CRIMINAL LAW.

CHAPTER I.

STATEMENT OF THE SUBJECT OF THE WORK.

A COMPLETE account of any branch of the law ought to consist of three parts, corresponding to its past, present, and future condition respectively. These three parts are—

(1) Its history.

(2) A statement of it as an existing system.

(3) A critical discussion of its component parts with a view to its improvement.

My *Digest of the Criminal Law* and the *Digest of the Law of Criminal Procedure* now published as a companion volume to it are attempts to state the most important parts of the criminal law as it is systematically. The present work is intended to relate its history, and to criticise its component parts with a view to their improvement. The criticism is for the most part interwoven with the history.

Before undertaking either of these tasks I must endeavour to define what I mean by the Criminal Law. The most obvious meaning of the expression is that part of the law which relates to crimes and their punishment—a crime being defined as an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act.

CHAP. I.

This definition is too wide for practical purposes. If it were applied in its full latitude it would embrace all law whatever, for one specific peculiarity by which law is distinguished from morality is, that law is coercive, and all coercion at some stage involves the possibility of punishment. This might be shown in relation to matters altogether unconnected with criminal law, as the expression is commonly understood, such as legal maxims and the rules of inheritance. A judge who wilfully refused to act upon recognised legal maxims would be liable to impeachment. The proprietary rights which are protected by laws punishing offences against property are determined by the application of those laws. If there were no such crimes as theft, forcible entry, malicious mischief, and the like, and if there were no means of forcing people to respect proprietary rights, there would be no such thing as property by law.

This is no doubt a remote and abstract speculation. The principle on which it depends may be displayed by more obvious and important illustrations. It would be a violation of the common use of language to describe the law relating to the celebration of marriage, or the Merchant Shipping Act, or the law relating to the registration of births, as branches of the criminal law. Yet the statutes on each of these subjects contain a greater or less number of sanctioning clauses which it is difficult to understand without reference to the whole of the acts to which they belong. Thus, for instance, it is felony to celebrate marriage otherwise than according to the provisions of certain [1]Acts of Parliament passed in 1823 and 1837, and these provisions form a connected system which cannot be understood without reference to the common law on the subject. These illustrations (which might be indefinitely multiplied) show that the definition of criminal law suggested above must either be considerably narrowed or must conflict with the common use of language by including many parts of the law to which the expression is not usually applied.

For all practical purposes a short description of the subject-matter to which the expression "criminal law" is commonly

[1] *Dig. Crim. Law*, 259, 260.

applied is more useful than any attempt to sum up in a few words the specific peculiarity by which this is distinguished from other parts of the law. The following is such a description: The criminal law is that part of the law which relates to the definition and punishment of acts or omissions which are punished as being (1) attacks upon public order, internal or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals, or upon rights annexed to their persons; or (5) attacks upon the property of individuals or rights connected with, and similar to, rights of property.

The laws which relate to these subjects may again be classified under three heads; they are—

First, general doctrines pervading the whole subject. These doctrines might be called collectively the conditions of criminality. They consist partly of positive conditions, some of which enter more or less into the definition of nearly all offences, the most important being malice, fraud, negligence, knowledge, intention, will. There are also negative conditions or exceptions tacitly assumed in all definitions of crimes, which may be described collectively as matter of excuse.

Secondly, the definition of crimes and the apportionment to them of punishments.

Thirdly, the procedure by which in particular cases criminals are punished according to those definitions.

All the laws which would commonly be described as forming part of the criminal law of this country might be classified under one or other of these heads.

The description of criminal law which I have substituted for a definition in the stricter sense of the word is intended to exclude two large and important classes of laws which might perhaps be included not only with theoretical propriety, but in accordance with popular language, under the phrase "criminal law." These are, first, laws which constitute summary or police offences, and secondly, laws which impose upon certain offenders money penalties, which may be recovered by civil actions, brought in some cases by the person offended, in others by common informers. Summary offences have of

late years multiplied to such an extent that the law relating to them may be regarded as forming a special head of the law of England. Such offences differ in many important particulars from those gross outrages against the public and against individuals which we commonly associate with the word crime. It would be an abuse of language to apply such a name to the conduct of a person who does not sweep the snow from before his doors, or in whose chimney a fire occurs. On the other hand, many common offences against person and property have of late years been rendered liable to punishment by courts of summary jurisdiction, and such cases and the courts by which they are tried fall within the scope of the subject of this book, and are dealt with in their place.

Penal actions by which private persons may in particular cases protect rights of a peculiar kind are still further removed from the associations which commonly connect themselves with a criminal prosecution.[1] If a lecture is published without the lecturer's leave, he has power, after taking certain precautions, to seize all published copies, and to recover a penalty in respect of each of them; but a proceeding to enforce such a right is a civil action, and differs in many ways from a criminal proceeding, though it has the practical effect of imposing a heavy fine on the person in default. I have not, however, left entirely unnoticed either the law relating to offences dealt with in a summary way or the law relating to penal actions.

