CAMBRIDGE LIBRARY COLLECTION

*Books of enduring scholarly value*

## British and Irish History, Nineteenth Century

This series comprises contemporary or near-contemporary accounts of the political, economic and social history of the British Isles during the nineteenth century. It includes material on international diplomacy and trade, labour relations and the women's movement, developments in education and social welfare, religious emancipation, the justice system, and special events including the Great Exhibition of 1851.

## A History of the Criminal Law of England

Sir James Fitzjames Stephen (1829–94) published this three-volume account of the English criminal law's historical development in 1883, four years after his appointment as a judge of the High Court. It is a revision and expansion of the second chapter in Stephen's 1863 *General View* (also reissued in this series). At first sight, it is ironic that the author of this classic of legal historical scholarship was himself a Benthamite who favoured and promoted the codification of the common law and worked on codes of criminal law and procedure for India and for England. Volume 1 contains a short preliminary account of Roman criminal law and pre-Conquest English criminal law; a survey of courts exercising criminal jurisdiction; a historical account of the development of the main elements of criminal procedure; a history of criminal punishments; and a general comparative view of the differences between English and French criminal procedure.

# A History of the Criminal Law of England

VOLUME 1

JAMES FITZJAMES STEPHEN

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge, CB2 8BS, United Kingdom

Published in the United States of America by Cambridge University Press, New York

Cambridge University Press is part of the University of Cambridge.
It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108060714



This edition first published 1883
This digitally printed version 2014

ISBN 978-1-108-06071-4 Paperback

# A HISTORY

OF

# THE CRIMINAL LAW OF ENGLAND.

VOL. I.

# A HISTORY

OF

# THE CRIMINAL LAW OF ENGLAND.

BY

SIR JAMES FITZJAMES STEPHEN, K.C.S.I., D.C.L.,

A JUDGE OF THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

IN THREE VOLUMES.

VOL. I.

London:

MACMILLAN AND CO.

1883.

LONDON:
R. CLAY, SONS, AND TAYLOR,
BREAD STREET HILL.

# PREFACE.

THIS work, which attempts to relate the history of the Criminal Law of England, has a history of its own.

In 1863 I published what in one sense may be called the first edition of this work under the title of *A General View of the Criminal Law*. In 1869 I became Legal Member of the Council of the Viceroy in India, and held that office for about two years and a half, during which time my attention was strongly directed, from the legislative point of view, to the subject of Criminal Law, and particularly to its codification. Amongst other things, I drew and carried through the Legislative Council the Code of Criminal Procedure, Act X. of 1872, which, with some slight alterations and variations has just been reenacted and extended to the High Courts by Act X. of 1882.

In 1873 or 1874 I was informed that a second edition of my *General View* was wanted. I began to prepare one, but I found myself hampered at every page by the absence of any authoritative statement of the law to which I might refer. It then occurred to me that as there was no such statement in existence I might write something which at all events would express my own views as to what the law was, to which I might refer in discussing its provisions historically and critically. Acting on this I wrote my *Digest of the Criminal Law* which was published in 1877, and of which a third edition is just coming out. The *Digest* does

not deal with the subject of Procedure. In order at once to complete it and to enable the readers of the present work to see the law of Criminal Procedure as well as that of crimes and punishments stated systematically, I have (with the help of my eldest son) written as a companion to the earlier *Digest* a *Digest of the Law of Criminal Procedure*, which is published contemporaneously with the present work.

When the *Digest of the Criminal Law* was written it occurred to me that with a little alteration it would make a Draft Penal Code. I communicated this view to Lord Cairns (then Lord Chancellor) and to the late Lord Justice Holker (then Attorney-General), and under their authority I drew the Draft Criminal Code of 1878, which was introduced into Parliament by Sir John Holker in the session of that year. Thanks to a great extent to the admirable skill with which Sir John Holker brought forward a measure which he appreciated with extraordinary quickness, for I think his attention had never before been directed to the subject of codification, the bill was favourably received, but Parliament had not time to attend to it. A commission, however, was issued to Lord Blackburn, Mr. Justice Barry, Lord-Justice Lush, and myself, to inquire into and consider and report upon the Draft Code. It was accordingly considered by us for about five months, namely from November, 1878, to May, 1879.[1] We sat daily during nearly the whole of that time, and discussed every line and nearly every word of every section. The Draft Code which was appended to the Report speaks for itself. It differs slightly from the Draft Code of 1878. The particulars of the differences are stated in the Report prefixed to the Draft Code of 1879. I did not discover, in the course of the searching discussions of every detail of the subject which took place, any serious error or omission

[1] The Report was signed June 12, 1879.

