CRIMINAL CODE BILL COMMISSION.

REPORT

OF THE

ROYAL COMMISSION

APPOINTED TO CONSIDER

THE LAW RELATING TO INDICTABLE OFFENCES:

WITH AN APPENDIX

CONTAINING A

Draft Code embodying the Suggestions of the Commissioners.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
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COMMISSION.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To Our Right Trusty and Wellbeloved Councillor Colin Baron Blackburn, one of Our Lords of Appeal in Ordinary,—Our Right Trusty and Wellbeloved Councillor Charles Robert Barry, one of the Judges of Our High Court of Justice in Ireland,—Our Trusty and Wellbeloved Sir Robert Lush, Knight, one of the Judges of Our High Court of Justice,—and Our Trusty and Wellbeloved Sir James Fitzjames Stephen, Knight Commander of Our Most Exalted Order of the Star of India, one of Our Counsel Learned in the Law, Greeting:

Whereas We have deemed it expedient that a Commission should forthwith issue to inquire into and consider the provisions of a Draft Code relating to Indictable Offences prepared for the purpose of being submitted to Parliament during the ensuing Session, and to report thereon, and to suggest such alterations and amendments in the existing law as to Indictable Offences, and the procedure relating thereto, as may seem desirable and expedient.

Now Know Ye that We, reposing great Trust and Confidence in your Knowledge and Ability, have authorised and appointed, and do by these Presents authorise and appoint, you the said Colin Baron Blackburn, Charles Robert Barry, Sir Robert Lush, and Sir James Fitzjames Stephen to be Our Commissioners for the purposes aforesaid.

And for the better effecting the purposes of this Our Commission, We do by these Presents give and grant unto you, or any three of you, in case you shall think fit so to do, full power and authority to call before you such persons as you shall judge likely to afford you any information on the subject of this Our Commission.

And We do by these Presents Will and Ordain that this Our Commission shall continue in full force and virtue, and that you Our said Commissioners, or any three of you, may from time to time proceed in the execution thereof and of every matter and thing therein contained, although the same be not continued from time to time by adjournment.

And We further ordain that you, or any three of you, may have liberty to report your proceedings under this Commission from time to time if you shall judge it expedient so to do.

And Our further Will and Pleasure is that you do with as little delay as possible report to Us, under your hands and seals, or under the hands and seals of any three of you, your opinion upon the several points herein submitted for your consideration.

And for your assistance in the execution of this Our Commission, We have made choice of Our Trusty and Wellbeloved Hugh Cowie, Esquire, Barrister-at-Law, to be Secretary to this Our Commission and to attend you, whose services and assistance We require you to use from time to time as occasion may require.

Given at Our Court at Saint James's, the Seventeenth day of August 1878, in the Forty-second year of Our Reign.

By Her Majesty's Command,
RICHARD ASSHETON CROSS.

REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, the Commissioners appointed to inquire into and consider the provisions of a Draft Code* relating to indictable offences prepared for the purpose of being submitted to Parliament, and to report thereon, and to suggest such alterations and amendments in the existing law as to indictable offences, and the procedure relating thereto, as may seem desirable and expedient, have in obedience to Your Majesty's commands proceeded to the best of our ability to consider the various matters referred to us.

The Draft Code of 1878 (hereinafter called the Bill) was prepared with reference to the law of England only; but it having since been resolved that the proposed legislation should extend to Ireland also, certain papers containing valuable information and suggestions with reference thereto have been drawn up and laid before us, under the directions of the Attorney General for Ireland.

The first step we took was to send copies of the Bill to Your Majesty's Judges, the Chairmen and Deputy Chairmen of Quarter Sessions, Recorders, and many members of the bar and other gentlemen having practical experience in the administration of the criminal law in both countries, with a circular requesting them to forward to us any suggestions which might occur to them on any subject within the scope of the Commission. Many answers were returned to us, containing suggestions which have been carefully considered.

We sat almost daily throughout the day from the early part of November 1878, till the 8th April last, and resumed our sittings during the month of May.

We considered the Bill referred to us with minute attention. We compared every one of its provisions with the authorities on which they were based, and we made such alterations as appeared to us desirable. We also considered such of the questions of policy raised by it as appeared to us to fall fairly within our Commission.

We have also considered and ascertained to the best of our ability what the unwritten criminal law is, so far as it is settled: and to what extent the law so settled can with practical advantage be declared and enacted in a Code, and in what respects it is expedient that it should be altered.

We have also considered on what points the unwritten law is at present doubtful; and how far it can with advantage be rendered certain and enacted in a Code.

We have also considered what alterations can practically and with advantage be made in such parts of the statute law as we deem it expedient and practicable to embody in a Code.

We have also taken into consideration certain acts and conduct at present not criminally punishable at all, or only punishable as common law misdemeanours by fine and imprisonment, but which have been found so highly mischievous that it is expedient to make them criminally punishable with severity.

Our suggestions on all these subjects will be found embodied in the Draft Code which we have appended to this Report. The references in the margin of the Draft Code will enable any one to compare it with the authorities on which it is founded, and also to see how far it corresponds with and how far it deviates from the existing law.

The question whether the reduction of the criminal law of England, written and unwritten, into one code is either desirable or practicable, is one which has been much considered. In 1833, 1836, and 1837, three different Commissions were issued, under which eight Reports were made. In 1845 a fourth Commission was issued, under which five Reports were made. In the Fourth Report of the Commissioners appointed in 1845, is a draft of a Bill for consolidating into one statute the written and unwritten law relating to the definition of crimes and punishments. This Bill was introduced into the House of Lords in 1848 by Lord Brougham, but was not further proceeded with.

* The Criminal Code Indictable Offences Bill, 1878.

In 1852 Lord St. Leonards, then Chancellor, took up the matter, and gave directions for preparing separate Bills for the codification of the criminal law on separate subjects. One Bill, for the codification of the law as to offences against the person, was accordingly prepared, and was introduced in the House of Lords by Lord St. Leonards, and referred to a Select Committee comprising (among others) Lords Lyndhurst, Brougham, Campbell, Truro, and Cranworth. That Select Committee considered the Bill, and made many amendments in it, but had not completely revised it when, on the change of Government, the matter dropped.

In 1853 the consideration of the subject was resumed, and Lord Cranworth (then Chancellor) sent a copy of the Bill as amended by the Select Committee to the judges, requesting their opinions on it. These opinions were unfavourable; and the Chancellor thereupon requested and received a memorandum in answer to the criticisms of the judges, from Messrs. Greaves and Lonsdale, the gentlemen who had prepared the Bill.

These papers were laid before the House of Lords, and are the Sessional Papers, No. 19 and No. 180 of 1854. The plan of codification was abandoned by Lord Cranworth, but eight Bills were prepared under his directions; and after much consideration nine other Bills were prepared in 1856.

Of these last, seven became, with some alterations, the Acts well known as Greaves' Criminal Consolidation Acts, 24 & 25 Vict. cc. 94, 95, 96, 97, 98, 99, and 100. These Acts have undoubtedly worked very well, and there have been few difficulties as to the interpretation of their clauses; but they make no attempt at codification. For example, c. 100, sect. 1. enacts that whosoever is convicted of murder shall suffer death, but leaves it to the common law to say what is murder; and sect. 20 enacts that whosoever shall unlawfully wound shall be liable to penal servitude, but leaves it to the common law to say under what circumstances wounding is not unlawful.

The Reports above-mentioned contain a great deal of very valuable information. We have consulted and referred to them; and though we dare not say we have considered everything of value to be found in such an immense mass of printed matter, we hope that nothing very material has escaped our notice.

We have also considered with care Lord St. Leonards' Bill as amended by the Select Committee, and the criticisms of the judges as found in the sessional paper of 1854. These criticisms (many of which were unsubstantial and needlessly refined) may be taken to show that to frame a Code properly is a very difficult task, but we do not think they by any means justify the conclusion that the undertaking is impracticable.

I.

CODIFICATION IN GENERAL.

Before proceeding to observe on the provisions of the Draft Code, we deem it expedient to make an attempt to remove certain misconceptions relating to codification, which we have reason to believe affect the judgment formed by many persons upon the possibility and the utility of the undertaking. These misconceptions seem to us to originate in a wrong estimate of what can be and is proposed to be effected by codification.

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

It is also common to argue that even if such a standard were attained, the result would not be beneficial, as it would deprive the law of its "elasticity"; by which is understood the power which the Courts of Justice are said to possess of adjusting the law to changing circumstances by their decisions on particular cases. It is said that the law of this country is in a state of continual development; that judicial decisions make it more and more precise and definite by settling questions previously undetermined; and that the result is to adjust the law to the existing habits and wants of the country. To this process it is said that codification, so far as it goes, would put an end, and that the result would be to substitute a fixed inelastic system for one which possesses the power of adjustment to circumstances.

It appears to us that these observations may be answered by pointing out the object and limits of codification, and by examining the real nature of the change which codification would produce.

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

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

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

The unwritten portion of the criminal law includes the three following parts: (1) Principles relating to matter of excuse and justification for acts which are *primâ facie* criminal; (2) the definitions of murder, manslaughter, assault, theft, forgery, perjury, libel, unlawful assembly, riot, and some other offences of less frequent occurrence and importance; and (3) certain parts of the law relating to procedure. To do for these parts of the criminal law what has already been done for the rest of it is no doubt a matter requiring labour and care; but when so much of the work has been already done, it seems unreasonable to doubt, either that the remaining part of the criminal law can be reduced to writing, or that when it is written down and made to form one body with the parts already written, the whole will not be improved.

The objection most frequently made to codification—that it would if successful deprive the present system of its "elasticity"—has, we have reason to believe, exercised considerable influence; but when it is carefully examined, it will we think turn out to be entitled to but little, if any, weight. The manner in which the law is at present adapted to circumstances is, first by legislation, and secondly by judicial decisions. Future legislation could of course be in no degree hampered by codification. It would on the other hand be much facilitated by it. The objection under consideration applies, therefore, exclusively to the effects of codification on the course of judicial decision. Those who consider that codification will deprive the common law of its "elasticity" appear to think that it will hamper the judges in the exercise of a discretion which they are at present supposed to possess, in the decision of new cases as they arise.

There is some apparent force in this objection, but its importance has to say the least been largely exaggerated, and it is in our opinion certainly not sufficient to constitute (as some people regard it) a fatal objection to codification. In order to appreciate the objection, it is necessary to consider the nature of this so-called discretion which is attributed to the judges.

It seems to be assumed that when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas on the contrary he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are to be found in previous judicial decisions or in books of recognized authority. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so

far as a Code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present.

For example, it never could be suggested that a judge in this country has any discretion at the present day in determining what ingredients constitute the crime of murder, or what principles should be applied in dealing with such a charge under any possible state of circumstances: and yet the common law definition of murder has in its application received a remarkable amount of artificial interpretation. The same observation is applicable to every other known offence.

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

The truth is that the expression "elasticity" is altogether misused when it is applied to English law. The great characteristic of the law of this country, at all events of its criminal law, is, that it is extremely detailed and explicit, and leaves hardly any discretion to the judges. This may be shown by comparing it with the law of France. The criminal law of France is founded upon the Code Pénal, but the decisions of the courts as to the meaning of the Code do not form binding precedents; and the result is that the French courts can (within the limits prescribed by the words of the Code Pénal) decide according to their own views of justice and expediency. In the exercise of this discretion they are of course guided, though they are not bound, by previous decisions. The result is that French criminal law under the Code Pénal is infinitely more elastic than the criminal law of England is or ever has been, although the latter is founded on unwritten definitions and principles. For instance, it is stated in a work of great authority (Chauveau et Hélie "Théorie du Code Pénal," III, 487–9, Edn. 1861), that, after holding for 27 years that to kill a man in a duel did not fall within the definition of "assassinat" given in the Code Pénal, the Court of Cassation decided in 1837 that such an act did fall within it. The authors of the work in question argue at great length that the earlier decisions were right, and ought to be followed. A comparison of the provisions contained in Part III of our Draft Code with the provisions on the same and similar subjects in the Code Pénal and the German Strafgesetzbuch will show how numerous and important are the questions which these Codes leave to be decided as they arise by judges and juries. We may observe, that it is this generality of language, leaving so much to be supplied by judicial discretion, which gives to the foreign Codes that appearance of completeness which creates so much misconception as to what can or ought to be effected by a Code for this country.

We think that the precise and explicit character of our own law is one of its most valuable qualities, and that one great advantage of codification would be that in giving the result of an immense amount of experience in the shape of definite rules, it would preserve this valuable quality.

We do not, however, mean to assert that this particularity is always necessary. Wherever precise and definite propositions are to be conveyed, our rules for the construction of statutes in many cases prohibit the employment of general language, and require elaboration and detail in the structure of a Code; but where the principles of our law admit of any matter being left to the so-called discretion of the judge or jury, as the case may be, this discretion can be preserved in a Code by the use of general language. An illustration is supplied by the Extradition Act (33 & 34 Vict. c. 52, s. 3) which enacts amongst other things that "a fugitive criminal shall not be sur-" rendered if the offence in respect of which his surrender is demanded is one of a " political character." It is obvious that the employment of the expression "an offence of a political character" might, under circumstances easy to imagine, impose upon the tribunal the necessity of deciding questions of extreme delicacy and difficulty, towards the decision of which the mere words of the Legislature would contribute little or nothing. Another illustration may be found in Section 39 of 33 & 34 Vict. c. 9, where a crime is referred to as "of the character known as agrarian." Numerous instances occur in the Draft Code in which we have thus designedly and of necessity employed general language. In the Part on "Matter of excuse and justification," such expressions as the following frequently occur: "Force reasonably necessary for preventing the continuance or renewal of a breach of the peace;" "Force not disproportioned to the danger to be apprehended from the continuance of the riot." In the provision

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

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

It may be objected that Section 5 of the Draft Code constitutes an exception to this general remark. It provides that for the future all offences shall be prosecuted either under the Code or under some other statute, and not at common law. The result of this provision would be to put an end to a power attributed to the judges, in virtue of which they have (it has been said) declared acts to be offences at common law, although no such declaration was ever made before. And it is indeed the withdrawal of this supposed power of the judge, to which the argument of want of elasticity is mainly addressed. It is worth while to give instances of the manner in which at different times this doctrine has been put forward and acted upon. Of the weakness of the administration of justice in the Middle Ages, the impediments opposed to it by what was then called maintenance, the establishment of the Court of Star Chamber professedly to remedy its defects, and the abuses which led to the abolition of that court in Charles I.'s reign, it is unnecessary to speak. It would seem, however, that in early times the courts were so little disposed to exercise the supposed power of declaring new offences, that perjury by a witness was never treated as an offence (except under certain statutes of Henry VIII and Elizabeth), till it was declared to be one by the Court of Star Chamber.

After the Restoration the Court of King's Bench took upon itself some of the functions of the Star Chamber. In the well-known case of Sir Charles Sedley for instance, who conducted himself in public with gross indecency, the justices told him that "notwithstanding there was not then any Star Chamber, yet they would have "him know that the Court of King's Bench was the *custos morum* of all the King's "subjects." (17 St. Tri. 155.)

In the case of Edmund Curll, who was prosecuted for publishing obscene libels in 1727, the court seems to have proceeded upon a similar principle, and the same course appears also to have been taken in several instances upon the prosecution of blasphemous libels. The principle was stated in very wide terms in discussions upon the law of copyright, first by Mr. Justice Willes (Lord Mansfield's colleague), and afterwards by Lord Chief Baron Pollock. Mr. Justice Willes spoke of "justice, moral fitness, "and public convenience which when applied to a new subject make common law "without a precedent" (Millar *v.* Taylor, 4 Burr. 2312). Lord Chief Baron Pollock, many years afterwards, referring to this passage, observed, "I entirely agree with "the spirit of this passage so far as it regards the repressing what is a public evil, "and preventing what would become a public mischief." (Jefferys *v.* Boosey, 4 H.L.C. 936.) In the observations made by the judges on a scheme of codification prepared in 1854, the same view was stated. The following are the words of Mr. Justice Crompton: "I think it unadvisable to lose the advantage of the power of applying "the principles of the common law to new offences and combinations arising from "time to time, which it is hardly possible that any codification, however able and "complete, should effectually anticipate." In Sir William Erle's Treatise on the Law relating to Trades Unions, there are several passages bearing on this subject. See pp. 31–36 and 47–53. Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, we do not think that any attempt would be made to exercise it at the present day; and any such attempt would be received with great opposition, and would place the Bench in an invidious position.

In by-gone ages, when legislation was scanty and rare, the powers referred to may

have been useful and even necessary; but that is not the case at the present day. Parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, Parliament will soon supply them. If Parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct against which the moral feeling and good sense of the community are the best protection. Besides, there is every reason to believe that the criminal law is and for a considerable time has been sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals, which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought in our opinion to be left in the hands of Parliament. If it should turn out that we have overlooked some common law offence, we think it better to incur the risk of giving a temporary immunity to the offender than to leave any one liable to a prosecution for an act or omission which is not declared to be an offence by the Draft Code itself or some other Act of Parliament.

But whilst we exclude from the category of indictable offences any culpable act or omission not provided for by this or some other Act of Parliament, there is another branch of the unwritten law which introduces different considerations; namely, the principles which declare what circumstances amount to a justification or excuse for doing that which would be otherwise a crime, or at least would alter the quality of the crime. In the cases of ordinary occurrence, the decisions of the Courts and the opinions of great lawyers enable us to say how the principles of the law are to be applied. And so far the unwritten law may be digested without extreme difficulty and with practical advantage, and so far also it may be settled and rendered certain.

