Review*, Jan. 1923.

and even with those which consist of merely oral utterances (hard to remember with precision) like slander.

4. Moreover this evidence should be such as can usually be obtained without impairing the privacy and confidence of domestic life. Hence in England, the criminal law does not punish drunkenness, unless seen in a public place.

5. And even if an offence is found to satisfy all these intrinsic conditions of illegality, the lawgiver should not prohibit it, until he has ascertained to what extent it is reprobated by the current feelings of the community. For, on the one hand, that reprobation may be sufficiently severe to remove all necessity for those more clumsy and costly restraints which legal prohibition would impose; just as in England at the present time, it is really by public sentiment, and not by the unpopular Lord's Day Act of Charles II, that our habitual abstinence from trade and labour on Sundays is secured. Or, on the other hand—as has sometimes been shewn by prosecutions, under the same statute, of bakers and crossing-sweepers for pursuing their callings on Sundays—public opinion may regard an offence so leniently that the fact of a man's having to undergo legal penalties for it, would only serve to secure him such a widespread sympathy as would countervail the deterrent effect of the punishment. Hence whist-drives are prosecuted only fitfully. Criminal legislation must only aim at expressing, as Prof. Ottley says, "the judgment of the *average* conscience as to the *minimum* standard of Right." To elevate the moral standard of the less orderly classes of the community is undoubtedly one of the functions of the criminal law; but it is a function which must be discharged slowly and cautiously. For attempts at a rapid and premature elevation are apt, as in the case of the Puritan legislation of the Cromwellian period, to provoke a reaction which defeats their aim. An admirable illustration of the caution which a wise legislator exercises in undertaking the tasks that moral reformers commend to him, is afforded by the English law of sexual offences (*infra*, p. 144). It does not

inflict criminal penalties upon all those acts which the ecclesiastical law prohibits and used to punish, and which the law of contract still visits fitly with the sanction of Nullity. It selects out of them, for criminal prohibition, those alone in which there is also present some further element—whether of abnormality or violence or fraud or widespread combination—that provokes such a general popular disgust as will make it certain that prosecutors and witnesses and jurymen will be content to see the prohibition actually enforced.

6. Whenever any form of objectionable conduct satisfies the five foregoing requisites, it is clear that the legislature should prohibit it. But still the prohibition need not be a criminal one. It would be superfluous cruelty to inflict criminal penalties where adequate protection can be secured to the community by the milder sanctions which civil courts can wield.

Hence breaches of contract have rarely been criminally dealt with. For, even when intentional, they are seldom accompanied by any great degree of wickedness or any great public risk; or by any great temptation which the fear of an action for damages would not be likely to counterbalance; or by any ill effects to the other contracting party which such an action could not repair. It has, however, been made a crime for a workman to break his contract of service whenever the probable consequences will be to endanger life or to expose valuable property to serious injury; (38 and 39 Vict. c. 36). Again, violations of the rights of property, whenever they are merely unintentional, are usually sufficiently restrained by the fear of a mere civil sanction, viz. the payment to the injured person of a sum of money co-extensive with the loss that has been inflicted, and of a further sum towards the "costs" which he has incurred by the litigation. But there are other forms of wrong-doing upon which the fear of damages and costs, or even of such mild forms of imprisonment as a civil court can inflict for breach of any injunction

which it has laid upon a defendant, do not impose an adequate restraint. Thus the case may be one in which the offender belongs to a class too poor to have the means of paying pecuniary compensation. Or the harm done to the immediate victim of the crime may be such that it cannot be redressed by pecuniary compensation; as in the case of murder. Or, as is far more commonly the case, the gravity of the offence, or the strength of the temptation to it, may be such that every instance of its commission causes a widespread sense of insecurity and alarm. In that case there is, beyond the immediate and direct victim who has been robbed or wounded, an unknown group of "indirect" sufferers; who, if only because they are unascertainable, cannot have pecuniary compensation given them for the suffering that has been caused to them. In such cases the lawgiver must adopt some more stringent remedy. He may, for instance, take precautions for securing some Antecedent interference which will check the wrong-doer at the incipient manifestations of his criminal purpose; interference such as our Saxon ancestors attempted to provide by their system of Frankpledge, which made it the direct interest of a man's neighbours to keep him from crime, and as Sir Robert Peel provided in the nineteenth century when he secured the establishment of the vigilant force of policemen with whom even the current slang of the streets still associates his two names. Or he may adopt the easier and more common, but less effective, method of a Retrospective interference; by holding out threats that, whenever a wrong has been actually committed, the wrong-doer shall incur punishment.

To check an offence by thus associating with the idea of it a deterrent sense of Terror, is possible only when both of two conditions are present. For (1) the wrong-doer must know he is doing wrong; for otherwise a terror would not affect him, and so not deter. It is on this ground that immunity from punishment is conceded to a man who has taken another's property by mistake for his own, or has committed a murder

in a fit of insanity. Nor does it suffice that he knows that what he is doing is wrong, unless also (2) he can "help" doing wrong: for a man ought not to be punished for acts which he was not, both physically and mentally, capable of avoiding; since the fear of punishment could not have the effect of making him avoid them. (Hence comes the reluctance which lawgivers have often shewn to punish men who have been coerced by threats of death to aid in a rebellion, or who have been hurried into a theft by some kleptomaniacal impulse.) When these two conditions are satisfied, so that the restraint of Terror becomes justifiable, such a restraint is supplied by criminal law very efficiently. For, as we have already seen in our review of the peculiarities which seem to distinguish criminal procedure from civil, the former exposes the offender to more numerous hazards of having litigation instituted against him, as well as to far severer "sanctions" in case of that litigation succeeding; and, at the same time, it diminishes his chances of having these penalties remitted.

According to the most generally accepted writers—as for instance Beccaria, Blackstone, Romilly, Paley, Feuerbach—this hope of preventing the repetition of the offence is not only a main object, but the sole permissible object, of inflicting a criminal punishment[1]. Hence Abp. Whately vividly says, "Every instance of the infliction of a punishment is an instance of the failure of that punishment"; for it is a case in which the threat of it has not proved perfectly deterrent. Whately here embodies an important truth; which had been exaggerated by Whichcote into the over-statement that "The execution of malefactors is no more to the credit of rulers than the death of patients is to the credit of physicians." But, whereas the death of one patient never constitutes any step towards the cure of others, the execution of a man, whom the fear of punishment has not deterred from murder,

[1] Hence Burnet, J., replied to a protesting prisoner: "Thou art to be hanged, not for having stolen the horse, but in order that other horses may not be stolen."

may nevertheless help to deter others. Hence there was sound logic in the often-derided exclamation of the shipwrecked crew who, when they saw a gibbet on the beach where they were washed ashore, cried "Thank God, we've reached a civilised country!"

Criminal punishment may effect the prevention of crimes in at least three different ways.

(*a*) It may act on the body of the offender, so as to deprive him, either temporarily or permanently, of the power to repeat the offence; as by imprisoning him, or by death.

(*b*) It may act on the offender's mind; counteracting his criminal habits by the terror it inspires, or even eradicating them by training him to habits of industry and a sense of duty—"awakening a 'serve me right' feeling" (Lord Haldane). The reforms in prison-management which, mainly under the influence of Howard's initiative, have been carried out during the past century and a half, have been largely directed towards the development of the educational influences that can be thus attempted during imprisonment. There are indeed some criminologists, especially in America, who hold this reformation of the individual punished to be the only legitimate object of punishment (though an object very rarely achieved)—an extreme view which denies to the State so simple and obvious a right as that of self-preservation.

(*c*) Its chief aim is to act on the minds of others, if only in one of the ways in which it may act on his mind; for, though it cannot amend them by education, it may at least deter them by fear[1]. It is in this way that pecuniary penalties help

[1] That the fear of punishment *can* deter is shewn by the fall in offences against the Education Act when the fine was raised from 5*s.* to 20*s.*; and still more vividly by its efficacy in the training of animals and even of fishes: a pike can by it be taught to swim amongst tench innocuously, or a flea to abstain from jumping. See p. 538 *infra*. The legislature showed confidence in that efficacy by the Dangerous Drugs Act, 1923 (as to traffic in cocaine or prepared opium), raising the incarceration imposed by the earlier Act from six months' imprisonment to ten years' penal servitude.

But were Deterrence the *sole* object, it would sometimes impose harsher punishments than public opinion (which usually thinks mainly of ethical Retribution) would tolerate.

to prevent crime, though incapable of preventing it either in mode (*a*) or as an educative influence.

But beyond this paramount and universally admitted object of punishment, the prevention of crime, it may be questioned whether there are not two further purposes which the legislator may legitimately desire to attain as results, though only minor results, of punishment.

One of these—distasteful as is the suggestion of it to the great majority of modern writers—is the gratification of the feelings of the persons injured. In early law this was undoubtedly an object, often indeed the paramount object, of punishment[1]. Even in Imperial Rome, hanging in chains was regarded as a satisfaction to the kindred of the injured, "ut sit solatio cognatis"; and even in England, so recently as 1741, a royal order was made for a hanging in chains "on petition of the relations of the deceased[2]." The current morality of modern days generally views these feelings of resentment with disapproval. Yet some eminent Utilitarians, like Bentham[3] (and apparently not without support from even so dissimilar a writer as Bishop Butler), have considered them not unworthy of having formal legal provision made for their gratification. Hence no less recent and no less eminent a jurist than Sir James Stephen maintains that criminal procedure may justly be regarded as being to Resentment what marriage is to Affection—the legal provision for an inevitable impulse of human nature[4]. And a very general, if an unconscious, recognition of this view may be found in the common judicial practice, in minor offences, of giving a lighter sentence[5] whenever the prosecutor "does not press the case": and again, in the widespread reluctance to punish crimes that are not prosecuted until several years after their

[1] Holmes, *Common Law*, p. 34. [2] Prof. Amos' *Ruins of Time*, p. 23.
[3] *Principles of Penal Code*, II. 16; *Sermons at the Rolls Chapel*, VIII. and IX., cf. Henry Sidgwick's *Lectures on Ethics*, p. 357.
[4] I have known an examinee reproduce this analogy in the startling form that "Stephen maintains that marriage is to love what punishment is to crime." [5] Cf. 8 Cr. App. R. at p. 271.

commission. The modern community, like those ancient ones which Maine depicts[1], measures here its own public vengeance by the resentment which the victim of the crime entertains. The same impulse occasionally reveals itself, in the "Lynch law" of the southern United States, when the mob that condemns a negro ravisher to the flames directs the outraged woman herself to kindle the first torch.

There is a second subsidiary purpose of Punishment, which, though not so distasteful as the foregoing one, is almost equally often ignored by modern jurists. This consists in the effects of Punishment in elevating the moral feelings of the community at large. For men's knowledge that a wrong-doer has been detected, and punished, gratifies and thereby strengthens—their disinterested feelings of moral indignation. They feel, as Hegel has it, that "wrong contradicts right, but punishment contradicts the contradiction." Mediæval law made prominent this effect of punishment. For more than a century past, the tendency of jurists has been to disregard it; but it occupies a large place in the judgment of ordinary men. It has full recognition from practical lawyers so eminent as Sir Edward Fry[2], Mr Justice Wright[3], and Lord Justice Kennedy[4]. Professor Sidgwick testifies: "We have long outgrown the stage at which the normal reparation given to the injured consisted in retribution inflicted on the wrong-doer. It was once thought as clearly right to requite injuries as to repay benefits; but Socrates and Plato repudiated this, and said that it could never be right to harm anyone, however he may have harmed us. Yet though we accept this view of Individual resentment, we seem to keep the older view when the resentment is universalised, *i.e.* in Criminal Justice. For the principle that punishment should be merely deterrent and reformatory is, I think, too purely utilitarian for current opinion. That opinion seems still to incline to the

[1] *Ancient Law*, ch. x.
[2] *Studies by the Way*, pp. 40 71. Cf. *Nineteenth Century*, 1902, p. 848.
[3] *Draft Jamaica Criminal Code*, p. 129. [4] *Law Magazine*, Nov. 1899.

view that a man who has done wrong *ought* to suffer pain in return, even if no benefit result to him or to others from the pain; and that justice requires this; although the individual wronged ought not to seek or desire to inflict the pain[1]." It may however be doubted whether any such qualification as that contained in the last fourteen words is really imposed by current opinion[2].

The view of most people who are not lawyers is thus much the same as that maintained by no less a philosopher than Victor Cousin, in his terse epigram[3] that "punishment is not just because it deters, but it deters because it is felt to be just." They hold with Lord Justice Fry that "the object of punishment is to adjust the suffering to the sin."

And accepted judicial practice, when carefully examined, contains much to corroborate this view, and to shew that Prevention is not the sole object of punishment. For were it so, then (1) an absolutely hardened and incorrigible offender ought to go scot-free, instead of being the most severely punished of all[4]. So that in a community utterly defiant of the law such discipline ought to be altogether abandoned as useless. Moreover, if prevention be all, then (2) we should have to consider force of Temptation as being usually reason for increasing the punishment[5]; yet judges have generally made it a ground of extenuation[6], as when a thief pleads that he stole to satisfy his hunger, or a slayer that he struck

[1] *Methods of Ethics*, p. 280.

[2] When, in 1903, the son of Mr Dexter, of New York, was murdered, the bereaved father announced his intention to spend a million dollars, if necessary, to bring the murderer to justice. Yet would current opinion blame this exceptional zeal?

[3] Preface to the *Gorgias* of Plato. Cf. Mr Lilly, cited p. 36 *infra*.

[4] Thus an able writer (Dr G. V. Poore, *Medical Jurisprudence*, p. 324, ed. 1901) expressly maintains that "In the case of young offenders, one should make an example of them;...but when we deal with a hardened sinner...the sooner we banish from our minds any idea of vengeance the better." To most persons this will appear a precise inversion of the proper contrast.

[5] As in thefts of goods necessarily *exposed*; see p. 221 *infra*.

[6] Cf. Prof. Maitland on this paradox; *Mind*, v. 259.

under the provocation of a blow. And (3) on the other hand, by a divergence in the opposite direction, the reluctance with which English law admits Duress by any threats to be an excuse for a crime committed by the intimidated agent, and its modern refusal[1] to treat Necessity as an excuse for homicide, even in the extreme case of a starving crew of shipwrecked men, shew again that deterrence cannot be the sole object of punishment; for punishment is thus inflicted where the fear of it could not have sufficed to deter. Indeed the sense of Ethical Retribution seems to play a part even in non-criminal law; for if, in some action of debt or trespass, the judge, in order to save himself trouble by shortening the suit, should offer to pay the plaintiff the damages out of his own pocket, an ordinary plaintiff would feel dissatisfied. Vivid proofs of the influence formerly exercised on criminal law by this idea of Ethical Retribution, may be found in the fact that it sometimes drove the tribunals into the illogical excess of punishing, from mere blind association of ideas, "crimes" committed by non-ethical agents. Instances occur in the mediæval punishments sometimes inflicted on animals for homicide[2]; and in the "piacularity" attached in ancient Greece to even inanimate instruments of death, as when, according to Pausanias, the Prytanes at Athens condemned to penal destruction lifeless objects that had accidentally slain a man[3]—a feeling which reappears in the "Deodand" of the old English law of Homicide[4].

On the other hand, the fact that temptation does not always extenuate, inasmuch as in some classes of offences (especially political and military ones) lawgivers often make it a reason for threatening a graver punishment, shews that the principle of Ethical Retribution is not the only one that

[1] *Reg.* v. *Dudley and Stephens*, L. R., 14 Q. B. D. 273. *Infra*, p. 76.

[2] See Mr G. P. Evans' treatise, "The criminal prosecution of Animals." In 1595 the city-court of Leyden sentenced a dog that had killed a man "to be hanged, and to remain hanging on the gallows, to the deterring of all other dogs: and his goods, if any, to be forfeited"; *South African Law Journal* for 1907, p. 233.

[3] *Itinerary*, Bk. I. c. 28, s. 11.

[4] *Infra*, p. 106.

guides them, and that they take account also of the necessity of Prevention. A further proof may be found in the comparatively severe punishment inflicted on criminals who through mere negligence (*e.g.* a careless engine-driver), or mere intoxication (*e.g.* a mother overlaying a child in drunken sleep), so that the purely ethical blame is small, have caused some fatal injury. The same lesson is taught, too, on the other hand, by some cases where the divergence from mere Ethics is in the opposite direction; as in the English rules that mere Intention to commit a crime is never punished, and that even the Attempt to commit it is punished but slightly. For in either case the ethical guilt may be just as great as if the guilty scheme had not happened to become frustrated[1].

It cannot, however, be said that the theories of criminal Punishment current amongst either our judges or our legislators have assumed, even at the present day, either a coherent or even a stable form[2]. To this, in part, is due the fact that—as will be shewn in Chapter XXXII—our practical methods of applying punishment are themselves still in a stage which can only be regarded as one of experiment and transition.

[1] Hence in French law an attempt to commit any grave crime, which has miscarried "only through circumstances independent of the criminal's own will," is punishable as severely as the consummated offence.

[2] The student should refer to the discussion of the Purposes of Punishment in Salmond's *Jurisprudence*, 7th ed. ss. 28–31. He may compare with it the views of J. S. Mill (*On Hamilton*, p. 581); Dr Rashdall (*Theory of Good and Evil*, I. 284–312); and of Mr W. S. Lilly (*Idola Fori*, pp. 233–240) who regards Retribution as being "first and beyond all things" the dominant aim of Punishment.

Dr Roscoe Pound, though dissenting from this view, concedes that "Anglo-American lawyers commonly regard the satisfaction of public desires for vengeance as both a legitimate, and a practically necessary, end of penal treatment" (*Criminal Justice in Cleveland*, p. 575; ed. 1922).

CHAPTER III

THE MENTAL ELEMENT IN CRIME

WE have already seen how closely the idea of moral Wickedness is interwoven with that of legal crime; and also (p. 29) how deterrence is dependent upon certain conditions of Mind. Hence to constitute a crime and subject the offender to a liability to punishment, *i.e.* to produce legal criminal "guilt" (or, in Austin's terminology "imputability"), a mental as well as a physical element is necessary[1]. Thus, to use a maxim (which has been familiar to English lawyers for nearly eight hundred years), "*Actus non facit reum nisi mens sit rea*[2]." Accordingly, every crime involves:

(1) A particular physical condition. Blackstone calls it "a vicious act[3]." As, however, it may consist of *in*action the term "vicious conduct" would be more appropriate.

(2) A particular mental condition causing this physical condition. Blackstone calls it "a vicious will[4]." It is not, however, a "will" in Austin's sense of that word; but is closely akin to, and includes, his "Intention."

In Ethics, of course, this second condition would of itself suffice to constitute guilt. Hence[5] on Garrick's declaring that whenever he acted Richard III he felt like a murderer, Dr Johnson, as a moral philosopher, retorted, "Then he ought to be hanged whenever he acts it." But there is no such searching severity in the rules of Law. They, whether civil or even criminal, never inflict penalties upon mere internal feeling, when it has produced no result in external

[1] See Austin's *Lectures on Jurisprudence*, xviii., xxvi.; Clark's *Analysis of Criminal Liability*; Stephen's *General View of the Criminal Law*, ch. III.; Stephen's *Hist. Cr. Law*, II. 94–123.

[2] Prof. Maitland has traced the use of this aphorism in England back to the *Leges Henrici Primi*, v. 28, and its origin to an echo of some words of St Augustine, who says of Perjury "ream linguam non facit nisi mens rea." *Hist. Eng. Law*, II. 475.

[3] 4 Bl. Comm. 21. [4] *Ibid.* [5] Boswell, *anno* 1783.

conduct. So a merely mental condition—Shakespeare's "wicked meaning in a lawful deed"—is practically never made a crime. If a man takes an umbrella from a stand at his club, meaning to steal it, but finds that it is his own, he commits no crime[1]. It is true that there appears at first sight to be an important exception to this principle, in that form of High Treason called "compassing the King's death[2]." But the exception is only apparent; for the Statute of Treasons goes on to make it essential to a conviction that some "overt act" should have been committed towards accomplishing the end contemplated. In another apparent exception, the misdemeanor of Conspiracy[3], it is true that the Conspiracy itself is a purely mental state—the mere agreement of two men's minds—and that here, unlike Treason, it is not necessary to a conviction that any act should have been done towards carrying out the agreement; but it would be impossible for two men to come to an agreement without communicating to each other their common intentions by speech or gesture, and thus even in conspiracy a physical act is always present. Hence conspiracies are amongst the commonest instances of the "overt acts" relied upon in charges of Treason.

A still greater divergence from Ethics will be remarked, if we turn from the criminal to the non-criminal branches of Law; for they often inflict their sanctions on mere external conduct, which is not the result of any blameable state of mind. Thus,

(1) In breaches of Contract, the mental and moral condition of the defaulter has no effect upon the question of his liability or non-liability; unless the very language of the contract implies that it can only be broken by some act which is wilful. Thus a wife's covenant in a separation deed "not to molest" her husband, is held not to be broken by anything

[1] Or if, not knowing that his wife is dead, he contracts what he believes to be a bigamous marriage. Cf. the American traitor, p. 268 *infra*.

[2] *Infra*, p. 267; Stephen, *Digest of Criminal Law*, Art. 52, 53.

[3] *Infra*, ch. XVIII.; Stephen, *Digest of Criminal Law*, Art. 49.

but an intentional annoying of him. And, similarly, if the defaulter be liable, the wilfulness or wickedness of his conduct will not affect the amount of the damages to be recovered from him; (except in the case[1] of a breach of promise to marry).

(2) And in Torts the mental condition of the wrong-doer is ignored very largely. But not so nearly universally as in the law of Contract[2]; for there are a few classes of tort (*e.g.* malicious prosecution) in which it is an indispensable element of liability; and in very many (if not, indeed, in all[3]) of the remaining classes, namely the torts in which liability can exist without it, it still may be taken into account in estimating the amount of the damages.

But in Criminal law, as we have seen, no external conduct, however serious or even fatal its consequences may have been, is ever punished unless it has been produced by some form or other of *mens rea*. It is not, however, necessary that the offender should have intended to commit the particular crime which he has committed; (nor indeed that he should have intended to commit any crime at all). In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed as consisting simply in "intending to do what you know to be illegal[4]." It admits, however, of a minuter description. Thus, in the scientific analysis given by Professor E. C. Clark[5], it is shewn to require:

(1) The power of *Volition*; *i.e.* the offender must be able to "help doing" what he does. This faculty is absent

[1] Anson on Contracts, ch. XVII. § 2 (3).

[2] Salmond on Torts, pp. 9-15. So in divorce proceedings a wife who has been ravished is not treated as an adulteress (*Long* v. *Long*, 15 P. D. 218); "there cannot be an *innocent* 'adultery'."

[3] Halsbury's *Laws of England*, x. 307.

[4] *I.e.* what you know to belong to a class of conduct that is (*whether you know it or not*) forbidden by law. Cf. p. 68 (3).

[5] *Criminal Liability*, pp. 80, 109. Cf. the analysis made by Sir James Stephen in his *History of Criminal Law*, II. ch. XVIII., and his *General View of the Criminal Law*, 1st ed. ch. III., 2nd ed. ch. V. Sir J. W. Salmond's *Jurisprudence*, chs. XVII., XVIII., XIX., should be carefully studied.

in persons who are asleep[1], or are subject to physical compulsion or to duress by threats, or whose conduct is due to accident or ignorance: and it is also absent in *some* cases of insanity, of drunkenness, and of infancy. Where it is absent, an immunity from criminal punishment will consequently arise.

(2) *Knowledge* that what the offender is doing is wrong; wrong either intrinsically, or, at any rate, in prospect of such consequences as he has grounds for foreseeing. There will be an absence of such knowledge in very early infancy, or in the case of some delusions as to the supernatural; and immunity, accordingly, will arise.

(3) In such crimes as consist of conduct that is not intrinsically unlawful, but becomes criminal only when certain consequences ensue, there must further be the power of *Foresight* of these consequences. It is sufficient that he merely had this power, *i.e.* that he would have expected these consequences had he but paid proper attention to his surroundings; yet if this be all, he will usually be placed by criminal law in a position of only minor liability. But, if on the other hand, he actually foresaw them (still more, if he both foresaw and desired them, *i.e.* in Bentham's phrase, intended them "directly"), the law will probably[2] impose on him a major liability. The power of foresight may be absent in infancy, even in late infancy; and in some forms of insanity.

It might seem that a rule thus rendering the existence of a complex mental element necessary to create legal liability, would usually cause a prosecutor much difficulty in obtaining evidence of it. For, to borrow the saying of a mediæval judge, which Sir Frederick Pollock has made familiar to modern readers, "the thought of man is not triable, for the Devil himself knoweth not the thought of man[3]." But this difficulty

[1] "If a man walking in his sleep do something, it is not his *act* at all"; Lord Hewart, L.C.J., May 25, 1922.

[2] Cf. p. 149 *infra*.

[3] Brian, C. J., Y. B. 17 Edw. IV. fo. 2. "Le diable n'ad conusance de l'entent de home."

seldom arises in practice; for in most cases the law regards the criminal act itself as sufficient *primâ facie* proof of the presence of this *mens rea*. Every sane adult is presumed to intend the natural consequences of his conduct[1].

We have seen that criminal liability may exist although the offender had no intention to commit the particular crime which he did in fact commit, and that it suffices if he had an intention to commit a crime at all, whatever it were, or even an act that was simply illegal without being criminal. But there remains a further question—whether English law does not even go so far as to permit a still slighter degree of *mens rea* to suffice, viz. an intention to commit some act that is wrong as a breach of the accepted rules of Morality, even though it be not a breach of Law at all. This question was discussed in the elaborately considered case of *Reg.* v. *Prince*[2], which deserves the most careful attention of the student. Prince had abducted from her father a girl under the age of sixteen; but in the belief, on adequate grounds, that she was eighteen (in which case the abduction would not have been a crime). It was held by Brett, J. (afterwards Lord Esher, M.R.), that to constitute criminal *mens rea* there must always be an intent to commit some *criminal* offence. The rest of the court, however (fifteen judges), decided that, upon the construction of the particular statute under which the prisoner Prince was indicted, his conduct was not excused by the fact that he did not know, and had no reasonable grounds for supposing, that he was committing any crime at all. Moreover, independently of the terms of that particular statute, most (or, probably, all) of these fifteen differed from Lord Esher on the general rule of criminal liability; and were agreed in the view than an intention to do anything that is wrong legally, even as a mere civil tort and not as a crime at all, would be a sufficient *mens rea*. Indeed eight of the fifteen,

[1] Cf. p. 333, *infra*; *Rex* v. *Sheppard*, L. and R. 169 (K. S. C. 463).

[2] L. R., 2 C. C. R. 154 (K. S. C. 21).

in a judgment delivered by Bramwell, B.[1], expressly went even beyond this; laying down a third view, according to which there is a sufficient *mens rea* wherever there is an intention to do anything that is wrong *morally*, even though legally it be quite innocent, both criminally and civilly. If this opinion be correct, the rule as to *mens rea* will simply be that any man who does any act which he knows to be immoral must take the risk of its turning out, from circumstances not contemplated by him, to be in fact criminal also. This third view has great authority from having been enunciated by so great a number of judges; and it is approved by eminent text-writers. Yet it must be remembered that it was only an *obiter dictum*; being unnecessary for the particular appeal, as there the circumstances actually known to the prisoner made his conduct not merely immoral but also legally actionable[2], as a tort. And it is not easy to reconcile this dictum with the express decision in *Reg.* v. *Hibbert*[3]; which none of the judges in *Reg.* v. *Prince* seem to have wished to overrule. Moreover the dictum has the inconvenience of substituting the vagueness of an ethical standard for the precision of a legal one.

Had Prince's mistake lain in a reasonable belief that he had the girl's father's consent, that mistake would (see p. 66, II. (1) *infra*) have entitled him to an acquittal.

Hitherto we have spoken only of the degree of *mens rea* required in the general run of crimes. But there are also crimes (usually grave ones) in which a higher degree is necessary. And, on the other hand, there are some (usually of a petty character) in which a less degree than the ordinary one will suffice. Let us consider these two extremes.

A more complex and special (and therefore more guilty)

[1] L. R., 2 C. C. R. at p. 173 (K. S. C. at p. 22). Cf. L. R. [1899] 1 Q. B. D. at p. 830.

[2] See *per* Denman, J., at p. 178 (K. S. C. at p. 25).

[3] L. R., 1 C. C. R. 184: cf. *Reg.* v. *Green* (3 F. and F. 274) where Martin, B., directed an acquittal, though pronouncing the abductors' conduct "very immoral." Cf. Lord Esher's "that which *the law* has forbidden" (14 Q. B. D. at p. 689); Irish L. R. [1908] 2 K.B. 425; Stroud, *Mens Rea*, pp. 29, 37.

state of mind than the usual *mens rea* is required for some particular crimes, sometimes by the common law—as in the case of murder, what is technically called "malice aforethought" being there necessary—and sometimes by statute, as in the cases of wounding "with intent to disfigure," and of wounding "with intent to do grievous bodily harm." (But with regard to statutory crimes it should here be noted that although the definitions of them often contain words specifying some mental condition—such as "knowingly," "maliciously," "wilfully," "negligently," "fraudulently"—yet words so general seldom add in any way to the degree of *mens rea* requisite[1]. Usually they merely alter the burden of proof with regard to it; their effect being to throw on the Crown the obligation of proving the ordinary *mens rea*[2] by further evidence than that mere inference from the *actus reus* which, as we have already seen, is ordinarily sufficient to prove it. Such evidence may consist, for instance, in expressions of vindictive feeling, or in previous injurious acts nearly identical with the present one; thus negativing the probability of accident or carelessness or ignorance.)

Conversely, some less complex and less guilty state of mind than the usual *mens rea* is sometimes by statutory enactment —but only once by the common law—made sufficient for the mental element in criminal guilt. Such statutory offences deserve consideration, not only because of their singular character, but also because they are steadily increasing both in number and in importance. Yet the legislature is usually averse to creating them except where (1) the penalty incurred is not great (usually not more than a petty fine imposed by a petty tribunal), but (2) the damage caused to the public by the offence is, in comparison with the penalty, very great;

[1] For they require only what the *actus reus* itself suggests.

[2] Thus by 10 Edw. VII. c. 24 publicans are forbidden to (1) "supply" refreshments to a constable on duty, or (2) "*knowingly* harbour" him. Yet guilty knowledge is equally necessary in both cases; the only difference being that in case (2) the prosecution must prove knowledge, whilst in (1) the accused must disprove it.

and where, at the same time, (3) the offence is such that there would usually be peculiar difficulty in obtaining adequate evidence of the ordinary *mens rea*, if that degree of guilt were to be required.

Thus where on ordinary principles there would be no guilt unless the offender actually knew all the circumstances under which he acted (or, at any rate, had wilfully and deliberately abstained from coming to know them), exceptional statutes sometimes make him guilty if, before acting, he merely failed to take effective *care to obtain* knowledge of the circumstances. The following are instances of this exceptional kind of criminal liability:

(*a*) An undischarged bankrupt's obtaining credit for £10 or upwards, without disclosing that he is an undischarged bankrupt; even though he had directed his agent to disclose it, and had reasonable grounds for believing that the agent had done so[1].

(*b*) Keeping two or more lunatics without a license; though without knowing the persons to be lunatics[2].

(*c*) Possessing, for sale, unsound meat; though without knowing it to be unsound[3].

(*d*) Selling an adulterated article of food; though without knowing it to be adulterated[4].

(*e*) Selling intoxicating liquor to a drunken person; though without noticing that he was drunk[5].

In these cases of an absolute liability, from the difficulty of obtaining legal evidence of the offender's knowledge of one portion of his *actus reus* (*e.g.* the adulteration, or the drunkenness), something much less than actual knowledge is allowed to suffice in respect of that portion. But for all the rest of the

[1] *Rex* v. *Duke of Leinster*, L. R. [1924] 1 K. B. 311: cf. p. 422 *infra*.
[2] *Reg.* v. *Bishop*, L. R., 5 Q. B. D. 259.
[3] *Hobbs* v. *Corporation of Winchester*, L. R. [1910] 2 K. B. 471.
[4] *Betts* v. *Armistead*, L. R., 20 Q. B. D. 771; *Goulder* v. *Rook*, L. R. [1901] 2 K. B. 290. *Laird* v. *Dobell*, L. R. [1906] 1 K. B. 131, is very strong. Contrast *Derbyshire* v. *Houliston*, L. R. [1897] 1 Q. B. 772.
[5] *Cundy* v. *Lecocq*, L. R., 13 Q. B. D. 207.

actus reus (*e.g.* the selling, or the supplying), an ordinary *mens rea* is still necessary. That is to say, the offender must have actually known that he went through the act of selling; though it will suffice that he merely neglected the means of coming to know that the butter sold was adulterated, or the purchaser of the gin was intoxicated. Of course the absence of full *mens rea* may mitigate the sentence.

Indeed, even a still slighter degreee of *mens rea* than this is sometimes allowed to suffice. For even when an offence is of such a kind as not to be punishable unless committed with full knowledge of its circumstances, it occasionally happens that an offender is by statute made liable to be punished for it; in spite of the fact that it was not he, but only some servant of his, that actually knew the circumstances. To punish such a man is a startling departure from the general rule of law. For the utmost moral blame that can be imputed to him is the comparatively trivial omission of not having originally secured a trustworthy servant and of not having subsequently kept him under constant supervision. Hence, in the case of all ordinary offences, the law does not regard a master as having any such connexion with acts done by his servant as will involve him in any *criminal* liability for them (whatever may be his liability in a *civil* action of tort or contract), unless he had himself actually authorised them. And to render him liable criminally this authorisation must have been given either expressly or else by a general authority couched in terms so wide as to imply permission to execute it even criminally[1]. Thus, if a bargeman steers his barge so carelessly that he sinks a skiff and drowns the oarsman, or a chemist's shopman carelessly puts a poison into the medicine he makes up, this negligence of his may involve his master in a civil liability, but not in any criminal one.

So fundamental is this rule that the common law seems never to have deviated from it, except in one instance, and this only

[1] *Rex* v. *Huggins*, 2 Ld. Raymond 1574 (K. S. C. 35); *Hardcastle* v. *Bielby*, L. R. [1892] 1 Q. B. 709; *Newman* v. *Jones*, L. R., 17 Q. B. D. 132.

an anomalous offence where the prosecution is criminal merely in point of form, and in substance and effect is only a civil proceeding[1]; its object usually being not Punishment but simply the cessation of the offence. The offence in question is that of a public nuisance (*i.e.* one from which no particular individual incurs any special damage). In the case of any *private* nuisance, as the remedy is by a civil action, the master is liable, under the ordinary civil rule, for all the acts of his servant done in the course of his employment; even though they may have been done without the master's knowledge and contrary to his general orders[2]. For public nuisances, on the other hand, no civil action can be brought, but only an indictment. There would therefore often be much greater difficulty in obtaining effectual redress for them than for the more trivial class of nuisances, were not the master's liability for his servant's conduct made as general as in the case of mere private nuisance. It accordingly is made so. This rule has the further justification that the master, by the very fact of setting a servant upon work that may result in a nuisance, has brought about a state of things which he ought at his peril to prevent from actually producing that criminal result. Hence, instead of, as in ordinary offences, being liable only if he had authorised the servant's crime, he will, in the case of Nuisance, be liable even although he had actually forbidden it. For here he ought, at his peril, to have seen his prohibition obeyed.

But whilst the common law recognises only one instance of this extreme liability, several in recent times have been created by Parliament. Thus, for example, under the Licensing Act, 1910, a publican is held to be liable for the conduct of his servants if they supply refreshments to a constable on duty[3]; or again, if they knowingly permit any unlawful game,

[1] Thus see its exceptional position as to Pardon, *supra*, p. 15.

[2] *E.g.* the driver of my traction-engine blocks the street with it; 15 Cox 725. Cf. L. R., 1 Q. B. 702.

[3] 10 Edw. VII. and 1 Geo. V. c. 24, s. 78. Yet not if the servants did not know him to be on duty; cf. p. 43, n. 2 *supra*.

or any "gaming," to be carried on upon the licensed premises[1]. For, as Grove, J., said, "If this were not the rule, a publican would never be convicted. He would take care always to be out of the way." Again, going still further, a man has even been held responsible for adulteration effected by a mere stranger, whose acts he had no means of protecting himself against[2].

But it must be remembered that even in these exceptional offences, where one man's *mens rea* makes another become liable, a *mens rea* is still necessary[3]. Had the servant had no grounds for thinking that the constable was on duty, or that gaming was taking place, neither he nor his master would be punishable.

It is, as we have said, only in rare instances, that any less degree of *mens rea* than the ordinary one is allowed by law to suffice; and clear words are usually needed to establish that sufficiency. In construing any statutory definition of a criminal offence there is always a presumption against the sufficiency of any degree of *mens rea* that falls short of the ordinary one. The lesser the suggested degree of it, or the severer the punishment, or the older the statute, the greater will be the need of clear and unmistakable words to rebut this presumption and establish the sufficiency. Hence though the statute against Bigamy simply specifies the *actus reus*—"being married, marries"—and is silent as to requiring any *mens rea*, yet the great majority of the judges decided in

[1] *Ibid.* s. 79. *Redgate* v. *Haynes*, L. R. 1 Q. B. D. 89; *Bond* v. *Evans*, L. R. 21 Q. B. D. 249. "Gaming" consists in the playing for money or money's worth at any game, even though a lawful one.

[2] *Parker* v. *Alder*, L. R. [1899] 1 Q. B. 20. Contrast *Brooks* v. *Mason* (L. R. [1902] 2 K. B. 743), with *Emary* v. *Nolloth* (L. R. [1903] 2 K. B. 264); showing that the law holds a publican liable for selling liquor in an unsealed vessel to a child under fourteen, although he honestly believed (mistakenly) that it was sealed; yet the law does *not* go so far as to hold him liable for its being similarly sold by his barman who is authorised to sell (unless this barman has the general control of the inn). Either seller's reasonable though mistaken belief that the child is over fourteen *would* excuse him.

[3] Hence say—with the Judicial Committee (L. R. [1897] A. C. 387)—that in them "a less *mens rea* is made sufficient," not that "there is *no mens rea*."

Reg. v. *Tolson*[1] that the absence of the ordinary *mens rea* will afford a good defence for remarrying, if it appears that the prisoner contracted the second marriage with an honest and reasonable belief that his first wife was dead. Similarly, in *Reg.* v. *Sleep*[2], under a statute which made it an offence simply "to be found in possession of Government stores marked with the broad arrow," and said nothing as to any necessity for guilty knowledge, it was held that the prisoner could not be convicted if the jury found that, though he had possession of such stores, and had reasonable means of knowing of the mark, he neither knew of it nor had wilfully abstained from knowing of it. But in Acts of Parliament that are very recent the courts are less reluctant to dispense with the necessity for the ordinary degree of *mens rea*. For, owing to the greater precision of modern statutes, it is permissible to draw a more emphatic inference from their silence than would be drawn in the case of an older enactment. Hence if the public evil of an offence created by some recent statute be very great, when compared with the smallness of its punishment, then even a mere silence as to guilty knowledge may be sufficient to show that the legislature did not intend ordinary guilty knowledge to be essential to the offence[3].

In determining whether an Act does create this more stringent prohibition, regard must be paid to "the object of the statute, the words used, the nature of the duty, the person upon whom it is imposed, the person by whom it would in ordinary cases be performed, and the person upon whom the penalty is imposed[4]."

[1] L. R. 23 Q. B. D. 168 (K. S. C. 15). *Infra*, pp. 308–9.
[2] L. and C. 44. Contrast *Reg.* v. *Woodrow*, 15 M. and W. 404.
[3] *Per* Stephen, J., in *Reg.* v. *Tolson*, L. R. 23 Q. B. D. 168 (K. S. C. 15). In contrast with Tolson's case, *Rex* v. *Wheat* (L. R. [1921] 2 K. B. 119) shews the increasing readiness to give this full effect to mere silence in a penal statute. See p. 306 *infra*.
[4] *Mousell Brothers Limited* v. *L.N.W. Ry. Co.*, L. R. [1917] 2 K. B. at p. 845.

CHAPTER IV

EXEMPTIONS FROM RESPONSIBILITY

We have seen that *mens rea*, in some shape or other, is a necessary element in every criminal offence. If this element be absent, the commission of an *actus reus* produces no criminal responsibility; any more than when a blow is inflicted by the involuntary jerkings of the limbs of a sufferer from St Vitus's Dance.

Blackstone's classification of the various conditions which in point of law negative the presence of a guilty mind[1], has become so familiar that it is convenient to adhere to it, in spite of the defects of its psychology. Three of his groups of cases of exemption deserve minute consideration. These are:

I. Where there is no will.

II. Where the will is not directed to the deed.

III. Where the will is overborne by compulsion.

I. *Where there is no will.* (Students of Austin's *Jurisprudence* should be warned that Blackstone's "Will" is not Austin's "Will," *i.e.* a volition, and indeed is not clearly definable at all; but it corresponds roughly with Austin's "Intention[2]."") This absence of will may be due to any one of various causes.

(1) *Infancy.*

The most common cause, one which must place every member of the community beyond the control of the criminal law for some part of his life, is Infancy. By the law of Crime, infants are divided into three classes:

i. Those under seven years of age. There is a conclusive presumption that children so young cannot have *mens rea* at

[1] 4 Bl. Comm. 21.
[2] Austin, Lect. XIX.; Clark's *Analysis of Criminal Liability*, p. 74.

all[1]. Nothing, therefore, that they do can make them liable to be punished by a criminal court; so a child of six, who was arrested for crime, obtained damages from the arrestor[2]. But it is not illegal for parents to administer domestic punishment to such children, if they have in fact become old enough to understand it[3].

ii. Between seven and fourteen[4]. Even at this age "infants" are still presumed to be incapable of *mens rea*; but the presumption is no longer conclusive, it may be rebutted by evidence. Yet the mere commission of a criminal act is not, as it would be in the case of an adult, sufficient *primâ facie* proof of a guilty mind. The presumption of innocence is so strong in the case of a child under fourteen that some clearer proof of the mental condition is necessary. This necessity for special proof of *mens rea* is impressed upon the jury who try such an infant, by their being asked not only the ordinary question, "Did he do it?" but also the additional one, "Had he a guilty knowledge that he was doing wrong?"

This guilty knowledge may be shewn by the fact of the offender's having been previously convicted of some earlier crime; or even by the circumstances of the present offence itself, for they may afford distinct proof of a wicked mind. Thus a boy of eight was hanged in 1629 for burning two barns; "it appearing that he had malice, revenge, craft and cunning[5]." Two boys, aged eight and nine respectively, were

[1] By an uncomplimentary parallel, Prisot, C. J., pronounced them to be "in the same case as an ox or a dog that does harm to a man"; Statham, *tit.* Trespass, pl. 93.

[2] *Marsh* v. *Loader*, 14 C. B., N.S. 535.

[3] *Reg.* v. *Griffin*, 11 Cox 402.

[4] Modern statutory phrases (see the Children Act, 1908, s. 131) are: up to fourteen, a "child"; from fourteen up to sixteen, a "young person"; from sixteen to twenty-one, a "juvenile adult." "Juvenile Courts" (*infra*, ch. XXVIII.) are for persons under sixteen. Yet in the Education Act, 1921, s. 170, "child" has a slightly different meaning.

[5] 1 Hale P. C. 25. Michael Hamond and his sister, aged *seven* and eleven, were hanged at Lynn for felony, in 1708; Richard's *King's Lynn*, p. 888. A boy of twelve and a half was hanged in New Jersey in 1828; 18 American Decisions 404.

tried at Liverpool, in 1891, for murder, in having drowned another boy, in order to steal his clothes; but they were acquitted on the ground of their infancy.

iii. Between fourteen and twenty-one. A boy knows right from wrong long before he knows how to make a prudent speculation or a wise will. Hence at fourteen an infant comes under full criminal responsibility. (A trifling exception perhaps exists in the case of some ethically innocent offences of omission, which may be merely due to lack of wealth; 3 Ad. and E. 597.)

But, by the Children Act, 1908 (8 Edw. VII. c. 67, s. 103) no infant under *sixteen* can be sentenced to death, or to penal servitude, or (unless he be "unruly") to imprisonment. And no infant under *fourteen* can be sentenced to imprisonment. In all these cases the forbidden punishment is replaced by mere "Detention"; and even it, in most crimes, can only be for a month. Cf. ch. XXXI, *infra*.

(2) *Insanity*[1].

Absence of "Will" may also arise, not from the natural and inevitable immaturity which we just now discussed, but from a morbid condition of mind; whether the temporary delirium of fever or a permanent Insanity.

English law, even in its harshest days[2], recognised insanity as a possible defence. On the other hand, it has never held (as a popular error imagines it to hold[3]) that the mere existence of any insanity whatever will suffice to exempt the insane person from criminal responsibility[4]. Only insanity of

[1] Stephen, *Hist. Cr. Law*, II. 124-156; *General View of Criminal Law*, 1st ed. 86-96.

[2] Cf. *Kentish Eyre of* 1313 (Selden Society), I. 81; "demens et furiosus, non per feloniam."

[3] But so to hold "would turn the administrators of the criminal law adrift, without a compass, upon a shoreless and starless sea" (Lord Hewart, L.C.J.).

[4] Thus a man who had an insane delusion that his wife had committed adultery with *A* and *B* and *C* was nevertheless sentenced to death for killing *Z*; *The Times*, Oct. 29, 1909.

a particular and appropriate kind will produce exemption[1]. For lunatics are usually capable of being influenced by ordinary motives, such as the prospect of punishment[2]; hence they usually plan their crimes with care, and take means to avoid detection.

Careful observation of insane patients, in various countries throughout many years, has now thrown light upon the mental processes of the insane. The world, it is now recognised, is full of "warped" men and women; in whom there exists some taint of insanity, but who nevertheless are readily influenced by the ordinary hopes and fears that control the conduct of ordinary people. To place such persons beyond the reach of all fear of criminal punishment would not only violate the logical consistency of our theory of crime, but would also be a cause of actual danger to the lives and property of all their neighbours. Where insanity takes any such form, it comes clearly within the rule of criminal legislation propounded by Bain[3]: "If it is expedient to place restrictions upon the conduct of sentient beings, and if the threatening of pain operates to arrest such conduct, the case for punishment is made out."

Hence our criminal[4] law divides insane persons into two classes:

(*a*) Those over whom the threats and prohibition of the criminal law would exercise no control, and on whom therefore it would be gratuitous cruelty to inflict its punishments; and

(*b*) Those whose form of insanity is only such that—to use

[1] Similarly in civil matters, the Will of a man who carried on his business intelligently has been held valid although he was so insane as to believe that his "trees were full of crocodiles, and their leaves were birds." Cf. L. R. 14 Ch. D. 674.

[2] "Lunatic prisoners, when guilty of assaulting a prison warder, will sometimes say 'You can't touch me; I am a lunatic.'" (Dr John Campbell's *Thirty Years' Experiences of a Medical Officer*, p. 92.)

[3] *Mental and Moral Science*, p. 404.

[4] But English law as a whole is complex with regard to Insanity. "As to crimes, contracts, wills, detention in asylums, and other matters, about eight different tests are applied by it"; (McCardie, J.).

Lord Bramwell's apt test—"they would not have yielded to their insanity if a policeman had been at their elbow."

But the very difficult question as to where the line of demarcation should be drawn between the two classes, is one upon which the law has undergone grave though gradual changes and cannot be said to have developed even now into a complete or even a perfectly stable form. Two centuries ago a view prevailed that no lunatic ought to escape punishment unless he were so totally deprived of understanding and memory as to be as ignorant of what he was doing as a wild beast. But ever since the epoch-making speech of Erskine in defence of Hadfield[1] a more rational view has prevailed; which bases the test upon the presence or absence of the faculty of distinguishing right from wrong in the crime committed.

This modern view has acquired a degree of authoritative precision unusual for any common law doctrine; through its formulation in an abstract shape, in 1843, by a set of answers delivered by the judges in reply to questions propounded to them by the House of Lords. One Daniel McNaughton[2] had aroused public excitement by the murder of a Mr Drummond, the private secretary of Sir Robert Peel, in mistake for that statesman. The acquittal of McNaughton on the ground of insanity provoked such widespread dissatisfaction that it became the subject of debate in the House of Lords (though the case never came before that House in its judicial capacity). In consequence of the debate, the Lords submitted to the judges certain abstract questions respecting persons afflicted with insane delusions[3]. The replies given by the judges may be summed up thus:

(i) Every man is presumed[4] to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of a jury.

(ii) To establish a defence on the ground of insanity, it

[1] 27 St. Tr. 1281; A.D. 1800. [2] The name is spelt variously.

[3] *Reg.* v. *McNaughton*, 10 Cl. and F. 200; (K. S. C. 43).

[4] Cf. ch. XXIV. *infra*.

must be "clearly" shewn that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality[1] of the act he was doing, or (if he did know this) not to know[2] that what he was doing was wrong[3] morally.

(iii) As to his knowledge of the wrongfulness of the act, the judges say: "If the accused was conscious that *the act* was one which he ought not[4] to do and if that act was at the same time contrary to the law of the land, he is punishable." Thus the test is the power of distinguishing between right and wrong, not, as was once supposed, in the abstract, but in regard to the particular act committed.

(iv) Where a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he will be under the same degree of responsibility as if the facts had been as he imagined them to be. He may, for instance, kill under the imagination either that he is an executioner law-

[1] These two words are mere synonyms (though medical witnesses have often treated their meanings as dissimilar). They refer to the "*physical* nature of the act, as distinguished from moral": 12 Cr. App. R. 27. *E.g.* the madman cut a woman's throat under the idea that he was cutting a loaf of bread.

[2] Stephen thinks that inability to "calmly and rationally" *consider* its wrongness suffices to disprove this knowledge.

[3] *E.g.* he fancied, like Hadfield, that he had received a Divine command to kill.

[4] As to the meaning to be given here to "ought not," it was decided in *Rex* v. *Codere* (12 Cr. App. R. at p. 27) that the meaning is—wrong "according to the ordinary standard adopted by reasonable men." And if he knew (not in mere presumption of law, but actually) that the act was wrong legally, he must—at any rate in serious crimes, though perhaps not always in "minor cases before a court of summary jurisdiction"—be taken to have known that it was wrong by this ordinary moral standard. In *Rex* v. *Punk* (C. C. C., May 21, 1919), the insane prisoner was under the double delusion (1) that his sister-in-law wished to commit adultery, and (2) that it was consequently his duty to kill her in retribution. Darling, J., directed the jury thus: "He knew the nature and quality of his act; for he knew that he was shooting, and that this shooting would kill her. Did he know that it was 'wrong'? If he knew that his act would be wrong in ordinary circumstances, it is no defence that he thought that the special circumstances, present in this particular case, would render it justifiable in him to do that act." He was convicted and sentenced.

fully carrying out a judicial sentence; or, on the other hand, merely that the person killed had once cheated him at cards.

Let us add that, for a defence of insane delusion, the act must be connected with the delusion directly. An instance of such connexion (though due not to insanity but to sleep), may be cited from Scotland where a man, dreaming that he was struggling with a wild beast, killed his baby[1]. On the other hand, a man has been convicted of obtaining money by false pretences notwithstanding his insanity, when his delusion was only that he was the lawful son of a well-known prince.

The questions put to the judges had reference, as we have seen, only to the effect of insane delusions and insane ignorance. But insanity affects not only men's beliefs, but also (and indeed more frequently) their emotions and their wills. Hence since 1843 much discussion has taken place as to the effect of these latter forms of insanity in conferring immunity from criminal responsibility. The result has been that though the doctrines laid down after McNaughton's trial remain theoretically unaltered[2], the practical administration of them affords a wider immunity than their language would at first sight seem to recognise. For many forms of insanity, which do not in themselves constitute those particular defects of reason which the judges recognised as conferring exemption from responsibility, are now habitually treated as being sufficient evidence to shew that one or other of those exemptive defects was also actually present. A man who, after killing his child, goes forthwith to the police station to surrender himself, and gives a lucid account of what he has done, would certainly seem to know the nature and quality of the act committed, and to know that in doing it he did wrong. Yet if he had previously shewn some symptoms of madness, and has killed this child with no discoverable motive and no attempt at concealment, a judge would probably encourage a jury to regard these facts as evidence of his labouring under

[1] *Fraser's Case*, 4 Couper 70; A.D. 1878. He was discharged.

[2] Cf. 14 Cr. App. R. at p. 54; 15 Cr. App. R. at p. 12.

such insanity as would render him irresponsible[1]. The mere fact that a crime has been committed without any apparent motive is, of course, not sufficient of itself to establish any similar immunity[2].

How far an insane Impulse to do an act is to be regarded —not merely as thus being evidence of an exculpative insanity, but—as *in itself* affecting criminal responsibility, is a question not yet definitely settled. In the United States both the Supreme Court and the courts of some of the States recognise irresistible impulse as being a sufficient defence; even when accompanied by a knowledge that the act was wrong. In England the authority of Sir James Stephen[3] and the dicta of some judges[4] similarly support the view that an insane impulse should be admitted as a defence if really irresistible (not merely unresisted)[5], because then the act done would not be a "voluntary" act at all. Stephen adds a qualification—"unless this absence of the power of control has been produced by his own default." But on the other hand, many of our judges have held that an insane impulse, even when uncontrollable, constitutes no defence[6].

There is one form of insane impulse, that of kleptomania,

[1] Cf. the case (*Times*, July 29, 1901) of Hannah Cox, a devoted mother, who, under pressure of poverty, drowned two of her infants, "as it was the best thing she could do for them." Though she had shewn no other symptoms of insanity, either before or after this act, Bigham, J., advised the jury to declare her irresponsibly insane.

[2] *Reg.* v. *Haynes*, 1 F. and F. 666 (K. S. C. 52).

[3] *Dig. Cr. Law*, Art. 38; *Hist. Cr. Law*, II. 167.

[4] *Rex* v. *Hay*, 22 Cox 268, is no sound authority; since Hay, independently of any Impulse, "did not know the quality" of his act; see C. C. C. Sess. Pap. CLV. 338. But *Rex* v. *Fryer* (24 Cox 403) and *Rex* v. *Jolly*, 83 J. P. 296, are stronger.

[5] A remarkable instance of continued and successful resistance to an insane impulse is cited by Stephen, *Hist. Cr. Law*, II. 172.

[6] *Reg.* v. *Burton* (K. S. C. 50). Cf. 15 Cr. App. R. 10, 163. See Russell on Crimes, p. 78, that "the tendency is in favour" of this view. Cf. Stroud's *Mens Rea*, p. 201. Ten out of twelve judges, consulted in 1924 as to the propriety of legislation—which Lord Justice Atkin's Committee had recommended in 1923—for recognising the defence of Irresistible Impulse, advised against its recognition; (*The Times*, May 16, 1924). The C. C. A., in *Rex* v. *Kopsch* (19 Cr. App. R. 50; cf. 142), repudiated this defence.

which is sometimes put forward, with or without evidence, by well-to-do persons accused of trivial acts of theft. It naturally is chiefly in courts of Petty Sessions that these unimportant charges are preferred; and in such courts a plea of insanity is the safer to raise because they do not possess the power, enjoyed by higher tribunals, of ordering an accused person, who establishes this plea, "to be kept in custody as a criminal lunatic[1]." That an impulse to steal does sometimes arise from actual insanity seems to be established by the fact that it is often limited to special times (*e.g.* that of pregnancy) or to some special class of objects (*e.g.* hats, boots, tablecloths) which are accumulated in numbers not at all needed by the thief.

The defence of insane Impulse is now rarer than that of Unconscious Automatism[2], as in epilepsy or sleep-walking. But our courts, unlike Continental tribunals, have not yet become familiar with the plea that a crime was committed under the influence of post-hypnotic "suggestion," exercised by some designing person who had induced hypnotic sleep in the offender. It remains to be seen what exemptive effect will ever be accorded in England to such "suggestions," or to those affections which (like hysteromania and neurasthenia) have been called the borderland of insanity. Such questions have become of great practical importance, now that modern science has come to recognise so clearly, in addition to the ordinary "Intellectual" insanity which impairs a man's Judgment, a "Conative" form which affects his Will, whether by weakening his natural impulses to action or by inspiring abnormal impulses, and an "Affective" insanity which disturbs his Emotions of love or hatred[3].

[1] Trial of Lunatics Act, 1883 (46 and 47 Vict. c. 38, s. 2).

[2] Which is covered by the McNaughton rules; 14 Cr. App. R. at p. 55.

[3] The *temporary* disturbance of a sane mind by intense grief was considered in *Rex* v. *Beadon*, where a sane woman was indicted for poisoning her child at a time when she was sane, but was distressed by the death of her husband. Shearman, J., told the jury that, if they thought she was "so distraught that she did not know it was a dangerous thing to administer poison" they might find her guilty of only a manslaughter. But he admitted his ruling to be "an innovation" (*Daily Telegraph*, Sept. 12, 1924).

Moreover there are many persons who, whilst not so insane as to be exempt from criminal responsibility, or perhaps even to require restraint, are nevertheless mentally abnormal. The Commissioners of 1908 classified all the mentally afflicted (eight per thousand of the nation, but nineteen per cent. of the persons arrested by the police) pathologically thus:

I. Those who once were normal, but have become abnormal; whether (*a*) through disorder of mind, *i.e.* "lunatics"; or (*b*) through decay of mind (*e.g.* in senility), *i.e.* "the mentally infirm."

II. Those who never had full mental power; viz. (1) Idiots, (2) the Imbecile, (3) the Feeble-minded, (4) the Moral Imbeciles.

This latter group (II. 1–4) are usually too incapable of self-control to be deterred effectually by the prospect of Punishment. Hence the Mental Deficiency Act, 1913 (3 and 4 Geo. 5, c. 28, s. 8), provides for cases in which a crime, so grave as to be punishable (in an adult) with penal servitude or imprisonment, has been committed by any one who *from before the age of eighteen*[1] has belonged to this group. The court which convicts him may, instead of passing a sentence, place him under guardianship or send him to an Institution for mental defectives. In 1926, 52 were so sent by the courts.

No similar provision has as yet been made for similar abnormality that has arisen in later life. Such cases are perhaps fitter for consideration by the Home Office than in the swiftness of a forensic trial. But in the United States and France and Scotland degrees of mental affliction that are too slight to confer complete exemption from responsibility are recognised as a circumstance that may mitigate the offender's punishment[2]. This view is defended on the ground that every form of insanity weakens the power of self-control, so that the offender's moral guilt is proportionately lessened, and therefore, on the Retributive theory, his punishment ought to be the less. (Yet, on the Deterrent theory of punishment,

[1] 17 and 18 Geo. 5, c. 33 modifies to this the original vague limit. Cf. p. 538 *infra*.

[2] Cf. infanticide, p. 125 *infra*.

this argument might occasionally be employed for the opposite purpose of aggravating the punishment; for the weaker a man's will, the more sternly does it need to be braced by the fear of penalty.) In English practice the lessened capacity of self-control is often treated as a mitigating circumstance; for instance, when sunstroke or sleepy sickness has left a man with a will-power permanently so weakened that he pursues any passing pleasure with little regard for consequences. Strict logic, however, suggests that a non-exemptive insanity instead of merely lessening the punishment should modify it, by giving it a curative form.

In cases where a defence of insanity has been accepted[1] by a jury[2], the form of their verdict used to be "not guilty, on the ground of insanity." But now, under the Trial of Lunatics Act, 1883 (46 and 47 Vict. c. 38), it is to be "guilty of the act (or omission), but so insane as not to be responsible, according to law, for his actions at the time when the act was done (or the omission made)[3]."

The Court then orders the prisoner to be kept in custody as a "criminal lunatic[4]," till His Majesty's pleasure shall be known; and His Majesty may order him to be kept in custody, during his pleasure, in such place and manner as he may think fit. The confinement is usually lifelong[5]; and consequently

[1] English law (*supra*, p. 53) presumes an accused person to be sane. Hence the prisoner must give "clear" proof (10 Cl. and F. at p. 210) of insanity. But any seeming harshness in this rule is obviated in the present practice, under which the Crown hands to the Judge and to the accused all its information as to the latter's state of mind, *e.g.* the prison-surgeon's report. Prisoners' counsel sometimes prefer *not* to raise the defence of Insanity. So also may an undefended prisoner: hence, if a prisoner has no counsel, the crown counsel will expressly ask whether the Judge thinks it desirable for him to call the medical witnesses.

[2] Justices of the Peace can accept the defence when trying an offender *summarily*: but not when examining for commitment to a higher court.

[3] This 1883 form was devised by Queen Victoria; to emphasise, somewhat illogically, that "guilt" which the law denies. Her life had several times been imperilled by insane assailants.

[4] There are usually nearly a thousand criminal lunatics under detention.

[5] Apart from female prisoners whose insanity was merely a puerperal mania, only about one prisoner in 150 obtains release from Broadmoor. The annual cost of this asylum is about £92,000.

the defence of insanity is rarely set up in the higher criminal courts except in heinous crimes[1].

It may be added that insanity is sometimes important in criminal law, even apart from its bearing on *mens rea*. For if a man become insane[2] after committing a crime, he cannot be tried until his recovery, any more than can a foreigner, or deaf mute, for whom no interpreter is available. Again, if after conviction a prisoner become insane[2], he cannot be hanged until his recovery, for he may have some plea which, if sane, he could urge in stay of execution[3].

(3) *Intoxication.*

This, whether produced by alcohol or by drugs, is ordinarily no excuse for the commission of a criminal act; even though it have produced for the time great aberration of mind. For, unlike insanity, it has been produced voluntarily; and to produce it was wrong, both morally and also legally[4]. Accordingly the law will not allow one wrong act to be an excuse for another[5]. Hence the gross negligence[6] which has caused

[1] During twenty-two recent years the defence was raised with success in thirty-three per cent. of the trials for murder; but in less than two per cent. of other criminal trials. An unusually minute picture of the practical working of a trial where this defence is raised may be seen in *The Times* of April 20, 1882.

[2] In *any* form of certifiable insanity, even though not such as the McNaughton rules would cover. See p. 539 *infra*.

[3] Less than thirty of the prisoners for trial in any year are found to be so insane as to be incapable of trial, whilst less than forty of those tried are acquitted on the ground of insanity. A person so acquitted cannot appeal to the Court of Criminal Appeal against *either* half of the verdict; *Felstead's Case*, L. R. [1914] A. C. 534.

[4] Until 1872 it was a criminal offence, under 4 Jac. I. c. 5, s. 2; and even now a conspiracy to produce it would be indictable, and a contract for it would be void.

