A GENERAL VIEW

OF THE

CRIMINAL LAW OF ENGLAND.

CHAPTER I.

THE PROVINCE OF CRIMINAL LAW.

Definitions of Law and Crime.

THE object of this chapter is to show what is the subject-matter to which criminal law relates, and what are the component parts of which by the nature of the case it must consist. First, then, what is a law, and what is a crime?

A law is a command enjoining a course of conduct. A command is an intimation from a stronger to a weaker rational being, that if the weaker does or forbears to do some specified thing the stronger will injure or hurt him.* A crime is an act of disobedience to a law forbidden under pain of punishment. It follows from these definitions that all laws are in one sense criminal, for by the definitions they must be commands, and any command may be disobeyed.

All law criminal in one sense.

This consequence may appear paradoxical, but it is true. To common apprehension, the laws of inheritance are absolutely unrelated to the criminal law, yet, in fact, they repose upon it. Thus the law is that the eldest son is heir-at-law to his father. This means that all persons, except the eldest son of the dead man—if he has one—are commanded by the sovereign power not to exercise proprietary rights over the land which belonged to him, unless they can show a title to do so. If

* Austin's Prov. of Jurisprudence, Lect. I.

CHAP. I. they should exercise such rights and should fail to show such a title, the sovereign would command the sheriff to give possession of the land to the heir-at-law, and to make the intruder pay the costs of the suit; and if the sheriff should fail to execute that command, he would be liable to punishment (amongst other things) by an indictment for not obeying the lawful commands of the sovereign, and to fine and imprisonment on conviction under that indictment. Thus, the ultimate meaning of the phrase, "By law the eldest son is heir to the father," is, that the sovereign commands all persons to act upon that rule, and will, if necessary, force them by the terror of legal punishment to do so. Legal maxims may appear to stand even further from the criminal law than the law of inheritance. It may be said the maxim that the king never dies is part of the law of England, but how can this be resolved into a command? The answer is, that this and other maxims of the same kind are to a great extent subject to the will of courts of justice, which are entrusted by the tacit consent of the sovereign power with a certain discretion in their interpretation, and are to that extent legislators. To the extent of that discretion these maxims are certainly not laws at all, but beyond that discretion they are laws and might be penally enforced. If, for example, a judge, being called upon to apply to a given case the maxim that the king never dies, were expressly to refuse to do so, that refusal might be evidence of judicial misconduct for which he might be made answerable by impeachment or by a criminal information. The extreme improbability of the case has nothing to do with the justice of the principle. The general doctrine well established in English law, that it is a misdemeanor to disobey the lawful commands of the king or the provisions of a public act of parliament, is in exact accordance with it.

Popular use of term "criminal law."

Though the notions of law and crime are thus, in reality, correlative and co-extensive, and though the phrase "criminal law" may thus be accused of tautology, it may be and generally is used in a sense definite enough for practical purposes, but much narrower. Laws relating to murder, theft, or robbery, would be included under the head of criminal law; whilst those which refer to contracts, inheritance, administration,

shipping, landlord and tenant, and the like, would not. What, then, is and what ought to be the principle of this distinction? The first question must be answered by reference to the common use of language, the second by reference to the nature of the things to be classified. According to the common use of language, a crime means something more than mere disobedience to law: it means an act which is both forbidden by law and revolting to the moral sentiments of society. Robbery or murder would, in common language, be described as crimes, but a trifling offence against the revenue laws would not; but this way of using language, though vivid, is obviously altogether indefinite. For example, it is agreed on all hands that murder is, in the popular use of language, a crime, but what in the popular use of language is a murder? Many acts which the law qualifies by that name would excite little or no feeling of moral detestation. In many states and classes of society they might excite the reverse. For example, a man in a fair duel shoots another for seducing his sister. An American soldier, in the War of Independence, rescues a brother insurgent by shooting an English soldier who had captured him. A man shooting at a domestic fowl with intent to steal, accidentally wounds a person with a stray shot corn, and the wounded man dies of lock-jaw six months afterwards. A midwife puts to death a monstrous birth which, though it had human shape, could not have lived to maturity. Two lovers agree to poison themselves together, one provides the poison, each partakes of it, the one who provided it recovers. Each of these cases is a case of wilful murder; each, therefore, is a capital crime, but in a moral point of view they differ endlessly; and whilst the common use of language might describe some of them as crimes, it would describe others as errors, and possibly approve of some as virtuous acts. It is clear, therefore, that the popular use of language throws no light on the question what sort of violations of law are emphatically crimes.

Strict sense of the phrase "criminal law" acts punished by law.

When we inquire what ought to be the principle on which the question should be determined, we must look at the nature of the things to be classified; and here a broad distinction suggests itself. Though all laws are commands, and as

CHAP. I. such may be broken, yet it is not every breach of every law by every person in every capacity for which punishments are provided. In the case just mentioned of the law of inheritance, the law issues a variety of commands in reference to the property of the dead man. It commands all persons, except the heir-at-law, to abstain from it without special grounds. It commands the judges to adjudicate upon the existence of those special grounds, if lawfully required to do so, and it commands the sheriff to enforce the judgment which they deliver. The commands to the judges and the sheriff would in case of need be enforced by punishments, but the general command to the world at large, to abstain from intermeddling, is in general enforced only by the circumstance that, if men do intermeddle, they will have to pay damages and costs to the lawful heir. Unless their misconduct assumes such a form as to become theft, or some other act specifically forbidden under a specific sanction, it is not punished at all.