In our opinion the principles of the common law on such subjects, when rightly understood, are founded on sense and justice. There are a few points on which we venture to suggest alterations, which we shall afterwards state in detail. At present we desire to state that in our opinion it is, if not absolutely impossible, at least not practicable, to foresee all the various combinations of circumstances which may happen, but which are of so unfrequent occurrence that they have not hitherto been the subject of judicial consideration, although they might constitute a justification or excuse, and to use language at once so precise and clear and comprehensive as to include all cases that ought to be included, and not to include any case that ought to be excluded.

We have already expressed our opinion that it is on the whole expedient that no crimes not specified in the Draft Code should be punished, though in consequence some guilty persons may thus escape punishment. But we do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risk of a Code being so framed as to deprive an accused person of a defence to which the common law entitles him, and that it might become the duty of the judge to direct the jury that they must find him guilty, although the facts proved did show that he had a defence on the merits, and would have an undoubted claim to be pardoned by the Crown. While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law so far as it affords a defence should be preserved in all cases not expressly provided for. This we have endeavoured to do by Section 19 of the Draft Code.

Perhaps our meaning cannot be better explained than by stating the reasons why we have on revision altered the clause on Compulsion which formed the twenty-second section of the Bill, and have altogether struck out the clause on Necessity, which formed the twenty-third section. (These reasons will be found in Note A to this Report.)

The mode in which we suggest that the principles of the common law should be dealt with will be found in Part III of the Draft Code. It would be easy to enunciate in general terms and as abstract propositions the common law maxims which guide the judges in administering the law; and the adoption of such a course would much shorten any Code, but would be attended with the disadvantages we have already pointed out. The principle which is derived from a number of decisions is applied to a new state of things, not according to the words in which it was originally expressed, but according to its substance. But if it were laid down in a Code, it would either have to be applied as it was expressed in the Code, or a latitude would be left which would deprive the Code of all certainty. We have been guided in

framing this Part of the Draft Code by principles, several of which we may here enunciate with sufficient accuracy for the purpose of this Report.

We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and justify many of our suggestions. It does not seem to have been universally admitted*; and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognised as the law in future, but that it is the law at present. But as this is in the nature of an argument, we have thought it better to print it as a note. (See Note B to this Report.)

Again, it is a principle of the common law that what the law requires it justifies —*Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud* (5 Rep. 115 *b.*) It it is also a principle of the common law that all powers, the exercise of which may do harm to others, must be exercised in a reasonable manner, and that if there is excess, the person guilty of such excess is liable for it according to the nature and quality of his act.† It may also be said to be a principle of the common law that where a person is under a legal duty on notice of certain facts to take certain action, he will be protected in acting on the honest belief, formed without negligence and on reasonable grounds, that those facts did exist, though that belief was mistaken.

For the reasons already given, instead of endeavouring to enunciate these principles in abstract and general terms, we have judged it better to declare expressly what the law is in cases of such frequent or probable occurrence, that the law in respect of them has been settled,—suggesting some few alterations,—and leaving the general principles to be applied to cases so extraordinary that the law as applicable to them has never yet been decided, when if ever they arise.

There is a difference in the language used in the sections in this Part which probably requires explanation. Sometimes it is said that the person doing an act is "justified" in so doing under particular circumstances. The effect of an enactment using that word would be not only to relieve him from punishment, but also to afford him a statutable defence against a civil action for what he had done. Sometimes it is said that the person doing an act "is protected from criminal responsibility" under particular circumstances. The effect of an enactment using this language is to relieve him from punishment, but to leave his liability to an action for damages to be determined on other grounds, the enactment neither giving a defence to such an action where it does not exist, nor taking it away where it does. This difference is rendered necessary by the proposed abolition of the distinction between felony and misdemeanour.

We think that in all cases where it is the duty of a peace officer to arrest, (as it is in cases of felony,) it is proper that he should be protected, as he now is, from civil as well as from criminal responsibility. And as it is proposed to abolish the distinction between felony and misdemeanour, on which most of the existing law as to arresting without a warrant depends, we think it is necessary to give a new protection from all liability (both civil and criminal) for arrest, in those cases which by the scheme of the Draft Code are (so far as the power of arrest is concerned) substituted for felonies. In those cases therefore which are provided for in sects. 32, 33, 34, 37, 38, the word "justified" is used. A private person is by the existing law protected from civil responsibility for arresting without warrant a person who is on reasonable grounds believed to have committed a felony, provided a felony has actually been committed, but not otherwise. In sect. 35, providing an equivalent for this law, the word used is "justified." On the other hand, where we suggest an enactment which extends the existing law for the purpose of protecting the person from criminal proceedings, we have not thought it right that it should deprive the person injured of his right to damages. And in cases in which it is doubtful whether the enactment extends the existing law or not, we have thought it better not to prejudice the decision of the civil courts by the language used. In cases therefore such as those dealt with by sects. 29, 30, 31, 36, 39, 46, 47, we have used the words "protected from criminal responsibility."

* See Lord St. Leonards' Bill of 1853 (No. 106).

II.

WHAT A CRIMINAL CODE SHOULD CONTAIN.

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

Crimes may be punished by Parliamentary impeachment; and some crimes if committed by persons having privilege of peerage, must be tried in a peculiar Court. Neither case is of frequent occurrence, and we have not thought it judicious to propose any alteration in either mode of procedure. Nor have we thought it expedient to interfere with those statutes by which official persons in the colonies and in India may be tried in this country for offences connected with their office.

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

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

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

3. Many statutes which create indictable offences are of so special a nature, and are so closely connected with branches of law which have little or nothing to do with crimes, commonly so called, that it seems better to leave them as they stand than to introduce them into a Criminal Code. The following are the most important statutes of this class:—the Acts for the suppression of the Slave Trade (5 Geo. 4, c. 113, 36 & 37 Vict. c. 88), the Foreign Enlistment Act (33 & 34 Vict. c. 90), the Corrupt Practices Acts (17 & 18 Vict. c. 102, and some others), the Customs Act (39 & 40 Vict. c. 36), the Post Office Act (7 W. 4 & 1 Vict. c. 36), the Merchant Shipping Acts, (17 & 18 Vict. c. 104, &c.). These Acts are complete in themselves; and though each creates indictable offences, each would be mutilated and rendered far less convenient than it is at present if the parts which create offences were separated from the parts which deal with other matters; whilst if the offences were transferred to the proposed Code in a form intelligible and complete, they would necessitate the introduction of an amount of matter which would render it inconveniently cumbersome, without any corresponding advantage.

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* These statutes are applied to the existing Prayer Book by 14 Ch. 2. c. 4. s. 20.

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

It will be remembered however that after the Code shall have come into operation, if it is found expedient to incorporate any of these provisions in the general criminal law of the country, this can be done by legislation from time to time as occasion arises. Besides the classes of statutes referred to, there will be found unrepealed on the statute book many enactments bearing more or less directly upon the criminal law or its procedure, which have been rendered practically obsolete or have been superseded by subsequent legislation. These enactments lying dormant on the statute book simply increase its bulk, but cause no embarrassment or inconvenience to those who have to administer or who desire to study the criminal law. The removal of these enactments from the statute book will be more aptly accomplished by the revision of the statutes which is continuously in progress, and the task can be more safely and satisfactorily performed after the Code, if it becomes law, shall have been for some time in operation.

5. There are statutes relating to Ireland, generally known as the "Peace Preservation Acts." These Acts are temporary, and of course should find no place in the proposed Code.

6. There are also in force and applicable to Ireland certain statutes, usually called the "Whiteboy Acts," and certain enactments connected therewith. These statutes constitute a body of law of a highly penal and exceptional character, apparently intended to repress offences springing from a peculiar state of society. Some of the offences dealt with are offences under the ordinary laws; and these will be found to be comprised in the Draft Code. We have also adopted into the Draft Code, but with considerable modifications, especially as regards the amount of punishment, some provisions found in these statutes, which ought to have a place amongst indictable offences in both countries. See, for example, Sections 416, 417. If the Draft Code becomes law, we hope that it will be found upon these points amply sufficient for the maintenance of order, and that the severe and exceptional provisions of the Whiteboy Code may be removed from the Statute Book.

III.

ARRANGEMENT OF CODE.—FELONY AND MISDEMEANOUR.—MALICE.

We do not propose to attempt more in this Report than to give a general account of the contents of the Draft Code, pointing out as we proceed in what respects it differs from the existing law, and showing generally how it is related to the Bill which we are required to consider and report upon.

It may well be supposed that in preparing so extensive and elaborate a measure, some difference of opinion was unavoidable. To a great extent, however, such difference turned upon matters of style and arrangement, which vary at least as much in relation to the proper manner of drawing up Acts of Parliament as in relation to any other species of literary composition. With this qualification, we may state that we are unanimous in submitting the Draft in its present form, subject to the observations with which it is accompanied.

As to the relation between the Draft Code and the Bill we have a general observation to make. The Draft is founded on the Bill throughout, but the language of the Bill is altered in nearly every section; considerable parts of it are altogether redrawn, and in some parts of the Draft Code a different arrangement has been adopted. In a large proportion of cases the differences between the two are differences of style, the matter expressed being substantially the same. Many alterations made were in the direction of expanding the provisions of the Bill, which, with a view to brevity, were framed

in more general terms than was ultimately thought desirable. Single sections were thus in many instances divided into two or more, and the language was frequently elaborated in order to prevent possible misconceptions of the meaning.

A material alteration—to be found in Part III—consists in the elaboration of the provisions respecting justification and excuse; another will be observed in the Part relating to Forgery, where it was deemed expedient to retain, even at the risk of some prolixity, the elaborate provisions of the existing statute law on the subject. The result is, that the Draft Code is somewhat longer than the Bill.

The distribution of the subject adopted in the Bill, and followed with two exceptions in the Draft Code, is as follows: First come certain preliminary matters affecting every part of the subject. These are, (1) the application and general scope of the Code; (2) general provisions relating to punishments; (3) provisions as to matter of justification and excuse for acts which would otherwise be crimes; and (4) provisions as to the degree of participation in a crime which involves criminal responsibility for it.*

The definitions of the different crimes follow. All crimes affect the public, and most crimes specially affect individuals. But in some the injury to the public is most obvious, in others the injury to individuals. We place the former first, and then go on to the latter. As regards crimes principally affecting the public, we place first those offences which disturb the public peace, either by open force or by various kinds of unlawful engagements and conspiracies. Next come the offences which interfere either by corruption, deceit, or violence with the administration of justice. These are followed by offences against religion, morality, and public convenience. Passing to offences which principally affect individuals, we take first those which affect the person, next those which relate to rights inseparable from the person, such as marital and parental rights, and reputation. These are followed by offences against rights of property and rights arising from contract. The procedure by which the offences previously defined are to be punished forms the seventh Title, and the repeal of the Acts which it supersedes the eighth and last.

With respect to the general scope and contents of the measure, it is to be remembered that it is intended to contain and in our opinion does contain the whole of the law relating to indictable offences, except that portion of it which is contained in statutory enactments falling under one or other of the classes above specified, and except certain common law offences which we think ought no longer to be treated as such, and which will be referred to in the course of our observations.

There is some difference as to this matter between the Draft Code and the Bill. The Bill included several common law offences which we have thought it safe to abolish, and it also embodied some statutes which we have thought it best to exclude, leaving them as they stand on the statute book for one or more of the reasons already given. We have found only two or three statutory enactments which the Bill did not contain, and which we thought it desirable to embody in the Draft Code. The chief are 23 & 24 Vict. c. 75, s. 12, which punishes the offence of aiding the escape of criminal lunatics, and 50 Geo. 3, c. 59, s. 2, which punishes public officers who make false statements in their accounts. And we have not discovered any common law offence not provided for in the Bill, which we thought it desirable to preserve.

Both the Draft Code and the Bill in defining offences abolish the distinction between felony and misdemeanour, and avoid throughout the use of the word "malice."

The distinction between felony and misdemeanour was in early times nearly, though not absolutely, identical with the distinction between crimes punishable with death and crimes not so punishable. For a long time past this has ceased to be the case. Most felonies are no longer punishable with death; and many misdemeanours are now punishable more severely than many felonies. The great changes which have taken place in our criminal law have made the distinction nearly if not altogether unmeaning. It is impossible to say on what principle embezzlement should be a felony, and the fraudulent appropriation of money by an agent or the obtaining of goods by false pretences a misdemeanour; why bigamy should be a felony, and perjury a misdemeanour; why child stealing should be a felony, and abduction a misdemeanour. The result of this arbitrary classification is that the right to be bailed, the liability to be arrested without warrant, and (to a certain extent) the right of the court to order the payment of the costs of prosecutions vary in a manner equally arbitrary and unreasonable.

* The Draft Code is divided into titles, parts, and sections. The Bill was divided into parts, chapters, and sections. We substituted "title" for "part," and "part" for "chapter," in order to avoid the use of the word "chapter" as the name of a sub-division of what might itself ultimately become a chapter of the statute book.

Moreover the old distinction still regulates the mode of trial. The person accused of felony has a right of peremptory challenge. The person accused of misdemeanour has in England no such right. The jury in cases of felony, however trifling it may be, must be kept together till they give their verdict; in cases of misdemeanour, however serious, they may be allowed to separate. We believe that crimes vary so greatly in their characteristics that it is practically impossible to suggest any principle of general classification to be substituted for that of the old distinction of felony and misdemeanour. The question whether a person accused of an offence should be entitled or not to be bailed as of right, and should be liable or not to summary arrest, can be more conveniently determined in reference to each particular offence than in reference to any classification which occurs to us. We have therefore specified in respect of each offence whether the accused is to be entitled to bail or not, and whether he is liable to be arrested without warrant or not; and as regards the right of challenging jurors, we propose that the number of challenges to be allowed shall be proportioned to the possible severity of the punishment which might follow on conviction. We have also provided for the jury being allowed to separate during the trial of all but capital cases. The Bill provided for the abolition of the distinction between felony and misdemeanour, by laying down a general rule making the liability to arrest and the right to bail dependent on the maximum punishment to which the offender would be exposed on conviction; but this we do not regard as satisfactory. With regard to challenges its provisions were not very different from those of the Draft Code.

We have avoided the use of the word "malice" throughout the Draft Code, because there is a considerable difference between its popular and its legal meaning. For example, the expression "malice aforethought" in reference to murder has received judicial interpretation which makes its use positively misleading.

We now proceed to explain and remark on the different provisions of the Draft Code, and to point out where they are intended to codify the unwritten law, and where to digest the statute law, indicating in each case those provisions which either alter or modify the existing law, and generally comparing the Draft Code and the Bill as we proceed. In doing so we shall follow the order of the Draft Code.

IV.

TITLE I.—INTRODUCTORY PROVISIONS.

Part I of the Draft defines the application of the Act. It is to apply to—

(*a*) Piracy by the law of nations wherever committed, and all offences committed in England or Ireland, and certain offences committed by British subjects elsewhere;

(*b*) All offences committed on board any British ship within the limits of the Admiralty jurisdiction, provided that such offences are tried in England or Ireland;

(*c*) All offences committed within the limits defined by the Territorial Waters Jurisdiction Act, 1878, provided that they are tried in England or Ireland.

This provision naturally raises the question—where is an offence committed? A shot is fired in one place, which wounds a man in another place, who dies in a third place. In which of these places is the crime committed? Section 4 provides that in such cases the crime is to be deemed to have been committed in each of the three places in question. But this is qualified by a proviso intended to prevent what might be considered an infringement on the comity of nations, by assuming legislative power to punish in this country foreigners for acts done abroad. The proviso deals with a matter of some technicality, and is explained by a marginal note.

The following illustrations will show the operation which these provisions are intended to have:—

A sailor (whether a British subject or an alien) commits an offence on board a British ship out of the realm of England or Ireland, but within the jurisdiction of the Admiralty. If he is tried in England or Ireland, he must be tried according to the provisions of the Draft Code; but the Draft Code would not apply if he were tried in the High Court of Calcutta, or the Supreme Court at Melbourne or Sydney under Admiralty jurisdiction, or if he were tried in Scotland.

An alien commits a crime on board a foreign ship whilst passing within the territorial waters of the realm as defined in the Territorial Waters Jurisdiction Act.

1878. He is liable to be tried under the Draft Code in England or Ireland, with the leave of the Secretary of State.

Aliens and British subjects whilst in a foreign country procure a crime to be committed in England or Ireland. The British subjects are triable in England or Ireland under the Draft Code, though they remain abroad till after the offence is complete. The aliens are not triable in England or Ireland unless before the offence is complete they come into Your Majesty's dominions, and so become triable in the same way as British subjects.

We have already observed upon the operation of section 5. The corresponding section of the Bill repealed in effect all the common law definitions of offences for which it provided substitutes, but left untouched all common law offences for which it did not so provide.

We have taken the responsibility of recommending that crimes should no longer be indictable at common law, but only under the provisions of the Draft Code, or of some other Act in force for the time being. We have adopted this course because after a careful consideration of the subject we are unable to discover any offence unprovided for, except some which having become obsolete—*e.g.* champerty and common barratry—we think ought not to be retained.

Section 5 will thus have the effect of preventing indictments at common law for conspiracy. The sections of the Draft Code which deal with this subject comprise treasonable conspiracies (section 79), seditious conspiracies (section 102), conspiracies to bring false accusations (section 126), conspiracies to pervert justice (section 127), conspiracies to defile women (section 149), conspiracies to murder (section 180), conspiracies to defraud (section 284), conspiracies to commit indictable offences (sections 419, 420), and conspiracies to prevent by force the collection of rates and taxes (section 421). The law as to trade conspiracies we have left untouched; and to make it clear that we have done so, we have added a few words at the end of the clauses relating to conspiracies in Part XXXVI.