[5] But actual Insanity, even when produced by drunken habits (as in some cases of *delirium tremens*), exempts from criminal responsibility just as effectually as if it had not originated in misconduct. And intoxication itself, in those rare cases where it is innocent—as when produced by necessary medical treatment or by the fraud of malicious companions—has the full exemptive effect of insanity. This exemption has been extended in Ireland and the United States even to the case of a person who, in consequence of fatigue or sleeplessness, becomes intoxicated by taking the small quantity of alcohol which usually he takes with impunity (*Reg* v. *Mary R.*, see Kerr on Inebriety, ch. XXII).

[6] Cf. 16 Cox, at p. 309 (surgeon's negligence).

a fatal collision is punishable, not only in a sober driver but also in a drunken one. And if a man, when excited by liquor, stabs the old friend whom he never quarrelled with when sober, or steals the picture which never attracted him before, it is no defence to say that "it was the drink that did it." Indeed the older law (4 Coke 125 *a*) regarded intoxication as even aggravating[1] the guilt of any crimes whose predisposing cause it was. But modern judges, whilst still holding that it cannot excuse that guilt, admit that it may mitigate the punishment[2].

Moreover, though drunkenness is thus no excuse for a guilty state of mind, it often affords a defence for an *actus reus* by being evidence that no guilty state of mind existed. For intoxication may cause—even on grounds slighter than could reasonably lead a sober person to the same erroneous conclusion—a Mistake[3] of fact, such as is incompatible[4] with *mens rea*. The drunken man fancies some one else's umbrella to be his own; or supposes an innocent gesture to be an assault, and hits back in supposed self-defence[5].

An authoritative declaration of the law as to intoxication was given in 1920 by the concurrence of eight law lords in *Beard's Case* (L. R. [1920] A. C. 479). This judgment settles (1) that, as we have already seen, "merely to establish that the man's mind was so affected by drink that he more readily gave way to some violent passion" forms no excuse. But (2) "if actual Insanity in fact supervenes, [even] as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as Insanity induced by any other cause... Insanity, even though temporary, is an answer." Yet (3) in cases of mere intoxication the test for exemption is more

[1] Though not on the principle of Lord Cockburn's convivial Scottish judge who argued, "If he remains so bad even when drunk what must he be when sober?"

[2] 1 Cr. App. R. 181, 255; 25 T. L. R. 76.

[3] At a baby's christening party, its nurse, having got so drunk as to be "quite stupid and senseless," put the infant on the fire by mistake for a log of wood. The magistrates discharged her. (*Gent. Mag.* 1748, p. 570.)

[4] *Infra*, p. 66.

[5] *Reg.* v. *Gamlen*, 1 F. and F. 90 (K. S. C. 54). Cf. 31 T. L. R. 361; and 15 Cr. App. R. 221.

stringent than in case of Insanity; a judge should not ask the jury "the question 'whether the prisoner knew that he was doing wrong,' in a defence of drunkenness where Insanity is not pleaded." Still (4) evidence of such a drunkenness as "renders the accused incapable of forming the specific intent, essential to constitute the crime, should be taken into consideration, with the other facts proved, in order to determine whether or not he had this intent." In such a case the drunkenness, if incompatible with the indispensable mental element of the crime, "negatives the commission of that crime." Thus a drunken man's inability to form an intention to kill, or to do grievous bodily harm[1] at the time of committing a homicide, may reduce his offence from murder[2] to manslaughter (which latter crime requires no specific intent). The judgment adds that this principle is not "an exceptional rule applicable only to cases in which it is necessary to prove a specific intent;...for, speaking generally, a person cannot be convicted of crime unless the *mens* was *rea*." A man's drunkenness may preclude him, not merely from forming one of these specific intentions, but from forming any intent at all.

It was held by the Court of Criminal Appeal in *Rex* v. *Meade* (L.R. [1909] 1 K. B. 895) that if a man were so drunk as to be "incapable of knowing that what he was doing was dangerous, *i.e.* likely to inflict serious injury," this would rebut the presumption that he *intended* the natural consequences of his act[3]. So a fatal attack with a razor might thus be reduced from murder to at most a manslaughter. Similarly in *Rex* v. *Griffiths* the same Court (Nov. 17, 1913) unanimously approved a ruling that to be in "such a state of drunkenness that he could not appreciate that his act would cause grievous bodily harm," would be a defence.

[1] As in *H.M. Advocate* v. *Campbell* (Scotch Justiciary Cases, 1921, p. 12).

[2] *Reg.* v. *Monkhouse*, 4 Cox 55.

[3] The general doctrine of *Rex* v. *Meade* seems to be recognised by *Rex* v. *Beard*; though the latter case engrafts upon the former one an exception, viz. where the crime is one of "Constructive Murder" in attempting some other felony (see pp 138–140 *infra*). Cf. also p. 539 *infra*.

Drunkenness thus may show that an apparent burglar had no intention of stealing[1]; or that an apparent suicide jumped into the water when "so drunk as not to know what he was about[2]." The more complex the intent required by the definition of the particular crime, the more likely is drunkenness to be useful in disproving the presence of some element requisite to it; as by shewing that wounds were inflicted with no "intent to do grievous bodily harm[3]," or that a false pretence was made with no "intent to defraud."

Let us finally note that the question "Was he drunk?" is often[4] answered too definitely, as if there existed some single standard of sobriety. Intoxication, it should always be remembered, is a question of degree, ranging from mere exhilaration down to unconsciousness[5]. The man may be too drunk to do this act properly, yet sober enough to do some other. Our earliest legal standard of sobriety was over-lenient; regarding a man as not intoxicated unless "the same legs which carry him into the house cannot bring him out again," (Dalton's *Country Justice*, p. 27, A.D. 1635)[6].

(4) *Corporations.*

Corporations formerly lay quite outside the criminal law. If a crime were committed by a corporation's orders, criminal proceedings, for having thus instigated the offence, could only be taken against the separate members, in their personal

[1] *The State* v. *Bell*, 29 Stiles 316 (K. S. C. 55).

[2] *Reg.* v. *Moore*, 3 C. and K. 319.

[3] *Rex* v. *Meakin*, 7 C. and P. 297 (K. S. C. 54).

[4] Especially often when it is (not the Excuse but) part of the Crime. It is such, for instance, in the various petty offences of being drunk (1) "in a public place," (2) "on licensed premises," (3) "and incapable," (4) "and disorderly," (5) "in charge of a carriage" (*e.g.* a motor-car), (6) "in charge of loaded firearms," (7) "in charge of a child under seven."

[5] Hence the familiar division into four successive stages—jocose, bellicose, lachrymose, comatose.

[6] We may add that an accused man may sometimes be helped towards acquittal by the fact of his having been drunk even on some occasion *subsequent* to the date of the crime in question. For it may afford an innocent explanation of conduct that otherwise would suggest a consciousness of guilt: as where, on being arrested, he has made untrue statements or has refused to make any statement at all.

capacities, and not against the corporation as itself a guilty person[1]. This was a consequence of the technical rule that criminal courts expected prisoners to stand at their bar, and did not permit "appearance by attorney[2]." But it was further supported also by more scientific considerations, which the Roman law had anticipated and accepted[3]. It was urged that a corporation, as it had no actual existence, could have no will; and therefore could have no guilty will[4]. And it was further urged that, even if the legal fiction which gives to a corporation an imaginary existence may be stretched so far as to give it also an imaginary will, yet the only activities that could consistently be ascribed to the fictitious will thus created, must be such as are connected with the purposes which it was created to accomplish. If so, it could not compass a crime; for any crime would be necessarily *ultra vires*. Moreover a corporation is devoid not only of mind, but also of body; and therefore incapable of the usual criminal punishments. "Can you hang its common seal?" asked an advocate in James II's days (8 St. Tr. 1138).

But under the commercial development which the last two generations have witnessed, corporations have become so numerous that there would have been grave public danger in continuing to permit them to enjoy this immunity. The various theoretical difficulties have therefore been brushed aside; and it is now settled law that corporations may, in an appropriate court, be indicted by the corporate name, and

[1] Cf. Pollock and Maitland, I. 473, 661.

[2] But the King's Bench allowed corporations indicted before itself to appear by attorney; hence they became able so to appear at Assizes (28 T. L. R. 197). The Criminal Justice Act 1925, s. 33 (3) will permit them so to appear even at Quarter Sessions. By s. 49 of the Summary Jurisdiction Act, 1879, corporations may now appear by attorney at *Petty* Sessions.

[3] Yet the theory of Germanic law inclined the other way; as our English institution of Frankpledge (Stubbs' *Const. Hist.* I. 618) may serve to remind us. Cf. Maitland's *Political Theories*, p. xxxix.

[4] Hence, even in civil actions, doubts were long entertained as to the possibility of holding a corporation liable for those Torts in which "express malice" is necessary. Contrast *Abrath* v. *N.E. Ry. Co.* (L. R. 11 A. C. 247) with *Chuter* v. *Freeth* (27 T. L. R. 467).

that fines may be consequently inflicted upon the corporate property. The innovation was introduced at first by drawing a distinction between offences of non-feasance and those of mis-feasance; on the ground that whilst, in the case of a criminal mis-feasance, the servant or agent who actually did the criminal act could always be himself indicted, no such indictment would be available in the case of a non-feasance; for the omission would not be imputable to any individual agent but solely to the corporation itself. Hence, in 1840, an indictment for non-feasance, in omitting to repair a highway, was allowed against a corporation, in *Reg.* v. *Birmingham and Gloucester Ry. Co.*[1] Soon afterwards, in the case of *Reg.* v. *The Great North of England Ry. Co.*[2], an indictment was similarly allowed even for a mis-feasance, that of actually obstructing a highway. And the principle has received legislative approval. For the Interpretation Act, 1889[3], provides that in the construction of every statutory enactment relating to an offence, whether punishable on indictment or on summary conviction, the expression "person" shall, *unless a contrary intention appears*, include a body corporate. The gravity, or the nature, of an offence may be sufficient to shew that the framers of the enactment against it could not have had any intention of regarding bodies corporate as capable of committing it.

Thus the fact that a corporation cannot be hanged or imprisoned[4] sets a limit to the range of its criminal liability. A corporation can only be prosecuted, as such, for offences which can be punished by a fine[5]. Thus, whilst it can be indicted and fined for a libel published by its order, it cannot

[1] 3 A. and E. (N. S.) 223. [2] 9 A. and E. (N. S.) 315 (K. S. C. 69).

[3] 52 and 53 Vict. c. 63, s. 2. *Pearks* v. *Ward*, L. R. [1902] 2 K. B. 1.

[4] Or "committed" for trial (16 Cr. App. R. 131); so the Criminal Justice Act, 1925, s. 33 (1), substitutes from June 1, 1926, an order empowering the prosecutor to present a bill to the grand jury.

[5] And though manslaughter is finable, a corporation cannot be indicted for it, nor for any other crime that involves personal violence (*e.g.* assault or riot) or that is a felony. See *Rex* v. *Cory*; L. R. [1927] 1 K. B. 810.

be indicted for a burglary, or any other offence which is too grave to admit of being visited by a merely pecuniary penalty. If any crime so heinous be committed by the orders of a corporation, the various persons by whom it was ordered must be indicted individually in their own names, and punished in their own persons. It must be remembered that they are also liable to be thus individually indicted, even in the case of those less heinous offences for which their corporation might itself be indicted; for *it* becomes indictable only through the fact that a wrong has been instigated by *them*.

II. *Where the will is not directed to the deed.*

This state of mind arises from mistake or some other form of ignorance (*e.g.* taking from the hat-stand in your club another man's umbrella in mistake for your own).

Our criminal law often allows it to afford a good defence; as shewing, even though there has been an *actus reus*, that no sufficient *mens rea* preceded it[1]. But such a defence can only arise when three conditions are fulfilled.

(1) The first condition is that the mistake must be of such a character that, had the supposed circumstances been real, they would have prevented any guilt[2] from attaching to the person in doing what he did. Therefore it is no defence for a burglar, who breaks into No. 5, to shew that he mistook that house for No. 6; or did not know that nine o'clock (see p. 176) had struck. Similarly, on an indictment for assaulting a constable "in the discharge of his duty," the fact that the assailants did not know of his official character will not excuse them. On the other hand, it will be no offence[3] to lay violent hands upon a person, whom you reasonably, though mistakenly, suppose to be committing a burglary[4]. The cases of

[1] Yet, in civil law, ignorance that a girl is a Ward of Court is no defence for the contempt of court committed by marrying her; L. R. [1909] 2 Ch. 260.

[2] As to whether this means legal guilt or moral guilt, see p. 42 *supra*.

[3] As to the killing of a supposed dead man by one who imagines himself to have *already* murdered him, see three Indian cases where it was held not to be murder; L. Q. R. XXXVI. 7.

[4] *Rex* v. *Levett*, Cro. Car. 538 (K. S. C. 26). Similarly where a friend, pre-

Reg. v. *Prince* and *Reg.* v. *Tolson*, which we have already discussed (*supra*, pp. 41, 48), afford important illustrations of this principle.

(2) A further condition is that the mistake must be a reasonable one. This will be mainly a question of fact; but the jury may be assisted by the judge's directions as to mistakes that are clearly reasonable or are clearly unreasonable. One of the former class is mentioned by Sir Michael Foster[1]. A man, before going to church, fired off his gun, and left it empty. But during his absence some person went out shooting with the gun; and, on returning, left it loaded. The owner, late in the same day, took up the gun again; and in doing this, touched the trigger. The gun went off, and killed his wife, who was in the room. Foster held that the man had reasonable grounds to believe that the weapon was not loaded. The case might well have been otherwise if weeks, instead of hours, had elapsed between his firing off the gun and his subsequently handling it without taking any pains to see whether it had meanwhile been loaded again[2]. Similarly in an American case[3], where a constable was charged with arresting a man unlawfully, it appeared that the man had fallen down in the street in a fit[4], and his friends had first tried to revive him by administering whiskey, and then had gone away to seek help. The constable was acquitted; for the fact that the man smelt of whiskey afforded reasonable ground for supposing his insensibility to be due to intoxication (a lawful ground for arrest)[5].

tending to be a highwayman, played the part with a realism that proved fatal to himself (Taylor's *Medical Jurisp.* 10th ed. p. 760).

[1] Foster 265 (K. S. C. 27).

[2] Thus see *Reg.* v. *Jones*, 12 Cox 628 (K. S. C. 28) and *The State* v. *Hardie*, 10 Rumnells 647 (K. S. C. 123); cases where a mistaken belief that the firearms were unloaded was *not* reasonable.

[3] *Commonwealth* v. *Presby*, 14 Gray 65.

[4] To distinguish epilepsy from intoxication is a difficult task; the police are often censured most unjustly for failing to achieve it.

[5] If you shoot a house-pigeon, fancying it to be a wild one, the mistake will not excuse. The bird is not, (as a crow is), *obviously* wild; so you shoot at your risk. L. R. [1921] 2 K. B. 661.

But no belief which has now come to be currently regarded as an obsolete superstition can be treated as a mistake sufficiently reasonable to excuse a crime. Thus in 1880, at Clonmel, a woman who had placed a child naked on a hot shovel, in the honest belief that it was a deformed fairy sent as a substitute for the real child (who would be restored if the changeling were thus imperilled), was convicted and sentenced. So, in 1895, again at Clonmel, were men who had caused the death of the wife of one of them by holding her over a fire and searing her with a red hot poker, in the honest expectation of thereby exorcising a demon that was supposed to possess her[1]. And even people who break the law in consequence of a belief that they are obeying a Divine command, are legally regarded as actuated by a mistake which is "unreasonable." Illustrations are afforded in America by the prosecutions of Mormons for polygamy[2]; and in England by the prosecutions of the "Peculiar People" for withholding medical aid from their sick children. At the same time it must be remembered that some religious delusions may be of so extreme a character as to be evidence of insanity, and to afford a good defence upon that ground[3].

(3) The final condition is, that the mistake, however reasonable, must not relate to matters of law but to matters of "fact." For a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime[4]. *Ignorantia juris neminem excusat*[5]. The utmost effect it can

[1] In 1894 an Indian sentinel was convicted in Canada who had killed a man under the belief of his being an evil spirit that would attack human beings; *Reg.* v. *Machekequonabe*, 28 Ontario 309.

[2] *Reynolds* v. *United States*, 98 U. S. 145 (K. S. C. 31).

[3] *Rex* v. *Hadfield*, 27 St. Tr. Compare C. C. Sess. Pap. CLIV. 357.

[4] But I know of no reported decision which extends this rule to mere municipal bye-laws. Both in England and in the United States (*Porter* v. *Waring*, 69 N. Y. 250) a judge would require legal proof of a bye-law before enforcing it. Should the law attribute to ordinary people a greater legal knowledge than to the judge?

[5] For a discussion of the justifications that may be offered for this severe rule, see Austin's *Jurisprudence*, Lect. XXV., and Markby's *Elements of Law*, secs. 269, 270. Perhaps after considering them all, the student may still

ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of *mens rea* which some particular kind of crime may require. Thus larceny can only be committed when a thing is stolen without even the appearance of right to take it; and, accordingly, a *bonâ fide* and reasonable mistake, even though it be of law—like that of a woman who gleans corn in a village where it is the practice to do so (*infra*, p. 205)—will afford a sufficient defence. Similarly a mortgagor who, under an invalid but *bonâ fide* claim of right, damages the fixtures in the house which he has mortgaged, will not be guilty of "malicious" damage[1]. Apart, however, from such exceptional offences, the rule which ignores mistakes of law is applied with rigour. A sailor has been convicted of an offence that had been forbidden only by an Act of Parliament of which he could not possibly know, since it was enacted when he was far away at sea, and the offence was committed before the news of its enactment could reach him[2]. Frenchmen, who had acted as seconds in a fatal duel here, have similarly been committed for trial on a charge of murder, although their own land practised duelling and they did not know that English law forbade it[3]. Italians have been punished in London for keeping lotteries, in spite of their urging that in Italy every little village possessed a lottery sanctioned by the State, and that they had no idea that the English law could be different. It is therefore easy to see that a veterinary surgeon's mistaken belief that an operation, which he knows to be painful and purposeless[4], is

feel compelled, with the late Prof. Henry Sidgwick, to regard the rule as "not a realisation of ideal justice, but an exercise of Society's right of self-preservation." For the milder principles adopted in Roman law see Justinian's *Digest*, XXII. 6, and Lindley's *Jurisprudence*, p. 24 and App. xix.

[1] *Reg.* v. *Croft* [1859], C. C. C. Sess. Pap. CXI. 202.

[2] *Rex* v. *Bailey*, R. and R. 1 (K. S. C. 29). Cf. 86 J. P. 77.

[3] *Barronet's Case*, 1 E. and B. 1. French *law* forbids it, but not French opinion and custom.

[4] In England dishorning adult cattle without an anaesthetic was illegal (*Ford* v. *Wiley*, L. R. 23 Q. B. D. 203) when still legal in Scotland and Ireland; see now 9 and 10 Geo. V. c. 54. It is an embarrassing but unsettled question whether the Jewish mode of slaughtering cattle is illegal in England. A bye-law favouring it was issued by the Ministry of Health in 1922.

nevertheless unpunishable legally, will afford him no defence for performing it.

These mistakes are reasonable enough; yet they afford no excuse. Nor would they do so, even if the prisoner could shew that he had taken pains to obtain a lawyer's advice and had been misled by it. Still less, therefore, can any excuse be conferred by legal errors that are unreasonable. Such are apt to occur in connexion with the crime of Bigamy. In a trial for it, which I witnessed at the Central Criminal Court in 1883, not only the prisoner himself, but also his first wife and all her family, had believed his marriage with her to be void, because the wedding-ring was only of brass and not of gold[1].

But although mistakes of law, unreasonable or even reasonable, thus leave the offender punishable for the crime which he has blundered into, they may[2] of course afford good grounds for inflicting on him a milder punishment[3].

III. *Where the will is overborne by compulsion.*

(1) *Public civil subjection.* This rarely affords any defence in English law. Though the King can do no wrong, either civilly or even criminally—or, rather, *because* the King can do no wrong—his subordinates must be held strictly accountable for any wrongs they may commit on his behalf. Hence, if a soldier or sailor or constable unlawfully does violence to any one, he cannot plead as a defence merely that he was acting under orders from his superior officer, or even from the King himself[4].

[1] One female bigamist tried in 1920 had been assured, by the authorities of the asylum in which her incurably insane husband had been confined for eleven years past, that his incurableness had set her legally free to marry again; a man, tried also in 1920, had honestly believed that his wife's elopement with an adulterer had *ipso facto* dissolved the marriage. A frequent error is that a mere decree *nisi* effects an immediate dissolution; cf. p. 305 *infra*.

[2] Especially in the case of a foreigner; 18 Cr. App. R. 6.

[3] Cf. 7 C. and P. 456: p. 130 n. *infra*; and L. R. [1921] 2 K. B. at p. 125.

[4] *Infra*, p. 78; cf. Pollock on Torts, ch. IV. s. 1; and Kenny's *Cases on Tort*, pp. 122-6. See Hallam's *Constitutional History*, ch. I. p. 3, and ch. VII. p. 526, as to this peculiarly English check upon royal authority.

Of course such orders, when not *obviously* unlawful, may be relevant to his defence under some more general rule of law. They may give him such a "claim of right[1]" as renders it no larceny for him to appropriate another man's goods; or such grounds for supposing the surrounding circumstances to justify his conduct as will render this Mistake of Fact[2] a valid defence.

And, more than this, by a special rule as to Public Subjection, a mistake even of Law may afford a defence to a public servant who has obeyed unlawful orders under a reasonable (though mistaken) belief that they were lawful. Thus when violence is exercised by a gaoler or hangman in carrying out an invalid sentence, then, though the violence was criminal, yet if the Court which passed the sentence had jurisdiction over the offence, and the sentence had all reasonable appearance of validity, the man's public official subjection affords him immunity[3].

There is not yet, however, any conclusive English authority for extending to the military and naval forces the degree of immunity which the common law thus concedes to gaolers and other civil functionaries. A marine who, to obey orders, shoots a boatman who insists on rowing up to the ship, will probably be held[4] not guilty of murder if he knew that the orders were given lest the boatman should promote a mutiny on board; for such orders he might reasonably suppose to be lawful. Yet he clearly would be guilty if he knew them to be

[1] *Infra*, p. 204.

[2] *Supra*, p. 66.

[3] 9 Coke 68; 1 Hale 496; 1 Hawkins, ch. XXVIII.; 1 East P. C. 331. See the authorities cited in *Marks v. Frogley*, L. R. [1898] 1 Q. B. at p. 404. Cf. 3 C. and K. 199. No less a judge than Willes, J., on the trial of a fireman, named Trainer, for manslaughter by a railway accident, laid it down (*The Times*, Aug. 4, 1864) that "in a criminal case an inferior officer must be held justified in obeying the directions of a superior that are not obviously improper or contrary to law." And he held this to extend even to a fireman's private obligation to obey his engine-driver.

[4] *Rex* v. *Thomas* (Russell on Crimes, 8th ed., p. 774. Cf. 4 F. and F. 763, 806; and L. R. [1898] 1 Q. B. at p. 404; *Reg.* v. *Smith*, 17 Cape of Good Hope 561, K. S. C. 60; *Rex* v. *Bekker*, 18 South African Law Journal 421; and Stephen's *Hist. Cr. Law*, I 205.

given from a mere desire to keep the ship agreeably isolated. The official British Manual of Military Law admits it to be still "somewhat doubtful" (ch. VIII, par. 95) how far a superior officer's specific command, even one not obviously improper, will excuse a soldier for acting illegally. But the courts of the United States have repeatedly refused to recognise any such excuse at all; and insist that a soldier or sailor cannot plead his commander's orders as a defence unless they not merely seemed to be legal but actually were so[1]. See *United States* v. *Jones* (3 Washington 218); *Commonwealth* v. *Blodgett* (12 Metcalf 56); and *United States* v. *Carr*, A.D. 1872 (1 Woods 480). This extreme American doctrine is ridiculed by French jurists as "la théorie des baïonettes intelligentes."

Private civil subjection has been of more frequent importance than Public, as a defence. It never afforded exemption to servants or children who committed crimes at the instigation of a master or a parent. Only in the case of conjugal subjection did it ever amount to a defence. For if a wife[2] committed an ordinary felony in her husband's actual presence and by his instructions, the common law raised a *primâ facie* presumption that she had committed it under such a compulsion as to entitle her to be acquitted; even though there were no proof of any actual intimidation by him. (Yet for any crime committed by her when he was not actually present, his previous orders or threats would afford her no more excuse than those of any other instigator[3] would do.) This presumption of coercion never applied in mere non-indictable offences. But it extended (so the majority of writers[4] assert) to all misdemeanors, except those that are connected with the management of the house (for in that matter the wife is assumed to be the person chiefly active).

[1] For the different views of English, Scotch, American and South African courts see the cases in K. S. C. pp. 59-62.

[2] Not a mere concubine; *Rex* v. *Court*, 7 Cr. App. R. 127.

[3] Cf. p. 74 *infra*.

[4] And so Lord Birkenhead's committee of 1922 reported. Cf. *Reg.* v. *Torpey*, 12 Cox 45; *Rex* v. *Smith*, 12 Cr. App. R. 42.

And it extended to most felonies[1], *e.g.* to burglary, larceny, forgery; but not to felonies of extreme gravity, such as treason and murder. Still, as we have said, this presumption of subjection was only a *primâ facie* one; rebuttable by proof that the wife took so active a part in the crime as to shew that her will acted independently of her husband's[2].

The singular privilege thus accorded to the wife, yet denied to the child, admits of a curious historical explanation. "Benefit of clergy"—the right[3] of any man, who could read, to escape capital punishment—was denied to women until 1692[4]. Hence, whenever a man and his wife were charged with jointly committing any felony, the man, if he could make a semblance of reading, would get off, whilst the woman, though probably the less guilty of the two, would be sentenced to death. This injustice was evaded by the establishment of this artificial presumption of conjugal subjection.

The Criminal Justice Act, 1925, abolishes this anomalous defence, as from June 1st, 1926. It provides (s. 47) that "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished. But on a charge against a wife, for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband."

It may perhaps be convenient, though not strictly relevant, to mention here that there are a few cases in which even an act itself, otherwise criminal, that has been done by a wife, will cease to be *reus* because of its connexion with the relations between her and her husband. Thus, if a husband who has committed a crime is received and sheltered by his wife, she (see p. 89 *infra*) is not regarded by the law as becoming by

[1] Kelyng 31 (K. S. C. 66). In 1891 Cave, J., allowed it in arson.

[2] *Reg.* v. *Cruse*, 2 Moody 53 (K. S. C. 66). [3] *Infra*, p. 486.

[4] Hence under Charles II and James II, though (just as now) few women were tried, I find them form about two-sevenths—sometimes even a majority—of those sentenced to *death* at each Old Bailey sessions.

such "bare reception" an accessory after the fact (or a participator in his treason); for she is bound to receive him. Again, in consequence of the conjugal unity by which the married pair are –for some purposes—regarded in law as constituting only a single person, no criminal agreement to which they are the only parties can amount to the crime of conspiracy p. 289 (see *infra*); for a conspiracy needs two conspirators. And, similarly, a libel published against a husband by his wife, or one against a wife published by her husband, constitutes no offence[1].

(2) *Duress per minas* is a very rare defence; so rare that Sir James Stephen, in his long forensic experience, never saw a case in which it was raised. Consequently the law respecting it remains to this day both meagre and vague. It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse *some* crimes that have been committed under the influence of such threats. It is impossible to say with precision for what crimes the defence will be allowed to avail. It certainly will not excuse murder. Yet it may excuse the still graver offence of treason, though only in its minor forms: as where a prisoner shews that under pain of death, or of some physical injury falling little short of death, he was forced into giving some subordinate assistance in a rebellion. But he must shew that the compulsion continued throughout the whole time that he was assisting; and that he did no more than he was obliged to do; and that he desisted at the earliest possible opportunity[2]. Moreover, according to Sir James Stephen, this defence is admissible, only where the prisoner has been threatened by a plurality of persons. Yet it would seem, on principle, that two persons may differ so much in strength, or in weapons, that a degree of compulsion sufficient to exempt may have been exercised

[1] *Reg.* v. *Lord Mayor of London*, L. R. 16 Q. B. D. 772.

[2] *Rex* v. *McGrowther*, Foster 13 (K. S. C. 56). Cf. supplies, or transport-service, requisitioned by an occupying Invader: Westlake's *International Law*, II. 96; *Rex* v. *De Jager*, 22 N. L. R. 62 (South Africa).

by one of them over the other, although there was but this single threatener.

Fears of some lesser degree of violence, insufficient to excuse a crime, may nevertheless mitigate its punishment. Wherever there are two criminals, one of them is always to some extent in terror of the other. In such a case the timid rogue will usually deserve a less severe punishment than his masterful associate.

(3) *Necessity.* The fact that a man who has inflicted harm upon another's person or property, did so for the purpose of saving the community from a much greater harm, has from early times been recognised as a defence in civil actions, brought to recover compensation for the harm thus inflicted[1]. It is admittedly no tort to pull down houses to prevent a fire from spreading[2], or to enter a person's house to put out a fire. It would therefore seem natural that such necessity should be still more readily admissible as a defence to criminal proceedings. For in them the object is not to compensate mere loss but only to punish actual guilt (which here seems almost or altogether absent); and punishment itself must fail to attain its great object, that of Deterrence, in those cases of necessity where the evil it threatens is less than the evil which would have been suffered if the crime had not warded it off. So a person who commits some trivial offence, for the purpose of saving life—who goes at night, shall we say, on a lampless bicycle to fetch the fire-engine—might seem to have a valid legal excuse. Yet though theoretical writers have been willing to accept this ground of defence, there is no English case in which the defence has been actually raised with success. Yet Lord Mansfield gave an *obiter dictum* that even an act of treason, like the deposition of a colonial governor by his Council, might, in some circumstances of public danger, be justified by its necessity[3]. It has

[1] For necessity as a civil defence, see Pollock on Torts, 6th ed. p. 168.

[2] Dyer 36 *b*. See Kenny's *Select Cases on Torts*, pp. 161–170.

[3] *Rex* v. *Stratton*, 21 St. Tr. 1222. The correctness of this dictum was conceded by Lord Coleridge in *Reg.* v. *Dudley* (see next page).

always been thought that if provisions run short during a voyage, the captain of the ship commits no larceny by breaking into the cargo to feed his crew. In *Gregson* v. *Gilbert*[1], which was an action on a policy of marine insurance to recover the value of a hundred and fifty slaves, who had been thrown overboard during a voyage because the casks of water were running short and a hundred slaves had already died of thirst, no doubt was suggested, either by the Court or even at the bar, as to extreme necessity being capable of excusing even so awful an act as this. But there the question of criminal liability did not directly arise; and now, since *Reg.* v. *Dudley*, it seems that the criminal law would concede no exemption, on the ground of necessity, for such an act of homicide.

Clearly no such defence can be accepted in any case (1) where the evil averted was a less evil than the offence committed to avert it, or (2) where the evil could have been averted by anything short of the commission of that offence, or (3) where more harm was done than was necessary for averting the evil. Hence it is scarcely safe to lay down any more definite rule than that suggested by Sir James Stephen, viz. that "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand[2]."

In the only English case where this defence has been expressly raised, it failed[3]. Three men and a boy escaped in an open boat from the shipwreck of the yacht *Mignonette*. After having passed eight days without food, the men killed the boy in order to eat his body. Four days later, they were rescued by a passing ship. On their arrival in England, two of the men were tried for the murder of the boy. Lord Bacon had suggested (*Maxims*, v) that if two shipwrecked men were clinging to a plank which was only sufficient to support one, and one of them pushed the other off, he would be exempt

[1] 3 Douglas 232.
[2] *Hist. Crim. Law*, II. 109.
[3] *Reg.* v. *Dudley and Stephens*, L. R. 14 Q. B. D. 273 (K. S. C. 61).

from any criminal liability, because his conduct was necessary to save his life[1]. But the Court of Queen's Bench declared emphatically that there is no general principle of law which entitles a man to take the life of an innocent person in order to preserve his own. The court appears to have been willing, if necessary, even to overrule Lord Bacon's dictum about the plank; but Sir J. Stephen considers that their actual decision does not go so far as to overrule it. For, as he points out, the accused man does no direct bodily harm to the other, but leaves him still the chance of getting another plank; whereas in the *Mignonette* case the boy was actually killed, and moreover by men who did it for the sake of avoiding a starvation which the jury only found to have been otherwise "*probable*," not otherwise "*inevitable*[2]."

The defence of necessity, however, can only be important where, as in capital offences, there is a prescribed minimum of punishment. For in all others every English judge would take the extremity of the offender's situation into account, by reducing the sentence to a nominal penalty[3].

Yet where immediate death is the inevitable consequence of abstaining from committing a prohibited act, it seems futile for the law to continue the prohibition, if the object of punishment be only to deter. For it must be useless to

[1] Hale's *Pleas of the Crown*, 54. Much legal controversy was aroused in France in 1898 by a judgment at Amiens which adopted Bacon's lenient principle; for Hale's view is more generally adopted by French judges.

[2] Stephen, *Dig. Cr. Law*, Art. 33. He also maintains that the circumstances of *Reg.* v. *Dudley* distinguish it from many cases in which there is a choice of evils; for instance, where an accoucheur finds it necessary to destroy a child at the approach of birth in order to save the mother (an act that is never made the subject of a prosecution). Still more is it distinguishable from those in which the question is not which one shall live, but whether any shall live; as where three mountaineers are roped together, but two of them slip, and the third cuts the rope to save himself from being dragged to death with them. See Plowden 13 for a prisoner's escaping from a burning gaol, *to save his life*.

[3] But in continental countries (where a minimum is frequently set to punishments) the necessity of averting grave bodily harm is often raised as a defence. See the penal codes of Italy (s. 49), Germany (s. 54), Hungary (s. 80), Switzerland (s. 40), Spain (s. 8 (10)), Belgium (s. 71).

threaten any punishment the threat of which cannot have the effect of deterring[1]. Hence, perhaps, it is that in the United States the defence of Necessity seems to be viewed with favour[2].

To these three primary groups of cases (see above, p. 49) where unquestionably a criminal act goes unpunished for lack of the necessary *mens rea*, Blackstone (IV. 32) adds a supposed fourth one: "Where the will is too perfect to do wrong." For, by a totally unnecessary legal fiction, he ascribes the King's unquestionable immunity from criminal liability to an imaginary "perfection" in his will, which Blackstone supposes to render him incapable of *mens rea*. But it is clear that our law does not really regard the King as incapable of committing crime; inasmuch as, though it will never punish him, it would readily punish, as an accessory before the fact, any evil counsellor who might prompt him to a crime. The King has indeed himself an exemption from liability; but it is sufficiently explained by the absence, in our Constitution, of any tribunal possessed of jurisdiction to try him. It is thus a mere matter of adjective law; and not the result of any fiction in our substantive law.

But, whichever be the proper branch of law to class it under, the exemption itself is dictated by a wise policy. Almost every nation has considered it necessary to clothe its Chief Magistrate with this immunity. (It is true that in the United States the personal responsibility of the President for any crimes he may commit is fully recognised[3]; but the particular circumstances under which the States framed their

[1] At a court-martial held (*The Times*, July 28, 1893) in consequence of a collision, it was shewn that naval discipline regards even disobedience to an Admiral's orders as being excusable by necessity, *e.g.* the paramount necessity of not endangering the safety of a ship.

[2] *Commonwealth* v. *Brooks*, 99 Mass. 431; *State* v. *Wray*, 72 N. C. 253; *Nixon* v. *State*, 76 Indiana 524; *Church* v. *U.S.*, 143 U. S. 459. In *Rice* v. *Georgia* (34 S. E. R. 202) a man prosecuted for breach of a statute that forbade taking alcoholic liquor to church, pleaded that it was necessary for his wife's life that she should always have alcohol at hand. But the defence was disallowed, as it was not necessary for the wife to go to church.

[3] Constitution of U.S.A., art. II. s. 4. Cf. *The Federalist*, no. 69.

constitution sufficiently account for this unusual liability.) At the trial of Charles I, even the Parliament's counsel admitted[1] the correctness of a judicial dictum, of Henry VII's time, that "If the King should, in passion, kill a man, this would be no felony for which to take away the King's life."

The like immunity conceded to every foreign sovereign and his ambassadors and their suites, whilst resident in this country (cf. p. 93 n. *infra*), must be remembered[2]. In some recent cases of the unlawful driving of motor-cars, it has had practical results.

[1] 4 State Trials, 1034. Cf. Anson's *Law of the Constitution*, II. 4, 453.

[2] Hall's *International Law*, II. 4. 49, 50; Westlake's *International Law of Peace*, chap. XI. In Lord Halsbury's *Laws of England* the immunity of ambassadors and their suites is asserted at VI. 429, 432; but denied at IX. 245. They must not even be subpœnaed as witnesses. In 1913 a secretary of the Danish embassy was drowned in the Thames; and the embassy claimed (with success) that no inquest could be held on his body.

See *The Times* of Oct. 27, 1896, as to the kidnapping of Sun Yat Sen (afterwards twice President of the Republic of China) in the London residence of the Chinese Imperial Legation.

See *Musmann* v. *Engelke* (L. R. [1928] 1 K. B. 90) as to the *conclusiveness* of a certificate from our Foreign Office about a person's possessing diplomatic privilege.

As to semi-sovereign rulers, like the protected Indian princes, see *Statham* v. *Statham*, L. R. [1912] P. 92.

CHAPTER V

INCHOATE CRIMES

We have seen that where there is merely *mens rea*, there is no crime at all. But though an *actus reus* is thus necessary, there may be a crime even where the whole of the particular *actus reus* that was intended has not been consummated. If an assassin misses the man he shoots at, there is clearly no murder; but nevertheless a crime has been committed. For the law will punish acts that constitute even a very early stage in the preparations for an *indictable* crime.

But, just as the mere *mens rea* is not punished, so neither are the earliest conceivable stages of the *actus reus*. There is thus, as a general rule (leaving out of view, at present, the anomalous case of Treason, see p. 267 *infra*), no criminal liability where a *mens rea* has only been followed by some act that does no more than manifest the *mens rea*. Liability will not begin until the offender has done some act which not only manifests his *mens rea*, but also goes some way towards carrying it out. Three classes of merely incipient or inchoate crimes proceed far enough to become punishable: Incitements, Conspiracies, Attempts.

(1) In *Incitement*, the act takes the form of soliciting some other person to commit a crime[1]. This is a misdemeanor[2], even though that person never does commit the ultimate crime thus suggested to him[3]. If he do commit it, the inciter becomes still more guilty; being liable as an "accessory before the fact[4]," if the suggested crime be a felony, and liable as a principal offender, if it be a misdemeanor.

[1] *Rex* v. *Higgins*, 2 East 5 (K. S. C. 83). But this desired crime must (except in a few statutory cases) be an *indictable* one. To "counsel or procure" the commission of a *non*-indictable crime will, however, itself become a petty offence if the offence counselled come to be actually committed.

[2] Punishable with fine and imprisonment.

[3] *Reg.* v. *Gregory*, L. R. 1 C. C. R. 77. Or even *could not* commit it, provided that the inciter supposed that he could; 63 J. P. 790.

[4] *Infra*, p. 87.

(2) In *Conspiracy*[1], the mere agreement of two or more persons to commit a crime is regarded by the law as an act sufficiently proximate to the contemplated offence to render these persons guilty at once of a crime. Even a conspiracy to do no more than incite some one else to commit a crime would be criminal.

(3) *Attempts* constitute the most common form of inchoate crime. They consist in some physical act which helps, and helps in a sufficiently "proximate" degree, towards carrying out an *indictable* crime that is contemplated. But no abstract test can be given for determining whether an act is sufficiently proximate to be an "attempt." It is clear that mere Preparations for the intended crime, antecedent to the actual commencement of the crime itself, do not amount to an indictable attempt[2]. Thus if a man, who contemplates murder, buys a pistol and takes a railway ticket to the place where he expects to find his intended victim, these are mere acts of preparation, too remote from the actual Perpetration to constitute an attempt. But if, on meeting the victim, he points the pistol at him and puts his finger on the trigger, he does acts which are a part of the offence of murder—and, similarly, of that of shooting with intent to wound—and certainly will amount to an "attempt" to commit either of those two crimes. And if a death by only a *slow* poisoning be intended, yet the administration of even the first dose (weak and non-fatal) is a sufficient attempt[3].

So again, the buying a box of matches would not be an act sufficiently proximate to the offence of arson to constitute an attempt to commit it; for it is an ambiguous act, not necessarily referable to that crime, or to any crime at all.

[1] *Infra*, p. 289. In a Conspiracy (*unlike* Incitement and Attempt) the crime aimed at need not be an indictable one; and, *as* in Incitement and Attempt, it probably need not be a possible one, *e.g.* a conspiracy to kill a man who really is already dead (see Wills, J., 24 Q. B. D. at p. 424, but cf. 34 T. L. R. 140).

[2] *Rex* v. *Robinson*, L. R. [1915] 2 K. B. 342. Yet they will often afford evidence of Conspiracy.

[3] *Rex* v. *White*, 4 Cr. App. R. 257.

But, on the other hand, actually striking one of the matches at a haystack, for the purpose of setting fire to the stack, would be a sufficient "attempt" to commit this arson[1]. And it will remain so, even if the match goes out—or is snatched away from the prisoner, or is thrown away by him on finding himself detected—before any hay has caught fire at all. Another illustration of this dividing line may be found in cases relating to the publication of seditious or defamatory books. Merely to preserve such a book, even with a view to publish it, is not an attempt at publication, nor is a journey with the aim of procuring such a book[2]. But actually procuring it, with intent to publish it, would be[3].

It was for a time thought that a person could not be convicted of an attempt unless the attempted act were possible. Thus for a thief to put his hand into a person's pocket which happened to be empty, was not regarded as amounting to an attempt to commit larceny[4]. This doctrine has, however, been definitely overruled[5].

The offence attempted may itself be only an inchoate form of crime. Thus a conviction may be obtained for an attempt to incite, or an attempt to conspire[6]. But, as it is of the essence of an attempt to be itself merely inchoate, it will be a good defence to an indictment for an attempt if the prisoner can shew that he actually completed the intended crime. For, thereupon, the attempt became merged in the greater offence[7];

[1] *Reg.* v. *Taylor*, 1 F. and F. 511. Cf. *infra*, p. 252. [2] Dearsley, 551.
[3] Contrast, similarly, 11 Cr. App. R. 111 with 11 Cr. App. R. 124.
[4] *Reg.* v. *Collins*, L. and C. 471. Nevertheless it was punishable as an "assault with intent to commit a felony" (*infra*, p. 159).
[5] *Reg.* v. *Brown*, L. R. 24 Q. B. D. 357; *Reg.* v. *Ring*, 61 L. J. R. (M. C.) 116 (K. S. C. 88). Nevertheless it may be that there are *some* forms of Impossibility which the law would still regard as preventing an Attempt from being criminal. Thus, although shooting at a distant man with a pistol that will not carry far enough would be an indictable attempt, there is some authority for saying that shooting at a post, which you mistake for a man, would not be. See *Rex* v. *Osborn* (84 J. P. 63). Cf. L. and C. 373–4.
[6] Or an attempt to incite to conspire.
[7] *Rex* v. *Higgins*, 2 East, at p. 20, *per* Grose, J.; *Reg.* v. *Meredith*, 8 C. and P. 589. Similarly an Incitement will merge in the completed crime. But a Conspiracy will not; see p. 290 *infra*.

and he must be reindicted if he is to be punished. If, however, on the other hand, a man indicted for some crime turns out to have done no more than attempt it, it is now provided by statute[1] that he may, even on the original indictment, be convicted of the mere attempt; thus avoiding the trouble of a new indictment and a new trial.

At common law, every attempt to commit any indictable crime, whether that ulterior crime be felony or misdemeanor, is itself a misdemeanor[2]; and is punishable with fine and imprisonment with hard labour. But by statutes some particular attempts have themselves been made felonies; thus, every attempt to murder is now a felony, and punishable with penal servitude for life[3].

By an "Endeavour" some act *less* than an Attempt is meant; (20 Cr. App. R. 78).

[1] 14 and 15 Vict. c. 100, s. 9.
[2] *Reg.* v. *Hensler*, 11 Cox 570.
[3] 24 and 25 Vict. c. 100, s. 11. This does not include attempts to commit *suicide*; see p. 114 *infra*.

CHAPTER VI

THE POSSIBLE PARTIES TO A CRIME

CRIMES are often grouped by English lawyers into three classes—Treasons, Felonies and Misdemeanors. In the gravest, and also in the least grave, of these three, no legal distinction, either of substance or even of form, is drawn between the various recognised modes of taking part in the commission of them. For the guilt of even the slightest share in any Treason is regarded as being so heinous that it is needless to distinguish it from still deeper shades of guilt. And, on the other hand, no activity in a mere Misdemeanor is considered heinous enough to make it worth while to draw a formal distinction between it and any less prominent mode of taking part in the offence. Hence if a crime belongs to either of these two opposite extremes, all persons who are concerned in it in any way—whether by actually committing it, or only by keeping near in order to assist whilst it is being committed, or merely by suggesting its commission—are indiscriminately classed together by the law as being alike "principals" in the offence.

But the intermediate group of crimes, viz. Felonies, appeared to be neither so grave nor so trivial as to make[1] it useless to take some formal notice of the gradations of guilt that arise from the variety of ways in which men may be concerned in them. And in the case of Felonies these distinctions still continue to be drawn, though their practical importance has now almost entirely disappeared. An accurate comprehension of them is, however, still of great value to the student as enabling him, not merely in Felonies but also in Treasons and Misdemeanors, to trace with precision the lines at which the law ceases to take notice of participation in a

[1] See Stephen, *Hist. Crim. Law*, II. 221–241; *Digest Crim. Law*, Arts. 36–47; Pollock and Maitland, II. 507–509.

crime—the stages, in other words, where Complicity ends and Immunity begins. Four several ways of taking part in a felony are recognised: (1) a principal in the first degree, (2) a principal in the second degree, (3) an accessory before the fact, (4) an accessory after the fact.

(1) By a *principal in the first degree*, we mean the actual offender—the man in whose guilty mind lay the latest blameable mental cause of the criminal act. Almost always, of course, he will be the man by whom this act itself was done. But occasionally this will not be so; for the felony may have been committed by the hand of an innocent agent who, having no blameable intentions in what he did, incurred no criminal liability by doing it. In such a case the man who instigates this agent is the real offender; his was the last *mens rea* that preceded the crime, though it did not cause it immediately but mediately. Thus if a physician provides a poisonous draught and tells a nurse that it is the medicine to be administered to her patient, and then by her administration of it the patient is killed, the murderous physician—and not the innocent nurse—is the "principal in the first degree[1]." Similarly, if a man sends a six-year-old child[2] into a shop to steal something out of it for him, the man himself will be principal in the first degree in this theft. Thus if you hand in to your master's book-keeper a lying statement of money matters, and he believes it and makes entry of it, you are yourself indictable for the offence of "falsifying" the master's account-books in which the untrue statement was so entered[3]. Even an animal may be employed as an "innocent agent." For, just as anyone who sets a dog upon people is himself guilty of assaulting them, so any one who should send his trained retriever to purloin meat from a butcher's stall, might be convicted of the larceny of the meat, as a principal in the first degree; and this, even though he were out of sight when the dog took it.

[1] Kelyng 52 (K. S. C. 79); *Rex* v. *Saunders*, Foster 371 (K. S. C. 81).
[2] *Reg.* v. *Manley*, 1 Cox 104 (K. S. C. 78). [3] *Reg.* v. *Butt*, 15 Cox 564.

There may, of course, be more than one principal in the first degree. Thus all the members of a gang of poachers may have fired simultaneously at the keeper who has surprised them. Or both the father and the mother of a little child may have together concurred in starving it. And persons may be thus joint principals in the first degree, even though one of them commits his share of the crime in one town whilst his colleague commits his in quite a different one.

(2) A *principal in the second degree* is one by whom the actual perpetrator of the felony is aided and abetted at the very time when it is committed. For instance, a car-owner sitting beside the chauffeur who kills some one by over-fast driving; or a bigamist's second "wife," if she *knows* he is committing bigamy. (In early law he was not ranked as a principal at all, but only as a third kind of accessory—the accessory *at* the fact.) This subordinate principal may or may not be actually present at the scene of the crime. Instances of persons who aid and abet a felony at the place itself[1] are afforded by the seconds in a prize-fight which ends fatally; or even by mere spectators if they actively encourage such a contest even by mere applause. But a spectator's presence at a prize-fight does not of itself constitute sufficient encouragement to amount to an aiding and abetting[2], and therefore does not necessarily make him punishable as a party to it. On the other hand, a man may effectively aid and abet a crime, and at the very moment of its perpetration, without being present at the place where it is perpetrated. Thus, when *A* is inside a house, committing a burglary, *B* and *C* may be waiting outside it, ready to help him in carrying off the plunder or to protect him by giving warning of the approach of the police[3]. A prize-fight will usually have sentinels thus on the alert. In a case in Ohio, a man who invited

[1] *Reg.* v. *Swindall* (K. S. C. 74); contrast *Rex* v. *Mastin* (K. S. C. 77). "The surgeon who attends a duel, to *save* the lives imperilled, attends it as a criminal"; L. R. 8 Q. B. D. at p. 536.

[2] *Reg.* v *Coney*, L. R. 8 Q. B. D. 534. Cf. 12 Cr. App. R. at p. 246.

[3] Foster 350. Cf. *Reg.* v. *Griffith*, Plowden 97 (K. S. C. 73).

a shop-keeper to accompany him to a convivial gathering, and took care to keep him agreeably occupied at it while some accomplices broke into his shop, was held to have been giving, even at the moment of the burglary, a sufficiently effective assistance in it to render him a principal in the second degree[1].

An aider and abettor is only liable for such crimes committed by the principal in the first degree as were done in execution of their common purpose[2]. Thus if burglars find themselves interrupted by the master of the house which they have broken into, and one of them shoots him, the other burglar will be in no way liable for this murder, unless they had jointly resolved to resist interruption at any cost.

(3) An *accessory before the fact* is a person who procures or advises[3] one or more of the principals to commit the felony[4]. This definition requires from him an instigation so active that a person who is merely shewn to have acted as the stakeholder for a prize-fight, which ended fatally, would not be punishable as an accessory. The fact that a crime has been committed in a manner different from the mode which the accessory had advised, will not excuse him from liability for it. Accordingly if *A* hires *B* to poison *C*, but *B* instead kills *C* by shooting him, *A* is none the less liable as accessory before the fact to *C*'s murder. But a man who has counselled a crime does not become liable as accessory if, instead of any form of the crime suggested, an entirely different offence is committed. An exception, however, arises where the crime counselled was one which was itself likely to cause

[1] *Breese* v. *State*, 12 Ohio 146.

[2] Usually there *is* a purpose agreed on between the two. But a man who does something, which he knows will assist an intended crime, is liable as aider and abettor, even though the main offender is unaware of this support. See 13 Cr. App. R. 166.

[3] Even to know that some crime, of a specified kind, is intended, and to supply the means that might be used in it, is not enough; instigation is necessary: *Rex* v. *Lomas*, 9 Cr. App. 220. Cf. L. and C. 161.

[4] Therefore there can be no accessory before the fact in "voluntary" (*i.e.* unpremeditated) manslaughter. See p. 116 *infra*.

this other crime that actually was committed; so if, when *A* has hired *B* to murder *C*, *B* by mistake kills *C*'s twin brother *D* instead, *A* may be convicted as an accessory to *D*'s murder. Yet in *Saunders' Case*[1], where one man had instigated another to give a woman a poisoned apple, but she innocently handed on this apple to her child, who died from eating it, there was held to be no such likelihood as would render the original instigator an accessory to the murder of the child.

The student should notice that in criminal law the word "principal" thus suggests the very converse of the idea which it represents in mercantile law. In the former, as we have seen, an accessory proposes an act, and the "principal" carries it out. But in the law of Contract, and in that of Tort, the "principal" only authorises an act, and the "agent" carries it out[2]. Where the same transaction is both a tort and a crime, this double use of the word may cause confusion. For example, if, by an innkeeper's directions, his chambermaid steals jewels out of a guest's portmanteau, the maid is the "principal" in a *crime*, wherein her master is an accessory before the fact; whilst she is also the agent in a *tort*, wherein her master is the "principal."

As we have already seen, to participate in a treason or a misdemeanor in either the second or the third of the modes now enumerated would constitute, not only an act of crime, but an act which the law does not distinguish (as it does in the case of felonies) from that of the "principal in the first degree." It is wholly immaterial, for all technical purposes, whether a misdemeanant was principal at the fact or before the fact.

(4) But the *accessory after the fact* stands in a fourth and remoter degree of complicity, which in the case of misdemeanors[3] involves no criminal responsibility at all. An

[1] Plowden 475; Foster 371 (K. S. C. 81).
[2] South African lawyers use the terms thus, even as to Crimes.
[3] Or of the petty offences punishable summarily.

accessory of this species is a person who, knowing that a felony has been committed, subsequently shelters or relieves one of the felons (even one who was a mere accessory) in such a way as to enable him to elude justice. He may do this, for instance, by concealing a fugitive murderer in his house or supplying him with the means of escape[1], or by helping a convicted murderer to get out of prison. Active assistance to the felon is thus necessary[2]. Hence merely abstaining (however wilfully) from arresting a known felon, and so leaving him to make his escape, is not enough[3] to make the sympathiser guilty, as an accessory, of the felony itself. (But it does make him guilty of the specific misdemeanor of a Misprision of Felony[4]. Similar merely passive connivance in a treason would, in like manner, be a Misprision of Treason. For crimes so grave as felonies or treasons ought to be disclosed to a magistrate by every one who knows of them. But in the case of mere misdemeanors there is no such duty.) It should be noted that, since it is a wife's duty to aid her husband and to keep his secrets, she incurs no[5] liability if, after he has committed a felony, she hides him from justice. But a husband enjoys no similar exemption when he assists a felonious wife; he becomes accessory to her felony.

Even in felonies but little practical importance now attaches to the distinctions between the first *three* of these four classes of "accomplices"—(a term which the law applies to all the *participes criminis*, whatever their degree of "complicity" in the offence, though popular use generally limits it to those who take only a minor part). For the maximum punishment prescribed for any given crime is the same in the case of all three classes. And similarly the mischievous rule of the old common law, that the accessories to a crime could not be convicted until their principal was convicted (though he perhaps might be acquitted utterly unjustly or might die before he

[1] Or destroying dangerous evidence; *Rex* v. *Levy*, 7 Cr. App. R. 61.
[2] *Reg.* v. *Chapple*, 9 C. and P. 355 (K. S. C. 82). But it need not be to him *personally*; as *Rex* v. *Levy* shows.
[3] Y. B. 9 Hen. IV. pl. 1. [4] *Infra*, p. 279. [5] *Supra*, p. 73.

could be arrested), has long ago been abolished by statute; so that now all accessories whether before or after the fact may be indicted even though the principal felon has not yet been convicted, or even is not amenable to justice[1]. Moreover, by a bold application of the principle that *qui facit per alium facit per se*, it has also been enacted that an accessory before the fact may even be indicted and convicted as himself a principal[2]. For the man who despatches the assassin is as truly a murderer of the victim as if he had himself fired the fatal bullet. But the converse does not hold good; if a principal is indicted as an accessory he cannot be convicted.

In modern times, the only important surviving difference between the various grades of accomplices consists in the fact that a much more lenient punishment is awarded to the man who is only an accessory *after* the fact. Instead of being, like accessories before the fact, liable to the same heavy maximum of sentence as the principal, he is punishable with nothing more than two years' imprisonment, with or without hard labour; (except in the case of murder, where the maximum punishment for an accessory after the fact is penal servitude for life).

It is scarcely necessary to say that a man may be accomplice in more than one way to the same act of crime; and thus he may be convicted on one count as an accessory before the fact, and on another count as an accessory after the fact[3]. For that famous and still mysterious crime, the murder of Sir Edmondsbury Godfrey in 1678, Atkins (the secretary of Pepys the diarist) was indicted both as an accessory before the fact and also as a principal[4].

[1] 24 and 25 Vict. c. 94, ss. 1, 3.
[2] 24 and 25 Vict. c. 94, s. 2. See *Reg.* v. *James*, L. R. 24 Q. B. D. 439 (K. S. C. 81).
[3] 8 C. and P. 43.
[4] 6 St. Tr. 1491.

CHAPTER VII

THE CLASSIFICATION OF CRIMES

PUBLIC wrongs, Pleas of the Crown, or—to use a phrase more familiar but more ambiguous—Crimes, may be arranged, according to their technical degrees of importance, in the following series of groups.

I. Indictable offences; *i.e.* those which admit of trial by jury.

(1) Treasons,
(2) (Other[1]) Felonies,
(3) Misdemeanors.

II. Petty offences; *i.e.* those which can only be tried summarily, by justices of the peace sitting without a jury[2].

The word "Crime" is properly applicable to all these; and thus, for instance, in the Judicature Act[3] the expression "criminal cause or matter" includes them all. But sometimes more restricted senses have been adopted: as when Serjeant Stephen, in re-writing Blackstone's *Commentaries*, limits "crime" to offences that are indictable; or when Blackstone himself goes still further, and limits it to indictable offences that are graver than misdemeanors[4].

The two groups, Indictable and Non-indictable, were originally quite exclusive of each other; but now they overlap to some extent. For, under the Summary Jurisdiction Act, 1879, some frequent indictable offences *may* under certain circumstances be tried summarily[5] instead; whilst all such

[1] For (*infra*, p. 92) "Felony" *properly* includes Treasons.
[2] Sometimes absurdly, though officially, styled "Summary offences"! "Misdemeanor" in a wide and better sense includes these as "petty misdemeanors," and means any offence below felony (L. R. [1928] 2 K. B. 459); whilst Blackstone (IV. 1. 5) recognises it as having also a third sense, synonymous with "Crime," and so including even Felonies.
[3] 36 and 37 Vict. c. 66, s. 47.
[4] 4 Bl. Comm. 1.
[5] 42 and 43 Vict. c. 49, ss. 10, 11, 12. *Infra*, ch. XXIX. Six-sevenths of all the indictable offences prosecuted *are* so tried.

of the petty offences as are heinous enough to admit of a sentence of imprisonment for over three months *may* instead be tried on indictment[1].

The discussion of the distinction between indictable and non-indictable offences may conveniently be postponed until we reach the subject of Procedure. But the mode in which indictable offences themselves are subdivided springs from so noteworthy a historical origin[2], and produces so many important consequences, as to deserve immediate consideration.

Amongst indictable crimes, the common law singled out some as being so conspicuously heinous that a man adjudged guilty of any of them must incur— not as any express part of his sentence but as a consequence that necessarily ensued upon it—a forfeiture of property, whether of his lands or of his goods or of both. Such crimes were called "Felonies." The other, and lesser, crimes were known as "Transgressions" or "Trespasses"; and did not obtain their present name of misdemeanors until a much later date. A felony is, therefore, a crime which either involved by common law such a forfeiture, or else has been placed by statute on the footing of those crimes which did involve it. (This definition, it will be seen, includes treason; and, accordingly, the Statute of Treasons[3] speaks of "treason or other felony." But the differences of procedure between cases of treason and those of other felonies are so numerous and important that treasons have usually to be discussed apart; and hence, for brevity's sake, the term "felony" is commonly employed as exclusive of them.)

The very word "felony" has been said[4] to contain a reference to the forfeiture which the crime entailed, and to be derived from the words *fee*, *i.e.* feudal holding, and *lon*,

[1] 42 and 43 Vict. c. 49, s. 17.

[2] See Pollock and Maitland, I. 284–286, II. 463–468, 509.

[3] 25 Edw. III. st. 5, c. 2. Cf. Maitland's *Collected Papers*, I. 316.

[4] 4 Blackstone Comm. 95. It occurs in French before 1066; but only as the name of one specific offence—the breach of a vassal's fealty to his lord, naturally involving the loss of his feudal land.

i.e. price; felony thus being such a crime as "costs you your property." But according to the Dictionary of Prof. Skeat the word is derived from a Celtic root, meaning "evil" (or, according to that of Dr Murray, from the Latin *fel*, "venom"); and at any rate it is akin to our English adjective "fell," as in Shakespeare's "fell and cruel hounds[1]."

Familiar instances of felonies are—murder, manslaughter, burglary, housebreaking, larceny, bigamy, rape; whilst the most conspicuous instances of misdemeanors are less heinous crimes, like perjury, conspiracy, fraud, false pretences, libel, riot, assault. The differences between felonies and misdemeanors are no longer so numerous as they once were. Amongst those, however, that have now disappeared there are some whose historical importance requires notice.

(1) Originally, as we have seen, every felony tacitly produced a forfeiture; whilst no misdemeanor did, and in extremely few misdemeanors could forfeiture be imposed even as an express part of the sentence. But all forfeitures for felony and treason were abolished by the Forfeiture Act, 1870 (33 and 34 Vict. c. 23, s. 1).

(2) Originally all felonies (except petty larceny) were punished with death; whilst no misdemeanor was[2]. Hence the idea of capital punishment became so closely connected with that of felony that any statute making a crime a felony made it capital by mere silent implication; whilst in an enactment which created a mere misdemeanor even the widest general words could not suffice to make it capital[3], and nothing but the most express language would suffice.

[1] Pollock and Maitland, II. 465.

[2] Heresy (though never a felony) was of course punishable with death; but it was an ecclesiastical offence not triable in temporal courts.

[3] Hence the Statute of Anne (7 Anne c. 12) which, in consequence of the unfortunate arrest of the Russian Ambassador, subjects those who violate an ambassador's privileges to "such pains, penalties, and corporal punishment *as the court shall think fit*" did not make it possible to punish this offence with death: though its framers may have hoped that "his Czarish Majesty," whom they avowedly were attempting to appease, would be unaware that its language would be construed thus restrictively. Blackstone, I. 255.

(3) Originally, a felon could not, at his trial, call any witnesses in his defence[1], or have any counsel to defend him[2] (except for the argument of mere points of law); whereas a misdemeanant, like a defendant in a civil case, could have both. These disabilities were removed in 1702 and in 1826 respectively.

But the majority of the ancient differences between felonies and misdemeanors still exist in the law of the present day. The discussion of most of these may be postponed until we reach the general subject of Procedure; when we can more appropriately discuss[3] those which relate to such matters as the mode of accusation, the procedure at the trial[4], and the disqualifications produced by a conviction. But there are some differences which can more conveniently be considered now.

(1) It is, as we have already seen[5], only in felonies that the distinction between the four classes of *participes criminis* is technically drawn, or the fourth class made criminal.