I have intentionally substituted this short description of the contents of an actually existing body of law for any definition attempting to sum up the characteristics of criminal law in a more abstract way, because the only abstractions which in any degree correspond with existing facts in reference to law are too wide in their sweep to furnish materials for such a definition.

Austin's definition of a law leaves room for no other definition of a crime than an act or omission which the law punishes, and the reasons already given show that for practical purposes this definition is inconveniently wide. I do not think that this result in any way discredits Austin's definition of a law, which is nothing more than the

[1] 5 & 6 Will. 4, c. 65.

recognition and record of the fact that there are in all human societies rules of conduct, differing from other rules of conduct in the circumstance that obedience to them is in some cases, and may be in all cases, enforced by the collective strength of the society in which they exist. To confine the word "law" to such rules, and to apply it to them irrespectively of their goodness or badness and of their origin is, I think, the first condition of clearness in all speculations on the subject. The only alternative is to attempt to embody goodness or wisdom in the definition of law, one effect of which must be to introduce into all legal questions the uncertainty which belongs to all discussions upon morality. In the common use of language, however, the word "crime" and "criminal" no doubt connote moral guilt of a more serious character than that which is involved in a bare infringement of law as defined by Austin. The effect of this difference between the popular meaning of the words "crime" and "criminal," and that broader signification which it would be natural to attach to it in connection with Austin's definition of law, is given by restricting the meaning of the expression "criminal law" in the manner already stated.

Much discussion has taken place on subjects connected, or supposed to be connected, with criminal law, which I leave on one side, because it seems to me at once idle and interminable. The subject in question is usually called the [1] Right to Punish. On what ground, it is asked, and under what limitations, has Society a right to punish individuals? These questions appear to me to be almost entirely unmeaning, and quite unimportant. Societies are stronger than their individual members, and do as a fact systematically hurt them in various ways for various acts and omissions. The practice is useful under certain conditions, and injurious under other conditions. What these conditions are is a question for legislators. If, all matters being duly considered, the legislature consider it expedient to punish a given action in a given way, I think they would be guilty of weakness if they did not punish that action in

[1] Rossi's *Traité du Droit Criminel* is occupied principally by discussions on this subject.

that way although they had no right to do so. If they considered it inexpedient that the act should be punished, they would be cruel if they punished it, however good a right they might have to do so. On this account the whole of the discussion as to the right to punish appears to me superfluous. I think indeed that from the nature of the case any conclusion as to any right alleged to exist antecedently to and independently of some law from which it is derived must be arbitrary and fanciful.

Taking this view of the elements of which the criminal law is composed, the next question is in what manner its history should be related.

In writing the history of a body of law, a difficulty presents itself which is inherent in the nature of the subject, and which reduces the writer to a choice between two modes of procedure, neither of which can be regarded as altogether satisfactory.

The law of England as a whole, or even the criminal law as a whole, can scarcely be said to have a history. There is no such series of continuous connected changes in the whole system as the use of the word "history" implies. Each particular part of the law, however, has been the subject of such changes. The law as to perjury and the definition of the crime of murder have each a history of their own, but the criminal law regarded as a whole is like a building, the parts of which have been erected at different times, in different styles and for different purposes. Each part has a history which begins at its foundation and ends when it reaches its present shape, but the whole has no history for it has no unity. How then is the history of the whole to be related? If an account of each successive change affecting any part is given in the order of time, the result is that it is impossible to follow the history of any one part, and the so called history becomes a mass of unconnected fragments. If, on the other hand, the history of each part is told uninterruptedly, there is a danger of frequent repetitions. After much consideration of the subject the second course has appeared to me on the whole to be the least objectionable of the two.

I have accordingly dealt with the subject in the following order:—First, I have given some account of the Criminal Law of Rome, which has in many ways exercised an influence on our own law. I have then described both the substantive law and the criminal procedure of the English before the Conquest. Passing to the history of the existing English Criminal Law I have given, first the history of the Courts. Under this head I have traced, first the history of the ordinary criminal courts, namely, the Queen's Bench Division of the High Court, the Assize Courts, the Courts of Quarter Sessions, the Courts of the Franchises, and the Welsh Courts. I have next given the history of the extraordinary criminal courts, namely, Parliament and the Court of the Lord High Steward. Lastly, I have given the history of the criminal jurisdiction of the Privy Council.

From the Courts I pass to the procedure followed in them, describing in successive chapters, first, the history of the procedure for the apprehension, examination, and committal or bail of a suspected person; secondly, the history of the various forms of accusation and trial, especially that of trial by jury and its incidents; thirdly, I have given the history of the development of trial by jury from the reign of Mary to that of George III., when the present system may be said to have been established; fourthly, I have given an account of our existing method of trial; fifthly, I have given the history of legal punishments; sixthly, I have given an account of the way in which prosecutions are managed and paid for. In conclusion, I have made some general observations on our system of criminal procedure viewed as a whole, and in particular I have given some account of the part of the Draft Code of 1879 which relates to procedure, and of the changes proposed by it in the existing law. I have also made a comparison between our own system and that of the *Code d'Instruction Criminelle* which prevails in France.