in the *Digest* upon which both measures were founded. Our report was presented too late for the Code to be passed in 1879. In 1880 there was a change of ministry, but in 1882 the part of the Code which related to Procedure was announced in the Queen's Speech as a Government measure. It had, however, to be postponed, like many other things, to matters of a more pressing nature. For reasons stated at length in the present work I should deeply regret the division of the Code into separate parts. Such a course would in my opinion produce confusion and deprive the measure of much of its value. If it is said that the Code taken as a whole is too extensive a measure to be disposed of in a single session, it may be replied that it is not longer than other single acts—for instance, the Merchant Shipping Act of 1854; and it may be added that by far the greater part of the Act is mere reenactment, and would in all probability give rise to no discussion. At all events, if the Bill is divided into two parts, it would be desirable to suspend the operation of the one first passed till the other could be enacted. They are so interwoven that it would be inconvenient to bring one into operation alone. To give a single instance. How can you retain the distinction between felony and misdemeanour as a part of the substantive law, and yet remove it from the law of procedure? How, if it is removed from the law of procedure, retain it as part of the substantive law? There is no hurry about the matter. The law as it stands is perfectly well understood and in substance requires little alteration. The use of codification would be to give it literary form, and so to render it generally accessible to all whom it concerns. Surely it would be unwise to perform the operation in such a way as to deprive the result of its principal value.

As soon as the sittings of the Criminal Code Commissions

were over I returned to the work which the preparation and revision of the Draft Codes of 1878 and 1879 had forced me to lay aside.

On turning back to the book published in 1863 I found that though the experience collected in the manner already stated had confirmed large parts of what I had written, the book was in many places crude and imperfect, and that in some respects it no longer represented my views. It seemed, accordingly, that if the work was to be republished it must be rewritten, and the present work is the result. I am conscious of many defects in it for which my best apology is that it has been written in the intervals of leisure left by my judicial duties. It is longer and more elaborate than I originally meant it to be, but, until I set myself to study the subject as a whole, and from the historical point of view, I had no idea of the way in which it connected itself with all the most interesting parts of our history, and it has been matter of unceasing interest to see how the crude, imperfect definitions of the thirteenth century were gradually moulded into the most complete and comprehensive body of criminal law in the world, and how the clumsy institutions of the thirteenth century gradually grew into a body of courts and a course of procedure which, in an age when everything is changed, have remained substantially unaltered, and are not alleged to require alteration in their main features. Much has been said and written of late years on the historical method of treating legal and political matters, and it has no doubt thrown great light on the laws and institutions of remote antiquity. Less has been done in investigating comparatively modern laws and institutions. The history of one part of our institutions has, under the name of constitutional history or law, been investigated with admirable skill and profound learning. Comparatively little has been done

towards writing the history of other branches of our law which are perhaps more intimately connected with the current business of life. Of these the criminal law is one of the most important and characteristic. No department of law can claim greater moral importance than that which, with the detail and precision necessary for legal purposes, stigmatises certain kinds of conduct as crimes, the commission of which involves, if detected, indelible infamy and the loss, as the case may be, of life, property, or personal liberty. A gradual change in the moral sentiments of the community as to crime in general and as to each separate crime in particular, displays itself in the history of legislation on the subject, and particularly in the history of legal punishments. The political and constitutional interest of the subject is not inferior to its moral interest. Every great constitutional question has had its effect both on criminal procedure and on the definition of crimes. I may instance the history of impeachments, the history of the criminal jurisdiction of the Privy Council, the history of the gradual development of the modern system of trial, the history of the law relating to treason, and that of the law relating to libel. Subjects of even more vital interest than politics have their bearing upon the criminal law. Any history of it which omitted the subject of religious offences would be incomplete, but that history involves a sketch of the process which has, in the course of about five centuries, changed a legislative system, based upon practically unanimous belief in the doctrines of the mediæval church, into a system which, according to some, is based upon the principle that for legislative purposes many religions are to be regarded as about equally true (which is probably what is meant by the principle of religious equality), and according to others on the principle that all religions are untrue.

The subject of criminal responsibility and the relation of madness to crime cannot be discussed without saying something on subjects forming the debateable land between ethics, physiology, and mental philosophy.

Again, the different views of social and political economy which have prevailed at different times have left traces, amongst others, on the laws which punish offences against trade, and on the laws against vagrancy and on the game laws.

Even the history of crimes which are crimes and nothing else, such as homicide in its two forms, and theft, is full of interest, partly because it illustrates the unexpressed views of many different ages upon violence and dishonesty, and partly because it is perhaps the most striking illustration to be found in any part of the law of the process by which the crude and meagre generalities of the early law were gradually elaborated into a system erring on the side of over luxuriance and refinement, but containing materials of the highest value for systematic legislation.

Lastly, the Criminal Law, like every other important branch of the law, connects itself with other systems, and that in several ways. First, the question of its local extent has much to do with questions connected with International Law. Secondly, it has been the parent of other systems, one of which at least (the Criminal Law of India) is on its own account a topic of great interest, whilst it becomes doubly interesting when it is regarded, as it ought to be, as a rationalised version of the system from which it was taken. Thirdly, it is difficult to criticise the system properly or to enter into its spirit except by comparing it with what may be described as the great rival system,—that which is contained in the French and German Penal Codes, both of which may be regarded to a certain extent as

rationalised versions and developments (though in each case at several removes) of the Criminal Law of Rome.