(2) When the Act of 1870[6] put an end, as we have seen, to the forfeitures which were formerly created by a conviction for treason or any other felony, it did not restore the offender's property free of all liabilities, but justly saddled him with certain burdens which the crime itself had brought about. Thus, sec. 4 of the Forfeiture Act enables the court before which any person is convicted of felony—but not of treason—to order that he shall pay damages, not exceeding £100, for any "loss of property" which the felony has occasioned (as where cash has been given for a forged cheque). But for this enactment, the person who had suffered the loss would have had to incur the trouble and expense of bringing an action in some civil court to obtain compensation. French procedure has long permitted the intervention, in criminal

[1] 1 St. Tr. 885, 1231, 1304.
[2] Y. B. 30 and 31 Edw. I. App. II. p. 529.
[3] *Infra*, chs. XXX. and XXXI.
[4] *Ibid.*
[5] *Supra*, pp. 84, 88.
[6] 33 and 34 Vict. c. 23.

proceedings, of a *partie civile*; so as to save expense and trouble by enabling one litigation to do the work of two. But the principle is so unfamiliar in England that it has not yet been extended to misdemeanors[1].

(3) As felonies were always heinous offences, the law regarded it as of great moment that the offender should be brought to justice. Hence whenever a felony has been committed, any one who, on reasonable grounds, suspects any person of being the offender, is permitted to arrest him forthwith. And any one who actually sees a felony committed is not only permitted, but required, to do his best forthwith to arrest the felon; and may use any degree of violence that may be necessary to attain that object. But in the case of misdemeanors the common law never permitted (and it is only in particular cases that modern statutes[2] now permit) even the eye-witnesses of the offence to arrest the offender without first obtaining a magistrate's warrant to enable them to do so. Hence a man who steals a penny may be seized on the spot, since he is a felon. But a man who has obtained a herd of cattle by false pretences is only a misdemeanant, so the farmer had, at the common law, to let him go. On the same principle, the justices of the peace who committed a

[1] But in those light cases where any crime—whether felony or misdemeanor or even a mere petty non-indictable offence—has been committed under such extenuating circumstances (whether arising from the triviality of the act itself, or from the youth, good character, mental condition, etc. of the offender) that, although the charge is proved, the court thinks it inexpedient to inflict actual punishment, it may instead order him to pay "such damages for injury or compensation for loss" as it thinks reasonable. If the court is only one of summary jurisdiction, the sum ordered must not exceed £10; but if it be a court of assizes or quarter-sessions there is no limit (not even that of the £100 prescribed in the Forfeiture Act). See 7 Edw. VII. c. 17, s. 1 (3); and cf. *infra* ch. XXXII. *ad finem*.

The Forfeiture Act also empowered the court which convicted a person of felony or of treason to charge him with the *costs* of the prosecution. But by the Costs in Criminal Cases Act, 1908 (8 Edw. VII. c. 15, s. 6) that power is now given on conviction for *any* indictable offence; and for all non-indictable offences it already existed, under 11 and 12 Vict. c. 43, s. 18. In 1909, such an order was made on a misdemeanant in a case where the taxed costs of the prosecution exceeded £2000; 2 Cr. App. R. 223.

[2] *Infra*, ch. XXX.

felon for trial, have always had authority to insist, if they thought fit, on his remaining in prison until the trial took place; though a person committed for trial for misdemeanor could, at common law, insist on being released on bail if he found sufficient sureties. By modern legislation, however, the discretion which justices possess in felonies has been extended —first to many—now to all misdemeanors[1]. The anxiety of the law to secure the punishment of felons led to the further rule that no person injured by a felony could bring a civil action against the felon, to recover compensation for his loss, until *after* a criminal prosecution had either taken place or (as by the death or the pardon of the offender) been rendered impossible. In misdemeanors, on the other hand, either the civil or the criminal remedy may be taken first; or indeed, in theory, both may be pursued simultaneously[2], though in practice such a course would never be prudent[3]. But it should be added that, even in the case of felonies, it is not altogether easy for a defendant to defeat a civil action by raising this defence that he has not yet been prosecuted for the wrong which is complained of. So audacious an attempt to "take advantage of his wrong" is not allowed by the courts to be raised in the form of an ordinary defence. But the defence does certainly exist; see *Smith* v. *Selwyn* (L. R. [1914] 3 K. B. 99)[4]. A defendant can set it up by a summons at chambers to stay the action; or the court itself may spontaneously refuse to hold the trial. The objection, however, was never regarded as applying to actions, even though connected with the felony, in which the defendant was not the felon himself, or in which the plaintiff was not the injured party himself.

(4) The heinousness of felonies is vividly shewn by the legal disqualifications which arise from the infamy of being

[1] 8 Edw. VII. c. 15; *infra*, p. 455.
[2] *Jones* v. *Clay*, 1 B. and P. 191; *Edgar's Case*, 29 T. L. R. 278.
[3] Cf. *Rex* v. *Mahon*, 4 A. and E. 575.
[4] See also L. R. 17 Q. B. D. 93; 16 Cox 567. Felonies of *homicide* are made an exception by 9 and 10 Vict. c. 93.

convicted of one. The convicted felon[1] loses any office *or pension*[2]; and he cannot vote for or sit in Parliament, or hold military or civil or ecclesiastical office, until after he either has been pardoned or has worked out his sentence[3]. These disqualifications are not entailed by any misdemeanor.

The existence of so many differences, some of them still so important, between felonies and misdemeanors naturally suggests to the student that the former class of crimes are marked by some special gravity. Yet it is not easy for him at first sight to discover on what principle the separation has been made between the crimes which are allotted to the one class or to the other. It cannot depend—like the French classification into *crimes*, *délits*, and *contraventions*—upon the degree of dignity of the tribunal before which the offender is to be tried. For a man may be tried for larceny, which is a felony, before a police magistrate, and yet for mere misdemeanors he may be impeached before the House of Lords. Nor, again, can it depend upon the amount of evil actually caused by the offence. For perjury, though it may cause the death of an innocent person, is only a misdemeanor, whilst keeping a horse-slaughterer's yard without licence is a felony[4]. Nor, thirdly, can it depend upon the gravity of the punishment. For larceny, which is a felony, and false pretences, which is a misdemeanor, are punishable alike. And the misdemeanor of conspiracy to murder is punishable with ten years' penal servitude[5]; yet the felony of stealing mineral ores is only punishable with two years' imprisonment (Larceny Act, 1916, s. 11). An arrangement which produces such

[1] Unless sentenced merely to imprisonment for twelve months or less, and without hard labour; or (8 Edw. VII. c. 67, s. 100) unless convicted when younger than sixteen.
[2] But in practice the pensioning authorities now deal with each case on its merits; and note any favourable report from the judge. See p. 539 *infra*.
[3] 33 and 34 Vict. c. 23, s. 2.
[4] 26 Geo. III. c. 71. The object is to prevent stolen horses from being easily disposed of.
[5] In the period when rape was only a misdemeanor it nevertheless was punished by the loss of the offender's eyes and testicles; Hawkins, Bk. I. ch. IV., s. 7.

anomalies as these, can only be explained by considerations purely historical. It probably may be traced back to ancient times when particular offences were first found to be of such frequency and gravity as to render it no longer safe to leave them to the chance of a prosecution by the injured, in the forms of ordinary litigation. The public safety demanded a periodical public investigation by the Crown, through a jury of accusation provided for the purpose, into the question whether any offences of this deep dye had been committed. Hence arose[1] what we now know as "Grand Juries." To facilitate their operations it became necessary to frame a precise legal definition of each of the offences which they were to report about[2]. To such offences the name of "felonies" probably soon became[3] limited; and the procedure concerning them gradually acquired its peculiar characteristics. But offences less grave, or less common, were for a long time left very loosely defined (as some of them still are, *e.g.* conspiracy); and were never prosecuted in this "inquisitorial" mode, but were left as before to the "litigious" action of private persons (though in later days that action would usually be nominally taken on behalf of the Crown). These latter offences (except where statutory enactment has since erected any of them into felonies) constitute our modern misdemeanors. They, said Bracton six hundred years ago, are tried like civil actions ("civiliter intentantur"); and even now, as Sir James Stephen says, a prosecution for misdemeanor is akin to an action for tort in which the King is plaintiff and which aims at punishment and not at damages. Thus, in a trial for misdemeanor, the juryman's oath is to "truly try the *issue* joined between our sovereign Lord the King and the *defendant*." But in a felony it is to "true *deliverance*[4] make between our sovereign

[1] See below, p. 461. [2] Cf. *Eyre of Kent*, 1313 (Selden Society), i. 52, 57.

[3] For an earlier and wider meaning (*i.e.* an "appealable" crime) see 2 P. and M. 466.

[4] It is uncertain whether this refers to (1) the deliverance of the verdict, or (2) the deliverance of the prisoner (who is said to "stand on his deliverance") from custody, or (3) the jury's *deliberation* on the evidence.

Lord the King and the *prisoner* at the bar." Hence it is easy to understand why, in so many respects, the older law assimilated the idea of misdemeanors rather to that of mere civil wrongs than to that of felony; as in the conspicuous instance of its requiring a Peer to be tried by the House of Lords if the charge is one of felony, but by a jury of mere commoners if it is one of misdemeanor. In the course of time, the analogies of civil procedure have gradually caused the litigious type of procedure to supersede the inquisitorial, even in the case of felonies[1]. The influence of the old inquisitorial theory, however, still survives in the conduct of all public prosecutions. Thus, in cases of homicide, every person present at the killing is usually called by the Crown as a witness, if he seem honest, even though he be manifestly hostile to the Crown. In a case of poisoning, all the chemists who have made analyses for the Crown, alike those who thought they found poison and those who did not, will be called. It is the view of English law that the Crown counsel are not "litigants" battling with the prisoner, but a royal commission of "inquirers" dispassionately investigating the truth[2].

We may add that long before the abolition, in 1870, of forfeitures for felony, they had ceased to be of any financial importance. The annual amounts received between 1848 and 1870 ranged only from £253 to £1317. Most felons were poor; and the rich ones disposed of their wealth between arrest and conviction. The time had come for this change.

It is quite possible that, in a perfect Criminal Code, crimes would continue to be broken into two great divisions according to their greater or lesser heinousness; and that particular

[1] But coroners still proceed inquisitorially; they obtain all the evidence they can get, whichever way it may tell.

[2] See 1 C. and K. 650. Similarly the judge in all criminal trials can, if necessary, call a witness whom neither party wishes to be called; (though the "litigious" nature of civil trials forbids him thus to interpose in them). And the prosecuting counsel is only a "minister of justice"; *infra* p. 482.

In trials for felony, the curious proclamation, inviting other charges against the prisoner, is a survival from "inquisitorial" procedure.

incidents both of procedure and punishment would attach to the graver class. But, in English law, great objection may be taken both, as we have seen, to the illogical manner in which particular crimes have been placed in the one class or the other, and also to some of the incidents attached to one or other of the classes. Hence the Criminal Code Bill of half a century ago, in its earlier form, abolished altogether the distinction between felonies and misdemeanors; and though the last draft, that of 1880, retained the distinction, yet it removed nearly all its importance. For it proposed that some incidents now attached to felonies should be attached only to such crimes as are punishable with death or penal servitude; whilst a few of the other incidents were to be extended to all crimes; and other incidents, again, were to be wholly abolished. There can be little doubt that, of all parts of our criminal law, none is in greater need of a thorough reconstruction than that which concerns the classification into Felonies and Misdemeanors.

BOOK II

DEFINITIONS OF PARTICULAR CRIMES

CHAPTER VIII

HOMICIDE

We have already shewn ample ground for not adopting, as the arrangement of our successive explanations of the various crimes known to English law, the technical classification into Felonies and Misdemeanors. All writers have found it necessary to classify crimes upon a very different and more scientific principle—viz. by reference to the various kinds of interests which the respective offences violate. Thus Blackstone arranged them into those that are committed against (1) religion; (2) the law of nations; (3) the sovereign executive power; (4) the rights of the public; and (5) the rights of private individuals, whether these rights relate to (*a*) the persons, or (*b*) the habitations, or (*c*) the ordinary property, of those individuals. And, very similarly, the proposed Criminal Code of 1880 classified crimes into (1) those against public order (*e.g.* treason); (2) those affecting the administration of law and justice (*e.g.* perjury); (3) those against religion, morals, or public convenience (*e.g.* blasphemy, nuisance); (4) those against the person or reputation of individuals (*e.g.* murder, libel); and (5) those against the rights of property of individuals (*e.g.* theft). But the clearest arrangement is that of Blackstone's modern editor, Serjeant Stephen, who divides them simply into (1) offences against the persons of individuals, (2) offences against the property of individuals, (3) offences against public rights.

Following this last arrangement, our list of crimes must begin with those which affect the security of men's persons—employing here that much abused word, not in its ancient

technical legal sense of "a subject of rights and duties[1]," but in the modern meaning of "the living body of a human being[2]." Of all such offences, that of homicide[3] is necessarily the most important. And, to every student of criminal law, homicide is a crime peculiarly instructive; inasmuch as in it, from the gravity of the fact that a life has been taken, a minuter inquiry than is usual in other criminal cases is made into all the circumstances, and especially into the wrong-doer's state of mind. Hence the analysis of the *mens rea* has been worked out in homicide with great detail; whilst in regard to many other offences it still remains uncertain what precise condition of mind the accepted definitions of them are to be interpreted as requiring.

It is not, however, every homicide that is criminal. And at one time those forms of homicide which were not criminal were subdivided into two species (though the importance of the distinction has now disappeared). For the older lawyers distinguished between the homicides that were Justifiable, and those that were only Excusable. In the former the act was enjoined or permitted by the law (the slayer thus really acting on behalf of the State); in the latter, the act was thought to carry with it some taint, however slight, of blameworthiness.

(A) The homicides classed as strictly *Justifiable* have never involved any legal penalty whatever.

(1) The execution of public justice. The hangman who carries out[4] the sentence of a competent court incurs no criminal liability. The sheriff who burnt the martyrs Latimer and Ridley at the stake was accordingly in no danger, either under Mary or even under Elizabeth, of being himself convicted of murder for having so done. His immunity was due —not, as Blackstone (IV. 28) ascribes it, to the mere absence

[1] See Holland's *Jurisprudence*, ch. VIII.

[2] This sense perhaps was brought into English law by Sir Matthew Hale; who has the grotesque phrase, "the interest which a *person* has in the safety of his own *person*." (*Analysis of the Law*, s. 1.)

[3] See Stephen's *Hist. Cr. Law*, III. 1; *Digest*, chs. XXIII., XXIV.

[4] If with precision; *e.g.* no change of day or of form of death.

of *mens rea* (because his act was extorted by a compulsion of official duty which overbore his own reluctance to commit it) —but to the entire absence of even an *actus reus*. It was not a crime for him to carry out the sentence; nay, it would have been a crime (though it might have been an act of moral heroism) for him to refuse to carry it out. For technical "murders," by deviating mercifully from a sentence, see p. 278 *infra*.

(2) The advancement of public justice. Thus life may be innocently taken, if it be necessary for arresting a felon[1], or suppressing a riot, or preventing some crime of a violent[2] character. On the other hand, when, in 1804, the "Hammersmith Ghost" (or a person mistaken for it) was shot on its nocturnal round, the slayer was held guilty of murder; for the masquerade thus prevented was not a violent crime but a mere misdemeanor of "Nuisance."

(3) The defence of oneself against a wrong-doer. A man is justified in using against an assailant a proportionate amount of force in defence of himself[3] or of his immediate kindred[4] (and in the case of a *felonious* assault[5], and probably even in lesser ones[6], the defence of anyone else who actually needs his protection[7]). Hence if he has a reasonable apprehension of danger, and adopts none but proportionate means of warding it off, he will be innocent even though the wrong-doer be killed by the means thus adopted. But proportionate these means must be. I must not stab a child because he is pricking me with a pin. Thus a person assaulted is not justified in using firearms against his assailant, unless the assault is

[1] Cf. pp. 286, 447, *infra*: and K. S. C. 143. As to officers' indemnification for firing on air-craft that fly illegally, see 2 and 3 Geo. 5. c. 22.

[2] Preventing a *non*-violent crime, even a felony, would not thus justify homicide: 1 C. and P. 319.

[3] *Howell's Case*, Maitland's *Select Pleas* 94 (K. S. C. 139). In 1811 Mr Purcell, of co. Cork, a septuagenarian, was knighted for killing four burglars with a carving-knife.

[4] *Reg.* v. *Rose*, 15 Cox 540 (K. S. C. 140).

[5] See 2 Bos. and P. 260.

[6] See p. 155 *infra*.

[7] Foster 274; Russell on Crimes, pp. 815, 818; 135 U. S. A. 80, "any bystander."

so violent as to make him consider his life to be actually in danger. On the other hand, where a man, after hurling a bottle at the head of one Mr Cope, had immediately proceeded to draw a sword, and Cope thereupon had thrown back the bottle with violence, Lord Holt held that Cope's action was justifiable[1]; "for he that hath manifested that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand." Again, self defence may sometimes lawfully take the form of attack. If a revolver be pointed at you, a blow from your umbrella may be the only possible method of self-defence. But though a blow struck merely to prevent further attacks is a justifiable self-defence, it must not be repeated for aggression; "a fair fight" is not self defence.

But where the wrong-doer is not going so far as to assault a human being, but is only interfering unlawfully with property, whether real or personal, the possessor of that property (though he is permitted by the law to use a moderate degree of force in defence of his possession), will usually not be justified in carrying this force to the point of killing the trespasser[2]. For such a justification will not arise unless the trespasser's interference, or his resistance, amounts to a

[1] *Mawgridge's Case*, Kelyng 128. If he be blameless *from the first* it is a disputed question whether a man, defending himself against immediate danger of grievous bodily harm, is bound (as he certainly is in Chance-medley, p. 107 *infra*) to retreat, if possible, before killing: especially if assailed within his own house; Halsbury, IX. art. 1186; contrast 1230. Recent *obiter dicta* in England seem (cf. 18 Cr. App. R. 160) against his having the right to stand his ground. *For* the right, see Foster, and East's P. C. 271. The right has twice been recognised by the Supreme Court of the United States: 158 U. S. 550, 256 U. S. 335; "detached reflection cannot be demanded in the presence of an uplifted knife." Cf. *Harvard Law Review*, XVI. 567.

[2] So a "black-leg" vandriver must not use a pistol to defend his van from being injured by strikers; but may use it if their attempt to overturn the van endangers his own life: *Rex* v. *Roberts*, 75 J. P. 436. But Hale held that since "a man's *house* is his castle," a violent attempt to take from him the possession of it may be resisted with as great force as would be permissible in defence of his person. This view was confirmed in 1924 by the Court of Criminal Appeal in *Rex* v. *Hussey* (18 Cr. App. R. 160). There a tenant had inflicted shot-wounds in resistance to his landlord's illegal attempt to eject him from his room prematurely.

felony; and moreover to a felony that is violent, such, for example, as robbery, arson, or burglary. And even these extremely violent felonies should not be resisted by extreme violence unless it is actually necessary; thus firearms should not be used until there seems to be no other mode available for defeating the intruder and securing his arrest. Hence, *à fortiori*, the actual killing of a person who is engaged in committing any mere misdemeanor, or any felony that is not one of force, cannot be legally justified; anyone so killing him will be guilty of a criminal homicide.

(4) There was some old authority for maintaining that under some circumstances a man might, for the preservation of his own life, be justified in taking away the life even of a person who was in no way a wrong-doer. Thus Lord Bacon[1], reviving the ancient problem which Cicero had cited from the Rhodian moralist Hecato, suggested that where two men, swimming in the sea after a shipwreck, get hold of a plank not large enough to support both, and one pushes off the other, who consequently is drowned, the survivor will not be guilty of any crime. But, as we have seen, in *Reg.* v. *Dudley and Stephens*[2], the five senior judges of the King's Bench Division threw doubt upon Bacon's doctrine; and refused to recognise as justifiable the act of some shipwrecked sailors, who had killed a boy, in order to feed on his body, when scarcely any other hope of rescue remained.

The peaceful orderliness of modern times has of course greatly diminished the number of cases of justifiable homicide. Some three hundred felonious homicides take place in England every year; but less than a score of executions, and less than half-a-dozen other homicides that are justifiable.

(B) Beyond the strictly justifiable cases of homicide there were other cases[3] which the law regarded as merely *Excusable*,

[1] Bacon's *Maxims*, v.; Cicero, *De Officiis*, III. 23; Puffendorf, 2. 6. 4.

[2] L. R. 14 Q. B. D. 273 (K. S. C. 61). *Supra*, pp. 75, 76.

[3] Bracton, II. 284–286; 1 Hale P. C. 419–424; Stephen, *Hist. Cr. Law*, III. 77; Pollock and Maitland, *Hist. Eng. Law*, II. 471.

i.e. similarly not deserving to be made felonies and punished with death, but as nevertheless being in some degree blameable. These accordingly were punished by the forfeiture of the offender's moveable property (though ultimately it became usual for the Crown to restore all these goods except the "deodand," the instrument by which the killing had been effected[1]). We have here a relic of the rough Anglo-Saxon times in which the law treated almost all homicides, heinous or innocent, as matters to be expiated by the payment of a pecuniary *wer*. Thus, so late as 1118, the compiler of the so-called *Leges Henrici I.* gives it as still the Wessex rule, that for every homicide, whether intentional or even accidental, the *wergild* must be paid[2] to the family of the slain man. Even after a more discriminating legislation had recognised, under ecclesiastical influence[3], that the more heinous forms must be punished with death, some time had still to elapse before it was clearly settled what forms were on the other hand so innocent as not to deserve even a pecuniary penalty. Thus, in the thirteenth century, even the man who slew some one by mere accident still needed a royal pardon, though he received this pardon as a matter of course[4]. And subsequently it came to be settled that, even when pardoned, he would still have to forfeit not merely the deodand but all the rest of his chattels (which, however, at that period were seldom of great value). Even if it were not to him that the deodand belonged, it nevertheless would still be confiscated, in order that it might be purged from the stain of blood by being "given to God" in pious uses. Hence it was exacted not only where a human agent was thus responsible for the death, as in the case of a man on horseback accidentally

[1] Pollock and Maitland, II. 473.

[2] Cap. 70, s. 12. "Sive sponte aut non sponte fiant hæc, nihilominus tamen emendetur, *quæ enim per inscientiam peccamus, per industriam corrigamus.*" Pollock and Maitland, II. 469; and (Alfred's quaint 36th Law, as to various accidents caused by carrying a spear) I. 53.

[3] Glasson, *Histoire du droit de l'Angleterre*, II. 557.

[4] Pollock and Maitland, II. 478.

riding over a man who was asleep on the highway, but even where death was due to some mere natural accident, as in the case of a man's falling from a boat and being drowned. The rule was

> "Whatever moved to do the deed
> Is deodand and forfeited."

But, in practice, the forfeiture of the deodand was not confined to things that had moved. A small boy fell into a pan full of milk and was thereby drowned; whereupon the pan was forfeited[1]. The deodand was usually sold by the King; the purchase money, or commutation money, received for it being devoted to pious uses for the soul that had died unabsolved. After the Reformation, the money was usually handed to the poor, or to the relations of the deceased. Thus when in 1716 the coroner's jury of Yarmouth declared a stack of timber which had fallen on a child to be forfeited as a deodand, it was ransomed for 30*s.*, which was paid over to the child's father. Deodands were not abolished until 1846[2]. But the general forfeiture of goods caused by excusable homicide had been abolished in 1828[3]; so the homicides which down to that time had been classed as Excusable ceased, thenceforward, to differ at all in their legal consequences from such as were fully Justifiable. The merely Excusable cases of homicide had been the two following.

(1) Where in any *chance-medley* (*i.e.* "sudden combat") one of the combatants desisted from fighting, but the other continued his assault, and then the former one, having no other probable means of escape open to him[4], killed his assailant, the necessity of self-defence prevented the homicide from being a felony. But, as at first he was to blame for his share in the affray, the case was distinguished from the strictly "justifiable" homicide in which a person, who had been

[1] *Select Coroners' Rolls*, p. 50.

[2] 9 and 10 Vict. c. 62. The abolition was hastened by the fear of entire railway-trains being forfeited.

[3] 8 and 9 Geo. IV. c. 31.

[4] For he should *retreat*, if he can. Cf p. 104 n. 1.

assaulted when entirely passive, slew his assailant in self-defence. On the other hand, if the chance-medley had been continued by *both* the combatants down to the time when the fatal blow was struck, the homicide would have nothing to "excuse" it, and would be felonious[1]—a manslaughter or possibly even a murder.

(2) Where one man killed another by *misadventure—i.e.* in doing a lawful act, and with no intention of causing harm, and with no culpable negligence in the mode of doing it[2]—his act was held excusable. Thus where a man spun round with a boy in a frolic, and, on the boy disengaging himself, reeled against a woman and thereby caused her death, the case was held to be only one of misadventure[3]. So again, where a child of four, on being asked if he would like a drop of gin, twisted the glass out of the prisoner's hand and swallowed nearly all its contents, and died in consequence, it was held that the drinking this extraordinary additional quantity of the gin was the act of the child himself; and that the prisoner therefore had committed no felony[4]. A very important class of cases of mere misadventure is that in which death is accidentally caused by a parent or master, when engaged in the lawful act of giving a child, or scholar, or apprentice, reasonable chastisement with a reasonable instrument[5].

The right of the parent or teacher to punish a child is recognised by the Children Act, 1908 (8 Edw. VII. c. 67, s. 37). By the older common law this right of correction was recognised even as against adult servants. Similarly, every husband was formerly intrusted with the power of correcting his wife by personal chastisement; but, as Blackstone (1. 444) tells us, in the politer days of Charles the Second this power

[1] *Infra*, p. 118.
[2] Contrast *Reg.* v. *Jones*, 12 Cox 628 (K. S. C. 28) with K. S. C. 27.
[3] *Reg.* v. *Bruce*, 2 Cox 262 (K. S. C. 136).
[4] *Rex* v. *Martin*, 3 C. and P. 211 (K. S. C. 137).
[5] *Rex* v. *Woods*, 85 J. P. 272; *Cleary* v. *Booth*, L. R. [1893] 1 Q. B. 465. Cf. p. 155, n[4] *infra*; and see 85 J. P. 272.

of correction began to be doubted; though, he adds in a vein of humour, "the lower rank of people, *who were always fond of the Common Law*, still claim and exert their antient privilege."

The right to punish a child exists of course only in the case of one who is old enough to be capable of appreciating correction; not, for instance, in that of an infant of the age of two and a half[1]. And, in all cases, the character and amount of the punishment that can be recognised as lawful will vary with the age and the sex and the apparent physical condition of the child. But where the punishment has clearly a lawful occasion, and is not unreasonable in the manner of its infliction or even in its amount, the fact that the child has died in consequence of it will not render the parent or master who inflicted it guilty of a felonious homicide. Thus a death may ensue where the child has some hidden peculiarity of structure that was unknown[2] to the parent or master. Such a defect, for instance, as a fatty heart or the familiar "egg-shell skull" may render a slight blow fatal; or a hæmophilic boy may have such a tendency to bleeding that he dies from a flogging which might have been administered with impunity to ordinary pupils. Similarly, quite apart from any chastisement, the peculiar physical formation of a person may easily lead to his death by misadventure. A slight push, which was only such as is usual in social intercourse, has, for instance, been known to cause the death of an old man with the brittle arteries of senility.

Another class of cases of misadventure, of still greater practical importance, is seen where death is accidentally caused in the course of some lawful game or sport; as, for instance, when a batsman's head is fatally injured by a short-pitched ball rising sharply from the ground. Thus, though an armed tournament was unlawful even in mediæval times, and

[1] *Reg.* v. *Griffin*, 11 Cox 402.
[2] *Status lymphaticus* (the debility produced by enlargement of the thymus gland) can rarely be detected during life; yet the most trifling cause may prove sufficient to kill anyone who has this malady; see 85 J. P. 72.

a knight who killed another in such an exercise would usually be guilty of criminal homicide, yet it was otherwise if the King had commanded the particular tournament in question. In a struggle thus legalised by the royal order, the death of any of the combatants was regarded as a case of mere innocent misadventure. At the present day, all such exercises with naked swords would be illegal however licensed. But ordinary fencing, and, similarly, boxing[1], wrestling, football[2], and the like, are lawful games if carried on with due care. Everyone who takes part in them gives, by so doing, his implied consent to the infliction upon himself of a certain (though a limited) amount of bodily harm. But no one has the right to consent to the infliction upon himself of an excessive degree of bodily harm, *e.g.* such harm as amounts to "maiming[3]" him; and thus his agreement to play a game under dangerously illegal rules will, if he be killed in the course of the game, afford no legal excuse to the killer[4]. (Nor has he even any right to consent to the production of such a state of affairs as will constitute a breach of the peace. For both these reasons, prize-fighting[5] is held to be illegal; in spite of the two competitors having consented to take its risk.)

Thus not only is a *combat* illegal, produced by an actual desire to hurt, but so also is even a *contest* for mere exhibition of strength and skill, if they are exhibited in a manner that is perilous[6]. To wear boxing-gloves will not necessarily reduce the peril of boxing to within the legal limit, for they may be

[1] *Reg.* v. *Coney*, L. R. 8 Q. B. D. 534.
[2] *Reg.* v. *Bradshaw*, 14 Cox 83 (K. S. C. 131).
[3] *Infra*, p. 146.
[4] Cf. p. 86 as to guilt of the spectators.
[5] The fact that the boxers are contesting for a wager does not necessarily constitute a Prize-fight. That term involves the further idea of a Battery (p. 152) with a *dangerous* weapon, viz. the fist of a trained boxer; and usually, moreover, the idea of Publicity, so that there also is an Affray (p. 152 n.), and an Unlawful Assembly (p. 282).
[6] As by the blow on the kidneys, now forbidden by the National Sporting Club. Doubts exist as to the legality of that knock-out blow on the jaw (Tom Sayers' "auctioneer"), which drives it upwards and so causes concussion of the brain.

too slight for their purpose[1]. And the question has further been debated whether an illegal degree of peril is not created by the Ten Seconds Rule; which, in order to protect an over-exhausted man from resuming the fight, makes his non-resumption of the contest equivalent to a defeat, but thereby tempts each boxer to try to secure victory by reducing his opponent to a dangerously extreme degree of exhaustion. The Home Secretary stated in 1925 that an average of five persons are annually killed in boxing.

Of course even the most lawful game will cease to be lawful as soon as anger is imported into it; and the immunity from criminal liability will consequently at once disappear[2].

[1] Or the fight may be unduly prolonged; C. C. C. Sess. Pap. LXIV. 73.
[2] *Reg.* v. *Canniff*, 9 C. and P. 359. The fact that the prisoner was playing in strict accordance with the well-accustomed rules of the game will help towards shewing that he was not actuated by anger; and, again, towards shewing that the way in which he was playing was not so obviously perilous as to be illegal. Hence, for either of these purposes, these rules may be admissible evidence on behalf of the prisoner. But, on the other hand, if the prisoner was playing in violation of the rules, they are not thereby rendered admissible evidence against him. For it is not criminal, and not necessarily either dangerous or malicious, to break them. On this point the case of *Reg.* v. *Bradshaw* (*supra*, p. 110) may be compared with that of *Reg.* v. *Moore* (14 T. L. R. 229), where, in a game of Association football, the prisoner had killed a man by charging him from behind, in defiance of the rules.

CHAPTER IX

FELONIOUS HOMICIDES

If a homicide be committed under such circumstances as to be neither justifiable nor excusable, but a crime, it is not, and never was, a mere misdemeanor, but always a felony. The felony may, however, take any one of four forms:

(I) *Felonia de se*; *i.e.* a suicide that takes place under such conditions as to be criminal. It is generally said that no one can be—and in actual practice no one ever is—adjudged a *felo*[1] *de se* unless he brought about his own death with the same full "malice aforethought" (*infra*, p. 139) that would render his killing of someone else a Murder; *e.g.* where a duellist was killed by the bursting of his own pistol[2].

The common law endeavoured to deter men from this crime by the threat of degradations to be inflicted upon the suicide's corpse, which, by a natural if unreasoning association of ideas, were often a potent deterrent; and also by threatening the forfeiture of his goods, a vicarious punishment which, though falling wholly upon his surviving family, was likely often to appeal strongly to his sense of affection. Thus the man who feloniously took his own life was at one time buried in the highway, with a stake through his body; and his goods were forfeited. The burial of suicides lost its gruesome aspect in 1824, when the original mode was replaced by the practice of burial between the hours of nine and twelve at night, without any service. In 1870, the confiscation of the goods of suicides was put an end to in the general abolition of forfeitures for felony[3]. And in 1882, the statute 45 and 46 Vict. c. 19 removed every penalty, except the purely ecclesi-

[1] *Felo de se* does *not* mean the felony, but the felon himself.

[2] But, more logically, Jervis (*Coroners*, 6th ed. p. 151) holds it sufficient that the suicide has committed "any unlawful act the consequence of which is his own death," as in Manslaughter. And the form of verdict prescribed in the Coroners Act (50 and 51 Vict. c. 71, s. 2) requires only a killing "feloniously," not any malice aforethought.

[3] 33 and 34 Vict. c. 23.

astical one that the interment must not be solemnised by a burial service in the full ordinary Anglican form. Even before the common law penalties of *felonia de se* were legally abolished, the popular disapprobation of them, which ultimately secured their abolition, had gone very far in reducing the number of cases in which they were actually inflicted. For it rendered coroners' juries eager to avail themselves of the slightest grounds for pronouncing an act of suicide to have been committed during a fit of insanity, and consequently to have involved no felonious guilt. So if the evidence disclosed any source of anxiety which might have given the deceased a motive for his fatal act, anxiety was declared to have unsettled his mind; if, on the other hand, no motive could be found, then the very causelessness of his act was declared to be itself proof of his insanity. It is to be regretted that this practice of "pious perjury"—to borrow an indulgent phrase of Blackstone's—became so inveterate that it has survived the abolition of those penalties which were its cause and its excuse. In every thousand cases of suicide upon which coroners' inquests are held, there are usually less than forty in which a verdict of *felo de se* is returned[1]. Juries who, in cases of suicide, pronounce on utterly inadequate grounds a verdict of Insanity[2], forget that such a verdict, whilst it no longer removes any appreciable penalty, may, on the other hand, throw upon the family of the deceased an undeserved stigma, gravely affecting their social or matrimonial or commercial prospects. For the same progress of thought which has made men averse to vicarious and to degrading punishments, has also made them quick to trace the physical and mental influences of heredity.

[1] In the seventeenth century, on the other hand, it was returned in over ninety per cent. of the cases. In France only sixteen per cent. of suicides are pronounced insane, unlike our more than ninety-six. A London coroner (*The Times*, Dec. 18, 1908) calculated that only thirty per cent. of suicides were really insane.

[2] In 1925 a London coroner pressed for a verdict of Insanity, though saying frankly, "There is not the slightest fact to shew an unsound mind." The jury refused to give the sham verdict.

In spite of the abolition of the old penalties, the intentional suicide of a sane person is still regarded by the law as an act of crime. Accordingly, every attempt to commit suicide is an indictable misdemeanor[1]. Another consequence of the criminality of suicide is that if two persons agree to die together, but only one succeeds in putting an end to his life, the survivor is guilty of murder[2]; as a principal if present, or, if absent, as an accessory before the fact[3]. Putting it more generally, anyone who successfully instigates another to commit suicide is guilty of murder. For the same reason, if a person, in making an attempt to commit suicide, should accidentally kill any of the bystanders, he will be guilty at least of manslaughter, and, in most cases, of murder[4].

Statistics shew that during the fifty years preceding the War the proportion of suicides to population went on increasing; but during the War it fell steadily. It is, however, higher now (1925), by a fifteenth, than before the War[5].

We now pass to those cases of felonious killing in which the person slain is not the slayer himself but someone else.

(II) Manslaughter. This felony consists in killing another person unlawfully, yet under conditions not so heinous as to render the act a murder[6]. It is spoken of by Hale and Blackstone as being committed "without malice, either express or implied." We shall better avoid confusion of language if we say, instead, "without any of those[7] *more guilty* forms of malice which amount to Murderous Malice." For malice, in its widest legal sense (that is to say, *mens rea*), is essential to every crime.

[1] *Vide supra*, p. 83. *Reg.* v. *Burgess*, L. and C. 258.

[2] *Commonwealth* v. *Bowen*, 13 Mass. 356 (K. S. C. 91).

[3] Yet, in these "death-pacts," the sentence is always commuted now.

[4] *Commonwealth* v. *Mink*, 9 Lathrop 422 (K. S. C. 110); *Rex* v. *Hopwood*, 8 Cr. App. R. 143.

[5] In France it is very much higher than in Great Britain. In both England and France, summer and not winter is the period of the maximum of suicides; and in both countries they are about thrice as common among men as among women.

[6] But originally, and even so late as 1581, "manslaughter" was a generic name that included *all* forms of felonious homicide. See Holdsworth's *Hist. Eng. Law*. III. 314.

[7] *Infra*, p. 134.

Manslaughter admits of subdivision into two sharply distinguished forms; the so-called "voluntary" and the so-called "involuntary."

(*a*) *Voluntary* manslaughter is that which is committed with the "voluntas," the intention, of causing to another person some illegal harm - it may be a merely slight or a grave or even a fatal harm. Where some trivial blow is struck, with the intention of producing mere momentary pain, but death unexpectedly results from it, then, if it is an unlawful blow, the striker will be guilty of manslaughter. (We have already seen, p. 108, *supra*, that this merely accidental homicide would not have been criminal at all if the blow had been a lawful one, as in correcting a scholar.) An illustration of such a manslaughter is afforded when the carrying out of some slight practical joke, which seemed harmless enough, unhappily results, perhaps through blood-poisoning, in the death of the victim of it[1].

Where, however, death is produced by a blow which was not a mere trivial one, but was likely to cause serious bodily harm, the crime may be either a manslaughter or a murder, according to the circumstances. For though, if the assailant had received only a slight provocation, or none at all, his crime will amount to murder; yet if he had received gross[2] provocation, and had been *in fact* provoked by it, it may amount to no more than a manslaughter. This may be the case even though the fatal injury were inflicted by a deadly weapon and with the full intention of killing. For the provocation which the slayer had received may have been so sudden and so extreme as actually to deprive him (for the

[1] *Rex* v. *Sullivan*, 7 C. and P. 641 (K. S. C. 116).

[2] *Reg.* v. *Wild*, 2 Lewin 214 (K. S. C. 116). The "grossness" must be measured by an ordinary person's feelings, not by this prisoner's exceptional sensitiveness (*Rex* v. *Alexander*, 9 Cr. App. R. 139; cf. *ibid.* p. 93). Were it measured by the latter, mere spoken words or even silent gestures might sometimes be adequate provocation.

time being) of the ordinary powers of self-control[1]; and consequently to render his violent feelings of hostility less blameable—blameable enough, still, to merit punishment, but not to merit the punishment of death. The suddenness of the homicidal act is thus an essential condition of this mitigation of his guilt. A settled habitual feeling of irritation cannot reduce a murder to a manslaughter. The fact that the weapon used was one which the slayer already had in his hand at the time of receiving the provocation, may be important as evidence that the blow was not premeditated. Still more favourable will it be for the prisoner if he can shew that he used no weapon but that with which nature had provided him—his own clenched fist. If *A*, firing at *B* under such provocation as would reduce to manslaughter his killing of *B*, miss his aim and instead kill *C*, this unintended crime will also be only a manslaughter.

In manslaughter of the "voluntary" kind, as there can have been no premeditation, there can never be an accessory before the fact (a remark which has sometimes been extended, too hastily, to manslaughters in general). There will usually, too, be no appreciable interval of time between the one man's act of provocation and the other man's act of killing. If, however, some time do intervene it is possible that the slayer's conduct during it may be such as to shew that the ungovernable passion, aroused by the provocation, still continued throughout that time and was truly the cause of the fatal blow. On the other hand, it is of course also possible that his conduct during the interval—even one of a few minutes—may have been so calm as to shew that his resentment had cooled down; and consequently that the provocation originally received will not have the legal effect of reducing the killing to something less than murder.

The provocation upon which any such sudden intent to kill is formed must, as we have said, be a gross one, if it is

[1] *Rex* v. *Lynch*, 5 C. and P. 324. Cf. the mental condition in the new offence of Infanticide, p. 125 *infra*.

to have the result of reducing the killing to a manslaughter. Mere words, however insulting and irritating, are never regarded by the law as gross enough to produce this result. Indeed very few forms of provocation that do not involve some physical assault are regarded as sufficiently gross to produce it. One of those few may be found in the case of a husband who detects a man in the very act of adultery with his wife[1], and kills him[2] on the spot. (But had the man been committing not mere adultery but rape—*i.e.* had the wife not been a consenting party—the husband's act in killing him might not have had even the guilt of manslaughter and might have been a Justifiable Homicide.) On the other hand, if he kill him, not on the spot but subsequently, "after cooling-time," it will be Murder.

Even an actual assault is not provocation enough unless it be of a very violent or very insulting[3] character. Thus if a man receives from a *woman* a slap in the face, the provocation is not gross enough for this purpose; though if she had struck him violently on the face with a heavy clog, so as to draw blood, that would have been sufficiently gross[4]. And a blow which was given lawfully, *e.g.* for the purpose of preventing a violent assault on some third person, can never be an adequate provocation. Although, as we have seen, mere words, however insulting, are never regarded as amounting of themselves to a sufficiently gross provocation, yet, where they accompany a blow, they may be taken into account in estimating the degree of provocation given by the blow. They may thus have the effect of rendering an assault, which, if

[1] Not with a mere fiancée, *Rex* v. *Palmer*, L. R. [1913] 2 K. B. 29; nor a concubine, *Rex* v. *Greening*, 9 Cr. App. R. 105.

[2] Or kills *her*. Cf. *Rex* v. *Maddy*, 1 Ventris 158 (K. S. C. 111). And so with a confession of *past* adultery, if the words used would cause in an ordinary man the same hostility as if he had witnessed his wife's *act* of adultery; *Rex* v. *Palmer*, *supra*. But no less convincing proof of adultery suffices: *Rex* v. *Birchall*, 29 T. L. R. 711, cf. p. 732. Nor does a wife's confession of intention to commit adultery; *Rex* v. *Ellor* (*The Times*, July 26, 1929).

[3] As to spitting on a person, cf. 4 F. and F. 1066 with 8 Cr. App. R. 121.

[4] Foster 292.

committed silently, would have been trivial, a provocation gross enough to reduce a homicide into a manslaughter. An unlawful imprisonment, or an unlawful arrest, may clearly be a sufficient provocation to reduce to manslaughter an act of killing inflicted by the actual person imprisoned or arrested[1]. But it will never have this effect as regards a homicide committed by other persons in their sympathy with him. Hence if bystanders try to rescue him, and kill someone in the attempt to do so, they will be guilty of murder[2]. Again, there must be a reasonable proportion between the provocation and the violence provoked by it. A kick that would extenuate the return of a fatal blow might not extenuate the fatal use of a pistol.

One of the most common cases of voluntary manslaughter is that of its being committed in the anger provoked by a sudden combat. Thus if, upon a quarrel which was not premeditated on the part of the prisoner, persons fall to fighting, and then, in the heat of the moment, either of them (for the combat affords matter of provocation to each) inflicts some fatal injury on the other, the slayer will not be guilty of more than a manslaughter. So where a soldier, who was defending himself against an insulting mob by brandishing his sword and by striking some of them with the side of it, finally struck one of them a blow on the head which killed him, the judges held it only manslaughter[3]. Similarly where, in a quarrel, one man threw another to the ground, and then stamped on his stomach and so killed him, it was held to be only manslaughter; as there had been no interval of time between the blow which threw the deceased person down and the stamping on his body[4]. If, however, the quarrel subside for a time, and then be resumed by one of the combatants, it usually will not afford him any palliation for a fatal blow struck after this

[1] See p. 449 *infra*. But the communication of venereal disease by a concubine is *not* sufficient. *Per* Avory, J. (*The Times*, March 6, 1918).

[2] *Reg.* v. *Allen*, Stephen's *Dig. Cr. Law*, Art. 245 and note 9.

[3] *Rex* v. *Brown*, 1 Leach 176 (K. S. C. 112).

[4] *Rex* v. *Ayes*, Russell and Ryan (K. S. C. 113).

resumption of the conflict. It certainly will not do so if he employed the interval in arming himself for the renewal of the combat. Hence if, when two persons quarrel, they proceed to fight then and there, and one of them is killed, the offence is only manslaughter; but if, instead of thus fighting at the moment of the quarrel, they agree to hold a duel on the following day, and one of them is killed in that duel, the slayer will be guilty of murder[1].

The various effects of provocation in cases of "voluntary" homicide may be summed up thus. A grave provocation reduces to manslaughter the act of killing, even though it be committed with some dangerous instrument, such as was likely to kill (*e.g.* a pestle). But a slight provocation (α) leaves the act of killing with a dangerous instrument still a murder; though it (β) reduces the act of killing with a slight instrument, such as was likely only to wound (*e.g.* a cudgel), to manslaughter. Provocation never reduces a homicide to misadventure, if the fatal blow were unlawful (*e.g.* resentful); though it may if that blow were only a lawful act of self-defence.

(*b*) *Involuntary* manslaughter is that which is committed by a person who brings about the death of another by acting in some unlawful manner, but without any intention of killing, or even of hurting, anyone. This may happen in three ways:

(1) He may be doing some act which is intrinsically unlawful (probably it must not[2] be so unlawful as to be a felony, for then the homicide might not be a mere manslaughter but a murder). Thus a person commits manslaughter if he accidentally kills[3] some one else by conduct which amounts to a

[1] *Reg.* v. *Cuddy*, 1 C. and K. 210.

[2] *Infra* p. 138.

[3] Even though a fatal result were so improbable that it could not be anticipated. In *Rex* v. *Sasun* (*The Times*, May 18, 1920), a man was convicted of manslaughter who, in commencing an illegal operation upon a woman, had caused her death, through nervous shock, by an act so slight that three experienced accoucheurs stated that they had never known it produce death. But Shearman, J., ruled that "*However improbable* a fatal result might be, if the illegal act did cause death there is a manslaughter." Cf. 21 Cox 693; 85 J. P. 276; and, for Torts, *In re Polemis*, L. R. [1921] 3 K. B. 560.

misdemeanor (as by taking part in an unlawful assembly), or even to a petty offence punishable summarily (as where a motorist exceeds the appointed limit of speed). And this rule has been regarded as holding good whenever the unlawful act which accidentally produced the death amounted to even a mere civil tort. But there is some modern authority for confining the doctrine to such torts as are likely to cause bodily hurt. In *Reg.* v. *Franklin*[1], this more lenient view was expressed by Field, J., and Mathew, J. But the late Mr Justice Stephen[2] adhered to the older doctrine that any tort will suffice, even though it did not seem fraught with any danger[3].

(2) He may be leaving unperformed some act which it is his legal duty to perform. Thus if a railway passenger is killed because the pointsman fell asleep and forgot to move the points, this pointsman will be guilty of manslaughter (if, on the other hand, he had purposely left the points unmoved, it would have been murder). Where the engine-man at a colliery left his steam-engine in the charge of an ignorant boy, and this lad's inexperience brought about the death of a miner, the engine-man was held guilty of manslaughter[4]. But the connexion between the omission and the fatal result must not be too remote[5].

In these two instances, the legal duty of acting arises from special circumstances whereby the particular person concerned had taken it upon himself[6]. It will usually arise thus;

[1] 15 Cox 163 (K. S. C. 118). [2] *Dig. Cr. Law*, 7th ed. Art. 314.

[3] Mothers frequently take their babies into bed with themselves; but at much risk of suffocating them by "overlaying," since children so young will not automatically struggle and so awake the overlayer. Yet such a homicide is not held to be a Manslaughter unless the overlayer were drunk. Cf. 3 Cr. App. R. 187 and 23 Victoria L. R. 159. Even if she be drunk the Children Act, 1908, s. 13, allows the alternative of dealing with it as only an act of Criminal Neglect, punishable with two years' imprisonment.

[4] *Reg.* v. *Lowe*, 3 C. and K. 123 (K. S. C. 132).

[5] See *Reg.* v. *Hilton*, 2 Lewin 214 (K. S. C. 133); *Reg.* v. *Rees*, C. C. C. Sessions Papers, cix. (K. S. C. 133).

[6] Even a duty created only by a contract (*e.g.* signalman's hiring) to which the person killed was not a party, may suffice; at any rate if it contemplated the safety of life. See 11 Cox 210, 16 Cox 710, 19 T. L. R. 37. Yet see Bevan on Negligence, p. 8. The common law bound the captain of a British ship to try to rescue any of *his own* sailors or passengers who fell overboard. But the Maritime Conventions Act, 1911, s. 6, extends his duty to the rescue of *any* person at sea in danger of being lost, even an alien enemy.

for the community at large are seldom under any legal duties but negative ones, duties to abstain from the commission of certain acts. I am under no legal obligation to protect a stranger. "If I saw a man, who was not under my charge, taking up a tumbler of poison, I should not become guilty of any crime by not stopping him[1]." Nor by not warning a blind man whom I see heading for the edge of a cliff. (Cf. p. 9, *supra*.) But the law itself does in some cases impose upon a special class of persons some duty of a positive character, a duty of acting. Thus parents are responsible for the care of their children[2]; and consequently, if a child's death is caused, or even accelerated, by a parent's gross neglect in not providing sufficient food or clothing for his child, the parent will be guilty of manslaughter.

The mere fact that there was some degree of negligence on the parent's part will not suffice. There must be a "wicked" negligence, a negligence so great as to satisfy a jury that the prisoner did not care whether the child died or not. Of course, if the wickedness went so far that the parent *intended* the child to starve to death, or even to suffer grievous bodily harm, he would be guilty not of manslaughter but of murder (13 Cr. App. R. 134). At common law, it was a good defence that the parent was not sufficiently well off to provide for the child. But now, under the Children Act, 1908—8 Edw. VII. c. 67, s. 12 (1)—neglect to provide food, clothing, medical aid, or lodging for a child is not excused by the being unable to do so without resorting to the Poor Law authorities. Hence if his wilful omission to provide medical aid for his child occasions or accelerates the death of the child, the parent will be guilty of manslaughter. (And this will be the

[1] *Per* Hawkins, J., in *Reg.* v. *Paine* (*The Times*, Feb. 25, 1880).

[2] From the birth, but not before; *Rex* v. *Izod*, 20 Cox 690.

case even when the omission is due to a conscientious or religious objection to the use of medicine[1].) This liability for neglect is not confined to parents. Any adult who undertakes, lawfully or unlawfully, the care of a person who is helpless, whether it be through infancy or even through mere infirmity[2], will similarly be guilty of manslaughter if this person should die through his *wicked* neglect; or even of murder, if he knew that the neglect was likely to prove fatal. And, on the same principle, if a doctor, after having (not merely been summoned to, but) actually undertaken the treatment of a patient, wickedly neglects him, and he dies in consequence of this neglect, the doctor will be guilty of manslaughter.

But the degree of negligence must be not merely a culpable but a criminal one. It is not enough to shew that there was an error of judgment, or even such carelessness as would support a civil action for damages for negligence[3]. Hence it has been noticed that when motorists are sued in civil actions for negligence, the verdict is usually against them, but is rarely so in prosecutions of them for manslaughter. There must be a "wicked" negligence[4]—"such disregard for the life and safety of others as to deserve Punishment" (19 Cr. App. R. 8). Yet the delicate line between these degrees has to be drawn by the jury[5], not by the judge (unless he hold that there

[1] *Reg.* v. *Senior*, L. R. [1899] 1 Q. B. 283.

[2] *Reg.* v. *Instan*, L. R. [1893] 1 Q. B. 450; cf. 17 Cr. App. R. 7.

[3] French law drew until 1912 the like distinction; but now identifies criminal negligence with civil.

[4] *Reg.* v. *Finney*, 12 Cox 625 (K. S. C. 120).

[5] Yet it cannot be drawn in abstract terms. But it may be illustrated by contrasts. Motorists have been allowed to be convicted for homicides caused by coming round a dangerous corner on the wrong side and without sounding the horn; or by driving at a rate of sixteen miles an hour down Oxford Street at ten a.m. (C. C. C. Sess. Pap. CXLVII. 677), or at twenty-five miles an hour on a country road that was slippery with ice (CLII. 340); or by steering out on the wrong side, to pass a tramcar that stood lengthways across the motorist's course (CLVIII. 33). And so has a drunken van-driver who took his horses "galloping like a fire-engine" along the wrong side of the road (CLIV. 386). But it was held by Ridley, J., to be no manslaughter where the negligence by which a motorist caused a death was only that of getting out of the line of traffic and proceeding on the wrong side (CXLIX. 314); or that of an error of judgment in continuing his journey after finding that his steering-gear had got out of order (CXLIX. 232). The well-known case of *Dixon* v. *Bell* (5 M. and S. 198, Kenny's *Cases on Tort*, p. 587) is so close to the dividing-line that authorities are disagreed as to whether or not the negligence shewn in it would be sufficient for Manslaughter.

is *no* evidence at all to shew the criminal degree). (Yet however extreme a man's negligence may have been, he still will not be answerable for a death which even full diligence on his part would not have averted or delayed[1].) On the other hand, "contributory negligence" (see p. 129, *infra*) is not a defence in criminal trials, whilst in civil ones it is accepted; as where a flurried pedestrian stops short in front of a taxicab.

(3) He may be doing some act which is quite lawful, but nevertheless may be doing it negligently[2] and therefore unlawfully. For instance, a sportsman indulges in rifle practice in the immediate vicinity of houses; a school-girl reads her favourite poet whilst cycling; or some one swings a chair to and fro wantonly, though in mere play[3]. If death be caused in chastising a child who is under your authority, and whom you have no intention to kill, the case will be (*a*) one of *Manslaughter*, if the extent of the punishment were unreasonable, although the instrument used was a reasonable one. On the other hand, it will be (*b*) one of *Misadventure*, if both the extent and the instrument were reasonable; but (*c*) of *Murder*, if the instrument used was utterly unreasonable.

[1] *Reg.* v. *Dalloway*, 2 Cox 273 (K. S. C. 134).

[2] *I.e.* with a *wicked* negligence. See Note 5, p. 122 *supra*. As to the Evidence necessary, it has been held in Ireland (*Rex* v. *Cavendish*, 8 Ir. C. L. 178) and approved by the High Court of Australia (27 C. L. R. 160) that, on an indictment for manslaughter by negligent driving, the proof of the mere fact of killing raises a presumption of unlawful killing, and thus throws on the accused the burden of disproving negligence (cf. 16 Cox 710; and the kindred rule in Murder, *infra*, p. 140). But this Irish ruling has not escaped criticism. That a motor-car was on the foot-path would be evidence of criminal negligence. But it would be rebutted by shewing that it went there by the machinery being out of order; or by the need of avoiding an imminent collision on the roadway; or even merely by (in the Admiralty phrase) "a wrong manœuvring in the agony of the moment" of impending collision.

[3] Or a motorist drives at a rate which, though within the prescribed speed limit (contrast p. 120 *supra*), is too rapid for the corner he is turning.

And similarly if death be caused by a workman throwing down rubbish from a roof, though without his having any idea of doing hurt to anyone, there are the same three alternatives. For (*a*) it will be *Misadventure*, if the matter occurs in a village, and the workman has called out to give warning before throwing the materials down. But (*b*) it will be *Manslaughter*, (1) if, though it were only in a village, the workman did not even call out; or (2) if it were in a town and he only called out, but did not take the further precaution of looking over. Finally, (*c*) it will be *Murder*, if it were in a town, and he so recklessly negligent as not even to call out[1]. In like manner, if a person die from being plied with liquor by his boon-companions, the degree of their legal responsibility will depend upon the motives with which they acted. If from mere unreflecting conviviality, the homicide would only be one of misadventure; if from a deliberate "practical joke," it would be[2] at least a manslaughter; and, in case that an extremely excessive amount of liquor was administered, or that there was a desire to produce death[3], it would be murder[4]. A person may be criminally negligent although taking all the care that *he* can. For if he undertake the work of an expert—*e.g.* if a ploughman act as a boatman or as a surgeon—he must exercise an expert's skill (cf. 12 Cr. App. R. 153).

Manslaughter is often spoken of as "the most elastic of crimes"; for the degrees of guilt which may accompany it extend from the verge of murder to the verge of excusable homicide. The punishment[5] is penal servitude for life or not less than three years, or imprisonment for not more than two, or a fine[6]. Coroners' inquests suggest an annual average for

[1] Archbold, p. 890. [2] *Rex* v. *Martin*, 3 C. and P. 211 (K. S. C. 137).
[3] *Reg.* v. *Paine*, Sessions Papers, xci. 537 592; *The Times*, Feb. 25, 1880.
[4] *Reg.* v. *Packard* (K. S. C. 137).
[5] 24 and 25 Vict. c. 100, s. 5. The normal sentence for Involuntary manslaughter is reputed to be six months' imprisonment.
[6] For manslaughter in a combat, Patteson, J., once inflicted merely a fine of a shilling (*The Times*, Aug. 9, 1845).

cases of manslaughter of a little under seventy, and for murders a little over one hundred and fifty; as against five justifiable homicides (other than executions) and nearly four thousand (sane and insane) suicides.

(III) Infanticide. This modern felony is the creation of the Infanticide Act, 1922 (12 and 13 Geo. 5. c. 18).

During the seventeen years 1905–21, sixty women were sentenced to death for infanticide; but in fifty-nine of the cases the sentence was commuted. To remove this divergence between theory and practice, the Act of 1922 enacts that: "Where a woman, by any wilful act or omission, causes the death of her newly-born child, but at the time...had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall...be guilty of Infanticide"; and may be punished as if guilty of Manslaughter (see p. 124, *supra*) although but for this enactment she would have been guilty of Murder. If she be tried for the child's murder, the jury may instead convict her of Infanticide; and if tried for Infanticide, they may instead convict her either of Concealment of Birth (see p. 131), or (if she be over sixteen) of an offence of Cruelty under s. 12 of the Children Act, 1908.

Thus she is treated as having been in *some* degree responsible when she did the act, although the balance of her mind was then so far disturbed that—like a person who kills under gross provocation—she was not completely mistress of her faculties. In a bad case, where she did intend to kill, a sentence of nine months' imprisonment was passed by Avory, J.

The Act unfortunately contains no definition of the vague phrase "*newly* born." Accoucheurs limit it to infants less than sixteen days old (Glaister's *Legal Medicine*, p. 133). But on the intention of the Act see the judgment in *Rex* v. *O'Donoghue*, (44 T.L.R. 51; 20 Cr. App. R., p. 132).

(IV) Murder. The word "murder," from the Germanic *morth*. originally denoted (1) a secret killing. Hence the name was applied to the fines imposed by William the Conqueror

upon any hundred where a Norman was found secretly killed. The dead man was presumed to be a Norman unless there was express "presentment of Englishry." After these fines (then already nearly obsolete) were abolished by Edward III. in 1340, the word "murder" necessarily lost its earlier meaning, and came to be used as a name for (2) the worst kinds of homicide. (Those kinds of homicide which, as they were neither justifiable nor even cases of misfortune or self-defence, were capital felonies, but yet were not of so bad a kind as to be called "murders," remained undistinguished by any particular name.) Finally, when by 23 Hen. VIII. c. 1 the benefit of clergy was largely taken away from "murder of malice aforethought," the term "murder" soon became (3) limited, as it still is, to the form of homicide dealt with by this statute. This phrase "malice aforethought" was not new. It had been in use since the thirteenth century (even before the abolition of Englishry); for "malitia praecogitata" was familiar under Henry III. as one of the tests of unpardonable (*i.e.* capital) homicide. But at the time when the phrase began to be used the word "malitia" meant rather the wrongful act intended, than the intention itself; still less had it any particular reference to that special form of evil intention, viz. hatred, which "malice" now popularly denotes[1].

Murder, in this third and final sense, may be defined, in antique phraseology which has been classical ever since the time of Lord Coke, as (α) unlawfully (β) killing (γ) a reasonable creature, who is (δ) in being and (ϵ) under the King's peace, (ζ) with malice aforethought either express or implied; (η) the death following within a year and a day[2]. Of these seven constituents, the first, viz. "unlawfulness," distinguishes murder from all non-felonious homicides, whether ranked as justifiable or only as excusable; and the sixth, "malice aforethought," distinguishes it from those unlawful homicides which rank only as manslaughter. The second, third, fourth,

[1] Pollock and Maitland, II. 467; Maitland's *Collected Papers*, I. 304.
[2] 3 Coke Inst. 47.

fifth and seventh are as necessary in manslaughter as in murder. But, as it is in cases of murder that they have received the fullest judicial consideration, it has seemed more appropriate to postpone until now our discussion of them. We will consider the last six points successively.

(1) *Killing.* In murder, as in manslaughter, a man may be held liable for a homicide which he effected, not by any direct violence, but only through some protracted chain of consequences; his own last act in it being remote, both in time and in order of causation, from the death which it brought about. This is vividly illustrated by two old cases mentioned by Blackstone. In one, a "harlot" abandoned her new-born child in an orchard, and covered it over with no better protection than leaves. Birds of prey being then common in England, a kite struck at the infant with its claws, and thereby inflicted wounds which caused the death of the child. The woman was arraigned of murder and executed[1]. The other case is that of a son who took his sick father from one parish into a second one in cold weather, against the old man's will, and so hastened his death[2]. Yet in murder, just as we saw in the case of Attempts[3], there is a point at which the law refuses to continue to trace out chains of causation; and beyond which, therefore, any act is regarded as too remote to produce guilt[4]. But here, as before in Attempts, it is impossible to lay down any general rule for fixing this point; and the utmost that can be done is to

[1] Crompton's *Justice* 24 (K. S. C. 92). So, where a woman injured herself by jumping out of a window, through a well-grounded apprehension of being dangerously attacked by *C*, *C* was held to have caused the injury, though he never touched her; *Rex* v. *Coleman*, 84 J. P. 112.
[2] Y. B. 2 Ed. III. f. 31, Hil. pl. 1 (K. S. C. 92).
[3] *Supra*, p. 81. Under Edward II a judge who, by an illegal sentence, had hanged a man, was only *fined*; Bracton's N. B., case 67.
[4] See L. and C. 161. At the Cambridge assizes in 1667 Robert Dickman, B.A., of Sidney, was indicted for the manslaughter of Nicholas Christmas, a scholar of St John's; whom he beat for throwing stones at an apricot-tree, and who then, in running away, fell and was killed by the fall. But Sir T. Selater, whose MS. notebook records it, does not say what was ruled as to the remoteness of the beating.

suggest it approximately by illustrative instances. The most noteworthy is the rule that killing a man by perjury is not murder[1]. That rule, though it has been doubted by some lawyers, has the sanction of so great a criminal judge as Sir Michael Foster[2]; and is supported by the fact that, even in an age when the definition of murder was less narrowly construed than now, and when judges were more pliant to the Crown, the lawyers of James II. did not venture to indict Titus Oates, the inventor of the imaginary "Popish Plot," for the murder of the men whose lives he had sworn away. Yet their desire to see him expiate his guilt by death, if it were legally possible, is sufficiently evidenced by the sentence passed (and executed) upon him when he was prosecuted for perjury—viz. two floggings of about two thousand lashes each. It used, again, formerly to be thought that killing by a *mental* shock would not be murder; but, in the clearer light of modern medical science, such a cause of death is no longer considered too remote for the law to trace[3].