There is not perhaps any distinct authority for the proposition that there are at common law any criminal conspiracies other than those referred to, but some degree of obscurity exists on the subject. An agreement to do an "unlawful" act has been said to be a conspiracy; but as no definition is to be found of what constitutes "unlawfulness," it seems to us unsatisfactory that there should be any indictable offence of which the elements should be left in uncertainty and doubt.

Part II contains general provisions as to punishments. It makes the following alterations in the existing law.

Section 8 provides that the punishment of death shall be carried out in private in all cases, and not, as at present, in cases of murder only.

Section 13 gives the court power to discharge without conviction, persons who have committed acts which, though amounting in law to crimes, do not under the circumstances involve any moral turpitude. This provision was suggested partly by section 95 of the Indian Penal Code, which excepts from the class of offences acts causing harm "so slight that no person of ordinary sense and temper would complain of such harm," and partly by 18 & 19 Vict. c. 126, s. 1 (the Criminal Justice Act, 1855), which enables justices to dismiss charges of larceny if they are of opinion "that there are circumstances in the case which render it inexpedient to inflict any punishment." The same principle is recognised as to assaults "so trifling as not to merit any punishment" by 24 & 25 Vict. c. 100, ss. 44, 45. There seems no reason why the principle should not extend to a trial for an indictable offence. The conferring of such power on the judge but little enlarges the authority at present vested in him. He may now, on a conviction, award a punishment merely nominal, or discharge the person convicted on his own recognizance. This course, while exempting the person from punishment under a sentence, may still leave him subject to the most serious consequences; for example, upon a conviction for manslaughter committed under circumstances showing the person convicted, though technically guilty, to be entirely free from all moral blame, he would forfeit a pension or be disqualified from holding a beer or spirit license. A conviction for bigamy under certain circumstances might furnish another illustration.

Section 15 re-enacts the provision of the existing law (27 & 28 Vict. c. 48, s. 2) which prohibits a person sentenced to penal servitude after a previous conviction from being sentenced to less than seven years' penal servitude. We have not altered this provision, but we must not be taken to approve of it. It seems unreasonable, and is much complained of by many persons concerned in the administration of justice. Judges of various courts have represented to us that they have in many cases passed

sentences of imprisonment in lieu of penal servitude because they were prevented by this section from passing a sentence for less than seven years. Similar observations apply to the minimum period of five years as at present fixed, where there is no previous conviction. As a Commission is sitting on the whole subject of Penal Servitude, we have thought it sufficient to call attention to these points.

As to the effect of previous convictions, we propose to make a considerable change from the existing law. By the existing law (the provisions of which are intricate) every one who is convicted of felony after a previous conviction for felony is liable to penal servitude for life, or imprisonment for four years with hard labour, and to be whipped once, twice, or thrice (7 & 8 Geo. 4. c. 28, s. 11, and 9 Geo. 4. c. 54, s. 21, Ireland). The provisions of the Larceny Act (24 & 25 Vict. c. 96, ss. 7, 8, 9) seem to limit the maximum punishment to ten years' penal servitude if each offence is simple larceny, but they also provide a maximum punishment of seven years' penal servitude for a conviction of larceny after a previous conviction on an indictment for certain misdemeanours, or after two summary convictions for offences resembling larceny. As a substitute for this we propose that a person convicted of a crime involving dishonesty, for which he might be punished with penal servitude for five or seven years, shall be liable to fourteen years' penal servitude if he has been previously convicted of such a crime. This is the result of the definition of "offence involving dishonesty" given in section 6, combined with sections 275, 294, 308. Section 380 provides specially for the punishment of offences relating to the coin after previous convictions for such offences. The provisions of the Bill on this subject were the same in principle as the existing law.

By the present law a person convicted of more offences than one may be sentenced in respect of every such offence separately, each sentence to take effect on the expiration of the preceding sentence. Under this state of the law, imprisonment may, in the case of several convictions, be prolonged to an extent limited in effect only by the life of the offender, and in some instances sentences have been actually passed involving imprisonment for very long periods. As this appears objectionable, we have prohibited any continuous imprisonment of longer duration than two years; and in lieu of the present unrestricted power of cumulating periods of imprisonment, we have substituted a power by section 17 to pass a sentence of from five to seven years' penal servitude in cases in which sentences of four years' imprisonment with hard labour might now be passed, and sentences of from five to fourteen years' penal servitude in cases in which sentences of six years' imprisonment with hard labour might now be passed. The provisions of the Bill as to cumulative punishment were in effect not very different from those of the Draft Code.

It is always to be borne in mind that the punishments specified in the various sections of the Draft Code are the maximum punishments, the provisions of each particular section being controlled by section 12, which gives unlimited power of mitigation in all but capital cases. In every case where we have proposed to increase the existing maximum punishment, we have called attention to the fact in a marginal note.

Part III deals with matters of justification and excuse for acts which would otherwise be indictable offences. We regard this as one of the most difficult as well as most important portions of the Draft Code: and we have already explained our reasons for presenting it in the shape in which it stands.

As regards the excuse of immaturity of age, both the Draft Code and the Bill simply repeat the existing law.

Section 22, which relates to insanity, expresses the existing law. The obscurity which hangs over the subject cannot be altogether dispelled until our existing ignorance as to the nature of the will and the mind, the nature of the organs by which they operate, the manner and degree in which those operations are interfered with by disease, and the nature of the diseases which interfere with them, are greatly diminished. The framing of the definition has caused us much labour and anxiety; and though we cannot deem the definition to be altogether satisfactory, we consider it as satisfactory as the nature of the subject admits of. Much latitude must in any case be left to the tribunal which has to apply the law to the facts in each particular case. The principal substantial difference between section 22 of the Draft Code and the corresponding section of the Bill is that the latter recognizes as an excuse the existence of an impulse to commit a crime so violent that the offender would not be

prevented from doing the act by knowing that the greatest punishment permitted by law for the offence would be instantly inflicted, the theory being that it is useless to threaten a person over whom by the supposition threats can exercise no influence. This provision of the Bill assumes that the accused would not be protected by the preceding part of the section, and therefore that he was at the time he did the act capable of appreciating its nature and quality, and knew that what he was doing was wrong. The test proposed for distinguishing between such a state of mind and a criminal motive, the offspring of revenge, hatred, or ungoverned passion, appears to us on the whole not to be practicable or safe, and we are unable to suggest one which would satisfy these requisites and obviate the risk of a jury being misled by considerations of so metaphysical a character. It must be borne in mind, that, although insanity is a defence which is applicable to any criminal charge, it is most frequently put forward in trials for murder, and for this offence the law—and we think wisely—awards upon conviction a fixed punishment which the judge has no power to mitigate. In the case of any other offence, if it should appear that the offender was afflicted with some unsoundness of mind, but not to such a degree as to render him irresponsible,—in other words where the criminal element predominates, though mixed in a greater or less degree with the insane element,—the judge can apportion the punishment to the degree of criminality, making allowance for the weakened or disordered intellect. But in a case of murder this can only be done by an appeal to the executive; and we are of opinion that this difficulty cannot be successfully avoided by any definition of insanity which would be both safe and practicable, and that many cases must occur which cannot be satisfactorily dealt with otherwise than by such an appeal.

With regard to compulsion we have already expressed our views. We recommend the abolition of the presumption as to the coercion of married women by their husbands. Upon the matter of compulsion generally the Draft Code and the Bill differ, but we need not notice their difference.

We have thought it unadvisable to introduce any express reference to the well-known doctrine that drunkenness is no excuse for crime, though in particular instances its existence may show the absence of specific intention. Reference to the matter might suggest misunderstanding of a dangerous kind.

Sections 25 to 66, both inclusive, contain a series of provisions as to the circumstances which justify the application of force to the person of another against his will. To these we have already referred at some length. We believe that in the main these provisions embody the common law, though on some points they lay down a definite rule where the law is at present doubtful, and in others correct what appear to be defects in the existing law. We have noticed in marginal notes the points in which we conceive the law to be altered by these sections.

We would direct special attention to the sections relating to the suppression of riots, particularly to their suppression by the use of military force. We do not think that these sections differ from what would probably be held to be the law if cases should ever occur to raise the questions which they determine, but we cannot say that every proposition has been expressly held to be the law. We must observe, in regard to all these provisions, that the law upon the different matters to which they relate has never before, so far as we know, been reduced to an explicit or systematic form. One of the principal differences both in the arrangement and in the substance of the Draft Code and the Bill consists in the different way in which they deal with these subjects. As regards arrangement, the provisions which specify the cases in which summary arrest is lawful were placed in that part of the Bill which relates to procedure on the ground that the first step to be taken towards the punishment of an alleged offender is to arrest him. So far as the other matters referred to were dealt with at all, they were (with one exception) treated in that part of the Bill which dealt with offences against the person, as in all common cases the matters provided for would have to be inquired into in connexion with such offences. As regards the substance of the enactments, the whole subject was treated much more concisely in the Bill than in the Draft Code.

The Bill also contained a provision as to the effect of mistakes of fact upon the criminality of acts done in consequence of such mistakes, which if some qualifications had been made in it would have included under one general principle a

considerable number of the enactments contained in Part III of the Draft Code. The difficulty presented on the one hand by our rules of construction to expressing matters of such intricacy in general language, and the danger apparent on the other hand of losing the certainty essential for a Code, have induced us (at some sacrifice perhaps of brevity) to adopt a mode of dealing with these subjects which reduces to an intelligible and systematic form a great body of law on which precise rules are very desirable, and which is at present in an extremely obscure and fragmentary state.

Part IV corresponds in the main with Chapter IV of the Bill. Each effects a change, not so much in the substance as in the language of the existing law. The old law as to principal and accessory was technical and intricate, but it was practically superseded by 24 & 25 Vict. c. 94, which put accessories before the fact upon the same footing in all respects as principals. We have thought it better to discontinue the use of an expression which has ceased to have any appropriate meaning.

Section 74 in this Part deals with attempts to commit offences, and treats the act of a person who with the intention to carry off the money he believes to be there puts his hand into a pocket or breaks open a box, as an attempt to steal, though there was in fact no money in the pocket or in the box. This alters the law from what it has been held to be. The other sections are not believed to do more than declare the existing law.

With these observations on the preliminary Title, we pass to those which contain the definitions of indictable offences.

V.

TITLES II AND III.—OFFENCES AGAINST PUBLIC ORDER AND THE ADMINISTRATION OF JUSTICE.

Title II relates to offences against public order, internal and external, and deals in four successive Parts with high treason and other offences against Your Majesty's authority and person; unlawful assemblies; riots and breaches of the peace; unlawful oaths; seditious words, conspiracies, and libels; and piracy and piratical offences, which are included in this Title because they are of the nature of private war waged against the lawful authority of all nations.

Our definition of High Treason exactly follows the existing law, with one or two exceptions which we felt warranted in making. The existing law depends upon the old statute of 25 Ed. 3, st. 5, c. 2, and on the judicial construction put upon that Act. It is well explained in the opinion delivered by the late Mr. Justice Willes in Mulcahy *v.* R. (L.R. 3 H. of L. 318). It has been thought better to make the act of killing or wounding the Sovereign in itself an act of treason, instead of adopting the artifical construction by which cutting off the head of Charles the First was not treason in itself, but was an overt act evidencing the compassing of his death, which was treason within the statute of Edward 3. And we have also thought it right to make conspiring to levy war against the Sovereign in itself treason, instead of evidence of compassing the Sovereign's death. It would in the present day be absurd to re-enact the provisions which make it high treason to kill the Lord Chancellor or a Judge of the Superior Courts in the discharge of his duties. The ordinary law as to murder affords sufficient protection. A provision as to the King's eldest daughter we also ventured to omit. Section 76 preserves the existing law as to evidence, which has for centuries required two witnesses to prove treason. We have not thought it right to alter this, which has so long been the law, though many persons doubt whether there is ground at the present day either in expediency or reason for preserving the anomaly.

The Treason Felony Act (11 Vict. c. 12) and the Act intended to protect Your Majesty's person from insult (5 & 6 Vict. c. 57) are re-enacted by sections 79 and 80.

Section 81 represents 12 Geo. 3, c. 2, which punishes with death the offence of burning ships of war, &c. By 4 Geo. 4, c. 48, sentence of death may in this case be recorded,—a course which has the same effect as if the sentence had been passed and the prisoner reprieved. In practice, sentences of death so recorded are never executed. We have not ventured to alter this, but the proceeding seems objectionable on obvious grounds. If the punishment in this case were reduced to penal servitude for life as a maximum, the section might be dispensed with, as every offence falling under it would be punishable as arson.

The definition of an unlawful assembly in Part VI depends entirely on the common law.

The earliest definition of an unlawful assembly is in the Year Book 21 H. 7, 39. It would seem from it that the law was first adopted at a time when it was the practice for the gentry, who were on bad terms with each other, to go to market at the head of bands of armed retainers. It is obvious that no civilised government could permit this practice, the consequence of which was at the time that the assembled bands would probably fight, and certainly make peaceable people fear that they would fight. It was whilst the state of society was such as to render this a prevailing mischief that the earlier cases were decided; and consequently the duty of not provoking a breach of the peace has sometimes been so strongly laid down as almost to make it seem as if it was unlawful to take means to resist those who came to commit crimes. We have endeavoured in section 84 to enunciate the principles of the common law, although in declaring that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly and without reasonable occasion provoke others to disturb the peace tumultuously, we are declaring that which has not as yet been specifically decided in any particular case. The clause as to the defence of a man's house has been inserted because of a doubt expressed on the subject. Forcible entry and detainer are offences at common law; and section 95 we believe correctly states the existing law.

The greater portion of this Part is merely a re-enactment of a variety of statutes which are referred to in the margin.

The three first sections of Part VII, sections 99, 100, and 101, are a re-enactment of the existing statute law as to unlawful oaths.

Section 102, relating to seditious offences, is taken without alteration from the Bill. It appears to us to state accurately the existing law as stated in the authorities noted in the margin of the Draft Code. On this very delicate subject we do not undertake to suggest any alteration of the law. It is not easy to find explicit authority earlier than the case of R. *v.* Frost (22 St. Tr. 471, tried before Lord Kenyon in 1793), for the proposition that to speak seditious words is an indictable offence. A passage in the 3rd Institute (p. 14) certainly says, "But words without an overt deed are to be "punished in another degree as an high misprision." This, however, is an incidental remark at the end of a passage, the main point of which is that mere words are not in general an overt act of treason.

The Bill contained a definition of "Piracy by the law of nations." We have thought it better to leave this offence undefined in Part VIII, as no definition of it would be satisfactory which is not recognised as such by other nations; and after careful consideration of the subject we have not been able to discover a definition fulfilling such a condition. We may observe as to this that the subject has been much discussed in the Courts of the United States, and the result appears to justify the course which we have adopted. We do not think it will lead to practical inconvenience.

Piracy is punished with death by the existing law if it is accompanied by personal violence, but sentence of death may be recorded. We need not repeat our observations on this procedure.

We will only further observe with regard to the contents of this Title that the corresponding part of the Bill included offences against the Acts for the suppression of the Slave Trade, several of which, according to the provisions of those Acts, are to be deemed to amount to piracy. We have, upon the whole, thought it best to omit these offences from the Draft Code. The Acts relating to the Slave Trade form a special code having a distinct object of their own, in which various foreign countries are interested. Offences against these Acts are extremely rare, and prosecutions for them do not form part of the usual routine of criminal justice.

Title III. deals with offences affecting the administration of justice, by way of corrupting judicial or ministerial officers, by disobeying lawful orders, by deceiving courts, by perjury and other means of the same kind, or by escaping or rescuing others from lawful custody. In a general Code of the criminal law we have thought it right to include the offence of judicial corruption, and to subject it to severe and infamous punishment. As no case of the kind has occurred (if we except the prosecutions of Lord Bacon and Lord Macclesfield), it is not surprising that the law on the subject should be somewhat vague. We have thought it right, in order to protect

persons holding judicial positions from malicious prosecutions, to provide that no prosecution for this offence shall be instituted except by the Attorney General, or in the case of judges of the Superior Courts (who since the Revolution have not been removable at the will of the Crown), without the resolution of one of the Houses of Parliament. We have also provided for the punishment of corruption in ministerial officers connected with the administration of justice. Recent experience has shown that the punishment awarded to such offences by the common law is not sufficiently severe.

We propose in Part X that perjury, the taking of false oaths otherwise than in judicial proceedings, the fabrication of evidence (which by the present law is perhaps not an offence, unless it amounts to a conspiracy), and conspiracies to bring false accusations or to defeat justice, should be punished more severely than at present. Perjury may be made the means of committing what amounts morally to murder or robbery of the worst kind, and it appears to us that in such cases the present maximum punishment (seven years' penal servitude) is not sufficiently severe. In framing section 119 we have proceeded on the principle that the guilt and danger of Perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions. It seems to us not desirable that a person who has done this should escape from punishment, if he can show some defect in the constitution of the tribunal which he sought to mislead, or some error in the proceedings themselves.

False oaths, and false statements not on oath to which faith is given, are not perjury, unless taken or made in a judicial proceeding. They are at common law punishable by fine and imprisonment only. They are provided for by sections 122 and 123.

Fabricating evidence is an offence which is not so common as perjury, but which does occur and is sometimes detected. An instance occurred a few years ago on a trial for shooting at a man with intent to murder him, where the defence was that though the accused did fire off a pistol, it was not loaded with ball and the only intent was to frighten. Evidence was given that a pistol ball was found lodged in the trunk of a tree nearly in the line from where the accused fired to where the prosecutor stood. It was afterwards discovered that the ball had been placed in the tree by those concerned in the prosecution, in order to supply the missing link in the evidence. Such an offence is as wicked and as dangerous as perjury, but the punishment as a common law offence (if, irrespective of conspiracy, it be an offence) is only fine and imprisonment. This is provided for by section 125.