Punishments distinguished from sanctions.

The definition of crimes may, therefore, be conveniently restricted to acts forbidden by the law under pain of punishment. This definition, however, requires further explanation; for what, it may be asked, is a punishment? Every command involves a sanction, and thus every law forbids every act, which it forbids at all, under pain of punishment. This makes it necessary to give a definition of punishments as distinguished from sanctions.

The sanctions of all laws of every kind will be found to fall under two great heads: those who disobey them may be forced to indemnify a third person either by damages or by specific performance, or they may themselves be subjected to some suffering. In each case the legislator enforces his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion, and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying. It is imposed for public purposes, and has no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, but they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public.

Punishments distinguished from penalties.

It may be worth while to observe that there is a distinction between a punishment and a penalty. The legislator sometimes chooses to deter men from particular courses of conduct, not by affixing a specific punishment to acts done in pursuance of them, but by providing either that any one who pleases, or that particular persons, if they please, may regard such acts in the light of private wrongs, and recover a specific indemnity in respect of them. This is the case with all statutes which authorize common informers to sue for penalties in respect of breaches of law, and also with regard to some of the provisions of the Revenue Acts, under which the Attorney-General can proceed, if he thinks fit, as for a penalty. Penalties differ from punishments in the fact, that they are enforced at the discretion and for the benefit of the informer. They differ from damages in the fact that no personal injury has been done to the informer, and that the penalty which he recovers is in substance a reward for his vigilance in detecting a breach of the law, and not an indemnity for personal loss sustained by it.

Judicial decisions on this point.

This account of the province of criminal law is confirmed by several judicial decisions. The act by which parties to a suit are rendered competent witnesses does not apply to "criminal proceedings," and the question has several times arisen, whether a particular proceeding was criminal within the meaning of the act. The result of the cases appears to be, that the infliction of punishment in the sense of the word just given is the true test by which criminal are distinguished from civil proceedings, and that the moral nature of the act has nothing to do with the question.*

Province of English criminal law includes many acts not immoral.

Crimes being thus defined as acts punished by law, criminal law may be defined as that part of the law which relates to crimes, and it will at once become apparent that these definitions extend the sphere of criminal law considerably beyond the narrow routine of the cases which usually occupy the criminal courts. In this country an immense mass of affairs, which in other parts of the world fall under the head of civil

* Att.-Gen. *v.* Radloff, 10 Exch. 84. Compare Cattell *v.* Ireson, 27 L. J. M.C. 167. In Berry's case, Bell, Cr. Ca. 58, it was held that a bastardy summons is not a criminal proceeding.

CHAP. I. administration, are transacted by the help of the criminal law. For example, the law of nuisances is a branch of the criminal law. A public nuisance is a misdemeanor punishable by fine and imprisonment, and it consists in doing anything which is an annoyance to all the Queen's subjects. It is under this head that questions about the legality of carrying on particular trades in particular situations, the liability to repair highways, and the sufficiency of their state of repair, the lawfulness of erections in rivers, on the sea-coast, or on or near bridges, and the like, are decided. The remedy for improper conduct in these respects is an indictment on which the offender is tried as on any other criminal charge. If he is convicted, an opportunity is in practice given him of abating the nuisance; but if he failed to do so, substantial punishment would be inflicted. This peculiarity in our system may be traced to historical causes, which are more largely referred to and illustrated below. It is sufficient in this place to observe that they illustrate the general proposition, that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but that it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment.

"Penal" would be a better phrase than "criminal" law, as it points out with greater emphasis the specific mark by which the province of law to which it applies is distinguished from other provinces; for the distinction arises not from the nature of the acts contemplated, but from the manner in which they are treated. Crimes frequently come under the cognizance of the law not only as crimes, but for other purposes, and as such form the subject-matter of laws which are not, in any sense of the word, penal. Many crimes, for example, are civil injuries, and as such may be made the subject of actions for damages independently of penal proceedings. This is the case with most assaults, with libels, and with some kinds of frauds. A person committing such acts may either be punished on conviction on an indictment, or compelled to pay damages, on a verdict in a civil action. The act remains the same in each case, though the consequences

which it involves differ according to the mode in which it is treated.

Crimes and torts, how related.