I have tried to deal with these matters in such a manner as to write a hitherto unwritten chapter of the history of England, and at the same time to explain one of the most important branches of the existing law, and to show on what foundations rests the Code in which it is proposed to embody it.

J. F. STEPHEN.

ANAVERNA,
RAVENSDALE,
CO. LOUTH,
*Oct.* 19, 1882.

# CONTENTS.

CHAPTER I.

PAGE

STATEMENT OF THE SUBJECT OF THE WORK . . . . . 1

CHAPTER II.

ROMAN CRIMINAL LAW . . . . . 9

CHAPTER III.

EARLY ENGLISH CRIMINAL LAW . . . . . 51

CHAPTER IV.

THE ORDINARY CRIMINAL COURTS—QUEEN'S BENCH DIVISION OF THE HIGH COURT, THE COURTS OF ASSIZE, THE COURTS OF QUARTER SESSIONS, COURTS OF SUMMARY JURISDICTION, FRANCHISE COURTS, WELSH COURTS . . . . . 75

CHAPTER V.

THE CRIMINAL JURISDICTION OF PARLIAMENT AND THE COURT OF THE LORD HIGH STEWARD . . . . . 145

## CHAPTER VI.

PAGE

THE CRIMINAL JURISDICTION OF THE PRIVY COUNCIL . . . . . 166

## CHAPTER VII.

HISTORY OF THE LAW OF CRIMINAL PROCEDURE.—PROCEDURE DOWN TO COMMITTAL FOR TRIAL OR BAIL . . . . . 184

## CHAPTER VIII.

HISTORY OF THE LAW OF CRIMINAL PROCEDURE CONTINUED.—FORMS OF ACCUSATION AND TRIAL—APPEALS—ORDEALS—TRIAL BY JURY 244

## CHAPTER IX.

HISTORY OF THE LAW OF CRIMINAL PROCEDURE CONTINUED.—LEGAL INCIDENTS OF A CRIMINAL TRIAL—INDICTMENT AND INFORMATION —ARRAIGNMENT, TRIAL, AND VERDICT . . . . . 273

## CHAPTER X.

HISTORY OF THE LAW OF CRIMINAL PROCEDURE CONTINUED.—PROCEEDINGS BY WAY OF APPEAL . . . . . 308

## CHAPTER XI.

HISTORY OF CRIMINAL TRIALS IN ENGLAND FROM 1554—1760 . . . . 319

## CHAPTER XII.

DESCRIPTION OF MODERN CRIMINAL TRIALS . . . . . 428

## CHAPTER XIII.

PAGE

HISTORY OF LEGAL PUNISHMENTS . . . . . 457

## CHAPTER XIV.

MANAGEMENT OF PROSECUTIONS . . . . . 493

## CHAPTER XV.

GENERAL AND COMPARATIVE VIEW OF ENGLISH AND FRENCH CRIMINAL PROCEDURE . . . . . 504

---

*** For List of Cases named, Statutes cited and General Index, see end of Volume III.

## ERRATA AND CORRIGENDA.

### VOL. I.

P. 56, *last line, omit* "[? culpam]" *and add the following note to the word* "colpum:"—"Colpus Gallis *coup* Italis *colpo* diminutivum ex *colaphus*."—*Ducange, sub voce.*
P. 70, *note* 2, *for* "Hen. 8," *read*, "Hen. 1."
P. 71, *line* 20 *from top, for* "theoir," *read*, "theow."
P. 98, *last line, for* "goal," *read*, "gaol."
P. 116, *last line of note* 1, *for* "c. 79," *read* "c. 76."
P. 126, *The passage quoted from Bracton is in* Vol. II., p. 538.
P. 127, *note* 2, *for* "Sir H. Twiss," *read*, "Sir T. Twiss."
P. 241, *add to note* 4 *the following*:—"The &c., to which this note is made is a misprint in Sir T. Twiss's edition for vic.,' the abbreviation of vicecomites, which makes the passage clear."

### VOL. II.

P. 17, *note* 1, *line* 2, *for* "Horace," *read* "Travers."
P. 187, *line* 5 *from the bottom, for* "cur," *read* "eas."

### VOL. III.

P. 15, *line* 8 *from bottom, dele* "who."
P. 21, *line* 17 *from top, dele* "two."
P. 29, *line next below the table, for* "Horace," *read* "Travers.'
P. 152, *note* 1, *for* "Shaw," *read* "Show."
P. 179, *line* 17, *for* "actions," *read* "sections."
P. 321, *line* 6 *from top, for* "they," *read* "he."