In reference to the somewhat intricate subject of escape and rescue dealt with in Part XI, we have made distinctions, which are, we think, insufficiently recognised by the existing law, between the commission of such offences by peace officers and gaolers, and by other persons.

This Title differs from the corresponding part of the Bill, principally in the circumstance that, for the reasons already assigned, it omits several obsolete common law offences included in this part of the Bill. The Bill also re-enacted the provisions of that part of the Corrupt Practices Act (17 & 18 Vict. c. 102) which creates indictable offences. These latter provisions appear to us hardly to deal with any part of the common routine of criminal justice; and being enacted for a limited time only, ought not to find a place in a Code intended to be permanent. The changes proposed by us in the punishment of judicial and official corruption, perjury, and conspiracies to make false accusations, or to defeat justice, are all contained in the Bill, though in some cases with slight differences. The part of the Draft Code which deals with escapes and rescues is rather more elaborate and detailed than the corresponding chapter of the Bill.

VI.

TITLE IV.—OFFENCES AGAINST RELIGION, MORALS, AND PUBLIC CONVENIENCE.

Title IV relates to offences against religion, morals, and public convenience, and corresponds with Part IV of the Bill.

Section 141 provides a punishment for blasphemous libels, which offence we deem it inexpedient to define otherwise than by the use of that expression. As, however, we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage which it inflicts upon the religious feelings of the community, and not in the expression of erroneous opinions, we have added a proviso to the effect that no one shall be convicted of a blasphemous libel only for expressing in good faith and

decent language any opinion whatever upon any religious subject. We are informed that the law was stated by Mr. Justice Coleridge to this effect in the case of R. *v.* Pooley, tried at Bodmin in 1857. We are not aware of any later authority on the subject. This provision is taken with some alteration from the Bill.

With regard to offences against morality, we think it expedient to do away with the minimum punishment of ten years' penal servitude, at present inflicted in certain cases. It is the only, or almost the only, minimum punishment still retained, and experience shows that in this, as in other cases, circumstances greatly affect the nature of the offence.

We believe that section 147, as to obscene publications, expresses the existing law, but it puts it into a much more definite form than at present. We do not however think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself.

With regard to section 148, we may observe that 24 & 25 Vict. c. 100, s. 49, on which it is founded, is so widely drawn as (in terms at least) to appear to make the seduction of a woman under age a criminal offence in almost every case. We have qualified this by introducing the words "from motives of lucre," which will carry out what has been treated as and what we suppose to have been the intention of the Legislature.

With regard to nuisances, which form the subject of Part XIV, we have in section 151 and section 152 drawn a line between such nuisances as are and such as are not to be regarded as criminal offences. It seems to us anomalous and objectionable upon all grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in perfect good faith. Nuisances which endanger the life, safety, or health of the public stand on a different footing.

By the present law, when a civil right such as a right of way is claimed by one private person and denied by another, the mode to try the question is by an action. But when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information, which is in form the same as an indictment or information for a crime. But it was very early determined that, though it was in form a prosecution for a crime, yet that as it involved a remedy for a civil right, the Crown's pardon could not be pleaded in bar. See 3 Inst. 237. And the legislature, so recently as in the statute 40 & 41 Vict. c. 14, again recognised the distinction. The existing remedy in such cases is not convenient, but it is not within our province to suggest any amendment. The other sections are mostly re-enactments of statutes; but sections 153 and 158 are declaratory of the common law, though we have suggested the addition of hard labour to the punishment. The Bill contained nearly all the provisions upon this subject which are found in Part XIV of our Draft, though it does not draw the distinction to which we have just adverted; but it also embodied the provisions of 8 & 9 Vict. c. 109, s. 8, and 17 & 18 Vict. c. 38, s. 2, as to the facts by which a house may be proved to be a common gaming house. We have omitted these as having reference, if not exclusively, at all events principally, to summary proceedings before magistrates.

We now arrive at the part of the Draft Code which relates to offences against individuals.

VII.

TITLE V.—OFFENCES AGAINST THE PERSON.

Title V corresponds for the most part (as did Part V of the Bill) to 24 & 25 Vict. c. 100, supplemented by a reduction to writing of the common law doctrines and definitions, a knowledge of which is necessary to complete the subject. As homicide and the infliction of bodily injury may be effected as well by an omission to discharge a legal duty as by an illegal act, it is necessary to begin by defining the legal duties tending to the preservation of life, the neglect of which is criminal. This is the subject of Part XV of the Draft Code, and of Chapter XVIII of the Bill. We believe that this Part of the Draft Code will be found to state in a clear and compendious form the unwritten law upon the subject to which it relates.

Section 161 is a re-enactment of 24 & 25Vict. c. 100, s. 26, which was itself a re-enactment of 14 & 15 Vict. c. 11. That statute was passed in the excitement con-

sequent on the case of R. *v.* Sloane,* and was framed so as to embrace all cases where there was a contract to supply a servant of whatever age with food, clothing, and lodging. It has been thought better to limit it to servants and apprentices under the age of 16, but it is right to point out that this is not the existing law. Section 160 puts the head of a family under the same criminal responsibility towards members of his household under the age of 16, as a master is to a servant of the same age.

The Draft Code deals next with murder, manslaughter, and some other offences to which we will refer specifically. Many of the doctrines of the common law bearing upon this subject relate equally to murder and manslaughter. Both the Draft Code (Part XVI) and the Bill (Chapter XIX) accordingly deal with homicide generically, and ascertain the cases in which it is culpable, before dealing specifically with murder and manslaughter. There is some difference in language and arrangement between this Part of the Draft Code and the Bill. The Draft Code preserves a rule of the common law which was repealed by the Bill, viz.: the rule that to render the homicide culpable, death must take place within a year and a day of the injury. It was thought desirable to fix some limit, and no sufficient reason occurred to us for departing from the ancient rule. In other respects there is little difference between the Draft Code and the Bill, and none between the former and the existing law. Having defined culpable (or, as it is called in the Bill, unlawful) homicide, both the Draft Code and the Bill proceed to the problem of defining murder and manslaughter. The common law definition of murder is "unlawfully killing with malice aforethought." Manslaughter may in effect be defined as "unlawful killing without malice aforethought." The objection to these definitions is that the expression "malice aforethought" is misleading. This expression taken in a popular sense would be understood to mean that in order that homicide may be murder, the act must be premeditated to a greater or less extent, the jury having in each case to determine whether such a degree of premeditation existed as deserved the name. This definition if so understood would be obviously too narrow, as without what would commonly be called premeditation, homicide might be committed which would involve public danger and moral guilt in the highest possible degree. Of course it can be pointed out that every intentional act may be said to be done aforethought, for the intention must precede the action. But even with this explanation, the expression is calculated to mislead anyone but a trained lawyer. The inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This conclusion was arrived at by means of the doctrine of constructive or implied malice. In this case as in the case of other legal fictions it is difficult to say how far the doctrine extended. We do not propose on the present occasion to enter upon a discussion of this subject. It was carefully considered before a Committee of the House of Commons sitting on a Bill for the definition of Homicide, introduced by the late Mr. Russell Gurney in 1874. It was also considered by the Commission on Capital Punishments, which reported in 1866. Each of these bodies reported that the present condition of the law was unsatisfactory, though neither arrived at a definition which was considered satisfactory.

The present law may, we think, be stated with sufficient exactness for our present purpose somewhat as follows:—Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:—(*a*) An intent preceding the act to kill or to do serious bodily injury to the person killed or to any other person; (*b*) Knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not; (*c*) An intent to commit any felony; (*d*) An intent to resist an officer of justice in the execution of his duty. Whether (*c*) is too broadly stated or not is a question open to doubt, but Sir Michael Foster, perhaps the highest authority on the subject, says (p. 258) "A shooteth at the poultry of B, and by accident killeth a man; if his "intention was to steal the poultry, which must be collected from circumstances, it "will be murder by reason of that felonious intent; but if it was done wantonly and "without that intention, it will be barely manslaughter."

It seems to us that the law upon this subject ought to be freed from the element

* Annual Register, vol. 92, p. 144.

of fiction introduced into it by the expression "malice aforethought," although the principle that murder may under certain circumstances be committed in the absence of an actual intention to cause death ought to be maintained. If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not, he ought in our opinion to be considered a murderer if death ensues.

For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not. This is the general object kept in view both in the Draft Code and in the Bill, but there is some difference in the extent to which they go. There is no difference as to the cases in which the death of the person killed or of some other person is intended. The Bill included in the definition of murder all cases in which the offender intended to cause, or knew that he probably would cause "grievous bodily harm" to any person. The Draft Code would include all such cases, substituting the expression "bodily injury known to the offender to be likely to cause death" for "grievous bodily harm," which to some extent narrows the definition given in the Bill. On the other hand, the Draft Code (section 175) includes all cases in which death is caused by the infliction of "grievous bodily injury" for the purpose of facilitating the commission of certain heinous offences. All these cases would fall within the definition of murder given in the Bill, according to which it is murder to kill by the intentional infliction of grievous bodily harm, irrespectively of the purpose for which it is used. Lastly, section 175 in sub-sections (*b*) and (*c*) provides that killing by the administration of stupefying things, or by wilfully stopping the breath, for the purpose in either case of committing any of the specified offences, shall be murder, whether the offender knows or not that death is likely to ensue. According to the provisions of the Bill these cases would amount to murder only if the offender knew their danger. The difference between the Draft Code and the Bill upon the whole comes to this. A, in order to facilitate robbery, pushes something into B's mouth to stop his breath and thus to prevent him from crying out; the death of B results. This is murder according to the Draft Code. According to the Bill it is murder if A knew that such an act would probably cause death; manslaughter if he did not. A few years ago a case occurred in the Western Circuit* which illustrates the principle on which this portion of the Draft Code is framed better than any hypothetical case. An innocent girl on her way to church had to pass over a stile into a narrow wooded lane and then go out of it by a stile on the other side. A ruffian who knew this lay in wait for her, muffled her head in a shawl to stifle her cries, and proceeded to drag her down the lane towards a wood. She died before she reached it. He was executed for the murder. It is plain he did not mean to kill her; indeed his object was frustrated in consequence of her not reaching the wood alive, and he probably was not aware that stifling her breath for so short a time was dangerous to life; but as the law at the time was and now is, the death having been occasioned by violence used to facilitate the commission of a rape, the offence was murder. And we believe there are few who would not think the law defective if such an offence was not murder.

Again, A stabs B in the leg, not intending to kill him; B dies. According to the Bill this would be murder if the jury thought the act showed an intent to do grievous bodily harm, or if without such intent it was done with knowledge that it would probably cause death or grievous bodily harm. According to the Draft Code it would be murder, if the jury thought the act was meant to cause to B an injury known to A to be likely to cause death, he being reckless whether it caused death or not. It will thus be seen that the Bill and the Draft Code approach other very closely.

There is no substantial difference between the provisions of the Draft Code and the Bill dealing with provocation, though the language and arrangement differ. Each introduces an alteration of considerable importance into the common law. By the existing law the infliction of a blow or the sight by the husband of adultery committed with his wife may amount to provocation which would reduce murder to manslaughter. It is possible that some other insufferable outrages might be held to have the same effect. There is no definite authoritative rule on the subject, but the authorities for saying that words can never amount to a provocation are weighty.

* Reg. *v.* Gilbert, known as the Fordingbridge murder. *See* "The Times," 19 July 1862.

We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow. The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury. By the present law suicide is murder, and a person who assists another to commit suicide is an accessory before the fact to murder, and liable to capital punishment. It appears to us that the abetment of suicide and attempts to commit suicide ought to be made specific offences. We provide for this in sections 183 and 184 (which correspond with sections 144 and 145 of the Bill).

The subject of child murder is one as to which the existing law seems to require alteration. At present no distinction is made between the murder of a new-born infant by its mother, and the murder of an adult. Practically this severity defeats itself, and offences which are really cases of child murder are often treated as cases of concealment of birth simply. The Bill proposed to meet this by an enactment which (as amended by the Attorney General) would have enabled a jury to convict a woman of manslaughter instead of murder who caused her new-born child's death by an act done when her power of self-control was greatly weakened. On the whole we have preferred to substitute for it the provisions contained in sections 185 and 186. (See marginal note to section 185.)

Parts XVIII–XXII correspond to 24 & 25 Vict. c. 100 and Chapters XXI–XXV of the Bill. Such alterations as they make in the existing law are marginally noted; they are not considerable. We may, however, observe that we provide by section 212 for the offence of killing a child in the act of birth, and before it is fully born. This seems not to be an offence by the present law. A similar provision was contained in the Bill.

The existing statute as to Bigamy is so worded as to have given rise to a difference of judicial opinion as to whether it does or does not, from motives of policy, make it a crime to marry again during the life of the husband or wife, though in the bonâ fide and reasonable belief that the first husband or wife was dead, unless seven years had elapsed since he or she was last heard of. We have thought it important that the law should be certain, and have accordingly framed the clause so as to leave no doubt what the law would be. In doing so, we have adopted the construction which has been more generally put on the existing statute. No doubt the conviction of a man marrying again within the seven years under the honest belief that his wife was dead, may be regarded as a hard case; but the hardship may at present be mitigated by the infliction of a nominal punishment, and will be capable of still further mitigation if section 13 of the Draft Code becomes law. On the other hand, care must be taken not to give encouragement to bigamous marriages by relaxing the rule that a man marrying within the prescribed seven years does so at his peril.

Among the suggestions furnished to us was one that clause 216 might subject a Hindoo coming to England to a prosecution for having a plurality of wives in his own country. So far as this point is concerned, the clause is taken from the Act of 1861, which re-enacted in terms the Act of 1828. We have merely altered the wording, so as to make it harmonize with the other sections of the Draft Code by changing "elsewhere than in England or Ireland" into "any part of the world." During the half century which has elapsed since the first of these statutes were passed, no attempt has ever been made to apply them to such a case as the one suggested,—for the reason we presume, that "marriage" in these statutes means the union for life of one man with one woman to the exclusion of all others, as is well expressed by Lord Penzance in Hyde *v.* Hyde, 35 Law J. Prob. 57. Whatever may be the ceremony by which a polygamist adopts a woman as one of his wives, the relation which it creates is essentially different from that which our criminal legislation contemplates by the word "marriage."

The law of libel is placed in this Title because, although a libel is not a bodily injury, it is an injury to reputation. Part XXIII, which relates to this subject, re-enacts in substance what we believe to be the existing law; we have so defined it as to dispense with the use of the word "maliciously."

VIII.

TITLE VI.—OFFENCES AGAINST RIGHTS OF PROPERTY AND BY CONTRACT.

Title VI, corresponding to Part VI of the Bill, relates to offences against rights of property and rights founded on contract. Offences against rights of property must be committed either by wrongfully taking property, by fraudulently deceiving the owners of property, or by the mischievous destruction of property, in other words, by theft,

cheating, or mischief. Theft may be either simple or aggravated. Simple theft is so closely connected with certain kinds of fraud that the two subjects run into each other. Theft aggravated by violence is either robbery or extortion. Theft accompanied by wilful trespass on a dwelling-house is either burglary or house-breaking. The receiving of goods dishonestly obtained is usually associated with theft. We have therefore placed it next after theft. Mischief is a distinct subject and follows fraud. Offences against rights of property are followed by the offences which are contained in the Acts for the punishment of fraudulent debtors.

This Title and the corresponding Part of the Bill include and re-enact in substance the provisions of the Larceny Act, the Forgery Act, the Coinage Offences Act, and the Malicious Mischief Act of 1861 (24 & 25 Vict. cc. 96, 97, 98, and 99). They also include some provisions less comprehensive which occur in other Acts, in particular the provisions of two sections of the Post Office Act (7 W. 4 & 1 Vict. c. 36, ss. 28, 47), part of the Trade Marks Act (25 & 26 Vict. c. 88), the Personation Act (37 & 38 Vict. c. 36), and the provisions of the Fraudulent Debtors Acts for England and Ireland (32 & 33 Vict. c. 62, and 35 & 36 Vict. c. 57). The minor alterations made in the provisions thus re-enacted can hardly be appreciated without comparing the wording of the Draft Code with that of the statutes on which it is founded, an operation for which our marginal notes are intended to give facilities. The changes made by this Title relate principally to the common law as to theft, and will be found in Parts XXIV and XXV.

The present statute law is substantially contained in the 24 & 25 Vict. c. 96. It recognises and continues the old (and, as it seems to us, unreasonable) distinctions between stealing animals *feræ naturæ* or things attached to or savouring of the realty, which were not at common law the subject of larceny, and stealing other property. There is good reason for holding that capturing wild animals in the enjoyment of their natural liberty, though on another's land, should not be considered stealing; but why should stealing one of the deer or valuable foreign birds in the Zoological Gardens, be treated differently from stealing a sheep or a hen? And why should it be a different offence to steal a log of timber, from that which it is to cut down the tree and carry it away? Again, the old law as to stealing required that the property should be taken out of the possession of the owner. This rule gave rise to many complicated and highly artificial decisions; and some statutes have included amongst thieves, bailees servants and others who, having lawfully obtained possession of property were not within the old definition, though they fraudulently appropriated to their own use the property entrusted to them; but many persons equally culpable are still beyond the reach of the criminal law. Even now a person who finds a purse and appropriates it under circumstances involving all the moral guilt of theft, may on technical grounds escape all criminal liability.

It is proposed to simplify the law by putting an end to all these distinctions, which are very subtle and many of them arbitrary. In order to understand their nature it is necessary to enter upon some explanations as to the history and present state of the law on this subject.

