BENTHAM'S

INTRODUCTION TO THE PRINCIPLES

OF

MORALS AND LEGISLATION.

AN

INTRODUCTION

TO THE

PRINCIPLES

OF

MORALS AND LEGISLATION.

BY

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AN

INTRODUCTION

TO THE

PRINCIPLES OF MORALS AND LEGISLATION.

CHAP. XIII.

§ I. GENERAL VIEW OF CASES UNMEET FOR PUNISHMENT.

The end of law is, to augment happiness.

THE general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief.

II.

But punishment is an evil.

But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil *.

What concerns the *end*, and several other topics relative to punishment, dismissed to another work.

* What follows, relative to the subject of punishment ought regularly to be preceded by a distinct chapter on the ends of punishment. But having little to say on that particular branch of the subject, which has not been said before, it seemed better, in a work, which will at any rate be but too voluminous, to omit this title, reserving it for another, hereafter to be published, intituled *The Theory of Punish-*

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III.

Therefore ought not to be admitted;

It is plain, therefore, that in the following cases punishment ought not to be inflicted.

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*ment**. To the same work I must refer the analysis of the several possible modes of punishment, a particular and minute examination of the nature of each, and of its advantages and disadvantages, and various other disquisitions, which did not seem absolutely necessary to be inserted here. A very few words, however, concerning the *ends* of punishment, can scarcely be dispensed with.

Concise view of the ends of punishment.

The immediate principal end of punishment is to controul action. This action is either that of the offender, or of others: that of the offender it controuls by its influence, either on his will, in which case it is said to operate in the way of *reformation;* or on his physical power, in which case it is said to operate by *disablement:* that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example.* A kind of collateral end, which it has a natural tendency to answer, is that of affording a pleasure or satisfaction to the party injured, where there is one, and, in general, to parties whose ill-will, whether on a self-regarding account, or on the account of sympathy or antipathy, has been excited by the offence. This purpose, as far as it can be answered *gratis*, is a beneficial one. But no punishment ought to be allotted merely to this purpose, because (setting aside its effects in the way of controul) no such pleasure is ever produced by punishment as can be equivalent to the pain. The punish-

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* This is the work which, from the Author's papers, has since been published by Mr. Dumont in French, in company with *The Theory of Reward* added to it, for the purpose of mutual illustration. It is in contemplation to publish them both in English, from the Author's manuscripts, with the benefit of any amendments that have been made by Mr. Dumont.

1. Where it is *groundless*; where there is no mischief for it to prevent; the act not being mischievous upon the whole. 1. Where groundless.

2. Where it must be *inefficacious*: where it cannot act so as to prevent the mischief. 2. Inefficacious.

3. Where it is *unprofitable*, or too *expensive*; where the mischief it would produce would be greater than what it prevented. 3. Unprofitable.

4. Where it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate. 4. Or needless.

§. 2. *Cases in which punishment is groundless.*

These are,

IV.

1. Where there has never been any mischief: where no mischief has been produced to any body by the act in question. Of this number are those in which the act was such as might, on some 1. Where there has never been any mischief: as in the case of consent.

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ment, however, which is allotted to the other purpose, ought, as far as it can be done without expence, to be accommodated to this. Satisfaction thus administered to a party injured, in the shape of a dissocial pleasure*, may be stiled a vindictive satisfaction or compensation: as a compensation, administered in the shape of a self-regarding profit, or stock of pleasure, may be stiled a lucrative one. See B. I. tit. vi. [Compensation.] Example is the most important end of all, in proportion as the *number* of the persons under temptation to offend is to *one*.

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* See ch. x. [Motives.]

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occasions, be mischievous or disagreeable, but the person whose interest it concerns gave his *consent* to the performance of it *. This consent, provided it be free, and fairly obtained *, is the best proof that can be produced, that, to the person who gives it, no mischief, at least no immediate mischief, upon the whole, is done. For no man can be so good a judge as the man himself, what it is gives him pleasure or displeasure.

V.

2. Where the mischief was outweighed: as in precaution against calamity, and the exercise of powers.

2. Where the mischief was *outweighed:* although a mischief was produced by that act, yet the same act was necessary to the production of a benefit which was of greater value † than the mischief. This may be the case with any thing that is done in the way of precaution against instant calamity, as also with any thing that is done in the exercise of the several sorts of powers necessary to be established in every community, to wit, domestic, judicial, military, and supreme ‡.

VI.

3. —or will, for a certainty be cured by compensation.

3. Where there is a certainty of an adequate compensation: and that in all cases where the offence can be committed. This supposes two things: 1. That the offence is such as admits of an adequate compensation: 2. That such a compensation is sure to be forthcoming. Of

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* See B. I. tit. [Justifications.] † See supra, ch. iv. [Value.]
‡ See Book I. tit. [Justifications.]

these suppositions, the latter will be found to be a merely ideal one: a supposition that cannot, in the universality here given to it, be verified by fact. It cannot, therefore, in practice, be numbered amongst the grounds of absolute impunity. It may, however, be admitted as a ground for an abatement of that punishment, which other considerations, standing by themselves, would seem to dictate*.

§ 3. *Cases in which punishment must be inefficacious.*

These are,

VII.

1. Where the penal provision is *not established* until after the act is done. Such are the cases, 1. Of an *ex-post-facto* law; where the legislator himself appoints not a punishment till after the act is done. 2. Of a sentence beyond the law; where the judge, of his own authority, appoints a

1. Where the penal provision comes too late: as in, 1. An *ex-post-facto* law. 2. An ultra-legal sentence.

* This, for example, seems to have been one ground, at least, of the favour shewn by perhaps all systems of laws, to such offenders as stand upon a footing of responsibility: shewn, not directly indeed to the persons themselves; but to such offences as none but responsible persons are likely to have the opportunity of engaging in. In particular, this seems to be the reason why embezzlement, in certain cases, has not commonly been punished upon the footing of theft: nor mercantile frauds upon that of common sharping†.

Hence the favour shewn to the offences of responsible offenders: such as simple mercantile frauds.

† See tit. [Simple merc. Defraudment.]

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punishment which the legislator had not appointed.

VIII.

2. Or is not made known: as in a law not sufficiently promulgated.

2. Where the penal provision, though established, is *not conveyed* to the notice of the person on whom it seems intended that it should operate. Such is the case where the law has omitted to employ any of the expedients which are necessary, to make sure that every person whatsoever, who is within the reach of the law, be apprized of all the cases whatsoever, in which (being in the station of life he is in) he can be subjected to the penalties of the law*.

IX.

3. Where the will cannot be deterred from *any* act: as in,

3. Where the penal provision, though it were conveyed to a man's notice, *could produce no effect* on him, with respect to the preventing him from engaging in any act of the *sort* in question. Such is the case,

[a] Infancy. 1. In extreme *infancy;* where a man has not yet attained that state or disposition of mind in which the prospect of evils so distant as those which are held forth by the

[b] Insanity. law, has the effect of influencing his conduct. 2. In *insanity;* where the person, if he has attained to that disposition, has since been deprived of it through the influence of some permanent though

[c] Intoxication. unseen cause. 3. In *intoxication;* where he has been deprived of it by the transient influence of a

* See B. II. Appendix. tit. iii. [Promulgation.]

visible cause: such as the use of wine, or opium, or other drugs, that act in this manner on the nervous system: which condition is indeed neither more nor less than a temporary insanity produced by an assignable cause*.

X.

4. Where the penal provision (although, being conveyed to the party's notice, it might very well prevent his engaging in acts of the sort in ques-

4. Or not from the individual act in question, as in,

* Notwithstanding what is here said, the cases of infancy and intoxication (as we shall see hereafter) cannot be looked upon in practice as affording sufficient grounds for absolute impunity. But this exception in point of practice is no objection to the propriety of the rule in point of theory. The ground of the exception is neither more nor less than the difficulty there is of ascertaining the matter of fact: viz. whether at the requisite point of time the party was actually in the state in question; that is, whether a given case comes really under the rule. Suppose the matter of fact capable of being perfectly ascertained, without danger or mistake, the impropriety of punishment would be as indubitable in these cases as in any other†.

In infancy and intoxication the case can hardly be proved to come under the rule.

The reason that is commonly assigned for the establishing an exemption from punishment in favour of infants, insane persons, and persons under intoxication, is either false in fact, or confusedly expressed. The phrase is, that the will of these persons concurs not with the act; that they have no vicious will; or, that they have not the free use of their will. But suppose all this to be true? What is it to the purpose? Nothing: except in as far as it implies the reason given in the text.

The reason for not punishing in these three cases is commonly put upon a wrong footing.

† See B. I. tit. iv. [Exemptions] and tit. vii. [Extenuations.]

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tion, provided he knew that it related to those acts) could not have this effect, with regard to the *individual* act he is about to engage in: to wit, because he knows not that it is of the number of those to which the penal provision relates. This may happen, 1. In the case of *unintentionality;* where he intends not to engage, and thereby knows not that he is about to engage, in the *act* in which eventually he is about to engage*.

[a] Unintentionality.

[b] Unconsciousness.

2. In the case of *unconsciousness;* where, although he may know that he is about to engage in the *act* itself, yet, from not knowing all the material *circumstances* attending it, he knows not of the *tendency* it has to produce that mischief, in contemplation of which it has been made penal in most instances.

[c] Mis-supposal.

3. In the case of *mis-supposal;* where, although he may know of the tendency the act has to produce that degree of mischief, he supposes it, though mistakenly, to be attended with some circumstance, or set of circumstances, which, if it had been attended with, it would either not have been productive of that mischief, or have been productive of such a greater degree of good, as has determined the legislator in such a case not to make it penal†.

XI.

5. Or is acted on by an opposite superior force: as by,

5. Where, though the penal clause might exercise a full and prevailing influence, were it to

* See ch. viii. [Intentionality.] † See ch. ix. [Consciousness.]

act alone, yet by the *predominant* influence of some opposite cause upon the will, it must necessarily be ineffectual; because the evil which he sets himself about to undergo, in the case of his *not* engaging in the act, is so great, that the evil denounced by the penal clause, in case of his engaging in it, cannot appear greater. This may happen, 1. In the case of *physical danger;* where the evil is such as appears likely to be brought about by the unassisted powers of *nature*. 2. In the case of a *threatened mischief;* where it is such as appears likely to be brought about through the intentional and conscious agency of *man**.

[a] Physical danger.

[b] Threatened mischief.

XII.

6. Where (though the penal clause may exert a full and prevailing influence over the *will* of the party) yet his *physical faculties* (owing to the pre-

6. —or the bodily organs cannot follow its determination: as under

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* The influences of the *moral* and *religious* sanctions, or, in other words, of the motives of *love of reputation* and *religion*, are other causes, the force of which may, upon particular occasions, come to be greater than that of any punishment which the legislator is *able*, or at least which he will *think proper*, to apply. These, therefore, it will be proper for him to have his eye upon. But the force of these influences is variable and different in different times and places: the force of the foregoing influences is constant and the same, at all times and every where. These, therefore, it can never be proper to look upon as safe grounds for establishing absolute impunity: owing (as in the above-mentioned cases of infancy and intoxication) to the impracticability of ascertaining the matter of fact.

Why the influence of the moral and religious sanctions is not mentioned in the same view.

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dominant influence of some physical cause) are not in a condition to follow the determination of the will: insomuch that the act is absolutely *involuntary*. Such is the case of physical *compulsion* or *restraint*, by whatever means brought about; where the man's hand, for instance, is pushed against some object which his will disposes him *not* to touch; or tied down from touching some object which his will disposes him to touch.

Physical compulsion or restraint.

§ 4. *Cases where punishment is unprofitable.*

These are,

XIII.

1. Where, in the *sort* of case in question, the punishment would produce more evil than the offence would.

1. Where, on the one hand, the nature of the offence, on the other hand, that of the punishment, are, *in the ordinary state of things*, such, that when compared together, the evil of the latter will turn out to be greater than that of the former.

XIV.

Evil producible by a punishment —its four branches— viz. [a] Restraint.

Now the evil of the punishment divides itself into four branches, by which so many different sets of persons are affected. 1. The evil of *coercion* or *restraint*: or the pain which it gives a man not to be able to do the act, whatever it be, which by the apprehension of the punishment he is deterred from doing. This is felt by those by whom the law is *observed*. 2. The evil of *apprehension*: or the pain which a man, who has exposed himself to punishment, feels at the thoughts of undergoing it. This is felt by those by whom

[b] Apprehension.

the law has been *broken*, and who feel themselves in *danger* of its being executed upon them. 3. The evil of *sufferance**: or the pain which a man feels, in virtue of the punishment itself, from the time when he begins to undergo it. This is felt by those by whom the law is broken, and upon whom it comes actually to be executed. 4. The pain of sympathy, and the other *derivative* evils resulting to the persons who are in *connection* with the several classes of original sufferers just mentioned†. Now of these four lots of evil, the first will be greater or less, according to the nature of the act from which the party is restrained: the second and third according to the nature of the punishment which stands annexed to that offence.

[c] Sufferance.

[d] Derivative evils.

XV.

On the other hand, as to the evil of the offence, this will also, of course, be greater or less, according to the nature of each offence. The proportion between the one evil and the other will therefore be different in the case of each particular offence. The cases, therefore, where punishment is unprofitable on this ground, can by no other means be discovered, than by an examination of each particular offence; which is what will be the business of the body of the work.

(The evil of the offence being different, according to the nature of the offence, cannot be represented here.)

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* See ch. v. [Pleasures and Pains.]

† See ch. xii. [Consequences] iv.

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XVI.

2.—Or in the *individual* case in question: by reason of

2. Where, although in the *ordinary state* of things, the evil resulting from the punishment is not greater than the benefit which is likely to result from the force with which it operates, during the same space of time, towards the excluding the evil of the offence, yet it may have been rendered so by the influence of some *occasional circumstances*. In the number of these circumstances may be, 1. The multitude of delinquents at a particular juncture; being such as would increase, beyond the ordinary measure, the *quantum* of the second and third lots, and thereby also of a part of the fourth lot, in the evil of the punishment. 2. The extraordinary value of the services of some one delinquent; in the case where the effect of the punishment would be to deprive the community of the benefit of those services. 3. The displeasure of the *people*; that is, of an indefinite number of the members of the *same* community, in cases where (owing to the influence of some occasional incident) they happen to conceive, that the offence or the offender ought not to be punished at all, or at least ought not to be punished in the way in question. 4. The displeasure of *foreign powers*; that is, of the governing body, or a considerable number of the members of some *foreign* community or communities, with which the community in question, is connected.

[a] The multitude of delinquents.

[b] The value of a delinquent's service.

[c] The displeasure of the people.

[d] The displeasure of foreign powers.

§ 5. *Cases where punishment is needless.*

These are,

XVII.

1. Where the purpose of putting an end to the practice may be attained as effectually at a cheaper rate: by instruction, for instance, as well as by terror: by informing the understanding, as well as by exercising an immediate influence on the will. This seems to be the case with respect to all those offences which consist in the disseminating pernicious principles in matters of *duty;* of whatever kind the duty be; whether political, or moral, or religious. And this, whether such principles be disseminated *under,* or even *without,* a sincere persuasion of their being beneficial. I say, even *without:* for though in such a case it is not instruction that can prevent the writer from endeavouring to inculcate his principles, yet it may the readers from adopting them: without which, his endeavouring to inculcate them will do no harm. In such a case, the sovereign will commonly have little need to take an active part: if it be the interest of *one* individual to inculcate principles that are pernicious, it will as surely be the interest of *other* individuals to expose them. But if the sovereign must needs take a part in the controversy, the pen is the proper weapon to combat error with, not the sword.

1. Where the mischief is to be prevented at a cheaper rate; as,

By instruction.

CHAP. XIV.

OF THE PROPORTION BETWEEN PUNISHMENTS AND OFFENCES.

I.

Recapitulation. WE have seen that the general object of all laws is to prevent mischief; that is to say, when it is worth while; but that, where there are no other means of doing this than punishment, there are four cases in which it is *not* worth while.

II.

Four objects of punishment. When it *is* worth while, there are four subordinate designs or objects, which, in the course of his endeavours to compass, as far as may be, that one general object, a legislator, whose views are governed by the principle of utility, comes naturally to propose to himself.