The second volume begins with a subject which has been little considered, and which is intermediate between criminal procedure and the substantive criminal law, namely, the limits of the criminal law in respect of time, place, and person.

I next proceed to treat of the substantive criminal law,

CHAP. I. including, first, the theory of criminal responsibility, and the exceptions to the general rule that men are responsible for their actions; secondly, the leading points in the general history of the law of crimes, considered as a whole; thirdly, the history of the principal classes of offences into which the criminal law may be divided.

These topics comprise all that need be said on the criminal law of England taken by itself, but the law of England resembles that of Rome in many ways, and perhaps in nothing so much as in the fact that it prevails in a great number of countries other than that of its origin, and this is perhaps more strikingly true of the criminal law than of any of its other departments. I have accordingly added to my account of the criminal law of England an account of the system adapted from it established in India, and some notices of other systems founded upon it.

The work concludes with detailed accounts of several trials, chosen as fair specimens of the practical results of English and French procedure.

As to the order in which some of these matters are discussed, I may observe that in a systematic exposition of an existing body of law it is natural to state first the substantive law, and then the law as to procedure by which it is applied to particular cases; but in treating the subject historically it seems more proper to begin with an account of Courts and other Officers of Justice, as the substantive law is to a great extent, perhaps mainly, developed by their decisions and by their tacit adoption of rules and principles before they are reduced to an express written form.

CHAPTER II.

ROMAN CRIMINAL LAW.

THE oldest part of the Roman Criminal Law was contained in the twelve tables. The twelve tables have been reconstructed by various authors, of course more or less conjecturally, from the remaining fragments of them. The following is M. Ortolan's [1] reproduction of what he numbers as the eighth table "*de delictis*":—

1. Libels and insulting songs to be punished by death.

2. Breaking a limb, unless settled for, to be punished by retaliation.

3. Breaking the tooth or bone of a free man, 300 asses; of a slave, 15 asses.

4. For insulting another, 25 asses.

5. For [2] damage to property caused unjustly . . . . If it is accidental, it must be repaired.

6. For damage caused by a quadruped, repair the damage or give up the animal.

7. An action lies against a man for pasturing his flock in the field of another.

8. [3] Whoever injures crops by enchantments or conjures them from one field into another . . . . (punishment unknown).

9. Whoever by night furtively cuts or causes to be grazed crops raised by ploughing, shall be devoted to Ceres and

[1] Ortolan, *Explication Historique des Instituts*, i. 114–118. The references to Pothier are to Pothier's *Pandectæ Justinianeæ*. 4 vols. Paris, 1818. This work contains all the texts of the Roman Law, arranged by Pothier in what he regards as their natural order. It is extremely useful.

[2] The fragment here is "Rupitias . . . Sarcito." [3] Pothier, i. cxx.

[1]put to death if he is an adult, or if he is under the age of puberty shall be flogged at the discretion of the prætor and made to pay double value as damages.

10. Whoever burns a house or a stack of corn near a house knowingly and maliciously (*dolo*) shall be bound, beaten, and burnt. If by accident, he must pay damages. If he is too poor he must be [2]slightly flogged.

11. A man who wrongfully cuts another's trees must pay twenty-five asses for each tree.

12. If a man is killed whilst committing theft by night he is lawfully killed.

13. If a thief is taken by day he may not be killed unless he resists with a weapon.

14. A thief taken in the fact (*fur manifestus*) must be beaten with rods, and adjudged (as a slave) to the person robbed. If he is a slave he must be beaten with rods and thrown from the Tarpeian rock. Youths are only to be beaten with rods at the discretion of the magistrate, and condemned to repair the damage.

15. A thief [3]discovered by plate and girdle is to be deemed to be taken in the fact.

A thief discovered in possession of the stolen property (not by plate and girdle), and a thief who hides the stolen property in the house of a third person must restore three times the value of the property.

16. When an action is brought for a theft not manifest, the thief must pay twice the value of the money stolen.

17. Stolen property cannot be acquired by usucaption.

18. [4]The interest of money is $8\frac{1}{3}$ per cent. per annum. A usurer who lends at a higher rate forfeits fourfold.

19. Breach of trust with a deposit is punished by double damages.

20. A guardian who appropriates the property of his ward forfeits double the amount.

[1] Pothier (i. cxxi.) says by hanging.

[2] *Levius castigator.*

[3] "*Lance licioque conceptum*"—a solemn search made with certain symbolical solemnities.

[4] "Si quis unciario fœnore amplius fœnerassit quadruplione luito." Unciarium fœnus is 1 per cent. per annum according to Pothier, $8\frac{1}{3}$ according to Ortolan. See also an account of the controversy as to the meaning of the phrase in the *Dictionary of Antiquities*, art. "Fœnus."