The things which are capable of being stolen, according to the common use of the word "steal," but which are not at common law the subjects of larceny, may be described as first, certain animals; secondly, documents evidencing certain rights; and thirdly, land and things fixed to or growing out of it. As to animals, one rule of the existing law is founded on the principle that to steal animals used for food or labour is a crime worthy of death, but that to steal animals kept for pleasure or curiosity is only a civil wrong. The principle has long since been practically abandoned. Sheep stealing is no longer a capital crime; and dog stealing is a statutory offence; but the distinction still gives its form to the law, and occasionally produces results of a very undesirable kind. It has been lately held, for instance, that as a dog is not the subject of larceny at common law, it is not a crime to obtain by false pretences two valuable pointers* It seems to us that this rule is quite unreasonable, and that all animals which are the subject of property should also be the subject of larceny. This, however, suggests the question, What wild animals are the subject of property, and how long do they continue to be so? This question must be considered in reference to living animals *feræ naturæ* in the enjoyment of their natural liberty; living animals *feræ naturæ* escaped from captivity; and pigeons, which singularly enough form a class by themselves. The existing law upon this subject, is that a living wild animal in the enjoyment of its natural liberty, is not the subject of property; but that when dead it

* R. *v.* Robinson, Bell 34.

becomes the property of the person on whose land it dies, in such a sense that he is entitled to take it from a trespasser, but not in such a sense that the person who took it away on killing it is guilty of theft. This is specially important in reference to game. This state of the law we do not propose to alter. As to living animals *feræ naturæ* in captivity, we think they ought to be capable of being stolen. When such an animal escapes from captivity, a distinction appears to us to arise which deserves recognition. If the animal is one which is commonly found in a wild state in this country, it seems reasonable that on its escape it should cease to be property. A person seeing such an animal in a field may have no reasonable grounds for supposing that it had just escaped from captivity. If, however, a man were to fall in with an animal imported as a curiosity, at great expense, from the interior of Africa, he could hardly fail to know that it had escaped from some person to whom it would probably have a considerable money value. We think that a wild animal should, on escaping from confinement, still be the subject of larceny, unless it be one commonly found wild in this country.

Pigeons whilst in a dovecot or farmyard ought obviously to be as much capable of being stolen as poultry. But suppose they are away from their home, and are not distinguishable from wild pigeons? The law upon this point is not quite clear; but it appears from section 23 of 24 & 25 Vict. c. 96, that a bird so situated is not the subject of larceny, as that Act imposes a penalty of forty shillings on persons killing pigeons "under such circumstances as shall not amount to larceny at common law;" and no other circumstances can be imagined to which these words would apply. These distinctions will be found to be embodied in section 245.

Deer in an enclosed park, and hares and rabbits in an enclosed warren from which they cannot escape, would seem on principle to be as much property as sheep or cows in the same position. Such, however, has not been the scheme of legislation hitherto. We have framed sections 276 and 277 so as to preserve the existing law.

The rules that documents evidencing certain rights, and that land and things "savouring of the realty" are not capable of being stolen appear to us wholly indefensible. It is no doubt physically impossible to steal a legal right or to carry away a field, but this affords no ground at all for the rule that it shall be legally impossible to commit theft upon documents which afford evidence of legal rights, or upon things which, though fastened to, growing out of, or forming part of the soil, are capable of being detached from it and carried away. These rules have been qualified by statutory exceptions so wide and intricate that they are practically abolished, but they still give form to a considerable part of the law of theft, and occasionally produce failure of justice in cases in which the statutory exception is not quite co-extensive with the common law rule. These rules we propose to abolish absolutely.

In the next place it is essential to larceny at common law that there should be a felonious "taking," which has been understood to mean a taking out of the possession of the owner. This rule has given rise to vast technicality. First there is the question what is the precise meaning of the word "taking" or "carrying away," considered as a physical operation; and there are many cases on this point which run into very minute distinctions. In order to supersede them, the Bill enacted that theft by taking should be considered complete as soon as the thing taken was touched with intent to move it. On the whole it was thought desirable to require that, in order to constitute theft by taking, there should be at least an actual moving of the thing stolen. The existing law on that point is accordingly unaltered by the Draft Code. This is a matter of comparatively small importance, as such questions arise very rarely.

Technicalities of more importance connected with taking are those which have led to the distinction between theft and embezzlement. The immediate consequence of the doctrine that a wrongful taking is of the essence of theft, is, that if a person obtains possession of a thing innocently, and afterwards fraudulently misappropriates it, he is guilty of no offence. This doctrine has been qualified by a number of statutory exceptions, each of which has been attended with difficulties of its own. The first of them is contained in the statute which provides that a clerk or servant, or person employed in the capacity of a clerk or servant, who embezzles property received on behalf of his master, shall be deemed to have stolen it. This enactment was interpreted as creating a new offence distinct from ordinary theft; and a great number of cases involving considerations technical and subtle to the last degree have been decided on various points connected with it; and it was found necessary for the legislature to interfere further in order to prevent many failures of justice. Clerks and servants, however, formed only one class of persons who had opportunities of committing

breaches of trust for which the common law provided no punishment. Bankers, merchants, brokers, solicitors, factors, and other agents might and did commit similar offences; and another great exception in the rule of the common law was made to include such cases. These enactments are elaborate and intricate, and present special difficulties of their own. The existing law will be found in 24 & 25 Vict. c. 96, ss. 75 and following. The first Act on the subject was passed in the reign of George III. The case of bailees singularly enough remained unprovided for after the rest, and a carrier stealing a parcel intrusted to him for carriage committed no crime till the fraudulent conversion of chattels, money, and valuable securities by bailees was made larceny by 20 & 21 Vict. c. 54. (See now 24 & 25 Vict. c. 96, s. 3.)

The common law rule, though thus nearly eaten up by exceptions, still survives as to all persons who come innocently into possession of the property of others, otherwise than as clerks, servants, bankers, merchants, brokers, solicitors, factors, and other agents or bailees. The case of the finder of goods already referred to furnishes an instance. This state of the law is obviously most objectionable, not only on account of its extreme intricacy and technicality, but also because the numerous exceptions made to the common law rule are inconsistent with the principle on which it depends. We have therefore defined theft in such a manner as to put wrongful taking and all other means of fraudulent misappropriation on the same footing.

The definition properly expounded and qualified will, we think, be found to embrace every act which in common language would be regarded as theft, and it will avoid all the technicalities referred to as arising out of the common law rules, as well as out of the intricate and somewhat arbitrary legislation, the course of which we have sketched above. The provisions of the Bill on this subject differed considerably in language from those of the Draft Code, but they were framed with the same objects, and would have effected them in another way. The Bill treated theft, criminal breach of trust, and obtaining property by false pretences as three ways of committing one offence—termed "fraudulent misappropriation." These offences were so defined that they would have covered the same ground as theft, false pretences, and criminal breach of trust as defined by the Draft Code; but many things which according to the Draft Code are theft, would according to the Bill have been criminal breaches of trust. The Draft Code defines the offence of obtaining property by false pretences substantially in accordance with the present law, and "criminal breach of trust" is retained as a distinct offence. The other cases of "fraudulent misappropriation" are denominated "theft."

The crimes of obtaining goods, money, or credit by false pretences, and of criminal breach of trust are in point of mischief and moral guilt much the same as theft, but from their nature they require separate clauses to define them.

The crime of embezzlement, wherever the subject matter of it is a chattel or other thing which is to be handed over in specie, will come within the definition of theft; but where the subject matter is not to be handed over in specie, but may be accounted for by handing over an equivalent, it requires separate provisions, which will be found in sections 249, 250, and 251.

It is essential to all of these offences that there should be the *animus furandi*,—that guilty intention which makes the difference between a trespass and a theft.

The only further observation we have to make on the general provisions as to theft relates to section 253. By the present law a husband or wife cannot steal from his wife or her husband, even if they are living apart, although by recent statutes the wife is capable of possessing separate property. So long as cohabitation continues, this seems reasonable; but when married persons are separated, and have separate property, it seems to us to follow that the wrongful taking of it should be theft. This section is also framed so as to put an end to an unmeaning distinction by which it is a criminal offence in an adulterer to receive from his paramour the goods of her husband, but no offence in anyone else to receive such goods from the wife.

We now pass to the law relating to the punishment of particular kinds of theft. At common law all larceny was either grand or petit. Grand larceny was the stealing of property worth one shilling or upwards: petit larceny was stealing property of less value. Grand larceny was a capital but clergyable felony down to the reign of George IV. The Bill was framed upon the principle of making the punishment of theft depend to a great extent upon the value of the stolen property. On the whole, however, it has been thought better that the legal limit of punishment ought not to depend on the mere value of the property stolen. The Draft Code accordingly reproduces in Part XXV the provisions of 24 & 25 Vict. c. 96 as

regards punishments for stealing particular things. In order, however, to meet some cases which are omitted, two provisions are added punishing specifically stealing from railways and stealing by means of picklocks, false keys, and other such instruments (sections 263, 264). These provisions are suggested partly by well-known cases which have occurred in this country and partly by similar provisions in the French and German Penal Codes. The state of the existing law as to stealing or maliciously injuring growing vegetable productions is very complicated; an attempt to preserve the effect of it and to adapt it to the enlarged definition of things capable of being stolen is made in sects. 244 and 267 of this Part, and sects. 404 and 405 in Part XXXIV.

By the existing law, if any one after stealing property in one county carries it into another, he is guilty of larceny in both, and may be tried in either. But if he steals it out of the United Kingdom and brings it into England or Ireland he commits no offence in either country. Sect. 269 is intended to remedy this, which seems a defect in the law. Sects. 278 and 279 are taken from the existing Game laws. They are added because they complete the subject, but no opinion is expressed as to them.

The provisions in Part XXVI as to fraud are principally re-enactments of existing statutes. In sect. 281 a few words are introduced in order to include the most common species of fraud.

Sect. 284 declares the common law as to a Conspiracy, but provides an increased punishment.

The provisions in Part XXVII as to Robbery and Extortion re-enact the existing law, with the exception of sect. 296, which is new. At present a policeman or gamekeeper who levies blackmail under threats of accusing of larceny or poaching, if criminally responsible at all, is only punishable with imprisonment and fine.

Part XXVIII re-enacts with some variations the existing law as to burglary and housebreaking. The proposed enactments explain themselves.

The most important alteration in Part XXIX "Receiving" is that it extends the existing law as to receiving stolen property, so as to make it apply to property obtained by any indictable offence, and also to the receiving in England or Ireland of property so obtained out of the United Kingdom, an extension similar to that in sect. 269.

The crime of Forgery, which is dealt with in Part XXX, was an offence at common law, the punishment of which was only fine and imprisonment. It is not possible to say precisely what are the documents the false making of which is forgery at common law. But by a great many different enactments passed at different times a great many forgeries have been made felonies, and as such punishable with great severity. The statute law was for the most part consolidated by the 24 & 25 Vict. c. 98. Like the other Consolidation Acts, the Forgery Act assumes that the common law definition of forgery is known. This definition, however, is a somewhat intricate matter involving various questions as to the extent of falsification implied in forgery, the character of the intent to defraud essential to it, and the circumstances essential to the completion of the crime. These matters are dealt with in sections 313 to 317 both inclusive. They differ considerably in language, but not very materially in substance, from the corresponding provisions of the Bill. The part relating to Forgery contains an enumeration of the various classes of documents the forgery of which is punishable. They include all those which are mentioned in 24 & 25 Vict. c. 98, though not always in the same order or under the same names. They also include a considerable number of documents (contracts, for instance, documents intended to be produced in evidence, and false telegrams) which are not included in that Act. This Part makes provision for the forgery of some documents as to which it is doubtful whether to forge them is or is not a common law offence. Finally it contains a general clause (section 336) punishing the forgery of any document whatever with intent to defraud the public or any person, or to pervert the course of justice, or to injure any person, or to deprive any person of or prevent his obtaining any office, &c. We believe that few, if any, cases would be punishable under this section which would not be forgeries at common law. There is a considerable difference

between this Part and the corresponding chapter of the Bill. The general section (section 336) corresponds very nearly to a similar provision in the Bill, which proposed to subject offenders against its provisions to a maximum punishment of seven years penal servitude instead of two years imprisonment with hard labour. Such an enactment would have rendered unnecessary a considerable part of the enumeration of documents contained in the Draft Code. The provision was regarded as objectionable on the ground that it authorised a sentence of penal servitude for the forgery of various documents which were not defined, and the forgery of which could be at present punished by fine and imprisonment only. The difference in length between the Draft Code and the Bill is to a great extent due to the manner in which, perhaps *ex abundanti cautelâ*, the former deals with each particular forgery. In the result there will, we believe, be but little practical difference. The Draft Code adheres more closely than the Bill to the existing law, and is in these matters more explicit and detailed.

The provisions in Part XXXI as to Preparations for forgery are chiefly re-enactments of existing statutes. In sect. 356 we have re-enacted 25 & 26 Vict. c. 88 as to Trade Marks, omitting some clauses which seem not practical. Sect. 358 is new and is intended to render punishable a class of fraud which is believed to be not uncommon.

The provisions of Part XXXII as to Personation are also re-enactments of existing statutes.

The existing law as to offences against the Coin dealt with in Part XXXIII is contained in the 24 & 25 Vict. c. 99. We have slightly altered the definition of Counterfeit Coin so as to meet some difficulties which have arisen in practice. And we have in sects. 367 and 371 inserted provisions for punishing the making of fillets of metal prepared for the purpose of being coined elsewhere, which at present is actually done with impunity. The rest of this Part is substantially a re-enactment of the existing law.

Part XXXIV is founded on the provisions of 24 & 25 Vict. c. 97, in which the word "maliciously" very frequently occurs. Section 381 is meant to give what we believe to be the legal effect of that word. The first portion of the section is intended to meet such state of facts as that in the case of Reg. *v.* Child (1 C. C. R. 307), where a man, who out of malice to a fellow lodger made a bonfire of her furniture on the floor of her room, not meaning that his landlord's house should catch fire, escaped punishment. Under the proviso a tenant for years burning his landlord's house commits an offence, though in so doing he burns his own leasehold, and a freeholder burning his own house commits an offence if he does so with intent to defraud the insurers. The rest of this Part re-enacts 24 & 25 Vict. c. 97, with little substantial alteration.

Part XXXV re-enacts verbatim the English and Irish Fraudulent Debtors' Acts. The bankrupt laws in England and in Ireland are in some matters of detail not identical. It has been therefore thought better to reproduce the law as to each country separately.

Part XXXVI collects into one body all offences consisting not in the actual perpetration of crimes but in threats, agreements or conspiracies, and attempts to commit offences. The offence of being accessory after the fact is of the same nature. With regard to threats, this Part adopts the provisions of existing statutes, some of which are at present confined to Ireland, but seem fit to have a place in the general statute law of both countries. With regard to conspiracies and attempts, we proportion the punishment to the gravity of the offence which is the subject of the criminal agreement or attempt, and a similar course is taken with regard to accessories after the fact. All these offences (except those taken from statutes confined to Ireland) were made punishable by the Bill, though not in precisely the same manner. The arrangement, too, was somewhat different, the threats being placed in the chapters relating to offences against person and property, and the provisions as to attempts, conspiracies, and accessories after the fact at the beginning instead of the end of the part of the Bill which defined offences.

Title VII.—Procedure.

Title VII and the corresponding part of the Bill relate to the Procedure in the prosecution of indictable offences, from the commencement to the conclusion of the

proceedings. The Title begins by disposing of some general matters affecting the whole course of the procedure. Section 428 gives to the judges a power to make rules for regulating the practice pleading and procedure under the Act which may be highly convenient in a variety of matters, and especially in the regulation of the practice upon trials in the Queen's Bench Division either at bar or at Nisi Prius.

Section 430 declares positively that the civil remedy for any wrongful act shall not be affected by the fact that the act is a crime. This seems to be the existing law, as laid down in Wells *v.* Abraham, L. R. 7 Q. B. 854, and Osborne *v.* Gillett, L. R., 8 Ex. 88.

Section 431 abolishes the distinction between felony and misdemeanour, and provides that all indictable offences shall be tried in the same manner, except so far as special provisions are made by the Draft Code with respect to treason. This section is qualified by several provisoes. In the first place, a certain number of offences will still be designated felonies under the provisions of one or other of statutes remaining unrepealed. It provides that the existing law as to arrest for such felonies shall remain unaltered. Disqualifications now attaching to felony are for the future to attach to convictions for an offence involving dishonesty. The disqualifications referred to are such as these: Persons convicted of felony cannot serve on juries (33 & 34 Vict. c. 77, s. 10 [*Eng.*], 34 & 35 Vict. c. 65, s. 17 [*Ire.*]), nor retail wine (23 & 24 Vict. c. 27, s. 32) or spirits (33 & 34 Vict. c. 29, s. 14), nor keep a beerhouse (3 & 4 Vict. c. 61, s. 17), nor be brokers in London (33 & 34 Vict. c. 60, s. 6). It is further provided that upon a conviction under the Draft Code for any offence which is now a felony, the consequences which now attach to the same offence shall still attach though the offence is no longer called felony; and further that any Act unrepealed which refers to an offence as felony or misdemeanour shall be deemed to apply to the offences to which it would have applied if the Code had not been passed.

We have felt great difficulty with regard to these provisions. They are undoubtedly open to the grave objection that they retain, though only for a collateral purpose, the existing distinction between felony and misdemeanour, and will in certain cases necessitate a reference to the common law and to unrepealed statutes, in order to ascertain whether a crime falls within the one description or the other. The difficulty arises mainly upon the provisions remaining in the statute book which attach to felonies forfeiture and other consequences, in addition to the disqualifications hereinbefore mentioned. To avoid the difficulty would however involve a new classification of offences, which we regard as impracticable, or an alteration of the law as laid down in 33 & 34 Vict. c. 23, and the recasting of the provisions of several statutes which, for the reasons already given, we deem it expedient to leave untouched. (See Note C to the Report.)