III.

1st Object —to prevent all offences. 1. His first, most extensive, and most eligible object, is to prevent, in as far as it is possible, and worth while, all sorts of offences whatsoever*: in other words, so to manage, that no offence whatsoever may be committed.

IV.

2d Object— to prevent the worst. 2. But if a man must needs commit an offence of some kind or other, the next object is to induce

* By *offences* I mean, at present, acts which appear to him to have a tendency to produce mischief.

him to commit an offence *less* mischievous, *rather* than one *more* mischievous: in other words, to choose always the *least* mischievous, of two offences that will either of them suit his purpose.

V.

3d Object —to keep down the mischief.

3. When a man has resolved upon a particular offence, the next object is to dispose him to do *no more* mischief than is *necessary* to his purpose: in other words, to do as little mischief as is consistent with the benefit he has in view.

VI.

4th Object —to act at the least expence.

4. The last object is, whatever the mischief be, which it is proposed to prevent, to prevent it at as *cheap* a rate as possible.

VII.

Rules of proportion between punishments and offences.

Subservient to these four objects, or purposes, must be the rules or canons by which the proportion of punishments* to offences is to be governed.

VIII.

Rule 1.

Rule 1. Outweigh the profit of the offence.

1. The first object, it has been seen, is to pre-

* [Punishments.] The same rules (it is to be observed) may be applied, with little variation, to rewards as well as punishment: in short, to motives in general, which, according as they are of the pleasurable or painful kind, are of the nature of *reward* or *punishment*: and, according as the act they are applied to produce is of the positive or negative kind, are stiled impelling or restraining. See ch. x. [Motives] xliii.

The same rule applicable to motives in general.

CHAP. XIV.

vent, in as far as it is worth while, all sorts of offences; therefore,

The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence†.*

If it be, the offence (unless some other considerations, independent of the punishment, should intervene and operate efficaciously in the cha-

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Profit may be of any other kind, as well as pecuniary.

* [Profit.] By the profit of an offence, is to be understood, not merely the pecuniary profit, but the pleasure or advantage, of whatever kind it be, which a man reaps, or expects to reap, from the gratification of the desire which prompted him to engage in the offence‡.

Impropriety of the notion that the punishment ought not to increase with the temptation.

It is the profit (that is, the expectation of the profit) of the offence that constitutes the *impelling* motive, or, where there are several, the sum of the impelling motives, by which a man is promted to engage in the offence. It is the punishment, that is, the expectation of the punishment, that constitutes the *restraining* motive, which, either by itself, or in conjunction with others, is to act upon him in a *contrary* direction, so as to induce him to abstain from engaging in the offence. Accidental circumstances apart, the strength of the temptation is as the force of the seducing, that is, of the impelling motive or motives. To say then, as authors of great merit and great name have said that the punishment ought not to increase with the strength of the temptation, is as much as to say in mechanics, that the moving force or *momentum* of the *power* need not increase in proportion to the momentum of the *burthen*.

† Beccaria, dei diletti, § 6. id. trad. par. Morellet, § 23.

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‡ See ch. x. [Motives] § 1.

racter of tutelary motives*) will be sure to be committed notwithstanding†: the whole lot of

* See ch. xi. [Dispositions] xxix.

† It is a well-known adage, though it is to be hoped not a true one, that every man has his price. It is commonly meant of a man's virtue. This saying, though in a very different sense, was strictly verified by some of the Anglo-saxon laws: by which a fixed price was set, not upon a man's virtue indeed, but upon his life: that of the sovereign himself among the rest. For 200 shillings you might have killed a peasant: for six times as much, a nobleman: for six-and-thirty times as much you might have killed the king‡. A king in those days was worth exactly 7,200 shillings. If then the heir to the throne, for example, grew weary of waiting for it, he had a secure and legal way of gratifying his impatience: he had but to kill the king with one hand, and pay himself with the other, and all was right. An earl Godwin, or a duke Streon, could have bought the lives of a whole dynasty. It is plain, that if ever a king in those days died in his bed, he must have had something else, besides this law, to thank for it. This being the production of a remote and barbarous age, the absurdity of it is presently recognized: but, upon examination, it would be found, that the freshest laws of the most civilized nations are continally falling into the same error§. This, in short, is the case wheresoever the punishment is fixed while the profit of delinquency is indefinite: or, to speak more precisely, where the punishment is limited to such a mark, that the profit of delinquency may reach beyond it.

‡ Wilkin's Leg. Anglo-sax. p. 71, 72. See Hume, Vol. I. App. I. p. 219.

§ See in particular the *English Statute laws* throughout, *Bonaparte's* Penal Code, and the recently enacted or not enacted *Spanish* Penal Code.

Note by the Author, July, 1822.

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punishment will be thrown away: it will be altogether *inefficacious**.

IX.

The propriety of taking the strength of the temptation for a ground of abatement, no objection to this rule.

The above rule has been often objected to, on account of its seeming harshness: but this can only have happened for want of its being properly understood. The strength of the temptation, *cæteris paribus*, is as the profit of the offence: the quantum of the punishment must rise with the profit of the offence: *cæteris paribus*, it must therefore rise with the strength of the temptation. This there is no disputing. True it is, that the stronger the temptation, the less conclusive is the indication which the act of delinquency affords of the depravity of the offender's disposition†. So far then as the absence of any aggravation, arising from extraordinary depravity of disposition, may operate, or at the utmost, so far as the presence of a ground of extenuation, resulting from the innocence or beneficence of the offender's disposition, can operate, the strength of the temptation may operate in abatement of the demand for punishment. But it can never operate so far as to indicate the propriety of making the punishment ineffectual, which it is sure to be when brought below the level of the apparent profit of the offence.

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* See ch. xiii. [Cases unmeet] § 1.

† See ch. xi. [Dispositions] xlii.

The partial benevolence which should prevail for the reduction of it below this level, would counteract as well those purposes which such a motive would actually have in view, as those more extensive purposes which benevolence ought to have in view: it would be cruelty not only to the public, but to the very persons in whose behalf it pleads: in its effects, I mean, however opposite in its intention. Cruelty to the public, that is cruelty to the innocent, by suffering them, for want of an adequate protection, to lie exposed to the mischief of the offence: cruelty even to the offender himself, by punishing him to no purpose, and without the chance of compassing that beneficial end, by which alone the introduction of the evil of punishment is to be justified.

X.

Rule 2.

Rule 2. Venture more against a great offence than a small one.

But whether a given offence shall be prevented in a given degree by a given quantity of punishment, is never any thing better than a chance; for the purchasing of which, whatever punishment is employed, is so much expended in advance. However, for the sake of giving it the better chance of outweighing the profit of the offence,

The greater the mischief of the offence, the greater is the expence, which it may be worth while to be at, in the way of punishment.*

* For example, if it can ever be worth while to be at the expence of so horrible a punishment as that of burning alive, Example.—Incendiarism and coining.

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XI.

Rule 3.

Rule 3. Cause the least of two offences to be preferred.

The next object is, to induce a man to choose always the least mischievous of two offences; therefore

*Where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less**.

XII.

Rule 4.

Rule 4. Punish for each particle of the mischief.

When a man has resolved upon a particular offence, the next object is, to induce him to do no more mischief than what is necessary for his purpose: therefore

The punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it†.

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it will be more so in the view of preventing such a crime as that of murder or incendiarism, than in the view of preventing the uttering of a piece of bad money. See B. I. tit. [Defraudment touching the Coin] and [Incendiarism.]

* Espr. des Loix, L. vi. c. 16.

Example.—In blows given, and money stolen.

† If any one have any doubt of this, let him conceive the offence to be divided into as many separate offences as there are distinguishable parcels of mischief that result from it. Let it consist, for example, in a man's giving you ten blows, or stealing from you ten shillings. If then, for giving you ten blows, he is punished no more than for giving you five, the giving you five of these ten blows is an offence for which

XIII.

Rule 5.

Rule 5. Punish in no degree without special reason.

The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore

The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.

XIV.

Rule 6.

Rule 6. Attend to circumstances influencing sensibility.

It is further to be observed, that owing to the different manners and degrees in which persons under different circumstances are affected by the same exciting cause, a punishment which is the same in name will not always either really produce, or even so much as appear to others to

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there is no punishment at all: which being understood, as often as a man gives you five blows, he will be sure to give you five more, since he may have the pleasure of giving you these five for nothing. In like manner, if for stealing from you ten shillings, he is punished no more than for stealing five, the stealing of the remaining five of those ten shillings is an offence for which there is no punishment at all. This rule is violated in almost every page of every body of laws I have ever seen.

The profit, it is to be observed, though frequently, is not constantly, proportioned to the mischief: for example, where a thief, along with the things he covets, steals others which are of no use to him. This may happen through wantonness, indolence, precipitation, &c. &c.

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produce, in two different persons the same degree of pain: therefore,

That the quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into account.*

XV.

Commparative view of the above rules.

Of the above rules of proportion, the four first, we may perceive, serve to mark out the limits on the side of diminution; the limits *below* which a punishment ought not to be *diminished*: the fifth, the limits on the side of increase; the limits *above* which it ought not to be *increased*. The five first are calculated to serve as guides to the legislator: the sixth is calculated, in some measure, indeed, for the same purpose; but principally for guiding the judge in his endeavours to conform, on both sides, to the intentions of the legislator.

XVI.

Into the account of the *value* of a punishment, must be taken its deficiency in point of certainty and proximity.

Let us look back a little. The first rule, in order to render it more conveniently applicable to practice, may need perhaps to be a little more particularly unfolded. It is to be observed, then, that for the sake of accuracy, it was necessary, instead of the word *quantity* to make use of the less perspicuous term *value*. For the word *quantity* will not properly include the circumstances

* See ch. vi: [Sensibility.]

either of certainty or proximity: circumstances which, in estimating the value of a lot of pain or pleasure, must always be taken into the account*. Now, on the one hand, a lot of punishment is a lot of pain; on the other hand, the profit of an offence is a lot of pleasure, or what is equivalent to it. But the profit of the offence *is* commonly more *certain* than the punishment, or, what comes to the same thing, *appears* so at least to the offender. It is at any rate commonly more *immediate*. It follows, therefore, that, in order to maintain its superiority over the profit of the offence, the punishment must have its value made up in some other way, in proportion to that whereby it falls short in the two points of *certainty* and *proximity*. Now there is no other way in which it can receive any addition to its *value*, but by receiving an addition in point of *magnitude*. Wherever then the value of the punishment falls short, either in point of *certainty*, or of *proximity*, of that of the profit of the offence, it must receive a proportionable addition in point of *magnitude* †.

XVII.

Also, into the account of the mis-

Yet farther. To make sure of giving the value of the punishment the superiority over that of the

* See ch. iv. [Value.]

† It is for this reason, for example, that simple compensation is never looked upon as sufficient punishment for theft or robbery.

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chief, and profit of the offence, the mischief and profit of other offences of the same *habit*.

offence, it may be necessary, in some cases, to take into the account the profit not only of the *individual* offence to which the punishment is to be annexed, but also of such *other* offences of the *same sort* as the offender is likely to have already committed without detection. This random mode of calculation, severe as it is, it will be impossible to avoid having recourse to, in certain cases: in such, to wit, in which the profit is pecuniary, the chance of detection very small, and the obnoxious act of such a nature as indicates a habit: for example, in the case of frauds against the coin. If it be *not* recurred to, the practice of committing the offence will be sure to be, upon the balance of the account, a gainful practice. That being the case, the legislator will be absolutely sure of *not* being able to suppress it, and the whole punishment that is bestowed upon it will be thrown away. In a word (to keep to the same expressions we set out with) that whole quantity of punishment will be *inefficacious*.

XVIII.

Rule 7.

Rule 7. Want of certainty must be made up in magnitude.

These things being considered, the three following rules may be laid down by way of supplement and explanation to Rule 1.

To enable the value of the punishment to outweigh that of the profit of the offence, it must be encreased, in point of magnitude, in proportion as it falls short in point of certainty.

XIX.

Rule 8.

Rule 8. So also want of proximity.

Punishment must be further encreased in point of magnitude, in proportion as it falls short in point of proximity.

XX.

Rule 9.

Rule 9. For acts indicative of a habit punish as for the habit.

Where the act is conclusively indicative of a habit, such an encrease must be given to the punishment as may enable it to outweigh the profit not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.

XXI.

The remaining rules are of less importance.

There may be a few other circumstances or considerations which may influence, in some small degree, the demand for punishment: but as the propriety of these is either not so demonstrable, or not so constant, or the application of them not so determinate, as that of the foregoing, it may be doubted whether they be worth putting on a level with the others.

XXII.

Rule 10.

Rule 10. For the sake of quality, increase in quantity.

When a punishment, which in point of quality is particularly well calculated to answer its intention, cannot exist in less than a certain quantity, it may sometimes be of use, for the sake of employing it, to stretch a little beyond that quantity which, on other accounts, would be strictly necessary.

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XXIII.

Rule 11.

Rule 11. Particularly for a moral lesson.

In particular, this may sometimes be the case, where the punishment proposed is of such a nature as to be particularly well calculated to answer the purpose of a moral lesson.*

XXIV.

Rule 12.

Rule 12. Attend to circumstances which may render punishment unprofitable.

The tendency of the above considerations is to dictate an augmentation in the punishment: the following rule operates in the way of diminution. There are certain cases (it has been seen†) in which, by the influence of accidental circumstances, punishment may be rendered unprofit-

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A punishment applied by way of moral lesson, what.

* A punishment may be said to be calculated to answer the purpose of a moral lesson, when, by reason of the ignomy it stamps upon the offence, it is calculated to inspire the public with sentiments of aversion towards those pernicious habits and dispositions with which the offence appears to be connected; and thereby to inculcate the opposite beneficial habits and dispositions.

Example.—In simple corporal injuries.

It is this, for example, if any thing, that must justify the application of so severe a punishment as the infamy of a public exhibition, hereinafter proposed, for him who lifts up his hand against a woman, or against his father. See B. I. tit. [Simp. corporal injuries.]

Example—In military laws.

It is partly on this principle, I suppose, that military legislators have justified to themselves the inflicting death on the soldier who lifts up his hand against his superior officer.

† See ch. xiii. [Cases unmeet.] § 4.

able in the whole: in the same cases it may chance to be rendered unprofitable as to a part only. Accordingly,

In adjusting the quantum of punishment, the circumstances, by which all punishment may be rendered unprofitable, ought to be attended to.

XXV.

Rule 13.

Rule 13. For simplicity's sake, small disproportions may be neglected.

It is to be observed, that the more various and minute any set of provisions are, the greater the chance is that any given article in them will not be borne in mind: without which, no benefit can ensue from it. Distinctions, which are more complex than what the conceptions of those whose conduct it is designed to influence can take in, will even be worse than useless. The whole system will present a confused appearance: and thus the effect, not only of the proportions established by the articles in question, but of whatever is connected with them, will be destroyed*. To draw a precise line of direction in such case seems impossible. However, by way of memento, it may be of some use to subjoin the following rule.

Among provisions designed to perfect the proportion between punishments and offences, if any occur, which, by their own particular good effects, would

* See B. II. tit. [Purposes.] Append. tit. [Composition.]

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*not make up for the harm they would do by adding to the intricacy of the Code, they should be omitted**.

XXVI.

Auxiliary force of the physical, moral, and religious sanction, not here allowed for—why.

It may be remembered, that the political sanction, being that to which the sort of punishment belongs, which in this chapter is all along in view, is but one of four sanctions, which may all of them contribute their share towards producing the same effects. It may be expected, therefore, that in adjusting the quantity of political punishment, allowance should be made for the assistance it may meet with from those other controuling powers. True it is, that from each of these several sources a very powerful assistance may sometimes be derived. But the case is, that (setting aside the moral sanction, in the case where the force of it is expressly adopted into and modified by the political†) the force of those other powers is never determinate enough to be depended upon. It can never be reduced, like political punishment, into exact lots, nor meted out in number, quantity,

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Proportionality carried very far in the present work—why.