An act may amount to an unlawful killing, either as a murder or a manslaughter, even though it be so remote in the chain of causes that it would not have produced death but for the subsequent acts or omissions of third parties[4]; unless this conduct of the third parties were either wilful or, at least, unreasonably negligent. The rule extends even to similar intervening conduct on the part of the deceased victim himself[5]; *e.g.* his refusal to submit to amputation. The rationale of it is, that a person who brought the deceased

[1] *Rex* v. *Macdaniel*, Leach 52 (K. S. C. 97). But the Roman jurists treated such a perjurer as a murderer; *Dig.* 48, 8, 1. In England, killing by Witchcraft was not murder; though made capital in 1562.

[2] Foster's *Crown Law*, 130.

[3] *Rex* v. *Hayward*, 21 Cox 693; *Reg.* v. *Towers*, 12 Cox 530; *Wilkinson* v. *Downton*, L. R. [1897] 2 Q. B. 57.

[4] Contrast *Reg.* v. *Hilton*, 2 Lewin 214 (K. S. C. 133), with *Reg.* v. *Lowe*, 3 C. and K. 123 (K. S. C. 132).

[5] Contrast *Reg.* v. *Holland*, 2 M. and R. 351 (K. S. C. 93) with *Reg.* v. *Sawyer*, C. C. C. Sessions Papers, CVI. (K. S. C. 94). In Scottish law, the corresponding rule does not thus include the conduct of the deceased or the mere *omissions* of third parties.

man into some new hazard of death may fairly be held responsible if any extraneous circumstances (that were not intrinsically improbable), *e.g.* septic poisoning, should convert that hazard into a certainty. An illustration, noteworthy both for the rank of the criminal and also because nearly twenty years elapsed between his crime and his trial, may be found in the case of Governor Wall[1]. He was tried and executed, in 1802, for the murder of Serjeant Armstrong, on the island of Goree, by sentencing him to an illegal flogging; though the illness thus caused might not have produced death, but for Armstrong's own rash act in drinking spirits whilst he was ill[2].

It was held by Baron Martin[3] that if an engine-driver negligently causes a collision, and a passenger, on seeing this collision to be imminent, jumps out of the train and is killed by the jump, the liability of the engine-driver for the manslaughter of this passenger will depend on the question whether a man of ordinary self-control would have thus jumped, or only a man unreasonably timid. In like manner, Quain, J., held that if a man who lay drunk in the middle of a road, and did not get out of the way of a vehicle, were driven over by it and killed, the driver would be indictable. For "contributory negligence" is no defence in criminal law[4].

(2) *A reasonable creature.* Here "reasonable" does not mean "sane" but "human." In criminal law a lunatic is a *persona* for all purposes of protection, even when not so for those of liability.

(3) *In being, i.e.* not a mere unborn child[5]. There can be

[1] 28 State Trials, 51. See *All the year round*, Vol. IX.

[2] Cf. *Reg.* v. *Holland*, 2 M. and R. 351 (K. S. C. 93); and a like case in C. C. C. Sess. Pap., LXXVI. 259.

[3] *Reg.* v. *Monks*, C. C. C. Sessions Papers (1870), LXXII. 424.

[4] C. C. C. Sess. Pap., LXXVII. 354. See *Reg.* v. *Dant*, L. and C. 567 (K. S. C. 126) *per* Blackburn, J.; *Reg.* v. *Kew*, 12 Cox 455 (K. S. C. 135) *per* Byles, J.; *Reg.* v. *Swindall*, 2 C. and K. 230 (K. S. C. 74) *per* Pollock, C. B. But it may mitigate the sentence; *Rex* v. *Stubbs*, 8 Cr. App. R. 238.

[5] For to early forensic medicine (A.D. 1348) it seemed "hard to know if he *did* kill it"; Statham, *Corone* 91.

no murder[1] of a child which dies before being born or even whilst being born; only of one that has been born, and, moreover, born alive. For purposes of criminal law—and also for those of property law, *e.g.* to become a holder of property and so transmit it again to new heirs, or to enable the father to obtain curtesy of his wife's lands—mere *birth* consists in extrusion from the mother's body, *i.e.* in having "come into the world." To the discredit of our law, a great encouragement to infanticide is afforded by the rule that *partial* extrusion is not sufficient. If but a foot be unextricated, there can be no murder; the extrusion must be complete, the whole body of the infant must have been brought into the world[2]. But it is not necessary that the umbilical cord should have been severed[3]. And to be born *alive* the child must have been still in a living state after it had wholly quitted the body of the mother. Hence that life then still existed must be actually proved[4], and this may be done by giving evidence of any cry, or breathing, or pulsation, or movement, after extrusion. But it is not necessary that the child should have continued to live until it was severed from the mother; or even until it could breathe[5], for a child may perhaps not breathe until some time after full extrusion (though, on the other hand, infants sometimes breathe, and even cry, before they are fully extricated). A Parliamentary Committee of 1893 recorded the sapient verdict of a coroner's jury upon "a

[1] But by statute (24 and 25 Vict. c. 100, s. 58) to use means to procure abortion is a felony and punishable with penal servitude for life.

[2] *Rex* v. *Poulton* (1832), 5 C. and P. 330. Not so in India.

[3] *Reg.* v. *Reeves*, 9 C. and P. 25. The ambiguous phrases, "separate existence" and "independent circulation," differently understood by different doctors, should be avoided, as more easily uttered than explained; (L. Q. R. xx. 142–5).

[4] As to the frequent difficulty of this proof see p. 342 *infra*.

[5] Nor is it necessary that it should be capable of *continued* life. In 1812, at York summer assizes, a midwife was convicted of murder for drowning a newborn child which, from the absence of part of the skull, could not have lived many hours. (Bayley, J., however, recommended commutation of her sentence, because she had sincerely believed her act to be lawful.) *Annual Register for* 1812, p. 96.

child found dead, *aged about three months*; but no evidence as to whether or not it had been born alive."

The birth must thus precede the death; but it need not also precede the injury. Thus an act which causes a child to be born much earlier than in the natural course, so that the child is rendered much less capable of living when born and accordingly soon dies, may itself amount to murder.

It may be convenient here to digress for a moment from murder to another offence; and to mention that on the indictment of any person (whether the mother or not) for the murder of a new-born infant, the jury may find no sufficient proof of murder, and yet may find proof of the statutory offence of "endeavouring, *by secret disposition*[1] of its dead[2] body, to conceal its birth" (24 and 25 Vict. c. 100, s. 60). In this crime, unlike murder, it is immaterial whether the child was born *alive* or not. In such cases the jury are permitted by the statute to convict of this offence of Concealment of Birth, without the delay of any fresh trial or fresh indictment. This statutory offence[3] (which, of course, may itself form the subject-matter of an express indictment) is a misdemeanor; and is punishable by two years' imprisonment, with hard labour. Concealment from the world in general must be intended; it is no crime to conceal a birth merely from some particular individual alone; "there would be a hardship in punishing a girl for concealment from her master, if there had been no concealment from her mother[4]." But there may be sufficient concealment although the birth is already made known to some persons pledged to secrecy.

(4) *Under the King's peace.* "The King's majesty is, by his office and dignity royal, the principal conservator of the

[1] *E.g.* throwing into a pond, or burning. Thus mere *denial* is not a sufficient concealment.

[2] There thus is no offence in concealing the birth of a child that is still alive.

[3] "An imaginary crime, consistent with perfect [mŏral] innocence"; Pollock, B. (*Life of Lord Bramwell*, p. 37). "I always regarded its moral guilt as altogether unworthy of punishment"; Lord Brampton (*Reminiscences*, ch. XXXII.).

[4] Mr Justice Wright, *Draft Criminal Code for Jamaica*, p. 108.

peace within all his dominions[1]." Yet in our Anglo-Saxon period the King's peace was only partial in its operation, and merely supplemented that national peace which it finally supplanted. The national peace, which apparently had its origin in the sanctity of the homestead, was protected only in the local courts; and these were weak. The King's peace, on the other hand, was enforced with vigour by royal officers of justice. At first it applied only in certain holy seasons, or to persons to whom it was specially granted by the King, or to places which were under the King's special protection (such as the precincts of his house and the four great roads)[2]. These limits, however, soon became indefinitely extended. "The interests of the King and of the subject conspired to the same end[3]." The King profited in the way of fees, and the subject was anxious to appeal to the one authority which could not anywhere be lightly disobeyed. Accordingly, "after the Conquest, the various forms in which the King's special protection had been given disappear, or rather merge in his general protection and authority[4]." But even then the King's peace did not arise throughout the nation at large until he proclaimed it; and it lasted only till his death. So on the death of Henry I., the chronicler tells us, "There was seen tribulation in the land; for every man that could forthwith robbed another." Finally, as Edward I. was away in Palestine when his father died, the magnates themselves proclaimed the King's peace, in spite of his absence, to avoid the confusion which would otherwise have arisen. Thenceforward even the King's death was never regarded as suspending the royal peace.

A man attainted of praemunire was not under the King's peace; and, therefore, until 5 Eliz. c. 1, it was not murder to kill him[5]. On the other hand, to kill an outlaw was murder[6];

[1] 1 Blackstone Comm. 350.
[2] Cf. Maitland's *Collected Papers*, II. 290–7.
[3] Pollock, *Oxford Essays* (The King's Peace), p. 83.
[4] *Ibid.* p. 87.
[5] Y. B. 2 Ed. III. fo. 6, pl. 19. [6] 1 Hale P. C. 433.

and even a savage[1] or a condemned criminal[2] or an alien enemy[3] is under the King's peace. Hence an alien enemy cannot lawfully be killed except in the actual course of true war[4]. In such he, of course, may; so, if the captured crew, on board a prize brought into British waters, should endeavour to release themselves from their British captors, and in the consequent struggle one of the prisoners should be killed by one of the captors, the homicide[5] would not be felonious.

The law (as we are often told) is no respecter of persons. Without being universally true, this is a principle which has always applied with special force to the law of Homicide. Thus the villein could not be killed by his lord. Nor could the slave, even in Anglo-Saxon times, be killed by his master; for the laws of Alfred inflicted a fine on the master who murdered his slave, and this at a time when most homicides admitted of being atoned for by mere payment of a fine. The King's peace was powerful to protect both villein and slave from the extremity of tyranny. It is instructive to notice that, even in much more recent times, a West Indian legislature imposed on masters no severer responsibility than Anglo-Saxon legislation had done in their dealings with the lives of their slaves. Thus one of the Acts of Barbadoes[6] ran as follows: "If any slave under punishment by his master, for running away or any other misdemeanor towards his master, unfortunately shall suffer in life (!) or member, no person whatsoever shall be liable to a fine. But if any man out of wantonness or cruel intention shall wilfully kill a slave of his own, he shall pay into the public treasury £15 sterling."

[1] See p. 136 n. *infra*.
[2] Y. B. 35 H. VI. 57; *Commonwealth* v. *Bowen*, 13 Mass. 356 (K. S. C. 91).
[3] *E.g.* a prisoner of war; 1 Taunt. 32, 36.
[4] Hence in 1902 four Zeerust natives were sentenced to death by the criminal court at Pretoria for having killed a Boer in the war of 1900 *outside* their frontier, when their Chief's only commission from the British authorities was to defend his own territory. Similarly in the Transvaal, Van Aan was executed for having shot an English officer approaching under a flag of truce.
[5] *Per* James, L. J., in *Dyke* v. *Elliott*, L. R. 4 P. C. 184.
[6] No. 329, p. 125.

(5) *Malice aforethought.* The preceding elements in the definition of murder are common to all forms of criminal homicide; but this fifth point is the distinctive attribute of those homicides that are murderous. When, as we have seen,[1] the legislature determined to take away the "benefit of clergy" from the most heinous cases of homicide, it adopted the already familiar[2] notion of "malice aforethought" (*malitia praecogitata*) as the degree of wickedness which should deprive a homicidal "clerk" of his ancient right to escape capital punishment. The phrase is still retained in the modern law of murder; but both the words in it have lost their original meanings. For the forensic experience of successive generations brought into view many cases of homicide in which there had been no premeditated desire for the death of the person slain, and which yet seemed heinous enough to deserve the full penalties of murder. These accordingly, one after another, were brought within the definition of that offence by wide judicial constructions of its language. Hence a modern student may fairly regard the phrase "malice aforethought" as now a mere arbitrary symbol. It is a convenient comprehensive term for including all the very various forms of *mens rea* which are so heinous that a homicide produced by any of them will be a murder. But none the less it is only an arbitrary symbol. For the "malice" may have in it nothing really malicious; and need never be really "aforethought," (except in the sense that every desire must necessarily come before—though perhaps only an instant before—the act which is desired). The word "aforethought," in the definition, has thus become either false or else superfluous[3]. The word "malice" is neither; but it is apt to be misleading, for it is not employed in its original (and popular) meaning. A desire for the death of the individual who was killed—or,

[1] *Supra*, p. 126.

[2] See Prof. Maitland's *Collected Papers*, I. 305.

[3] Contrast the "deliberateness" which the German Penal Code, § 211, requires for Murder; even an hour's interval being held too brief to constitute it; Mullins' *Leipzig Trials*, p. 200.

as for distinctness' sake it may be termed, "Specific Malice"—is not essential to murder. Blackstone, indeed, in his treatment of this crime, sometimes uses the word Malice as if in this narrow sense; but at other times he includes under it, and more correctly, other states of mind far less guilty. For there are several forms of *mens rea* which have been held to be sufficiently wicked to constitute murderous malice. They are the following:

(i) Intention to kill the particular person who, in fact, was killed. This, of course, is the most frequent of all the six forms.

(ii) Intention to kill a particular person, but not the one who actually was killed[1]. If a man shoots at *A* with the intention and desire (or, as Bentham would express it, the "direct intention") of killing *A*, but accidentally hits and kills *B* instead, this killing of *B* is treated by the law not as an accident but as a murder[2]. In old legal phrase, *malitia egreditur personam*; the *mens rea* is transferred from the injury contemplated to the injury actually committed. Austin has pointed out that such a murderer may have had any one of three mental attitudes with regard to the prospect of this latter injury. He may have—

(*a*) Thought it probable that he would hit *B* instead of *A*; and have risked doing so, though feeling no desire at all that *B* should be hit. Austin classes this as an "intention"; and Bentham gives it the specific name of "*indirect* intention." But in ordinary parlance it is not called "intention" at all[3]; because there was no desire of killing *B*.

(*b*) Thought it improbable that he would do so. This, Austin denominates "rashness."

(*c*) Not thought of it at all. This, Austin denominates "heedlessness."

[1] *Reg.* v. *Salisbury*, Plowden 100 (K. S. C. 102). Cf. Orsini's outrage, p. 419 *infra*; and *Commonwealth* v. *Mink*, p. 114 *supra*.

[2] Or manslaughter, if *A* has given such provocation as would reduce the killing of *him* to manslaughter; *Rex* v. *Gross*, 23 Cox 455.

[3] Cf. p. 149 *infra*.

(iii) Intention to kill, but without selecting any particular individual as the victim. This has been conveniently called "universal malice." It is exemplified by the case put by Blackstone, of a man who resolves to kill the next man he meets and does kill him[1]; and by the more frequent and more intelligible case of Malays who madden themselves, with hemp, into a homicidal frenzy, and then run "amok"; and by that of the miscreant who, about 1890, placed an explosive machine on board an Atlantic liner about to sail from Bremerhaven, in order to get the money for which he had insured part of the cargo. It is also exemplified by such atrocities as those attributed to the early settlers in Queensland, who are said to have rubbed poison into carcases of sheep or into masses of flour, and then placed them in the bush in hopes of their being eaten by the aborigines[2].

(iv) Intention only to hurt—and not kill—but to hurt by means of an act which is intrinsically likely to kill. There is an old case of a park-keeper who, on finding a mischievous boy engaged in cutting some boughs from a tree in the park, tied him to his horse's tail, and began to beat him on the back; but the blows so frightened the horse that it started off and dragged the boy along with it, and thus injured him so much that he died[3]. The park-keeper was held to be guilty of murder. More recently, in 1885, a very similar case was tried at the Lewes Assizes. In it, a cow-boy had tied a child, who annoyed him whilst he was milking, to one of the hind legs of a cow; but the cow took fright at this, and started off, and in its course dashed the child's head against a post. Here, the jury, with the approval of the judge, convicted the prisoner of manslaughter only. The case is of course distinguishable

[1] 4 Bl. Comm. 200.

[2] Haydon's *Trooper-Police of Australia*, p. 304. On Dec. 15, 1838, seven settlers were hanged in New South Wales for the unprovoked massacre of thirty natives; but pleaded "It has been so common that we had no idea it was against the law"; *ibid.* Cf. the case of Christiana Edmunds, who in 1872 used wilfully to supply a confectioner's shop with chocolate-creams imbued with strychnine.

[3] *Rex* v. *Halloway* (1628), Cro. Car. 131 (K. S. C. 103).

from Halloway's; inasmuch as the cow, being both a less sensitive and a less active animal than the horse, was not so likely to do a serious injury. But the more lenient verdict is probably to be attributed less to this consideration than to the general tendency of modern tribunals to relax the severity of the old law of murder.

We have already seen[1] that even a parent or master, legally entitled to inflict corporal punishment upon a child, will be guilty of murder if he should, however unintentionally, kill the child by inflicting the punishment in some mode which was obviously likely to cause death. Thus in *Rex* v. *Grey*[2], where a blacksmith was charged with the murder of his apprentice by striking him on the head with a bar of iron, it was held that the use of so dangerous an instrument "is all one as if he had run him through with a sword." And, similarly, a mother who had punished her child by stamping on its body, and had thereby killed it, was held guilty of murder[3].

(v) Intention to do an act which is intrinsically likely to kill, though without any purpose of thereby inflicting any hurt whatever[4]. Of this character is the intention of any workman who recklessly throws things off the roof of a house in a town, without looking over the edge to see if anyone is likely to be struck, or giving any warning[5]. We may add, as an instance of this fifth form of *mens rea*, Blackstone's case of the "unnatural" son who carried his sick father about, out of doors, in cold weather, which hastened the old man's death[6]. (This latter case, the printers of some thirteen successive editions of Stephen's *Commentaries* unwittingly represented as if it had been one of a deliberate intention to kill, by printing "rich" instead of "sick"!)

[1] *Supra*, p. 123. [2] Kelyng 64 (K. S. C. 105). [3] K. S. C. 105.

[4] *E.g.* purposely letting loose a fierce bull, though merely "to fright people and make sport" (2 Ld. R. 1573). Or, again, the blowing down of the wall of Clerkenwell Prison, Dec. 13, 1867, to make a gap through which some Fenian prisoners could escape; twelve bystanders were unintentionally killed, and a hundred and twenty wounded; *The Times*, Apr. 29, 1868.

[5] *Supra*, p. 124. *Rex* v. *Hull* (1664), Kelyng 40 (K. S. C. 125).

[6] *Supra*, p. 127. Y. B. 2 Ed. III. f. 18, Hil. pl. 1 (K. S. C. 92).

To treat this class of intentions as amounting to a murderous malice is perhaps impolitic: as being a more severe treatment than modern public opinion cordially approves. It certainly is felt by juries to be so. This was forcibly shewn at the trial of Leon Sernè, at the Central Criminal Court in 1887[1]. He set fire to his house, which he had insured for considerably more than its value; and in the fire his two boys perished. He had been a kind father; and he had no intention of causing the death of the boys. On an indictment for their murder, he was acquitted. The acquittal seems to have been due simply to the jury's dislike of the doctrine of "constructive" malice; for when indicted, in the following month, for arson, he was convicted. Yet if guilty of arson, he undoubtedly was legally guilty of murder.

(vi) (The older authorities add) Intention to commit a felonious act even though it be one unlikely to kill.

The oldest text-books had extended this principle to any *unlawful* act, but Sir Michael Foster limited it to *felonious* acts. Since his time, however, the effect of the rule, even as thus limited, has become enlarged, in consequence of various assaults and other acts having by statute been made into felonies. The illustration which Foster (*Crown Law*, p. 258) gives of this sixth rule is that of a man shooting at a fowl in order to steal it, and thereby accidentally killing a bystander. This, according to his view, would be murder; though if the intent had been merely to kill (and not to steal) the fowl, or if the bird aimed at had been a mere sparrow, the homicide would only have been manslaughter, as the act intended would not be a felony. Similarly, if a thief gives a man a push with intent to steal his watch, and the man falls to the ground and is killed by the fall—or if a man assaults a woman, with intent to ravish her, and she, having a weak heart, dies in the struggle—such a homicide would, according to Foster's rule, be murder.

[1] *Reg.* v. *Sernè*, 16 Cox 311 (K. S. C. 106). Cf. the closely similar case of *Rex* v. *Loufer*, C. C. C. Sess. Pap. CLVIII. 488.

Yet the severity of this rule has led to its being doubted. As early as 1773, in *Lad's Case* (Leach 96), the judges hesitated to say whether it would be murder to cause a child's death by a rape[1]. Both Stephen, J.[2], and Huddleston, B., instructed juries that the Court for Crown Cases Reserved would probably not uphold Foster's rule. The draft Criminal Code of 1880 omitted it. Such an omission would still leave such felonies as are intrinsically likely to cause death to be dealt with as cases of our last mentioned rule, No. (v); though homicide resulting from any felony which was *unlikely* to cause death would be only a case of "involuntary" manslaughter[3]. On the other hand, Lord Alverstone, L.C.J., said[4] that "The experience of the judges shews that there are so many cases of death caused by attempts to commit felonies, that, for the protection of human life, it is not desirable to relax the rule which treats such crimes as murders."

Hence in the frequent cases in which death results from an abortion procured feloniously, yet by the woman's consent and therefore with no violence against her, and moreover in such a manner as seemed to involve no appreciable risk to her life, the judges formerly regarded it as clearly murder; and they passed sentences of death. But in later years these sentences were usually commuted by the Crown; and juries moreover shewed reluctance to convict of this merely "constructive" murder (cf. pp. 138, 275). Hence the judges developed a rule[5] that, in such cases, the jury may convict of a mere manslaughter; unless they think that the prisoner must as a reasonable person have contemplated (or did in fact contemplate) that death or grievous bodily harm was likely to

[1] But it clearly is. See *Beard's Case*, 14 Cr. App. R. 163–4, 187, 199.

[2] See *Reg.* v. *Sernè*, *loc. cit.*; *Reg.* v. *Horsey*, 3 F. and F. 287 (K. S. C. 109); Stephen, *Hist. Crim. Law*, III. 79; Blackburn, J., in *Reg.* v. *Pembliton*, L. R. 2 C. C. R. at p. 121 (K. S. C. 159).

[3] *Supra*, p. 119.

[4] To the grand jury at Liverpool, March 9, 1909.

[5] *Rex* v. *Lumley*, 22 Cox 635; *Reg.* v. *Whitmarsh*, 62 J. P. 711; cf. 12 Cr. App. R. 15, and 16 Cr. App. R. 24. This new rule unfortunately puts the practised abortionist into a more advantageous position than the mere first offender. Both Scotland and Ireland still retain the older and sterner doctrine.

result[1]. Thus our sixth rule must be limited to such felonious acts as involve violence to an unwilling victim[2].

(vii) There is authority for including, amongst the cases of malice that give the character of murder to homicide produced by acts that were *not* likely to kill, one form of intention which would not even be felonious; viz. the intent knowingly to oppose by force an officer of justice, when engaged in arresting or imprisoning an offender. Sir James Stephen, for example, maintains that even if the opposition took no more violent form than merely that of tripping up the officer, yet, should his fall accidentally kill him, the case would be one of murder[3]. But he appears to have drawn this severe doctrine merely from general language used in the old authorities. In all the reported cases in which officers were killed, the actual means appear to have been intrinsically dangerous ones. Hence, in view of the modern tendency to narrow even the accepted rules as to constructive malice in murder, it may well be doubted whether the Court of Criminal Appeal would support this less definitely established doctrine. But the corresponding court in Ireland has ruled in its favour (*The State* v. *M'Mullen* [1925], 2 Ir. 9); saying that if the fugitive fired back towards the pursuing arrestor, there would be Murder even if he did not *mean* to hit him.

The existence of these various forms of "murderous malice" shew it to be much wider than mere "malice" in the popular sense, viz. ill-will; though much narrower than malice in the technical legal sense, viz. *mens rea*. Every intentional homicide is *primâ facie* presumed to have been committed with a murderous malice[4]; so that the defendant has the

[1] Hence it is well to add an express count for Manslaughter, so that the Murder count, if not pressed, may be dropped altogether.
[2] See 14 Cr. App. R. at p. 116, and p. 187.
[3] *Dig. Cr. Law*, Art. 315: Illustration 11.
[4] Indeed the strict rule does not require Intention, but only that the death be due to the prisoner's *act* (not his mere *omission*); 9 Cr. App. R. 63; 8 Ir. C. L. 178; *Rex* v. *Wittig*, Australia [1919] 158. See the elaborate judgment in *Commonwealth* v. *York* (43 Am. Dec. 373).

burden[1] of shewing, if he can[2], that the circumstances were such as to reduce it to a manslaughter or a non-criminal homicide[3]. But he may, of course, do this even by mere cross-examination of the Crown witnesses themselves. If the circumstances raise even a reasonable doubt as to its being murder, the jury should resolve that doubt in favour of the accused.

As regards the malice which is to be imputed to the various members of a group of wrong-doers when one of them commits a homicide, the rule is that, if several persons act together in pursuance of a common intent, every act done in furtherance of it by any one of them is, in law, done by all. Hence if persons have agreed to waylay a man and rob him, and they come together for the purpose armed with deadly weapons, and one of them happens to kill him, every member of the gang is held guilty of the murder. But if their agreement had merely been to frighten the man, and then one of them went to the unexpected length of shooting him, such a murder would affect only the particular person by whom the shot was actually fired[4].

(6) *A year and a day.* "Day" was here added[5] merely to indicate that the 365th day after that of the injury must be included. Such an indication was rendered necessary by an old rule (now obsolete) that, in *criminal* law, in reckoning a period "from" the doing of any act, the period was (in favour of prisoners) to be taken as beginning on the very day when this act was done[6].

The doctrine that a charge of homicide could not be sustained unless the death ensued within a limited period after the injury that caused it, was a wise precaution in view of

[1] Hence, if he decline to go into the witness-box, the judge will be unusually apt to exercise his privilege (*infra*, p. 408) of commenting on that fact.
[2] *E.g.* by the extenuating fact of Intoxication; see p. 61 *supra*.
[3] As to the kindred rule in manslaughter by negligence, see p. 123 *supra*.
[4] See *Reg.* v. *Macklin*, 2 Lewin 225 (K. S. C. 100).
[5] As early as before 1330: Fitzh. *Corone*, 163.
[6] Hob. 139. But *now* see *Radclyffe* v. *Bartholomew*, L. R. [1892] 1 Q. B. 161.

the defectiveness of medical science in mediæval days. In Holland, indeed, so brief a period as six weeks was adopted; but the modern Roman-Dutch law of South Africa, in view of the present advanced state of forensic medicine, recognises no time-limit (Nathan, § 2605). Nor is any recognised in Scottish law (Hume I. 186); nor in the Indian Penal Code. But in England the common-law rule is still retained, and has been applied in even a case of manslaughter (*Rex* v. *Dyson*, L. R. [1908] 2 K. B. 454).

The punishment of murder is death[1]. But until 1828 those murders which constituted an act of petit-treason (*e.g.* where a person was murdered by his wife or servant, or a bishop by one of his clergy) received an enhanced punishment. The offender, if a male, instead of being taken in a cart to the scaffold, was dragged thither on a hurdle; and, if a woman, was not hanged but burned, as in the case of Catherine Hayes, in 1726, familiar to readers of Thackeray. By 31 Vict. c. 24, s. 2, every execution *for murder* must take place within the prison walls, before such persons only as the sheriff may admit. It should be noted that this necessity does not extend to the other three offences which still continue to be punishable with death (viz.: treason[2], piracies that are accompanied by any act which endangers life[3], and the arson of a royal dockyard or man-of-war[4]). Yet the execution of Roger Casement for treason took place (August 3, 1916) inside the prison.

As murder is so heinous an offence, the legislature has enacted severe penalties for even mere incipient approaches to it. Thus any conspiracy to murder, though it still remains only a misdemeanor, is by statute punishable with ten years' penal servitude[5], a far higher maximum of punishment than is allowed in the case of many felonies. And every attempt

[1] Except for murderers not yet sixteen, who, instead, are "detained" during the King's pleasure. *Supra*, p. 51; *infra*, p. 489.
[2] Petit-treason is abolished. [3] 7 Wm. IV. and 1 Vict. c. 88.
[4] 12 Geo. III. c. 24, s. 1; 7 and 8 Geo. IV. c. 28, ss. 6, 7.
[5] 24 and 25 Vict. c. 100, s. 4.

to commit a murder is now made by statute[1] a felony, and is punishable with penal servitude for life.

In concluding this subject, it may be added that murder affords a noteworthy exception to the general legal rule that "criminal jurisdiction is territorial[2]." Every nation tries and punishes all crimes committed in its own territory (or on its own ships), whether committed by its own subjects or by foreigners. Conversely, on the same principle, a nation usually does not concern itself with crimes committed anywhere else, even though committed by its own subjects. But to this latter branch of the rule, homicide has been made an exception in English law, by a succession of statutes commencing as far back as Henry VIII. The enactment now in force is 24 and 25 Vict. c. 100, s. 9; under which the courts of any part of the United Kingdom may try a British subject for *murder or manslaughter* committed by him anywhere outside the United Kingdom, whether within or without the Empire, provided it were on land. The power thus does not extend to homicides committed on a foreign ship. It is immaterial whether the person killed were a British subject or not. (It may be convenient to add here that similarly Bigamy, when committed by a British subject, even in a foreign country, may, by virtue of s. 57 of the same statute, be tried in the United Kingdom.)

As regards the effect of felonious homicide upon rights of property, it should be noted that both murder and manslaughter debar the killer from receiving any benefit under his victim's Will (*Re Crippen*, L. R. [1911], P. 108). It has been said that it might be otherwise under an Intestacy, as the Statute of Distributions speaks imperatively; but cf. *Re Gray* (*The Times*, June 24, 1924), with L. R. [1915] 2 Ch. 173. A policy of insurance on the life of the victim, effected by the killer with a view to the killing, is invalid, as a fraud; 25 Beavan 605.

[1] *Ibid*, ss. 11–15.
[2] *Infra*, p. 416. *Macleod* v. *Att.-Gen.*, L. R. [1891] A. C. 455.

CHAPTER X

OFFENCES AGAINST THE PERSON THAT ARE NOT FATAL

CRIMES of this class are of two sharply distinguished types, the sexual and the non-sexual; the one springing from lust, the other from anger.

To these offences that are of the former type, a very brief reference will be sufficient for the purposes of the present volume. The mediæval English law adopted, in all their entirety, the lofty ethical teachings of Christianity as to the mutual relations of the sexes. Those teachings are, for example, strictly followed by the common law in its doctrine of contract, when deciding what agreements shall be regarded as too immoral for the courts to enforce[1].

And the same teachings were enforced by punitive sanctions in the ecclesiastical courts; a jurisdiction which, though long obsolete in practice, has never been formally abolished[2]. But the common law had no penal prohibitions of similar comprehensiveness; its criminal rules taking cognisance only of those grosser breaches of sexual morality that were rendered peculiarly odious, either by the abnormality of the form they took[3], or by the violence with which they were accompanied; aggravations to which the legislature subsequently added that of the tender age of the female concerned in them[4]; or of her near consanguinity[5]. Hence, the voluntary illicit intercourse of the sexes, even though it take the form of mercenary prostitution or of an adulterous violation of marital legal rights, furnishes no ground for a criminal indictment. Such a limitation of the sphere of penal law, like the

[1] Anson on Contracts, Part II. VII. 1 (16th ed. p. 249).
[2] Stephen, *Dig. Cr. Law*, Art. 170; *Hist. Cr. Law*, II. 396–429. See the authorities cited *arguendo* in *Phillimore* v. *Machon*, L. R. 1 P. D. 481.
[3] Stephen, *Dig. Cr. Law*, ch. XVIII. [4] *Ibid.* ch. XXIX.
[5] Punishment of Incest Act, 1908; 8 Edw. VII. c. 45.

modern abandonment of the ecclesiastical courts' penalties, is abundantly justified by the considerations, which have been already set out[1], that distinguish those injurious acts that can prudently be repressed by criminal sanctions, from such as will more fitly be left to be restrained by the penalties of social opinion and of religion.

From this class of offences against the person we may pass to those that are unconnected with sexual relations. These call for a detailed consideration. They fall readily into two groups: according as the crime does or does not leave behind it, upon the sufferer's body, some actual hurt. The former alternative must first be considered.

A. *Offences where actual bodily injury is occasioned*[2].

The present law regarding this aggravated class of crimes is entirely the creation of statutes. Wounding and maiming did, in early times, entitle the sufferer to bring an "appeal" of felony[3]; and if the appeal were successful the wrong-doer forfeited life and member. But these appeals seldom proved successful; as they were usually quashed for some technical informality; and if the appellee were then arraigned at the King's suit he received no heavier punishment than that of a mere misdemeanor– imprisonment or fine. Appeals for wounding consequently died out; though the injured parties, if unwilling to indict the offender for a mere assault, had still the alternative of a civil remedy in the shape of an action of trespass[4] to recover pecuniary damages. But subsequently, by various statutes, offences of this class have again been exposed to a more adequate punishment. The present law on the subject is, however, as Mr Justice Wright has said, "singularly fragmentary and unsystematic[5]." It is mainly to be found in the Act of 1861 consolidating the enactments that dealt with offences against the person (24 and 25

[1] *Supra*, p. 26.
[2] See Stephen, *Hist. Cr. Law*, III. 108–120; *Dig. Cr. Law*, Arts. 257–268.
[3] *Supra*, p. 19. [4] Pollock and Maitland, II. 487.
[5] *Draft Criminal Code for Jamaica*, p. 106.

Vict. c. 100). By this Act the graver offences are made felonies, the others ranking as misdemeanors. We may mention some salient instances of each class.

1. *Felonies.*

(*a*) It is a felony, punishable with penal servitude for life, unlawfully and maliciously to wound or cause any grievous bodily harm to anyone—or shoot (or even attempt to shoot) at him—*with intent* to maim, disfigure, disable, or do any other grievous bodily harm, or prevent an arrest[1].

Some of the phrases here used are so technical as to need explanation. Thus, to constitute a "wound" the continuity of the skin must be broken; *i.e.* that of both[2] skins, *cutis vera* as well as epidermis[3]. Hence a mere scratch in the latter is not a wound; nor will it even suffice that bones have been fractured if the skin is not broken also. Harm may be "caused" without personal contact: so, if *A* break his leg by jumping out of a window to avoid *B*'s threatened attack, *B* is indictable for "causing" this injury[4].

Bodily harm becomes "grievous" whenever it seriously interferes with health or even with comfort. It is not necessary that its effects should be dangerous, nor that they should be permanent[5]. The rather vague question as to whether, in any particular case, the harm done was serious enough to be classed as grievous, is for the jury to determine.

To "maim" is to do such a hurt to any part of a man's body that he is rendered less capable, in fighting, either of defending himself or of annoying his adversary.

The statutory "attempt" to shoot at a person is not made

[1] 24 and 25 Vict. c. 100, s. 18.

[2] The "three skins" of the older anatomists. Internal skin, *e.g.* in the mouth, suffices.

[3] So no injury can be a wound unless it do bleed. Thus a burn is not a "wound"; nor is a kick that causes internal hæmorrhage but breaks no skin.

[4] *Reg.* v. *Parker*, C. C. C. Sess. Pap. LIX. 393. Cf. p. 128 *supra*.

[5] Merely that "the shoulder was very much bruised" was held insufficient (C. C. C. Sess. Pap. LXXXI. 440); but harm that causes a week's confinement to bed may suffice (1 C. and D. 81). "Any bullet-wound, in any part of the body," even a finger, suffices (Avory, J.).

until some really proximate step is taken; as, for instance, that of drawing the trigger; cf. p. 81 *supra*. Hence merely to point a loaded pistol at a man (though it does amount to an "assault" on him) will not suffice for the crime we are now considering. But to pull the trigger, even though the discharge fails through a defect in the cartridge (or barely to put your finger on the trigger with the intention of pulling it, even though you be interrupted before you actually pull it), does suffice to constitute an attempt to shoot, within the statute[1].

In this crime (unlike murder, see p. 140 *supra*) the Crown must prove the Intent. But the act itself *may* afford sufficient proof. Thus, to fire maliciously a loaded pistol at short range must shew this "intent of doing grievous bodily harm" (and it may well shew an intent to murder).

The wording of the statute does not make it necessary that the person whom it was intended to harm should be the one actually harmed.

(*b*) It is a felony, punishable with penal servitude for ten years, unlawfully and maliciously to administer any poison or other noxious thing to anyone so as thereby to endanger his life or inflict upon him grievous bodily harm[2].

2. *Misdemeanors.*

Each of the three following statutory misdemeanors is punishable with five[3] years[4] penal servitude.

(*a*) Unlawfully and maliciously[4] wounding, or inflicting any grievous bodily harm upon, any person[5].

This offence differs from the somewhat similar felony above referred to as "1 (*a*)," in that the felony requires an actual intention to do the particular kind of grievous bodily harm, whereas in the misdemeanor it is sufficient that such harm has been done "maliciously," even though there was no intention to produce the full degree of harm that has actually

[1] *Reg.* v. *Duckworth*, L. R. [1892] 2 Q. B. 83.

[2] 24 and 25 Vict. c. 100, s. 23. [3] Not merely *three*, as sometimes stated.

[4] Hence *accident* would not suffice. [5] 24 and 25 Vict. c. 100, s. 20.

been inflicted. Here we again meet with "that most unsatisfactory of all expressions[1]"—*malice*. But the "malice" required here is something narrower than that vague general idea of a wicked state of mind which the word usually denotes at common law[2], as in cases of homicide or in the phrase "mute of malice[3]." For in *statutory* wrongs the word "malice" is presumed to have been employed by the legislature in a precise sense; so as to require a wickedness which included an actual intention to do an injury, and, moreover, an injury of the same kind as that which in fact was done. Thus the intention to injure a man's body is not such malice as will support an indictment for malicious injury to his property; and similarly *vice versâ*. Accordingly if a stone aimed at a person misses him, but crashes through a window, the thrower will not necessarily be guilty of "maliciously" breaking this window[4]. And, similarly, had the stone been flung at the window, and then intercepted on its flight by the head of someone who unexpectedly looked out of the window, the thrower would not necessarily have committed a "malicious" injury to this person. In either of these two cases, however, there would be a sufficient "malice," if the man who threw the stone in the desire of doing the one kind of harm, knew that it was likely that the other kind might be done, and felt reckless as to whether it were done or not, though not desiring it[5].

But if the harm done be of the *kind* intended, this is sufficient; even though it be produced in some degree, or in some manner, or upon some subject, that was not intended. Thus where a soldier aimed a blow at another man with his

[1] Prof. E. C. Clark, *Analysis of Criminal Liability*, p. 82. "One of the most perplexing legal terms;...continually used in conflicting senses" (Bigelow on Torts, § 35).

[2] Cf. 2 Ld. Raymond 1485.

[3] *Infra*, p. 473. Yet it is not so narrow as the popular sense of "spite"; any more than it is in the definition of Murder (see p. 134 *supra*).

[4] *Reg.* v. *Pembliton*, L. R. 2 C. C. R. 119 (K. S. C. 157). Similarly, if a horse be hurt by a shot aimed at its rider: 1 C. and D. 188.

[5] *Re Borrowes*, Ir. L. R. [1900] 2 K. B. 593.

belt, but the belt bounded off and struck a woman who was standing by, and cut open her face, he was held guilty of maliciously wounding her[1].

Much confusion hangs around the three cognate words—Malice, Intention, Purpose[2]. Clearly "purpose" always involves the idea of a desire. So, also, in popular parlance does "intention"; for a man is not ordinarily said to "intend" any consequences of his act which he does not desire but regrets to have to run the risk of[3] (*e.g.* when he shoots at an enemy, though seeing that a friend is close to the line of fire). Yet in law it is clear that the word "intention," like the word "malice," covers all consequences whatever which the doer of an act foresees as likely to result from it; whether he does the act with an actual desire of producing them, or only in recklessness as to whether they ensue or not[4]. The fact that he had means of knowing[5] a consequence to be likely, raises a *primâ facie* presumption that he did actually foresee it as being so. There is such a great difficulty in obtaining any evidence to rebut this presumption, as usually to render it practically equivalent to a conclusive one[6].

Accordingly, to give legal proof of malice is less difficult than might theoretically have been expected. If the act was unlawful, and done with a bad motive, and was at all likely to cause injury of the kind that did in fact result, there is enough *primâ facie* proof of "malice" to warrant a conviction. Thus, where *A* was engaged in shooting wild-fowl, and *B* fired a gun in the direction of *A*'s boat with the mere object of frightening *A* so as to make him give up his sport, but, owing to the boat's being suddenly slewed round, the shot

[1] *Reg.* v. *Latimer*, L. R. 17 Q. B. D. 359 (K. S. C. 144).

[2] The reader should study Sir J. Salmond's exposition (*Jurisprudence*, chs. XVII., XVIII., XIX.).

[3] Prof. E. C. Clark's *Analysis of Criminal Liability*, pp. 73, 78; Markby's *Elements of Law*, s. 222. And see above, p. 135.

[4] *Reg.* v. *Welch*, L. R. 1 Q. B. D. 23. Cf. Mr Justice Wright's *Draft Criminal Code for Jamaica*, pp. 3, 98; Austin, Lecture XXI.

[5] As to "Knowledge," see p. 255 *infra*.

[6] But it is *not* conclusive. See p. 333 *infra*.

actually struck *A*, it was held that there was sufficient evidence of malice on the part of *B*[1]. And where *A*, merely in order to frighten *B*, pointed at him a gun which he knew to be loaded, and then, in consequence of *B*'s own act in seizing the muzzle, the gun accidently went off and shot *B*, it was held by Wills, J.[2], that there was a sufficiently "malicious" wounding.

Unlawfully inflicting grievous bodily harm *without* (strict statutory[3]) "malice," is not known to the law as a specific offence; and can at most be dealt with as a mere form of assault. If it were inflicted by mere *negligence*, however gross, it probably, in *criminal* law, is not even an assault[4]; and thus is no offence at all, unless death results from it[5]. The quack, who makes his patient lose a limb or an eye, is only liable civilly and not criminally.

The question as to what kind of causation will suffice to constitute an "inflicting" shall be considered later on[6].

(*b*) Occasioning actual bodily harm by an assault[7].

The reason of the framers of the Act of 1861 for separating this offence from that last described (viz. "2 (*a*)") is not obvious; especially as they both entail the same punishment. Indeed, "occasioning actual bodily harm by an assault" would seem a description wide enough to include all the acts covered by 2 (*a*); unless "inflict" be taken to have been used by the legislature as a wider word than "assault," and as capable of including the production of harm by some indirect and protracted chain of causation, *e.g.* by poisoning (see p. 151), or infecting with disease. Arguments of great force have been used in favour of this wide construction[8]. And we may add to them that in *Reg.* v. *Halliday*[9] the Court for Crown Cases Reserved held that grievous bodily harm had

[1] *Reg.* v. *Ward*, L. R. 1 C. C. R. 356.
[2] Cambridge Assizes, Oct. 1899.
[3] *Supra*, p. 148.
[4] *Infra*, p. 159. *Reg.* v. *Latimer*, L. R. 17 Q. B. D. 359 (K. S. C. 144).
[5] Or unless it were negligence in managing a "vehicle"; see p. 151 *infra*.
[6] *Infra*, p. 151.
[7] 24 and 25 Vict. c. 100, s. 47.
[8] See *per* Hawkins, J., in *Reg.* v. *Clarence*, L. R. 22 Q. B. D. at p. 49.
[9] 61 *Law Times*, 699. Cf. 7 Cr. App. R. 197; and L. R. 8 Q. B. D. 54.

been "inflicted," where the defendant had merely frightened a woman so that she jumped from a window and was hurt; and this frightening, though an "assault" in the old technical meaning of that word was no assault in the modern sense of a "battery." But in *Reg.* v. *Clarence*[1], when the majority of the Court held that the communication of venereal disease by a husband (even though he knew of it) to his wife (even though she did not know of it) was no assault, inasmuch as there was consent to the contact, they decided that it consequently was not an "*inflicting* of grievous bodily harm"; on the ground that they considered that an "inflicting" must be by assault and battery[2] and requires a direct and immediate causing of the harm.

(*c*) Unlawfully and maliciously administering to anyone any poison or other noxious thing with intent to injure, aggrieve, or annoy him[3].

If the thing administered be a recognised "poison," it seems probable that the offence would be committed by giving even a quantity so small as to be incapable of doing harm[4]. But if it be not a poison, and be "noxious" only when taken in large quantities (as, for example, castor-oil or ardent spirits), the offence will not be committed by giving a person only a small dose of it.

A misdemeanor less severely punishable (viz. only by two years' imprisonment with hard labour), is committed when any person having the charge of any carriage or vehicle (for instance, a bicycle) causes bodily harm to any one by wanton or furious driving, or racing, or other wilful misconduct, or even merely by wilful *neglect*[5].

[1] L. R. 22 Q. B. D. 23. Cf. *Hegarty* v. *Shine*, 14 Cox 145.
[2] Wills, J., at p. 37; Stephen, J., at p. 41; Pollock, B., at p. 62.
[3] 24 and 25 Vict. c. 100, s. 24.
[4] See *per* Field, J., and Stephen, J., in *Reg.* v. *Cramp*, L. R. 5 Q. B. D. 307; a case arising upon similar words in a different statute.
[5] 24 and 25 Vict. c. 100, s. 34. "'Wilfully' means deliberately, not by inadvertence" (Lord Russell, L.C.J., 47 W. R. 369). It has been held by Acton, J. (C. C. C., April 19, 1923) that the driver's neglect must be of the criminal, *i.e.* wicked, degree (cf. *supra*, p. 122).

B. *Offences in which actual bodily harm is not essential.*

An "assault" is an unlawful attempt, or offer, to do with violence a corporal wrong to another person[1]. A "battery" is such a wrong actually done to him in an angry, revengeful, rude or insolent manner. In other words, an assault is a movement which attempts, or threatens, the unlawful application of force[2] to another person; whilst such an application itself, when actually effected, constitutes a battery. Thus riding *at* a person is an assault, riding *against* him is a battery. Even a mere assault, without any battery, is not only a tort but also a misdemeanor. Hence if a battery ensue, it does not enhance the degree of the crime; though it is important as affording clear proof of the hostile intention of the movements which constitute the assault. Usually, of course, both the two offences are committed together; and the whole transaction is legally described as "an assault and battery." This became shortened in popular language to "an assault"; and now the current speech even of lawyers habitually uses that word as if inclusive of "battery."

Even in a battery, no actual harm need be done or threatened. The slightest force will suffice, if it were exercised in a hostile spirit; thus merely spitting on a person may amount to an indictable battery[3]. The force applied (or threatened) need not involve immediate contact of the assailant with the sufferer. Thus it is sufficient if harm is done (or threatened) to a person's clothes without touching his skin. And, similarly, the hostile force may be exercised either directly or even indirectly; as by striking a horse and

[1] An assault committed in a *public* place becomes an "Affray." For an assault without a battery, see *Smith* v. *Newsam* (3 Keble 283).

[2] The learned editors of Russell on Crimes consider (p. 839) that "force" here includes light, heat, gas, electricity, or odour.

[3] A MS. in the British Museum records an action of assault brought in 1693 against a tavern-keeper whose servants had refused to let the plaintiff leave until he paid his bill. Lord Holt declared the detention illegal; "but ordered *small* damages."

thereby making it throw its rider[1], or by breaking the ice just in front of a skater[2].

To deprive another person of his liberty will usually involve touching or threatening to touch him; and thus the tort of false imprisonment usually involves an obvious assault. And even though the force used for that tort do not involve any threat of contact, it is held still to amount to an assault civilly; and, if the assailant knew himself to be acting wrongly, to an indictable assault[3]. Some bodily *movement* is essential to an assault or battery; so that supposing you only offer mere motionless obstruction, acting as if you were "a door or a wall[4]"—as where a cyclist is brought down by collision with a person who only stands still, however wilfully, in front of him—no proceedings can be taken for assault. (The much graver offence of "maliciously causing grievous bodily harm," may, however, have been committed.) Similarly, mere words, however threatening, can never make an assault[5]. Yet they may *un*make an assault; as in a case where a man laid his hand menacingly on his sword, but at the same time said, "*If it were not assize time*, I'd run you through the body[6]."

Alarm is essential to an assault. Hence if a person who strikes at another is so far off that he cannot by possibility touch him, it is certainly no assault. And it has even been said that to constitute an assault there must, in all cases, be

[1] *Dodwell* v. *Burford*, 1 Mod. 24.

[2] Stephen's *Digest*, art. 241 n. Similarly in *Rex* v. *Jolly* (S. A. L. Rep. 1923, 176) the Supreme Court of South Africa held that a "battery" had been committed when *J* so tampered with a railway line as to secure the derailment of the next train, several hours later, and a consequent hurt to the engine-driver.

[3] *E.g.* where an accoucheur was locked into the patient's room, lest he should depart before her child was born; C. C. C. Sess. Pap. CXLI. 577. But a doubt was there expressed as to the *criminality* of an imprisonment inflicted in a *bonâ fide*, though erroneous, belief of right, *e.g.* in a wrongful arrest.

[4] *James* v. *Wylie*, 1 C. and K. at p. 263.

[5] Thus the alarming utterance which caused "weeks of physical suffering" in *Wilkinson* v. *Downton* (L. R. [1897] 2 Q. B. 57) was no assault.

[6] *Tubervile* v. *Savage*, 1 Mod. 3

the means of carrying the threat into effect[1]. Accordingly, whilst pointing a loaded pistol at a person is undoubtedly an assault, it was held, in *Reg.* v. *James*[2], that it was no assault to present an unloaded one. But in an earlier case, *Reg.* v. *St George*[3], it was held, on the contrary, that if a person presents a firearm which he knows to be unloaded, at a man who does not know that it is unloaded, and who is so near that (were it loaded) its discharge might injure him, an assault is committed. This latter view, which makes the offence depend upon the alarm naturally (however mistakenly) aroused in the person threatened, is in accord with the Scotch law[4]; and it agrees with the predominance of authority in America, where this question has much more frequently arisen than in this country[5].

Poisoning, where the poison (as is usually the case) is taken by the sufferer's own hand, does not constitute an assault[6]. A contrary view was at one time taken here; and is still favoured in America[7]. But it is essential to an assault that there should be a personal exertion of force by the assailant. If therefore the actual taking up of the glass was the act of the person poisoned, there is no assault[8]; even though he took it in consequence of the poisoner's false representation that it was harmless. The further argument has been urged, that poison, unlike an ordinary "battery," takes effect internally instead of externally, and acts chemically instead of mechanically.

[1] *Per* Tindal, C. J., in *Stephens* v. *Myers* (1830), 4 C. and P. 349.

[2] (1844), 1 C. and K. 530.

[3] (1840), 9 C. and P. 483 (contrast 626). So Comyn's *Digest* tit. Battery, A. *n* r.

[4] 1 Broun 394; and with Queensland law (Q. L. R. 1911, p. 206).

[5] See, for the liability, *Commonwealth* v. *White*, 100 Mass. 407; and, against it, *State* v. *McKay*, 44 Texas 43. In 1891 the Supreme Court of New South Wales pronounced *for* the liability (12 N. S. W. 113); though in 1870 it had decided against it (9 S. C. R. 75).

[6] See *Reg.* v. *Clarence*, L. R. 22 Q. B. D. at p. 42.

[7] *Commonwealth* v. *Stratton*, 114 Mass. 303.

[8] But there will be a statutory offence (see pp. 147, 151) of "administering poison."

The exercise of force against the body of another man is not always unlawful[1]. The principal occasions on which it is legally justifiable (provided that no more force is used than is proportionate to the immediate need) are the following:

(1) In the furtherance of public authority; as in preventing a breach of the peace, or arresting[2] a felon, or executing any process issued by a court of law, or forcibly feeding a "hunger-striking" prisoner (26 T. L. R. 139). This has been already sufficiently considered in Homicide[3].

(2) In correcting your children, or the scholars or apprentices who have been placed under your authority. This right has also been already considered[4].

(3) In defending either (*a*) your person, or (*b*) your existing lawful possession of any property (whether it consist of lands or merely of goods).

"Nature prompts a man who is struck to resist; and he is justified in using such a degree of force as will prevent a repetition" (Parke, B.). Nor is it necessary that he should wait to be actually struck, before striking in self-defence. If one party raise up a threatening hand, then the other may strike. Nor is the right of defence limited to the particular person assailed; it includes all who are under any obligation, even though merely social and not legal, to protect him. The old authorities exemplify this by the cases of a husband defending his wife, a child his parent, a master his servant, or a servant his master[5] (and perhaps the courts would now take a still more general view of this duty of the strong to protect the weak[6]). A familiar modern instance is the force exercised by the stewards of a public meeting to remove those who persistently disturb it.

[1] Cf. *supra*, pp. 102–111.

[2] But any *unnecessary* handcuffing would be an assault; 3 D. and R. 300.

[3] *Supra*, p. 103.

[4] *Supra*, p. 109. It was upheld in 1910 for an apprentice as old as seventeen; *McGee* v. *Robinson* (*The Times*, Nov. 30, 1910).

[5] Cf. p. 103 n. 7 *supra*; *Reg.* v. *Rose*, 15 Cox 540 (K. S. C. 140).

[6] Cf. L. R. 2 C. C. R. 178; 11 Mod. 242; 1 East P. C. 292; and *Stanley* v. *Commonwealth* 9 Am. State Rep. 305. See p. 103 *supra*.

But the justification covers only blows struck in sheer self-defence and not in revenge. Accordingly if, when all the danger is over and no more blows are really needed for defence, the defender nevertheless strikes one, he commits an assault and battery[1]. The numerous decisions that have been given as to the kind of weapons that may lawfully be used to repel an assailant, are merely applications of this simple principle. Thus, as we have already seen[2], where a person is attacked with such extreme violence that his very life is in danger he is justified in even killing his assailant. But a mere ordinary assault must not be thus met by the use of firearms or other deadly weapons[3]. And, similarly, a knife is not usually a proper instrument of self-defence, but must only be employed where serious bodily danger is apprehended, or where a robbery (*i.e.* a theft *by violence*) is to be prevented[4]. Hence it is unjustifiable for a man to use it where the attack upon him is made with a mere strap[5]. It should, however, be noted that where more force than was necessary has been used for self-defence, the case is not to be treated as if all the force employed had been illegal. The fact that part of it was justifiably exerted may, for instance, have the effect of reducing a charge of "wounding with intent to do grievous bodily harm" to one of mere unlawful wounding.

The right of self-defence extends, as we have said, to the defence not only of your person but also of your property. Thus force may lawfully be used in expelling anyone who is trespassing in your house, or on your land (or even on a railway-carriage *reserved* for you)[6], if no milder mode of getting rid of him would avail. Hence if his entry had itself been effected forcibly, as by a burglary or even by breaking open a gate, you may at once use force to expel him[7]. But

[1] *Reg.* v. *Driscoll*, C. and M. 214 (K. S. C. 151). [2] *Supra*, p. 103.
[3] *Osborn* v. *Veitch*, 1 F. and F. 317 (K. S. C. 150).
[4] *Reg.* v. *Headley*, 1 F. and F. 91 (K. S. C. 150).
[5] Or to repel with a razor an attack by the mere fist: 4 Cr. App. R. 51.
[6] Cf. L. R. [1915] 1 K. B. 1.
[7] *Green* v. *Goddard*, 2 Salk. 641 (K. S. C. 147).

in the case of an ordinary peaceful trespasser, it will not be until you have first requested him to depart, and he has failed to comply with the request, that you will be justified in ejecting him by the strong hand. Disturbance of an easement is a wrong in the nature of a trespass, and therefore force may similarly be used to prevent it[1].

A similar right exists in the case of movable property. Force may accordingly be used to resist anyone who attempts to take away your goods from you[2]. And there is modern authority[3] for saying that force may even be used to *recapture* your goods, after they have been actually taken out of your possession. In the case of real property this right to recover by force certainly does not exist. Under an Act of Richard II. (A.D. 1381) a landlord commits an indictable offence by "forcibly entering" a house, although it is his own, if any full (though unlawful) possessor is excluding him[4]. For real property, unlike personal, is in no danger of being meanwhile destroyed, or lost, if the owner waits to sue at law for it.

(4) There is, again, a legal justification for the trifling degree of force involved in those petty instances of contact which inevitably arise in the ordinary social intercourse of everyday life; such as tapping a friend's shoulder to attract his attention, or jostling past one's neighbour in a crowd. But, to be thus justifiable, these acts must be done *bonâ fide*[5], and with no unusual vehemence.

(5) There is, further, a justification for acts that are done by consent of the person assaulted; unless the force be a breach of the peace, or be causelessly dangerous. *Volenti non*

[1] Or to defend your due precedence in a procession. *E.g.* contest between a D.D.'s wife and a J.P.'s wife; *Ashton* v. *Jennings*, 2 Levinz 133.
[2] *Bird* v. *Jones*, L. R. 7 Q. B. D. 742.
[3] In *Blades* v. *Higgs* (11 H. L. C. 621) the House of Lords seems to have tacitly accepted this doctrine; cf. Halsbury, XXVII. 868. Yet see Pollock on Torts, 12th ed. p. 393.
[4] *Newton* v. *Harland*, 1 M. and G. 744; cf. L. R. 17 Ch. D. at p. 188.
[5] A man was indicted at the Central Criminal Court in 1925 (June 18) for an assault on his former fiancée, though her utmost charge was "He caught hold of my coat and said he wanted a few words with me." Sankey, J., left it to the jury; but only as "a very, very small matter." They acquitted.

fit injuria. Hence seduction is no assault, either in the law of crime or even in that of tort.

But the consent must be given freely (*i.e.* without force, fear or fraud), and by a sane and sober person, so situated as to be able to form a reasonable opinion upon the matter to which consent is given[1]. "Fraud vitiates consent"; if the fraud relate to a fundamental Fact[2], like the identity of the deceiver, or the nature of the assault. Accordingly an impostor who, by pretending to be a surgeon, induces an invalid to submit to be operated upon by him, will be guilty of assault, notwithstanding the consent which was nominally given. As regards the mental capacity to consent, it may be mentioned that, in the case of indecent assaults, the legislature has established a definite rule as to age, by enacting that consent given by a child of either sex under sixteen years of age shall not constitute a defence[3]. And, again, even the most complete consent, by the most competent person, will not suffice to legalise an assault which there are public grounds for prohibiting. Thus consent is no defence, criminally[4], for any assault that involves some extreme and causeless injury to life, limb, or health; or even one that constitutes a mere breach of the peace. If, therefore, one of the parties to a duel is injured, his consent is no excuse. Yet it is uncertain at what degree of danger the law thus takes away a man's right to consent to be placed in situations of peril (as for instance, by allowing himself to be wheeled in a barrow along a tight-rope[5]). But in the case of a surgical operation carried out by a competent surgeon, however great be the risk, there will usually be adequate cause for running it; and so the

[1] For a Submission is not always a Permission.

[2] But error as to a matter of law does not vitiate consent, *e.g.* imagining that a policeman has a right to strip naked a person whom he has arrested; 12 Cox 91.

[3] Criminal Law Amendment Act, 1922, s. 1.

[4] *Reg.* v. *Coney*, L. R. 8 Q. B. D. 534. *Supra*, p. 110. For the (disputed) effect of such consent upon the *civil* liability, see Pollock on Torts, ch. IV. s. 10; Kenny's *Cases on Tort*, p. 157; Beven on Negligence, I. 111.

[5] But as to *juvenile* acrobats, see the Children's Dangerous Performances Acts, 1879 and 1897.

patient's consent will be full justification for what would otherwise be an aggravated assault. And even injuries which are occasioned in the course of a mere game, if it be a lawful one and be played with due care, are not regarded as causeless[1].

These rules as to the amount of violence which constitutes an assault, and as to the circumstances which will excuse that violence, hold equally good in the law of tort and in the law of crime. But those two branches of law differ in their rules as to the state of mind which will render a man liable for the exercise of such violence as has been shewn to be a forbidden act. In actions of tort, either intention or even mere negligence[2] (as where a waiter clumsily upsets over a customer a boiling teapot) will—if the degree of negligence be adequate—suffice to render the wrong-doer liable to damages. But an assault will not render a man liable to criminal punishment unless it were committed with actual intention[3].

We have, however, seen (*supra*, p. 151) that bodily harm done by the wrongful *driving of a vehicle* may be criminal though caused by "wilful neglect" only.

The following assaults are statutory misdemeanors, punishable with the statutory penalty of imprisonment with hard labour for two years, or a fine, viz.:

1. Assault with intent to commit a felony[4].

2. Assault with intent to prevent the lawful apprehension either of the assailant himself or of any other person[5].

3. Assault upon a constable in the execution of his duty, or upon any person acting in aid of such constable[6].

4. Indecent assault upon a female[7].

Even a mere common assault is also an indictable

[1] *Supra*, p. 109. Cf. Deiser's Yearbook of 12 Ric. II. p. 125.

[2] *Weaver* v. *Ward*, Hobart 134; yet see Bigelow on Torts, 7th ed. § 374.

[3] *Ackroyd* v. *Barett*, 11 T. L. R. 115. Cf. *Commonwealth* v. *Adams*, 114 Mass. 323. In India, in the United States (Wharton's *Criminal Law*, Bk. IV. ch. VIII.), and in Scotland (Macdonald's *Criminal Law*, p. 154), negligence is similarly held to be not sufficient to make assaults criminal.

[4] 24 and 25 Vict. c. 100, s. 38. [5] *Ibid.* [6] *Ibid.*

[7] *Ibid.* s. 52. But an indecent assault on a male, although it is only a misdemeanor, can be punished by ten years' penal servitude (s. 62).

A question arises which has caused differences of opinion. Is an indecent

misdemeanor, punishable on indictment by imprisonment for one year with hard labour, or by a fine[1].