Section 434 states the cases in which Courts of Quarter Sessions are to have jurisdiction, and supersedes 5 & 6 Vict. c. 38, from which it varies but little. It empowers the Courts of Quarter Sessions, however, to try burglaries and robberies of a class punishable with penal servitude for life and flogging; but this is coupled with a proviso that these courts are not to have power in any case to sentence an offender to be flogged, or to more than 14 years' penal servitude. This is adopted from the corresponding provision of the Bill as proposed to be amended by the Attorney General. Many cases of burglary and aggravated robbery are just as fit to be tried at the Quarter Sessions as cases of housebreaking or simple robbery, and the more serious cases would under other provisions of the Draft Code be sent from those courts to the assizes.

Before examining the provisions relating to procedure in their order, it may be well to notice an effect which some of them when put together will have of abolishing all local restrictions upon jurisdiction. At present the jurisdiction of the criminal courts is strictly local, though a great number of statutory exceptions enable particular offenders (*e.g.* persons who commit crimes at sea) to be tried wherever they may happen to be found. We propose to extend this principle to all offenders whatever.

If our suggestions are adopted, all courts otherwise competent will have jurisdiction to try all offenders brought before them, wherever the offences are committed. Any magistrate will have jurisdiction to compel the appearance before him of all persons who have committed indictable offences within his district, or who are within his district, having committed elsewhere any indictable offence triable in England or in Ireland, as the case may be. Having obtained the offender's appearance, the justice will be

able to send him for trial to a competent court, and the High Court will have power to vary by order the place of trial, if it thinks proper. In the Bill the provisions as to the local jurisdiction of the courts and justices were brought together in a chapter by themselves. In the Draft Code they are introduced in various places, according to a different method of arrangement, but the result is in each case the same.

A crime having been committed, there are at present four entirely different modes of proceeding against the accused person: He may be taken before a magistrate and committed for trial; he may, except in a few cases, be indicted by a grand jury without being so committed; he may in the case of homicide be committed and tried upon a coroner's inquisition; and in cases of misdemeanour he may be put upon his trial by a criminal information, filed either by the Attorney General *ex officio*, or, if the Queen's Bench Division so orders, by the Master of the Crown Office, at the instance of a private person injured.

According to the ancient theory of the law, from which it still derives its form, the course is this: The Queen from time to time sends commissioners through the country to hear and determine all accusations of crime, and to deliver the gaols. The grand juries of the different counties accuse by way of presentment certain persons as offenders, and the accusations are referred to a petty jury by whom they are disposed of. The common practice is different: Suspected persons are brought before a justice of the peace by the police or by private complainants. The magistrate takes the depositions of witnesses, and either discharges the prisoner or commits him for trial. The accusation is put in the form of an indictment and laid before the grand jury, who having heard the evidence, determine whether the accused is to be put on his trial or not. The grand jury are still however in theory, the sole accusers; but inasmuch as they have long ceased to report matters within their own knowledge and have come to act upon information supplied by others, any one can send up a bill before them, accusing any person of any offence whatever, with certain specified exceptions.

The proceeding upon coroner's inquisitions is a relic of times preceding the appointment of justices of the peace. The coroner and his jury at that time had a power of accusation concurrent with that of the grand jury, much as if a suspected person could in the present day be put on his trial upon the magistrate's committal without any bill being found by the grand jury.

As to criminal informations, they form a mode of proceeding adopted in peculiar cases, and call for no observation here.

In all common cases we think that of these modes of prosecution, that of initiating the charge before a magistrate is by far the fairest and most satisfactory in every way. It gives suspected persons full notice of the case against them, and it enables the judge and jury who finally dispose of the prosecution to discharge their duties with confidence that the whole matter has been properly prepared for their decision. It is moreover the mode in common use. All the others have become exceptional, and we think that, being the common course, it ought to be made imperative in all cases.

We doubt whether the existence of the power to send up a bill before a grand jury without a preliminary inquiry before a magistrate, the extent of this power, and the facilities which it gives for abuse, are generally known. It is not improbable that many lawyers, and most persons who are not lawyers, would be surprised to hear that theoretically there is nothing to prevent such a transaction as this:—Any person might go before a grand jury without giving any notice of his intention to do so. He might there produce witnesses, who would be examined in secret, and of whose evidence no record would be kept, to swear, without a particle of foundation for the charge, that some named person had committed any atrocious crime. If the evidence appeared to raise a *primâ facie* case, the grand jury, who cannot adjourn their inquiries, who have not the accused person before them, who have no means of testing in any way the evidence produced, would probably find the bill. The prosecutor would be entitled to a certificate from the officer of the court that the indictment had been found. Upon this he would be entitled to get a warrant for the arrest of the person indicted, who, upon proof of his identity, must be committed to prison till the next assizes. The person so committed would not be entitled as of right to bail, if his alleged offence were felony. Even if he were bailed, he would have no means of discovering upon what evidence he was charged, and no other information as to his alleged offence than he could get from the warrant,

as he would not be entitled by law to see the indictment or even to hear it read till he was called upon to plead. He would have no legal means of obtaining the least information as to the nature of the evidence to be given, or (except in cases of treason) even as to the names of the witnesses to be called against him; and he might thus be tried for his life without having the smallest chance of preparing for his defence, or the least information as to the character of the charge.

Of course in practice the conviction of an innocent man under such circumstances would be practically impossible. The judge would postpone the trial, the jury would acquit the prisoner, the prosecutor would probably be subjected to exemplary damages in an action for malicious prosecution; but it still remains that such is the law, though it could not be put in force without shocking the feelings of the whole community. That such however is the law, subject only to certain exceptions hereinafter mentioned, there can be no doubt.

Although the law is theoretically the same in Ireland, a salutary practice has prevailed there, whereby if the accused has not been committed for trial, a private prosecutor is not permitted to lay an indictment before the grand jury without the leave of the presiding judge obtained in open Court.

The exceptions we have referred to are constituted by the statutes which provide that it shall not be lawful to present an indictment against any person for perjury, subornation of perjury, conspiracy, obtaining property by false pretences, keeping a gambling house, keeping a disorderly house, or any indecent assault, or certain offences under the Debtors Act, 1869, unless the prosecutor has been bound over to prosecute or give evidence, or unless the accused person has been committed to or detained in custody, or is bound by recognizance to appear to answer to the indictment, or unless the indictment is preferred with leave of the Court or of a judge or the Attorney General, as in these statutes mentioned.

So far as it goes, this legislation appears to us wise and sound. On the one hand, it secures to the person accused the fullest possible notice of the nature of the charge against him and of the evidence on which it is to be supported; on the other, it does not invest the magistrate with an absolute veto on a prosecution. It enables the prosecutor, if he thinks proper, to take the opinion of a grand jury as to whether the accused person should or should not be put on his trial. It is, however, impossible to defend on any principle which occurs to us, the narrow range of the provisions. Why are indecent assaults included and other charges of indecency, most easily made, most hard to refute, and commonly employed as the engines of extortion, excluded? On what possible ground can it be right that a man should be at liberty to accuse another of murder, piracy, or arson without giving him notice of the nature of the charge against him, whilst he is obliged to give him notice if he charges him with perjury or conspiracy? It is obvious that this legislation was partial and tentative.

As to persons committed upon a coroner's inquisition, the common though not universal practice is to take a prisoner committed by the coroner before a magistrate. We do not undervalue the coroner's inquest, but we see no reason why in cases in which they result in a committal for murder or manslaughter, the suspected person should not have a right by law to be taken before a magistrate, and have the advantages which other accused persons possess; and upon the whole, we propose to extend the principle of the Vexatious Indictments Act to all offences whatever, except those which are tried on criminal informations. Section 505 accordingly provides that no one except the Attorney General may prefer any bill of indictment unless he is bound over to prosecute, or unless he has the written consent of a judge of the High Court or of the Attorney General, or of the Court before which the bill is to be preferred to do so; and section 506 enacts that henceforth no one shall be tried upon a coroner's inquisition, and that no grand jury shall present except upon a bill of indictment duly sent before them. The effect of this will be that as a rule no one will, if the Draft Code becomes law, be liable to be indicted without a preliminary inquiry being first held before a magistrate.

We may here refer with approval to the excellent practice so long prevailing in Ireland whereby, generally speaking, all prosecutions are conducted under the direction of the Attorney General as Public Prosecutor.

The provisions of the Bill upon this subject did not go so far as those of the Draft Code, though they were intended to effect the same object. They left coroners' inquests untouched, but they enacted that no one should indict another without going before a magistrate, except upon conditions as to notice to the accused of the charge and of the evidence against him of so stringent a kind that such a mode of prosecution

would never or hardly ever have been adopted. The provisions of the Draft Code seem simpler and more effectual.

Should these proposals be adopted the regular course of a prosecution would consist of the following steps:—

(1) Procuring the appearance of the suspected person before a magistrate, either by summary arrest, summons, or warrant:

(2) The preliminary hearing before the magistrate, resulting either in the discharge or committal of the prisoner, and in the case of his discharge being followed or not by the binding over of the prosecutor:

(3) The preferring of the indictment before the grand jury:

(4) The trial:

(5) Proceedings by way of appeal subsequent to the trial.

Each of these matters is dealt with both in the Draft Code and the Bill. In the Draft Code they are arranged in the order just indicated. In the Bill the provisions relating to the indictment were placed at the end, as the subject was regarded as a special one depending on considerations peculiar to itself. In the Draft Code this matter is inserted between the proceedings before the magistrate and the trial, as this follows the order of time.

We proceed to comment upon the provisions of the Draft Code in the order in which they stand.

We propose in section 437 to empower magistrates, upon receiving information that a crime has been committed, to summon witnesses and take evidence before any person is charged. It appears highly desirable that this power should exist, as evidence may often be available whilst the whole matter is fresh, which is lost sight of during the interval which passes before any particular person is charged with the offence. People able to give material information, and prepared to do so if legally required, will often withhold it when they are questioned by persons who have no legal authority to require it. We also extend (section 438) to some degree the magistrate's power to grant search warrants.

Passing to the case in which a charge is made against a particular person; the first step is to secure his attendance before the magistrate. This may be procured either by summary arrest, by summons, or by warrant. The provisions of the Draft Code and those of the Bill as to summary arrest closely follow the existing law, with alterations rendered necessary by the abolition of the distinction between felony and misdemeanour.

With respect to arrest upon warrant we propose to make certain changes corresponding to the changes which have been made in the police organization of this country since the law upon the subject was last under the consideration of Parliament. As the law now stands, if a warrant is issued in one county for the arrest of a suspected person, it cannot (except in a very few cases) be executed in another county without being backed by a magistrate of that county, who before backing it must be satisfied upon oath of the genuineness of the signature of the justice whose name it bears. It has been represented to us that this formality is useless and often mischievous; useless, because it can be no protection against a forged warrant, as a person capable of forging a warrant would not hesitate to commit perjury by swearing to its signature; mischievous, because it often causes delay which enables criminals to escape. The practice originated in times when constables were parish officers unknown beyond their own immediate neighbourhood. Since the general introduction of county police it seems to have become useless. We propose accordingly that English warrants should run all over England, and Irish warrants all over Ireland. On the other hand, we propose that the execution of warrants everywhere should be confined to police constables. This practice already exists, with some modifications, in Ireland, where it is carried out by the Royal Irish Constabulary.

With regard to summonses we suggest no change, except that they should in all cases be served by police officers. We have provided in section 440, with respect to both warrants and summonses, that they should not be refused by a magistrate merely because the alleged offender may be arrested without warrant. This we believe to express the spirit, though it is not to be found in the letter, of the present law. We are, however, informed that some justices take a different view, and refuse in cases of felony to issue either a warrant or a summons, leaving the person applying for one to arrest the alleged offender on his own responsibility.

We now come to the preliminary hearing before the magistrate. The whole of this subject, including the way in which witnesses are to be summoned, the taking of their

depositions, the committal or discharge of the accused, his bail, the binding over of the witnesses to attend at the trial, the transferring of documents to the proper officer of the courts of trial, are provided for in minute detail, for England by 11 & 12 Vict. c. 42, and for Ireland (except Dublin) by 14 & 15 Vict. c. 93, which latter Act provides also for proceedings in summary cases. We have re-enacted in Parts XXXVIII and XXXIX the provisions of these two statutes relating to indictable offences. In some cases where there is a difference in the practice of the two countries, we have thought the Irish practice preferable, and have accordingly adopted it. We have added provisions similar to, though not quite identical with, those of 30 & 31 Vict. c. 35, s. 6, for taking the depositions of witnesses who may be discovered after the committal of an accused person (see section 466). In this portion of the Draft Code a few modifications of the existing law are introduced, but they are of comparatively little importance, and are for the most part marginally noted. The offender having been committed for trial, the mode and place of trial have next to be considered. The abolition of the distinction between felony and misdemeanour makes it necessary to determine the cases in which the Attorney General may file a criminal information. We propose that he shall have power to do so in all cases not punishable by death or penal servitude.

With regard to the place of trial, the existing law is founded in the main on the theory of venue. The jury of the neighbourhood (*vicinia—visne—venue*) inform the court of the crimes committed in their own district, and are not supposed to know what happens elsewhere. It is, however, qualified by numerous exceptions both by statute and by common law. At common law, the Court of Queen's Bench in the case of an indictment originating in or removed into that Court possessed the power under certain circumstances to change the place of trial by a suggestion on the record. This power was extended by what is known as Palmer's Act, 19 & 20 Vict. c. 16, so as to enable the Court to direct a case to be tried at the Central Criminal Court. Provisions having the same effect are to be found in 25 & 26 Vict. c. 65, as to the trial for murder or manslaughter of soldiers subject to the Mutiny Act. We propose to extend the principle thus recognised to all cases, and to substitute for the present mode of procedure the simpler one of obtaining an order from the High Court for the change of the place of trial. The provisions on these subjects are contained in Part XL, which also contains provisions for trial by special jury.

The Draft Code next deals with the subject of indictments, the object being to reduce them to what is really necessary for the purposes of justice. The law as it at present stands is in the form of objectionable unwritten rules, qualified by several wide exceptions which modify some of their defects. These general rules require the greatest minuteness in many matters, which need not be referred to here. Two rules, however, may be specially mentioned: (1) Indictments must not be double and cannot be in the alternative; each count must charge one offence and no more: (2) All material averments must be proved as laid. Although these rules have been considerably relaxed in practice, the effect of them is that indictments run to a most inordinate length, and become at once so long and so intricate that it is hardly possible to understand them, and that practically no one reads them but the counsel who draw and the clerks who copy them.

The method employed is to take a section of an Act of Parliament and draw a series of counts, each charging one of the offences which the section creates; and as a single section often creates many offences hardly differing from each other except by very slight shades of meaning, counts are inordinately multiplied in this manner. For instance, in R. *v.* Sillem (2 H. and C. 431), an information (which might have been an indictment) charged certain persons in substance with having equipped for the Confederate States, then at war with the United States, a ship called the "Alexandra." The information was framed upon 59 Geo. 3. c. 69, and contained 95 counts. The first count charged an equipping with intent that the ship should be employed by certain foreign states, styling themselves the Confederate States, with intent to cruise against the Republic of the United States. The second count, instead of the Republic of the United States, mentioned the citizens of the Republic of the United States. The third count omitted all mention of the Confederate States, and called the United States the Republic of, &c. The fourth count was like the third, with the exception of returning to the expression "citizens," &c. After giving various names to the United States and Confederate States in the first eight counts, eight other counts were added substituting "furnish" for "equip." Eight more substituted "fit out" for "furnish." In short, the indictment contained a number of counts obtained by

combining every operative verb of the section on which it was founded with all the other operative words.

The excessive stringency of the rules on the subject of indictments has been greatly though somewhat capriciously relaxed by a variety of statutes, of which 14 & 15 Vict. c. 100 is perhaps the most extensive. By their provisions the necessity for excessive particularity is done away with in some cases, but is left untouched in others. Thus, for instance, it is sufficient in an indictment for murder to charge that A wilfully, feloniously, and of his malice aforethought did kill and murder B, instead of setting out, as was formerly necessary, the precise manner in which the murder was committed. If the charge is not murder but obtaining goods by false pretences, the particular false pretence used must be stated, and must be proved as laid, and a proper averment that it was false to the knowledge of the accused must be introduced. It is quite impossible to assign any reason whatever why indictments for murder should be drawn on one principle, and indictments for false pretences on another. The explanation is that the inconvenience of the principle which used to apply to both cases happened to attract notice in the one case, and to escape notice in the other. We propose to deal with this matter, not by making any further exceptions to the rules now in force as to indictments, but by altering the rule itself, and substituting for it the rule stated in section 482, the most important part of which is in these words: "Every count of an indictment shall contain and shall be sufficient if it contains in "substance a statement that the accused has committed some offence therein specified. "Such statement may be made in popular language without any technical averments "or any allegation of matter not essential to be proved." We make in other sections a variety of provisions which we hope will render all future indictments perfectly simple, though sufficient to define the matter to be tried, and to form the basis of a record of the trial. In the matter of indictments the Bill went further than the Draft Code. It proposed substantially to abolish the thing, though the name was to be retained. The indictment was to consist of a form in two columns, the first column containing a reference to the enactment against which the offence was alleged to have been committed, and the second containing a short particular of the offence. The practical difference between the Bill and the Draft Code was inconsiderable, so far as the introduction of simplicity into indictments is concerned.