* Notwithstanding this rule, my fear is, that in the ensuing model, I may be thought to have carried my endeavours at proportionality too far. Hitherto scarce any attention has been paid to it. Montesquieu seems to have been almost the first who has had the least idea of any such thing. In such a matter, therefore, excess seemed more eligible than defect. The difficulty is to invent: that done, if any thing seems superfluous, it is easy to retrench.

† See B. I. tit. [Punishments.]

and value. The legislator is therefore obliged to provide the full complement of punishment, as if he were sure of not receiving any assistance whatever from any of those quarters. If he does, so much the better: but least he should not, it is necessary he should, at all events, make that provision which depends upon himself.

XXVII.

Recapitulation.

It may be of use, in this place, to recapitulate the several circumstances, which, in establishing the proportion betwixt punishments and offences, are to be attended to. These seem to be as follows:

I. *On the part of the offence:*

1. The profit of the offence;
2. The mischief of the offence;
3. The profit and mischief of other greater or lesser offences, of different sorts, which the offender may have to choose out of;
4. The profit and mischief of other offences, of the same sort, which the same offender may probably have been guilty of already.

II. *On the part of the punishment:*

5. The magnitude of the punishment: composed of its intensity and duration;
6. The deficiency of the punishment in point of certainty;
7. The deficiency of the punishment in point of proximity;

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8. The quality of the punishment;
9. The accidental advantage in point of quality of a punishment, not strictly needed in point of quantity;
10. The use of a punishment of a particular quality, in the character of a moral lesson.

III. *On the part of the offender:*

11. The responsibility of the class of persons in a way to offend;
12. The sensibility of each particular offender;
13. The particular merits or useful qualities of any particular offender, in case of a punishment which might deprive the community of the benefit of them;
14. The multitude of offenders on any particular occasion.

IV. *On the part of the public,* at any particular conjuncture;

15. The inclinations of the people, for or against any quantity or mode of punishment;
16. The inclinations of foreign powers.

V. *On the part of the law:* that is, of the public for a continuance:

17. The necessity of making small sacrifices, in point of proportionality, for the sake of simplicity.

XXVIII.

The nicety here ob-

There are some, perhaps, who, at first sight,

may look upon the nicety employed in the adjustment of such rules, as so much labour lost: for gross ignorance, they will say, never troubles itself about laws, and passion does not calculate. But the evil of ignorance admits of cure*: and as to the proposition that passion does not calculate, this like most of these very general and oracular propositions, is not true. When matters of such importance as pain and pleasure are at stake, and these in the highest degree (the only matters, in short, that can be of importance) who is there that does not calculate? Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate†. Passion calculates, more or less, in every man: in different men, according to the warmth or coolness of their dispositions: according to the firmness or irritability of their minds: according to the nature of the motives by which they are acted upon. Happily, of all passions, that is the most given to calculation, from the excesses of which, by reason of its strength, constancy, and universality, society has most to apprehend‡: I mean that which corres-

CHAP. XIV. served vindicated from the charge of inutility.

* See Append. tit. [Promulgation.]

† There are few madmen but what are observed to be afraid of the strait waistcoat.

‡ See ch. xii. [Consequences.] xxxiii.

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ponds to the motive of pecuniary interest: so that these niceties, if such they are to be called, have the best chance of being efficacious, where efficacy is of the most importance.

CHAP. XV.

OF THE PROPERTIES TO BE GIVEN TO A LOT OF PUNISHMENT.

I.

Properties are to be governed by proportion.

It has been shewn what the rules are, which ought to be observed in adjusting the proportion between the punishment and the offence. The properties to be given to a lot of punishment, in every instance, will of course be such as it stands in need of, in order to be capable of being applied, in conformity to those rules: the *quality* will be regulated by the *quantity*.

II.

Property 1. Variability.

The first of those rules, we may remember, was, that the quantity of punishment must not be less, in any case, than what is sufficient to outweigh the profit of the offence: since, as often as it is less, the whole lot (unless by accident the deficiency should be supplied from some of the other sanctions) is thrown away: it is *inefficacious*. The fifth was, that the punishment ought in no case to be more than what is required by the several other rules: since, if it be, all that is above that quantity is *needless*. The fourth was, that the punishment should be adjusted in such manner to each individual offence, that every part of the mischief of that offence may have a penalty (that is, a tutelary motive) to encounter it; other-

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wise, with respect to so much of the offence as has not a penalty to correspond to it, it is as if there were no punishment in the case. Now to none of those rules can a lot of punishment be conformable, unless, for every variation in point of quantity, in the mischief of the species of offence to which it is annexed, such lot of punishment admits of a correspondent variation. To prove this, let the profit of the offence admit of a multitude of degrees. Suppose it, then, at any one of these degrees: if the punishment be less than what is suitable to that degree, it will be *inefficacious;* it will be so much thrown away: if it be more, as far as the difference extends, it will be *needless;* it will therefore be thrown away also in that case.

The first property, therefore, that ought to be given to a lot of punishment, is that of being variable in point of quantity, in conformity to every variation which can take place in either the profit or mischief of the offence. This property might, perhaps, be termed, in a single word, *variability*.

III.

Property 2. Equability.

A second property, intimately connected with the former, may be stiled *equability*. It will avail but little, that a mode of punishment (proper in all other respects) has been established by the legislator; and that capable of being screwed up or let down to any degree that can be required; if, after all, whatever degree of it be pitched upon,

that same degree shall be liable, according to circumstances, to produce a very heavy degree of pain, or a very slight one, or even none at all. In this case, as in the former, if circumstances happen one way, there will be a great deal of pain produced which will be *needless:* if the other way, there will be no pain at all applied, or none that will be *efficacious.* A punishment, when liable to this irregularity, may be stiled an unequable one: when free from it, an equable one. The quantity of pain produced by the punishment will, it is true, depend in a considerable degree upon circumstances distinct from the nature of the punishment itself: upon the condition which the offender is in, with respect to the circumstances by which a man's sensibility is liable to be influenced. But the influence of these very circumstances will in many cases be reciprocally influenced by the nature of the punishment: in other words, the pain which is produced by any mode of punishment, will be the joint effect of the punishment which is applied to him, and the circumstances in which he is exposed to it. Now there are some punishments, of which the effect may be liable to undergo a greater alteration by the influence of such foreign circumstances, than the effect of other punishments is liable to undergo. So far, then, as this is the case, equability or unequability may be regarded as properties belonging to the punishment itself.

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Punishments which are apt to be deficient in this respect.

IV.

An example of a mode of punishment which is apt to be unequable, is that of *banishment*, when the *locus a quo* (or place the party is banished from) is some determinate place appointed by the law, which perhaps the offender cares not whether he ever see or no. This is also the case with *pecuniary*, or *quasi-pecuniary* punishment, when it respects some particular species of property, which the offender may have been possessed of, or not, as it may happen. All these punishments may be split down into parcels, and measured out with the utmost nicety: being divisible by time, at least, if by nothing else. They are not, therefore, any of them defective in point of variability: and yet, in many cases, this defect in point of equability may make them as unfit for use as if they were*.

V.

Property 3. Commensurability to other punishments.

The third rule of proportion was, that where two offences come in competition, the punishment for the greater offence must be sufficient to in-

* By the English law, there are several offences which are punished by a total forfeiture of moveables, not extending to immoveables. This is the case with suicide, and with certain species of theft and homicide. In some cases, this is the principal punishment: in others, even the only one. The consequence is, that if a man's fortune happens to consist in moveables, he is ruined; if in immoveables, he suffers nothing.

duce a man to prefer the less. Now, to be sufficient for this purpose, it must be evidently and uniformly greater: greater, not in the eyes of some men only, but of all men who are liable to be in a situation to take their choice between the two offences; that is, in effect, of all mankind. In other words, the two punishments must be perfectly *commensurable*. Hence arises a third property, which may be termed *commensurability*: to wit, with reference to other punishments*.

VI.

How two lots of punishment may be rendered perfectly commensurable.

But punishments of different kinds are in very few instances uniformly greater one than another; especially when the lowest degrees of that which is ordinarily the greater, are compared with the highest degrees of that which is ordinarily the less: in other words, punishments of different kinds are in few instances uniformly commensurable. The only certain and universal means of making two lots of punishment perfectly commensurable, is by making the lesser an ingredient

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* See *View of the Hard-Labour Bill.* Lond. 1778. p. 100.

For the idea of this property, I must acknowledge myself indebted to an anonymous letter in the St. James's Chronicle, of the 27th of September 1777; the author of which is totally unknown to me. If any one should be disposed to think lightly of the instruction, on account of the channel by which it was first communicated, let him tell me where I can find an idea more ingenious or original.

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in the composition of the greater. This may be done in either of two ways. 1. By adding to the lesser punishment another quantity of punishment of the same kind. 2. By adding to it another quantity of a different kind. The latter mode is not less certain than the former: for though one cannot always be absolutely sure, that to the same person a given punishment will appear greater than another given punishment; yet one may be always absolutely sure, that any given punishment, so as it does but come into contemplation, will appear greater than none at all.

VII.

Property 4. Characteristicalness.

Again: Punishment cannot act any farther than in as far as the idea of it, and of its connection with the offence, is present in the mind. The idea of it, if not present, cannot act at all; and then the punishment itself must be *inefficacious*. Now, to be present, it must be remembered, and to be remembered it must have been learnt. But of all punishments that can be imagined, there are none of which the connection with the offence is either so easily learnt, or so efficaciously remembered, as those of which the idea is already in part associated with some part of the idea of the offence: which is the case when the one and the other have some circumstance that belongs to them in common. When this is the case with a punishment and an offence, the punishment is said to bear an *analogy* to, or to be *characteristic* of,

the offence*. *Characteristicalness* is, therefore, a fourth property, which on this account ought to be given, whenever it can conveniently be given, to a lot of punishment.

VIII.

The mode of punishment the most eminently characteristic, is that of retaliation.

It is obvious, that the effect of this contrivance will be the greater, as the analogy is the closer. The analogy will be the closer, the more *material*† that circumstance is, which is in common. Now the most material circumstance that can belong to an offence and a punishment in common, is the hurt or damage which they produce. The closest analogy, therefore, that can subsist between an offence and the punishment annexed to it, is that which subsists between them when the hurt or damage they produce is of the same nature: in other words, that which is constituted by the circumstance of identity in point of damage‡. Accordingly, the mode of punishment, which of all others bears the closest analogy to the offence, is that which in the proper and exact sense of the

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* See Montesq. Esp. des Loix. L. xii. ch. iv. He seems to have the property of characteristicalness in view; but that the idea he had of it was very indistinct, appears from the extravagant advantages he attributes to it.

† See ch. vii. [Actions.] iii.

‡ Besides this, there are a variety of other ways in which the punishment may bear an analogy to the offence. This will be seen by looking over the table of punishments.

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word is termed *retaliation*. Retaliation, therefore, in the few cases in which it is practicable, and not too expensive, will have one great advantage over every other mode of punishment.

IX.

Property 5. Exemplarity.

Again: It is the idea only of the punishment (or, in other words, the *apparent* punishment) that really acts upon the mind; the punishment itself (the *real* punishment) acts not any farther than as giving rise to that idea. It is the apparent punishment, therefore, that does all the service, I mean in the way of example, which is the principal object*. It is the real punishment that does all the mischief†. Now the ordinary and obvious way of increasing the magnitude of the apparent punishment, is by increasing the magnitude of the real. The apparent magnitude, however, may to a certain degree be increased by other less expensive means: whenever, therefore, at the same time that these less expensive means would have answered that purpose, an additional real punishment is employed, this additional real punishment is *needless*. As to these less expensive means, they consist, 1. In the choice of a particular mode of punishment, a punishment of a particular quality, independent of the quantity‡. 2. In a particular set of *solemnities* distinct from

* See ch. xiii. [Cases unmeet] § 1, 2. note.

† Ib. § 4. par. iii. ‡ See B. I. tit. [Punishments.]

the punishment itself, and accompanying the execution of it*.

X.

The most effectual way of rendering a punishment exemplary is by means of analogy.

A mode of punishment, according as the appearance of it bears a greater proportion to the reality, may be said to be the more *exemplary*. Now as to what concerns the choice of the punishment itself, there is not any means by which a given quantity of punishment can be rendered more exemplary, than by choosing it of such a sort as shall bear an *analogy* to the offence. Hence another reason for rendering the punishment analogous to, or in other words characteristic of, the offence.

XI.

Property 6. Frugality.

Punishment, it is still to be remembered, is in itself an expence: it is in itself an evil†. Accordingly the fifth rule of proportion is, not to produce more of it than what is demanded by the other rules. But this is the case as often as any particle of pain is produced, which contributes nothing to the effect proposed. Now if any mode of punishment is more apt than another to produce any such superfluous and needless pain, it may be styled *unfrugal*; if less, it may be styled *frugal*. *Frugality*, therefore, is a sixth property to be wished for in a mode of punishment.

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* See B. II. tit. [Execution.]

† Ch. xiii. [Cases unmeet] par. ii.

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XII.

Frugality belongs in perfection to pecuniary punishment.

The perfection of frugality, in a mode of punishment, is where not only no superfluous pain is produced on the part of the person punished, but even that same operation, by which he is subjected to pain, is made to answer the purpose of producing pleasure on the part of some other person. Understand a profit or stock of pleasure of the self-regarding kind: for a pleasure of the dissocial kind is produced almost of course, on the part of all persons in whose breasts the offence has excited the sentiment of ill-will. Now this is the case with pecuniary punishment, as also with such punishments of the *quasi-pecuniary* kind as consist in the substraction of such a species of possession as is transferable from one party to another. The pleasure, indeed, produced by such an operation, is not in general equal to the pain*: it may, however, be so in particular circumstances, as where he, from whom the thing is taken, is very rich, and he, to whom it is given, very poor: and, be it what it will, it is always so much more than can be produced by any other mode of punishment.

XIII.

Exemplarity and frugality in what they differ and agree.

The properties of exemplarity and frugality seem to pursue the same immediate end, though by different courses. Both are occupied in dimi-

* Ib. note.

nishing the ratio of the real suffering to the apparent: but exemplarity tends to increase the apparent; frugality to reduce the real.

XIV.

Other properties of inferior importance.

Thus much concerning the properties to be given to punishments in general, to whatsoever offences they are to be applied. Those which follow are of less importance, either as referring only to certain offences in particular, or depending upon the influence of transitory and local circumstances.

In the first place, the four distinct ends into which the main and general end of punishment is divisible*, may give rise to so many distinct properties, according as any particular mode of punishment appears to be more particularly adapted to the compassing of one or of another of those ends. To that of *example*, as being the principal one, a particular property has already been adapted. There remain the three inferior ones of *reformation*, *disablement*, and *compensation*.

XV.

Property 7. Subserviency to reformation.

A seventh property, therefore, to be wished for in a mode of punishment, is that of *subserviency to reformation*, or *reforming tendency*. Now any punishment is subservient to reformation in proportion to its *quantity*: since the greater the punishment a man has experienced, the stronger

* See ch. xiii. [Cases unmeet] par. ii. note.

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is the tendency it has to create in him an aversion towards the offence which was the cause of it: and that with respect to all offences alike. But there are certain punishments which, with regard to certain offences, have a particular tendency to produce that effect by reason of their *quality*: and where this is the case, the punishments in question, as applied to the offences in question, will *pro tanto* have the advantage over all others. This influence will depend upon the nature of the motive which is the cause of the offence: the punishment most subservient to reformation will be the sort of punishment that is best calculated to invalidate the force of that motive.

XVI.

—applied to offences originating in ill-will.

Thus, in offences originating from the motive of ill-will*, that punishment has the strongest reforming tendency, which is best calculated to weaken the force of the irascible affections. And more particularly, in that sort of offence which consists in an obstinate refusal, on the part of the offender, to do something which is lawfully required of him†, and in which the obstinacy is in great measure kept up by his resentment against those who have an interest in forcing him to compliance, the most efficacious punishment seems to be that of confinement to spare diet.

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* See ch. x. [Motives.]

† See B. I. tit. [Offences against Justice.]

XVII.

CHAP. XV. —to offences originating in indolence joined to pecuniary interest.

Thus, also, in offences which owe their birth to the joint influence of indolence and pecuniary interest, that punishment seems to possess the strongest reforming tendency, which is best calculated to weaken the force of the former of those dispositions. And more particularly, in the cases of theft, embezzlement, and every species of defraudment, the mode of punishment best adapted to this purpose seems, in most cases, to be that of penal labour.