The person assaulted has usually also the option of prosecuting the offender summarily before a court of petty sessions. For though an assault must be dealt with by indictment if it either (i) involves the title to lands[2], or (ii) is accompanied by an attempt to commit a felony, yet in ordinary cases of assault the offender may be summarily convicted, without a jury, before two justices of the peace. Still the maximum penalties that such a court can inflict are only:

(*a*) Nine months' imprisonment with hard labour: for assaulting a constable in the execution of his duty, after having been recently convicted of a similar assault[3].

(*b*) Six months' imprisonment with hard labour, or a fine

i. of £20 for assaulting a constable in the execution of his duty[4],

ii. of £50[5] for assaulting a boy under fourteen, or any female; if the assault is of an aggravated nature[6].

act essential to this offence, or does it suffice that an assault, decent in itself, was committed with an indecent *aim*? The former view was taken by the Supreme Court of New South Wales (*Reg.* v. *Culgan*, 19 N. S. W. 160); who held it not sufficient that the accused had "tried to drag" the prosecutrix to a place where he could have intercourse with her; and by that of South Africa (*Rex* v. *Abraham*, C. G. H. [1918] 590). But the contrary view was adopted by the Supreme Court of Ontario (*Rex* v. *Chong*, 32 Ontario 66); they holding that "an indecent assault is an assault which has in it *an element* of indecency," even a merely mental one. I can find no English authority upon the question, except that of Lord Esher (then Brett, J.) in the case of Col. Valentine Baker (*The Times*, July 30 and Aug. 3, 1875). He took the Canadian view, by instructing the grand jury that "If a man kisses a young woman against her will, and with feelings of carnal passion and with a view to gratify his passions or to excite hers, that would be an Indecent Assault. The kisses of young people in seasons of universal gaiety are not indecent, but kisses given by a man under the influence of carnal passion are indecent."

[1] 24 and 25 Vict. c. 100, s. 47.

[2] *Ibid.* s. 46.

[3] 34 and 35 Vict. c. 112, s. 12.

[4] *Ibid.* Even though not knowing him to be a constable: 73 J. P. 176.

[5] Under the Criminal Justice Act, 1925, s. 39. By this Act the offender, in (*b*) ii and in (*c*), may be *also* bound over.

[6] Aggravated, not by its indecency but by its violence.

(*c*) Two months' imprisonment with hard labour, or a fine of £5, for a common assault. The justices in this instance can summarily convict only when the complaint has been made by (or, as in the case of children assaulted, on behalf of) the very person assaulted; and not merely by the police[1]. For a resort to this summary procedure takes away the aggrieved party's right of civil action.

By 41 Vict. c. 19, any court which convicts a husband (either summarily or not) of an aggravated assault on his wife may, if satisfied that her future safety is in peril, make an order that she shall no longer be bound to cohabit with him; and may also make an order for her maintenance. The first-mentioned order will have the effect of a judicial separation[2]. The word "aggravated," in this enactment, is not limited to the various statutory aggravations of assaults.

A striking illustration of the increased orderliness of the people, probably due to the diminution of drunkenness, is afforded by the fact that the number of petty assaults summarily prosecuted in 1923 was little more than half what it had been twenty years previously; though the population had meanwhile increased greatly. Despite a corresponding increase the number of violent robberies, which in 1857 was 625, was only 151 in 1923.

[1] But in proceedings under s. 43 for "aggravated" assaults on females or boys, the right of prosecution is not thus limited. The legislature had wife-beaters in view; and realised that injured wives are often too ready to forgive. Similarly in Ireland, where injured persons are less ready to prosecute, justices may (by 25 and 26 Vict. c. 50, s. 9) try cases of assault even when the party assaulted declines to complain.

In Cambridge, on the other hand, the Proctors and their men enjoy exemption from all summary jurisdiction of justices, in respect of assaults committed by them "in the exercise of the authority of the Proctor"; though the person assaulted may still proceed by indictment or by civil action: Cambridge Award Act, 1856, s. 7. This enactment arose from fines having been imposed upon a Proctor and two of his men, by the borough justices, on Dec. 3, 1850.

[2] But not of a *Divorce*; neither party can marry anyone. These orders have been made very freely (4476 in 1922); and have resulted in much immorality.

CHAPTER XI

ARSON AND OTHER MALICIOUS INJURIES TO PROPERTY

PASSING from crimes against the Person to crimes against Property, our discussion of the various offences which violate rights of ownership ought to begin with those groups which centre round two ancient crimes of peculiar heinousness—Arson and Burglary—whose historical importance can be traced to the peculiar sacredness which early English law attached to men's habitations. For a dwelling-house was regarded as being its occupier's "castle and fortress, as well for his defence against injury and violence, as for his repose. *Domus sua cuique est tutissimum refugium*[1]." Hence to set fire wilfully to the humblest cottage is still a heinous felony; though to set fire equally wilfully to some unique picture or some priceless tapestry is at most a misdemeanor, and at common law was no crime at all.

This felony of Arson (so called from the Latin *ardeo*, I burn) was at one time punished with the terrible retaliation of death by burning[2]. Yet to destroy a house in any other manner than by fire was not regarded by the common law as a criminal offence at all. The legislature has, however, now supplied this omission by making it a felony *riotously* to demolish a house[3] and a misdemeanor *riotously* to damage[4] one; and more generally, apart from any riot, by rendering the doing of malicious injury to any property—whether a house or not—a crime. That crime is punishable in some cases as an indictable misdemeanor and in others as a mere petty offence, according to the amount of damage done; see p. 166.

[1] *Semayne's Case* [A.D. 1604], 5 Coke 91.
[2] Britton, I. 41.
[3] 24 and 25 Vict. c. 97, s. 11.
[4] *Ibid.* s. 12.

Arson at common law was defined as "the malicious and wilful burning of the house or outhouse of another man." The requirement of malice suggests the remark that arson seems to have been one of the earliest crimes in which the mental element was emphasised. "At a very early time, men must distinguish between fires that are, and fires that are not, intended[1]." So far back as the days of Bracton[2] it was already settled that "Incendia fortuita, vel per negligentiam facta, et non malâ conscientiâ, capitali sententiâ non puniuntur; quia civiliter agitur contra tales."

In limiting the crime to the burning of the house of "another man," attention was concentrated on the interference with the rights, not of the owner, but of the immediate occupier. Hence, if a tenant were actually in lawful possession of a house, even though his tenancy was to last no longer than for the single day, he would commit no arson by burning the house down. And, on the other hand, his landlord (though the owner of the house) would commit arson if he burned it whilst it was still in the occupation of the tenant.

But the common law definition no longer holds good. It has been superseded by the somewhat different language adopted in various statutes dealing with arson, which are now consolidated by the Malicious Injuries to Property Act, 1861[3].

Arson under this enactment is now the felony of unlawfully and maliciously setting fire to buildings or to certain peculiarly inflammable kinds of other property. The possible punishments vary. In one extremely rare class of cases arson is still (nominally) punishable with death, under statute law; viz. when it consists in setting fire to a King's ship or dockyard[4].

The next most heinous class of cases are those in which

[1] Pollock and Maitland, II. 491.
[2] Fo. 146 b.
[3] 24 and 25 Vict. c. 97. See Stephen, *Dig. Cr. Law*, Arts. 417–421.
[4] 12 Geo. III. c. 24, s. 1 (Dockyards Protection Act); 7 and 8 Geo. IV. c. 28, ss. 6, 7.

penal servitude for life may be inflicted; viz. the offences of setting fire to: (1) a church[1], railway station[2], public building[3], stack[4], coal mine[5], or ship[6]; (2) a dwelling-house when any person is therein[7]; and (3) almost any kind of building if the act be done with intent of injuring or defrauding any person[8]. But for setting fire to any building under any other circumstances than those above mentioned[9], or for setting fire to crops or plantations[10], the maximum penalty is only penal servitude for fourteen years.

It will be seen that the statutory law of arson is far wider than was the common law doctrine. The crime is no longer confined to houses and outhouses; and moreover it may be committed even by a person who is in possession of the thing burned.

Two of the statutory phrases call for comment—the "maliciously" and the "setting fire to."

(*a*) "*Maliciously.*" Burning a house by any mere negligence, however gross it be, is, as we have seen[11], no crime (an omission in our law which may well be considered as deserving the attention of the legislature). Even the fact that this gross negligence occurred in the course of the commission of a felonious act will not suffice to render the consequent burning-down indictable as an arson. For in any statutory definition of a crime, "malice" must, as we have already seen[12], be taken—not in its vague common law sense as a "wickedness" in general, but—as requiring an actual intention to do the particular kind of harm that in fact was done (or at least a recklessness as to doing it)[13]. Consequently, if a criminal, when engaged in committing some burglary or

[1] 24 and 25 Vict. c. 97, s. 1. [2] *Ibid.* s. 4. [3] s. 5.
[4] s. 16. [5] s. 26. [6] s. 42.
[7] s. 2. [8] s. 3. [9] s. 6. [10] s. 16.
[11] *Supra*, p. 163. *E.g.* if a smoker thoughtlessly throws away his match against a stack.
[12] *Supra*, p. 148; *Reg.* v. *Pembliton*, L. R. 2 C. C. R. 119 (K. S. C. 157).
[13] On the other hand it is not limited to, nor does it require, any ill-will to the person injured; cf. p. 134 *supra* and p. 169 *infra*.

other felony, negligently sets fire to a house, he usually will not be guilty of arson[1]. He would, however, be so in those rarer cases where the original crime he was engaged in was itself an act of burning, such as he would know to be likely to result in producing an arson. For a man is responsible for all the foreseen consequences of his acts. Thus under the old common law, if a man by wilfully burning his own house (which *then* would not be arson), accidentally burnt the closely adjacent house of a neighbour, he might be guilty of arson; since in such a case the law would raise a *primâ facie* presumption of malice from the manifest obviousness of the danger. But it must not be supposed that everyone who has maliciously set fire to some article which it is not arson to burn, will necessarily become guilty of arson if the fire should happen to spread to an arsonable building. For if a man mischievously tries to burn some chattels inside a house, and, quite accidentally and unintentionally, sets fire to the house thereby, this is not an arson of the *house*[2]. And even if his setting fire to the chattels inside the building was intrinsically likely to result in setting fire to the building itself, he still will not necessarily be guilty of arson of it. For it is essential to arson that the incendiary either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so[3].

(*b*) The statute speaks of "setting fire to" houses, where

[1] *Reg.* v. *Faulkner*, 11 Ir. Rep. C. L. 8 (K. S. C. 152).
[2] Not of the house; and not even of the chattels burned, for, though s. 7 does make it a felony to set fire to "*any* matter or thing" in (or against) a building, it does so only where the incendiary knows and disregards the danger to *the building*. *Reg.* v. *Child*, L. R. 1 C. C. R. 307; *Reg.* v. *Nattrass*, 15 Cox 73 (K. S. C. 156).
[3] *Reg.* v. *Harris*, 15 Cox 75 (K. S. C. 154). Similarly where a prisoner, indicted (under 24 and 25 Vict. c. 100, s. 32) for maliciously obstructing a railway line with intent to endanger the safety of persons travelling thereon, was found by the jury to be "guilty of the act, but with an intent, not of causing injury, but only of gaining favour with his employers by professing to discover the obstruction," this was held to amount to a verdict of Not guilty (*The Times*, July 29, 1901).

the common law required a "burning." But this appears to be a distinction without a difference; since "set fire to" is regarded as meaning not merely "place fire against," but actually "set on fire." It will be sufficient if any part of the woodwork of the building has been charred by being raised to a red heat, even without any blaze[1]; for some kinds of wood will burn away completely without ever blazing at all. But it has been held not to be sufficient that the action of the fire has scorched some of the wood to blackness, if no part of it has been actually "consumed[2]." Yet even a mere blackening of wood shews that the chemical constitution of its cell-walls has (as in the case of charcoal) undergone a change. There must consequently have been a "decomposition" (which is the test suggested by Sir James Stephen[3]), with a consequent actual loss in weight; and therefore, in fact, a "consumption" of part of the wood, though this appears to have been denied in *Reg.* v. *Russell*.

Arson was the only form of injury to property that was recognised by the common law as a crime. All other kinds of mischievous damage to it were merely trespasses; to which only a civil remedy was attached. But by statutory legislation, numerous provisions have been made for the criminal punishment of various forms of malicious injury to property.

Under the Malicious Damage Act, 1861 (24 and 25 Vict. c. 97), malicious injuries to various specified classes of property are rendered criminal offences of various degrees of guilt, ranging from that of felonies punishable with penal servitude for life (*e.g.* for destroying machinery used in textile manufactures, or textile goods exposed in process of manufacture[4]), down to offences punishable on summary conviction.

Malicious injuries to all other real or personal property, not included in these classes, are dealt with as follows:

(1) Maliciously causing damage is an indictable misde-

[1] *Reg.* v. *Parker*, 9 C. and P. 45.
[2] *Reg.* v. *Russell*, C. and M. 541.
[3] *Dig. Cr. Law*, Art. 419 n.
[4] 24 and 25 Vict. c. 97, s. 14.

meanor; and (*a*) when committed by night (*i.e.* between 9 p.m. and 6 a.m.) is punishable with penal servitude for five years, or imprisonment for two years, with or without hard labour[1], or a fine[2]; or (*b*) when committed by day, is punishable with such imprisonment, or a fine. But no person is to be sent for trial by indictment unless the committing justice considers the damage to exceed £5[3].

(2) Maliciously, or even merely wilfully[4], causing damage to any amount not exceeding £20 may be dealt with as a petty offence, punishable on summary conviction (*a*) if the damage exceeds £5, by imprisonment for three months or by a fine not exceeding £20; or (*b*) if it be only £5 or less, by imprisonment for two months or by a fine not exceeding £5.

Both in (1) and in (2) compensation may, in addition, be awarded to the party aggrieved[5].

These provisions do not extend to mischief done either (*a*) under a reasonable supposition of right[6]; or (*b*) without producing any actual harm—merely nominal damage (as in walking on a gravel path) that would suffice for an action of Tort, thus not being enough. But if the damage, though slight, is quite appreciable, the statute applies. In *Hamilton* v. *Bone*[7] a conviction was sustained for cutting blossom from a chestnut tree, though the blossom was only worth elevenpence. But a conviction was held impossible where persons,

[1] *Ibid.* s. 51.
[2] *Ibid.* s. 73.
[3] 4 and 5 Geo. V. c. 58, s. 14 (2).
[4] *Ibid.* s. 14. "Wilfulness" (*i.e.* acting "with a will") is advertent and deliberate action with knowledge that the Thing is damaged, even though there be no "malice" against its Owner. *E.g.* a dairyman waters his employer's milk, but only in order to have more to sell. *Roper* v. *Knott*, L. R. [1898] 1 Q. B. 868.
[5] 4 and 5 Geo. V. c. 58, s. 14 (1). In either case the imprisonment may be either with or without hard labour; s. 16 (1).
[6] *Ibid.* s. 14 (1). Cf. L. R. [1903] 2 K. B. 714. In Canada it has been held (7 Ontario L. R. 530), following a New Zealand decision, that the supposition excuses only when it is a mistake of Fact, not of Law; *i.e.* it must be an erroneous but honest belief in the existence of circumstances that really would, in law, have constituted a right.
[7] 16 Cox 437.

in playing football, repeatedly trespassed into an adjoining pasture to recover the fugitive ball, yet (it being winter) did no appreciable harm to the grass thereby[1]. So the familiar announcement "Trespassers will be prosecuted" is often a prophecy utterly incapable of fulfilment[2]. But where the land to which it refers is bearing such a crop (*e.g.* mowing grass) as is capable of receiving appreciable damage from the trespass, the presence of a prohibitory notice may be important as shewing the "wilfulness"—and therefore the criminality—of a trespass committed in defiance of it[3].

Moreover it must be remembered that to damage property is one thing, and to carry it off is another. Hence in *Gardner* v. *Mansbridge*[4], a conviction under the Act of 1861 for plucking wild mushrooms (though to a value of as much as two shillings) was quashed; partly upon this very ground, viz. that the Act does not regard the loss to the owner, but the damage to the realty. And here the realty itself was no worse, for sections 16–24 shew that the statute treats the fruits of realty not as being a part of the realty, but as distinct from it. (In our case of plucking blossom from a tree, part, and a cultivated part, of the freehold stood visibly mutilated.) A further ground was that, as s. 24 inflicts only one month's imprisonment for taking cultivated plants, the mere general words of s. 52, which inflicts two months' imprisonment, must not be allowed to include *un*cultivated plants. Hence to take, however wilfully and maliciously, such things as fern-roots, primrose-roots, watercresses, mushrooms, sloes, hips, nuts, blackberries, when they are growing *wild*, usually constitutes no offence under this Act. Yet where, as in the case of nuts and sloes, a shrub or underwood is concerned, the plunderer will commit a punishable offence if his depredations are so effected as to involve injury to the shrub itself. In all other

[1] *Eley* v. *Lytle*, 50 J. P. 308.
[2] Cf. Pollock on Torts, ch. IX. s. 10; Maitland's *Justice and Police*, p. 13.
[3] See *Gayford* v. *Chouler*, L. R. [1898] 1 Q. B. 316.
[4] L. R. 19 Q. B. D. 217.

cases his act is merely a civil wrong; for, even when looked at as a theft, it will fall neither within the common law[1] (which punishes no thefts of realty), nor within the Larceny Act of 1861, which does not, even under ss. 36 and 37, protect uncultivated plants. Hence the prudence of those farmers who, in fields where mushrooms are plentiful, place some spawn here and there under the turf, and put up a notice that "Mushrooms are cultivated in this field."

We have already more than once said[2] that in *statutory* wrongs of malice, there must be an intention to do the particular kind of harm that actually was done. It is scarcely necessary to point out here that, as all the offences with which we are now dealing are purely statutory, this principle applies to them with full force. It is, at the same time, provided by s. 58 of the Act, that the malice need not be against the owner of the property. And indeed, it need not be against any human being at all. It is true that on the construction of a similar statute, 9 Geo. I. c. 22, which first made it a crime "maliciously to kill or wound cattle," the judges of the eighteenth century repeatedly held it to be necessary that the wound should have been inflicted from a feeling of malice against the owner of the animal; so that spite merely against the animal itself would not suffice, even where the injury to it would necessarily violate the rights of its owner[3]. But in a modern case a man, who had in a fit of drunken spite cruelly kicked and stabbed a horse which was his own, was indicted (under 24 and 25 Vict. c. 97, s. 40) for having feloniously and maliciously wounded it[4]. It was urged that he was only liable to be convicted of a petty offence under the Act for the prevention of cruelty to animals[5]. But it was held by Lord Russell, C.J. (after consultation with Grantham, J.), that he

[1] *Infra*, p. 198.
[2] *Supra*, pp. 148, 164.
[3] 2 East's *Pleas of the Crown*, 1072–1074.
[4] *Reg.* v. *Parry* (Chester Assizes), *The Times*, July 27, 1900. Cf. *Reg.* v. Welch, L. R. 1 Q. B. D. 23.
[5] 12 and 13 Vict. c. 92, s. 2.

might be convicted of the felony. This extension of the idea of malice to cases of mere cruelty, in which a sentient creature is hurt but the rights of no human being are infringed, affords a striking instance of the advance which has taken place during the past century in the current ethical conception of man's duties towards the lower animals[1].

[1] The doctrine laid down in this decision as to the felony of wounding "cattle," under s. 40, will find more frequent application in the petty offence, under s. 41, of wounding any other animal that either is larcenable at common law or else is "ordinarily kept in a state of confinement or for any domestic purpose." The clause in inverted commas applies whenever the animal belongs to a species ordinarily so kept (*e.g.* cats) even though there is no proof that this individual was so kept; and also whenever there is proof that the individual was so kept, although those of its species (*e.g.* pheasants, tortoises, tigers) ordinarily are not. *Nye* v. *Niblett*, L. R. [1918] 1 K. B. 23. Cf. p. 222 *infra*.

Buddhist tenderness to animals causes France's Code of 1924 for the kingdom of Cambodia to impose imprisonment on any one who "uselessly" kills an elephant or horse or ox, even though it be his own property (s. 475).

CHAPTER XII

BURGLARY AND HOUSEBREAKING

In consequence of the peculiar sanctity which, as we have seen[1], the common law attaches to even the humblest dwelling-house, capital punishment was inflicted upon those guilty of the nocturnal violation of any habitation, even when little or no injury had been done thereby to the fabric. The crime of Burglary[2] is committed when anyone, in the night, either (1) breaks and enters another person's dwelling-house with intent to commit a felony therein; or (2) breaks *out of* another person's dwelling-house after having either (*a*) entered it with intent to commit a felony therein, or (*b*) actually committed a felony therein. Let us consider successively the five points in this definition; the place, the breaking, the entry, the time and the intention.

(1) *The Place.* It must, now, be a dwelling-house. Yet at common law even the outer walls of a town were protected by the same penalties which safe-guarded the townsmen's actual homes. This will not surprise any one who is familiar with the Roman treatment of city-walls as *res sanctae*; or who has learned from a visit to Berwick, or York, or Chester, the importance of the defence, against private as well as public violence, which a mediæval town derived from its circumvallation[3]. And a reverence for religious edifices led mediæval criminal lawyers to extend also to churches the full protection of the penalites which guarded a dwelling-house —an extension for which Lord Coke offers the verbal justification that "a church is the *dwelling-house* of God[4]."

[1] *Supra*, p. 162.

[2] Larceny Act, 1916 (6 and 7 Geo. 5. c. 50), s. 25.

[3] The original importance of this form is illustrated by the fact that the earliest English name of the crime was "*burgh*-breche." Its Latin name (A.D. 1200) was "burgaria." See Dr Murray's Dictionary.

[4] 3 Coke *Inst.* 64.

Much technicality has arisen in determining what buildings are to be regarded as "houses," and when a house is to be regarded as being "dwelt" in. Clearly a house must be something more than a mere caravan or tent or booth, it must be a permanent structure. But it is not necessary that it should consist of the whole of such a structure. Thus one building may contain several dwelling-houses; each single set of chambers, or even each single room, in it may be a separate dwelling-house[1]. The test of separateness is merely whether or not there is internal communication between this part of the building and the rest of it[2]. If any one occupier's part has no internal communication with other parts, it becomes a separate house. Conversely, a house is regarded as including its accessory buildings that stand outside its own walls, if only they (*a*) stand in the same curtilage[3] with the house, and (*b*) are occupied along with it, and (*c*) communicate with it either directly or at least by a covered and enclosed passage[4]. So to "break" an area gate, for the purpose of gaining admittance to the house through a door in the area, is not a breaking of the house itself[5].

But a building, although it be a "house," is not to be regarded as being "dwelt" in unless some person habitually sleeps there[6], and sleeps in it as his *home*. He must thus be a member of the household that occupies it[7]—whether as himself the possessor[8] of the house or only as one of that possessor's family or servants—and not a mere temporary licensee whose home the place is not. But though he must sleep there habitually, he need not do so invariably, *i.e.* his residence may at intervals be interrupted. For if a householder goes away from home, but with an *animus revertendi*, his house is still considered to be a dwelling, although not a single person remains in it[1].

[1] As in colleges; 3 Coke *Inst.* 65.
[2] *Rex* v. *Eyginton*, 2 B. and P. 508.
[3] The "curtilage" is the ground immediately round the house, such as passes upon a grant of the messuage without being expressly mentioned.
[4] Larceny Act, 1916, s. 46 (2). Would an underground passage suffice?
[5] *Rex* v. *Davis*, R. and R. 322 (K. S. C. 160).
[6] *Rex* v. *Martin*, R. and R. 108 (K. S. C. 161).
[7] *Rex* v. *Harris*, Leach 701 (K. S. C. 163).
[8] Even a mere tenancy-at-will suffices; 1 Cox 261.

(2) *The Breaking*. This may be either actual or constructive. It is considered as "actual" whenever the intruder displaces any part of the building or of its closed fastenings. It is therefore not necessary that there should be an actual fracture of anything. Drawing a bolt, or turning a key, or even lifting a latch will suffice. And, similarly, if a "cat burglar" climb up a rain-pipe and open a closed bedroom window, even though its sash be kept in position by nothing but its own weight, his raising the sash will amount to a "breaking[2]." So, too, will the raising of a cellar flap even though it be held down by nothing more than its intrinsic weight; or the turning of a swing window. Yet if a window or fanlight or door be already partly open, it will not be a "breaking" to open it still further[3] and gain admittance thereby. For when a householder leaves a window or a door partly open, he gives, as it were, a visible invitation to enter; but the fact of his having left it merely unbolted is not thus conspicuous to the passers-by.

But besides these so-called "actual" breakings, in which the intruder himself displaces the fastenings of the house, the definition of burglary is interpreted as extending even to cases in which the breaking is admittedly a purely "constructive" one. Such cases may arise (*a*) where the displacement has been effected by some authorised person (some innocent member of the household), or even (*b*) where there has been no displacement at all.

In (*a*) the burglar, by force or fraud, gets some inmate of the house to open it; but, though it is thus opened to him by consent, that consent is deprived of all its ordinary legal

[1] *Rex* v. *Nuthrown*, Forster 76 (K. S. C. 164).
[2] *Rex* v. *Haines*, R. and R. 451 (K. S. C. 167). But what of a window opening *laterally* (a "casement")?
[3] *Rex* v. *Smith*, 1 Moody 178 (K. S. C. 168).

effect by the way in which it was obtained. Thus if an intending burglar gains admittance to the house by threats of violence, which put the inmates into such fear that they open the door to him, there is a constructive breaking. Or, again, if, as is more common, he rings the bell like an ordinary visitor, and then, when the door is accordingly opened to him, he comes in on pretence of wanting to speak to some member of the household, this is held to be as true a breaking as if he had himself opened the door. The fraud vitiates the consent. But if a pretence thus attempted should fail to deceive (so that, though the door be opened to the evil-doer, it is opened solely for the purpose of entrapping him), the law does not regard such an opening as being in any way *his* act, and therefore does not hold it to be, even "constructively," a breaking[1].

We have said that (*b*) a constructive breaking may also occur even though nothing whatever be displaced. This occurs where the burglar comes into the house by some aperture which, by actual necessity, is permanently left open. There is thus a sufficient "breaking" if the thief comes down into the house by the chimney[2]: though there would be no breaking if he came in through a window which the builders had not yet filled with glass.

It should be added that "breaking," whether actual or constructive, need not be committed upon the external parts of the house; it will be sufficient, for instance, if an inner door be "broken." And therefore if a robber gain admittance to a house by means of an open window or door, but then, when inside, proceed to unlock a parlour-door and enter the parlour, he from that moment becomes guilty of burglary[3]. The same

[1] *Reg.* v. *Johnson*, C. and M. 218 (K. S. C. 171). Contrast with this case *Rex* v. *Chandler*, L. R. [1913] 1 K. B. 125.

[2] *Rex* v. *Brice*, R. and R. 450. Cf. the case tried at Cambridge by Sir Matthew Hale, 1 Hale P. C. 552; and an American case (*The State* v. *Donohoe*, 36 Alabama 271). In the latter, the chimney proved to be of such inadequate dimensions that the burglar stuck fast in it, and it had to be pulled down to extricate him.

[3] Cresswell, J., held it no *burglary* if, having thus entered only by an open door, he do not enter the inner room which he breaks into; C. C. C. Sess. Pap. xc. 706. But it is an indictable nocturnal entering; p. 178 *infra*.

principle holds good, of course, in the case of a servant[1] or guest who, whilst resident in the house, opens and enters any of the rooms for a felonious purpose. But whether this is to be extended to the opening of the door of a mere cupboard in the wall is very doubtful. There is certainly no burglarious "breaking" in opening the door of a mere piece of movable furniture, like a sideboard or bureau.

At common law, to break *out of* a house did not amount to a burglarious breaking. But by statute[2] it is now provided that if a person who has committed a felony in a dwelling-house—or even has entered a dwelling-house with the intention of committing a felony—shall proceed to break out of this dwelling-house by night, he is to be held guilty of a burglary. Thus while both a breaking and an entering are still necessary, either of them may now precede the other.

(3) *The Entering.* The entry may be sufficiently made by the insertion of any part of the intruder's own body, however small that part be. Thus a finger, or even a part of a finger[3], will suffice. And there may even be a sufficient entry—without any part whatever of the man himself having come into the house—by his merely inserting some instrument which he is holding. But in this case, a subtle distinction is drawn. The insertion of an instrument, unlike that of a limb, is not regarded by law as constituting an entry, unless it were thus inserted for the purpose (not merely of entering or of breaking but) of accomplishing that ulterior felony for the sake of which the house is being broken into. Thus if a man pushes a bar through a window for the simple purpose of making a hole in the shutter, there is only a breaking, but no entry[4]. Yet if he had pushed the bar through the window for the

[1] So an innkeeper breaking into a guest's room; like Bradford, p. 506 n. *infra*.

[2] Larceny Act, 1916, s. 25. *Supra*, p. 171.

[3] *Rex* v. *Davis*, R. and R. 499 (K. S. C. 172).

[4] *Rex* v. *Rush*, 1 Moody 183 (K. S. C. 174).

purpose of drawing towards him a spoon which he was going to steal, there would have been both a breaking and also an entry[1]. So, again, it would be no entry to push a pistol through a window, merely in order to make an aperture to get in at. But if after having broken a window, he were to thrust a pistol through the hole, in order to shoot one of the persons in the room, this would be a sufficient entry[2]. Perhaps the best justification that can be given for this very technical distinction as to entry by instruments, is that if the mere insertion of an instrument were always to be sufficient to constitute an "entry," most of the common acts of breaking would of themselves include an entry, whereas the definition of Burglary evidently supposes the two things to be quite distinct.

(4) *The Time.* In the earliest law, burglary might be committed in the day-time as well as at night[3]. But afterwards it became essential that it should take place at night. By "night" was then understood the period between sunset and sunrise[4]. Later, however, it was held not to be night if there was even sufficient sun-light to tell a man's face. This test again was discarded; and night was defined as the period between 9 p.m. and 6 a.m.[5] As to the precise instant when that period begins and ends, it should be noted that here (as always when a reference to time occurs in an Act of Parliament or other legal instrument, without the expression of a contrary mode of reckoning), it is to be understood to be *Greenwich* mean time[6].

To constitute a burglary, then, the breaking must always take place during this statutory night-time. And if, as is usually the case, the breaking precedes the entering, both

[1] *Rex* v. *Hughes*, Leach 406 (K. S. C. 173).
[2] 1 Anderson 114 (K. S. C. 173). [3] Pollock and Maitland, II. 491.
[4] As in 1913 it was adjudged still to be in French law.
[5] See *now* the Larceny Act, 1916, s. 40.
[6] Except in months when the Summer Time Act prescribes sixty minutes earlier. In Ireland, *Dublin* mean time. But "sunset" and "sunrise," for lighting-up vehicles, refer to local time.

must take place at night, though not necessarily on the same night[1]. But if the entry precedes the breaking, *i.e.* if the latter is not a breaking-in but a breaking-*out*, the entry need not be at night[2].

(5) *The Intent.* There must be an intention to commit some felony (*e.g.* to kill, or to commit a rape, most commonly it is an intention to steal). But it is not necessary that the felony should actually be accomplished. Moreover this intention must exist at the time of the breaking and the entering; and not arise merely after he is in the house[3]. Hence if people break open the front door of a house illegally, but only for some honest purpose (*e.g.* constables acting with an invalid search warrant), and then are so tempted by the sight of something inside that they steal it, they will not be guilty of any burglary[4].

Accordingly if only a tort, or even a misdemeanor, be intended—as, for instance, to get a night's shelter[5], or to commit an adultery or an assault—the breaking and entering for such a purpose will not be burglary, but either a mere civil trespass and no crime at all, or, if a crime, only an attempt to commit a misdemeanor. And thus, in 1770, where a man broke into a stable and cut the sinews of a horse's fore-leg in such a manner that it died, but it was shewn that his intention had not been to kill the horse (which would have been even then a felonious act) but only to maim it, so as to prevent it from running in a race, he was held not to have committed a burglary[6]. For in 1770, although killing a horse had already

[1] 1 Hale P. C. 551; *Rex* v. *Smith*, R. and R. 417.
[2] Larceny Act, 1916, s. 25.
[3] But if he break *out* after actually committing a felony inside, felonious intent at the time of entry is not necessary.
[4] *Rex* v. *Gardiner*, Kelyng 46 (K. S. C. 178).
[5] For a quaint case where the intruder declined to quit the agreeable shelter, see 4 Cr. App. R. 41. In 1922 a charge was dismissed because the only purpose of the supposed burglars had been to see the apparitions by which the house was reputed to be haunted.
[6] *Rex* v. *Dobbs*, 2 East P. C. 513 (K. S. C. 176). The stable was part of a dwelling-house.

been made a statutory felony, any lesser injury to the animal was merely a tort. At the present time it is a felony, not only to kill but, even to maim a horse[1].

The fact that the burglar actually committed some felony in the house, is excellent evidence that he broke and entered it with an intention of committing this felony. Thus if he drank some wine which he found in the dining-room, this theft would be evidence, though certainly only weak evidence, that he entered the house with intent to steal. In the great majority of cases the question of intention will resolve itself simply into Lord Beaconsfield's old antithesis of "Plunder or Blunder?" Drunkenness may be useful as evidence to support the latter alternative. But the question is not always an easy one to answer, and it often has to be determined by a somewhat weak chain of inference. Thus in 1899 a boy broke into a house while the family were away; but contented himself with winding up all the clocks and setting them going. Had he been detected before he had undertaken this comparatively innocent course of action, he might have found it difficult to rebut the inference that he had broken into the house for purposes of theft.

Under the Larceny Act, 1916, s. 25, the maximum punishment for burglary is penal servitude for life[2]. The same enactment deals also with some statutory nocturnal offences, which are approximations to burglary, but much less heinous than it. We may mention the following:

1. Entering (*i.e.* without breaking) a dwelling-house, by night, with intent to commit felony therein, is a felony. It is punishable with seven years' penal servitude[3].

2. Being found by night in any building (*i.e.* although the entry may have been effected only in the day-time), with

[1] 24 and 25 Vict. c. 97, s. 40.

[2] Imprisonment for two years or less may be imposed; s. 37 (4).

[3] s. 27 (1). But such an entry in the day-time is not indictable at all; though there may under the Vagrancy Act be the petty offence mentioned in the next note.

intent to commit felony therein, is a misdemeanor. It is punishable with five years' penal servitude[1].

3. Being found by night in possession of housebreaking implements, without lawful excuse, is a misdemeanor. It is punishable with five years' penal servitude[2]. Cf. p. 352 *infra*.

We have seen that burglary is essentially a nocturnal offence. To do in the day-time what it would be a burglary to do at night, was at common law a mere misdemeanor. It was known as Housebreaking. But statutory enactment has now erected it into a felony. It is identical with burglary so far as concerns the breaking, the entry, and the intention that it requires. But in some points it differs from burglary. Thus (1) it is not limited to any particular hours. An indictment for burglary must state that the offence was committed at night; but an indictment for housebreaking omits all reference to time. Again, (2) it extends to a wider range of buildings; including, besides dwelling-houses, mere shops, warehouses, etc. And (3) it admits of different maxima of punishment accordingly as the ulterior felony intended is actually committed or not. For, under the Larceny Act, 1916, it is punishable with penal servitude (1) for fourteen years, if any ulterior felony is actually committed; but (2) only for seven years, where nothing more is proved than that the breaking and entering were effected with the intent to commit some felony[3]. A breaking *out* will suffice in the first of these two forms, but not in the latter. In either case, instead of penal servitude, imprisonment for not more than two years may be imposed, with or without hard labour.

[1] s. 28 (4). Even in the day-time it is a petty offence, punishable with three months' imprisonment, under the Vagrancy Act, to be found in a house or an enclosed garden, for *any* criminal purpose (5 Geo. IV. c. 83, s. 4). See p. 326 *infra*.

[2] s. 28 (2). See p. 5, *supra*. Even in the day-time such a possession, if *with the intention of housebreaking*, would be a petty offence similarly punishable under the Vagrancy Act.

[3] Larceny Act, 1916, ss. 26, 27.

We have seen (p. 171) that the old idea of burglary included a sacrilegious form, in which the place broken into at night was a church. Modern enactments have replaced this by a statutory crime of Sacrilege, which differs from that just now mentioned, (1) in being irrespective of the hour of the day, and (2) in extending to other places of worship besides those of the established religion. For, under provisions that are now consolidated in the Larceny Act, 1916, it is a felony, punishable with penal servitude for life[1], to break and enter and commit a felony in—or to enter and commit a felony in and then to break out of—"any place of Divine worship." And it is also a felony, but punishable with only seven years' penal servitude, to break and enter such a place with the intention of committing a felony, though without accomplishing that intention[2]. In either case, instead of penal servitude, imprisonment for not more than two years, with or without hard labour, may be imposed.

It will readily be observed that the definitions of both burglary and housebreaking are wide enough to cover, along with acts of heinous guilt, others of a very trivial character. In 1801, Andrew Branning, a boy of thirteen (to whom three witnesses gave a good character) was sentenced[3] to death for burglary, in having, after sunset but before closing-time, broken a pane of glass in a shop window and put his hand through the hole, and stolen a spoon that lay inside.

[1] s. 24. [2] s. 27 (2).
[3] Sess. Pap., LXXVIII. 104. Probably not *executed*.

CHAPTER XIII

STEALING

§ 1. Historical

We now pass from the offences which consist in destroying or damaging a man's property, to those which consist in depriving him of the enjoyment of it, though probably leaving the property itself uninjured. Of such offences the most ancient in English law is Larceny[1]. The rules relating to it can be traced back through a history of several centuries; and they have now become so complex as to be scarcely intelligible without a knowledge of their history.

Some seventeen hundred years ago, the jurist Paulus elaborated for Roman law a definition of the offence of Theft (*furtum*) which subsequently received legislative approval from Justinian. Bracton, more than a thousand years afterwards, embodied this definition, with some verbal alteration, in his account of English law as it then stood, in Henry III.'s reign. His words are: "Contrectatio rei alienae fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit[2]." ("The fraudulent dealing with another man's property against his will, with an intention of stealing it.") Bracton thus retains the wide Roman idea of theft, as including any kind of dealings (*contrectatio*) by which a dishonest appropriation could be effected. But it would seem that, in so doing, he greatly exaggerated the comprehensiveness of the English idea of theft. Here, as in all Germanic nations, that idea was too crude to go beyond punishing such dishonest dealings as took the "violent and unmistakeable form of a change of

[1] Stephen, *Hist. Cr. Law*, III. 121–176; *Dig. Cr. Law*, Arts. 304–334.
[2] Bracton, III. 32. 1. The words of Paulus had been "Contrectatio rei fraudulosa, lucri faciendi gratia, vel ipsius rei vel etiam usus ejus possessionisve." *Digest*, XLVII. 2. 1. 3.

possession[1]." This narrow conception was subsequently narrowed still further by various subtleties which were introduced by judicial decision. Some of these limitations would seem to us unaccountable, if we did not know that they had been inspired by motives of humanity. The desire of avoiding capital punishment—and in later times that of restricting the number of offences in which, by the old procedure in trials for felony[2], the accused person was denied the support of counsel and witnesses—led our mediæval judges to invent ingenious reasons for depriving many acts, that seemed naturally to fall within the definition of larceny, of all larcenous character. So extreme was the severity of the law of larceny that it exacted death as the penalty for stealing, except when the thing stolen did not exceed the value of twelve pence; see p. 219 *infra*. This severity was ultimately tempered by two active forces. One was what Blackstone[3] leniently terms "a kind of pious perjury" on the part of juries; who assessed the value of stolen articles in a humanely depreciatory manner. Thus in 1808, to avoid convicting a woman for the capital offence of "stealing in a dwelling-house to the value of forty shillings," a jury went so far as to find on their oaths that a £10 Bank of England note was worth only 39*s*.[4] The other force which similarly opposed putting men to death for thefts was that ingenious judicial legislation which we have already mentioned. By it, as early as the reign of Edward III., many articles were placed outside the protection of the law of larceny on the ground of their technical connexion with immovable property, as for instance,

[1] Pollock and Maitland, II. 497. "There can we think be little doubt that the 'taking and carrying away,' upon which our later law insists, had been from the first the very core of the English idea of theft"; *ibid.*

[2] *Supra*, p. 94.

[3] 4 Bl. Comm. 239.

[4] *Rex* v. *Bridget Macallister* (Sess. Pap., LXXXVI. 18). Sir S. Romilly mentions another, in 1732, where a woman had stolen two guineas and two half-guineas, yet the jury pronounced the total value of the four coins to be "under 40*s*." In 1823, in an indictment for stealing a guinea and a sovereign, their value was prudently placed at *ten pence*, in order to make a conviction more probable (*The Times*, Oct. 21, 1823).

title deeds to land, or even the boxes in which such deeds were kept. Again, under Edward IV., the judges declared certain acts of dishonest appropriation to be no larcenies, on account of their not involving a sufficient change of technical possession.

By these and other modifications, the legal idea of larceny came at last to be that of the crime which is committed when any person (1) takes, and (2) carries away—or when (3) a bailee appropriates—(4) another person's (5) personal chattel, (6) of some value, (7) without any claim of right, and (8) with an intention to deprive that other person of the whole benefit of his title to the chattel.

But a step towards a definition by Statute was taken in 1916 by a very valuable "Act to consolidate and simplify the law relating to Larceny triable on indictment[1], and similar offences" (6 and 7 Geo. V. c. 50). It commences by defining *Stealing*; enacting—by s. 1 (1)—that a person is to be held to "steal" when he "without the consent of the owner, fraudulently and without a claim of right made in good faith, *takes* and carries away anything capable of being stolen, with intent, at the time of such taking, permanently to deprive the owner thereof."

"Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part-owner thereof, he fraudulently *converts* the same to his own use or the use of any person other than the owner."

On this basis, a definition[2] of the narrower crime of "Simple Larceny" is established (s. 2); which declares it to be "Stealing for which no *special*[3] punishment is provided under this Act or any other Act for the time being in force." The maximum

[1] It was left to some future enactment to deal with the thefts that are punishable only on summary conviction.

[2] Curiously narrow; since turning on a mere arbitrary technicality.

[3] Even the words "to be punished as in the case of Simple Larceny" constitute a "special punishment"; cf. s. 37 (2). Cf. 7 C. and P. 665; 8 C. and P. 203.

punishment for this Simple Larceny is to be five years' penal servitude; together with a private whipping if the offender be a boy under sixteen. It is a felony. The Act also recognises a variety of other forms of felonious Stealing that are punishable with periods of long punishment varying up to penal servitude for life. Some of the graver of these had, before the Act, been classed together as "Compound," or "Aggravated," or "Grand," Larceny; but none of these antitheses to "Simple" appear in the Act. No definition of "Larceny," in the abstract, is given; probably it must now be "Felonious Stealing." It might seem natural to adopt for it the Act's definition of Simple Larceny. But a difficulty in so doing is raised by the fact that the marginal notes[1] of sections 5, 11, and 16 (*b*) of the Act apply the term "Larceny" to species of stealing which do have "special punishments," and moreover are less severely punishable than Simple Larceny.

Let us proceed to consider the various points which the definition of Stealing involves.

§ 2. The Taking

The Act of 1916, by requiring a "Taking" as essential to one of its two forms of Stealing, recalls the common-law rule which made a change of possession essential to larceny. Where there was no infringement of possession, *i.e.* no "trespass," there could be no larceny. Thus the definition of this felony became embarrassed with "that vaguest of all vague questions—the meaning of the word Possession[2]." The utter technicality of that question is illustrated by the legal theory of conjugal life. A wife is held to be one person with her husband; and therefore a possession by her is possession by him. Consequently an appropriation of his goods by her would not constitute a change of possession; and therefore did not at common law constitute a larceny[1]. Nor did even adultery put an end to this. So if a wife went away with money of her husband's, and then met her adulterer and gave him this money, he could not be convicted of receiving stolen goods; for they had not been "stolen[2]." Yet if the adulterer had instead assisted her in the original taking of the goods, he could have been convicted of a larceny of them[3]; for then he would have taken them out of the actual possession of the husband himself. But since the Married Women's Property Act, 1882[4], husband and wife are criminally liable for stealing each other's property, if (*a*) they were not living together[5] at the date of the offence, or if (*b*) the property was appropriated with a view to their ceasing to live together. But when they once again are living together no prosecution can take place. Thus a wife, so long as she has no intention of ceasing to cohabit with her husband, retains even under the Act of 1916 her immunity for committing thefts of his property[6]. And even if she were to abscond from him temporarily and to take away with her some of his property, but in the expectation of ultimately returning to him and bringing it back with her, then she would commit no larceny. For she would not satisfy the final clause of the definition of the word *Stealing*; since she does not intend to deprive him of the property "permanently."

But the necessity of protecting masters against the dishonesty of their servants soon caused the judges to make an extension of the legal conception of changes of possession. It came to be held[7] that it was sufficient if, without any

[1] For the unsettled question of the admissibility of such notes in interpreting a statute, see Halsbury's *Laws of England*, XXVII. 121.

[2] *Per* Erle, C. J., in *Reg.* v. *Smith*, 6 Cox 554. In 1915 (*Rex* v. *Rasmeni*), in Johannesburg, a hand-cuffed thief ran away from the arrestors: and on being re-arrested, was prosecuted for theft of the handcuffs. The court held that there was no voluntary "taking" of them by him. Cf. p. 211 *infra*.

[1] *Rex* v. *Harrison*, Leach 47 (K. S. C. 274); Statham, *Corone* 39.

[2] *Reg.* v. *Streeter*, L. R. [1900] 2 Q. B. 601 (K. S. C. 367).

[3] *Reg.* v. *Featherstone*, Dearsly 369 (K. S. C. 274).

[4] Replaced now by s. 36 of the Larceny Act, 1916

[5] They may "live together" though geographically apart; 14 Cr. App. R. 19.

[6] *Rex* v. *Creamer*, 14 Cr. App. R. 19. Hence her paramour, receiving it from her *then*, does not receive "stolen" goods.

[7] Y. B. 21 Hen. VII. Hil. pl. 21 (K. S. C. 216).

change in the actual holding of an article, there were a change in what, by a mere fiction of law, was regarded as equivalent to possession—*i.e.* a merely "constructive" possession. Thus, where a butler has his master's plate in his keeping, or a shepherd is in charge of his master's sheep, the *legal* possession remains with the master; and similarly the landlord of an inn retains the legal possession of the silver forks which his customers are handling at the dinner table. In all such cases —where one person has physical possession and yet the legal possession is "constructively" in some one else—the former person is not said in law to have a "possession," but only "charge" or "custody." If, however, he proceeds to appropriate the thing—*e.g.* if the shepherd sells a lamb out of the flock—he thereby converts his custody into a "possession" (*i.e.* into a "legal," though not a *lawful*, possession). Accordingly by thus converting to his own use the thing entrusted to him, and thereby ceasing to hold it on that trust, the servant is regarded in law as creating a new possession, and thereby constructively "taking" the thing, so as to become as truly guilty of larceny as if he had never had it in his custody at all.

Many other cases, too, besides that of master and servant, may be found, in which the legal possession is divorced from the physical possession, and in which accordingly it would be a constructive "taking," and therefore a larceny, for the custodian to appropriate the article to himself, though he thus actually holds it. One such case arises whenever the owner of a portmanteau delivers it to a lad to carry for him to his hotel, but accompanies the lad on his way and has no intention of relinquishing the full control over the portmanteau. Similarly where at a railway booking-office a lady handed a sovereign to a man to get her ticket for her (he being nearer than she to the office window), it was held that in point of law she still retained possession of the sovereign; consequently, when the man ran off with it, he became guilty of larceny[1]. So, again, a cabman does not get legal possession

[1] *Reg.* v. *Thompson*, L. and C. 225.

of his passengers' luggage when he puts it on the top of his cab; hence if the passengers, on quitting the cab, left some portmanteau behind, it would be a larceny, even at common law, for him to appropriate it[1].

Recurring to the particular case of servants, it may be convenient to note here that when it is not by the master himself, but by some third person, that chattels are entrusted to a servant, they are held to be not in the servant's mere custody, but in his full legal possession. Such chattels do not—in *criminal* law (see below, p. 229)—pass into the possession of the master until they are actually delivered to him; as by the money being placed in his till. Accordingly, if the servant appropriates them whilst they are only on the way towards such a delivery, he does not commit larceny. Indeed until 1799 such an appropriation did not constitute any crime at all. But in that year a statute was passed making such conduct felonious[2]. It constitutes the crime of Embezzlement, which we shall hereafter deal with in detail[3]. A dishonest servant commits embezzlement in the case of things which he has received *for* his master; though larceny in the case of those which he has received *from* his master.

§ 3. The Carrying Away

Grasping a thing is sufficient to confer possession of it, *i.e.* to constitute a "taking"; but it does not amount to an "asportation," *i.e.* to a carrying away. Thus where *A* stopped *B*, who was carrying goods, and bade him lay them down, which *B* did, but *A* was arrested before he could touch them, it was held that *A* had not committed larceny; for there had been no carrying away. But removal, the slightest removal of anything from the place which it occupies, will suffice; and this, even though the thief at once abandon the thing[4]. Thus there is a sufficient asportation in taking plate out of a chest

[1] *Reg.* v. *Thurborn*, 1 Den. 387 (K. S. C. 276). Cf. p. 214 *infra*.
[2] 39 Geo. III. c. 85.
[3] *Infra*, p. 229.
[4] Larceny Act, 1916, s. 1 (2) ii.

and laying it on the floor[1]; or in shifting a bale from the back of a cart to the front; or in pulling a lady's ear-ring from her ear, even though the ear-ring be caught in her hair and remain in it[2]. But as the Act adds[3], in the case of a thing *attached*, there cannot be a sufficient removal unless it has been completely detached; *e.g.* not unless the string which ties the scissors to the counter has been cut through. The test seems to be—Has every atom left the place in which that particular atom was before? So there may thus be a sufficient carrying away even though part of the thing still occupies the place which some other part of it previously did; *e.g.* by half-drawing a sword from its scabbard, or lifting a bag part-way out of the boot of a coach[4], or pulling a pocket-book not quite out of a man's pocket[5].

§ 4. Appropriation by a Bailee

Where the proprietor of an article temporarily entrusts not merely the physical but also the legal possession of it to another person, *e.g.* to a carrier, a "Bailment" arises. The temporary possessor, or bailee, was at common law not indictable for larceny[6], for as he (unlike a "custodian") had possession—legal as well as actual—of the article, it was impossible for him to "take" it[7]. Here, again, it was the necessities of domestic life that first compelled an extension of the law. In the case of its being to one of his own servants that the proprietor of an article thus entrusted the legal possession of it, an appropriation by that servant was made criminal by statute so early as Henry VIII.'s reign[8]. But, in regard to all other bailees, the common law rule remained in force for some three hundred years longer. The judges had,

[1] *Rex* v. *Simson*, Kelyng 31 (K. S. C. 219).
[2] *Rex* v. *Lapier*, Leach 320 (K. S. C. 222).
[3] Larceny Act, 1916, s. 1 (2) ii.
[4] *Rex* v. *Walsh*, 1 Moody 14 (K. S. C. 220).
[5] *Rex* v. *Taylor*, L. R. [1911] 1 K. B. 674.
[6] See Pollock and Wright on Possession, pp. 160–171.
[7] Contrast the wider sweep of the Roman law of Furtum, *Dig.* XLVII. 2. 52. 7.
[8] 21 Hen. VIII. c. 7.

however, so far back as the reign of Edward IV.[1], engrafted upon it the subtle distinction that if any bailee dishonestly severed into separate parts the article bailed to him—*e.g.* by drawing a pint of beer from the cask he was carrying—he thereby put an end to that possession of the Thing, as a unity, which he held under the bailment. Accordingly a subsequent appropriation by him of any of the parts thus separated—as by his drinking the pint of beer—would amount to a "taking" of that part, and so would be larceny. This rule as to "breaking bulk" brought within the reach of punishment many cases of dishonest appropriation. And in 1691 Parliament interposed, to extend the law of larceny to lodgers who stole the furniture of the rooms that had been let to them[2]. But it was not till 1857 that any general provision was made for dealing comprehensively with misappropriation by bailees. The statute of that year[3] has since been replaced by a clause in the Larceny Act of 1916[4], which provides that it shall be larceny for a bailee, or a part-owner, fraudulently to convert anything that is capable of being "stolen," to the use of himself, or of any person but the owner; notwithstanding that he has lawful possession of the thing. Wide as these words seem to be, they are held[5] to apply only, by judicial decision, to those bailments under which it is the bailee's duty to deliver up at last (whether to the original owner or to some one else) the identical article bailed and not merely an equivalent for it. In the case by which the principle was established, *Reg.* v. *Hassall*, the prisoner was treasurer of a money club, and had authority to lend to its

[1] *The Carrier's Case*, Y. B. 13 Ed. IV. f. 9, Pasch. pl. 5 (K. S. C. 223). Stephen looks upon the decision in this case as an extraordinary one; and thinks it obvious that it was a compromise intended to propitiate the Chancellor, and perhaps the King (*Hist. Cr. Law*, III. 139).
[2] 3 W. and M. c. 9, s. 5; see now the Larceny Act, 1916, s. 16.
[3] 20 and 21 Vict. c. 54, s. 17.
[4] s. 1 (1).
[5] *Reg.* v. *Hassall*, Leigh and Cave 58 (K. S. C. 227). On the point whether the Act applies when the bailee has also a power to divest the bailor's ownership (*e.g.* in a "sale on approval"), see *Whitehorn* v. *Davison*, L. R. [1911] 1 K. B. 463, *infra*, p. 242, and *Reg.* v. *Richmond*, 12 Cox 497.

members sums out of the club-money in his hands. He misappropriated part of this fund. It was held that he was not a bailee within the Act; since he was under no obligation to pay over to anybody the specific coins which had been paid to him. Accordingly a land-agent usually cannot be indicted under *this* clause[1] for stealing the rent he has collected. Nor can the auctioneer who sells an article for you and then absconds with its price. Before the sale he was a bailee of the article, and was bound to dispose of it according to your directions. But after the sale he does not become a similar bailee of the money which he has received for it, inasmuch as he is not bound to deliver to you the identical coins.

But the tendency is to restrict rather than to enlarge the principle of this immunity. Thus it has been held that there was a duty to deliver over the specific coins received, in some cases where at first sight it might have been supposed that the parties had not created any such obligation. Thus in *Reg.* v. *Aden*[2] a bargeman, who had been entrusted with £24 to buy a barge-load of coals, and who appropriated this money, was convicted of larceny under the statute; apparently on the ground that it was his duty to pay for the coals with the actual coins which the prosecutor had given him. And, similarly, in *Reg.* v. *De Banks*[3], where the prisoner sold a horse for the prosecutor and appropriated the purchase-money he received, there was held to be evidence of his holding this money under such a bailment as would come within the statute. (There is nothing unreasonable in making such a bailment, even of a "fungible" thing like money. It has even been said, and by judges so eminent as Lord Wensleydale and the late Mr Justice Willes, that *whenever* a servant receives money for his master from anyone he is bound to hand over the very same coins that he received[4].)

[1] But see *another* clause—s. 20 (1) iv.—*infra*, p. 236.
[2] 12 Cox 512.
[3] L. R. 13 Q. B. D. 29.
[4] L. and C. 62. Cf. K. S. C. 177.

But[1] whilst Aden or De Banks was a mere bailee of a fixed sum which he had only to hand over, Hassall's club-money was left in his hands as a fund which he had to deal with, so that he was a trustee of it, with complex duties to discharge.

It should be noticed that the idea of bailment is not confined to cases where the article has been in the bailor's own possession before it was delivered to the bailee[2]. Thus if a vendor of goods deliver them to a carrier for conveyance to the purchaser, it is the latter that is regarded in law as the bailor; for the vendor, who actually handed them over to the bailee, is regarded as having done so only as an agent for the purchaser[3]. It must also be noticed that bailment requires nothing more than simply a delivery upon a trust. Hence, though there is usually also a contract, express or implied, to fulfil this trust, there may quite well be a bailment even where no such contract can exist, as when goods are delivered to some person who is incapable of contracting. Accordingly, if an infant hires furniture, though no valid contract of hiring may arise[4], he nevertheless becomes a bailee. Consequently, if he proceeds to sell the furniture, he will be guilty of larceny[5].

Before a bailee can be convicted of larceny, it must be clearly shewn that he has really converted to his own use the article entrusted to him. Only some act of conversion that is quite inconsistent with the bailment can amount to a sufficient appropriation. In the case of a bailment of silver forks for use, melting them down would of course always be evidence of a conversion; and so would selling them, or dishonestly refusing to return them when asked for[6]. But as to pawning, a distinction must be drawn. If the bailee can shew that when he pawned the goods he honestly intended to redeem them subsequently (which might very well be

[1] *Reg.* v. *Governor of Holloway Prison*, 18 Cox 631 (K. S. C. 229).
[2] See *Reg.* v. *Bunkall*, L. and C. 371 (K. S. C. 231).
[3] Benjamin on Sales, Book I. Part I. ch. IV.
[4] Anson on Contracts, Part II. ch. III. s. 2.
[5] *Reg.* v. *Macdonald*, L. R. 15 Q. B. D. 323.
[6] *Rex* v. *Wakeman*, 8 Cr. App. R. 18.

made out by instances of his previous similar conduct), and can also give proof of there having been a full prospect of his getting money enough to carry out this intention, the pawning will not amount to a conversion[1]. But if he had merely a vague intention to redeem the goods at some future time in case he should happen to become able to do so, then he clearly acted in a manner quite inconsistent with his duties as bailee, and so became guilty of larceny[2]. When once a bailment has come to an end, and the article bailed has returned into the possession of its proprietor, no contracts subsequently made about it by the ex-bailee—such, for instance, as a bargain by him to sell it—can amount to a conversion[3]. This seems obvious enough; but a student may be apt to overlook it by failing to trace the changes in the legal possession.

It is desirable to notice that there does not exist, as seems sometimes to be supposed, a specific offence entitled "larceny by a bailee." The statute[4] places Conversion by a bailee on the same footing as a stealing by Taking; so that an indictment for it need not even contain the word "bailee."

§ 5. The Ownership

Things which do not belong to any determinate possessor[5] cannot be the subjects of larceny. One conspicuous example of such things is a human corpse, and accordingly the "resurrection men"—who, in the days before the Anatomy Act[6], used to violate churchyards in order to supply the dissecting-rooms with "subjects"—committed no larceny in taking the

[1] As where a solicitor, to whom a valuable watch was intrusted by a client, pawned it simply to secure its safe custody; C. C. C. Sess. Pap. CXLV. 420. But it may be a petty finable offence of "Unlawful Pawning"; 35 and 36 Vict. c. 93, s. 33. And the loss of control is an actionable breach of his contract.

[2] *Reg.* v. *Medland*, 5 Cox 292 (K. S. C. 236). Cf. p. 212 *infra*.

[3] *Reg.* v. *Jones*, C. and M. 611 (K. S. C. 237).

[4] *Supra*, p. 183.

[5] With such a possession as would support an action of trespass; 2 Den. 451.

[6] 2 and 3 Wm. IV. c. 75.

bodies. (It was otherwise if they carried off a coffin or grave-clothes; for these remained the property of the executors who had bought them.) But a consequent question, of much practical importance though still unsettled[1], is whether the rule of law must further be taken to be that "once a corpse, always a corpse"; for, if so, the protection of criminal law will not extend even to skeletons and similar anatomical preparations on which great labour has been expended[2], or to ethnological collections of skulls or mummies brought to this country at great cost.

Even an article that has an owner may come to be intentionally abandoned by him[3], and of such "derelict" articles there can be no larceny[4]. Thus abandoned wrecks[5], and treasure-trove that has no longer any owner, are incapable of being stolen[6], until after they have been taken possession of by the Crown, or by some person to whom the Crown has granted the franchise of taking them[7].

Animals *ferae*[8] *naturae*, straying at large, form the most important of all the classes of things which have no owner. Even the (so-called) property *per privilegium*, which the lord

[1] See the conflicting judgments in *Doodward* v. *Spence*, 9 New South Wales Rep. 107. From the decision, *recognising* ownership, the Judicial Committee refused leave to appeal.

[2] Stephen, *Dig. Cr. Law*, Art. 318. But any metal inserted, *e.g.* wiring, would of course be larcenable. Cf. a dog's collar, *infra*, p. 202.

[3] As in the case of coal dropped from overloaded carts or barges. Cf. L. R. [1894] A. C. at p. 532.

[4] 2 Bl. Comm. 9; *Reg.* v. *Peters*, 1 C. and K. 247; *Reg.* v. *Reed*, C. and M. 307; Justinian's *Digest*, XLVII. 2. 43. 9.

[5] Whales cast ashore are "wreck."

[6] 22 Lib. Ass. 95, 99; Williams' *Personal Property*, 52 n[r].

[7] A curious question arises as to the rations supplied to a seaman but not actually consumed by him. Ridley, J., held that the supplying does not forthwith make them his; so he may commit larceny by saving them to sell or give away. Cf. 35 T. L. R. 381. For the safety of the ship "a man can't be allowed to starve himself in order to have an unconsumed surplus"; C. C. C. Sess. Pap. CLIII. 561. Cf. the Army Order of Sept. 1915, making rations "the property of the State until consumed." See 13 Cr. App. R. 22.

[8] *Ferae*, here, is of course an adjective. Yet people talk about "hunting our *ferae naturae*"; and both Sir Walter Scott (*Antiquary*, ch. XXII.) and Sir W. H. Rattigan (*Jurisprudence*, p. 138) have fallen into like error.

who has a chartered park or forest is regarded by law as having over certain of the wild creatures in it, is not a sufficient ownership to sustain an indictment for larceny[1]; for it is not so much an ownership as a peculiar right to obtain ownership. For the general principle of law is that all true ownership of living things depends upon actual control over them. Domestic animals (such as horses, oxen, sheep), or domestic fowls (such as hens, ducks, geese), usually have a settled home, and so come under the control of its occupier; and consequently are larcenable. If they are so, their eggs and other produce will equally be larcenable; and this even when the produce is stolen directly from the living animals themselves (as by milking cows, or plucking wool from the backs of sheep), before the true owner has ever had possession of it as a separate thing. But over animals that are of a *fera natura* there is usually no control, and therefore no ownership. Ownership over them whilst uncontrolled, if it were to exist, could exist only in the owner of the land where at any moment they were; and it would be futile to recognise any such mutable ownership, which the animal itself might vary from hour to hour[2]. But a power of control may of course be created; either *per industriam*, by their being killed, or caught, or tamed[3], or *propter impotentiam*, by their being too young to be able to get away. Consequently larceny may be committed of pheasants which have been shot, or deer which have been so enclosed in a park that they may be taken at pleasure[4]; or of fish in a tank, or even at large in a mere pond, though not when at large in a running stream[5].

[1] 7 Coke Rep. 17 b.