Part XLII, which relates to preferring indictments, contains the provisions already referred to, which are intended to do away with the law of venue. They also deal with another matter which must be shortly mentioned. If an indictment is found against a person who cannot be apprehended—if, for instance, he goes to a foreign country—the ultimate process against him is outlawry, which has all the effects of a conviction, including that of forfeiture abolished in all other cases. This process has become practically obsolete and in these times in which extradition treaties have been very generally adopted, it is less likely to be of use than formerly. We accordingly propose to abolish it. The Bill made the same proposal, but added by way of substitute, provisions which would have enabled the Crown to make a man who absconded from justice a bankrupt, and to take possession of the surplus of his property after paying his debts. We do not think this will be needed, and we propose therefore to abolish outlawry simply.

Part XLIII deals with the Trial. It does not (as the Bill did) go in minute detail through every part of it, but notices those parts only on which the law appears to require statement or alteration. Several alterations made in the law are taken from recent legislation with regard to Ireland.

Sections 518, 519, and 520 state the law as to going through the panel, introducing into England some of the provisions of 39 & 40 Vict. c. 78 (as to Ireland), and providing that the number of jurors to be peremptorily challenged shall henceforth be thirty-five in cases of treason, twenty in cases where the accused might upon conviction be sentenced to penal servitude for life, and six in all other cases. Some alteration is made necessary by the abolition of the distinction between felony and misdemeanour; and what we suggest is something between the present English and the present Irish system. In England there are twenty peremptory challenges in all felonies, and none in any misdemeanour. In Ireland there are twenty in felony, and six in misdemeanour. Section 531 abolishes juries of matrons, where pregnancy is pleaded, and substitutes a medical examination; section 525 enables the court to adjourn or postpone the trial in order to obtain the attendance of any witness whose testimony appears material. This alteration is one of considerable importance.

Section 526 permits Admissions to be made in a criminal trial. At present if the accused is proved before his trial to have made an admission, it is evidence against him; but though he offers to make the same admission in court, it is thought that in cases of felony the judge is obliged to refuse to let him do so.

Section 532 gives the court a discretion as to allowing the jury to separate on an adjournment, except in capital cases. At present the practice is that they may separate in cases of misdemeanour, but not in cases of felony. Section 535 allows the court to direct that the jury should have a view, which is already permitted by statute in Ireland (39 & 40 Vict. c. 78, s. 111). Section 536 enables the court to take a verdict on Sunday. This provision was suggested by the case of Winsor *v.* R., in which it was stated as one reason for discharging the jury late on a Saturday night that if they agreed to their verdict on Sunday, the verdict could not be taken till the Monday.

Section 537 preserves the power of staying proceedings always hitherto possessed, by the Attorney General, and at present exercised by entering a *nolle prosequi* on the record.

We have passed over section 523, which enables the accused to offer himself as a witness. The Bill contained a clause (section 368) enabling the accused to make an unsworn statement on his own behalf, and subjecting him to cross-examination of a restricted character. For this we have substituted section 523, which renders the accused and the husband or wife of the accused competent witnesses for the defence. As regards the policy of a change in the law so important, we are divided in opinion. The considerations in favour of and against the change have been frequently discussed and are well known. On the whole we are of opinion that, if the accused is to be admitted to give evidence on his own behalf, he should do so on the same conditions as other witnesses, subject to some special protection in regard to cross-examination.

Part XLIV deals with the subject of Appeal in criminal cases. There are several important alterations in the existing practice suggested by the provisions in this Part, which we have prepared for consideration, without expressing any opinion as to how far it may be judicious to adopt them. In order to explain their precise effect, it is necessary to make some introductory observations on the state of the law as it stands. The procedure under the existing law subsequent to a trial, and in the nature of an appeal, may be arranged under three separate heads. These are, first, proceedings in error; secondly, cases for the Court of Crown Cases Reserved; thirdly, motions for a new trial.

Proceedings in error are proceedings by which the Queen's Bench Division of the High Court is called upon to reverse a judgment on the ground that error appears on the record,—a writ of error being granted only on the Attorney General's fiat. An appeal lies ultimately to the House of Lords. The record, however, is so drawn up that many matters by which a prisoner might be prejudiced, indeed the matters by which he is most likely to be prejudiced, would not appear upon it; for instance, the improper reception or rejection of evidence, or a misdirection by the judge would not appear upon the record. This remedy therefore applies only to questions of law, and only to that very small number of legal questions which concern the regularity of the proceedings themselves, *e.g.*, an alleged irregularity in empanelling the jury (Mansell *v.* R.), or in discharging a jury (Winsor *v.* R.), or a defect appearing upon the face of the indictment (Bradlaugh *v.* R.). The result is that the remedy by writ of error is confined to a very small number of cases of rare occurrence. It must be added that the procedure in writs of error is extremely technical. It is necessary in such cases to draw up the record, and this is an extremely formal and prolix document, though the materials from which it is compiled are simply short notes in a rough minute book kept by the officer of the court. When the record is drawn up the Court of Appeal cannot look beyond it, but is tied down to the matters expressly entered in it. The proceedings on special verdicts and demurrers to evidence have practically fallen into disuse.

The second mode in which proceedings in the nature of an appeal may be taken is upon a case stated by the judge for the Court for Crown Cases Reserved. Up to the year 1848 it was the practice, if any question of law which would not appear on the record arose at a criminal trial at the assizes, for the judge who tried the case to state the point for the opinion of all the judges, by whom it was afterwards considered and determined, no reasons for the determination being given. If the judges thought that the conviction was wrong, the person convicted was pardoned. There was no mode of reserving cases which arose at the quarter sessions. By 11 & 12 Vict. c. 78, a Court for Crown Cases Reserved was instituted, composed of the judges of the three common law

courts or any five of them, a Chief Justice or the Lord Chief Baron being one. Upon the construction of the Act it has been considered that, if a difference of opinion occurs between the five judges, the minority are not bound by the majority, but the matter must be referred to the whole body,—a course which is on many obvious grounds inconvenient. The existing power of appeal on a point reserved is only on behalf of the accused. The consequence is that the judge cannot reserve a question, unless he rules it against the accused, notwithstanding his own opinion may be that, though the point is doubtful, it should be decided in favour of the accused; and if ultimately it is determined that there has been an improper ruling against the accused, on some point of perhaps very little importance, or that some evidence, perhaps of little weight, has been improperly received or rejected, the Court of Appeal must avoid the conviction, and has no power to grant a new trial. The procedure is, however, extremely simple and free from technicality. No record is drawn up, and the judge who reserves the point states a case in simple language.

The third proceeding in the nature of an appeal is a motion for a new trial. This is confined to cases which have either originated in or have been removed into the Queen's Bench Division, and as it seems (R. *v.* Bertrand, L. R. 1 P. C. 520, disapproving of R. *v.* Scaife, 2 Den., 281) to cases of misdemeanour. A defendant who has been convicted may move for a new trial in these cases as in a civil case, but the decision of the Queen's Bench Division is final.

It seems to us that in order to form a complete system these various forms of proceeding ought to be combined. For this purpose we propose, in the first place, to constitute a single court of Criminal Appeal closely resembling the Court for Crown Cases Reserved, but with two important differences. We propose that, as in other courts, the minority should be bound by the majority. A court composed of fifteen judges is inconveniently large. If on a point of importance a court of five should be divided, it might be desirable that a further appeal should be possible. We accordingly propose that the court should have power to permit an appeal to the House of Lords.

We do not interfere with the present practice as to trials in the Queen's Bench Division, and we propose that in the case of such trials the Queen's Bench Division should be the Court of Appeal, and that it should have power to give leave to appeal to the House of Lords.

As to the power to appeal and the cases in which an appeal should lie, the Draft Code proposes to make considerable changes in the existing law as regards both matter of law and matter of fact. With regard to matter of law, the judge has at present absolute discretion as to reserving or not reserving questions which arise at the trial and do not appear on the record. This we think ought to be modified. We propose accordingly that the judge shall be bound to take a note of such questions as he may be asked to reserve, unless he considers the application frivolous. If he refuses to grant a case for the Court of Appeal, the Attorney General may in his discretion grant leave to the person making the application to move the Court of Appeal for leave to appeal, and the Court may direct a case to be stated. The Court on hearing the case argued may either confirm the ruling appealed from, or grant a new trial, or direct the accused to be discharged; in a word, it may act in all respects as in a civil action when the question is one of law, and that on the application of either side. This in some ways is favourable, and in others unfavourable, to accused persons. By the existing law the prisoner's right to appeal on a point of law is, generally speaking, subject to the absolute discretion of the judge; but if he is permitted to appeal, and if the Court above decides in his favour, the conviction is quashed, although in a civil case he would gain nothing but a right to a new trial. Under section 542 the prisoner would be able to appeal, with the leave of the Attorney General, against the will of the judge, but if he succeeded he would in many cases only obtain a new trial. If the matter appealed upon was a mere irregularity, immaterial to the merits of the case, the Court of Appeal would have power to set it right. All this would diminish the value of the right of appeal to prisoners, though it would increase its extent. It must be observed, too, that the right of appeal on questions of law is given equally to both sides. The Commissioners as a body express no opinion on the expediency of this. If it is thought proper to confine the right to the accused, the alteration of a few words in the section would effect that object. In dealing with appeals upon matter of law little is wanted beyond an adaptation of the existing law.

It is more difficult to provide in a satisfactory way for an appeal upon matters of fact. It is obvious that the only practicable means of giving such an appeal is by permitting convicted persons to move under certain circumstances for a new trial, either on the ground that the verdict was against the evidence, or on the

ground that the verdict has been shown to be wrong by facts discovered subsequently to the trial. If the ground on which a new trial is sought for is that the verdict was against the evidence, the case is comparatively simple. In such cases the judge before whom the case was tried ought to have power to give leave to the convicted person to apply to the Court of Appeal for a new trial. If the convict had an absolute right to make such an application, it would be made whenever the convict could afford it. By making the leave of the judge who tried the case a condition for such an application, such motions would be practically confined to cases in which the judge thought the jury had been harsh towards the prisoner. However, when the application was made the Court of Appeal could deal with it as in civil cases.

A much more difficult question arises in relation to cases which occur from time to time, where circumstances throwing doubt on the propriety of a conviction are discovered after the conviction has taken place. In these cases it was provided by the Bill that the Secretary of State should have power to give leave to the person convicted to apply to the Court of Appeal for a new trial. Upon the fullest consideration of the subject we do not think that such an enactment would be satisfactory. In such a case the Court of Appeal must either hear the new evidence itself, or have it brought before it upon affidavit. In the former case the Court would substantially try the case upon a motion for a new trial, and this is opposed to the principle of trial by jury. In the latter case they would have no materials for a satisfactory decision. It is impossible to form an opinion on the value of evidence given on affidavit and *ex parte* until it has been checked and sifted by independent inquiry. Such duties could not be undertaken by a Court of Appeal. If the Secretary of State gave leave to a convict to move the Court of Appeal for a new trial on evidence brought before the Court by affidavit, the only well-ascertained fact before the Court would be that the Secretary of State considered that there were grounds for such an application. This would make it difficult to refuse the application. The Secretary of State would be responsible only for granting leave to move the Court for a new trial. The Court, in granting a new trial, would always in fact take into account the opinion indicated by the Secretary of State's conduct. It must also be remembered that a court of justice in deciding upon such applications would, in order to avoid great abuses, be obliged to bind itself by strict rules, similar to those which are enforced in applications for new trials in civil cases on the ground of newly-discovered evidence. Such applications cannot be made at all after the lapse of a very short interval of time, and are not granted if the applicant has been guilty of any negligence; and this stringency is essential to the due administration of justice and to the termination of controversies. It would be unsatisfactory to apply such rules to applications for new trials in criminal cases. No matter at what distance of time the innocence of a convicted person appeared probable,—no matter how grossly a man (suppose under sentence of death) had mismanaged his case, it would be impossible to refuse him a fresh investigation on the ground of such lapse of time or mismanagement. Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur; but when they occur it is under circumstances for which fixed rules of procedure cannot provide.

Experience has shown that the Secretary of State is a better judge of the existence of such circumstances than a court of justice can be. He has every facility for inquiring into the special circumstances; he can and does, if necessary, avail himself of the assistance of the judge who tried the case, and of the law officers. The position which he occupies is a guarantee of his own fitness to form an opinion. He is fettered by no rule, and his decision does not form a precedent for subsequent cases. We do not see how a better means could be provided for inquiry into the circumstances of the exceptional cases in question. The powers of the Secretary of State, however, as to disposing of the cases which come before him are not as satisfactory as his power of inquiring into their circumstances. He can advise Her Majesty to remit or commute a sentence; but, to say nothing of the inconsistency of pardoning a man for an offence on the ground that he did not commit it, such a course may be unsatisfactory. The result of the inquiries of the Secretary of State may be to show, not that the convict is clearly innocent, but that the propriety of the conviction is doubtful; that matters were left out of account which ought to have been considered; or that too little importance was attached to a view of the case the bearing of which was not sufficiently apprehended at the trial; in short, the inquiry may show that the case is one on which the opinion of a second jury ought to be taken. If this is the view of the Secretary of State, he ought, we think, to have the right of directing a new trial on his own undivided responsibility. Such a power we accordingly propose to give him by section 545.

With respect to the materials to be laid before the Court of Appeal we propose to

abolish the present record. It is extremely technical and gives little real information. Instead of it, we propose that a book to be called the Crown Book should be kept by the Officer, which should record in common language the proceedings of the Court. In practice the record is hardly ever made up, and if it is necessary to make it up, the officer's minute book affords the only materials for doing so. Our proposal is practically to substitute the original book for the record which is made up from it, and is merely a technical expansion of the original.

We also propose that the Court of Appeal should have power to call for the judge's notes, and to supply them if they are considered defective by any other evidence which may be available,—a shorthand writer's notes for instance. We consider the statutory recognition of the duty of the judge to take notes as a matter of some importance. Upon the subject of appeal there is not much difference between the Draft Code and the Bill. The provisions of the former are more simple.

Part XLV relates to costs, some provision as to which is rendered necessary by the abolition of the distinction between felony and misdemeanour. As the law now stands, costs may be allowed in all cases of felony, and in all misdemeanours indictable under any of the Consolidation Acts of 1861; also (by 7 Geo. 4. c. 64) for assaults with intent to commit felony, attempts to commit felony, riots, misdemeanours for receiving stolen property knowingly, assaults upon peace officers in the execution of their duty or upon persons acting in their aid, neglect and breach of duty as a peace officer, assaults committed in pursuance of any conspiracy to raise the rates of wages, indecent exposure, perjury and subornation of perjury; also (by 14 & 15 Vict. c. 55, s. 2.) in cases of abduction, conspiracy to accuse a person of felony and conspiring to commit a felony,—in short, in all the commoner misdemeanours. The law as to costs in Ireland is substantially the same, though it is in practice differently administered by reason of all prosecutions being conducted by the Crown Officers. We propose that costs should be allowed in all cases of prosecutions for offences included in the Draft Code, and that the accused shall be liable to be ordered to pay the costs in all cases if he is convicted. He is now subject to this liability upon a conviction for felony.

Finally, section 551 makes an alteration in principle on the existing law, to which we call attention. Where property has been stolen, no change in the property is produced by the theft, but a *bonâ fide* purchaser in market overt acquires under the common law a property superior to that of the true owner. By the general law merchant a *bonâ fide* purchaser of a negotiable instrument, though it may be from a thief, acquires a property superior to that of the true owner. By the common law, where property has been parted with under a contract obtained by fraud, the property passes, though it may be reclaimed and the contract rescinded; but the right of a *bonâ fide* purchaser for value before rescission is superior to that of the former owner. And by the Factors' Acts purchasers from agents entrusted with goods or the title to goods acquire a title superior to that of the true owner. The existing statute law, 24 & 25 Vict. c. 96, s. 100, however, rewards one who prosecutes with success by depriving the innocent purchaser in market overt, and the innocent purchaser of property obtained by a contract not yet rescinded, of the property which they have innocently acquired*; yet at the same time the enactment excepts the cases of negotiable instruments and property pledged or sold by agents within the Factors' Acts. If there is any ground for these exceptions other than the fact that the mercantile classes who would suffer without them are vigilant and powerful, we cannot perceive it. We think that it is just and politic to protect the interest acquired by *bonâ fide* purchasers in all cases, and that it is a vicious principle to reward a prosecution at the expense of a third person. But at all events the rule should be uniform; and we suggest, as will be seen by sect. 551, that the order of restitution should be effectual to put the person in possession who appears to the Court to be justly entitled to the property, but not to deprive the other claimant of his right to bring an action to recover it.

The only remaining observation we have to make is, that most of the forms appended to the Draft Code in the first Schedule are adapted from the Irish Act, 14 & 15 Vict. c. 93. They are considerably shorter and plainer than those which are appended to 11 & 12 Vict. c. 42.

The repealing Schedule repeals in whole or in part sixty-seven statutes of the Parliament of England and Great Britain, or the United Kingdom, and fifteen statutes of the Parliament of Ireland, the provisions of which the Code would supersede.

* In Moyce *v.* Newington, L. R., 4. Q. B. Div. 32, a construction is put on the section which, if sustained, would render the alteration proposed less necessary. It is, however, as it seems to us, better to put an end to all doubt.

It is not without much diffidence that we present to Your Majesty the result of our labours. It may be that some inaccuracies, omissions, and imperfections may be discovered, and we would be well content that our work could be subjected to a scrutiny as close, and a consideration as candid and painstaking as we have applied to the Bill submitted to us for our report. But we are at the same time convinced that however carefully a Code of Criminal Law may be framed, much risk of occasional miscarriage must at first be incurred. If codification is postponed until some proposed Code has been pronounced perfect, or until desultory and irresponsible criticism has been exhausted, the accomplishment of the work will be indefinitely deferred. In fact the merits or defects of a well-considered Code can only be ascertained after it has become law, and has been interpreted under the sanction of judicial responsibility.