XVIII.

Property 8. Efficacy with respect to disablement.

An eighth property to be given to a lot of punishment in certain cases, is that of *efficacy with respect to disablement*, or, as it might be stiled more briefly, *disabling efficacy*. This is a property which may be given in perfection to a lot of punishment; and that with much greater certainty than the property of subserviency to reformation. The inconvenience is, that this property is apt, in general, to run counter to that of frugality: there being, in most cases, no certain way of disabling a man from doing mischief, without, at the same time, disabling him, in a great measure, from doing good, either to himself or others. The mischief therefore of the offence must be so great as to demand a very considerable lot of punishment, for the purpose of example, before it can warrant the application of a punish-

CHAP. XV.

ment equal to that which is necessary for the purpose of disablement.

XIX.

—is most conspicuous in capital punishment.

The punishment, of which the efficacy in this way is the greatest, is evidently that of death. In this case the efficacy of it is certain. This accordingly is the punishment peculiarly adapted to those cases in which the name of the offender, so long as he lives, may be sufficient to keep a whole nation in a flame. This will now and then be the case with competitors for the sovereignty, and leaders of the factions in civil wars: though, when applied to offences of so questionable a nature, in which the question concerning criminality turns more upon success than any thing else; an infliction of this sort may seem more to savour of hostility than punishment. At the same time this punishment, it is evident, is in an eminent degree *unfrugal;* which forms one among the many objections there are against the use of it, in any but very extraordinary cases*.

XX.

Other punishments in which it is to be found.

In ordinary cases the purpose may be sufficiently answered by one or other of the various kinds of confinement and banishment: of which, imprisonment is the most strict and efficacious. For when an offence is so circumstanced that it cannot be committed but in a certain place, as is

* See B. I. tit. [Punishments.]

the case, for the most part, with offences against the person, all the law has to do, in order to disable the offender from committing it, is to prevent his being in that place. In any of the offences which consist in the breach or the abuse of any kind of trust, the purpose may be compassed at a still cheaper rate, merely by forfeiture of the trust: and in general, in any of those offences which can only be committed under favour of some relation in which the offender stands with reference to any person, or sets of persons, merely by forfeiture of that relation: that is, of the right of continuing to reap the advantages belonging to it. This is the case, for instance, with any of those offences which consist in an abuse of the privileges of marriage, or of the liberty of carrying on any lucrative or other occupation.

XXI.

Property 9. Subserviency to compensation.

The *ninth* property is that of *subserviency to compensation.* This property of punishment, if it be *vindictive* compensation that is in view, will, with little variation, be in proportion to the quantity: if *lucrative,* it is the peculiar and characteristic property of pecuniary punishment.

XXII.

Property 10. Popularity.

In the rear of all these properties may be introduced that of *popularity;* a very fleeting and indeterminate kind of property, which may belong to a lot of punishment one moment, and be lost

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by it the next. By popularity is meant the property of being acceptable, or rather not unacceptable, to the bulk of the people, among whom it is proposed to be established. In strictness of speech, it should rather be called *absence of unpopularity*: for it cannot be expected, in regard to such a matter as punishment, that any species or lot of it should be positively acceptable and grateful to the people: it is sufficient, for the most part, if they have no decided aversion to the thoughts of it. Now the property of characteristicalness, above noticed, seems to go as far towards conciliating the approbation of the people to a mode of punishment, as any; insomuch that popularity may be regarded as a kind of secondary quality, depending upon that of characteristicalness*. The use of inserting this property in the catalogue, is chiefly to make it serve by way of memento to the legislator not to introduce, without a cogent necessity, any mode or lot of punishment, towards which he happens to perceive any

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Characteristicalness renders a punishment, 1. memorable: 2. exemplary: 3. popular.

* The property of characteristicalness, therefore, is useful in a mode of punishment in three different ways: 1. It renders a mode of punishment, before infliction, more easy to be borne in mind: 2. It enables it, especially after infliction, to make the stronger impression, when it is there; that is, renders it the more *exemplary*: 3. It tends to render it more acceptable to the people, that is, it renders it the more *popular*.

violent aversion entertained by the body of the people. CHAP. XV.

XXIII.

The effects of unpopularity in a mode of punishment are analogous to those of unfrugality. The unnecessary pain which denominates a punishment unfrugal, is most apt to be that which is produced on the part of the offender. A portion of superfluous pain is in like manner produced when the punishment is unpopular: but in this case it is produced on the part of persons altogether innocent, the people at large. This is already one mischief; and another is, the weakness which it is apt to introduce into the law. When the people are satisfied with the law, they voluntarily lend their assistance in the execution: when they are dissatisfied, they will naturally withhold that assistance; it is well if they do not take a positive part in raising impediments. This contributes greatly to the uncertainty of the punishment; by which, in the first instance, the frequency of the offence receives an increase. In process of time that deficiency, as usual, is apt to draw on an encrease in magnitude: an addition of a certain quantity which otherwise would be *needless**.

Mischiefs resulting from the unpopularity of a punishment—discontent among the people, and weakness in the law.

XXIV.

This property, it is to be observed, necessarily

This property sup-

* See ch. xiii. [Cases unmeet] § v.

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poses a prejudice which the legislator ought to cure.

supposes, on the part of the people, some prejudice or other, which it is the business of the legislator to endeavour to correct. For if the aversion to the punishment in question were grounded on the principle of utility, the punishment would be such as, on other accounts, ought not to be employed: in which case its popularity or unpopularity would never be worth drawing into question. It is properly therefore a property not so much of the punishment as of the people: a disposition to entertain an unreasonable dislike against an object which merits their approbation. It is the sign also of another property, to wit, indolence or weakness, on the part of the legislator: in suffering the people, for the want of some instruction, which ought to be and might be given them, to quarrel with their own interest. Be this as it may, so long as any such dissatisfaction subsists, it behoves the legislator to have an eye to it, as much as if it were ever so well grounded. Every nation is liable to have its prejudices and its caprices, which it is the business of the legislator to look out for, to study, and to cure*.

XXV.

Property 11. Remissibility.

The eleventh and last of all the properties that seem to be requisite in a lot of punishment, is

* See ch. xiii. [Cases unmeet] § iv. par. iv.

that of *remissibility**. The general presumption is, that when punishment is applied, punishment is needful: that it ought to be applied, and therefore cannot want to be *remitted*. But in very particular, and those always very deplorable cases, it may by accident happen otherwise. It may happen that punishment shall have been inflicted, where, according to the intention of the law itself, it ought not to have been inflicted: that is, where the sufferer is innocent of the offence. At the time of the sentence passed he appeared guilty: but since then, accident has brought his innocence to light. This being the case, so much of the destined punishment as he has suffered already, there is no help for. The business is then to free him from as much as is yet to come. But *is* there any yet to come? There is very little chance of their being any, unless it be so much as consists of *chronical* punishment: such as imprisonment, banishment, penal labour, and the like. So much as consists in *acute* punishment, to wit where the penal process itself is over presently, however permanent the punishment may be in its effects, may be considered as *ir*remissible. This is the case, for example, with whipping, branding, mutilation, and capital punishment. The most perfectly irremissible of any is capital punishment. For though other punishments can-

* See View of the Hard Labour Bill, p. 109.

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not, when they are over, be remitted, they may be compensated for; and although the unfortunate victim cannot be put into the same condition, yet possibly means may be found of putting him into as good a condition, as he would have been in if he had never suffered. This may in general be done very effectually where the punishment has been no other than pecuniary.

There is another case in which the property of remissibility may appear to be of use: this is, where, although the offender has been justly punished, yet on account of some good behaviour of his, displayed at a time subsequent to that of the commencement of the punishment, it may seem expedient to remit a part of it. But this it can scarcely be, if the proportion of the punishment is, in other respects, what it ought to be. The purpose of example is the more important object, in comparison of that of reformatian*. It is not very likely, that less punishment should be required for the former purpose than for the latter. For it must be rather an extraordinary case, if a punishment, which is sufficient to deter a man who has only thought of it for a few moments, should not be sufficient to deter a man who has been feeling it all the time. Whatever, then, is required for the purpose of example, must abide at all events: it is not any reformation

* See ch. xiii. [Cases unmeet] ii. note.

on the part of the offender, that can warrant the remitting of any part of it: if it could, a man would have nothing to do but to reform immediately, and so free himself from the greatest part of that punishment which was deemed necessary. In order, then, to warrant the remitting of any part of a punishment upon this ground, it must first be supposed that the punishment at first appointed was more than was necessary for the purpose of example, and consequently that a part of it was *needless* upon the whole. This, indeed, is apt enough to be the case, under the imperfect systems that are as yet on foot: and therefore, during the continuance of those systems, the property of remissibility may, on this second ground likewise, as well as on the former, be deemed a useful one. But this would not be the case in any new-constructed system, in which the rules of proportion above laid down should be observed. In such a system, therefore, the utility of this property would rest solely on the former ground.

XXVI.

To obtain all these properties, punishments must be mixed.

Upon taking a survey of the various possible modes of punishment, it will appear evidently, that there is not any one of them that possesses all the above properties in perfection. To do the best that can be done in the way of punishment, it will therefore be necessary, upon most occasions, to compound them, and make them into complex lots, each consisting of a number of different modes of punishment put together: the nature

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and proportions of the constituent parts of each lot being different, according to the nature of the offence which it is designed to combat.

XXVII.

The foregoing properties recapitulated.

It may not be amiss to bring together, and exhibit in one view, the eleven properties above established. They are as follows:

Two of them are concerned in establishing a proper proportion between a single offence and its punishment; viz.

1. Variability.
2. Equability.

One, in establishing a proportion, between more offences than one, and more punishments than one; viz.

3. Commensurability.

A fourth contributes to place the punishment in that situation in which alone it can be efficacious; and at the same time to be bestowing on it the two farther properties of exemplarity and popularity; viz.

4. Characteristicalness.

Two others are concerned in excluding all useless punishment; the one indirectly, by heightening the efficacy of what is useful; the other in a direct way; viz.

5. Exemplarity.
6. Frugality.

Three others contribute severally to the three inferior ends of punishment; viz.

7. Subserviency to reformation.

8. Efficacy in disabling.

9. Subserviency to compensation..

Another property tends to exclude a collateral mischief, which a particular mode of punishment is liable accidentally to produce; viz.

10. Popularity.

The remaining property tends to palliate a mischief, which all punishment, as such, is liable accidentally to produce; viz.

11. Remissibility.

The properties of commensurability, characteristicalness, exemplarity, subserviency to reformation, and efficacy in disabling, are more particularly calculated to augment the *profit* which is to be made by punishment: frugality, subserviency to compensation, popularity, and remissibility, to diminish the *expence:* variability and equability are alike subservient to both those purposes.

XXVIII.

Connection of this with the ensuing chapter.

We now come to take a general survey of the system of *offences:* that is, of such *acts* to which, on account of the mischievous *consequences* they have a *natural* tendency to produce, and in the view of putting a stop to those consequences, it may be proper to annex a certain *artificial* consequence, consisting of punishment, to be inflicted on the authors of such acts, according to the principles just established.

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§ 1. CLASSES OF OFFENCES.

I.

Distinction between what are offences and what ought to be.

*It is necessary, at the outset, to make a distinction between such acts as *are* or *may* be, and

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Method pursued in the following divisions.

* This chapter is an attempt to put our ideas of offences into an exact method. The particular uses of *method* are various: but the general one is, to enable men to understand the things that are the subjects of it. To understand a thing, is to be acquainted with its qualities or properties. Of these properties, some are common to it with other things; the rest, peculiar. But the qualities which are peculiar to any one sort of thing are few indeed, in comparison with those which are common to it with other things. To make it known in respect of its *difference*, would, therefore be doing little, unless it were made known also by its *genus*. To understand it perfectly, a man must therefore be informed of the points in which it agrees, as well as of those in which it disagrees, with all other things. When a number of objects, composing a logical whole, are to be considered together, all of these possessing with respect to one another a certain congruency or agreement denoted by a certain name, there is but one way of giving a perfect knowledge of their nature; and that is, by distributing them into a system of parcels, each of them a part, either of some other parcel, or, at any rate, of the common whole. This can only be done in the way of *bipartition*, dividing each superior branch into two, and but two, immediately subordinate ones; beginning with the logical whole, dividing that into two parts, then

such as *ought* to be offences. Any act *may* be an offence, which they whom the community are in

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each of those parts into two others; and so on. These first-distinguished parts agree in respect of those properties which belong to the whole: they differ in respect of those properties which are peculiar to each. To divide the whole into more than two parcels at once, for example into three, would not answer the purpose; for, in fact, it is but two objects that the mind can compare together exactly at the same time. Thus then, let us endeavour to deal with offences; or rather, strictly speaking, with acts which possess such properties as seem to indicate them fit to be constituted offences. The task is arduous; and, as *yet* at least, perhaps *for ever*, above our force. There is no speaking of objects but by their names: but the business of giving them names has always been prior to the true and perfect knowledge of their natures. Objects the most dissimilar have been spoken of and treated as if their properties were the same. Objects the most similar have been spoken of and treated as if they had scarce any thing in common. Whatever discoveries may be made concerning them, how different soever their congruencies and disagreements may be found to be from those which are indicated by their names, it is not without the utmost difficulty that any means can be found out of expressing those discoveries by a conformable set of names. Change the import of the old names, and you are in perpetual danger of being misunderstood: introduce an intire new set of names, and you are sure not to be understood at all. Complete success, then, is, as yet at least, unattainable. But an attempt, though imperfect, may have its use: and, at the worst, it may accelerate the arrival of that perfect system, the possession of which will be the happiness of some maturer age. Gross ignorance descries no difficulties; im-

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the habit of obeying shall be pleased to make one: that is, any act which they shall be pleased to prohibit or to punish. But, upon the principle of utility, such acts alone *ought* to be made offences, as the good of the community requires should be made so.

II.

No act ought to be an offence but what is detrimental to the community.

The good of the community cannot require, that any act should be made an offence, which is not liable, in some way or other, to be detrimental to the community. For in the case of such an act, all punishment is *groundless**.

III.

To be so, it must be detrimental to some one or more of its members.

But if the whole assemblage of any number of individuals be considered as constituting an imaginary compound *body*, a community or political state; any act that is detrimental to any one or more of those *members* is, as to so much of its effects, detrimental to the *state*.

IV.

These may be assignable or not.

An act cannot be detrimental to a *state*, but by being detrimental to some one or more of the *individuals* that compose it. But these individuals may either be *assignable*† or *unassignable*.

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perfect knowledge finds them out, and struggles with them: it must be perfect knowledge that overcomes them.

* See ch. xiii. [Cases unmeet] § ii. 1.

Persons assignable, how.

† [Assignable.] That is, either by name, or at least by description, in such manner as to be sufficiently distinguished

V.

When there is any assignable individual to whom an offence is detrimental, that person may either be a person *other* than the offender, or the offender *himself*. If assignable, the offender himself, or others.

VI.

Offences that are detrimental, in the first instance, to assignable persons other than the offender, may be termed by one common name, *offences against individuals*. And of these may be composed the 1st class of offences. To contrast them with offences of the 2d and 4th classes, it may also sometimes be convenient to stile them *private* offences. To contrast them at the same time with offences of the 3d class, they may be stiled *private extra-regarding* offences. Class 1. Private offences.

VII.

When it appears, in general, that there are persons to whom the act in question may be detrimental, but such persons cannot be individually assigned, the circle within which it appears that they may be found, is either of less extent than that which comprizes the whole community, or not. If of less, the persons comprized within this lesser circle may be considered for this purpose as composing a body of themselves; Class 2. Semi-public offences.

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from all others; for instance, by the circumstance of being the owner or occupier of such and such goods. See B. I. tit. [Personation.] Supra, ch. xii. [Consequences] xv.

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comprized within, but distinguishable from, the greater body of the whole community. The circumstance that constitutes the union between the members of this lesser body, may be either their residence within a particular place, or, in short, any other less explicit principle of union, which may serve to distinguish them from the remaining members of the community. In the first case, the act may be stiled an *offence against a neighbourhood:* in the second, an offence against a particular *class* of persons in the community. Offences, then, against a class or neighbourhood, may, together, constitute the 2d class of offences*. To contrast them with private offences on the one hand, and public on the other, they may also be stiled *semi-public* offences.