[2] Rather on this account, I think, than on that of their being (as Prof. Christian maintains) part of the realty (see p. 198 *infra*), it is not larceny for anglers to take earthworms out of another man's land: though it is larceny to take them after he has collected them into a pot for sale; Christian's *Game Laws*, p. 79. It is larceny to take oysters from an oyster-bed actually owned by another person; oysters having neither will nor power to stray from it. Cf. the Sea Fisheries Act, 1868, § III. s. 51.

[3] *Rex* v. *Rough*, 2 East P. C. 607 (K. S. C. 250). [4] 1 Hale P. C. 511.

[5] *Ibid.* At Cambridge in 1627, before Harvey, J., two men were convicted of larceny for taking fish *out of a net* lying in the river.

Again, young partridges reared under a barndoor fowl and not yet old enough to leave her protection[1], are the subjects of a true ownership, and so are larcenable[2].

The degree of physical control which is necessary to establish ownership will vary with the habits of the particular species concerned. Creatures may be subjects of ownership although they are not closely confined but are allowed to wander away from home, provided they have a settled habit of returning thither; and this will be so although they are not shut up even at night[3]. Peacocks, ducks, geese, and pigeons readily acquire this *animus revertendi*; unlike pheasants and partridges. This rule, that the taking of ownerless things[4] cannot be a larceny, still holds good; but the modern statute-law has created many offences of dishonesty which it has not erected into larcenies. And thus deer-stealing[5], the taking of hares or rabbits in warrens in the night-time[6], and the taking of fish from private waters[7], have been made offences; but they vary greatly in their degrees of heinousness as well as in their punishments[8].

It is important to notice that larceny requires not only an ownership, but an ownership which already existed before the act of taking. A proprietorship that was created only by that very act will not suffice. Thus, although rabbits or wild pigeons, on being killed by a trespasser, become the property of the owner of the land where they are killed[9], yet if this trespasser who kills them should proceed to carry them away, he will not[10] commit larceny thereby. For the ownership

[1] *Reg.* v. *Shickle*, L. R. 1 C. C. R. 159 (K. S. C. 251). But the young, or the eggs, in a *wild* bird's nest are not in the landowner's Possession; and so, though his, are not larcenable; *Rex* v. *Stride*, L. R. [1908] 1 K. B. 617; overruling Lambard, fo. 274. Cf. *Rex* v. *Clinton* (Irish Rep. 4 C. L. 6), as to seaweed washed ashore

[2] Y. B. 18 Edw. IV. fo. 8, pl. 7 (K. S. C. 249). Cf. 7 Coke 17.

[3] *Reg.* v. *Cheafor*, 2 Denison 361.

[4] Larceny Act, 1916, s. 1 (3). Cf. *The Case of Peacocks* (K. S. C. 250).

[5] 24 and 25 Vict. c. 96, ss. 12-15.

[6] *Ibid.* s. 17. [7] *Ibid.* s. 24. [8] *Infra*, p. 222.

[9] *Blades* v. *Higgs*, 11 H. L. C. 621.

[10] *Reg.* v. *Townley*, L. R. 1 C. C. R. 315 (K. S. C. 255); p. 199 *infra*.

which he infringes did not exist before he killed the creatures. (The Larceny Act, 1916, s. 1 (3) *b*, preserves this common-law doctrine that "The carcase of a creature wild by nature, and not reduced into possession while living, shall not be capable of being stolen by the person who has killed such creature; unless, after killing it, he has abandoned possession of the carcase.") But if, after killing them he should go away and leave them on the land, with the idea of abandoning them altogether, he would thereby cease to be their possessor, and they would pass into the legal possession of the owner of the soil[1]. So if the trespasser should afterwards change his mind and come back and seize them again, this would be an entirely new act of taking. And, as the things had now got an owner, it would be a larceny. Where a man, employed to trap rabbits, put some into a bag in order to appropriate them, and a keeper (suspecting him) nicked them during his absence, for purposes of identification, it was held that the nicking was not sufficient to reduce them into the possession of the keeper or of his master. Hence the trapper did not become guilty of larceny by carrying them away, even when thus nicked[2].

But though there can be no larceny of things which have no owner at all, there may be a larceny although the owner is unknown and undiscoverable; as in the case of brass plates being stolen from very old coffins in a vault. It is well, however, to bear in mind Sir Matthew Hale's caution never to convict any person of having stolen from a supposed but unknown owner, merely because he has been found in possession of property under suspicious circumstances and will not give an account of how he came by it[3]. Even if a tramp is found to have six gold watches in his pocket, he ought not to be treated as a thief until some definite proof can be obtained of their having actually been stolen somewhere. His possession is *primâ facie* evidence of ownership (*infra*, p. 333); and

[1] Cf. *Reg.* v. *Foley*, L. R. (Ir.) [1889] C. L. 299 (K. S. C. 241).
[2] *Reg.* v. *Petch*, 14 Cox 116.
[3] Hale 2 P. C. 290 (K. S. C. 467). Cf. 26 T. L. R. 265.

his silence, or even his giving an unsatisfactory account, does not rebut this evidence so strongly as to justify a conviction for larceny. See p. 343.

But though there can only be a larceny where the thing (at the time of being stolen) already "belonged" to some other person, it is not necessary that this person should be a sole owner, or even a full owner. (*a*) He may, for instance, be merely a joint-owner with the thief himself. At common law, as every co-owner is lawfully entitled to the possession of the whole thing, he could not commit larceny by taking it. But now, by the Larceny Act, 1916, s. 1 (1), a part-owner "may be guilty of stealing a thing, notwithstanding that he has lawful possession thereof; cf. s. 40 (3). (*b*) And by it—s. 1 (2) iii—the person stolen from may be one who is even less than a co-owner, merely some "person having possession or control of, or a special property in," the thing stolen; *e.g.* a mere bailee (or even a thief who himself had stolen it; see 10 Cushing 397).

Consequently, paradoxical as it may seem, a man may commit larceny by stealing his own property. For when an owner of goods has delivered them to anyone on such a bailment as (like those of pawn and of hire) entitles the bailee to exclude him from possession[1], that owner may become guilty of larceny, even at common law, if he carries them off from this bailee with any intention to defraud him. He might, for instance, aim at defrauding him by making him chargeable for the loss; or by depriving him of an interest which he had in retaining his possession, such as the lien of a cobbler upon the boots which he has mended, for the cost of the mending. Possibly it will suffice even though the intention was to defraud (not the bailee but) some other person; as where the owner of goods, which are in a bonded warehouse, surreptitiously takes them out, in order to cheat the Crown of the customs-duty payable on them[2]. An old illustration

[1] Williams' *Personal Property*, Part 1, ch. 1, § 2, 2.
[2] *Rex* v. *Wilkinson*, R. and R. 470 (K. S. C. 253).

was that[1] of a man who sent his servant on a journey in charge of some valuables, and then disguised himself as a highwayman and robbed the servant of these things, in order to claim their value from the inhabitants of the Hundred (under its ancient liability to make good the loss sustained by a crime of violence committed within its boundaries). But Mr Justice Wright[2] questioned whether the owner of a thing can commit any larceny of it by taking it away from a mere bailee *at will*, such as his own messenger would be.

§ 6. The Subject-Matter

Some of the very early Roman lawyers had thought there might be *furtum fundi locive*, *i.e.* that land was legally capable of being stolen. But, even before the time of Gaius, all the jurists came to abandon this view. No one ever held it in England. For, since a larceny could only be committed by carrying a thing away, this clearly made it essential that the thing should be movable. Moreover, just as we have seen that some other person's ownership over the thing must exist before the act of theft, and not merely be created by it, so this movableness of the thing must also have existed before the theft. A thing therefore was not larcenable if it first became movable by the very act of the taking. Thus it is no theft at all to take mould from a garden or sand from a pit; or to pull down a wall[3] and carry away the bricks. So it was no larceny to strip woodwork or other fixtures from a house, or to cut down a tree[4]; but these acts have now been made specific statutory offences[5]. Hence if a man demolishes some one else's house and sells the materials, he may be proceeded against in respect of the fixtures. The Larceny Act, 1916, s. 1 (3) *a*, preserves the rule that (with some exceptions as to

[1] 2 East P. C. 654. (K. S. C. 260.)

[2] Pollock and Wright on Possession, pp. 165, 228. Cf. Bishop's *Criminal Law of U.S.A.*, 8th ed. II. § 790.

[3] But this is a crime of Malicious Damage: *supra*, p. 166.

[4] *The Forester's Case*, Y. B. (Rolls Ser.) 11 and 12 Edw. III. 641 (K. S. C. 238). Cf. *Reg.* v. *Pinchbeck* (K. S. C. 355).

[5] Larceny Act, 1916, s. 8. Often *felonies*.

fixtures, growing plants, and mineral ores) "anything attached to or forming part of the Realty shall not be capable of being stolen by the person who severs the same from the Realty; unless, after severance, he has abandoned possession thereof." For, even at common law, there would be a larceny if, after the severance had once been fully completed, the thing were abandoned by the thief but he afterwards changed his mind and returned and carried it away. On this point *Townley's Case*[1] may again be referred to, as shewing how a poacher who shot rabbits and hid them in a ditch, and then went away, nevertheless retained "possession," during that interval of personal absence, by mere continuousness of intention. It will be instructive to a student to compare this decision with the case of *Reg.* v. *Foley*[2]. In the latter case a trespasser mowed some grass, but left it where it fell; then, after two days, he returned and took it away. It was held by the Irish Court for Crown Cases Reserved that, even if he had a continuous intention, there was not a continuous possession; and, therefore, that his ultimate removal of the grass constituted a larceny. If this case be regarded as at variance with that of Townley, the latter is of course the one to be followed by English courts. But the two may be reconciled if it be thought right to lay stress on the distinction that Foley, before leaving the hay, had not performed any unequivocal act of taking possession of it; such as Townley did perform by hiding the rabbits.

It seems strange that land, by far the most important form of wealth in the middle ages, should have been left unprotected by even our early criminal law[3]. The omission, however, as Sir James Stephen[4] points out, is rendered more intelligible by the fact that in ordinary cases it is nearly

[1] L. R. 1 C. C. R. 315 (K. S. C. 255). *Supra*, p. 195.

[2] L. R. (Ir.) [1889] C. L. 299 (K. S. C. 241).

[3] Hence water in a pond—often carried off copiously by roadmen for steam-rollers—is not larcenable; but it would become so when severed, as by being pumped into a cart. In 1900 the East London Waterworks prosecuted a man for stealing 900,000 gallons of their water.

[4] *Hist. Cr. Law*, III. 126.

impossible to misappropriate land without resorting to some act which itself is criminal, such as personation or forgery[1]. But a dislike to capital punishment was probably the reason why the judges went still further, and excluded from the scope of larceny even things that really were movable and had only a technical connexion with the land; as when they held it to be no crime to carry off dung which had been spread upon a field[2]. Moreover, even standing corn and similar growing crops, although the law of property gives them to a deceased owner's executors as chattels personal, were held in criminal law to savour so far of the realty as not to be larcenable[3]. Yet, on the other hand, some things which do not thus go to the executor, but to the heir, are larcenable; *e.g.* some species of heirlooms. It has similarly been held in an American case[4] that though, by a very reasonable rule of law, the keys of a house always pass along with it on any alienation (whether by death or by conveyance), this legal identification of them with the realty does not go so far as to prevent its being a larceny to steal them.

In general, however, the rule of immobility extends to all things which any legal fiction identifies with the land[5], even though they be physically movable. It was the case, for instance, with title deeds[6]; they would not pass under a grant of "all my goods and chattels"; so they were not larcenable. And a sealed-up box, inclosing such deeds, was once held to be so identified with them as itself to become not larcenable[7]. (An additional reason has been given for this non-larcenability of title deeds; namely, that their value is so indefinite that it was impossible to say whether or not

[1] Though not when a visitor to Dartmoor carries off stones from a hut-circle to decorate his front-garden.
[2] *Carver* v. *Pierce*, Style 66 (K. S. C. 238).
[3] 3 Coke *Inst.* 109.
[4] *Hoskins* v. *Tarrance*, 5 Blackford 417 (K. S. C. 239).
[5] Thus a villein was so identified; and consequently, though saleable, he was not larcenable; 3 Coke *Inst.* 109.
[6] 1 Hale P. C. 510; Stephen, *Hist. Cr. Law*, III. 138.
[7] Y. B. 10 Ed. IV. fo. 14, pl. 9; Dalton, c. 156, s. 8.

they were worth more than 12*d.*; cf. p. 219 *infra*. For a still better reason—Identification with the right they evidence—see p. 202 *infra*.) But *now* under s. 7 (1) of the Larceny Act, 1916, it has been made a statutory felony to steal documents of title to land[1]; thus abolishing the fiction.

It may here be convenient, if not strictly relevant, to mention that, even at common law, gas is larcenable[2]; and that it is a statutory felony[3] to "maliciously or fraudulently abstract, cause to be wasted or diverted, consume, or use, any electricity[4]."

§ 7. The Value

A thing is not stealable, at law, unless it[5] "has value." "De minimis non curat lex." Otherwise it would, as Lord Macaulay says, be a crime to dip your pen in another man's inkstand, or to pick up acorns in his garden to throw at a bird[6]. But the exact measure of this value has never been fixed. Its indefiniteness gave scope for the humane ingenuity of the judges. Hence many things in which a legal property existed, and which were of such appraisable importance that damages could have been recovered in a civil action for taking them away, were held to be below the minimum of value that was necessary to support a conviction for the felony of larceny. A vivid illustration is afforded by the fact that at one time it was doubted whether even diamonds and other precious stones, if unset, had any such intrinsic worth as to be larcenable, "because they be not of price with all men; however dear and precious some do hold them[7]." It became

[1] As it also is one to *destroy* them; 24 and 25 Vict. c. 96, s. 28.
[2] *Reg.* v. *Firth*, L. R. 1 C. C. R. 172. [3] Larceny Act, 1916, s. 10.
[4] A man was accordingly convicted who had put a wire into his land and tapped (in order to light his house) the waste electricity which had been allowed to run into the earth at neighbouring works. But might he not have urged that it was derelict (p. 193 *supra*)?
[5] Larceny Act, 1916, s. 1 (3).
[6] Note N, to his Indian Penal Code.
[7] Hales, J., A.D. 1553; cited by Lambard, p. 275. Lambard himself enumerates as larcenable "horses, mares, colts, oxen, kine, sheep, lambs, swine, pigs, hens, geese," etc. He does not mention goats.

clearly settled that the law of larceny affords no protection for such animals as serve neither for draught nor for food[1]. Hence clearly there was no crime in stealing cats, ferrets[2], monkeys, nightingales, parrots, or canaries. The principle was applied even to dogs; for "a man's two best friends—his wife and his dog—were singularly disregarded by the old common law[3]." (Yet, for taking a dog, damages could be recovered in a civil action even in very early days[4], and it was never denied that stealing a dog's collar, or even stealing the dressed skin of a dead dog, would amount to larceny.) Bees, however, though themselves inedible, were a source of food, and consequently were held[5] to be larcenable; and the law similarly protected the hawk when tamed, "in respect of the nobleness of its nature, and its use for princes and great men[6]." A statutory protection, however, though less stringent than that of larceny, has been given in modern times to every animal or bird that is ordinarily kept for domestic purposes, or even kept in confinement[7].

The rule which made value essential to larcenability was extended artificially by a fiction which identified the documentary evidence of any right with the right itself, so that if the subject of the right could not be stolen the document could not be. "The accessory must follow its principal." We have already noticed one application of this rule, the case of the title deeds of real property. The same rule was applied to documents which were evidence of the right to any mere chose in action[8], *e.g.* such instruments as a promissory note,

[1] 1 Hale P. C. 512. [2] *Rex* v. *Searing*, Leach 350 (K. S. C. 244).

[3] Ingham's *Law of Animals*, p. 57.

[4] Y. B. 12 Hen. VIII. 3. Manwood (*Forest Laws*, p. 99 A.D. 1598) speaks of even mortgages and pledges of dogs, as if quite frequent. Yet the civil action has recently been refused in America, in deference to the old rule of larceny; see 75 Georgia 444.

[5] *Hannam* v. *Mockett*, 2 B. and C. at p. 944. A swarm from my hive remains mine until I abandon the intention to pursue it.

[6] 1 Hale P. C. 512.

[7] *Infra*, p. 222. The individual must be so kept; the species need not.

[8] Dalton, 501; cf. Williams' *Personal Property*, Introd. § 3. But note also p. 222 (2) *infra*.

or even a contract for the sale of a quantity of unascertained goods; their character as pieces of paper was "absorbed" (Dearsly 334). But a document of title to specific goods, which themselves were larcenable, was itself larcenable; *e.g.* a pawnbroker's duplicate[1].

Now, however, under the Larceny Act, 1916, s. 46 (1), "*all* deeds and instruments relating to, or evidencing, the title or right to any property" [real or personal] "or giving a right to recover or receive any money or goods" are capable of being stolen. And the stealing will be a Larceny: sometimes Ordinary, sometimes Aggravated. The reason why the thief of title deeds could not be indicted for simply stealing so much parchment was certainly not the mere smallness of the intrinsic value of the parchment or paper; for an indictment for the larceny of merely "a piece of paper" is good, and counts so expressed are habitually inserted in indictments for stealing post-office letters. Accordingly convictions have taken place for the larceny of proof-sheets[2], of cancelled bank-notes[3], of a worthless cheque[4], and of a small slip with memoranda pencilled on it[5]. Indeed the principle is now distinctly laid down that although, to be the subject of a Stealing, a thing must be of value to its owner, if not to other people, yet this need not amount to the value of the

[1] *Reg.* v. *Morrison*, Bell 158.

[2] A proof-sheet containing secret information (*e.g.* a telegraphic cipher code, or the forthcoming annual report of the Directors of a Company) might have very great pecuniary value to certain persons. See in C. C. C. Sess. Pap. XLIX. 179, a trial for stealing from the Colonial Office a despatch, whose premature publication by the thief rendered futile (Morley's *Gladstone*, Bk. IV. ch. X.) Mr Gladstone's mission as Lord High Commissioner to the Ionian Islands. Still greater political confusion was caused in 1878 when a Foreign Office copyist disclosed to the *Globe* the secret Anglo-Russian agreement which Lord Salisbury had signed. Still the copyist had not "taken" the documents but had merely copied one and memorised the other. This was no offence, as the Official Secrets Act had not been passed then (*Annual Register*, 1878, p. 67).

[3] *Rex* v. *Clark*, R. and R. 181. A telegram; C.-C. C. Sess. Pap. CLIII. 451.

[4] *Reg.* v. *Perry*, 1 C. and K. 729 (K. S. C. 245).

[5] *Reg.* v. *Bingley*, 5 C. and P. 602. That the owner carried it in his pocket affords evidence of its being of some value to him.

smallest coin known to the law, or of even "the hundredth part of a farthing[1]." In *Reg.* v. *Clarence*, Mr Justice Hawkins went so far as to say, though only incidentally, that stealing a single pin would be larceny (L. R. 22 Q. B. D. 23).

To have omitted from the definition of Stealing all reference to the element of Value would have been to make the Act of 1916 alter some established points of law. But it must frankly be admitted that the word, thus retained in the definition, must be understood in some sense which is neither a natural nor even a precise one[2].

§ 8. The Claim of Right

If property is taken by legal right, obviously no wrong, either civil or criminal, is committed by taking it. But in criminal law immunity is carried still further. An act of taking will not amount to Stealing unless it be committed not only without a legal right, but without even any appearance (or, in the old phrase, "colour[3]") of a legal right. So the ordinary *mens rea*, quite compatible with an honest ignorance of law[4], does not suffice to constitute guilt in cases of Stealing. For any "claim of right, made in good faith[5]," if at all reasonable will suffice to deprive the taker's act of any larcenous character; *e.g.* a mistake of Law as to the rights of a Finder or of a Poacher[6]. It is a question of fact, for the jury, whether the goods were taken with such a belief or not. But there is high authority for saying that "If there be in the prisoner

[1] *Reg.* v. *Morris*, 9 C. and P. 349, *per* Parke, B.

[2] Bishop (II. § 37. 9) treats the rule as quite obsolete in America.

[3] Under the *colour* of commending him
I have access my own love to prefer.
Two Gentlemen of Verona, IV. 2.

[4] *Supra*, p. 68.

[5] Larceny Act, 1916, s. 1 (1). Cf. p. 167 *supra* as to malicious damage.

[6] C. and M. 306; 3 C. and P. 409. It is held in New South Wales (*Rex* v. *Nundah*, 16 N. S. W.) that the claim, if honest, need not even be reasonable. But in the United States the belief, during the Civil War, that a person whose property had been appropriated by a rebel could legally reimburse himself by taking the property of any other rebel, was held to be too unreasonable an error of law to afford a defence; *Lancaster* v. *The State*, 3 Coldwell 339.

any fair pretence of property or right, or if it be brought into doubt at all, the court will direct an acquittal[1]." The best evidence that there was actually a sincere claim of right is that the goods were taken quite openly[2]. A surreptitious taking, or a subsequent denial of the taking, or a concealment of the goods, suggests a felonious intent.

The following instances may be mentioned in which the carrying off of some one else's goods will be unpunishable, on account of their being appropriated under a *bonâ fide* claim of right.

(1) Where something is seized by a landlord in a distress for rent; even though he be mistaken in thinking that any rent is due, or even though the article seized be one which is privileged by law from being distrained on.

(2) Where corn is taken by a gleaner, honestly and openly, in a locality where gleaning is customary[3].

(3) Where the taker believes that the owner has abandoned the thing; or that what he is taking is his own property[4]; or that it is something which he has a right to take[5], whether as an equivalent for his own property[6] or with a view to mere temporary detention (*e.g.* by way of lien).

§ 9. Absence of Owner's Consent

The Act of 1916, s. 1 (1), preserves the rule[7] that a thing is not stolen unless taken "without the consent of the owner," or of his duly authorised agent[8]. Upon this point a question

[1] East, *Pleas of the Crown*, 659.

[2] *Rex* v. *Curtiss*, 18 Cr. App. R. 174; *Causey* v. *The State* (K. S. C. 281).

[3] Russell on Crimes, 8th ed. p. 1174.

[4] *Rex* v. *Hall*, 3 C. and P. 409 (K. S. C. 280); cf. 3 Cr. App. R. 92.

[5] Even claims under a reprehensible practice, if it be commonly prevalent, may suffice; *e.g.* where sergeants, in weighing out the regimental meat, used to appropriate a certain percentage of it; *Rex* v. *Daniels* (*The Times*, Feb. 9, 1915).

[6] *Reg.* v. *Boden*, 1 C. and K. 305 (K. S. C. 282).

[7] *Rex* v. *Macdaniel*, Foster 121 (K. S. C. 259).

[8] Thus an agent, duly authorised to transfer ownership, commits no larceny if he appropriates the article; *Folkes* v. *King*, L. R. [1923], 1 K. B. 282.

of practical importance often arises in consequence of the plans laid by the police for the detection of a suspected thief. If, for mere purposes of detection, the owner of goods acquiesces in a thief's carrying them off, does such a consent suffice to prevent the thief's act from being a larceny? We have seen (p. 174) that, in burglary, an entry permitted, after an *unsuccessful* attempt to deceive, does not amount to a constructive breaking. Similarly in larceny, if the owner desired that the thief should actually remove his goods, or, still more, if he had employed someone to suggest to the thief the perpetration of the theft, his action would constitute a sufficient consent to render the taking no larceny, although his sole object was to secure the detection of the offender. Yet if he went no further than merely to facilitate the commission of the theft (*e.g.* by allowing one of his servants to assist the thief), such conduct would no more amount to a consent than if a man, knowing of the intention of burglars to break into his house, were to leave one of the bolts on the front door unfastened.

But the owner's consent must of course be a true consent --a free and a full one[1]. Thus it can afford no defence where it is obtained from him by Intimidation. In such a case his will is overborne by compulsion; as where the keepers of an auction-room forced a woman to pay for some lots which she had not bid for, by threatening that she should not be allowed to leave the room until she had so paid[2]. Much more frequent than intimidation, however, is Fraud; which is equally effective in removing all exemptive character from an apparent permission. Consent obtained by fraud is not a true consent. Hence wherever an owner's consent to the taking of his goods is obtained *animo furandi*, the deception vitiates the consent. The taker is accordingly guilty of "larceny by a trick[3]."

[1] Larceny Act, 1916, s. 1 (2) i (*a*) and (*b*).

[2] *Reg.* v. *McGrath*, L. R. 1 C. C. R. 205 (K. S. C. 262). Contrast 4 F. and F. 50. See *Rex* v. *Hilliard*, 9 Cr. App. R. 171, on theft by drugging.

[3] A common offence; but often puzzling, even to experts. See L. R. [1907] 2 K. B. at p. 77; cf. also p. 540 *infra*.

It should be noticed that here he has a guilty intention at the time when he receives the thing from the owner. If he had received it innocently, and had not conceived until afterwards the idea of appropriating it, his conduct would not be larceny (unless he were a bailee, see p. 189).

In some cases an actual "trick" is carried out, some false artifice[1] or misrepresentation, like those involved in the use of false weights, or in the practices of ring-dropping[2] and of "ringing the changes[3]," or in the "confidence trick." Still simpler pretences are a representation by the thief that he has been sent by customers to fetch away the goods[4] they had bought; or a representation that he wants change for a sovereign, which affords him an opportunity of running off with both the sovereign and the change also[5]. But it is not essential that there should be any such *active* fraud. It is enough if the offender obtains the thing from the owner, fully intending to appropriate it, and knowing at the same time that the owner does not intend him to appropriate it. It is thus abundantly clear that if the owner only consents to give up the mere possession of the thing (*e.g.* to lend a horse for a ride), the fact that this consent was obtained by fraud will prevent its constituting any defence for the larceny of subsequently appropriating the thing.

But if the owner had consented to give up not only his Possession but also his Property in the thing, then -- even though there may have been such fraud as to vitiate the transaction, still more if there were merely the owner's own mistake-- may not a valid possession have passed in spite of the error, and a larceny consequently have been rendered impossible? This question involves various alternative possibilities, which we must consider separately.

[1] *E.g.* cardsharping; for the victim meant his money to pass only if won by fair playing: 9 Cr. App. R. 174.

[2] *Rex* v. *Patch*, 1 Leach 238.

[3] *E.g.* change a florin for sixpences, and then the sixpences into pence, and carry off both the pence and the florin. *Reg.* v. *McKale*, L. R. 1 C. C. R. 125.

[4] *Rex* v. *Hench*, R. and R. 163 (K. S. C. 264).

[5] *Rex* v. *Williams*, 6 C. and P. 390 (K. S. C. 265).

(*a*) It is usually by active Fraud on the part of the thief, and not by a mere spontaneous blunder of the owner himself, that the latter is led to give a defective consent to a transfer of his ownership. But such a fraud may take either of two forms. If it be merely such as, in property law, gives the alienor only a right to rescind the alienation, and does not prevent a legal ownership[1] (though only a voidable one), and a consequent right of possession, from passing meanwhile to the alienee, then the alienee's crime will not be that of larceny, but only the misdemeanor of obtaining by false pretences[2]. If, however, the fraud related to some circumstance so fundamental[3] that, notwithstanding the owner's intention to alienate, no right of property (not even a voidable one) passed to the author of the fraud, the latter will have committed a larceny. Similarly, there will be a larceny if the owner's intention was not to make an immediate and absolute alienation but only a deferred or a conditional one; as where a stranger purports to buy a horse in a fair for ready money, but mounts it and rides off without paying the price[4]. Such a transaction may at first sight seem to resemble the misdemeanor of a fraudulent obtaining of ownership, rather than the felony of larcenously taking away possession from a continuing owner. But the latter view of it has prevailed; for the owner, it is said, must have intended only a conditional alienation, by which the property would not vest absolutely in the recipient until the price was paid. This argument, however, does of course involve a conjectural assumption as to the owner's state of mind with regard to a

[1] Or even merely a power to confer ownership; L. R. [1911] 1 K. B. at p. 479.

[2] See p. 241 *infra*. Cf. 5 Cr. App. R. 102.

[3] Anson on Contract, ch. VI., Pollock on Contract, IX. 2. Cf. L. R., 2 C. C. R. at p. 45; *Rex* v. *Tideswell*, L. R. [1905] 2 K. B. 273. Such errors may relate to the Person (*Cundy* v. *Lindsay*, L. R. 3 App. Ca. 459); or the Subject matter (*Couturier* v. *Hastie*, 5 H. L. C. 673); or the Nature of the transaction (*e.g.* welshing, *Reg.* v. *Buckmaster*, L. R., 20 Q. B. D. 182).

[4] *Reg.* v. *Russett*, L. R. [1892] 2 Q. B. 313 (K. S. C. 349). Cf. 4 Cr. App R. 17, 53.

contingency that possibly never occurred to his mind at all. A further reason, perhaps more satisfactory, is that inasmuch as there was no *concensus voluntatum*, no "meeting of two minds in one and the same intention[1]"—the prisoner never having any genuine intention to contract—the arrangement (whatever its conditionality or unconditionality) was wholly void in law, and therefore could confer on the prisoner no rights whatever; though he himself would be "estopped" from asserting its invalidity.

(*b*) Occasionally, however, a man's own spontaneous Mistake leads him to wish to make over all his rights in some chattel. If that mistake amounts to a Fundamental error (see p. 208 n.), and the recipient knowingly and dishonestly avails himself of it and appropriates the thing, does he commit larceny? This question was discussed very fully in *Reg.* v. *Middleton*[2]. A post-office clerk, when about to pay out money to a savings-bank depositor, consulted by mistake the wrong letter of advice; and consequently handed over to the depositor a far larger sum than really stood to his credit. The man took the money, knowing full well that it was paid to him by mistake. On being indicted for larceny, he was convicted; and the conviction was upheld by eleven judges against four. Eight[3] of these eleven judges held that, even here, the clerk's mistake was one sufficient to prevent both the property and even the possession from passing[4]; and regarded the prisoner's taking of the coins as felonious. They insisted that a mere inoperative intention on the part of an owner to pass the property—inoperative in itself, and known to the thief to be inoperative—could not be enough to prevent the appropriation from constituting a larceny. On the

[1] Sir F. Pollock. Cf. *Rex* v. *Oliver*, 4 Taunton 275.

[2] L. R. 2 C. C. R. 38 (K. S. C. 266).

[3] For Pigot, B., seems to have "quite acceded to" the legal doctrine of the seven others, though advancing a further view of the particular facts.

[4] Sir Frederick Pollock thinks that this doctrine had already been conclusively established in the earlier case of *Hardman* v. *Booth* (1 H. and C. 803); which, however, was not cited in *Reg.* v. *Middleton*. See Pollock and Wright on Possession, p. 112.

other hand, seven judges thought that an owner's consent to pass not only possession but also property might, even when too defective to pass a perfect title, still suffice to prevent the taking of possession from being a larceny; in spite of there being mistake, or fraud, of such a nature as to prevent the consent from being operative. (But three of these seven, it may be added, upheld nevertheless the conviction of Middleton; on the ground that the full authority of an owner had not been delegated to the post-office clerk.)

But, now, the Larceny Act, 1916, s. 1 (2), i, by a general provision that Stealing shall include the taking of a thing "under a mistake on the part of the owner, with knowledge on the part of the taker that possession has been so obtained," seems to establish the doctrine of the eight judges.

(5) To this discussion of the effect of an owner's consent in giving a "colour of right" and so preventing a taking from being larcenous, we may add that where the taking is by consent of the owner's agent or apparent agent, as where a cook gives scraps of food to a beggar, the same principles will apply. And a wife will usually have sufficient appearance of being her husband's agent for this purpose[1]. But her consent to the taking of his goods is no defence where they are taken by her adulterer[2]. It may reasonably be conjectured that where (under the Married Women's Property Act, 1882) property belongs to a wife, the consent of her husband would similarly be held to afford a sufficient "colour of right" to excuse a taking.

§ 10. The Intent

The Act of 1916 requires "intent, at the time of the taking, *permanently* to deprive the owner" of his chattel. The mere fact of taking possession surreptitiously of another man's goods raises a presumption of that criminal intent. But there is no larceny when a thing is taken quite unintentionally; as

[1] *Rex* v. *Harrison*, Leach 47 (K. S. C. 274).
[2] *Reg.* v. *Featherstone*, Dearsly 369 (K. S. C. 274).

when a guest, playing at bagatelle, puts a ball in his pocket, and goes away forgetting it. And even an actual intention to take away the owner's possession from him, but only *temporarily*, will not suffice[1]; as when a schoolboy takes out of his master's desk a "crib" wherewith to prepare a lesson. Similarly a husband who takes his wife's diary merely that he may produce it as evidence against her on his petition for a divorce, does not commit a larceny. To seize your debtor's property wrongfully, but merely for the purpose of inconveniencing him by detaining it until he pays your debt, is thus no larceny but only a tort. So again, it is no larceny for the finder of an article to refuse to deliver it up when first asked for, if he is delaying merely in hopes of a reward being offered. To take a key merely for unlocking a safe, even though it be with the object of stealing the contents, is no larceny[2]. And thus a boy may steal a ride without stealing the donkey[3]. He does of course commit a trespass; but he does nothing that amounts, in the law of tort, to a "conversion." Nor will even his turning the animal loose, when he has finished his ride, necessarily constitute a conversion. But if he dismissed it at some place so remote that it would be unlikely to find its way back to its owner, he would usually be guilty of a conversion, and of a larceny. For the abandoning it with a reckless disregard as to whether or not it will be recovered by the owner, is evidence of an intention to deprive him of it altogether[4].

It has already been seen (*supra*, p. 191) that, where goods are bailed, only an act of conversion by the bailee quite

[1] English law, like Scotch and even Roman-Dutch, thus rejects the Roman "furtum usûs." But Scotland (7 Justiciary 189) punishes the borrowing of a document to *steal* from it valuable secrets; and see p. 540 *infra*.
[2] *Reg.* v. *Haslam* (C. C. C. Sess. Pap. LXVII. 66). So, when in May, 1914, at the porch of the Central Criminal Court a banker's ledger was taken, by deceit, from a witness; but only for temporary detention, to prevent its being used as evidence in a pending trial. Cf. *Rex* v. *Jones*, 19 Cr. App. R. 39.
[3] *Rex* v. *Crump*, 1 C. and P. 658 (K. S. C. 284).
[4] Cf. *Rex* v. *Oliver* (Transvaal [1921] 120); *Rex* v. *Laforte* (Cape [1922] 487); as to motor-cars. Even an intention to repay the value will not excuse a *permanent* appropriation.

inconsistent with the bailment can amount to an appropriation. Equally must there, in the case of all other larcenies, be an intention to appropriate the thing in a manner wholly inconsistent with the rightful possessor's interest in it. (But in them such an intention may be sufficiently manifested by many acts which it would have been quite permissible for a bailee to do, though they shew gross dishonesty in the case of anyone who has no right to be in possession of the thing at all.) There is no sufficient appropriation if a servant takes his master's goods merely for the purpose of bringing them back and then defrauding him by a pretence of having meanwhile done work upon them and earned wages thereby[1]. And similarly, it is no larceny for a man, who is only temporarily in need of money, to carry off another person's overcoat and pawn it, with a full intention of redeeming it and returning it, and with a full likelihood of being able to carry out this intention[2]. But a man must be taken to intend the natural consequences of his conduct; and therefore if, when he pawned the overcoat, he had not an immediate prospect of being able to redeem it, the mere hope and desire on his part of restoring the coat, if he should ever become able to do so, will not suffice to negative a larcenous intent[3]. An intention of appropriation does not cease to be criminal because the owner is unknown, or even quite untraceable (see p. 196).

It should be observed that the mere intention thus to injure the owner suffices, even though the thief have no intention to benefit himself by the theft. It thus is not essential in English law, as it was in Roman law[4], that the theft should be committed *lucri causâ*. Accordingly where a servant, in order to suppress inquiries as to her character, took a letter

[1] *Reg.* v. *Holloway*, 1 Denison 370 (K. S. C. 285).
[2] But it will be an offence of "Unlawful Pawning"; cf. p. 192 n. *supra*.
[3] *Reg.* v. *Trebilcock*, D. and B. 453.
[4] *Digest*, XLVII. 2. 1. 3. In 1904 a cook on a Rhine steamer angrily threw some pans overboard. The Cologne court acquitted her both (1) of damaging them, for they lie in the river intact, and (2) of stealing them, for she sought no *lucrum*. But Scottish, French and (recently) Roman-Dutch law, have abandoned *lucri causâ*.

and destroyed it, she was convicted of a larceny of it[1]. Similarly if, at the termination of a drunken fight, one of the combatants should, in his ill-temper, pick up the hat which his antagonist has dropped, and fling it into a river, he would commit larceny. Had he, however, flung it merely into a field, there would be no evidence of any intention to deprive the owner of it permanently.

There is, however, one exceptional case in which a thief's intention merely to deprive the owner of his ownership, without any intention of also benefiting himself by his theft, will not suffice for larceny. For by 26 and 27 Vict. c. 103 (a statute passed in consequence of a case that excited a momentary agitation), it has been made no longer a larceny for servants to give to their master's animals, against his orders, food that belongs to him; and it is, instead, made a petty offence, punishable on summary conviction.

By far the most difficult question that arises in respect of the *animus furandi* is that of Time. At what moment must the guilty intention exist, in order to render an appropriation larcenous? The answer must differ, accordingly as the accused person's original possession was a lawful one or not.

If it were lawful, then no dishonest intention that arises only subsequently could amount at common law to a larceny[2] (but it has, as we have seen (p. 189 *supra*) been provided by the Act of 1916 that *bailees*—though their original taking of possession is of course a lawful one—may be convicted of larceny if they, however long after receiving possession, convert to their own use the article bailed).

If, however, the original taking of possession were in any way unlawful, then any subsequent determination to appropriate the thing will operate retrospectively, and will convert that taking into a larceny. Even if the original taking were no more than a trespass (*e.g.* taking the wrong umbrella by

[1] *Reg.* v. *Jones*, 1 Denison 182. The Larceny Act, 1916, follows this common-law doctrine.
[2] *Rex* v. *Holloway*, 5 C. and P. 525 (K. S. C. 288).

mistake, or borrowing a neighbour's plough for an afternoon's work without his leave), a subsequent intent to appropriate the thing so taken will thus relate back, and render the act a larceny. Thus where the prisoner drove off amongst his own lambs a lamb of the prosecutor's by honest mistake, but, after he had discovered the error, proceeded to sell the lamb, he was convicted of larceny[1].

Let us apply these two principles to the very common case of the finding of lost articles[2]. If the owner has intentionally abandoned all right to them, of course the finder may appropriate them, and thereby become true owner[3]. But even where there has been no such abandonment, and consequently the finder does not become owner of the thing which he has found, he will not commit any crime by appropriating it, unless, at the very time of the finding, he both

(i) "believes

(α) that the owner can be discovered by taking reasonable steps" (Larceny Act, 1916, s. 1 (2) i); and

(β) that that owner had not intentionally abandoned the thing[4],

and yet also (ii) forthwith resolves to appropriate it.

In determining whether or not a finder has had reasonable grounds to believe that the owner could be discovered, it will be important to take into account the place where the thing was found, and also its own nature, and, again, the value of any identificatory marks upon it. Thus in the case of cheques, bills of exchange, promissory notes, and other securities that carry the owner's name upon them, a finder could scarcely think it impossible to trace out the owner, even though it were in a crowded thoroughfare that he picked up the papers.

[1] *Reg.* v. *Riley*, Dearsly 149 (K. S. C. 289).

[2] See Pollock and Wright on Possession, pp. 171–187. If the finder take possession with no intention of restoring them to the owner, he commits a Trespass: if he make any use of them, he commits a Conversion; if he take them with intent to appropriate them, it may be a Larceny.

[3] *Supra*, p. 193.

[4] *Reg.* v. *Thurborn*, 1 Denison 387 (K. S. C. 276).

Similarly in the case of articles left in a cab, the driver will generally have a clue to the owner from knowing where he picked up, or set down, his passengers[1]. And where property has been accidentally[2] left by a passenger in a railway train, it has always been held to be larceny for a servant of the railway company to appropriate it instead of taking it to the lost-property office[3].

Every finder, it has always been clearly held, has a "special property," *i.e.* a right to possession; so that he could maintain against any stranger the old actions of trover, detinue, or trespass[4]. But it must be noted that he has not—as some bailees have—a right of possession against the owner himself. The owner remains all the while in "constructive possession" of the article; and hence, if any third person should dishonestly take it from the finder, that person may be treated as having stolen it from the owner[5].

Cases of finding present, however, much less difficulty than those of mutual error, *i.e.* where a wrong article has been both given, and accepted, in mistake for something else which both parties believed they were dealing with. Simple as is our twofold rule as to the time of the *animus furandi*, it is not easy to apply it in these cases; because of the difficulty of deciding which was the moment when, in contemplation of law, the technical possession shifted, and the thing accordingly was "taken[6]." When walking together in the evening, *A* asks *B* to lend him a shilling; and *B* gives him a coin which both of them, owing to the darkness, suppose to be a shilling[7]. But, after they have separated, *A* discovers the

[1] And, if *no* clue, he ought to deliver the articles to the cab-owner; as *he* is "Possessor" of the cab and its contents. Cf. p. 186 *supra*.

[2] Contrast the newspapers *intentionally* abandoned there by him.

[3] Cf. *Reg.* v. *Pierce*, 6 Cox 117; contrast a mere coin found on an open moor, 18 Bombay 212.

[4] Pollock and Wright on Possession, p. 187.

[5] *Reg.* v. *Swinson*, C. C. C. Sess. Pap. CXXXI. 132.

[6] See 6 Edw. VII. c. 32, s. 4, as to the special duty of finders of stray *dogs*.

[7] Or a sovereign is put into an organ-grinder's cap, by mistake for a penny. In Dublin, in one single year (1902), sixteen gold coins, that had been given to cabmen in mistake for silver ones, were handed by them to the police.

coin to be a sovereign; and thereupon resolves nevertheless to spend it. When, in point of law, did *A* "take" this sovereign into his possession? If it were when the coin was actually handed to him, then (as he had at that time no guilty intent) he "took" it innocently; and therefore no subsequent appropriation of it can make him guilty of larceny. But, on the other hand, if the law does not regard him as having taken possession of it until he came really to know what it was, then (as he simultaneously formed the intention of appropriating it) he will be guilty of larceny. The whole question therefore resolves itself into this, What mental element is necessary for legal possession? "Delivery and receipt," said Lord Coleridge, C.J., "are acts into which mental intention enters. There is not in law, any more than in common sense, a delivery and receipt, unless the giver and receiver intend respectively to give and to receive what *is* given and received." Yet there still remains difficulty in determining what precise extent of concurrence between their intention and the facts is necessary. Thus in *Ashwell's Case* (where the circumstances which we have above described arose) although all the fourteen judges were agreed[1] in adhering to the rule that "if the original taking is innocent, no subsequent appropriation can be a crime," yet seven of them were for upholding his conviction for larceny, whilst seven[2] were for quashing it[3]. In the similar and later case of *Reg.* v. *Hehir*[4] the Irish Court for Crown Cases Reserved was divided almost equally closely; four judges being in favour of the conviction, but the remaining five in favour of quashing it. It must be noted that in both these difficult cases the mutual error went so far as to be a mistake about the species of the article, and not merely about its marketable value. Had the error

[1] As was stated in *Reg.* v. *Flowers*, L. R. 16 Q. B. D. 643.

[2] Whose view Lord Loreburn approved, in the Committee on the Larceny Bill, p. 21.

[3] L. R. 16 Q. B. D. 190 (K. S. C. 292). The rule of the Court being "praesumitur pro negante," the conviction stood affirmed. See p. 541 *infra*.

[4] Irish L. R. [1895] 2 Q. B. 709 (K. S. C. 300).

concerned value alone, it certainly would not have prevented the possession from passing at the moment of the physical delivery. As was said by Madden, J.[1]: "*A* may deliver to *B*, in discharge of a trifling obligation, an old battered copy of Shakespeare printed in 1623; both innocently believing at the time that—being old, full of errors and misprints, and badly spelled—it would only fetch a couple of shillings at an auction. Suppose *B* then to sell it to a collector for several hundreds of pounds[2], and to appropriate the proceeds, he would not be guilty of larceny; inasmuch as there was an intelligent delivery of the chattel itself, though there was a mistake as to its value." But in the view of those judges who upheld the convictions of Ashwell and Hehir a mistake as to the species of a *coin* is not a question of mere value but one of identity. Now in contracts for the sale of chattels, any mistake of identity undoubtedly avoids the contract; since there is no *consensus ad idem*, and therefore[3] the property does not pass. Yet even then it does not follow that legal possession may not pass. True, there are two civil cases[4] in which it was held that the delivery of a bureau (whether on sale or on bailment) is *not* a delivery of its unknown contents (*e.g.* money lying in some secret drawer); and accordingly that these are not "received" by the deliveree until he knows of their existence. These cases go so far as to shew that a person does not always "receive" a thing by its merely coming into his physical possession. But, inasmuch as the parties dealing with the bureaux were ignorant of the very existence of the money, these cases fall short of *Ashwell's Case*, where both parties quite knew that it was with a coin that they were dealing[5].

[1] *Reg.* v. *Hehir* (K. S. C. at p. 301).

[2] A well-known Cambridgeshire antiquary sold in 1906 for £2500 a book which he had bought in a cottage for 2*s.* 6*d.*

[3] *Raffles* v. *Wichelhaus*, 2 Hurlstone and Coltman 906.

[4] *Cartwright* v. *Green*, 8 Vesey 405; *Merry* v. *Green*, 7 M. and W. 623.

[5] In *Reg.* v. *Ashwell* those who maintained that knowledge of the true nature of the thing was essential also held that the taker had at first merely an excusable "detention"; and accordingly, if he had paid away the coin

We therefore can only say that, if a chattel is given and received "intelligently," the possession will certainly pass; and beyond this we must not go. For it is not yet possible to lay down authoritatively *what* exactly it is that must be understood with due intelligence by the parties.

Where the mutual mistake relates to the person for whom a letter is intended, it has more than once been held[1] that if a postman mis-delivers a letter, and then the recipient, on opening it and finding it not to be meant for him, nevertheless appropriates some article which was enclosed in it, he commits no larceny. For there was no *animus furandi* at the time when the letter came into his hands; and the delivery of a letter, unlike that of a bureau, clearly is always intended to include delivery of all its contents. Thus a letter addressed to a Mrs Fisher in one house was delivered to a Mr Fish living in another; and, on opening it, he found that it contained a cheque. This he proceeded to endorse (in the name of Fisher) and to cash. On an indictment for stealing this cheque, he was acquitted; the court holding that the legal "receipt" both of the letter and of the cheque took place at the actual moment when the envelope reached Fish, although he then mistakenly supposed it to be a letter for himself[2].

§ 11. The Punishment

As regarded its punishment, larceny presented some anomaly at common law; for, though a felony, it was not

before discovering its nature, he would have been protected from any claim by the owner for its proper value. But an intermediate view has since been suggested by Mr Justice Wright (*Possession*, p. 210: cf. p. 105), viz. that the mistake did not thus invalidate the acceptance, but that it did invalidate the delivery; so that, though a new (and an excusable) possession did arise, it was a trespassory one, and accordingly the subsequent *animus furandi* related back and made the taker guilty of larceny; cf. pp. 213–4.

[1] *Rex* v. *Mucklow*, Moody 160; *Reg.* v. *Davies*, Dearsly 640; see Pollock and Wright on Possession, p. 113, as to the authority of these cases being still maintainable, whatever view be taken of the subsequent conflict of opinion in *Reg.* v. *Ashwell*.

[2] C. C. C. Sess. Pap. CXXXI. 212. Fish might, however, have been indicted under 7 Wm. IV. c. 36, s. 31, for the statutory misdemeanor of "fraudulently retaining a post-letter which ought to have been delivered to some other person."

invariably a capital offence[1]. A distinction was made, according to the pecuniary value of the thing stolen. If it were worth only twelve pence[2] or less, the offence was merely a "Petty" larceny; and, although a felony, was not punishable with death. If the thing were worth more than 12*d.* the crime was a "Grand" larceny[3]; and at least as early as the time of Edward I. —probably indeed by the legislation of the stern "Lion of Justice," Henry I.[4] —it became punishable capitally. The phrases "Petty" and "Grand" have become obsolete since the abolition in 1827 of the distinction between them[5]. But larceny still admitted a division into two forms; the Simple and the Aggravated.

Simple larceny—as now defined by the Larceny Act, 1916 —is, as we saw (*supra*, p. 184), declared therein to be punishable either with penal servitude for not more than five years or less than three, or with not more than two years' imprisonment with or without hard labour[6]. If convicted on an indictment, the offender cannot be fined; but upon summary conviction by justices of the peace, he may be. A person convicted of simple larceny, after having been previously convicted of any felony whatever, may be sentenced to ten years' penal servitude[7].

Aggravated larceny is of various kinds; punishable by various long periods of penal servitude, ranging from the offender's life down to seven years. The circumstances by which larceny may be aggravated are of four species.

(1) The place where it is committed; *e.g.* a ship[8], dock[8], wharf[8], or wreck[8], or (if the stolen property be worth not

[1] *Supra*, p. 93.

[2] See the Laws of Athelstane (v. 1). Under Edward I. the 12*d.* was reckoned to be eight days' wages of a man.

[3] Cf. Bolland's *General Eyre*, p. 66.

[4] Pollock and Maitland, II. 496. "If two or three jointly steal goods to the value of twelvepence halfpenny, they shall *severally* have judgment of life and limb"; *Eyre of Kent*, A.D. 1313, p. 90.

[5] 7 and 8 Geo. IV. c. 28, s. 2.

[6] Larceny Act, 1916, ss. 2, 37 (4). And a boy under sixteen may be whipped.

[7] *Ibid.* s. 37 (1).

[8] *Ibid.* s. 15.

less than £5) a dwelling-house[1]. The maximum punishment in each of these five cases is fourteen years' penal servitude.

(2) The manner in which it is committed; *e.g.* by stealing from the person[2]. If the property is not only stolen from the person of someone but taken from him by force (snapping a watch-chain suffices); or if he is led to give it up by being put in fear of force being used; the offence obtains the name of Robbery[3]. The force need not be great[4]. Yet obtaining money from a solitary woman in a lonely place by a threat, not to use force, but merely to accuse her of being there for evil purposes, would not be robbery; though it would, as we shall shortly see, constitute a statutory felony. And even actual force, if it does not begin until after the taking, will not make a larceny become a robbery.

The maximum punishment of these offences is again fourteen years' penal servitude. But for robberies that are further aggravated in certain specified ways (as by the robber's being armed, or having a companion, or using any personal violence), the maximum punishment rises to penal servitude for life[5]; and a flogging may be added, unless the offender be a woman. Even if no article be actually taken, and so no robbery be effected, the mere assault with intent to rob is a felony, and punishable with five years' penal servitude[6]. Similarly to demand a thing by force or with menaces, with the intent to steal it—though there be no assault and the menaces do not relate to physical violence—is a felony incurring the same punishment[7].

[1] Larceny Act, 1916, s. 13. [2] *Ibid.* s. 14. *E.g.* pocket-picking.

[3] *Ibid.* s. 23 (2). Six times rarer now (proportionally) than fifty years ago. Is this a decadence? For Fortescue (L.C.J., 1442–1460) preferred the many English robbers to the many French thieves, since "there is more spirit and a better heart in a robber than in a thief" (*Monarchy*, c. 12).

[4] Catching hold of an arm suffices. The gentle application of a chloroformed rag, producing a mere momentary unconsciousness, was held sufficient by the Court of Criminal Appeal; since "it was all the violence that was necessary for the purpose"; *Rex* v. *Carney*, Dec. 18, 1922.

[5] *Ibid.* s. 23. [6] *Ibid.* s. 23 (3).

[7] *Ibid.* s. 30. It is enough if the menace "unsettle the mind"; hence a groundless threat of a divorce petition was held by Lord Darling in 1924 to

(3) The person by whom it is committed. For a larceny by a clerk or servant, the maximum punishment is raised to fourteen years' penal servitude[1], owing to the opportunities of dishonesty which are necessarily placed within the reach of all persons thus employed, and to the breach of trust which is involved in taking advantage of them. The discussion of the difficult question "Who is a clerk or servant?" may be deferred until the subject of Embezzlement is dealt with[2].

(4) The subject-matter which is stolen. Thus the larceny of cattle, or of ten shillings' worth of textile goods exposed in process of manufacture[3], is punishable with penal servitude for fourteen years. (But maliciously destroying such textile goods is punishable with penal servitude for life[4].) Again, for stealing letters from a post-office, or from a postman, the maximum punishment is penal servitude for life[5]. And yet, curiously enough, a more complex and apparently more heinous offence, viz. the stealing of a post-letter by a person who is himself an employé of the post office, is punishable only with seven years' penal servitude[6] (unless the letter contain some chattel or money or valuable security, in which case the maximum punishment is penal servitude for life).

§ 12. Quasi-Larcenies

In the course of the foregoing account of larceny we have had occasion to mention various articles which, though movable, were not within the old law of larceny. It is important to add that by modern statutes, it has been made a crime to steal almost any of these[7]. But such thefts are not always made "larcenies"; and some are not even made felonies, but only indictable misdemeanors or offences punishable on

suffice. But in a genuine dispute about the ownership of a chattel even physical violence would not suffice, for there would be no "stealing."

[1] *Ibid.* s. 17 (1). [2] *Infra*, p. 229. [3] *Ibid.* ss. 3, 9.

[4] 24 and 25 Vict. c. 97, s. 14. [5] Larceny Act, 1916, s. 12.

[6] *Ibid.* s. 18. This lessening of punishment was perhaps due to the influence of the ancient rule that mere embezzlement was no crime.

[7] See Stephen, *Dig. Cr. Law*, Arts. 347–354.

summary conviction. The Larceny Act, 1916, contains several instances of these statute-made thefts. But its omission (see p. 184 *supra*) to define Larceny prevents our ascertaining which of them are larcenies[1]. But such thefts are construed by all the other common law rules about larceny, *e.g.* rules as to what will constitute a taking or a carrying away, or an intent to steal. It may consequently be convenient if, for want of any recognised name, we call them for the moment "Quasi-Larcenies," or, in Lord Loreburn's phrase, "Auxiliary Larcenies."

The cases of hares, and of fish, have already been mentioned. We may add some still more common instances.

(1) The theft of any valuable security[2] is larceny, and punishable in the same manner as if the thief had stolen a chattel of like value.

(2) To steal trees of the value of £1[3] or more, if growing in a park or garden, or to steal fixtures[4] or the title-deeds of land[5], is a felony punishable (like simple larceny) with five years' penal servitude.

(3) To steal wild deer in *inclosed* land (24 and 25 Vict. c. 96, s. 13), and to steal mineral ore from the mine[6], are felonies, but punishable with no higher penalty than two years' imprisonment, with or without hard labour.

(4) And it is a petty offence punishable, on summary conviction, with (for a *first* commission of the crime) six months' imprisonment with or without hard labour, to steal any plant, fruit or other vegetable production growing in a garden or orchard[7], or any *cultivated* root or plant—*fruit* is not included—growing elsewhere[8], or to steal a dog[9], or indeed to steal any bird, beast or other animal which has been ordinarily[10]

[1] See 7 C. and P. 667 *n.*; cf. 8 C. and P. 294. The marginal note to s. 5 of the Larceny Act, 1916, creates further confusion as to this word.
[2] Larceny Act, 1916, s. 46 (1).
[3] *Ibid.* s. 8 (2). [4] *Ibid.* s. 8 (1). [5] *Ibid.* s. 7. [6] *Ibid.* s. 11.
[7] 24 and 25 Vict. c. 96, s. 36. [8] s. 37. [9] *Ibid.* s. 18.
[10] It suffices that the individual has been so kept; though those of its species are not confined ordinarily.

kept in confinement (*e.g.* a canary) or for any domestic purpose (*e.g.* a cat) and is not larcenable at common law[1].

§ 13. Restitution of Possession

The only remaining topic to be considered in connexion with larceny, is that of the Restitution of the stolen property. The thief, as we have said, aims at depriving the true owner of all the benefits of his ownership. But of the ownership itself he cannot deprive him. It is important for the student to avoid the misapprehensions on this point which are apt to arise from the ambiguity of the word "property." That term may mean[2] either the physical object which is owned (*e.g.* "This umbrella is part of my *property*"), or the legal right which the owner has over it (*e.g.* "The finder of a lost umbrella acquires a special *property* in it"). It is only in the former sense that we can ever speak of "lost property" or of "stolen property." For property in the second sense (*i.e.* the intangible right of ownership) cannot be stolen or mislaid. A theft, then, leaves unaltered the ownership in the goods stolen[3]: so that the owner is still entitled to seize upon the thing, or to bring a civil action to recover it from the thief. There is an apparent exception to this where the thief has gone on to destroy the thing, or even to alter its essence irrecoverably by making out of it an entirely new kind of thing. In the latter case, as when *A* takes *B*'s barley and makes it into malt, or *B*'s planks and builds a summer-house with them, he acquires title, by *Specificatio*[4], in the new thing thus created. For, just as if *A* had burned the planks, or had fed pigs with the barley, *B*'s ownership is utterly gone[5]; and, consequently, his civil remedy is an action for damages alone. Yet even here there is no real exception to the principle we

[1] 24 and 25 Vict. c. 69, s. 21. Cf. p. 202 *supra*.
[2] Austin's *Jurisprudence*, Lect. XLVII.
[3] It is usually said that even the *possession* remains, constructively, in the owner (1 Hale P. C. 507); but see Pollock and Wright, p. 157, as to whether this should not be understood only as the *right to* possession.
[4] See Justinian, *Inst.* II. 1. 25–29. [5] Y. B. 5 Hen. VII. fo. 15, pl. 8.

laid down. For it was not by the theft, but by further conduct, posterior to the theft, that *B*'s ownership was extinguished[1].

Since a thief does not become owner, he cannot confer ownership upon anyone else; for *non dat qui non habet*. Hence the original owner may sue the thief, or anyone to whom the thief has given or sold the stolen article, in a civil action to recover it or its value. Moreover, to save owners the trouble and expense of this fresh litigation, it has been enacted that an order for restitution[2] of stolen property may be made by the criminal court (even though it be a court of[3] mere summary jurisdiction) before which any person is convicted[4] under the Larceny Act, 1916, of larceny or embezzlement or conversion or theft in any form, or even false pretences. But it should only cover such stolen property as

[1] If *A* had dealt with the materials in a less trenchant manner, so that the law would regard their identity as still continuing and as being still traceable—as where leather is made into shoes, cloth into a dress, or a log into planks (*Betts* v. *Lee*, 5 Johnson, New Yk. 348)—ownership would not have been changed; and *B* might lawfully have seized the whole of the manufactured product.

Indeed, *A*'s misconduct will sometimes have even the result of actually enriching *B*. For if, by a *Confusio*, *A* mingles *B*'s goods with his own, and not in a mere separable combination (like a heap of chairs) but so as to become mixed undistinguishably (as in a heap of corn), then the law confers upon *B* the ownership of the whole mass. *B* therefore becomes entitled to carry off even that part which, before the theft, did not belong to him at all (Popham 38, mixing hay). Similarly, in *Accessio*, if *A* take *B*'s dressing-gown and embroider it with his own thread, *B*, as owner of the "principal," can retake the garment and, along with it, the "accessory" embroidery (1 Hale P. C. 513). Nor does the English law require him in any of these cases to pay compensation for the advantage he obtains. Roman law did. See Prof. Buckland's *Textbook*, pp. 210-211.

It should be added, however, that in those cases of *Confusio* where the commingled articles are identical not only in kind but even in mere quality and value, it is doubtful whether the general rule would not be modified, by making *A* and *B* joint owners of the total mass (see 15 Vesey 442).

[2] Larceny Act, 1916, s. 45 (1), (2). See p. 227 *infra*.

[3] 42 and 43 Vict. c. 49, s. 27.

[4] But *before* conviction no such order can be made. Hence until then the police must exercise discretion about handing to the owner any goods they have rescued from a thief; *e.g.* about posting to the addressees the letters he has stolen from a pillar-box. Cf. pp. 227–8 *infra* as to judicial orders.

has been mentioned in the indictment and has been produced and identified at the trial[1].

But it must now be added that upon this general principle, *Non dat qui non habet*, the common law soon engrafted two exceptions, which the necessities of trade had shewn to be indispensable for the security of purchasers[2]. One depends upon a peculiarity in the stolen property itself; the other upon a peculiarity in the place where the purchaser buys it. A man who, in all ignorance of the theft, gives the thief valuable consideration in exchange for the stolen property, may, in spite of its having been stolen, acquire a good title to it, if either (i) this stolen property consisted of money or of a negotiable security, or if (ii) it was transferred to him in a "market overt."

(i) To secure the free circulation of current coin[3], the law treats as indefeasible the title to money which is paid away (*a*) for value and (*b*) to an innocent recipient (L. R. 14 Q. B. D. 34); and this, even though the particular coins may chance to be still identifiable. Yet even money can be claimed back by its original owner from a beggar to whom the thief has generously flung it; or from a companion to whom he has paid it in discharge of a bet; or, again, from shopkeepers who have sold goods to him for it, but in full knowledge that he had no lawful right to the coins he was paying them[4]. And it has recently been held that if the coins were dealt with, not as currency but, as chattels, the privilege does not apply. Thus, where a stolen Jubilee £5 piece had been acquired, by an innocent purchaser for value, as a curiosity,

[1] It ought to be made only in very clear cases; for the dispossessed third party has no power of appeal (except in a case where the conviction itself is appealed against).

[2] Williams' *Personal Property*, Part IV. p. 588.

[3] "Nec secta...de denariis foret acceptanda, propter eorum consimilitudinem qui sunt ejusdem fabricæ per totum regnum"; *Eyre of Kent*, I. 78, A.D. 1313. Hence experienced thieves prefer to steal money or bills rather than chattels; for coin is hard to identify, and bills fetch a better price than chattels because the receiver gets a safer title.

[4] Williams' *Personal Property*, 17th ed. 559.

the original owner was held to be entitled to recover it or its worth[1]. The distinction is perhaps to be regretted; as making a *bonâ fide* receiver's title depend upon a question so uncertain, even possibly to himself, as that of his intentions about his future treatment of the coin.

When modern commercial law introduced a paper currency, in the shape of bills of exchange and promissory notes, the privileges of money were (under similar restrictions) conferred on them. This privilege it is which renders them not merely "assignable" but "negotiable[2]." Hence the honest finder of a lost bill, though he obtains no title to it, can give a title.