All of which we humbly submit to Your Majesty.

(Signed) BLACKBURN.
CHARLES R. BARRY.
ROBERT LUSH.
JAMES FITZJAMES STEPHEN.

H. COWIE,
Secretary,
12th June 1878.

Note A to page 10.

There can be no doubt that a man is entitled to preserve his own life and limb; and on this ground, he may justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day occurrence. There is no doubt on the authorities that compulsion is a defence where the crime is not one of a heinous character. But killing an innocent person, according to Lord Hale, can never be justified. He lays down the stern rule: "If a man be desperately assaulted and in peril of death, and "cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent "person then present, the fear and actual force will not acquit him of the crime and "punishment of murder, if he commit the fact; for he *ought rather to die himself than* "*kill an innocent.*"

On the trials for high treason in 1746, the defence of the prisoners was in many cases that they were compelled to serve in the rebel army. The law was laid down somewhat more favourably for the prisoners than it had been before, as the defence of compulsion was stated to apply not merely to furnishing provisions to the rebel army, but even to joining and serving in that army. It was laid down (see Foster 14) that "The only "force that doth excuse is a force upon the person and present fear of death; and this "force and fear of death must continue all the time the party remains with the rebels. "It is incumbent on every man who makes force his defence, to show an actual force, "and that he quitted the service as soon as he could." It is noticeable that though most of those who set up this defence must have fought in actual battle and must have killed, or at least have assisted in killing the loyalists, and so brought themselves within the stern rule laid down by Hale, it was never suggested that this made a difference. The Indian Commissioners proposed in the first draft of the Indian Code to make compulsion in no case a defence, but to have it merely a ground for appealing to the mercy of the Government. Their reasons are to be found in the note at pp. 134–5.* The Indian Code as published contains a section (clause 94) more lenient than that originally proposed, but more severe than that laid down in Foster. We have framed section 23 of the Draft Code to express what we think is the existing law, and what at all events we suggest ought to be the law.

But compulsion is only one instance of a justification on the ground that the act, otherwise criminal, was necessary to preserve life.

A case of frequent occurrence is where a thief says he was starving and could not save his life unless he stole. Lord Hale, after stating the rule laid down by some casuists that this was justifiable, says emphatically, "I do therefore take it that where "persons live under the same civil government as here in England, that rule, at least "by the laws of England, is false; and therefore if a person being under necessity for "want of victuals or clothes shall upon that account clandestinely and *animo furandi* "steal another man's goods, it is felony." And he gives an excellent reason: "Men's "properties would be under a strange insecurity, being laid open to other men's "necessities, whereof no man can possibly judge but the party himself."

But Lord Hale admits that this general principle is subject to some exceptions. He says, "Indeed this rule '*in casu extremæ necessitatis omnia sunt communia*' does hold in "some particular cases, where by the tacit consent of nations, or of some particular "countries or societies it hath obtained. * * By the Rhodian Law and the common "maritime custom, if the common provision for the ship's company fail, the master "may under certain temperaments break open the private chests of the mariners or "passengers and make a distribution of that particular and private provision for the "preservation of the ship's company." †

Such cases have frequently happened, and the law has been settled as to them. But ingenious men may suggest cases which, though possible, have not come under

* Penal Code prepared by the Indian Law Commissioners, published by command of the Governor-General of India. Hertford, 1851.

† 1 Hale, 54, 55.

practical discussion in courts of justice. Casuists have for centuries amused themselves, and may amuse themselves for centuries to come, by speculating as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one. If ever such a case should come for decision before a court of justice (which is improbable), it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case.

Note B to page 11.

The proposition that the force used in defence of person, liberty, or property must be proportioned to the injury or mischief which it is intended to prevent, is in our opinion one of great importance, yet it seems not to have commended itself to the minds of highly respectable authorities. We think it right first to call attention to the mode in which the subject was dealt with in Lord St. Leonards' Bill. The first part of sect. 88 of that Bill was as follows: "Homicide shall be justifiable where one "in lawful defence of his person repels force by force, and using no more violence "than he has reasonable cause for believing to be necessary for the purpose of self "defence, kills the assailant." Had this been passed unaltered into law, it would have justified every weak lad whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault.

Again. Sect. 90 says, "Homicide shall be justifiable" (not merely reduced from murder to manslaughter) "where one in defence of moveable property in his lawful possession repels force by force, and using no more force than he has reasonable cause for believing to be necessary for the defence of such property against wrong, kills the wrong-doer." If two roughs who each claimed a game-cock, and insisted on taking it home, quarrelled, and the weaker stabbed the stronger to the heart, this would, if made law, have justified the slayer, if he turned out to be the rightful owner of the bird, and could not otherwise have prevented its being taken away.

And Sect. 91 says, "Homicide shall be justifiable where one in defence of house or land in his lawful possession, resisting a person endeavouring by force to enter into or upon such house or land, repels force by force, and using no more force than he has reasonable cause for believing to be necessary for the defence of his possession, kills the wrong-doer."

It is the more singular that this last clause should have been drawn as it is, because Lord Tenterden in a case which at the time attracted much attention laid down law directly opposed to it. It was the case of R. v. Moir, tried before Lord Tenterden at Chelmsford. A full report of the evidence, and an imperfect report of Lord Tenterden's summing up, are to be found in the Annual Register for 1830, vol. 72, p. 344. Mr. Moir having ordered some fishermen not to trespass on his land by taking a short cut, found the deceased and others persisting in going across. He rode up to them and ordered them back. They refused to go, and there was evidence of angry words, and some slight evidence that the deceased threatened to strike Mr. Moir with a pole. Mr. Moir shot him in the arm, and the wound ultimately proved fatal. Before the man died, or indeed was supposed to be in danger, Mr. Moir avowed and justified his act, and said that in similar circumstances he would do the same again. This land, he said, was his castle, and as he could not without the use of fire-arms prevent the fishermen from persisting in their trespass, he did use them, and would use them again. Lord Tenterden took a very different view of the law. He told the jury that the prevention of such a trespass could not justify such an act, and he seems to have left to them as the only justification which on these facts could arise, the question whether the prisoner was in reasonable apprehension of danger to his life from the threats of the deceased. Mr. Moir was found guilty of murder and executed.

It seems to us strange that these startling provisions passed without observation through the Select Committee, and were unnoticed by any of the judges except Mr.

Justice Coleridge, who, however, did not dwell on them, but merely made them the subject of a passing remark.

It would of course follow that if homicide was, under the circumstances mentioned in these three sections, justifiable, any less degree of violence, however great, would be justifiable also; and such appears to have been the view of the law taken by the Commissioners who framed the first draft of the Indian Code, and who in an eloquent passage directed to another purpose say, "That a man who deliberately kills another in "order to prevent that other from pulling his nose should be allowed to go absolutely "unpunished would be most dangerous. The law punishes and ought to punish such "killing. But we cannot think that the law ought to punish such killing as murder." In this we agree; the provocation would be sufficient, generally, to reduce the crime to manslaughter. But they proceed, "For the law itself has encouraged the slayer to "inflict on the assailant any harm short of death which may be necessary for the "purpose of repelling the outrage,—to give the assailant a cut with a knife across the "fingers, which may render his right hand useless to him for life, or to hurl him "down stairs with such force as to break his leg. And it seems difficult to conceive "that circumstances which would be a full justification of any violence short of "homicide, should not be a mitigation of the guilt of homicide. That a man should "be merely exercising a right by fracturing the skull and knocking out the eye of an "assailant, and should be guilty of the highest crime in the code if he kills the same "assailant,—that there should be only a single step between perfect impunity and "liability to capital punishment seems unreasonable. In a case in which the law "itself empowers an individual to inflict any harm short of death, it ought hardly, we "think, to visit him with the highest punishment if he inflicts death."

If we thought that the common law was such as is here supposed, we should without hesitation suggest that it should be altered. But we think that such is not and never was the law of England. The law discourages persons from taking the law into their own hands. Still the law does permit men to defend themselves. *Vim vi repellere licet modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.*—Co. Lit., 162 a. And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified.

There is no case that we are aware of in which it has been held that homicide to prevent mere trespass is justifiable. The question raised has always been, whether it was murder, or reduced by the provocation to manslaughter. And when death has not ensued, the forms of pleading, which had the advantage of bringing the principles of law to a precise issue, show what the principle was. In an appeal of Mayhem, the form of the plea of son assault demesne was that "the appellant made "an assault upon the appellee and him then and there would have beaten wounded "and maimed unless he had forthwith defended himself against the appellant, and so "the ill which the appellant suffered was from his own proper assault and in defence "of the appellee:"—Coke's Entries, 526. Less than this was not a defence,—see Cook v. Beale, 1 Ld. Ray. 176. In Handcock v. Baker, 2 Bos. & P. 260, a plea justifying the breaking of the plaintiff's dwelling-house, assaulting him therein, beating him, and imprisoning him on the ground that plaintiff was about to kill his wife, and that all that was done was for the purpose of and necessary to prevent his doing so, was held good after verdict. And we take it to be clear that even killing the intruding criminal, if necessary to prevent a crime of this magnitude, would be justifiable; but not if it were to prevent a common assault.

But the defence of possession either of goods or land against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace. The party in lawful possession may justify gently laying his hands on the trespasser and requesting him to depart. If the trespasser resists, and in so doing assaults the party in possession, that party may repel the assault and for that purpose may use any force which he would be justified in using in defence of his person. As is accurately said in 1 Rolle's Abt. Trespass G. 8, "a justification of a battery in defence of possession, though it "arose in the defence of the possession, yet in the end it is the defence of the person."

Some misapprehension may have arisen from the numerous cases decided, on the 9 Geo. 4. c. 31, s. 11., in which persons indicted for wounding with intent to do grievous bodily harm were held entitled to an acquittal, on its coming out in evidence that there was an illegality or informality in an arrest, or some other provocation disproportioned to the degree of violence used. See R. v. Hood, 1 Moody, C.C. 281. And it may have been supposed that these are authorities that the violence was absolutely justified.

But this is from not observing that the effect of the enactment then in force, was that if wounding was inflicted under such circumstances that if death had ensued therefrom the offence would not have amounted to murder, the person indicted should be acquitted of felony. That provison was repealed in 1838, and since that time the course of practice has, we believe, been to leave it to the jury with proper explanations and directions, to say whether the wounding was disproportionate to the injury which it was intended to prevent. The cases in which this doctrine has been acted on seem not to have been reported, with the exception of R. *v.* Hewlett, 1 F. & F. 91, in which the point only incidentally arose. We think that it is good sense, and that it is the law; and if it is not the law, we submit that it ought to be made so.

Note C to page 31.

Mr. Justice Barry and Mr. Justice Stephen object to section 431 on the ground that it keeps alive the distinction between felony and misdemeanour, mainly if not altogether for the sake of avoiding the necessity of dealing expressly with two matters which they think might be dealt with without difficulty, viz.:—the provisions of the Act abolishing forfeitures for felony, and the effect of the abolition of the distinction between felony and misdemeanour on the privileges of the peers.

By the Act which abolishes forfeiture for felony (33 & 34 Vict. c. 23, s. 7) a person convicted of felony and sentenced thereon to penal servitude is disabled from selling or alienating his property. The Crown may appoint an administrator of such property. The administrator is to make amends out of it to persons injured by the convict's offence; to support his family; and to preserve the property itself, and its surplus income, if any, for the convict or his representatives at his death. If a person should be sentenced to penal servitude for a misdemeanour (for instance, for obtaining goods by false pretences, misappropriation as an agent, fraud as a director, or false accounting), this consequence does not follow. Such a person whilst undergoing his sentence might sue and be sued and alienate his property at will. If the proposed proviso is adopted, the consequence will be that if a man with property is convicted of theft and sentenced to penal servitude under the provisions of the Draft Code, it will be necessary before the right of the Crown to appoint an administrator to the estate could be determined, to ascertain whether his offence would, before the Code became law, have been felony or a misdemeanour. This would be objectionable, not only because it perpetuates distinctions which it is desirable to abolish, but also because it would be practically impossible in many cases to say of what offence, according to the old law, the convict had been found guilty. Suppose for instance, the man were convicted of stealing money which he had picked up in the road; under the Draft Code, if there was a dishonest appropriation of the money, the offence of theft would be committed, although under the technical subtleties of the common law no felony might under the circumstances have been committed. A conviction under the Draft Code would not therefore decide whether the criminal was guilty of a felony at common law, and accordingly a further investigation would be required in order to determine whether the Crown could appoint an administrator or not.

As the sections relating to the appointment of administrators are not intended to inflict any punishment on the convict, but are rather meant for the protection of his property, it would seem simpler to enact that they should apply to all cases in which a sentence of penal servitude is passed for any offence. It seems very difficult to give any reason why a person convicted of bigamy should, and a person convicted of perjury should not, fall under these sections, and it is perhaps not easy to say what is the use of them under any circumstances.

A considerably greater difficulty arises with respect to one of the other provisions of the Act. A person sentenced for felony to imprisonment for 12 months or to imprisonment with hard labour, or to penal servitude thereupon loses every office, all ecclesiastical preferment, and every pension or superannuation allowance payable by the public or out of any public fund to which he may be entitled. Such consequences do not follow upon the infliction of similar punishments for misdemeanours. As

regards offices and ecclesiastical preferments this provision seems superfluous, and even to some degree objectionable, as it supersedes the authority of special professional tribunals. Her Majesty would of course dispense with the services of any person in military or civil employment who was convicted of any disgraceful offence, whether felony or misdemeanour. If a clergyman were so convicted, he might after the conviction be punished by the Ecclesiastical Courts. A barrister would be disbarred under similar circumstances, or a solicitor struck off the rolls. No special protection thus appears to be required for the protection of honourable professions against members who disgrace themselves. The provisions of the Act, on the other hand, might work cruel wrong to individuals, and might also produce inequality of punishment. Suppose that a military officer committed manslaughter. It is quite possible that a judge might under the circumstances consider it his duty to inflict a sentence of imprisonment with hard labour; but ought it to follow as a necessary consequence that such a man should lose his commission, and that such a loss should depend on the sentence passed by the judge? Would not the military authorities be better qualified on every ground to decide the question whether or not such a result should follow? Would it not be a disgrace to the law that, if another military officer committed deliberate perjury in order to ruin an innocent man, and was thereupon sentenced to penal servitude, the loss of his commission should be, not the legal consequence of his sentence, but the effect of the displeasure of the Sovereign?

Still greater irregularities are or might be involved in the provisions which deprive convicts of pensions and superannuation allowances. A pension (except in cases where it is a retaining fee for future services) is part of the consideration for which past services were rendered, and it is difficult to suggest any rational distinction between it and other property. If the principle of forfeiture is given up it seems inconsistent to retain forfeiture for one particular kind of property. If an Indian civilian retires upon a pension of 1,000*l.* a year and with 10,000*l.* saved from his pay, it seems difficult to justify a law which if he commits an offence forfeits his pension but leaves his savings untouched. But when this is connected with the distinction between felony and misdemeanour, the arbitrary character of the rule becomes still more apparent. Two public servants retire upon pensions; one becomes the secretary and the other a director of a joint stock bank; they conspire together to carry out a fraud, and its nature is such that in carrying it out, the secretary commits embezzlement as a servant, the director fraud as an agent; each is sentenced to 12 months imprisonment; the secretary will lose his pension, because his offence is felony; the director will retain his, because his offence is a misdemeanour. Surely this is a monstrous result; the two men commit the very same act and receive to all appearance the same punishment, yet because the one offence is (or rather used to be) called by a different name from the other, the one is to be fined thousands of pounds to his utter ruin, whilst the other at the end of his sentence retains his means of living.

It ought to be added that these forfeitures are the only remaining considerable exception to the rule which abolishes minimum punishments. If a man in possession of a pension is convicted of felony and sentenced to hard labour, the judge cannot help inflicting upon him, in addition, a heavy and it may be ruinous fine, depriving him of what may be his principal means of livelihood. This punishment is doubly invidious; it is inflicted or not according to an unintelligible and unmeaning distinction between the names of crimes, and it is inflicted upon those persons only who have earned a pension by long public service. A military officer and a rich civilian both commit an offence for which they are sentenced to penal servitude. The civilian's property is administered for him by a public officer, his family is supported out of it, the surplus is accumulated for his benefit, and he ends his term of punishment a richer man than when he began it. His fellow culprit is deprived of the whole of his income, and his family is reduced to absolute destitution. Mr. Justice Barry and Mr. Justice Stephen are of opinion that the second section of the Act for abolishing forfeitures for felony (33 & 34 Vict. c. 23) should be repealed, and that the latter part of the Act should either be repealed (which in their opinion would be the better course) or else be extended to all persons sentenced to penal servitude.

The effect of the abolition of the distinction between felony and misdemeanour on the privilege of the peerage, is certainly not likely to be of much practical importance. If a member of the House of Lords were ever to be accused of an offence against property, it might be matter of great difficulty to say whether the crime would have been felony or misdemeanour before the Code became law. To recur to the illustration given above. A peer is indicted for stealing property found by him. He says, "I

"demand to be tried by my peers, because the offence with which I am charged "would have been felony at common law." The answer would be, "It is impossible "to say, till the evidence is given, whether the offence with which you are charged "would have been felony at common law or not."

Lord Blackburn and Mr. Justice Lush are, however, not prepared to express any opinion as to the propriety of continuing or repealing the provisions of the Act for the abolition of forfeitures hereinbefore mentioned. They think that any alteration of the provisions of an Act which has so recently found its place in the statute book, should form the subject of independent legislation.