Limits between private, semi-public, and public offences, are, strictly speaking, undistinguishable.

* With regard to offences against a class or neighbourhood, it is evident, that the fewer the individuals are, of which such class is composed, and the narrower that neighbourhood is, the more likely are the persons, to whom the offence is detrimental, to become assignable; insomuch that, in some cases, it may be difficult to determine concerning a given offence, whether it be an offence against individuals, or against a class or neighbourhood. It is evident also, that the larger the class or neighbourhood is, the more it approaches to a coincidence with the great body of the state. The three classes, therefore, are liable, to a certain degree, to run into one another, and be confounded. But this is no more than what is the case, more or less, with all those ideal compartments under which men are wont to distribute objects for the convenience of discourse.

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Class 3. Self-regarding offences.

Offences, which in the first instance are detrimental to the offender himself, and to no one else, unless it be by their being detrimental to himself, may serve to compose a third class. To contrast them the better with offences of the first, second, and fourth classes, all which are of a *transitive* nature, they might be stiled *intransitive** offences; but still better, *self-regarding*.

IX.

Class 4. Public offences.

The fourth class may be composed of such acts as ought to be made offences, on account of the distant mischief which they threaten to bring upon an unassignable indefinite multitude of the whole number of individuals, of which the community is composed: although no particular individual should appear more likely to be a sufferer by them than another. These may be called *public* offences, or offences against the *state*.

X.

Class 5. *Multiform* offences, viz. 1. Offences by falsehood 2. Offences against trust.

A fifth class, or appendix, may be composed of such acts as, according to the circumstances in which they are committed, and more particularly according to the purposes to which they are applied, may be detrimental in any one of the ways in which the act of one man can be detrimental to another. These may be termed *multiform*, or *heterogeneous offences*†. Offences that

* See ch. vii. [Actions] xiii.

† 1. Offences by *falsehood:* 2. Offences against *trust*. See The imperfections of

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are in this case may be reduced to two great heads: 1. Offences by *falsehood:* and, 2. Offences against *trust.*

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language an obstacle to arrangement.

also par. XX. to XXX. and par. LXVI. Maturer views have suggested the feasibility, and the means, of ridding the system of this anomalous excrescence. Instead of considering these as so many *divisions* of offences, divided into *genera*, correspondent and collateral to the several *genera* distinguished by other appellations, they may be considered as so many specific differences, respectively applicable to those *genera*. Thus, in the case of a *simple personal injury*, in the operation of which a plan of falsehood has been employed: it seems more simple and more natural, to consider the offence thus committed as a particular *species* or *modification* of the *genus* of offence termed a *simple personal injury*, than to consider the simple personal injury, when effected by such means, as a modification of the *division* of offences entitled *Offences through falsehood.* By this means the circumstances of the intervention of falsehood as an instrument, and of the existence of a particular obligation of the nature of a trust, will be reduced to a par with various other classes of circumstances capable of affording grounds of modification, commonly of *aggravation* or *extenuation*, to various genera of offences: instance, *Premeditation*, and *conspiracy*, on the one hand; *Provocation received*, and *intoxication*, on the other. This class will appear, but too plainly, as a kind of botch in comparison of the rest. But such is the fate of science, and more particularly of the moral branch; the distribution of things must in a great measure be dependent on their names: arrangement, the work of mature reflection, must be ruled by nomenclature, the work of popular caprice.

In the book of the laws, offences must therefore be treated

§ 2. *Divisions and sub-divisions.*

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XI.

Let us see by what method these classes may be farther sub-divided. First, then, with regard offences against individuals.

Divisions of Class 1. 1. Offences against person. 2—Pro-

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of as much as possible under their accustomed names. Generical terms, which are in continual use, and which express ideas for which there are no other terms in use, cannot safely be discarded. When any such occur, which cannot be brought to quadrate with such a plan of classification as appears to be most convenient upon the whole, what then is to be done? There seems to be but one thing; which is, to retain them, and annex them to the regular part of the system in the form of an appendix. Though they cannot, when entire, be made to rank under any of the classes established in the rest of the system, the divisions to which they give title may be broken down into lesser divisions, which may not be alike intractable. By this means, how discordant soever with the rest of the system they may appear to be at first sight, on a closer inspection they may be found conformable.

This must inevitably be the case with the names of offences, which are so various and universal in their nature, as to be capable, each of them, of doing whatever mischief can be done by any other kind or kinds of offences whatsoever. Offences of this description may well be called anomalous.

Irregularity of this class.

Such offences, it is plain, cannot but shew themselves equally intractable under every kind of system. Upon whatever principle the system be constructed, they cannot, any of them, with any degree of propriety, be confined to any one division. If, therefore, they constitute a blemish in the present system, it is such a blemish as could not be avoided but at the expence of a greater. The class they are here

—which could not be avoided on any other plan.

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perty. 3—Reputation. 4—Condition. 5—Person and property.—6. Person and reputation.

In the present period of existence, a man's being and well-being, his happiness and his security; in a word, his pleasures and his immunity from pains, are all dependant, more or less, in the first place, upon his *own person;* in the next place, upon the *exterior objects* that surround him. These objects are either *things,* or other *persons.* Under one or other of these classes must evidently be comprised every sort of exterior object, by means of which his interest can be affected. If then, by means of any offence, a man should on any occasion become a sufferer, it must be in one or other of two ways: 1. *absolutely,* to wit, immediately in his own person; in which case the offence may be said to be an offence against his person: or, 2. *relatively* by reason of some *material**† relation which he bears to the before-

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thrown into will traverse, in its subordinate ramifications, the other classes and divisions of the present system: true, but so would they of any other. An irregularity, and that but a superficial one, is a less evil than continual error and contradiction. But even this slight deviation, which the fashion of language seemed to render unavoidable at the outset, we shall soon find occasion to correct as we advance. For though the first great parcels into which the offences of this class are divided are not referable, any of them, to any of the former classes, yet the subsequent lesser subdivisions *are.*

* See ch. vii. [Actions] iii. and xxiv.

'In what manner pleasure

† If, by reason of the word *relation,* this part of the division should appear obscure, the unknown term may be got

mentioned exterior objects may happen to bear, in the way of *causality* (See ch. VII. Actions, par. 24.) to his happiness. Now in as far as a man is in a

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rid of in the following manner. Our ideas are derived, all of them, from the senses; pleasurable and painful ones, therefore, among the rest: consequently, from the operation of sensible objects upon our senses. A man's happiness, then, may be said to depend more or less upon the *relation* he bears to any sensible object, when such subject is in a way that stands a chance, greater or less, of producing to him, or averting from him, pain or pleasure. Now this, if at all, it must do in one or other of two ways; 1. In an *active* way, properly so called; viz. by motion: or, 2. In a *passive* or quiescent way, by being moved to, or acted upon: and in either case, either, 1. in an *immediate* way, by acting upon, or being acted on by, the organs of sense, without the intervention of any other external object: or, 2. in a more or less *remote* way, by acting upon, or being acted on by, some other external object, which (with the intervention of a greater or less number of such objects, and at the end of more or less considerable intervals of time) will come at length to act upon, or be acted upon by, those organs. And this is equally true, whether the external objects in question be things or persons. It is also equally true of pains and pleasures of the mind, as of those of the body: all the difference is, that in the production of these, the pleasure or pain may result immediately from the perception which it accompanies: in the production of those of the mind, it cannot result from the action of an object of sense, any otherwise than by *association*; to wit, by means of some connection which the perception has contracted with certain prior ones, lodged already in the memory*.

and pain depend upon the relation a man bears to exterior objects.

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* See ch. v. [Pleasures and Pains] xv. xxxi. Ch. x. [Motives] xxxix. note.

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way to derive either happiness or security from any object which belongs to the class of *things*, such thing is said to be his *property*, or at least he is said to have a *property* or an *interest* therein: an offence, therefore, which tends to lessen the facility he might otherwise have of deriving happiness or security from an object which belongs to the class of things, may be stiled an offence against his property. With regard to persons, in as far as, from objects of this class, a man is in a way to derive happiness or security, it is in virtue of their *services:* in virtue of some services, which, by one sort of inducement or another, they may be disposed to render him*. Now, then, take any man, by way of example, and the disposition, whatever it may be, which he may be in to render you service, either has no other connection to give birth or support to it, than the general one which binds him to the whole species, or it has some other connection more particular. In the latter case, such a connection may be spoken of as constituting, in your favour, a kind of fictitious or incorporeal object of property, which is stiled your *condition*. An offence, therefore, the tendency of which is to lessen the facility you might otherwise have of deriving happiness from the services of a person thus specially connected with you, may be stiled

* See ch. x. [Motives.]

an offence against your condition in life, or simply against your condition. Conditions in life must evidently be as various as the relations by which they are constituted. This will be seen more particularly farther on. In the mean time, those of husband, wife, parent, child, master, servant, citizen of such or such a city, natural-born subject of such or such a country, may answer the purpose of examples.

Where there is no such particular connection, or (what comes to the same thing) where the disposition, whatever it may be, which a man is in to render you service, is not considered as depending upon such connection, but simply upon the good-will he bears to you; in such case, in order to express what chance you have of deriving a benefit from his services, a kind of fictitious object of property is spoken of, as being constituted in your favour, and is called your *reputation*. An offence, therefore, the tendency of which is to lessen the facility you might otherwise have had of deriving happiness or security from the services of persons at large, whether connected with you or not by any special tie, may be stiled an offence against your *reputation*. It appears, therefore, that if by any offence an individual becomes a sufferer, it must be in one or other of the four points above-mentioned; viz. his person, his property, his condition in life, or his reputation. These soures of distinction, then,

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may serve to form so many subordinate divisions. If any offences should be found to affect a person in more than one of these points at the same time, such offences may respectively be put under so many separate divisions; and such compound divisions may be subjoined to the preceding simple ones. The several divisions (simple and compound together) which are hereinafter established, stand as follows: 1. Offences against person. 2. Offences against reputation. 3. Offences against property. 4. Offences against condition. 5. Offences against person and property together. 6. Offences against person and reputation together*.

XII.

Divisions of Class 2. 1. Offences through calamity.

Next with regard to semi-public offences. Pain, considered with reference to the time of the act from which it is liable to issue, must, it is evident, be either present, past, or future. In as far as it

* Subsequent consideration has here suggested several alterations. The necessity of adding, to *property*, *power*, in the character of a distinguishable as well as valuable object or subject-matter of possession, has presented itself to view: and in regard to the fictitious entity here termed *condition* (for shortness instead of saying *condition in life*,) it has been observed to be a sort of composite object, compounded of *property*, *reputation*, *power*, and *right* to *services*. For this *composite* object the more proper place was therefore at the tail of the several *simple* ones.—*Note by the Editor*, *July*, 1822.

is either present or past, it cannot be the result of any act which comes under the description of a semi-public offence: for if it be present or past, the individuals who experience, or who have experienced, it are *assignable**. There remains that sort of mischief, which, if it ever come to exist at all, is as yet but future: mischief, thus circumstanced, takes the name of *danger*†. Now, then, when by means of the act of any person a whole neighbourhood, or other class of persons, are exposed to danger, this danger must either be *intentional* on his part, or *unintentional*‡. If unintentional, such danger, when it is converted into actual mischief, takes the name of a *calamity:* offences, productive of such danger, may be stiled *semi-public offences operating through calamity;* or, more briefly, *offences through calamity.* If the danger be intentional, insomuch that it might be produced, and might convert itself into actual mischief, without the concurrence of any calamity, it may be said to originate in *mere delinquency:* offences, then, which, without the concurrence of any calamity, tend to produce such danger as disturbs the security of a local, or other subordinate class of persons, may be stiled *semi-public offences operating merely by delinquency,* or more briefly, *offences of mere delinquency.*

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* Supra, iv. note. † See ch. xii. [Consequences.]

‡ See Ch. viii. [Intentionality.]

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Sub-divisions of offences through calamity, dismissed.

XIII.

With regard to any farther sub-divisions, offences against calamity will depend upon the nature of the several calamities to which man, and the several things that are of use to him, stand exposed. These will be considered in another place *.

XIV.

Offences of mere delinquency, how they correspond with the divisions of private offences.

Semi-public offences of mere delinquency, will follow the method of division applied to offences against individuals. It will easily be conceived, that whatever pain or inconvenience any given individual may be made to suffer, to the danger of that pain or inconvenience may any number of individuals, assignable or not assignable, be exposed. Now there are four points or articles, as we have seen, in respect to which an individual may be made to suffer pain or inconvenience. If then, with respect to any one of them, the connection of causes and effects is such, that to the danger of suffering in that article a number of persons, who individually are not assignable, may,

* See B. I. tit. [Semi-public offences.] In the mean time that of *pestilence* may serve as an example. A man, without any intention of giving birth to such a calamity, may expose a neighbourhood to the danger of it, by breaking *quarantine* or violating any of those other preventive regulations which governments, at certain conjunctures, may find it expedient to have recourse to, for the purpose of guarding against such danger.

by the delinquency of one person, be exposed, such article will form a ground of distinction on which a particular sub-division of semi-public offences may be established: if, with respect to any such article, no such effect can take place, that ground of distinction will lie for the present unoccupied: ready, however, upon any change of circumstances, or in the manner of viewing the subject, to receive a correspondent subdivision of offences, if ever it should seem necessary that any such offences should be created.

XV.

Divisions of Class 3. coincide with those of Class 1.

We come next to self-regarding offences; or, more properly, to acts productive in the first instance of no other than a self-regarding mischief: acts which, if in any instance it be thought fit to constitute them offences, will come under the denomination of offences against one's self. This class will not for the present give us much trouble. For it is evident, that in whatever points a man is vulnerable by the hand of another, in the same points may he be conceived to be vulnerable by his own. Whatever divisions therefore will serve for the first class, the same will serve for this. As to the questions, What acts are productive of a mischief of this stamp? and, among such as *are*, which it may, and which it may not, be *worth while** to treat upon the footing of offences?

* See ch. xiii. [Cases unmeet] § iv.

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these are points, the latter of which at least is, too unsettled, and too open to controversy, to be laid down with that degree of confidence which is implied in the exhibition of properties which are made use of as the groundwork of an arrangement. Properties for this purpose ought to be such as shew themselves at first glance, and appear to belong to the subject beyond dispute.

XVI.

Divisions of Class 4.

Public offences may be distributed under eleven divisions*. 1. Offences against *external* security.

Exhaustive method departed from.

* In this part of the analysis, I have found it necessary to deviate in some degree from the rigid rules of the exhaustive method I set out with. By me, or by some one else, this method may, perhaps, be more strictly pursued at some maturer period of the science. At present, the benefit that might result from the unrelaxed observance of it, seemed so precarious, that I could not help doubting whether it would pay for the delay and trouble. Doubtless such a method is eminently instructive: but the fatigue of following it out is so great, not only to the author, but probably also to the reader, that if carried to its utmost length at the first attempt, it might perhaps do more disservice in the way of disgust, than service in the way of information. For knowledge, like physic, how salutary soever in itself, becomes no longer of any use, when made too unpalatable to be swallowed. Mean time, it cannot but be a mortifying circumstance to a writer, who is sensible of the importance of his subject, and anxious to do it justice, to find himself obliged to exhibit what he perceives to be faulty, with any view, how indistinct soever, of something more perfect before his eyes.

2. Offences against *justice*. 3. Offences against the *preventive* branch of the *police*. 4. Offences against the public *force*. 5. Offences against the *positive* encrease of the national *felicity*. 6. Offences against the public *wealth*. 7. Offences against *population*. 8. Offences against the *national wealth*. 9. Offences against the *sovereignty*. 10. Offences against *religion*. 11. Offences against the national *interest* in general. The way in which these several sorts of offences connect with one another, and with the interest of the public, that is, of an unassignable multitude of the individuals of which that body is composed, may be thus conceived.

XVII.

Connection of the nine first divisions one with another.