(ii) Fairs and markets, moreover, brought together men from places so distant that, in mediæval days, the purchaser had little means of knowledge about the vendor he dealt with there, and consequently he needed the protection of some legal privilege[3]. Hence it became settled that even the most ordinary chattels might be effectually alienated by a mere thief, if he sold them for value to a *bonâ fide* purchaser on a market day, in such a place as was a lawfully established market for the particular kind of goods concerned—*e.g.* cattle, or corn, or cloth. And the publicity and rarity of the privileged occasions made this exceptional rule work comparatively little injury in the way of encouraging thieves. But modern facilities of intercourse have lessened the need for this protection; and, accordingly, modern legislation has restricted its completeness. For now, even when the ownership of goods has been divested by a sale in market overt, it will be revested in the old proprietor if the thief, or the guilty receiver,

[1] *Moss* v. *Hancock*, L. R. [1899] 2 Q. B. 110.

[2] Anson on Contracts, ch. IX. s. 1. But the rule of Evidence is that theft *taints* a negotiable instrument; so a subsequent holder loses the benefit of the normal presumption and has the burden of *proving* that he took it in good faith and for value. It has however been held in Australia that, in a similar action to recover stolen *money* from a thief's payee, the owner has to prove that the payee's title is defective (*Freedman* v. *Black*, 12 Commonwealth 105).

[3] Cf. Pollock and Maitland, II. 154, 164.

be convicted of the stealing or receiving[1]; a rule intended to stimulate owners to activity in prosecuting. (The court which convicts may itself issue an order for restitution (p. 224 *supra*), and so save the trouble of a civil action[2]. Such an order does not create any new right; the mere conviction has upset the effect of the sale in market overt[3].) But a conviction does not revest the ownership retrospectively. Accordingly, though the present holder must give up the article to the old owner, yet if the former were not the original purchaser in market overt, the owner will have no right of action in "trover" against that original purchaser, or against any intermediate holders.

Hence after a conviction for larceny (but usually not after one for false pretences[4]) the owner is sure to be able to sue for restitution, except in the case of money or a negotiable security. And even in this excepted case, if the thief has spent the proceeds of the theft in buying some article, the owner of the money may seize that article, and the thief cannot recover it from him[5]. For an owner may "follow his money" even into the subsequently purchased goods which represent it[6]; for in the Larceny Act[7] the word "property" includes not only the property originally possessed, but also any property into or for which it has been converted or exchanged. An innocent purchaser[8], against whom a restitution order is made, may ask the court to compensate him by returning him, out of any moneys that have been taken from

[1] Larceny Act, 1916, s. 45 (1). This rule as to Larcenies does not extend to misdemeanors of False Pretences or of Fraudulent Conversion.

[2] But if notice be given of an appeal against the conviction, both the revesting and the restitution order are thereby suspended; 7 Edw. 7, c. 23, s. 6.

[3] *Scattergood* v. *Sylvester*, 15 Q. B. 506. *Infra*, p. 253.

[4] See p. 253 *infra*.

[5] *Cattley* v *Loundes*, 2 T. L. R. 136. Cf. L. R. 17 Q. B. D. at p. 601.

[6] But after a conviction for the theft of a blank *cheque-form*, an order cannot be made for the restitution of the money which the thief obtained by forging thereon a *cheque* and cashing it; for there is no direct "representation."

[7] Of 1916; s. 46 (1).

[8] *Ibid.* s. 45 (3).

the prisoner on his apprehension, the amount of the price which he had paid[1].

It will be seen that the rules which we have explained do not include any provisions for cases (1) where a thief, though really guilty, has been acquitted, or (2) where further property is claimed as stolen but has not been included in the indictment, or (3) where stolen property has been recovered by the police, but the thief has not been arrested. Accordingly the Police Property Act, 1897 (60 and 61 Vict. c. 30), has given more extensive powers; by enabling Courts of Summary Jurisdiction to order the delivery of any property, which has come into the possession of the police "in connexion with any criminal charge," to anyone who appears to be the owner. After six months from the date of such an order, this person will become indefeasible owner.

[1] In the case of a Pawnbroker with whom the stolen goods have been pledged for not more than £10, the convicting court has still greater power of compensation; for it may make the restitution-order *conditional* upon the owner's repaying the loan, or part of it, to the pawnbroker. (If the owner sued the pawnbroker in a civil court, no such condition could be imposed *there*.) The court will consider whether there has been carelessness on the part either of pawnbroker or of owner. But there is no such general power where the loan, on the individual pledge, exceeds ten pounds.

CHAPTER XIV

EMBEZZLEMENT

As early as 1529 (21 Hen. VIII. c. 7) the criminal liability of servants[1] was extended to cases in which their master had delivered (not into their mere custody but) into their full "legal" possession any valuable goods to be kept by them as bailees for him. The "imbezilment" of such goods by them was made a felony. But where goods were received by a servant into his legal possession on his master's account, not from that master himself but from some third person, who wished to transfer the possession of them (whether with or without the ownership) to the master, the statute did not apply. In such a case the deliveror has ceased to have any possession of the goods; while, on the other hand, they have not yet reached the possession of the master; and they thus are for the time being in the servant's own possession. There they will continue until he either actually delivers them to his master, or constructively does so by consenting to hold them as a mere "custodian." Until then, he accordingly cannot commit larceny of them. (Yet, somewhat inconsistently, it is held by our civil courts that this delivery to a servant, by a stranger, gives the master such a possession, as against *third* parties, as entitles him to sue anyone for damages who commits a trespass to the goods, even whilst they are still in the servant's hands[2].) Accordingly if a bank cashier, on receiving money at the counter, does not put it into the till, but pockets it and uses it for his own purposes, he commits no larceny. It had not reached the possession of the bankers; he therefore cannot legally be said to have "taken" it from them. Such a doctrine exposed employers to risks so great that immediately upon its definite establishment in 1799

[1] *Supra*, pp. 186, 188. See Stephen, *Dig. Cr. Law*, Arts. 335–338.
[2] Pollock and Wright on Possession, 130; 1 Hale P. C. 668.

by the case of *Rex* v. *Bazeley*[1] Parliament took action. A statute[2] was passed, which made it felony for any servant or clerk to embezzle money or goods thus received into his possession for his employer, although they had not reached the employer's own actual possession. (The words *embezzle* (or *imbezil*) and *bezzle* had been in use since at least the fourteenth century, as meaning "to make away with"; usually connoting some degree of clandestinity[3].) The enactment now in force as to this crime[4] provides that:

"Every person who, being a clerk or servant, or person employed in the capacity of a clerk or servant, fraudulently embezzles the whole or any part of any chattel, money, or valuable security, delivered to, or received or taken into possession by, him for, or in the name, or on the account, of his master or employer...shall be guilty of felony[5]."

As he occupies a fiduciary position, he is liable to a higher punishment than that of simple larceny. He may be sentenced to penal servitude for any term not exceeding fourteen years and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and—if a male under the age of sixteen years—with or without being once privately whipped (Larceny Act, 1916, ss. 17, 37).

The crime of Embezzlement presents three points for our consideration: (1) the persons who can commit the offence; (2) the property on which it can be committed; and (3) the mode of commission.

[1] Leach 973 (K. S. C. 305).

[2] 39 Geo. III. c. 85. Stephen, *Hist. Cr. Law*, III. 152.

[3] The derivation is uncertain. Prof. Skeat suggests a connexion with *imbecile*, and the idea of diminishing by a purloining: but Dr Murray traces it to the French *besillier*, to ravage. The legal use of the term is almost exclusively limited, at the present day, to the statutory felony explained on this page. For its use in A.D. 1353, see K. S. C. p. 219.

[4] Larceny Act, 1916, s. 17.

[5] The same section makes it similarly a felony for any one employed in the public service or in the police to embezzle, or fraudulently apply, any chattel, money or valuable security that has been entrusted to, or received or taken into possession by, him in his employment.

(1) As to the first of these, the question, Who is a clerk or a servant?—the latter term here including the former—often presents great difficulty in practice. If *A* is employed by *B* to do work for him, he is not necessarily *B*'s servant, but may be merely an agent, an "independent contractor[1]." He will not be a "servant" unless the agreement, between himself and *B*, puts him so completely under *B*'s control that he must obey all lawful orders that *B* may give him in connexion with the employment[2]; *i.e.* *B* can tell him not only what to do, but even how to do it[3]. To ascertain whether or not the contract between the parties did create so complete a control, we must first inquire if its terms were embodied in a written document. If they were, it will be for the court to determine whether or not they established this full control. But if the contract was an oral one, then it is by the jury that the question must be determined. In determining it, they may have to take into consideration a variety of points, no one of which is of itself absolutely conclusive. Something will depend on (*a*) the nature of the employment; thus a commercial traveller usually is a servant, whilst an insurance collector or a debt collector usually is not[4]. Again, it is important to notice (*b*) the amount of time which it was agreed should be devoted to the employment. That *A* was to give the whole of his time to *B* is strong evidence of his being a servant, though it is not conclusive. Yet, on the other hand, it is not essential; for a true servant may also work for himself, or even for other masters. He may even have been employed by the prosecutor for merely one solitary transaction; and, indeed, in principle, the relationship of master and servant is merely one of present fact, and may exist

[1] Cf. Pollock on Torts, ch. III. s. 3.

[2] *Reg.* v. *Negus*, L. R. 2 C. C. R. 34 (K. S. C. 306).

[3] "You can bid your *cook* not to fry the potatoes but to mash them; but your *dentist* you can't prevent from doing many disagreeable things which he is sure to do" (Sir John Simon).

[4] As to taxicab-drivers, see *Smith* v. *G. M. C. C. Ld.*, L. R. [1911] A. C. 188. In London they are not servants but pay the cab-owner a percentage of the takings; dishonestly to pay less is a Fraudulent Conversion, p. 236.

where there is no contract binding the servant to go on serving any longer than he likes[1]. Another matter for consideration is (*c*) the mode of payment. A periodical salary or wage is some evidence of the recipient's being a servant[2]; hence it is common for societies to pay their treasurers a nominal yearly sum, such as a shilling, to secure the protection of the law of embezzlement. Conversely, payment by commission, or by share of profits, tends to disprove the existence of any such relation as that of master and servant. But neither fact is at all conclusive.

(2) Passing to the property concerned, we must notice that the Larceny Act limits the offence to the appropriation of such articles as have been received by the prisoner "for, or in the name, or on the account of, his master or employer." Thus a servant can commit an embezzlement only of things that he has received *as* servant. A shopman who sells such goods as he is authorised to sell—or a workman who executes for his master's customer, and with his master's tools, work which he is authorised to execute and receive payment for—will be guilty of embezzlement if he appropriates the money paid by the customer[3]. But a servant cannot embezzle anything which he obtained by doing an act that was outside his authority. Hence if a gentleman's coachman takes it on himself to ply for hire with his master's carriage, and spends in drink the coins so earned, he does not commit embezzlement of them[1]. Or if a woman, employed in a shop only to act as cashier, should take it upon herself to sell ribbons at the counter, and should appropriate the prices paid to her for them, she will not be guilty of any embezzlement of the money (though she will have committed a larceny of the ribbons themselves[5]). Similarly, if a servant forges a cheque in the name of his master, and cashes it, he does not receive

[1] *Reg.* v. *Foulkes*, L. R. 2 C. C. R. 150 (K. S. C. 309).
[2] *Reg.* v. *Negus*, loc. cit.
[3] *Rex* v. *Hoggins*, R. and R. 145 (K. S. C. 314).
[4] *Per* Blackburn, J., in *Reg.* v. *Cullum*, L. R. 2 C. C. R. 28 (K. S. C. 311).
[5] *Reg.* v. *Wilson*, 9 C. and P. 27 (K. S. C. 313).

the coins in his capacity of servant, and therefore does not commit embezzlement by making off with them[1]. But it would be embezzlement to appropriate money which he had obtained by cashing any cheque that had been sent to him on his master's account; even though it had been made out to the prisoner himself as payee[2].

A servant, as we have already said, can only "embezzle" what he has received *for* his master. It is not an embezzlement, but a larceny, for him to appropriate money which he has received *from* his master; and this even though it did not come to him from the master directly, but only through the hands of some fellow-servant[3]. Yet if, through the same fellow-servant, he had received money remitted for their master by some stranger, he can commit embezzlement of this money; for it has not yet reached his master's possession, but is stopped by him whilst still on its way to the master[4]. But if once he had put this money into his master's till[5], his subsequently taking it out again and appropriating it would be a larceny and not an embezzlement. So would the conduct of a person who should remove a load of straw after once he had delivered it on his master's premises[6] or even had merely put it into a cart, or a barge, that belonged to (or was possessed by) his master.

These illustrations shew vividly how fine a line often has to be drawn in determining whether it is a larceny or an embezzlement that a servant has been guilty of. The doctrine of possession is so subtle and technical that it frequently is hard to say for which of the two offences a man should be indicted; and failures of justice used often to arise in consequence. But they are now rare; as the absolute necessity of accuracy on this point is removed, so far as the indictment

[1] *Reg.* v. *Aitken*, C. C. C. Sess. Pap. XCVII. 336 (K. S. C. 315).
[2] *Reg.* v. *Gale*, L. R. 2 Q. B. D. 141 (K. S. C. 316).
[3] *Reg.* v. *Murray*, 1 Moody 276 (K. S. C. 318).
[4] *Reg.* v. *Masters*, 1 Denison 332 (K. S. C. 319).
[5] Cf. *Reg.* v. *Sullens*, 1 Moody 129 (K. S. C. 320).
[6] *Reg.* v. *Hayward*, 1 C. and K. 518 (K. S. C. 321).

is concerned. The Larceny Act, 1916, provides, by s. 44 (2), that if, on a charge of stealing, the actual crime committed prove to have been an embezzlement (or *vice versâ*), the jury may convict of the crime actually proved, instead of the crime originally charged. But this still leaves the difficult duty of saying which one *was* proved.

(3) Turning to the mode of committing the offence, we must note that, as embezzlement is committed without any change of possession, the fact of a "fraudulent" appropriation is often hard to prove. It may be shewn by absconding with the money[1], or by denials of having ever received it, or by any really wilful omission to pay it over. But the mere fact of omission, as it may have been due to pure carelessness, does not suffice to shew an appropriation[2]. Still less does the mere fact of there being a deficiency in the servant's accounts; *i.e.* his not having actually credited to himself, in his books, disbursements sufficient to exhaust all the cash he has received. For he may merely have lost it by negligence; and negligence, however gross, is not a criminal dishonesty[3]. And even if he has spent it, there is nothing to shew that he did not spend it on his master's account. Moreover, when it is proved that there must have been some really dishonest appropriation, this proof will not be enough so long as the theft is only shewn to have produced a "general deficiency." There must further be evidence that the particular amount specified in the indictment was appropriated, and at the particular date and place also there specified. For otherwise the prisoner would have no means of securing himself the protection of the plea of *autrefois convict* or *autrefois acquit*[4], in case of his being prosecuted a second time for this same charge.

[1] *Rex* v. *Williams*, 7 C. and P. 338 (K. S. C. 322).
[2] *Rex* v. *Jones*, 7 C. and P. 833 (K. S. C. 322). So, besides proving non-payment, you should also prove non-entry in his accounts.
[3] *Lanier* v. *Rex*, 24 Cox 53.
[4] *Infra*, ch. XXXI.

It is easy to understand that dishonest clerks often escape on indictments for embezzlement, because of the difficulty of thus proving an actual appropriation; even where it is clear that money has been received by them, and detained without their making any entry or other acknowledgment of the receipt. Hence in 1875, by a measure introduced by Sir John Lubbock but commonly known as Lopes' Act[1], it was made a misdemeanor, punishable with seven years' penal servitude, for a clerk or servant "wilfully, and with intent to defraud, to alter, or make a false entry[2] in, or omit a material particular from, any account of his master's." An indictment for this offence of false accounting is often useful where a clerk to whom a customer has paid money is suspected of stealing it, but no more can be actually proved than that he has never credited the customer with the amount. If, however, his books do shew correctly the sum which he ought to have in hand, the fact of his not really having that amount, ready to hand over, does not render the entry a "false" one within this statute.

Servants and clerks are far from being the only persons whose fiduciary position gives them opportunities for committing acts of dishonesty which, in the common law, were treated as deprived of legal criminality by those very circumstances of trust which aggravate their moral heinousness. We have already alluded[3] to the case of an employer's being defrauded by some agent whose engagement has not placed him under such a control as would render him a "servant," and so bring him within the law of embezzlement. And a trustee, since he has possession, and even legal ownership, of the things he holds for his *cestui que trust*, could not by appropriating them commit any offence against the common law. It altogether ignored the existence of Trusts, even for civil purposes; not regarding a breach of trust as creating

[1] 38 Vict. c. 24.
[2] *E.g.* even tilting a taximeter-flag, so as to make the meter cease to record.
[3] *Supra*, p. 231.

any debt, still less any crime. A dishonest trustee thus enjoyed in penal law an immunity as unreasonable as the extreme civil responsibility which equity, on the other hand, imposes upon even honest trustees if they prove complaisant or unbusinesslike.

Happily, in recent times, a much-needed extension of the criminal law has been effected in these respects. Thus, as to appropriation by agents, some limited provisions were initiated so far back as 1811; and have been expanded into a comprehensive form in the Larceny Act, 1916[1]. This statute renders it a misdemeanor for any person fraudulently[2] to convert[3] to his own use, or to that of any other person, any property—or the proceeds of any property—which he (whether solely or jointly with some other person) has been entrusted with:

either (*a*) for, or on account of, any other person[4];

or (*b*) in order that it, or any part of it, or any proceeds of it, may be retained by him in safe custody[5], or may be applied or paid or delivered by him for any purpose or to any person[6].

Fraud is necessary. Pure carelessness, however gross, will not render an agent indictable; *e.g.* leaving the article in a railway carriage; or a commercial traveller's mistaking the amount he is entitled to deduct for journeying expenses. The maximum punishment of this misdemeanor is higher than that of simple larceny; being penal servitude for seven years;

[1] s. 20 (1) iv. It covers realty as well as personalty.

[2] *I.e.* wilfully and knowingly; cf. p. 239 n[7].

[3] Mere non-payment will not suffice.

[4] *E.g.* even the entrustor himself; 16 Cr. App. R. at p. 189. It is enough that the *offender* meant to receive it for a third person, although the entrustor supposed him to be receiving it on his (the recipient's) own account; *i.e.* to be vendor, not vendor's agent; C. C. C. Sess. Pap. CLVI. 645.

[5] *E.g.* furniture under a "hire and purchase" agreement. Not money, unless the identical coins are to be returned; 68 J. P. 143.

[6] *E.g.* a lodger is sent by his landlady with £1 to pay her rates; or an estate-agent collects a tenant's rent; or a stockbroker receives from a client £100 to buy Consols with; or the weekly money for the alms folk is given to the almoner of the almshouse; or to a commission-agent goods to sell.

but a fine is possible[1]. The enactment does not extend to mortgages of either real or personal property. Nor does it extend to "trustees on any express trust created by a deed or will." Most equitable owners must thus rely upon other clauses[2]; under which a trustee of either real or personal property is punishable with seven years' penal servitude, if, with intent to defraud, he converts or appropriates to any other purpose than that of his trust, any property which has been given to him on an express trust *created in writing*[3]. This extension of the criminal law to the protection of mere equitable ownership was originally an experiment so novel that it had to be restricted closely. Hence no trustee[4] can be thus prosecuted without the leave of the Attorney-General, and if proceedings have already been begun in any civil court in respect of the breach of trust, the person who has taken them must obtain the leave of that court before beginning a criminal prosecution. Moreover, the criminal liability thus created is not to prejudice any agreement which the trustee may have entered into for making good the loss caused by his dishonesty. So that even a bargain by him to make restitution in consideration of not being prosecuted, would appear to be rendered enforceable, in spite of the ordinary rules as to contracts that are against public policy, and also unindictable, in spite of the ordinary rule against "compounding" a misdemeanor[5]. A remarkable clause in the Larceny Act of 1861 (s. 85), applying not only to trustees but also to agents and many other similar fiduciary misdemeanants, exempts them from criminal prosecution if the misdemeanor was first disclosed by them in the course of civil proceedings instituted against them by the person defrauded;

[1] The statute, by s. 20 (1) ii., similarly punishes the misdemeanor of any director or member or officer of a corporate body who fraudulently misappropriates any of the corporate property. It would apply even to a director who held all the shares in the company.

[2] Larceny Act, 1916, ss. 21, 46 (1); following the Larceny Act, 1861.

[3] Implied trusts, and Oral trusts, are thus excluded; as too vague.

[4] s. 21 (*a*) and (*b*).

[5] *Infra*, p. 280.

but removes their privilege as to refusing to incriminate themselves when examined in these civil proceedings. Similarly, the offenders' disclosures in Bankruptcy proceedings are inadmissible as evidence against them on prosecutions for this peculiar group of misdemeanors (4 and 5 Geo. 5, c. 59, s. 166); cf. s. 43 (3) of the Larceny Act, 1916.

The Forms of Theft

It may be convenient, at this stage, to summarise the chief results which, step by step, we have arrived at, in discussing the historical development of the English law of theft. Four leading classes of cases must be carefully distinguished:

1. The owner gives up no rights at all; and the article is taken entirely without his consent. This clearly is Larceny.

2. The owner gives up physical possession (*i.e.* "custody"), though retaining legal possession; and then the custodian appropriates. This is Larceny, even at common law.

3. The owner gives up both physical and legal possession; and then the possessor appropriates. Here:

(i) If possession were obtained *animo furandi*, then the fraud vitiates the consent, and there is a "Larceny by a trick." *E.g.* a plough is borrowed with intent to steal it; or a sovereign is handed to a cabman, who *knows* it has been given in mistake for a shilling.

(ii) If possession were obtained *bonâ fide*, then the subsequent appropriation is no crime at common law.

But by statute, even if possession were obtained *bonâ fide*, yet if it had been obtained

(*a*) by a clerk or servant, receiving for his master from a *third* person, appropriation by him is an Embezzlement;

(*b*) by a bailee who is to deliver up the specific article, appropriation by him is a Larceny, under statute;

(*c*) by an agent who comes within the Larceny Act, 1916, appropriation by him is a misdemeanor of Fraudulent Conversion.

4. The owner gives up not only physical and legal possession, but also ownership. This cannot be a Larceny (either at common law or by statute), or an Embezzlement. But it may be the misdemeanor of an "Obtaining by false pretences[1]," or of an appropriation by an Agent[2] or by a Trustee[3].

Our account of the closely allied offences of common law larceny, statutory larceny, "quasi-larceny," and embezzlement, will have enabled the student to appreciate Mr Justice Wright's criticism that "The English law of criminal misappropriation has been...extended piecemeal, by fictions and by special legislation;...and the resulting mass is at once heterogeneous and incomplete[4]." The valuable consolidating Act of 1916[5] is, we may hope, a basis for a really scientific reform such as was long ago attempted in the Parliamentary efforts of 1878–1880 to enact a Criminal Code. This code proposed to abandon the term Larceny and to replace it by that of "Theft"; which it defined[6] as being –"Fraudulently, and without colour of right, taking or converting[7] to the use of any person anything capable of being stolen, with intent"

[1] See p. 241. [2] *Supra*, p. 236. [3] *Supra*, p. 237.

[4] *Draft Criminal Code for Jamaica*, p. 110.

[5] Which it is proposed to supplement by a like consolidation of the law relating to those minor thefts that are punishable only summarily.

[6] See Stephen, *Hist. Cr. Law*, pp. 162-168. It is instructive to compare with this the definitions of Continental codes. *Italian Penal Code* of 1890, s. 402: "To possess oneself of a movable thing belonging to another person, for the purpose of deriving advantage from it, and take it away from the place where it is, without that person's consent." *German Penal Code* of 1870, s. 242: "To take away a movable thing which is not the taker's own, from some other person, with the intention of illegally appropriating it." Still briefer, though earlier, is the French definition (*Code Pénal*, s. 379), "Whoever has fraudulently taken away a thing which does not belong to him is guilty of theft."

[7] Fraudulent Conversion was defined by Stephen, J., as "A conversion with no claim of right, and with the intention to deprive the owner of his property permanently"; 16 Cox 234.

(*inter alia*) "...to permanently deprive the owner, or any person having any special property or interest therein, of such thing or property or interest." And things capable of being stolen were made to include "all tame animals, all confined wild animals, and all inanimate things which either are, or may be made, movable (except things growing out of the earth and not worth more than a shilling)." No carrying away was to be required; and no change of possession; and the very act of rendering the thing movable might suffice to constitute a Theft.

CHAPTER XV

FALSE PRETENCES

THE common law, as we have seen, treated Dishonesty as a felonious crime only when it took the form of an actual wrong to the owner's Possession[1]. But it also regarded dishonesty as sufficiently affecting the public to be made criminal, though only in the degree of misdemeanor, whenever an owner had been induced to alienate his goods or money to some knave by using any permanent Thing that was calculated to deceive, not merely him, but people in general. The protection of public trade seemed to require this restraint upon the use of false weights, measures, hall-marks, or even dice. But it was no offence to get a man to pay money, or give away property, by a false Act, like shuffling genuine cards unfairly, or telling him some lie. When *A* got money from *B* by pretending that *C* had sent him for it, Lord Holt grimly asked, "Shall we indict a man for making a fool of another?" and bade the prosecutor to have recourse to a civil action[2]. But a statutory provision for the punishment of mere private cheating was made in 1757; and is followed in the Larceny Act of 1916, under which it is an indictable misdemeanor to[3] obtain from any person by any false pretence any chattel, money, or valuable security, with intent to defraud.

Under this enactment five points arise for our consideration: (1) the Right obtained, (2) the Thing which is the subject-matter of that right, (3) the Pretence, (4) its Effect, and (5) the Intent.

(1) *The Right.* The offence before us is committed when persons get goods dishonestly by fraudulently inducing the owner to make over to them at once the immediate ownership

[1] *Supra*, pp. 182–184.
[2] *Reg.* v. *Jones*, 1 Salk. 379. Cf. *Rex* v. *Wheatley*, 1 W. Bl. 273 (K. S. C. 2).
[3] s. 32 (1).

in those goods. Indeed it is now established[1] that it is sufficient if the deliveror, without giving ownership, gives a power to pass the ownership. For a purchaser, buying under this power, will buy by authority of the owner.

We have already seen that for such persons the law of larceny provides no punishment. Sometimes, however, where frauds of this kind are attempted, they do unexpectedly turn out to be larcenies, because of some legal difficulty which has prevented the ownership from actually passing. One such difficulty may be that the deceit, which has been practised, related to facts so fundamental to the intended alienation that error as to them will render the transaction absolutely null and void, and thus prevent the supposed alienation from effecting any transfer of ownership at all. *A*, for instance, may obtain goods from *B* by personating *C*; or *A* may purchase goods from *B* on his own account, but with a secret intention never to pay for them[2]. In such cases the carrying-off of the goods will, as we have seen, amount to "larceny by a trick." But wherever the alienation is not thus utterly void from the outset, there will be no larceny. And, in the great majority of cases of fraudulent obtaining, the fraud does not relate to a fundamental fact, but to some merely extraneous one, errors as to which do not render the transaction void but only voidable[3]. Ownership therefore passes in such cases, notwithstanding the false pretence; though the defrauded owner has a right to rescind the alienation and to cause the property to revest in him. Yet, even should he do so, this revesting will have no retrospective operation on the thief's criminal liability; and thus will not convert his conduct into a larcenous taking[4]. Moreover even this right to rescind

[1] *Folkes* v. *King*, L. R. [1923] 1 K. B. 282; *Whitehorn Brothers* v. *Davison*, L. R. [1911] 1 K. B. 463. Contrast *Heap* v. *Motorists A. A.*, L. R. [1923] 1 K. B. 577; power merely to pass to a specified person who does not exist.

[2] *Rex* v. *Gilbert*, 1 Moody 185 (K. S. C. 353).

[3] Anson on Contract, ch. VI. ss. 1, 2, 3; Pollock on Contract, ch. IX. pt. II.; Pollock and Wright on Possession, p. 100.

[4] *Per* Wills, J., in *Reg.* v. *Clarence*, 22 Q. B. D. at p. 27.

and revest will be extinguished if, before it has been exercised, the thief should dispose of the goods for valuable consideration to some innocent[1] purchaser; and, against such a purchaser, even an ultimate conviction of the offender will not suffice to revive the original owner's rights[2].

Another cause which may similarly defeat an intended alienation, and prevent ownership from passing, is that the person who attempted to alienate had not the legal power to do so. Thus if a man tries to obtain the property in goods by a fraud practised, not upon the owner himself, but upon his servant, and if that servant had only a limited authority to dispose of these goods, and one too limited to cover the transaction in question, then the carrying them off will be a larceny[3]. Hence, as a postmaster receives from London specific instructions for all "money orders" (unlike mere "postal orders") which he ought to cash, the money he pays on a forged money order is taken from him by a larceny. But, on the other hand, money paid by him on a forged "postal order" (with regard to which he receives no specific instructions), would become the property of the payee, and accordingly would be obtained by false pretences, and not by a larceny. (The general extent of the authority of Post Office servants to part with the moneys of the Postmaster-General has not yet been precisely settled; *e.g.* it is uncertain whether it covers payments made by them by spontaneous mistake[4].) And as every bank cashier has a full and general authority to part with the money entrusted to him by his employer for the purposes of business, it follows that any coins paid by him in cashing a forged cheque become the property of the recipient. The latter, therefore, obtains them by false pretences and does not commit larceny.

It is not essential that the right obtained should be that

[1] And the purchaser will not have to prove his innocence; the owner must disprove it.

[2] Sale of Goods Act, 1893 (56 and 57 Vict. c. 71, s. 24 (2)).

[3] *Reg.* v. *Stewart*, 1 Cox 174.

[4] *Reg.* v. *Middleton*, L. R. 2 C. C. R. 38 (K. S. C. 266).

of a full ownership. It consequently appears to be sufficient for this offence that the victim is deprived of his whole[1] indefeasible interest in the thing, even though he be no more than a bailee[2]. Hence the owner himself may be convicted of obtaining the thing from his bailee by false pretences[3]. But apparently the offence cannot be committed by obtaining a bare right, without delivery (either actual or constructive). But manual possession is unnecessary; transfer of control suffices; cf. p. 254. Yet there is no decision, or even dictum, that would support an indictment for obtaining by false pretences when there has been no delivery. But so long as there has been a delivery, it is not necessary that it should have been made to the same person who made the false pretence. For s. 32 of the Larceny Act, 1916, makes it sufficient if the prisoner's pretence has caused a delivery or payment either to himself or "to any other person," whether for the prisoner's own use or anyone else's.

But in false pretences, just as in larceny, there must be an intention to deprive the injured owner of his whole interest (or of a right to divest that whole interest), and not merely to deprive him of the temporary use of his interest. Thus to obtain by fraud the loan of a horse for a day's ride does not come within the statute[4]. Objection has consequently been taken to the ruling in ***Reg.* v. *Boulton***[5]—where a conviction was upheld for obtaining a railway ticket by false pretences—on the ground that the railway ticket is to be restored to the Company when the journey is over, and therefore that a full criminal "obtaining" of the property in it never took place. But surely a person who, on abandoning his idea of making the journey, destroys his ticket, does not infringe any

[1] Obtaining an *un*divided share with him does not suffice; D. and B. 348.
[2] Cf. p. 197 *supra*.
[3] *Reg.* v. *Martin*, 8 Ad. and E. at pp. 485, 488.
[4] *Reg.* v. *Kilham*, L. R. 1 C. C. R. 261 (K. S. C. 243). Cf. p. 211 *supra*. A so-called "loan" of money is not a *commodatum* but a *mutuum*, and so does pass the entire ownership.
[5] 1 Den. 508; followed in *Rex* v. *Chapman*, 4 Cr. App. R. 276.

right of the railway company. If so, their only right must be a merely contractual one, against him alone, (viz. a right that, *if* he should actually take the journey, he will give up the ticket to them); and not a right of ownership in the ticket itself.

(2) *The Thing.* What we have just said suffices to shew that the legal distinction between larceny and a mere obtaining by false pretences is often hard to trace. The two offences being so closely akin, it is not surprising that the technicalities of the older one—as, for instance, with regard to the subject-matters capable of being stolen—should have affected even the more modern of the two. Thus an indictment for obtaining by false pretences will not lie unless the thing obtained were either (1) money or (2) a valuable security, or else (3) such a chattel as was a subject of larceny at common law[1]. Thus the offence does not include a fraudulent obtaining of real property, or of anything "savouring" of the realty[2], or of those chattels which are considered as of insufficient value for larceny (*e.g.* dogs); yet a railway ticket, in spite of its being evidence of a mere chose in action (*supra*, p. 202), may be the subject of an indictment for obtaining it by false pretences[3]. So, again, if what was obtained by the false pretence were not a Thing at all, but only the enjoyment of lodgings[4] or an Act of service, the offence is not committed; as where a man secures a ride in a train by saying, "I am a season-ticket holder." (It may, however, be noted that under the London Cab Act, 1896[5], it is a specific petty offence, punishable on summary conviction, to hire a cab *in London* with intent to avoid payment of the lawful fare. And the Larceny Act, 1916, by s. 32, makes it an indictable misdemeanor to procure by false pretences the execution of any valuable security.)

[1] *Supra*, pp. 198–204.
[2] *Reg.* v. *Pinchbeck*, C. C. C. Sess. Pap. CXXIII. 205 (K. S. C. 355); *Reg.* v. *Robinson*, Bell 35 (K. S. C. 357).
[3] *Reg.* v. *Boulton*, *supra*, p. 241 n.
[4] 17 Cr. App. R. 162.
[5] 59 and 60 Vict. c. 27.

(3) *The Pretence.* The false representation may operate either by fear of detriment or by hope of benefit. It may be made expressly in words (either written[1] or spoken); but it is quite sufficient that it can be even implied from them, or from mere silent conduct. But the words or the conduct must be fairly capable of conveying the false meaning; and must moreover have been intended[2] to convey it. (Yet in a *commercial* court it would be no defence to say "I never meant that construction to be put on my words.") Thus for a mere huckster to give an order for goods to an extent so great that only a man in a very large way of business could require them, may amount to a false pretence; and so may the packing up of goods made by yourself in wrappers closely resembling those used by some well-known firm of manufacturers[3]. Again, without any deceptive words at all, the mere act of wearing a cap and gown, in a University town, may be enough to constitute a representation that you are a member of its University[4]. Similarly, quite apart from the use of any words asserting the genuineness of the article, there would be a false representation in passing a note of a wound-up bank; or, again, in offering for sale a sparrow painted as a canary (such as the late Lord Justice Mathew described to be a "gaol-bird")[5].

The pretence must relate to some fact that is either past or present. A statement purely affecting the future will not suffice. For all future events are obviously matters of conjecture, upon which every person should exercise his own

[1] Even *written* words must be construed by the jury, not the judge.

[2] As where a hawker of rings announces them as "all marked" meaning his hearers to understand "hall-marked." Or where a man at Tottenham, who had served three terms of penal servitude, set up as a builder, and (with literal truth yet with intentional deceit) headed his letter-paper: "Employed fourteen years in Government work."

[3] To use a false name in order to defraud by denying your identity is indictable; but not if used merely to *conceal* identity, *e.g.* a trade name or stage-name. [4] *Rex* v. *Barnard*, 7 C. and P. 784 (K. S. C. 333).

[5] Or in offering, for sale, stolen goods; *Re Pinter*, 17 Cox 498. Cf. 17 C. B., N. S. 723. But none in merely overcharging, where there is no fixed price; 13 Cr. App. R. 170. As to vendors who conceal incumbrances, see p. 541 *infra*.

judgment. If the buyer says, "Send me the meat and I will pay to-morrow," it is for the butcher to determine whether he will part with the meat on the strength of this promise. If, therefore, the customer fails to fulfil his promise, the butcher cannot prosecute him for obtaining the meat by false pretences, but can only sue him in a civil action to recover the price of it. In like manner, to borrow money under the pretence that you will use it in paying your rent, is not an obtaining by such a false pretence as will come within the statute. This distinction between Present and Future is, however, now being undermined by the principle that representations, which do not expressly mention anything but the future, may nevertheless imply a representation about the present; viz. a representation that the existing state of affairs is such that, in the ordinary course of events, the future occurrence mentioned will take place. Thus it has been held that sending the half of a bank-note, along with an order for goods, is not merely a promise that on a subsequent occasion the other half shall be sent, but implies also a representation that at the present time the sender already possesses that other half[1]. Similarly the familiar act of drawing a cheque —a document which on the face of it is only a command of a future act—is held[2] to imply at least three statements about the present:

(1) That the drawer has an account with that bank;

(2) That he has authority to draw on it for that amount;

(3) That the cheque, as drawn, is a valid order for the payment of that amount (*i.e.* that the present state of affairs is such that, in the ordinary course of events,

[1] *Reg.* v. *Murphy*, Ir. Rep. 10 C. L. 508 (K. S. C. 338). "I will deliver the article" *may* thus involve representations that "I am now in a position to be then able to deliver it," and that "I now intend to deliver it." Cf. L. R. [1896] A. C. at p. 284.

[2] *Reg.* v. *Hazelton*, L. R. 2 C. C. R. 134 (K. S. C. 336). The doctrine probably applies even to *post-dated* cheques. But in Australia (13 N. S. W. 410) and Canada (11 Can. Cr. Ca. 279) they are held to be merely representations about the Future.

the cheque will on its future presentment be duly honoured).

It may be well to point out, however, that it does not imply any representation that the drawer now has money in this bank to the amount drawn for; inasmuch as he may well have authority to overdraw, or may intend to pay in (before the cheque can be presented) sufficient money to meet it[1].

It has sometimes been suggested that when a man orders a meal at a restaurant he impliedly makes a representation as to his present ability, and present intention, to pay for it. But to treat every order for goods as if it impliedly contained the words, "I can pay," would render it dangerously easy for disappointed creditors to call in the law of False Pretences to the assistance of the law of Debt. Accordingly it is now settled[2] that the penniless man, who orders and eats a meal at a restaurant, does not thereby make any implied false statement about the present. But though his deceit relates only to the future, it is enough to constitute an "obtaining credit by fraud in incurring a liability" (which is a specific statutory misdemeanor under the Debtors Act, 1869[3]); although the credit given by the innkeeper was to last only until the end of the meal.

Where it is by the joint operation of several representations, that the prisoner has induced the owner to part with his property, the offence may be committed, even although some of them were mere promises about the future, if any one representation was as to a present fact. In other words, it is sufficient that the false representation of present fact was essential to the transaction; even though it alone would not have been enough to induce the owner to part with his

[1] That the covenants for title in a conveyance of realty imply no indictable pretence, see *Reg.* v. *Marriott* (*The Times*, Aug. 10, 1863).

[2] *Reg.* v. *Jones*, L. R. [1898] 1 Q. B. 119.

[3] 32 and 33 Vict. c. 62, s. 13. Its maximum punishment is only a year's imprisonment, with hard labour. This enactment is useful where there is either (1) a "fraud" which is not a "false pretence," *e.g.* by mere reticence, as in *Reg.* v. *Jones*, or (2) "credit" not on alienation, but on a bailment, or for services, or for lodgings.

property. Thus if a married man represents himself as unmarried, and proposes marriage to a woman, and thereupon obtains money from her for the pretended purpose of furnishing their house, he may be convicted of obtaining this money by false pretences[1].

Again, even in the case of statements which clearly relate only to the present, it is often hard to say whether they are statements as to actual Facts or merely as to matters of Opinion; as in the case of a vendor's exaggerated eulogies of his wares. For in English law, as in Roman[2], the license of trade has established as to "dealers' talk" the lax rule that "Simplex commendatio non obligat." In all bargaining there is usually a conflict between the two parties, in commercial skill and general experience; and it would be perilous to employ the criminal law to regulate this conflict. For a man to represent himself as having "a good business," when he carries on no business at all, is clearly a false statement of a definite Fact. But a similar representation made by a man who has a business, however poor a one, will generally be a mere matter of Opinion[3]. A seller's misrepresentation of the weight of a sack of corn will concern mere matter of opinion, if the sale is for a lump sum; but will concern a fact so fundamental as to render it indictable, if the sale is by weight[4]. In the same way, to falsely represent an article as being silver —or to represent a chain as being of 15 carat gold, when it is really only 6 carat[5]—is a false pretence of fact; the real article being different in *substance* from the pretended article. Yet to represent plated spoons as being "equal to Elkington's A," has been held to be only exaggerated praise, a mere puffing[6]; inasmuch as the person deceived did get plated

[1] *Reg.* v. *Jennison*, L. and C. 157 (K. S. C. 324).

[2] Justinian's *Digest*, IV. 3. 37; cf. Benjamin on Sales, III. ii. 1.

[3] *Reg.* v. *Williamson*, 11 Cox 328. Yet contrast *Reg.* v. *Cooper*, L. R. 2 Q. B. D. 510 (K. S. C. 333).

[4] *Reg.* v. *Ridgway*, 3 F. and F. 858.

[5] *Reg.* v. *Ardley*, L. R. 1 C. C. R. 301 (K. S. C. 331).

[6] In mercantile law, statements of Quality may be (1) mere "Puffing," (2) Representations inducing a contract, (3) Estoppels, (4) Warranties, (5) Integral Terms of a contract, or (6) Conditions Precedent.

spoons, differing only in *value* from what he had been led to expect[1].

It seems[2] that even mere states of mind are to be regarded as "Facts" within the definition of the offence; so that an indictment will lie against a man for obtaining goods by a false statement of his present intention to do a given future act. In *Reg.* v. *Gordon*[3], Mr Justice Wills inclined to think that such a merely mental fact would suffice. This accords with the celebrated dictum of Lord Bowen that "the state of a man's mind is just as much a fact as the state of his digestion[4]." But if such expressions of Intention are to be recognised as sufficient pretences, it will often be hard to distinguish between them and mere Promises, which (as we have seen[5]) are not sufficient.

(4) *The Effect.* The change of ownership must not merely have been preceded by a false pretence, but also have been actually *caused* by it, wholly or at any rate[6] in material part. The counsel for the crown should not omit to put an express question as to this[7]. When a shopkeeper is actually delivering goods on credit to *A*, no offence is created if *A* should *then* say falsely, "I am the Earl of *Z*[8]." Nor if the buyer of a sham gem relied, not on the seller's false assurance but on

[1] *Reg.* v. *Bryan*, D. and B. 265 (K. S. C. 328).

[2] Cf. *Rex* v. *Bancroft*, 3 Cr. App. R. 16; and see p. 302 *infra*. In *Hunt* v. *Battersby* (*The Times*, April 16, 1920) a railway-servant obtained "for the use of my wife" a privilege-ticket to which he was entitled for his wife but not for any one else. A Divisional Court held that there was a criminal false pretence. Lord Reading, L.C.J., said that the man had "the *intention* in his mind, at that time, to use the ticket for a person other than his wife. It was a false statement that he *wanted* the ticket for his wife." Avory, J., said "The false pretence was a pretence that the man bonâ fide *required* the ticket for his wife. Leaving out any intention, that was the false pretence of an existing fact."

[3] L. R. 23 Q. B. D. 354 (K. S. C. 326). Cf. *Reg.* v. *Jones* (6 Cox 47) and the remarks of Hawkins, J., in *Reg.* v. *Pockett* (*The Times*, May 14 and 18, 1896).

[4] L. R. 29 Ch. D. 483; cf. *Angus* v. *Clifford*, L. R. [1891] 2 Ch. D. at p. 470.

[5] *Supra*, p. 247. [6] D. and B. 578.

[7] For the actuation should be proved by direct evidence, not by mere inference from business-ways; *Rex* v. *Dargue*, 6 Cr. App. R. 261.

[8] Cf. *Reg.* v. *Martin*, 1 F. and F. 501 (K. S. C. 339).

the (incorrect) report of a jeweller whom he consulted. Similarly, if a false representation had been actually made by the prisoner to the prosecutor's agents, but the agents never communicated it to the principal before he parted with his goods (so that it was not by it that he was led to act), there must be an acquittal. The same principle applies wherever the pretence did not in fact deceive the person to whom it was made; as in the frequent instances where, on the advice of the police, the recipients of a begging letter send money to the writer of it, in order to expose him. (In such cases, however, the prisoner may nevertheless be guilty of an Attempt to obtain by false pretences—which is (*supra*, p. 84) a common law misdemeanor.) If, however, the person was in fact actuated by the false pretence, it does not matter how credulous or how careless he may have been in accepting it; as where the defrauder professed to have the magical power of bringing back a missing person "over hedges and ditches[1]."

Even, however, where there is a causal connexion between the pretence and the obtaining, the law will refuse to take cognisance of this causation if it be too remote[2]. But mere lapse of time does not necessarily amount to remoteness. And if the delivery of the article obtained was the object and aim of the false pretence[3], there will be a sufficiently direct connexion between the pretence and the obtaining, even though what was obtained immediately by the false pretence was not the delivery but merely a contract, the ultimate execution of which produced the delivery[4]. And this, even though the thing delivered was not in existence at the time of the pretence[5]. In the case of races, if a competitor, by making a false statement of his previous performances, obtain an undue allowance in a handicap, and thereby win a prize,

[1] *Reg.* v. *Giles*, L. and C. 502.

[2] Cf. *supra*, p. 81.

[3] Even if there was no express request for the article, the jury may still find that there was an implied one.

[4] *Rex* v. *Moreton*, 8 Cr. App. R. 214.

[5] *Reg.* v. *Martin*, L. R. 1 C. C. R. 56 (K. S. C. 344).

such a false pretence will not be too remote from the obtaining of the prize to be indictable[1]. Had he not won the prize, the running the race would still have been indictable as an attempt to obtain the prize by false pretences; though merely entering for the race, without running, would probably have been too remote an act to constitute even an attempt.

(5) *The Intent.* It is not enough that the false pretence did obtain the thing, it must have been made with the purpose of obtaining, and of obtaining by Defrauding (*e.g.* not simply to rescue your own chattel from a wrongful possessor, or to get it as a joke and then promptly return it, or to hold it as security for a genuine debt). And it must moreover have been made, not by honest mistake, but with knowledge of (or *perhaps*[2] recklessness about) its falsity[3]; *e.g.* not merely by carelessly signing a paper without reading it. The offender's mere intention ultimately to make good the loss *if* he can, does not displace Fraud[4].

Although the statutory offence of obtaining by false pretences is, as we have seen, only a misdemeanor, it is punishable as severely as petty larceny: viz. with penal servitude for not more than five years or less than three, or imprisonment, with or without hard labour, for not more than two years or (unlike larceny) with a fine[5]. After the famous Tichborne case, an Act was passed (37 and 38 Vict. c. 36) making false *personation*, for the purpose of obtaining either personal or real property (whether the property be actually obtained or not), a felony, punishable with penal servitude for life. An applicant for a policy of life insurance has been

[1] *Reg.* v. *Button*, L. R. [1900] 2 Q. B. 597 (K. S. C. 342). See p. 541 *infra*.

[2] No criminal court has, as yet, decided this: but see L. R. [1884] 9 A. C. at p. 203, and L. R. [1889] 14 A. C. at p. 374. In a civil action of Deceit recklessness does suffice; see L. R. 4 H. L. at p. 79, and 14 A. C. at p. 368.

[3] Such knowledge is *primâ facie* evidence of intent to defraud.

[4] Even if it be likely that he ultimately *will* be able; 22 Cox, 624. See *Reg.* v. *Naylor*, L. R. 1 C. C. R. 4; cf. 25 Cox 145. Lord Darling has expressed the opinion that an indictment would lie for defrauding even an intending criminal; as by selling him, for a poison, a harmless drug; 63 J. P. 790.

[5] Larceny Act, 1916, ss. 32, 37 (4), 37 (5 *a*).

known to send for the medical examination another and healthier man to personate him.

On an indictment for false pretences, a prisoner may now be convicted—and convicted of that very misdemeanor—even though his offence be shewn to have really constituted a larceny; whilst on an indictment for larceny he may be convicted of false pretences[1]. The subtle distinctions between the two crimes have thus lost much of their practical importance.

A restitution order[2] may be had against the actual offender, or his *malâ fide* sub-purchaser, by any prosecutor who has actually become again the owner, *i.e.* who has legally rescinded the transfer. But the Sale of Goods Act, 1893 (56 and 57 Vict. c. 71, s. 24), provides that conviction for frauds not amounting to larceny shall not[3] produce such a revesting as to defeat intermediate *bonâ fide* sales. Hence the courts are chary of granting restitution orders in cases of false pretences, for fear there may have been such a sale.

THE RECEIVING OF STOLEN PROPERTY

Having now completed our view of the various crimes by which an owner may be dishonestly deprived of his chattels, we may supplement it by an account of a crime that is likely to be committed in the course of the subsequent disposition of that property.

At common law the receiving of stolen goods with knowledge that they had been stolen was a mere misdemeanor. It was necessary that a larceny of the goods should have been committed; yet the receiver was not indictable as an accessory after the fact to this larceny (unless the receiving in some way assisted the thief's escape from justice), because it was

[1] *Infra*, pp. 469–470.

[2] *Supra*, pp. 224–227.

[3] Cf. Larceny Act, 1916, s. 45 (2). But if, though the conviction were for False Pretences, the evidence established Larceny, the ownership does revest; 65 J. P. 729; so a restitution order can be made.

not the thief, but only the goods, that he received. Subsequently, however, by various statutes (whose provisions are now comprised in the Larceny Act, 1916[1]), the scope of the offence was greatly widened; by extending it to cases where the original act of dishonesty was a stealing or obtaining of the property "in any way whatsoever under circumstances which amounted to felony or misdemeanor." As to receiving the proceeds of a *non*-indictable theft, see the Act of 1861, *infra*, p. 256.

The offence thus consists of "receiving[2] stolen goods[3], knowing them to have been stolen." This involves three points for consideration: (1) the receiving, (2) the thing received, (3) the guilty knowledge.

(1) There must have been some act of "receiving"; which involves a change of possession. It must therefore be shewn that the prisoner took the goods into his possession, actual or constructive. This cannot be the case so long as the original thief retains exclusive possession of them (though there may well be an amicable joint possession by a receiver and a thief together). But, as in all cases of possession, a person may "receive" without himself taking part in any physical act of receipt. Accordingly if stolen goods are delivered to the prisoner's servant, or wife, in his absence, but he afterwards does some act that implies an acceptance of the goods—as by removing them to some other part of his premises, or by striking a bargain about them with the thief[4]—he will then (though not till then) become himself a "receiver" of them. The mere fact that stolen jewels are in a man's house does not make his wife a constructive possessor of them; it is not as if she were wearing them[5].

[1] s. 33 (1).

[2] For any purpose, even mere temporary custody or carrying. But an *innocent aim* excuses; *e.g.* to restore the goods to the owner, or to entrap the thief. As to goods stolen abroad, see p. 420 *infra*.

[3] Not the mere *proceeds* of stolen goods; 6 Cr. App. R. 112.

[4] *Reg.* v. *Woodward*, L. and C. 122 (K. S. C. 364).

[5] See C. C. C. Sess. Pap. CL. 295.

(2) It is also necessary that the goods received should have already been stolen[1], antecedently to the act of receiving. Hence a man cannot become a receiver of stolen goods by himself committing the act of stealing them. Moreover, the character of being "stolen goods" is only a temporary one. For if, after being stolen, the goods happen to return into the possession (actual or even constructive) of their owner, such a return will deprive them of the character of stolen property; so that there will not be any crime in subsequently receiving them. This rule often defeats measures which have been taken by an owner, after detecting a theft, in hopes of entrapping and punishing some expected receiver.

(3) Finally, the prisoner must have received the stolen goods with knowledge *then*[2] of their having been stolen (not knowledge obtained merely after taking possession). Such knowledge may be presumed, *primâ facie*, if he knew of circumstances so suspicious as to convince any reasonable man that the goods had been stolen—*e.g.* when an unlikely vendor offers them for an unlikely price at an unlikely hour[3]. His subsequent conduct may be evidence of such knowledge; *e.g.* his hiding the goods, or selling them surreptitiously and over-cheaply, or making no written entry of having bought them.

As to the punishment of receivers, the main provisions of the Larceny Acts, 1861 and 1916, are as follows:

1. If the original stealing or obtaining was a felony, the receiver is guilty of a felony. The maximum punishment is fourteen years' penal servitude; a boy under sixteen may,

[1] As to *proof* of the theft, see *Rex* v. *Sbarra*, 13 Cr. App. R. 118.

[2] *Rex* v. *Johnson*, 6 Cr. App. R. 218. Retaining is not Receiving.

[3] Actual *certainty* is not necessary; 1 F. and F. 665. Wills' *Circumstantial Evidence*, p. 76; L. R. [1892] A. C. 287. But negligence (or even Recklessness) in not realising their having been stolen will not create guilt; he must have shut his eyes *wilfully* to facts from which ordinary men would realize it clearly; cf. 11 Cr. App. R. 2; and C. C. C. Sess. Pap. CXLVIII. 232. See p. 362 *infra* as to statutory evidence of Knowledge.

in addition, be once privately whipped. (Sec. 33 (1) of the Larceny Act, 1916.)

2. If the original stealing or obtaining was a misdemeanor (*e.g.* if the goods had been obtained by false pretences), the receiving is a misdemeanor; and punishable with a maximum punishment of seven years' penal servitude. A boy under sixteen may, in addition, be once privately whipped. (Sec. 33 (1) of the Larceny Act, 1916.)

3. If the original stealing was, by the Larceny Act of 1861, a petty offence punishable on summary conviction (*e.g.* if the thing stolen were only a dog), the receiving is only a similar offence; and is punishable just as the stealing itself is. (Sec. 97 of the Larceny Act, 1861.)

CHAPTER XVI

FORGERY

THE verb "to forge," which originally meant simply "to make," acquired early, even before the time of Shakespeare, the special sense of making deceitfully[1]. (The cognate verb "to fabricate" has passed through a similar development.) Forgery, accordingly, is the offence of "making a false document in order that it may be used as genuine[2]," or, similarly, of counterfeiting certain seals or dies or the impressions of them; with an unlawful intent.

Though at first sight this might seem a crime not likely to be prevalent except in an age of commercial activity, yet it had already become quite a common offence in England as early as the fourteenth century. And it was not regarded as a heinous one. Thus a man who had forged a conveyance of lands in the name of a deceased person was merely fined 13*s.* 4*d.*[3] For the common law treated it only as a misdemeanor, punishable with fine and imprisonment. But, in proportion as the increase of education and the development of commerce multiplied the opportunities for committing acts of forgery, it became necessary to restrain heinous ones by more stringent penalties. Accordingly, by a succession of statutes, now consolidated in the Forgery Act, 1913 (3 and 4 Geo. V. c. 27), many classes of instruments have been covered with a special protection, by making the forging of any of them a felony. Moreover, this statute re-enacts a comprehensive provision (s. 7), making it a felony punishable with fourteen years' penal servitude, to *obtain money or property* (or even endeavour to obtain it) by "*any* forged instrument whatsoever, with intent to defraud." Accordingly

[1] See Dr Murray's *English Dictionary*.
[2] 3 and 4 Geo. V. c. 27, s. 1 (1); Stephen, *Hist. Cr. Law*, III. 180–186.
[3] *Kentish Eyre of* 1313, p. lxxi; cf. Mr Pike's Y. B. 20 Edw. III. p. *l.*

to send even a false telegram, or tamper with a postmark, with the view of wrongfully obtaining money thereby, will be a felony[1].

We must consider (1) the Document, (2) the Falsity, (3) the Making, (4) the Intent.

(1) The words "Document," or "Instrument," will[2] cover any writing the falsification whereof can prejudice any person[3]. Accordingly the forgery of very many instruments not comprised in the definitions of any of the numerous statutory felonies is punishable; for instance, certificates of Holy Orders, theatre tickets[4], and ordinary unsealed written contracts. Thus not only deeds and similar important instruments are protected by the law of Forgery, but also mere letters of recommendation by which employment or other pecuniary advantage is sought, or certificates of identity for obtaining a passport[5]. A letter to a man who really owed money to the forger, falsely purporting to be written by his employer and urging him to pay the debt promptly, has been held a sufficient document[6]. And so is a mere letter to a gaoler, requesting leave to confer with a prisoner but falsely purporting to be written by his solicitor[7]. "It is immaterial in what language the document is expressed; or in what place, within *or without* the King's dominions, it is expressed to take effect[8]."

Yet a picture is not a document. Hence it is no forgery to put on a picture the false signature of some famous painter; for the painter's signature gives no legal efficacy[9], but is a mere identificatory mark. The imitation of any trademark,

[1] *Reg.* v. *Riley*, L. R. [1896] 1 Q. B. 309 (K. S. C. 179).

[2] *Here* the two words are synonymous (*Rex* v. *Cade*, L. R. [1914] 2 K. B. 209); but "Instrument" is sometimes narrowed to such documents as affect legal rights. As to *inchoate* documents, see L. R. 7 Q. B. D. 79.

[3] *I.e.* by prejudicing him in any "business relation"; even though it one not enforceable legally, *e.g.* a bet.

[4] *Reg.* v. *Bennett*, C. C. C. Sess. Pap. LXXIII. 94.

[5] *Reg.* v. *Barrow*, C. C. C. Sess. Pap. c. 644.

[6] *Rex* v. *Parker*, 74 J. P. 208. Cf. *Rex* v. *James* (*Times*, Jan. 16, 1897)bo

[7] *Rex* v. *Barrett*, C. C. C. Sess. Pap. CXXX. 797.

[8] Forgery Act, 1913, s. 1 (3 *a*).

[9] *Reg.* v. *Closs*, D. and B. 460 (K. S. C. 184).

accordingly, was not a forgery, until specifically made a misdemeanor by statute[1]. Similarly, when a man pays his bill in a shop with a bank-note and some sovereigns, although he would commit a forgery if he were to put on the back of the note the name of some well-known capitalist, yet there would be no forgery in his scratching the same name on the sovereigns.

So, again, whilst it is forgery to fabricate a postage-stamp for actual use, or to eradicate from a used stamp the Post Office's cancelling marks, it is not a common-law forgery to make what purports to be an already-used stamp, for sale as a curiosity; but it is forgery by the Stamp Act[2].

(2) A document is a "false" one, whenever the forgery causes it to have an effect which the person executing it does not desire to produce, or an effect which (though he does desire to produce it) he cannot legally produce. Accordingly an instrument is not a forgery when it merely contains statements which are false, but only when it falsely purports to *be* itself that which it is not[3]. Hence a conveyance which contains false recitals, or exaggerates the price paid, is not rendered thereby a forgery. A telegram to a newspaper is forged if it is sent falsely in the official reporter's name; but not if it merely sends untrue news[4]. Thus a forgery is a document which not only tells a lie, but tells a lie about itself. The commonest case is where it "purports to be made by or on behalf of a person who did not make it nor authorise its making[5]."

Again, an instrument's mis-statement of the time or place of making it, will render it false *if* that time or place be material[6] to its operation (and, similarly, too, will the misstatement of any distinguishing mark—like the number on a debenture—which identifies the instrument). So the fraudu-

[1] See, *now*, the Merchandise Marks Act, 1887 (50 and 51 Vict. c. 28).

[2] See 9 Cr App. R. 195; *Rex* v. *Jeffreys*, C. C. C. Sess. Pap. CXV. 575.

[3] *Reg.* v. *Ritson*, L. R. 1 C. C. R. 200 (K. S. C. 188).

[4] *Rex* v. *Horner*, 74 J. P. 216.

[5] Forgery Act, 1913, s. 1 (2).

[6] *Ibid.* *E.g.* in a railway-ticket.

lent antedating of a cheque is forgery. And if a telegraph clerk, immediately on hearing the result of a race, despatches to a bookmaker a telegram backing the winning horse, and purporting to have been handed in at the post office before the race was run—*i.e.* in time to make a genuine bet—he commits a forgery[1]. Again, a person, to whom a merely limited authority to act as agent has been given, may commit forgery by exceeding this authority. Thus if a servant, to whom £2 are due for wages, receives from his employers a cheque in his own favour, duly signed but with the amount left blank, and is told to fill it up for the £2, he will become guilty of forgery if he fills it up for £3[2]. But it is otherwise if the agent has a general authority; or if, though he has merely a limited authority, he makes only such a document as comes within the limit. Accordingly if, when a blank signed cheque has been entrusted to a man, with authority to fill it up for an amount to be calculated by him, he fills it up for that amount correctly, but wrongfully goes on to cash it and to appropriate the proceeds, his crime is not a forgery[3].

A document may tell a sufficient falsehood about itself even by mere implication. Thus falsity may be produced by making a document in the name of an imaginary or of a deceased person[4]; or even by making it in your own name but with the intention that it shall pass as made by some one else[5], as where a man indorses a bill which was remitted to some other person of his name, but by mistake came to him instead[6]. In all these cases there is a forgery; for one person makes a writing which represents itself as the act of some other person (real or fictitious). But when a man puts forward a document as emanating, not from any other person, but strictly from himself, it will not be rendered false by his

[1] *Reg.* v. *Riley*, L. R. [1896] 1 Q. B. 309 (K. S. C. 179).
[2] *Reg.* v. *Bateman*, 1 Cox 186 (K. S. C. 191). [3] *Ibid.*
[4] *Rex* v. *Lewis*, Foster 116 (K. S. C. 195); Forgery Act, 1913, s. 1 (2 *b*).
[5] Forgery Act, 1913, s. 1 (2 *c*). Cf. p. 542 *infra*.
[6] *Mead* v. *Young*, 4 T. R. 28 (K. S. C. 197); *Rex* v. *Parkes*, 2 Leach 775.

adopting an assumed name in his signature to it, for it still is to him and no one else that credit is given[1].

(3) The act of "making" a false document may be committed either (i) by affixing to it a seal or a stamp, or altering one that is already on it or (ii) by either writing, or erasing[2], in the document itself, any material words or letters or figures, even though they do not constitute the whole of the document but only a part of it[3] (*e.g.* the signature, or even the crossing[4], of a cheque). There may even be a forgery by a mere inactive omission, provided that the words omitted would have qualified the operation of those that remained; as where an amanuensis, when taking down a will from a testator's dictation, fraudulently omits a condition attached to one of the legacies[5]. And the offence of Forgery[6] "may be complete even if the document, when forged, is incomplete; or is not, or does not purport to be, such a document as would be binding in law"—*e.g.* an *unstamped* promissory note.