This simple view of the matter avoids the difficulty, which has exercised some ingenuity, of attempting to distinguish between crimes and torts. The two terms do not exclude each other, and, therefore, cannot be distinguished. To ask whether an act is a crime or a tort, is like asking whether a man is a husband or a brother. Whatever is within the scope of the penal law is a crime; whatever is a ground for a claim of damages, as for an injury, is a tort: but there is no reason why the same act should not belong to both classes, and many acts do. Indeed, crimes may come under the cognizance of the law neither as crimes nor as torts. For example, bigamy is a cause of divorce; arson, by the party insured, would be a good defence by an insurance company to an action on a policy. In each of these cases, a crime would be judicially proved before a court of justice; yet the crime would be viewed by the court neither as a crime nor as a tort, but simply as an act affecting the status or the money liability of other persons. It follows from this that the consequences charged upon an act by law, and not the nature of the act itself, is the specific difference by which crimes are distinguished.

Natural classification of criminal law.

Such being, in general, the nature of crimes and of criminal law, what are the elements of which, from the nature of the case, it must be composed? The first and chief division is twofold. Every system of criminal law must be composed, *first*, of laws forbidding specified acts under specified punishments; and, *secondly*, of laws by which these general provisions may be applied to particular cases. The first of these divisions may be described as the law of crimes and punishments; the second as the law of criminal procedure.

LAW OF CRIMES AND PUNISHMENTS.
1. Principles.
2. Definitions.
3. Allotment of punishment.

The law of crimes and punishments must consist of three parts: *first*, General principles, determining what are the elements which must concur in order to constitute an act of disobedience to a law; *secondly*, Definitions of crimes; and, *thirdly*, The apportionment of punishment.

The law of criminal procedure consists of four parts—*first*, The preliminary proceedings; including the taking

CHAP. I. *Procedure.* 1. Instruction. 2. Trial. 3. Rules of evidence. 4. Infliction of punishment.

security, by imprisonment or otherwise, for the appearance at the trial of the suspected person, the collection of evidence against him (called, in the French system, the instruction of the process), and his formal accusation; *secondly*, The regulation of the trial; *thirdly*, The rules governing the evidence produced at the trial; and, *fourthly*, The infliction of punishment. These divisions are inherent in the subject, and must exist, under some form or other, in every nation, and under every conceivable system.

History.

Independently of these broad general divisions, which must apply to every legal system whatever, certain features, peculiar to each particular system, affect the character of every part of it. The skeleton of the criminal law, in every country, is on the same general plan; but the shape of the members, their proportionate importance, and general appearance, differ widely; so that there is a corresponding difference in the functions which they are fitted to discharge.

Laws, in different countries, may be, and are, made and abrogated in very different ways; they are contained in very different repositories; they propose to themselves different objects; they are animated by a different spirit; and these differences show their traces in every part of every system. In some countries the definitions of crimes are more complete than in others. In some, punishments are severe; in others, lenient. In some, the procedure is favourable to the accused; in others, to the prosecutor. The rules of evidence differ widely. In France, for example, they can hardly be said to exist at all. In England, they form one of the most prominent and characteristic parts of the system. The peculiar character of particular systems, in these and other analogous particulars, can be estimated only by historical inquiries.

Plan of the present work.

This general analysis of the province of criminal law is intended to explain the arrangement of this work. As its object is to give a general view of the criminal law of England, it begins by sketching the history of its construction. This forms the subject of the second chapter. The following chapters describe its different component parts in the order indicated above, examining first the general principles on which the subject depends, and then the particular institutions of

our own law, in relation to those general principles. Thus the third chapter treats of the definition of crime in general; the fourth, of the English definitions of particular crimes; the fifth, of criminal procedure in general, illustrated by a comparison of the English and French systems; the sixth, of the peculiarities of English criminal procedure; the seventh, of the principles of evidence in general; the eighth, of English rules of evidence; and the ninth, of English criminal legislation—the way in which the law is made. The work concludes with detailed accounts of four English and three French criminal trials, intended to illustrate the practical operation of our own and the French systems.

CHAPTER II.

HISTORICAL SKETCH OF ENGLISH CRIMINAL LAW.

CHAP. II. Object and arrangement of the chapter. Historically, law of procedure antecedent to law of crimes and punishments.

IN the last chapter I gave an analysis of criminal law in general, according to the order of thought. In the present chapter I propose to give a sketch of the construction of English criminal law, according to the order of time. The two modes of viewing the subject require a different arrangement. In the order of thought, the law of crimes and punishments precedes the law of criminal procedure, inasmuch as it is necessary to understand the object to be attained before it is possible to estimate the means employed for its attainment. In the order of time, the law of criminal procedure precedes the law of crimes and punishments; for definitions of crimes, the general principles which regulate the view which the courts take of them, and the provisions for their punishment, have, in this country, been, to a great extent, the creatures of the courts of justice. According to the oldest theory, the criminal law, as well as the rest of the common law of the land, was an unwritten tradition, in the keeping of the judges, who, from the earliest times to the present day, have enjoyed a qualified power of legislation, by virtue of their right to declare with authority what the law is. That part also of the criminal law which has been expressly enacted by the supreme legislature has always been made with express reference to the existing state of things; and the changes made by legislation, in definitions of crimes and the apportionment of punishments, have been deeper and wider than the alterations introduced into the rules of procedure. The law of crimes and punishments has been more than once completely recast, and is composed, to a great extent, of statutes, of which few are fifty years old. The courts by which the law is administered have undergone few changes, and it