Mischief by which the interest of the public as above defined may be affected, must, if produced at all, be produced either by means of an influence exerted on the operations of government, or by other means, without the exertion of such in-

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If there be any thing new and original in this work, it is to the exhaustive method so often aimed at that I am indebted for it. It will, therefore, be no great wonder if I should not be able to quit it without reluctance. On the other hand, the marks of stiffness which will doubtless be perceived in a multitude of places, are chiefly owing to a solicitous, and not perfectly successful, pursuit of this same method. New instruments are seldom handled at first with perfect ease.

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fluence*. To begin with the latter case: mischief, be it what it will, and let it happen to whom it will, must be produced either by the unassisted powers of the agent in question, or by the instrumentality of some other agents. In the latter case, these agents will be either persons or things. Persons again must be either not members of the community in question, or members. Mischief produced by the instrumentality of persons, may accordingly be produced by the instrumentality either of *external* or of *internal* adversaries. Now when it is produced by the agent's own unassisted powers, or by the instrumentality of internal adversaries, or only by the instrumentality of things, it is seldom that it can show itself in any other shape (setting aside any influence it may exert on the operations of government) than either that of an offence against assignable individuals, or that of an offence against a local or other subordinate class of persons. If

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* The idea of government, it may be observed, is introduced here without any preparation. The fact of its being established, I assume as notorious, and the necessity of it as alike obvious and incontestible. Observations indicating that necessity, if any such should be thought worth looking at in this view, may be found by turning to a passage in a former chapter, where they were incidentally adduced for the purpose illustration. See ch. xii. [Consequences] § xvii.

there should be a way in which mischief can be produced, by any of these means, to individuals altogether unassignable, it will scarcely be found conspicuous or important enough to occupy a title by itself: it may accordingly be referred to the miscellaneous head of *offences against the national interest in general.**. The only mischief, of any considerable account, which can be made to impend indiscriminately over the whole number of members in the community, is that complex kind of mischief which results from a state of war, and is produced by the instrumentality of external adversaries; by their being provoked, for instance, or invited, or encouraged to invasion. In this way may a man very well bring down a mischief, and that a very heavy one, upon the whole community in general, and that without taking a part in any of the injuries which came in consequence to be offered to particular individuals.

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* See infra, liv. note. Even this head, ample as it is, and vague as it may seem to be, will not, when examined by the principle of utility, serve, any more than another, to secrete any offence which has no title to be placed there. To show the pain or loss of pleasure which is likely to ensue, is a problem, which before a legislator can justify himself in adding the act to the catalogue of offences, he may in this case, as in every other, be called upon to solve.

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Next with regard to the mischief which an offence may bring upon the public by its influence on the operations of the government. This it may occasion either, 1. In a more immediate way, by its influence on those *operations* themselves: 2. In a more remote way, by its influence on the *instruments* by or by the help of which those operations should be performed: or 3. In a more remote way still, by its influence on the *sources* from whence such instruments are to be derived. First then, as to the operations of government, the tendency of these, in as far as it is conformable to what on the principle of utility it ought to be, is in every case either to avert mischief from the community, or to make an addition to the sum of positive good*. Now mischief we

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* For examples, see infra, liv. note. This branch of the business of government, a sort of work of supererogation, as it may be called, in the calendar of political duty, is comparatively but of recent date. It is not for this that the untutored many could have originally submitted themselves to the dominion of the few. It was the dread of evil, not the hope of good, that first cemented societies together. Necessaries come always before luxuries. The state of language marks the progress of ideas. Time out of mind the military department has had a name: so has that of justice: the power which occupies itself in preventing mischief, not till lately, and that but a loose one, the police: for the power which takes for its object the introduction of positive

have seen, must come either from external adversaries, from internal adversaries, or from calamities. With regard to mischief from external adversaries, there requires no further division. As to mischief from internal adversaries, the expedients employed for averting it may be distinguished into such as may be applied *before* the discovery of any mischievous design in particular, and such as can not be employed but in consequence of the discovery of some such design: the former of these are commonly referred to a branch which may be stiled the *preventive* branch of the *police:* the latter to that of justice*. Second,

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good, no peculiar name, however inadequate, seems yet to have been devised.

* The functions of justice, and those of the police, must be apt in many points to run one into another: especially as the business would be very badly managed if the same persons, whose more particular duty it is to act as officers of the police, were not upon occasion to act in the capacity of officers of justice. The ideas, however, of the two functions may still be kept distinct: and I see not where the line of separation can be drawn, unless it be as above.

As to the word *police*, though of Greek extraction, it seems to be of French growth: it is from France, at least, that it has been imported into Great Britain, where it still retains its foreign garb: in Germany, if it did not originate there, it has at least been naturalized. Taken all together, the idea belonging to it seems to be too multifarious to be susceptible of any single definition. Want of words obliged me to re-

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As to the *instruments* which government, whether in the averting of evil or in the producing of positive good, can have to work with, these must be either *persons* or *things*. Those which are destined to the particular function of guarding against mischief from adversaries in general, but more particularly from external adversaries*,

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duce the two branches here specified into one. Who would have endured in this place to have seen two such words as the *phthano-paranomic* or *crime-preventing*, and the *phthano-symphoric* or *calamity-preventing*, branches of the police? the inconvenience of uniting the two branches under the same denomination, are, however, the less, inasmuch as the operations requisite to be performed for the two purposes will in many cases be the same. Other functions, commonly referred to the head of police, may be referred either to the head of that power which occupies itself in promoting in a positive way the encrease of the national felicity, or of that which employs itself in the management of the public wealth. See infra, liv. note.

* It is from abroad that those pernicious enterprises are most apt to originate, which come backed with a greater quantity of physical force than the persons who are in a more particular sense the officers of justice are wont to have at their command. Mischief the perpetration of which is ensured by a force of such magnitude, may therefore be looked upon in general as the work of *external* adversaries. Accordingly, when the persons by whom it is perpetrated, are in such force as to bid defiance to the ordinary efforts of justice, they loosen themselves from their original denomination in proportion as they encrease in force, till at length they are

may be distinguished from the rest under the collective appellation of the *public military force*, and, for conciseness sake, the *military force*. The rest may be characterised by the collective appellation of the *public wealth*. Thirdly, with regard to the sources or funds from whence these instruments, howsoever applied, must be derived, such of them as come under the denomination of *persons* must be taken out of the whole number of persons that are in the community, that is, out of the total *population* of the state: so that the greater the population, the greater may *cæteris paribus* be this branch of the public wealth; and the less the less. In like manner, such as come under the denomination of *things* may be, and most of them commonly are, taken out of the sum total of those things which are the separate properties of the several members of the community: the sum of which properties may be termed *the national wealth**: so that the greater

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looked upon as being no longer members of the state, but as standing altogether upon a footing with external adversaries. Give force enough to robbery, and it swells into rebellion: give permanence enough to rebellion, and it settles into hostility.

* It must be confessed, that in common speech the distinction here established between the public wealth and the national wealth is but indifferently settled: nor is this to be wondered at; the ideas themselves, though here necessary to be distinguished, being so frequently convertible. But I

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the national wealth, the greater *ceteris paribus*, may be this remaining branch of the public wealth; and the less, the less. It is here to be observed, that if the influence exerted on any occasion by any individual over the operations of the government be pernicious, it must be in one or other of two ways: 1. By causing, or tending to cause, operations *not* to be performed which *ought* to be performed; in other words, by *impeding* the operations of government. Or, 2. By causing operations to *be* performed which ought *not* to be performed; in other words, by *misdirecting* them. Last, to the total assemblage of the persons by whom the several political operations above-mentioned come to be performed, we set out with applying the collective appellation of *the government*. Among these persons there *commonly* * is some one person, or body of per-

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am mistaken if the language will furnish any other two words that would express the distinction better. Those in question will, I imagine, be allowed to be thus far well chosen, that if they were made to change their places, the import given to them would not appear to be quite so proper as that which is given to them as they stand at present.

* I should have been afraid to have said *necessarily*. In the United Provinces, in the Helvetic, or even in the Germanic body, where is that one assembly in which an absolute power over the whole resides? where was there in the Roman Commonwealth? I would not undertake for certain to find an answer to all these questions.

sons, whose office it is to assign and distribute to the rest their several departments, to determine the conduct to be pursued by each in the performance of the particular set of operations that belongs to him, and even upon occasion to exercise his function in his stead. Where there is any such person, or body of persons, *he* or *it* may, according as the turn of the phrase requires, be termed *the sovereign*, or the *sovereignty*. Now it is evident, that to impede or misdirect the operations of the sovereign, as here described, may be to impede or misdirect the operations of the several departments of government as described above.

From this analysis, by which the connection between the several above-mentioned heads of offences is exhibited, we may now collect a definition for each article. By *offences against external security*, we may understand such offences whereof the tendency is to bring upon the public a mischief resulting from the hostilities of foreign adversaries. By *offences against justices*, such offences whereof the tendency is to impede or misdirect the operations of that power which is employed in the business of guarding the public against the mischiefs resulting from the delinquency of internal adversaries, as far as it is to be done by expedients, which do not come to be applied in any case till *after* the discovery of some particular design of the sort of those which they

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are calculated to prevent. By *offences against the preventive branch of the police*, such offences whereof the tendency is to impede or misdirect the operations of that power which is employed in guarding against mischiefs resulting from the delinquency of internal adversaries, by expedients that come to be applied *before-hand*; or of that which is employed in guarding against the mischiefs that might be occasioned by physical calamities. By *offences against the public* force, such offences whereof the tendency is to impede or misdirect the operations of that power which is destined to guard the public from the mischiefs which may result from the hostility of foreign adversaries, and, in case of necessity, in the capacity of ministers of justice, from mischiefs of the number of those which result from the delinquency of internal adversaries.

By *offences against the increase of the national felicity*, such offences whereof the tendency is to impede or misapply the operations of those powers that are employed in the conducting of various establisments, which are calculated to make, in so many different ways, a positive addition to the stock of public happiness. By *offences against the public wealth*, such offences whereof the tendency is to diminish the amount or misdirect the application of the money, and other articles of wealth, which the government reserves as a fund, out of which the stock of in-

struments employed in the service above-mentioned may be kept up. By *offences against population*, such offences whereof the tendency is to diminish the numbers or impair the political value of the sum total of the members of the community. By *offences against the national wealth* such offences whereof the tendency is to diminish the quantity, or impair the value, of the things which compose the separate properties or estates of the several members of the community.

XVIII.

Connection of offences against religion with the foregoing ones.

In this deduction, it may be asked, what place is left for *religion?* This we shall see presently. For combating the various kinds of offences above enumerated, that is, for combating all the offences (those not excepted which we are now about considering) which it is in man's nature to commit, the state has two great engines, *punishment* and *reward:* punishment, to be applied to all, and upon all ordinary occasions: reward, to be applied to a few, for particular purposes, and upon extraordinary occasions. But whether or no a man has done the act which renders him an object meet for punishment or reward, the eyes of those, whosoever they be, to whom the management of these engines is entrusted cannot always see, nor, where it is punishment that is to be administered, can their hands be always sure to reach him. To supply these deficiencies in point of power, it is thought necessary, or at least

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useful, (without which the *truth* of the doctrine would be nothing to the purpose) to inculcate into the minds of the people the belief of the existence of a power applicable to the same purposes, and not liable to the same deficiencies: the power of a supreme invisible being, to whom a disposition of contributing to the same ends to which the several institutions already mentioned are calculated to contribute, must for this purpose be ascribed. It is of course expected that this power will, at one time or other, be employed in the promoting of those ends: and to keep up and strengthen this expectation among men, is spoken of as being the employment of a kind of allegorical personage, feigned, as before*, for convenience of discourse, and styled *religion.* To diminish, then, or misapply the influence of religion, is *pro tanto* to diminish or misapply what power the state has of combating with effect any of the before enumerated kinds of offences; that is, all kinds of offences whatsoever. Acts that appear to have this tendency may be styled *offences against religion.* Of these then may be composed the tenth division of the class of offences against the state†.

* See par. xvii. with regard to *justice.*

† It may be observed, that upon this occasion I consider religion in no other light, than in respect of the influence it may have on the happiness of, the *present* life. As to the effects it may have in assuring us of and preparing us for, a

XIX.

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Connection of offences against the national interest in general with the rest.

If there be any acts which appear liable to affect the state in any one or more of the above ways, by operating in prejudice of the external security of the state, or of its internal security; of the public force; of the encrease of the national felicity; of the public wealth; of the national population, of the national wealth; of the sovereignty; or of religion; at the same time that it is not clear in which of all these ways

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better life to come, this is a matter which comes not within the cognizance of the legislator. See tit. [Offences against religion.]

I say offences against *religion*, the fictitious entity: not offences against God, the real being. For, what sort of pain should the act of a feeble mortal occasion to a being unsusceptible of pain? How should an offence affect him? Should it be an offence against his person, his property, his reputation, or his condition?

It has commonly been the way to put offences against religion foremost. The idea of precedence is naturally enough connected with that of reverence. *Ex Διος αρχωμεσθα.* But for expressing reverence, there are other methods enough that are less equivocal. And in point of method and perspicuity, it is evident, that with regard to offences against religion, neither the nature of the mischief which it is their tendency to produce, nor the reason there may be for punishing them, can be understood, but from the consideration of the several mischiefs which result from the several other sorts of offences. In a political view, it is only because those others are mischievous, that offences against religion are so too.

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they will affect it most, nor but that, according to contingencies, they may affect it in one of these ways only or in another; such acts may be collected together under a miscellaneous division by themselves, and styled *offences against the national interest in general.* Of these then may be composed the eleventh and last division of the class of offences against the state.

XX.

Sub-divisions of Class 5 enumerated.

1. Divisions of offences by falsehood.

We come now to class the fifth: consisting of *multiform* offences. These, as has been already intimated, are either offences by *falsehood,* or offences concerning *trust.* Under the head of offences by falsehood, may be comprehended, 1. Simple falsehoods. 2. Forgery. 3. Personation. 4. Perjury*. Let us observe in what particulars

* This division of falschoods, it is to be observed, is not regularly drawn out: that being what the nature of the case will not here admit of. Falsehood may be infinitely diversified in other ways than these. In a particular case, for instance, simple falsehood when uttered by writing, is distinguished from the same falsehood when uttered by word of mouth; and has had a particular name given to it accordingly. I mean, where it strikes against reputation; in which case, the instrument it has been uttered by has been called a *libel.* Now it is obvious, that in the same manner it might have received a distinct name in all other cases where it is uttered by writing. But there has not happened to be any thing in particular that has disposed mankind in those cases to give it such a name. The case is, that among the infinity of cir-

these four kinds of falsehood agree, and in what they differ.

XXI.

Offences by falsehood, however diversified in other particulars, have this in common, that they consist in some abuse of the faculty of discourse, or rather as we shall see hereafter, of the faculty of influencing the sentiment of belief in other men*, whether by discourse or otherwise. The use of discourse is to influence belief, and that in such manner as to give other men to understand that things are as they are really. Falsehoods, of whatever kind they be, agree in this: that they give men to understand that things are otherwise than as in reality they are.

Offences by falsehood, in what they agree with one another.

XXII.

Personation, forgery, and perjury, are each of them distinguished from other modes of uttering falsehood by certain special circumstances. When a falsehood is not accompanied by any of those circumstances, it may be styled simple falsehood. These circumstances are, 1. The *form* in which

—in what they differ.

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cumstances by which it might have been diversified, those which constitute it a libel, happen to have engaged a peculiar share of attention on the part of the institutors of language; either in virtue of the influence which these circumstances have on the tendency of the act, or in virtue of any particular degree of force with which on any other account they may have disposed it to strike upon the imagination.

* See B. I. tit. [Falsehoods.]

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the falsehood is uttered. 2. The circumstance of its relating or not to the identity of the *person* of him who utters it. 3. The solemnity of the *occasion* on which it is uttered*. The particular application of these distinctive characters may more commodiously be reserved for another place†.

XXIII.

Sub-divisions of offences by falsehood are determined by the divisions of the preceding classes.

We come now to the sub-divisions of offences by falsehood. These will bring us back into the regular track of analysis, pursued, without deviation, through the four preceding classes.