A man may be guilty of forging a document even though no part of it was actually written by him. Thus the written transcript of a telegraphic message, made out at the arrival office, is made by the hand of a purely innocent agent[7], the post office clerk; but the sender of the telegram is as much responsible for it as if he had written it with his own hand[8]. Yet it is not forgery merely to use fraud (however gross) to procure the execution of a document, *e.g.* to get a man to sign it by misrepresenting to him its contents[9]. Such conduct, however, is a statutory misdemeanor[10], punishable with five years' penal servitude. And it may well be contended that

[1] Cf. p. 246 n. *supra*.
[2] *E.g.* rubbing out items in the bill at a teashop, before paying.
[3] Forgery Act, 1913, s. 1 (2 *a*). [4] Forgery Act, 1913, s. 1 (3 *c*).
[5] 1 Hawkins P. C. p. 265. [6] Forgery Act, 1913, s. 1 (3 *b*).
[7] Cf. p. 85 *supra*.
[8] *Reg.* v. *Riley*, L. R. [1896] 1 Q. B. 309 (K. S. C. 179).
[9] *Reg.* v. *Chadwick*, 2 M. and R. 545.
[10] Larceny Act, 1916, s. 32 (2): "fraudulently inducing by a false pretence the execution of a valuable security." All instruments of title, either to land or to goods, are here included as "valuable securities"; see s. 46.

in all those cases where the deceived person—as where he is blind or illiterate[1]—is entitled to repudiate the instrument as not his genuine act, the fraudulent author of this false document is guilty of Forgery, through an innocent agent[2].

If a document is not *itself* false in any way, the mere fact of putting it to a fraudulent use will not make it a forgery. Thus where wrappers were printed in imitation of those used by a well-known firm, but the goods of a less famous firm were packed in them for sale, the mere printing of these wrappers was held not to constitute a forgery[3]. (But the actual use of them in trade would involve the crime of an attempt to obtain money by false pretences.)

(4) It only remains to consider whether it is necessary that the forger should have had any specific form of *mens rea* in deceitfully making the false document. At common law it was necessary that he should intend not merely to deceive but also to defraud[4] thereby—to prejudice some one by inducing him to alter (or abstain from altering) his rights, though not necessarily to his actual pecuniary loss. But the statute law has specified many kinds of instruments which it makes it criminal to forge even for the purpose of merely deceiving, without any intention of defrauding. This, for instance, is the case with every *public* document[5] (*e.g.* a nomination paper or ballot paper for a Parliamentary or municipal election); and thus with marriage licences and the documents or registers of any court of justice[6]; with registers (or certificates) of births, baptisms, marriages, deaths, burials,

[1] But as to normal men the law is not clear. See *Howatson* v. *Webb*, L. R. [1908] 1 Ch. 1: *Carlisle C. B. Co.* v. *Bragg*, L. R. [1911] 1 K. B. 489; Pollock on Contract, ch. IX. pt. II, A; Kenny's *Contract Cases*, p. 223.

[2] See Stephen (*Dig. Cr. Law*, Art. 385) on *Reg.* v. *Collins*, 2 M. and R. 461. Cf. 4 American State Rep. 848.

[3] *Reg.* v. *Smith*, D. and B. 566 (K. S. C. 186).

[4] *Reg.* v. *Hodgson*, D. and B. 3 (K. S. C. 202).

[5] Forgery Act, 1913, s. 4 (2). Two years' imprisonment with hard labour and a fine is the maximum punishment; except for those especially important ones which it is made felony to forge.

[6] *Ibid.* s. 3 (3). Felony: seven years' penal servitude.

or cremations[1]; and with documents that bear a royal seal or sign-manual[2]. It similarly is made an offence to forge a telegram[3]—*e.g.* to send one so signed as to purport to come from an existing[4] person other than the actual sender—even though the object in view be not to defraud, but merely to obtain the joy of hoaxing the recipient. See p. 259 *supra*.

In most forgeries, however, an intention to defraud is necessary[5]. Thus there is a comprehensive provision[6] in the Forgery Act, 1913, s. 4 (1), that "Forgery of any document which is not made felony...[by statute]...if committed with intent *to defraud* shall be a misdemeanor; and punishable with imprisonment with or without hard labour for any term not exceeding two years" and a fine. And even of those forgeries that are statutory felonies the most common require an intent not merely to deceive but to defraud: as in the case of forging valuable securities or documents of title to land or to goods, or of forging deeds, wills, or bank-notes[7].

At common law, it was moreover necessary that the indictment should specify the particular person against whom this intention to defraud had been directed. But it is now[8] sufficient to allege in general terms an intention to defraud —or, where mere deceit makes the forgery criminal, to deceive—without stating in the indictment, or even shewing by the evidence, what particular person was to suffer.

But it is not necessary that the forger should have intended the defrauded person to incur an actual pecuniary

[1] Forgery Act, 1913, s. 3 (2). Felony: fourteen years' penal servitude.

[2] *Ibid.* s. 3 (1). Felony: penal servitude for life.

[3] Twelve months' imprisonment.

[4] A merely imaginary name would not make it a forgery; nor would mere false news in the contents.

[5] Hence where a servant lost the receipt given to him for the price of goods bought by him for his master, and therefore forged an accurate copy of it, the forgery was held by Lord Alverstone not to be indictable (Norwich Assizes, Jan. 1908).

[6] This provision practically supersedes the common-law crime.

[7] *Ibid.* s. 2 (1). Penal servitude for life. The notes of even private or foreign banks are included; s. 18 (1).

[8] *Ibid.* s. 17 (2).

detriment. Consequently a man may be fully guilty of having forged an acceptance, although he may from the outset have truly intended to "take it up" before it should fall due, or although the money which he aimed at getting by the forgery was only a sum that was legally due[1] to him. The mere existence, in the prisoner's mind, of this intent to defraud will suffice, though (*a*) no one was in fact defrauded, and though (*b*) no particular individual was aimed at in the prisoner's scheme[2], and even though (*c*) there did not in fact exist[3] any one whom the scheme could have defrauded. Thus if the person, whose signature has been forged as the drawer of a cheque, has ceased to have any account at the particular bank, this will not deprive the forgery of its full criminality. But the fraudulent intent necessary will not exist unless the offender had reasonable grounds for supposing (however wrongly) that some one or other might possibly be defrauded. Thus it will be no forgery for a man, who is himself the sole payee of a bond, to alter it by lessening its amount[4].

The offence of forgery consists, as we have seen, in "making" the instrument. But the "uttering" of it is also an offence; incurring whatever punishment a forgery of the particular document would have involved, and being a felony or a misdemeanor according as that forgery would be[5]. A person is regarded as "uttering" when he "uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange... tenders in evidence, or puts off" a forgery, knowing it to be forged, and having the same intent (whether to defraud or to deceive) that the law requires, in the case of that particular thing, to constitute the offence of forging it[6].

The punishments of forgeries, as we have seen, vary very

[1] 14 Cr. App. R. 101. Cf. p. 252 *supra*.

[2] Forgery Act, 1913, s. 17 (2). *Rex* v. *Mazagora*, R. and R. 291.

[3] That such a person does exist, is *primâ facie* evidence of an intent to defraud. "Uttering" is still stronger evidence of it.

[4] *Blake* v. *Allen*, Moore 619. Let us add that he loses more than may appear; for the bond thereby becomes wholly void.

[5] Forgery Act, 1913, s. 6 (1).

[6] *Ibid.* s. 6 (2).

greatly. All the various forgeries that have by statute been made felonies, have their respective maxima of punishment, ranging from penal servitude for life to penal servitude for seven years; whilst, instead of penal servitude, imprisonment may be imposed for any term not exceeding two years, with or without hard labour[1]. But any forgery that is a mere misdemeanor, is punishable only by such imprisonment as just mentioned, and fine, and binding over; or by merely one of these[2].

The Criminal Justice Act, 1925, s. 36, makes (from June 1, 1926), the forging of a passport—and similarly the knowingly making any untrue statement for the purpose of procuring a passport (whether for the offender himself or for any other person)—a misdemeanor punishable with imprisonment for two years and a fine of £100.

[1] Forgery Act, 1913, s. 12 (1). The offender may, in addition, be bound over to be of good behaviour; s. 12 (2 *b*).

[2] *Ibid.* s. 4, s. 12 (2 *a*, *c*). There are a few statutory misdemeanors of Forgery which may be prosecuted either by indictment or even summarily at Petty Sessions. In the latter case their maximum punishments are reduced; *e.g.* forged trademarks, four months' imprisonment or £20 fine; forged telegrams, a £10 fine. See s. 19 (2) of the Forgery Act, 1913.

CHAPTER XVII

OFFENCES AGAINST THE SAFETY OF THE STATE

PASSING from offences committed against Property to the offences against Public Rights, our account of these latter must commence with what the law ranks as the most heinous of all crimes—that of Treason[1]—"the atrocious crime of endeavouring to subvert by violence those institutions which have been ordained in order to secure the peace and happiness of society" (Chief Justice Marshall). Its name, derived from the French *trahir* and Latin *tradere*, denotes an act of perfidious "betrayal." The offence might, at common law, be committed either by a breach of the faith due to the King from his subjects (High treason), or even by a breach of that due to one of those subjects from his own inferiors (Petit treason). But a sufficiently grave breach of the latter form of allegiance could only be committed by the actual slaying of the superior; as when a feudal vassal murdered his lord, a priest his bishop, or a wife her husband. Since 1828 (9 Geo. IV. c. 31, s. 2), such homicides have ceased to differ from ordinary murders; so that high treason is now the only kind of treason known to our law.

An indictment for high treason was in mediæval times a most powerful weapon for the Crown to wield against its two great rivals, the church and the baronage. For a "clerk" who was accused of this crime could not claim benefit of clergy[2]; and if any feudal vassal was convicted of it, his lands passed to the Crown instead of to his immediate lord. Hence the King's judges, attentive to their master's interests, expanded the definition of high treason until it became a most comprehensive offence, including any kind of injury to

[1] See Pollock and Maitland, I. 498; Stephen, *Hist. Cr. Law*, II. 241.
[2] *Infra*, p. 486. Pollock and Maitland, I. 429; II. 500.

the King's rights, *e.g.* even the hunting of deer in his forests. At last a reaction was provoked. In the reign of Edward III. one John Gerbage of Royston laid hands on one William of Bottisford and would not release him until he made a payment of £90. This act of unlawful imprisonment was construed as an act of treason, on the plea of its being an "accroaching" (*i.e.* appropriating of) royal power. At this the barons forthwith took action[1]; and succeeded in confining the law of treason within definite limits by the enactment, in 1351, of the Statute of Treasons (25 Edw. III. c. 2). This measure is remarkable; both for the constitutional securities directly conferred by it[2], and also from its affording, at so early a date, what is still almost[3] the only instance in which any statutory definition of an important crime has entirely superseded the common law with regard to it. It limited high treason to seven possible forms (two of which have since been reduced to felonies). The seven were:

1. Compassing[4] the death of the King, of his Queen, or of their eldest son and heir.

So far as these words go, the crime seems to consist in a mere state of mind. But an *actus reus* is made necessary by words in a subsequent part of the statute, which require the person accused to "be thereof proveably attainted of *open deed*[5]." It was for this incipient offence of "compassing the death" of the King, that the regicides of Charles the First

[1] Reeves' *History of English Law* (ed. Finlason), II. 317.
[2] "No people enjoy a free constitution unless adequate security is furnished by their laws against the discretion of judges in a matter so closely connected [as the law of treason is] with the relation between the Government and its subjects"; Hallam's *Constitutional History*, ch. XV. pp. 203–226 (a passage deserving careful study).
[3] Cf. p. 163 *supra*, as to Arson.
[4] See Austin's *Jurisprudence*, Lect. XXI.
[5] These words do not occur in the statute until the conclusion of the fourth species of treason. But the judges, in construing the statute, did not limit them to that species; and ruled that, in indictments for any form of treason, a definite overt act must be alleged. The first species, it being the only one which is purely mental, is the case in which this rule assumes its chief importance. See Foster's *Crown Law*, p. 220; and 1 Hale P. C. 108.

were indicted; the ultimate act of taking off his head being merely treated as one of the open deeds which made manifest that compassing[1].

That in treason, just as in all other crimes, a *mens rea* will not constitute guilt without an *actus reus*, is vividly shewn by a Transatlantic decision that an American citizen who meant to join the hostile British forces, but found that he had by mistake attached himself to a party of the United States troops, could not be convicted of treason[2].

An "open deed," or "overt act," has been defined by Alderson, B., as "any act, measure, course, or means whatever, done, taken, used, or assented to, for the purpose of effecting a traitorous intention[3]"; and, more tersely, by Lord Tenterden[4] as "any act manifesting the criminal intention and tending towards the accomplishment of the criminal object." Thus even so commonplace an event as hiring a boat at a riverside wharf may amount to such an act[5]. And the collecting of information for the use of the King's enemies, though it never be actually sent to them, clearly amounts to one[6]. And even a conspiracy, though going no further than the oral conversation, constitutes a sufficient overt act[7]. But mere spoken words, however seditious and violent, are not as a general rule an overt act[8]. Yet they may become one if they are not simply "loose words, spoken without relation to any act or project," but help to carry forward, or are connected with conduct which carries forward, the intention which they express[9]. Thus words inciting some one to kill the King are an overt act of high treason. Indeed spoken words, uttered with an intent to confirm men in the prosecution of measures for a deposing of the King by force of arms, "are

[1] 5 St. Tr. 982.
[2] *Commonwealth* v. *Malin*, 1 Dallas 33.
[3] 6 St. Tr. (N. S.) 1133.
[4] *Rex* v. *Thistlewood*, 33 St. Tr. 684.
[5] *Lord Preston's Case*, 12 St. Tr. 646 (K. S. C. 377).
[6] *Rex* v. *Delamotte*, 22 St. Tr. 808.
[7] See 7 St. Tr. (N. S.) 463. A conspiracy to depose the King is held to be an overt act of compassing his death.
[8] Foster 200; *Pyne's Case*, Cro. Car. 117 (K. S. C. 377).
[9] *Rex* v. *Charnock*, 2 Salk. 633 (K. S. C. 379).

in their very nature and essence the clearest and most absolute overt acts of high treason[1]."

But the publication of *written* words, since they are in a more permanent form, and have usually been composed with more deliberation than mere spoken ones, may be a sufficient overt act of treason; even when it is unconnected with any plan for further conduct of a treasonable character. Yet, whilst published writing may clearly be thus an overt act, it is quite uncertain how far, if at all, the mere writing of a document, without ever publishing it, can be an overt act. In 1615, Edward Peacham[2] was convicted of treason on account of certain passages in a sermon found in his study, which had never been preached. But he was never executed; and died in prison. Algernon Sidney[3], again, was similarly convicted of treason in 1683, on account of an old unpublished MS. treatise on Sovereignty found in his house. He was executed; but his conviction was subsequently reversed by Parliament. Hence neither of these two cases is of weight as a precedent. Had Sidney's papers been, on the other hand, plainly referable to some definite project of insurrection, they might of course have constituted an overt act.

2. Violating the King's consort, their eldest daughter unmarried, or the wife of their eldest son and heir.

It seems illogical to bring in the daughter, since the wives of younger sons are omitted; hence all reference to her was left out in the Draft Criminal Code of Lord Beaconsfield's administration (*infra*, p. 531).

A sufficient "violating" may take place even by consent. And the executions, in Henry VIII.'s reign, of two queens, Anne Boleyn and Catherine Howard, serve to shew that the royal lady, who consents to her paramour's addresses, shares the full guilt of his treason.

[1] *Per* Lord Ellenborough in *Rex* v. *Despard*, 28 St. Tr. at p. 487.
[2] 2 St. Tr. 869. Hallam, *Const. Hist.* ch. VI.
[3] 9 St. Tr. 818; Foster, 198. See also *Lord Preston's Case*, 12 St. Tr. 646 (K. S. C. 377).

3. Levying war against the King in his realm.

"War," here, is not limited to the true "war" of international law[1]; but will include any forcible disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a "general" character, *e.g.* to release the prisoners in *all* the gaols. It is not essential that the offenders should be in military array or be armed with military weapons[2]. It is quite sufficient if there be assembled a large body of men who intend to debar the Government from the free exercise of its lawful powers and are ready to resist with violence any opposition[3].

This kind of treason is therefore distinguishable from a mere riot by nothing but the "generality" of the object which is aimed at by those taking part in it. Thus the Edinburgh rioters in the Porteous case of 1736[4], rendered familiar to English readers by Scott's *Heart of Midlothian*, were, after mature consideration, prosecuted only for riot, and not for treason; inasmuch as, though they sought to interfere with the Crown's prerogative of mercy, they resisted merely its being exercised in the particular case of the detested Captain Porteous, and not the general exercise of it. "It is neither the numbers concerned, nor the force employed, but the object which the people have in view, that determines the character of their crime; which will be a riot or a treason, according as this object is of a private and local or of a public and general character[5]." Thus in *Damaree's Case*[6], in Queen Anne's reign, a riotous tumult with the object of demolishing all accessible Nonconformist meeting-houses was held to amount to a treason; on the ground that it was to be regarded

[1] Dr T. J. Lawrence's *Principles of International Law*, Part III. ch. I.

[2] *Reg.* v. *Dowling*, 7 St. Tr. (N. S.) 460; cf. 32 St. Tr. 3.

[3] Nor need the body be large; three men *with dynamite* have been held sufficient. C. C. C. Sess. Pap. XCVIII. 280.

[4] 17 St. Tr. 993; Lord Stanhope's *History of England*, ch. XVII.

[5] *Rex* v. *Hardie*, 1 St. Tr. (N. S.) 624. Cf. *Reg.* v. *Frost*, 4 St. Tr. (N. S.) 85 (K. S. C. 374).

[6] Foster 213; 15 St. Tr. 521 (K. S. C. 370).

as a public resistance to the Toleration Act (which had legalised such meetings) and an attempt to render it ineffectual by numbers and open force. Hence, although the rioters were strong partisans of the Queen and imagined themselves to be serving her interests and advancing her policy, they were, by construction of law, guilty of treason against her.

It will be noticed that the levying of war must be "in the realm"; so that enlisting men, even within the realm, to go to the aid of the King's enemies in military operations that are to be carried on abroad, will not be punishable under this section[1]. It is, however, punishable under both species 1 and 4.

4. Adhering to the King's enemies in his realm[2], by giving to them aid and comfort[3] in the realm or elsewhere[4].

"Enemies," here (unlike "war" in section 3), is to be taken in the strict sense which international law puts upon the word; and accordingly includes none but true public belligerents[5]. Hence to assist mere rebels against the King, or pirates, does not constitute any offence under this section; though if the assistance were rendered within the realm it would be a sufficient "levying of war" under species 3[6].

5. Slaying the Chancellor or the Treasurer or the King's justices, when in their places doing their offices.

6 and 7. The statute also contained two further sections, which made it treason to counterfeit the King's great seal or his privy seal, or his money; but these offences were reduced to felony by statutes passed in 1832[7].

[1] "Even the actual enlistment of men to serve against the Government, does not amount to levying of war. To constitute it, there must be an actual *assembling* of men for a treasonable purpose"; 4 Cranch 126.

[2] These three words seem surplusage; *Rex* v. *Lynch*, 20 Cox 477. Cf. *Rex* v. *Casement*, 12 Cr. App. R. at p. 124.

[3] *E.g.* by subscribing to their War Loan.

[4] As to aid rendered under Compulsion, *e.g.* when supplies are requisitioned by an occupying enemy's army, see p. 74 *supra*.

[5] Oppenheim's *International Law*, II. ss. 55–57.

[6] In Natal it was held in 1901 that by serving the Boer forces even as a cook, a man gave them "aid and comfort."

[7] 2 and 3 Wm. IV. c. 123; 2 Wm. IV. c. 34, s. 1.

By statutes of Anne, which are still in force, two further species of treason have been created, viz.:

(*a*) To attempt to hinder the succession to the Crown of the person entitled thereto under the Act of Settlement[1];

(*b*) To maintain in writing the invalidity of the line of succession to the Crown established by the Act of Settlement[2].

To this summary of the statute law of treason, we must add an account of what is almost equally important—the extraordinary extension of its scope by the interpretations which the judges of the seventeenth and eighteenth centuries (from political sagacity rather than from logical necessity), placed upon the simple language of the ancient Parliament of Edward III.

The original idea of high treason was, as we have seen, that of a breach of the personal loyalty due to the lord paramount of the realm from each of his vassals. Thus an alien, who had never been even resident in our realm, could not commit treason; for clearly he was under no duty of allegiance. Hence when a charge of adultery was made, in Parliament, against the Queen of George IV., it was pointed out that it did not amount, as in the case of Henry VIII.'s wives, to a charge of participation in treason. For the acts alleged against Queen Caroline were supposed to have been committed abroad with a paramour (Signor Bergami) who was an alien and had never resided in British territory.

And this rule still remains in force. No alien falls within the law of treason unless, by coming into this realm under the King's permission (express or tacit), and so obtaining the benefit of the King's protection, he has placed himself under the consequent obligation of rendering him an allegiance, though only a local and a temporary one[3]. And even then,

[1] 1 Anne, st. 2, c. 21, s. 3. [2] 6 Anne, c. 41, s. 1.

[3] 1 Bl. Comm. 457; Foster 183; *Rex* v. *Maclane*, 26 St. Tr. 721. This temporary allegiance by domicile, insisted on in many South African trials, seems to be due (Forsyth's *Cases and Opinions*, p. 200) from every subject of a friendly State who enters our dominions, even though he avowedly come for hostile purposes alone. See *Rex* v. *Lynch*, L. R. [1903] 1 K. B. 444, for the converse case, that of the Englishman naturalised in a hostile State; his naturalisation, if effected during the war, would be, in itself, a treasonable "adherence."

as his duty—unlike the lifelong obligation of the King's own subjects—is only temporary, it has sometimes been urged that it does not necessarily continue throughout the whole of his residence, but only for so long as the King's protection continues to be actually effective. Hence, when British territory, where a Boer had for ten years resided, passed into the military occupation of his own State's forces, and he thereupon took service with them, it was argued that the withdrawal of the British troops had dissolved his British allegiance and that his subsequent conduct was therefore no treason against the King. But the Judicial Committee[1] overruled this contention; pointing out that, so soon as the invaders were expelled, the King's courts gave redress for any wrongs sustained during the hostile occupation, and that the King's protection was therefore a continuous one. It would be intolerable if, immediately upon an enemy's taking possession of a country, the aliens resident within it could join him with impunity; a small invading force might thus become an army.

The historical development of our nation tended steadily, century after century, to make a consciousness of the importance of the stability of public order—rather than the feudal feeling of mere personal loyalty to a prince—become the binding force of the body-politic. This new conception of civic duty rendered necessary new provisions for its legal enforcement. The criminal law had to begin to take cognizance of politicians who, whilst devoted to the reigning King, were nevertheless disturbing the order of the realm[2]; though possibly only by assailing those institutions whereby the constitution had set a check upon the King's powers. It

[1] *De Jager* v. *Att. Gen. of Natal*, L. R. [1907] A. C. 326.

[2] "There are no crimes which produce vaster or more enduring suffering than those which sap the great pillars of Order" (W. E. H. Lecky).

is a remarkable instance of the activity of judicial legislation that the important legal development, thus rendered necessary, was effected not by Parliament, but by the judges. They transformed the feudal conception of treason, as a breach of personal faith, into the modern one, which regards it as "armed resistance, made on political grounds, to the public order of the realm[1]." This new idea they evolved out of Edward III.'s statute by violent interpretations of the language of the 1st and 3rd sections. Thus a compassing of the death of the King was held to be sufficiently evidenced by the overt act of imprisoning him; because, as Machiavelli had observed, "between the prisons and the graves of princes the distance is very small[2]." And an attempt to raise a rebellion against the King's power, in even a remote colony, was similarly held to shew a compassing of his death; though he were thousands of miles away from the scene of all the disturbances[3]. So, again, the overt act of inciting foreigners to invade the kingdom, *i.e.* of compassing the levying of war, an offence which the statute does not mention, was held to constitute an overt act towards compassing the King's death[4]. Similarly, as we have seen, a levying of war against any general class of the King's subjects was held—by a construction which Hallam[5] pronounces to be "repugnant to the understandings of mankind in general and of most lawyers"—to be a levying of war against the King himself; as in the case of riots for the purpose of pulling down all public houses or all inclosures of commons, or of forcing all the employers in a particular trade to raise the rate of wages[6]. Yet men may be breakers of the King's peace without being enemies to the King's government.

These interpretations were often violently artificial, almost setting the statute of Edward aside by their forced constructions, and accordingly they were viewed with jealousy by the public at large—a jealousy which found expression in the verdicts of jurymen[1]. Thus when, for his share in the No-Popery riots of 1780, Lord George Gordon was indicted for the treason of constructively "levying war[2]," the acquittal which he secured, whilst fully justified by the facts of the case, was facilitated by the popular dislike to strained interpretations of the law[3]. Not long afterwards, Hardy, Horne Tooke and Thelwall were in 1794 indicted for a constructive compassing of the King's death[4]. The doctrine which was laid down at these trials, as to constructive treasons, was of an extreme character, carrying its "construction" of Edward III.'s statute to (in Hallam's opinion) "a length at which we lose sight of the plain meaning of words[5]." The verdicts of acquittal shewed that such judicial legislation would serve only to defeat its own end. Direct legislation had obviously become necessary. Accordingly the Parliament at once enacted, in 1795, a statute expressly recognising as treason the most important of the constructive treasons.

After the Irish agitation of 1848, a further statute[6], extending to Ireland, was passed; which reduced those constructive treasons dealt with in George III.'s statute (except some which really affected the person of the Sovereign) to mere felonies, so far as regarded the operation of the Act of 1795. They have no statutory name; but are commonly known as "treasonable felonies" or "treason-felonies." They include all deliberate expression, by overt act, of any intention to depose the King, or to incite an invasion of the realm, or to levy war against even a House of Parliament to change its policy. The maximum punishment for them is

[1] Stephen's *General View*, 1st ed. p. 36. [2] Foster, 196.
[3] *Rex* v. *Maclane*, 26 St. Tr. 721.
[4] But if their nation be at peace with us, it is not an adhering "to the King's enemies."
[5] *Constitutional History*, ch. xv. [6] Foster 211.

[1] An excellent account of Constructive Treason will be found in chapters CLXXVI. and CLXXX. of Lord Campbell's *Lives of the Chancellors*.
[2] 21 St. Tr. 485.
[3] Campbell's *Lives of the Chief Justices*, ch. XXXVIII.
[4] 24 St. Tr. 199; 25 St. Tr. 1.
[5] *Constitutional History*, ch. XV.
[6] 11 Vict. c. 12, ss. 6, 7. See 54 and 55 Vict. c. 67, abrogating the merely oral treason-felonies.

penal servitude for life. This change in the punishment rendered it much easier to prosecute these crimes with success[1]. For juries, naturally, are extremely reluctant to convict persons of good character for offences which, however gravely injurious to the community, may involve no ethical guilt and yet are punished with death.

But it is important to notice that these Acts of 1795 and 1848 left untouched the statute of Edward III. and the judicial constructions of it; and that, consequently, it is still open to the Crown in such cases to proceed against the offender for a constructive treason instead of on the lighter charge of a treason-felony. That precisely the same action should thus occupy, simultaneously, two different grades in the scale of crime is indeed a singular juridical anomaly.

As treason was, of all crimes, that in which the Crown had the strongest direct interest in securing the conviction of an accused person, it was the one in which a public prosecutor or a subservient judge had most temptation to conduct the trial so as to press harshly upon the prisoner. The reigns of the Stuarts afforded so many instances of this harshness that, after the Revolution of 1688, the legislature introduced great innovations into the course of criminal procedure so far as trials for treason were concerned; and, as Erskine says, "met the headlong violence of angry Power by covering the accused all over with the armour of the Law." By the 7 and 8 Wm. III. c. 3 it was provided that a prisoner accused of high treason should have a right to receive (1) a list of the intended jurors[2], (2) a copy of the indictment, and to make defence (3) by counsel learned in the law, and (4) by witnesses. Another clause (re-enacting and strengthening an enactment of Edward VI.[3]) made necessary (5) a technical minimum of proof; by providing that the prisoner should not be convicted

[1] So, too, did a change as to Evidence; *infra*, p. 392.

[2] To which 7 Anne, c. 21, s. 14 adds a list of the intended Crown witnesses.

[3] 1 Edw. VI. c. 12, s. 22. Hence when a treason had been committed, but the Crown could obtain only a single witness, the only mode of punishing the offender was either to prosecute him for the mere misdemeanor of

unless either he voluntarily confessed in open court or his guilt were established by *two* witnesses, deposing either to the same overt act, or at least to separate overt acts of the same kind of treason. And (6) it was provided that treason can only be prosecuted within three years from its commission; unless it be committed abroad, or consist of an actual plot to assassinate the Sovereign (not a mere technical "compassing the death"). (These rules—except Nos. (3) and (4) —have not been extended to treason-felony; an omission which creates additional causes for the greater facility of obtaining a conviction for that crime than for treason.)

Treason, like all felonies, was punished with death. But the execution of a traitor was accompanied with special circumstances of horror, to mark the supreme heinousness of his crime[1]. Instead of being taken in a cart to the scaffold, he was drawn to it on a hurdle[2], hanged only partially, cut down alive[3] and then disembowelled, beheaded and quartered. The head and quarters were permanently exposed in some conspicuous place[4], after being boiled in salt to prevent putrefaction, and in cummin seed to prevent birds pecking at them. But the form of sentence in treason was not quite invariable[5], and the King often remitted everything excepting the beheading. In later times, even where there was no such remission, the executioner usually took it upon himself to

sedition—as in the case of Hampden, who took part in the Rye House Plot (9 St. Tr. 1053), a grandson of the great opponent of illegal taxation—or to attaint him by an *ex post facto* Act of Parliament, as in the case of Fenwick (13 St. Tr. 537), who plotted the assassination of William III.

[1] See Stephen, *Hist. Cr. Law*, I. 476–477; Pollock and Maitland, I. 499.

[2] He was so drawn; and *then* hanged. Avoid the popular sequence "hanged, drawn and quartered"; which suggests that "drawn" is here used in the culinary sense of disembowelling. The traitor was dragged prostrate to the scaffold, originally with nothing under him (as in the picture of A.D. 1242 in the library of C. C. Coll. Camb.). But in later years a hurdle was allowed.

[3] The regicide Harrison rose and struck the executioner *after* his bowels had been cut out (5 St. Tr. 1237).

[4] Dr Pusey's mother, who survived until 1858, could remember seeing on Temple Bar the head of one of the rebels of 1745.

[5] The grossest may be seen in 3 Hargrave's State Trials, 340, 409.

make the strangulation fatal (technically an act of murder, p. 102). At last it was enacted, in 1814[1], that the beheading and quartering should not take place till after the prisoner had been put to death by the hanging. (Women were never beheaded or quartered; but[2] burned.) And finally in 1870 by the Forfeitures Act[3] all the exceptional features of execution for treason were abolished, except in cases where quartering or beheading may be ordered by royal warrant. For by the Act of 1814[4] the Crown has still power to order, by warrant under the sign manual, that any male who has been sentenced to be hanged for treason shall be beheaded. The judge, however, cannot appoint any mode of death[5] but hanging. In treason (as in all capital crimes except murder), the common-law rule which permits executions to take place in public still holds.

A penalty which was entailed at common law by all capital crimes, and which sometimes was more dreaded than that of death, was the loss of all the offender's property, and the consequent ruin of the fortunes of his family. But in treasons his landed estate was not disposed of in the same way as in felonies. For in cases of treason, as we have already seen, not only the personal but also the real estate was forfeited to the Crown absolutely. But in case of felonies, the realty was forfeited to the Crown for no longer than the offender's life and a year afterwards; after which period his estate (if in fee simple and not of gavelkind tenure) escheated at common law to the lord from whom it was held.

There had been no trial, in England or Wales, for a treason since 1882 (or for a treason-felony since 1885), until Lynch[6] was tried for treason on Jan. 21, 1903.

[1] 54 Geo. III. c. 146.

[2] Till 1790; 30 Geo. III. c. 48. Here again, in later years, by a merciful illegality, a fatal hanging usually preceded the burning.

[3] 33 and 34 Vict. c. 23.

[4] 54 Geo. III. c. 146, s. 2.

[5] As to infants under sixteen, see p. 489 n[3]. All sentences on even adult traitors after 1820 were commuted till Casement's in 1916.

[6] L. R. [1903] 2 K. B. 444.

Misprision of Treason

In our account of the law of Principal and Accessory[1] we saw that, when a treason has been committed, anyone who knowingly receives or assists the traitor, so as to aid him in escaping from justice, becomes himself guilty of complicity in the past act of treason as a "principal after the fact." And, in the case of felonies, a corresponding rule renders a similar harbourer an "accessory after the fact" to the original felony. We may now add that, even where no active assistance is thus given to the person who has committed a treason or a felony, anyone who knows of his guilt, and can give information that might lead to his arrest, will commit an offence if he omits to communicate that information to some justice of the peace. The "misprision" (*i.e.* high misdemeanor) of thus concealing a treason, or a felony, is usually termed briefly "misprision of treason" or "misprision of felony[2]." There is some authority[3] for saying that a misprision may also be committed in the case of a treason or felony that is merely being planned, if anyone who knows of the design refrains (however much he may disapprove of the project) from disclosing it to a justice of the peace in order to prevent its accomplishment[4]. If he go so far as to give actual assent and encouragement to the plot, he may of course become guilty (not of this mere misdemeanor but) as an accomplice in the felony or treason itself, should the design be ultimately carried into effect. A misprision of felony is punishable with imprisonment and fine[5]; but a misprision of treason

[1] *Supra*, pp. 84, 89.

[2] The word Misprision was formerly in use as a general name for any of the more heinous kinds of misdemeanors (4 Bl. Comm. 119); but it has become obsolete except in the two offences now mentioned; where it probably means "undervaluing" the crime concealed. In French "mépriser."

[3] 2 Hawkins P. C. c. 29, s. 23; cf. Bishop's *Criminal Law of U.S.A.*

[4] For the wider duty imposed in India, including even that of answering questions put by the police, see the Indian Penal Code, s. 44.

[5] Prosecutions for it are now unknown, but Lord Wensleydale had tried two; *The Times*, March 18, 1852. In 1914 a prosecution for it was commenced in County Clare; but was abandoned on the six defendants agreeing to give evidence against the murderer.

with imprisonment for life and the forfeiture of the offender's goods absolutely and of his lands for so long as he lives. In the case of mere misdemeanors[1] there is no similar crime in omitting to disclose them.

It is moreover in felonies, and perhaps also even in misdemeanors[2] an offence to "compound" them; *i.e.* to bargain, *for value*, to abstain from prosecuting the offender who has committed a crime[3]. You commit this offence if you promise a thief not to prosecute him if only he will return the goods he stole from you; but you may lawfully take them back if you make no such promise. You may shew mercy, but must not sell mercy. This offence of compounding is committed by the bare act of agreement: even though the compounder afterwards breaks his agreement and prosecutes the criminal. And inasmuch as the law permits not merely the person injured by a crime, but also all other members of the community, to prosecute, it is criminal for anyone to make such a composition; even though he suffered no injury and indeed has no concern with the crime.

Praemunire

Akin in nature to treason, though far less heinous in degree, are the miscellaneous offences which have become grouped together under the name of Praemunire. Under this head are comprised a variety of crimes whose chief connexion lies in their having the same punishment. But all the earlier offences so punished were, as some of the later also are, acts tending to introduce into the realm some foreign power (usually that of the Pope), to the diminution of the King's authority. The word "praemunire" was the name of the writ which commenced the proceedings against a person

[1] Cf. p. 89.

[2] Often, certainly, as a "conspiracy to pervert the course of justice." But as to it in "quasi-private" crimes, see Anson on Contracts, II. vii. s. 1. The numerous authorities on the whole question are collected in Archbold's invaluable *Criminal Pleading and Evidence*, pp. 1208–1211.

[3] But you *may* so bargain for not taking divorce proceedings, as they are civil. Cf. p. 12 n. *supra*.

guilty of such an offence; but afterwards it was also applied to any statute that created an offence for which this writ was to be issued; and, still later, it came to be applied to the punishment appointed for such offences, and even to the offences themselves[1].

Voluminous as are the collections of our State Trials, they contain only one English instance of any proceedings under any Statute of Praemunire; viz. that of some Quakers who refused to swear allegiance to Charles II.[2] The principal offences of praemunire still recognised in our criminal law are the following:

(1) By 25 Henry VIII. c. 20, the refusal of a dean and chapter to elect to a bishopric the clergyman nominated to them by the King.

(2) By the Habeas Corpus Act (31 Car. II. c. 2), the unlawful sending of any prisoner outside the realm, so that he would be beyond the protection of the writ of Habeas Corpus.

This offence is not only made a praemunire, but, as we have seen, even the Crown's power to pardon it is taken away[3].

(3) By 6 Anne, c. 23, s. 9, if the Scotch peers when met to elect their representative peers to the House of Lords discharge any further business they commit a praemunire.

The offence of praemunire is only a misdemeanor; yet it is punished more severely than most felonies[4]. For the offender (*a*) is placed out of the King's protection, *e.g.* he cannot sue; (*b*) he is imprisoned for life; and (*c*) he forfeits to the Crown all his property, real as well as personal, absolutely. This forfeiture is pronounced expressly as a part of the sentence. Consequently it does not render the offence a felony[5], and it is not removed by the Forfeitures Act, 1870.

[1] 4 Bl. Comm. ch. VIII.

[2] 6 St. Tr. 201. There is also one Irish case, 2 St. Tr. 553.

[3] *Supra*, p. 15 [4] Cf. p. 97 *supra*. [5] *Supra*, p. 92.

OFFENCES AGAINST THE PUBLIC PEACE

In reviewing the law of treason, we have seen[1] that the extension of that crime by judicial constructions has enlarged its scope so as to include many acts which would seem to fall more naturally under the head of the much less heinous offence of Rioting. This offence itself is also one of a very wide and elastic character. This comprehensiveness is probably due (like the severity of the law of Conspiracy[2]) to the weakness which characterised our constitutional provisions for the prevention of crime throughout the long period that elapsed, after the decay of the old system of corporate responsibility by Frankpledge[3], before the establishment by Sir Robert Peel of our modern force of borough and county police. Throughout these intervening centuries, the law felt its parish constabulary to be comparatively powerless to prevent any offence that involved the presence of a plurality of offenders. It consequently attempted to supply the defect by very comprehensive prohibitions of all such crimes.

Hence it was laid down that whenever so many as three persons meet together to support each other, even against opposition, in carrying out a purpose which is likely to involve violence or to produce in the minds of their neighbours any reasonable apprehensions of violence, then even though they ultimately depart without doing anything whatever towards carrying out their design, the mere fact of their having thus met will constitute a crime. It will be the indictable misdemeanor of Unlawful Assembly. Such an offence will therefore be committed as soon as three labourers collect in a cottage, with a view to a night's poaching, or to attending service in the village church and protesting turbulently against the mode in which it is conducted; even though they never actually start on their expedition. Similarly, a group of people who have come together to see a prize-fight constitute an unlawful assembly, even though the fight never

[1] *Supra*, p. 273. [2] *Infra*, p. 293. [3] *Supra*, p. 20.

takes place[1]. The offence is sometimes defined so widely as to include all cases where three or more persons are assembled for any unlawful purpose whatever, even though it be one that can cause no fears of violence. But this comprehensive definition, long ago called in question[2], has now been set aside by the case of *Field* v. *The Receiver for the Metropolitan Police District*, L. R. [1907] 2 K. B. 853 (which should also be studied for its definition of the offence of Riot). Accordingly, when three boys meet to go and gamble at pitch-and-toss on a common, or when three costermongers go into a street on Sunday morning to sell their vegetables contrary to the Lord's Day Act, they do not constitute an unlawful assembly (though they may be guilty of an indictable conspiracy[3]).

In this offence, as in all others, the law regards persons as responsible for the natural consequences of their conduct. Consequently if people have assembled together under such circumstances as are in fact likely to cause alarm to bystanders of ordinary courage, the assembly will be an unlawful one, even though the original purpose for which it came together involved neither violence nor any other illegality. "You must look not only to the purpose for which they meet, but also to the manner in which they come, and to the means which they are using" (Bayley, J.). Accordingly the idea of an unlawful assembly is not restricted to gatherings met together for the commission of some crime (like the poachers or prize-fighters already mentioned), or for arousing seditious feelings, or for inciting to some breach of the law (such as the non-payment of rents). For however innocent[4]

[1] *Rex* v. *Brodribb*, 6 C. and P. 571; cf. *Reg.* v. *Coney*, L. R. 8 Q. B. D. 534.
[2] *Dig. Cr. Law*, Art. 75. Cf. *Beatty* v. *Gillbanks*, L. R. 9 Q. B. D. 308 (K. S. C. 392).
[3] *Infra*, p. 290.
[4] The seriousness of possible risks was well illustrated in 1908 when the Battersea Borough Council were told by the Commissioner of Police that they must either remove the "Battersea Brown Dog" with its provocative anti-vivisectionist inscription or pay £700 a year for special police protection.

may be the object for which a meeting is convened—*e.g.* to support some Parliamentary measure by strictly constitutional means—it will nevertheless become an unlawful assembly if the persons who take part in it act in such a way as to give firm and rational men a reasonable ground for fearing that some breach of the peace will be committed[1]. Mere numbers alone, it is true, will not suffice to make an assembly unlawful; but they are a circumstance to be considered. And a marked absence of women and children from a crowd, an unusually late hour of meeting, a seditious tone in the speeches, any menacing cries or banners, any carrying of weapons, are similarly circumstances which must be taken into account in determining whether a meeting might reasonably inspire terror in a neighbourhood. But it is important to notice that, if persons meet together for a lawful purpose and quite peaceably[2] in act and intent, the fact of their being aware that other people, less scrupulous, are likely to disturb them unlawfully and thereby to create a breach of the peace, does not render their assembly an unlawful one. A man cannot be convicted for doing a lawful act, *merely* because his doing it may cause some one else to do an unlawful act[3]. But to do this intrinsically lawful act, *e.g.* to wear a party badge (17 Ir. C. L. 1), with the desire of thereby irritating others into a breach of the peace, would render it unlawful. Some authorities go further, and hold that mere knowledge (without desire) of the irritation being probable will suffice to render the act unlawful if it be done without reasonable occasion; (cf. 17 Cox 483, and the Draft Code of 1879).

The alarm with which the common law viewed unlawful

[1] *Reg.* v. *Vincent*, 9 C. and P. 91 (K. S. C. 391). *E.g.* if speeches provocative of violence are made.

[2] As to the necessity of this qualification, see *Wise* v. *Dunning*, L. R. [1902] 1 K. B. 167; Dicey's *Law of the Constitution*, App. v.; and 14 L. R. Ir. 111.

[3] *Beatty* v. *Gillbanks*, L. R. 9 Q. B. D. 308 (K. S. C. 392); cf. 51 L. T. 304, and *McClenaghan* v. *Waters* (*The Times*, July 18, 1882). Yet it seems clear in (at any rate) Irish law, that constables are justified in *removing* such innocent persons to a safer place, if it be the only means of avoiding an *imminent* breach of the peace; *Coyne* v. *Tweedy*, Ir. [1898] 2. 167.

assemblies naturally led to the establishment of the rule that they may be dispersed forcibly, even by private persons acting on their own initiative[1]. The particular degree of force which such persons will be lawfully justified in using must be determined by the particular necessities of each individual case. But an unlawful assembly—even when accompanied by such further circumstances as aggravate it into a common-law riot—only amounts to a misdemeanor; and therefore, although blows with fists or with sticks may be struck when necessary to suppress it, it will be unlawful to kill any of the rioters or to employ deadly weapons. If, however, the rioters go beyond their mere misdemeanor and proceed to the length of some felonious violence, then even the infliction of death will be permissible in resisting such violence or in dispersing or arresting the rioters, and the act of killing will be a justifiable homicide[2]. Indeed, so long as those engaged in suppressing the felonious violence act with due care, the accidental killing of even an innocent bystander by the means lawfully employed for the suppression will amount only to a case of homicide by misadventure.

Closely akin to the offence of an unlawful assembly are some other crimes of tumultuous disorder which are technically distinguished from it. Thus an unlawful assembly developes into a *Rout*, so soon as the assembled persons do any act towards carrying out the illegal purpose which has made their assembly unlawful; *e.g.* so soon as they actually commence their journey towards the plantation which is to be netted or the field where the fight is to come off. And the rout will become a *Riot*, so soon as this illegal purpose is put into effect forcibly by men mutually intending to resist any opposition[3]; *e.g.* so soon as a hare is netted or a blow is

[1] When an anti-scientific crowd, on Dec. 2, 1833, attacked the Anatomical School at Cambridge the undergraduates aided in its defence.

[2] "The law of England is unswervingly Socialistic. The individual rioter must be shot down rather than be allowed to interfere with the good of the community" (Lord Haldane).

[3] *Field* v. *The Receiver*, L. R. [1907] 2 K. B. 853; cf. 6 Cr. App. R. 60.

struck. All these three offences are misdemeanors punishable with the common-law penalties of fine and imprisonment; to which, by statute, hard labour may now be added[1].

But from these mere misdemeanors we must pass to a cognate but more modern and more heinous offence; which has no recognised technical name but, for distinction's sake, may conveniently be termed a Riotous Assembly. It is the creation of the Riot Act of 1715[2], which was passed in consequence of the riots in many towns that followed the accession of George I. in 1714. It establishes a wiser mode of prosecuting grave tumults than by treating them as treasonable "levyings of war[3]." Under its provisions, whenever an unlawful assembly of *twelve* or more persons do not disperse within an hour after a Justice of the Peace has read, or has endeavoured to read, to them a proclamation (set out in the Act) calling upon them to disperse, they cease to be mere misdemeanants and become guilty of a felony, punishable with penal servitude for life. But, by a departure from the general rule of criminal procedure (see p. 416 *infra*), no prosecution for this felony can be commenced after the lapse of twelve months from its commission.

The Riot Act contains an express clause[4] indemnifying any persons who, after the expiration of the statutory hour, may have to use violence for dispersing or arresting the rioters and in so doing may hurt or kill some one. Indeed, such an indemnity was already implied in the provision that, after the lapse of the hour, the rioters' offence should become aggravated into a felony[5]; for this rendered justifiable the employment of any amount of force necessary to suppress this tumultuous felony, *e.g.* even the infliction of death, as by troops firing upon the crowd. But even whilst the hour

[1] 4 and 5 Geo. V. c. 58, s. 16.

[2] 1 Geo. I. st. 2, c. 5. This statute contains (s. 7) the remarkable provision that its contents must be "openly read at every quarter sessions and at every court leet"; a provision disobeyed probably everywhere except at the annual court leet of Southwark.

[3] *Supra*, p. 270. [4] s. 3. [5] *Supra*, pp. 95, 103.

is still unexpired the common-law right of dispersion[1] still exists, unaffected by the Riot Act and by the justice's proclamation. Consequently a moderate degree of force may be lawfully used even then. And if the rioters should proceed to commit any felonious violence, they may be checked with the same extreme measures of force as if the statutory hour were over. But a misapprehension that the Riot Act had somehow impliedly modified the common-law right did at one time prevail, and sometimes led to grave disorder being allowed to rage unchecked. In 1780, for instance, in consequence of this misapprehension, London was abandoned to pillage for three days during the disturbances initiated by Lord George Gordon[2]. Neither the citizens nor the soldiers dared to fire upon the plundering incendiaries who had become masters of the metropolis, because no magistrate was present to "read the Riot Act." Their timidity was doubtless enhanced by the verdict of murder which had been given at Edinburgh in 1736 against Captain Porteous[3], and by the indictments which had been found in 1768 against the soldiers who fired upon the Wilkite rioters in London[4]. But the result of the Gordon riots was to make it clear, beyond doubt, that every citizen—and the armed soldier, no less than any other—has by common law the right and the duty of using even deadly violence, whenever it is indispensable for the purpose of protecting person and property against a felonious mob of rioters. For, in Lord Mansfield's phrase, "whether the citizen's coat be a brown one or a red" it is equally his duty to aid the law[5]. This principle is vividly

[1] *Supra*, p. 285.

[2] See Dickens' *Barnaby Rudge*, chs. LXIII.–LXVII. Cf. the Dublin riots of 1913 in which 196 policemen were injured.

[3] *Supra*, p. 270.

[4] Of those Wilkites, a certain stout-hearted Mr Green, with the help of his equally courageous maidservant, slew no fewer than eighteen, when they attacked the little alehouse which he kept. He was tried for murder, and acquitted; but seven of his antagonists were hanged (Knight's *Popular History of England*, VI. 291).

[5] During the Littleport riots of 1816 the heads of the Cambridge colleges passed a resolution "to arm the undergraduates if necessary."

recognised in the present Army Regulations; which (whilst providing that, if a magistrate be present, the officer in command of the troops should not fire without the magistrate's orders)[1] direct that if no magistrate be present, the officer need not wait for one before taking active steps to prevent outrage upon persons or property[2].

The matter, indeed, is not merely one of right, but of duty. It is an indictable misdemeanor for any person to refuse to take part in suppressing a riot, when called upon to do so by a justice of the peace or by a constable. And the duty of the justice of the peace himself goes further. It is incumbent on him to proceed to the scene of a riot, and to read the statutory proclamation if the riot be such as to require it, and to take whatever subsequent steps are necessary to disperse the rioters[3]. If he fail to do this, he is guilty of a criminal neglect of duty, unless he can shew that he has at least done all that a man of firm and constant mind would have done under the circumstances. In the vast majority of cases the mere arrival of troops suffices to quell the disturbance[4].

[1] And even those orders will not absolve the officer from the duty of exercising his own discretion before proceeding to fire.

[2] An admirable account of the law as to the suppression of riots will be found in the Report (drafted by Lord Bowen) upon the Featherstone Riots of 1893; when 2000 miners, about to destroy a colliery, were faced by twenty-eight soldiers; see *The Times* of December 8, 1893. Cf. the Report of the Royal Commission of 1914 on the landing of arms at Howth.

[3] *Rex* v. *Kennett*, 5 C. and P. 283 (K. S. C. 396).

[4] The law of Riot includes a remarkable instance of a Vicarious liability —that thrown upon the inhabitants of any locality where rioters (even mere misdemeanants) have done damage to "buildings," to make good that damage. The particular locality originally assigned as the unit for this purpose was the Hundred. It is now the district—whether a borough or a section of a county—which maintains the local police-force; and the liability is discharged out of the local police-rate. See the Riot Damages Act, 1886 (49 and 50 Vict. c. 38). It protects not only the building but also the premises appurtenant to it; and the property within.

CHAPTER XVIII

CONSPIRACY

CONSPIRACY is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it. This definition presents three points for notice: (1) the act of agreement, (2) the persons agreeing, (3) the purpose agreed upon.

(1) *The Agreement.* It must not be supposed that conspiracy is a purely mental crime, consisting in the mere concurrence of the intentions of the parties. Here as everywhere in our law, bare intention is no crime. "Agreement," as Lord Chelmsford puts it clearly, "is an act in advancement of the intention which each person has conceived in his mind[1]." It is not mere intention, but the announcement and acceptance of intentions. Bodily movement, by word or gesture, is consequently indispensable to effect it. In order of time, this precedes the act agreed upon. But the mere fact of the parties having come to such an arrangement suffices to constitute a conspiracy[2]. Hence it is not necessary to shew that they went on to commit some overt act towards carrying it out, though this (and also some consequent Damage) would be necessary in an action of Tort for conspiracy[3]. It follows that a person may be convicted of a conspiracy as soon as it has been formed, and before any overt act has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it. Thus if two lovers agree to commit suicide together, but promptly think better of it, they nevertheless

[1] *Mulcahy* v. *The Queen*, L. R. 3 H. L. at p. 328.

[2] *Rex* v. *Gill*, 2 B. and Ald. 205 (K. S. C. 398).

[3] *Mogul Steamship Co.* v. *McGregor*, L. R. 21 Q. B. D., *per* Lord Coleridge, C.J., at p. 549. See Pollock on Torts, ch. VIII. s. 4.

are liable to an indictment for conspiracy[1]. On the other hand, the actual accomplishment of the crime agreed upon will not cause the original offence of conspiracy to become "merged" in it[2]. Hence it would be technically possible to bring an indictment for a mere conspiracy to commit some grave crime, and then support it by evidence that tends to shew an actual consummation of the crime; but judges sternly discourage such a course as unfair to the accused[3].

It is not necessary that the intended victims should be persons already ascertained. An indictment may charge a conspiracy to defraud "such persons as might thereafter be induced to deal with" the conspirators.

(2) *Two persons.* The very name of the crime indicates that it is essentially one of combination; a man cannot by himself *con*-spire[4]. Moreover, the law applies here the old doctrine of conjugal unity, reckoning husband and wife as one person; so that an unlawful combination by him and her alone does not amount to a conspiracy. But though there must be a plurality of conspirators, it is not necessary that all should be brought to trial together. One person may be indicted, alone, for conspiring with other persons who are not in custody, or who are even unknown to the indictors. Indeed some of the conspirators may be unknown even to the others, provided they all be acting under the directions of one common leader.

(3) *An unlawful purpose.* The term "unlawful" is here used in a sense which is unique[5]; and, unhappily, has never yet been defined precisely. The purposes which it comprises appear to be of the following species:

(i) Agreements to commit a substantive crime; *e.g.* a

[1] The question has been raised whether there is an indictable conspiracy when one of the parties has no intention to carry it out, and aims merely at getting money from the other under pretence of conspiring.

[2] As attempts *are* merged; see p. 82 *infra*.

[3] See 19 Cr. App. R. at p. 137.

[4] So, on indictment of *A* and *B* for conspiring together, if *A* be acquitted, *B* cannot be convicted.

[5] Contrast its sense in the Vagrancy Act; *infra*, p. 326, n[1].

conspiracy to steal, or even merely to incite some one else to steal. This extends to all cases where it would be criminal for any of the conspirators to commit the act agreed upon; even though there be in the gang other persons in whom it would be no offence to commit it; and to all "crimes," even non-indictable ones[1]; *e.g.* non-payment of poor-rates.

(ii) Agreements to commit any tort that is malicious[2] or fraudulent. Some say that agreements to commit any tort, of whatever kind, are indictable as conspiracies. But the weight of authority[3] seems to be in favour of limiting the rule to torts of fraud or malice; thus excluding, for instance, a trespass committed *bonâ fide* by persons eager to assert their supposed right of way.

(iii) Agreements to commit a breach of contract under circumstances that are peculiarly injurious to the public[4].

(iv) Agreements to do certain other acts, which (unlike all those hitherto mentioned) are not breaches of law at all, but which nevertheless are outrageously immoral or else are, in some way, extremely injurious to the public. We may quote, as instances, agreements to facilitate the seduction of a woman[5]; or to run slackly in a race so as to enable a confederate to win his bets[6]; or to hiss a play unfairly[7]; or to defraud a shipowner by secretly putting stow-aways on board. Similar criminality would arise in agreements to raise by false reports the price of the Funds[8] or of any other vendible commodity[9]; or so to carry on trade as to diminish

[1] *Reg.* v. *Whitchurch*, L. R. 24 Q. B. D. 420. Cf. p. 283 *supra*; and Lord Campbell's "If two men agree to blow their noses together during Divine service so as to disturb the congregation, they may be indicted for conspiracy" (Hansard, March 1, 1859).

[2] Wright's *Conspiracy*, 40; *e.g.* to pirate a copyright book.

[3] The conflicting authorities are well collected in Harrison on Conspiracy, pp. 91–96.

[4] *Vertue* v. *Lord Clive*, 4 Burrows 2473 (K. S. C. 401).

[5] *Rex* v. *Howell*, 4 F. and F. 160.

[6] *Rex* v. *Orbell*, 6 Mod. 42.

[7] *Gregory* v. *Duke of Brunswick*, 6 Man. and Gr. 205.

[8] *Rex* v. *De Berenger*, 3 M. and S. 67 (the trial of Lord Dundonald, the naval hero).

[9] L. R. 1 Q. B. D. at p. 743; 2 Q. B. D. at p. 59.

the revenue; or to persuade a prosecutor not to appear at the trial; or to give false information to the police; or to indemnify a prisoner's bail[1]. On the other hand, it is doubtful whether an agreement to make loud noises for the purpose of disturbing an invalid neighbour would be indictable as a conspiracy[2]. And it is now settled, that there is nothing criminal (or even illegal) in a "knock out," *i.e.* a combination among buyers to abstain from bidding against one another, and to redistribute amongst themselves afterwards the goods so underbought[3]. And a thrifty combination of poor-law authorities to marry a female pauper to a pauper of another parish, in order to relieve the ratepayers of the woman's parish, is not a conspiracy[4]. Yet some combinations for procurement of marriage will amount to conspiracy; *e.g.* taking a young woman of property from the custody of her relations in order to marry her to one of the conspirators[5]. And although all combinations "in restraint of trade" are so far illegal as to be unenforceable[6], it is now settled that they do not necessarily constitute a criminal offence. Some, at least, of them did so in the older common law; as, for example, any combination of employed or employers that affected the rate of wages, (such as that of the journeymen tailors of Cambridge who were successfully indicted in 1721 for combining to refuse to work below a certain rate of payment[7]). But by the Conspiracy and Protection of Property Act, 1875 (38 and 39 Vict. c. 86), no combination for the doing of any act "in furtherance of a Trade Dispute between employers and workmen" is any longer to be indictable, unless the act

[1] *Rex* v. *Porter*, L. R. [1910] 1 K. B. 369.
[2] Cf. *Rex* v. *Lloyd*, 4 Esp. 200, with *Rex* v. *Levy*, 2 Starkie 458.
[3] *Rawlings* v. *General Trading Co.*, L. R. [1921] 1 K. B. 635. It is even enforceable as a contract. Yet see p. 537 *infra*.
[4] *Rex* v. *Seward*, 1 A. and E. 706 (K. S. C. 405). At Meldreth (Cambs.) in 1724 a widow who cost the ratepayers 70*s.* a year was thus got rid of at an expense of only 50*s.* 8*d.*
[5] *Rex* v. *Wakefield*, 2 Lewin 1, cf. *Rex* v. *Thorp*, 5 Mod. 221 (K. S. C. 407).
[6] *Mogul Steamship Co.* v. *McGregor*, L. R. [1892] A. C. 25.
[7] 8 Mod. 11 (K. S. C. 404); cf. *Rex* v. *Hammond*, 2 Esp. 718 (K. S. C. 411).

contemplated be one which is in itself a crime—and moreover a crime punishable with imprisonment—even when committed by one person alone[1].

The vagueness of the definition of this fourth class of "unlawful" purposes—to say nothing of the minor uncertainties hanging over the second and third classes—is historically intelligible. For in days when our police system was ineffective, the law felt itself dangerously threatened by any concert amongst evil-doers; and consequently, in the seventeenth and eighteenth centuries, indictments against conspirators were held good very readily. "A conspiracy," said even Lord Holt, "is odious in the law[2]." But this vagueness renders it possible for judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes, by declaring this purpose to be "unlawful." Owing to this elasticity in the definition of the crime, and also to the unusually wide range of evidence by which (as we shall see) indictments for it may be supported, there is much justification for the language used by Fitzgerald, J., in reference to it, in the Irish State Trials of 1867: "The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits." For, in the prudent words of the greatest of American judges: "It is more safe that punishment should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they are to operate, than that it should be inflicted under the influence of those passions which a trial seldom fails to excite, and which a flexible definition of the crime, or a construction that would render it flexible, might bring into operation[3]."

As to the Evidence admissible, the principles are just the same for conspiracy as for other crimes. But, owing to two

[1] Cf. as to civil actions for Torts, the Trade Disputes Act, 1906.
[2] 5 Mod. 408. [3] *Per* Marshall, C.J., in *Ex parte Bollman* (4 Cranch 127).

peculiarities in the circumstances to which those principles are here applied, it often seems as if there were an unusual laxity in the modes of giving proof of an accusation of conspiracy[1]. For (*a*) it rarely happens that the actual fact of the conspiring can be proved by direct evidence; since such agreements are usually entered into both swiftly and secretly. Hence they ordinarily can be proved only by a mere inference from the subsequent conduct of the parties, in committing some overt acts which tend so obviously towards the alleged unlawful result as to suggest that they must have arisen from an agreement to bring it about[2]. Upon each of several isolated doings a conjectural interpretation is put; and from the aggregate of these interpretations an inference is drawn. The circumstantial evidence thus rendered necessary will often embrace a very wide range of acts, committed at widely different times and in widely different places[3]. The range of admissible evidence is still further widened (*b*) by the fact that each of the parties has, by entering into the agreement, adopted all his confederates as agents to assist him in carrying it out. Consequently, by the general doctrine as to principal and agent, any act done[4] subsequently for that purpose[5] by any of them will be admissible as evidence against him[6]; unless, before it was done, he had given them notice that he *withdrew* from the conspiracy. Just the same doctrine is, of

[1] See *Reg.* v. *Hunt*, 1 St. Tr. (N. S.) 437; cf. 7 St. Tr. (N. S.) 472–475.

[2] *Reg.* v. *Parnell*, 14 Cox 505 (K. S. C. 412), *Rex* v. *Parsons*, 1 W. Bl. 391 (K. S. C. 408). For acts *not* obvious enough, see 3 Cr. App. R. 31, 32.

[3] *Rex* v. *Hammond*, 2 Esp. 718 (K. S. C. 411).

[4] But not a mere *admission* uttered; see below, p. 405. The cobbler is the burglar's agent for mending the noiseless shoes, but not for uttering a remark as to the use they have been put to; (though he can, of course, give evidence as to such a remark having been made by the burglar).

[5] But not acts that go beyond that purpose; *e.g.* where the purpose was only theft, yet murder was committed. Nor acts done after the purpose has been accomplished; *e.g.* the disposal of his share of the proceeds of the theft.

[6] Hence in trials for conspiracy a difficulty is apt to arise in determining at what stage the judge will pronounce the evidence to have given sufficient *primâ facie* proof of a conspiracy, and of the defendant's being a party in it, to render it now permissible to give against him evidence of the conduct of his colleagues (furthering it) when he was *absent* from them.

course, applicable to any crime where a plurality of offenders are concerned, and so is not peculiar to trials for conspiracy. But in them it assumes unusual prominence; because, in cases of conspiracy, an unusually long interval often elapses —with consequently an unusually long series of acts—between the time when the common criminal purpose is formed and the time when it is carried out or is frustrated by arrest.

Moreover there is often, just as on every other protracted trial of a plurality of defendants, the danger that the jury may—even despite judicial warning—be influenced against one of the accused by evidence that is legally admissible only against another of them. Thirteen days were occupied at Birmingham in 1925 by the trial of a group of nineteen men for a conspiracy to defraud. To prevent any misapplication of evidence by the jury, the judge found it desirable to sum up against each prisoner separately, and took the verdict upon him before passing to the next man's case.

Conspiracy is a misdemeanor; punishable with fine and imprisonment, to which no limit is affixed. Since the Criminal Justice Administration Act, 1914 (see p. 318 *infra*), hard labour may, in all cases, be added. Moreover a conspiracy to murder is punishable with penal servitude for ten years, though it still remains only a misdemeanor (24 and 25 Viet. c. 100, s. 4).