By whatever means a mischief is brought about, whether falsehood be or be not of the number, the individuals liable to be affected by it must either be assignable or unassignable. If assignable, there are but four material articles in respect to which they can be affected: to wit, their persons their properties, their reputations, and their conditions in life. The case is the same, if, though unassignable, they are comprisable in any class subordinate to that which is composed of the

* There are two other circumstances still more material; viz. 1. The parties whose interest is affected: by the falsehood. 2. The point or article in which that interest is affected. These circumstances, however, enter not into the composition of the generical character. Their use is, as we shall see, to characterize the several species of each genus. See B. I. tit. [Falsehoods.]

† Ibid.

whole number of members of the state. If the falsehood tend to the detriment of the whole state, it can only be by operating in one or other of the characters, which every act that is an offence against the state must assume; viz. that of an offence against external security, against justice, against the preventive branch of the police, against the public force, against the encrease of the national felicity, against the public weath, against the national population, against the national wealth, against the sovereignty of the state, or against its religion.

XXIV.

Offences of this class in some instances change their names: in others not.

It is the common property, then, of the offences that belong to this division, to run over the same ground that is occupied by those of the preceding classes. But some of them, as we shall see, are apt, on various occasions, to drop or change the names which bring them under this division: this is chiefly the case with regard to simple falsehoods. Others retain their names unchanged; and even thereby supersede the names which would otherwise belong to the offences which they denominate: this is chiefly the case with regard to personation, forgery, and perjury. When this circumstance then, the circumstance of falsehood, intervenes, in some cases the name which takes the lead, is that which indicates the offence by its effect; in other cases, it is that which indicates the expedient or instrument as it were by

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the help of which the offence is committed. Falsehood, take it by itself, consider it as not being accompanied by any other material circumstances, nor therefore productive of any material effects, can never, upon the principle of utility, constitute any offence at all. Combined with other circumstances, there is scarce any sort of pernicious effect which it may not be instrumental in producing. It is therefore rather in compliance with the laws of language, than in consideration of the nature of the things themselves, that falsehoods are made separate mention of under the name and in the character of distinct offences. All this would appear plain enough, if it were now a time for entering into particulars: but that is what can not be done, consistently with any principle of order or convenience, until the inferior divisions of those other classes shall have been previously exhibited.

XXV.

A trust—what.

We come now to offences against trust. A trust is, where there is any particular act which one party, in the exercise of some *power*, or some *right**, which is conferred on him, is bound to

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Power and *right*, why no complete definition is here given of them.

* Powers, though not a species of rights (for the two sorts of fictitious entities, termed a *power* and a *right*, are altogether disparate) are yet so far included under rights, that wherever the word *power* may be employed, the word *right* may also be employed: The reason is, that wherever you may speak of a person as having a power, you may also speak of

perform for the benefit of another. Or, more fully, thus: A party is said to be invested with a

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him as having a right to such power: but the converse of this proposition does not hold good: there are cases in which, though you may speak of a man as having a right, you can not speak of him as having a power, or in any other way make any mention of that word. On various occasions you have a *right* for instance, to the services of the magistrate: but if you are a private person, you have no *power* over him: all the power is on his side. This being the case, as the word *right* was employed, the word *power* might, perhaps, without any deficiency in the sense, have been omitted. On the present occasion however, as in speaking of trusts this word is commonly made more use of than the word *right*, it seemed most eligible, for the sake of perspicuity, to insert them both.

It may be expected that, since the word *trust* has been here expounded, the words *power* and *right*, upon the meaning of which the exposition of the word *trust* is made to depend, should be expounded also: and certain it is, that no two words can stand more in need of it than these do. Such exposition I accordingly set about to give, and indeed have actually drawn up: but the details into which I found it necessary to enter for this purpose, were of such length as to take up more room than could consistently be allotted to them in this place. With respect to these words, therefore, and a number of others, such as *possession*, *title*, and the like, which in point of import are inseparably connected with them, instead of exhibiting the exposition itself, I must content myself with giving a general idea of the plan which I have pursued in framing it: and as to every thing else, I must leave the import of them to rest upon whatever footing it may happen to stand upon in the apprehension of each reader. Power and right, and the whole tribe of fictitious en-

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trust, when, being invested with a *power*, or with a *right*, there is a certain behaviour which, in the

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tities of this stamp, are all of them in the sense which belongs to them in a book of jurisprudence, the results of some manifestation or other of the legislator's will with respect to such or such an act. Now every such manifestation is either a prohibition, a command, or their respective negations; viz. a permission, and the declaration which the legislator makes of his will when on any occasion he leaves an act uncommanded. Now, to render the expression of the rule more concise, the commanding of a positive act may be represented by the prohibition of the negative act which is opposed to it. To know then how to expound a right, carry your eye to the act which, in the circumstances in question, would be a violation of that right: the law creates the right by prohibiting that act. Power, whether over a man's own person, or over other persons, or over things, is constituted in the first instance by permission: but in as far as the law takes an active part in corroborating it, it is created by prohibition, and by command: by prohibition of such acts (on the part of other persons) as are judged incompatible with the exercise of it; and upon occasion, by command of such acts as are judged to be necessary for the removal of such or such obstacles of the number of those which may occur to impede the exercise of it. For every right which the law confers on one party, whether that party be an individual, a subordinate class of individuals, or the public, it thereby imposes on some other party a *duty* or *obligation*. But there may be laws which command or prohibit acts, that is, impose duties, without any other view than the benefit of the agent: these generate no rights: duties, therefore, may be either *extra-regarding* or *self-regarding*: extra-regarding have rights to correspond to them: self-regarding, none.

That the exposition of the words *power* and *right* must, in

exercise of that power, or of that right, he is bound to maintain for the benefit of some other

order to be correct, enter into a great variety of details, may be presently made appear. One branch of the system of rights and powers, and but one, are those of which property is composed: to be correct, then, it must, among other things, be applicable to the whole tribe of modifications of which property is susceptible. But the commands and prohibitions, by which the *powers* and *rights* that compose those several modifications are created, are of many different forms: to comprize the exposition in question within the compass of a single paragraph, would therefore be impossible: to take as many paragraphs for it as would be necessary, in order to exhibit these different forms, would be to engage in a detail so ample, that the analysis of the several possible species of property would compose only a part of it. This labour, uninviting as it was, I have accordingly undergone: but the result of it, as may well be imagined, seemed too voluminous and minute to be exhibited in an outline like the present. Happily it is not necessary, except only for the scientific purpose of arrangement, to the understanding of any thing that need be said on the penal branch of the art of legislation. In a work which should treat of the civil branch of that art, it would find its proper place: and in such a work, if conducted upon the plan of the present one, it would be indispensable. Of the limits which seem to separate the one of these branches from the other, a pretty ample description will be found in the next chapter: from which some further lights respecting the course to be taken for developing the notions to be annexed to the words *right* and *power*, may incidentally be collected. See in particular, § 3. and 4. See also par. lv. of the present chapter.

I might have cut this matter very short, by proceeding in the usual strain, and saying, that a power was a faculty, and

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party. In such case, the party first mentioned is styled a trustee: for the other party, no name has ever yet been found: for want of a name, there seems to be no other resource than to give a new and more extensive sense to the word *beneficiary*, or to say at length *the party to be benefitted**.

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that a right was a privilege, and so on, following the beaten track of definition. But the inanity of such a method, in cases like the present, has been already pointed out:† a power is not a—any thing: neither is a right a—any thing: the case is, they have neither of them any superior genus: these, together with *duty*, *obligation*, and a multitude of others of the same stamp being of the number of those fictitious entities, of which the import can by no other means be illustrated than by showing the relation which they bear to real ones.

* The first of these parties is styled in the law language, as well as in common speech, by the name here given to him. The other is styled, in the technical language of the English law, a *cestuy que trust:* in common speech, as we have observed, there is, unfortunately, no name for him. As to the law phrase, it is antiquated French, and though complex, it is still elliptical, and to the highest degree obscure. The phrase in full length would run in some such manner as this: *cestuy* al use de qui le trust est créé: he to whose use the trust or benefit is created. In a particular case, a *cestuy que trust* is called by the Roman law, *fidei-commissarius*. In imitation of this, I have seen him somewhere or other called in English a *fide-committee*. This term however, seems not very expressive. A fide-committee, or, as it should have been, a *fidei*-committee, seems, literally

† See Fragment of Government, ch. v. § 6, note.

The trustee is also said to have a trust *conferred* or *imposed* upon him, to be *invested* with a trust, to have had a trust given him to execute, to perform, to discharge, or to fulfil. The party to be benefitted, is said to have a trust established or created in his favour: and so on through a variety of other phrases.

Offences against

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Now it may occur, that a *trust* is oftentimes

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speaking, to mean one who is committed to the good faith of another. Good faith seems to consist in the keeping of a promise. But a trust may be created without any promise in the case. It is indeed common enough to exact a promise, in order the more effectually to oblige a man to do that which he is made to promise he will do. But this is merely an accidental circumstance. A trust may be created without any such thing. What is it that constitues a legal obligation in any case? A command, express or virtual, together with punishment appointed for the breach of it. By the same means may an obligation be constituted in this case as well as any other. Instead of the word *beneficiary*, which I found it necessary to adopt, the sense would be better expressed by some such word as *beneficiendary*, (a word analagous in its formation to *referendary*) were it such an one as the ear could bring itself to indure. This would put it more effectually out of doubt, that the party meant was the party who *ought* to receive the benefit, whether he actually receives it or no: whereas the word *beneficiary* might be understood to intimate, that the benefit, was *actually* received: while in offences against trust the mischiefs commonly is, that such benefit is reaped not by the person it was designed for, but by some other: for instance, the trustee.

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trust, condition, and property, why ranked under separate divisions.

spoken of as a species of *condition**: that a trust is also spoken of as a species of *property*: and that a condition itself is also spoken of in the same light. It may be thought, therefore, that in the first class, the division of offences against condition should have been included under that of the offences against property: and that at any rate, so much of the fifth class now before us as contains offences against trust, should have been included under one or other of those two divisions of the first class. But upon examination it will appear, that no one of these divisions could with convenience, nor even perhaps with propriety, have been included under either of the other two. It will appear at the same time, that there is an intimate connection subsisting amongst them all: insomuch that of the lists of the offences to which they are respectively exposed, any one may serve in great measure as a model for any other. There are certain offences to which all

* It is for shortness' sake that the proposition is stated as it stands in the text. If critically examined, it might be found, perhaps, to be scarcely justifiable by the laws of language. For the fictitious entities, characterized by the two abstract terms, *trust* and *condition*, are not subalternate but disparate. To speak with perfect precision, we should say that he who is invested with a trust, is, on that account, spoken of as being invested with a condition: viz. the condition of a trustee. We speak of the condition of a trustee as we speak of the condition of a husband or a father.

trusts as such are exposed: to all these offences every sort of condition will be found exposed: at the same time that particular species of the offences against trust will, upon their application to particular conditions, receive different particular denominations. It will appear also, that of the two groupes of offences into which the list of those against trust will be found naturally to divide itself, there is one, and but one, to which property, taken in its proper and more confined sense, stands exposed: and that these, in their application to the subject of property, will be found susceptible of distinct modifications, to which the usage of language, and the occasion there is for distinguishing them in point of treatment, make it necessary to find names.

In the first place, as there are, or at least may be (as we shall see) conditions which are not trusts*, so there are trusts of which the idea would not be readily and naturally understood to be included under the word *condition:* add to which, that of those conditions which do include a trust, the greater number include other ingredients along with it: so that the idea of a condition, if on the one hand it stretches beyond the idea of a trust, does on the other hand fall short of it. Of the several sorts of trusts, by far the most important are those in which it is the public that

* Infra, lv.

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stands in the relation of *beneficiary*. Now these trusts, it should seem, would hardly present themselves at first view upon the mention of the word *condition*. At any rate, what is more material, the most important of the offences against these kinds of trust would not seem to be included under the denomination of offences against condition. The offences which by this latter appellation would be brought to view, would be such only as seemed to affect the interests of an individual: of him, for example, who is considered as being invested with that condition. But in offences against public trust, it is the influence they have on the interests of the public that constitutes by much the most material part of their pernicious tendency: the influence they have on the interests of any individual, the only part of their influence which would be readily brought to view by the appellation of offences against condition, is comparatively as nothing. The word trust directs the attention at once to the interests of that party for whom the person in question is trustee: which party, upon the addition of the epithet public, is immediately understood to be the body composed of the whole assemblage, or an indefinite portion of the whole assemblage of the members of the state. The idea presented by the words *public trust* is clear and unambiguous: it is but an obscure and ambiguous garb that that idea could be expressed

in by the words *public condition.* It appears, therefore, that the principal part of the offences, included under the denomination of offences against trust, could not, commodiously at least, have been included under the head of offences against condition.

It is evident enough, that for the same reasons neither could they have been included under the head of offences against property. It would have appeared preposterous, and would have argued a total inattention to the leading principle of the whole work, the principle of utility, to have taken the most mischievous and alarming part of the offences to which the public stands exposed, and forced them into the list of offences against the property of an individual: of that individual, to wit, who in that case would be considered as having in him the property of that public trust, which by the offences in question is affected.

Nor would it have been less improper to have included conditions, all of them, under the head of property: and thereby the whole catalogue of offences against condition, under the catalogue of offences against property. True it is, that there are offences againt condition, which perhaps with equal propriety, and without any change in their nature, might be considered in the light of offences against property: so extensive and so vague are the ideas that are wont to be annexed to both these objects. But there are other of-

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fences which though with unquestionable propriety they might be referred to the head of offences against condition, could not, without the utmost violence done to language, be forced under the appellation of offences against property. Property, considered with respect to the proprietor, implies invariably a benefit, and nothing else: whatever obligations or burthens may, by accident, stand annexed to it, yet in itself it can never be otherwise than beneficial. On the part of the proprietor, it is created not by any commands that are laid on him, but by his being left free to do with such or such an article as he likes. The obligations it is created by, are in every instance laid upon other people. On the other hand, as to conditions, there are several which are of a mixt nature, importing as well a burthen to him who stands invested with them as a benefit: which indeed is the case with those conditions which we hear most of under that name, and which make the greatest figure.

There are even conditions which import nothing but burthen, without any spark of benefit. Accordingly, when between two parties there is such a relation, that one of them stands in the place of an object of *property* is applied only on one side; but the word *condition* is applied alike to both: it is but one of them that is said on that account to be possessed of a property; but both of them are alike spoken of as being possessed of

or being invested with a condition: it is the master alone that is considered as possessing a property, of which the servant, in virtue of the services he is bound to render, is the object: but the servant, not less than the master, is spoken of as possessing or being invested with a condition.

The case is, that if a man's condition is ever spoken of as constituting an article of his *property*, it is in the same loose and indefinite sense of the word in which almost every other offence that could be imagined might be reckoned into the list of offences against property. If the language indeed were in every instance, in which it made use of the phrase, *object of property*, perspicuous enough to point out under that appellation the material and really existent body, the *person* or the *thing* in which those acts terminate, by the performance of which the property is said to be *enjoyed*; if, in short, in the import given to the phrase *object of property*, it made no other use of it than the putting it to signify what is now called a corporeal *object*, this difficulty, and this confusion would not have occurred. But the import of the phrase *object of property*, and in consequence the import of the word *property*, has been made to take a much wider range. In almost every case in which the law does any thing for a man's benefit or advantage, men are apt to speak of it, on some occasion or other, as conferring on him a sort of property. At the same time, for one reason or

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other, it has in several cases been not practicable, or not agreeable, to bring to view, under the appellation of *the object of his property*, the thing in which the acts, by the performance of which the property is said to be enjoyed, have their termination, or the person in whom they have their commencement. Yet something which could be spoken of under that appellation, was absolutely requisite *. The expedient then has been

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* It is to be observed, that in common speech, in the phrase *the object of a man's property*, the words *the object of* are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words *a man's property*, perform the office of the whole. In some cases then it was only on a *part* of the object that the acts in question might be performed: and to say, on this account, that the object was a man's property, was as much as to intimate that they might be performed on any part. In other cases it was only certain particular acts that might be exercised on the object: and to say of the object that it was his property, was as much as to intimate that any acts whatever might be exercised on it. Sometimes the acts in question were not to be exercised but at a future *time*, nor then, perhaps, but in the case of the happening of a particular event, of which the happening was *uncertain*: and to say of an object that it was his property, was as much as to intimate that the acts in question might be exercised on it at any time. Sometimes the object on which the acts in question were to have their termination, or their commencement, was a human creature: and to speak of one human creature as being the

to create, as it were, on every occasion, an ideal being, and to assign to a man this ideal being for the object of his property: and these are the sort of objects to which men of science, in taking a view of the operations of the law in this behalf, came, in process of time, to give the name of *incorporeal*. Now of these incorporeal objects of property the variety is prodigious. Fictitious entities of this kind have been fabricated almost out of every thing: not *conditions* only (that of a trustee included) but even *reputation* have been of the number. Even *liberty* has been considered in this same point of view: and though on so many occasions it is contrasted with *property*, yet on other occasions, being reckoned into the ca-

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property of another is what would shock the ear every where but where slavery, is established, and even there, when applied to persons in any other condition than that of slaves. Among the first Romans, indeed, the wife herself was the property of her husband; the child, of his father; the servant, of his master. In the civilized nations of modern times, the two first kinds of property are altogether at an end: and the last, unhappily not yet at an end, but however verging, it is to be hoped, towards extinction. The husband's property, is now the company* of his wife; the father's the guardianship and service of his child; the master's, the service of his servant.

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* The *consortium*, says the English Law.

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talogue of possessions, it seems to have been considered as a branch of property. Some of these applications of the words *property, object of property,* (the last, for instance) are looked upon, indeed, as more figurative, and less proper than the rest: but since the truth is, that where the immediate object is incorporeal, they are all of them improper, it is scarce practicable any where to draw the line.

Notwithstanding all this latitude, yet, among the relations in virtue of which you are said to be possessed of a condition, there is one at least which can scarcely, by the most forced construction, be said to render any other man, or any other thing, the object of your property. This is the right of persevering in a certain course of action; for instance, in the exercising of a certain trade. Now to confer on you this right, in a certain degree at least, the law has nothing more to do than barely to abstain from forbidding you to exercise it. Were it to go farther, and, for the sake of enabling you to exercise your trade to the greater advantage, prohibit others from exercising the like, then, indeed, persons might be found, who in a certain sense, and by a construction rather forced than otherwise, might be spoken of as being the objects of your property: viz. by being made to render you that sort of negative service which consists in the forbearing to do those acts which

would lessen the profits of your trade. But the ordinary right of exercising any such trade or profession, as is not the object of a monopoly, imports no such thing; and yet, by possessing this right, a man is said to possess a condition: and by forfeiting it, to forfeit his condition.

After all, it will be seen, that there must be cases in which, according to the usage of language, the same offence may, with more or less appearance of propriety, be referred to the head of offences against condition, or that of offences against property indifferently. In such cases the following rule may serve for drawing the line. Wherever, in virtue of your possessing a property, or being the object of a property possessed by another, you are characterised, according to the usage of language, by a particular name, such as master, servant, husband, wife, steward, agent, attorney, or the like, there the word *condition* may be employed in exclusion of the word *property*: and an offence in which, in virtue of your bearing such relation, you are concerned, either in the capacity of an offender, or in that of a party injured, may be referred to the head of offences against condition, and not to that of offences against property. To give an example: Being bound, in the capacity of land steward to a certain person, to oversee the repairing of a certain bridge, you forbear to do so: in this case, as the services

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you are bound to render are of the number of those which give occasion to the party, from whom they are due, to be spoken of under a certain generical name, viz. that of land steward, the offence of withholding them may be referred to the class of offences against condition. But suppose that, without being engaged in that general and miscellaneous course of service, which with reference to a particular person would denominate you his land steward, you were bound, whether by usage or by contract, to render him that single sort of service which consists in the providing, by yourself or by others, for the repairing of that bridge: in this case, as there is not any such current denomination to which, in virtue of your being bound to render this service, you stand aggregated (for that of architect, mason, or the like, is not here in question) the offence you commit by withholding such service can not with propriety be referred to the class of offences against condition: it can only therefore be referred to the class of offences against property.

By way of further distinction, it may be remarked, that where a man, in virtue of his being bound to render, or of others being bound to render him, certain services, is spoken of as possessing a condition, the assemblage of services is generally so considerable, in point of duration, as

to constitute a course of considerable length, so as on a variety of occasions to come to be varied and repeated: and in most cases, when the condition is not of a domestic nature, sometimes for the benefit of one person, sometimes for that of another. Services which come to be rendered to a particular person on a particular occasion, especially if they be of short duration, have seldom the effect of occasioning either party to be spoken of as being invested with a condition. The particular occasional services which one man may come, by contract or otherwise, to be bound to render to another, are innumerably various: but the number of conditions which have names may be counted, and are, comparatively, but few.

If after all, notwithstanding the rule here given for separating conditions from articles of property, any object should present itself which should appear to be referable, with equal propriety, to either head, the inconvenience would not be material; since in such cases, as will be seen a little farther on, whichever appellation were adopted, the list of the offences, to which the object stands exposed, would be substantially the same.

These difficulties being cleared up, we now proceed to exhibit an analytical view of the several possible offences against trust.

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Offences against trust —their connection with each other.

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Offences against trust may be distinguished, in the first place, into such as concern the existence of the trust in the hands of such or such a person, and such as concern the *exercise* of the functions that belong to it*. First then, with regard to

* We shall have occasion, a little farther on, to speak of the person in whose hands the trust exists, under the description of the person who possesses, or is in possession of it, and thence of the possession of the trust abstracted from the consideration of the possessor. However different the expression, the import is in both cases the same. So irregular and imperfect is the structure of language on this head, that no one phrase can be made to suit the idea on all the occasions on which it is requisite it should be brought to view: the phrase must be continually shifted, or new modified: so likewise in regard to conditions, and in regard to property. The being invested with, or possessing a condition: the being in possession of an article of property, that is, if the object of the property be corporeal; the having a legal title (defeasible or indefeasible) to the physical possession of it, answers to the being in possession of a trust, or the being the person in whose hands a trust exists. In like manner, to the *exercise* of the *functions* belonging to a trust, or to a condition, corresponds the *enjoyment* of an article of property; that is, if the object of it be corporeal, the *occupation*. These verbal discussions are equally tedious and indispensable. Striving to cut a new road through the wilds of jurisprudence, I find myself continually distressed, for want of tools that are fit to work with. To frame a complete set of new ones is impossible. All that can be done is, to make here and there a new one in cases of absolute

such as relate to its existence. An offence of this description, like one of any other description, if an offence it ought to be, must to some person or other import a prejudice. This prejudice may be distinguished into two branches: 1. That which may fall on such persons as are or should be invested with the trust: 2. That which may fall on the persons for whose sake it is or should be instituted, or on other persons at large. To begin with the former of these branches. Let any trust be conceived. The consequences which it is in the nature of it to be productive of to the possessor, must, in as far as they are *material**, be either of an advantageous or of a disadvantageous nature: in as far as they are advantageous, the trust may be considered as a *benefit* or privilege:

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necessity, and for the rest, to patch up from time to time the imperfections of the old.

As to the bipartition which this paragraph sets out with, it must be acknowledged not to be of the nature of those which to a first glance afford a sort of intuitive proof of their being exhaustive. There is not that marked connection and opposition between the terms of it, which subsists between contradictory terms and between terms that have the same common genus. I imagine, however, that upon examination it would be found to be exhaustive notwithstanding: and that it might even be demonstrated so to be. But the demonstration would lead us too far out of the ordinary track of language.

* See Cap. vii. [Actions.] 111.

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in as far as they are disadvantageous, it may be considered as a *burthen**. To consider it then upon the footing of a benefit. The trust either is of the number of those which ought by law to subsist†;

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* If advantageous, it will naturally be on account of the *powers* or *rights* that are annexed to the trust: if disadvantageous, on account of the *duties*.

† It may seem a sort of anachronism to speak on the present occasion of a trust, condition, or other possession, as one of which it may happen that a man ought or ought not to have had possession given him by the law, for the plan here set out upon is to give such a view all along of the laws that are proposed, as shall be taken from the reasons which there are for making them: the reason then it would seem should subsist before the law: not the law before the reason. Nor is this to be denied: for, unquestionably, upon the principle of utility, it may be said with equal truth of those operations by which a trust, or any other article of property, is instituted, as of any other operations of the law, that it never can be expedient they should be performed, unless some reason for performing them, deduced from that principle, can be assigned. To give property to one man, you must impose obligation on another: you must oblige him to do something which he may have a mind not to do, or to abstain from doing something which he may have a mind to do: in a word, you must in some way or other expose him to inconvenience. Every such law, therefore, must at any rate be mischievous in the first instance; and if no good effects can be produced to set against the bad, it must be mischievous upon the whole. Some reasons, therefore, in this case, as in every other, there ought to be. The truth is, that in the case before us, the

that is, which the legislator meant should be established; or is not. If it is, the possession which at any time you may be deprived of, with respect to it, must at that time be either present or to come: if to come (in which case it may be regarded either as certain or as contingent) the investitive event, or event from whence your

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reasons are of too various and complicated a nature to be brought to view in an analytical outline like the present. Where the offence is of the number of those by which *person* or *reputation* are affected, the reasons for prohibiting it lie on the surface, and apply to every man alike. But *property*, before it can be offended against, must be created, and at the instant of its creation distributed, as it were, into parcels of different sorts and sizes, which require to be assigned, some to one man and some to another, for reasons, of which many lie a little out of sight, and which being different in different cases, would take up more room than could consistently be allotted to them here. For the present purpose, it is sufficient if it appear, that for the carrying on of the several purposes of life, there are trusts, and conditions, and other articles of property, which must be possessed by somebody: and that it is not every article that can, nor every article that ought, to be possessed by every body. What articles ought to be created, and to what persons, and in what cases they ought to be respectively assigned, are questions which cannot be settled here. Nor is there any reason for wishing that they could, since the settling them one way or another is what would make no difference in the nature of any offence whereby any party may be exposed, on the occasion of any such institution to sustain a detriment.

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possession of it should have taken its commencement, was either an event in the production of which the will of the offender should have been instrumental, or any other event at large: in the former case, the offence may be termed *wrongful non-investment of trust:* in the latter case, *wrongful interception of trust* *. If at the time of the offence whereby you are deprived of it, you were already in possession of it, the offence may be stiled *wrongful divestment of trust.* In any of these cases, the effect of the offence is either to put somebody else into the trust, or not: if not, it is wrongful divestment, wrongful interception, or wrongful divestment, and nothing more: if it be, the person put in possession is either the

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* In the former case it may be observed, the act is of the negative kind: in the latter, it will commonly be of the positive kind.

As to the expression *non-investment of trust*, I am sensible that it is not perfectly consonant to the idiom of the language: the usage is to speak of a person as being invested (that is clothed) with a trust, not of a trust as of a thing, that is itself *invested*, or put on. The phrase at length would be, the non-investment of a person with a trust: but this phrase is by much too long-winded to answer the purpose of an appellative. I saw, therefore, no other resource than to venture upon the ellipsis here employed. The antient lawyers, in the construction of their appellatives, have indulged themselves in much harsher ellipsises without scruple. See above, xxv. note. It is already the usage to speak of a trust as a thing that *vests*, and as a thing that may be *divested*.

wrong doer himself, in which case it may be stiled *usurpation of trust;* or some other person, in which case it may be stiled *wrongful investment*, or attribution, *of trust*. If the trust in question is not of the number of those which ought to subsist, it depends upon the manner in which one man deprives another of it, whether such deprivation shall or shall not be an offence, and, accordingly, whether non-investment, interception, or divestment, shall or shall not be wrongful. But the putting any body into it must at any rate be an offence: and this offence may be either usurpation or wrongful investment, as before.

In the next place, to consider it upon the footing of a burthen. In this point of view, if no other interest than that of the persons liable to be invested with it were considered, it is what ought not, upon the principle of utility, to subsist: if it ought, it can only be for the sake of the persons in whose favour it is established. If then it ought *not* on any account to subsist, neither non-investment, interception, nor divestment, can be wrongful with relation to the persons first-mentioned, whatever they may be on any other account, in respect of the manner in which they happen to be performed: for usurpation, though not likely to be committed, there is the same room as before: so likewise is there for wrongful investment; which, in as far as the trust is considered as a burthen, may be stiled

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wrongful imposition of trust. If the trust, being still of the burthensome kind, is of the number of those which *ought* to subsist, any offence that can be committed, with relation to the existence of it, must consist either in causing a person to *be* in possession of it, who ought *not* to be, or in causing a person *not* to be in possession of it who *ought* to be: in the former case, it must be either usurpation or wrongful divestment, as before: in the latter case, the person who is caused to be not in possession, is either the wrong doer himself, or some other: if the wrong doer himself, either at the time of the offence he was in possession of it, or he was not: if he was, it may be termed *wrongful abdication* of trust; if not, *wrongful detrectation** or *non-assumption:* if the person, whom the offence causes not to be in the trust, is any other person, the offence must be either wrongful divestment, wrongful non-investment, or wrongful interception, as before: in any of which cases, to consider the trust in the light of a burthen, it might also be stiled *wrongful exemption from trust.*

Lastly, with regard to the prejudice which the persons for whose benefit the trust is instituted,

* [Detrectation.] I do not find that this word has yet been received into the English language. In the Latin, however, it is very expressive, and is used in a sense exactly suitable to the sense here given to it. *Militiam detrectare,* to endeavour to avoid serving in the army, is a phrase not unfrequently met with in the Roman writers.

or any other persons whose interests may come to be affected by its existing or not existing in such or such hands, are liable to sustain. Upon examination it will appear, that by every sort of offence whereby the persons who are or should be in possession of it are liable, in that respect, to sustain a prejudice, the persons now in question are also liable to sustain a prejudice. The prejudice, in this case, is evidently of a very different nature from what it was of in the other: but the same general names will be applicable in this case as in that. If the beneficiaries, or persons whose interests are at stake upon the exercise of the trust, or any of them, are liable to sustain a prejudice, resulting from the quality of the person by whom it may be filled, such prejudice must result from the one or the other of two causes: 1. From a person's having the possession of it who ought not to have it: or 2. From a person's not having it who ought: whether it be a benefit or burthen to the possessor, is a circumstance that to this purpose makes no difference. In the first of these cases the offences from which the prejudice takes its rise are those of usurpation of trust, wrongful attribution of trust, and wrongful imposition of trust: in the latter, wrongful non-investment of trust, wrongful interception of trust, wrongful divestment of trust, wrongful abdication of trust, and wrongful detrectation of trust.

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So much for the offences which concern the existence or possession of a trust: those which concern the exercise of the functions that belong to it may be thus conceived. You are in possession of a trust: the time then for your acting in it must, on any given occasion, (neglecting, for simplicity's sake, the then present instant) be either past or yet to come. If past, your conduct on that occasion must have been either conformable to the purposes for which the trust was instituted, or unconformable: if conformable, there has been no mischief in case: if unconformable, the fault has been either in yourself alone, or in some other person, or in both: in as far as it has lain in yourself, it has consisted either in your *not* doing something which you ought to do, in which case it may be stiled *negative breach of trust;* or in your *doing* something which you ought *not* to do: if in the doing something which you ought not to do, the party to whom the prejudice has accrued is either the same for whose benefit the trust was instituted, or some other party at large: in the former of these cases, the offence may be stiled *positive breach of trust;* in the other *abuse of trust**.

* What is here meant by abuse of trust, is the exercise of a power usurped over strangers, under favour of the powers properly belonging to the trust. The distinction between what is here meant by breach of trust, and what is here meant by abuse of trust, is not very steadily observed in common speech: and in regard to public trusts, it will even in

In as far as the fault lies in another person, the offence on his part may be stiled *disturbance of trust*. Supposing the time for your acting in the trust to be yet to come, the effect of any act which tends to render your conduct unconformable to the purposes of the trust, may be either to render it actually and eventually unconformable, or to produce a chance of its being so. In the former of these cases, it can do no otherwise than take one or other of the shapes that have just been mentioned. In the latter case, the blame must lie either in yourself alone, or in some other person, or in both together, as before. If in another person, the acts whereby he may tend to render your conduct unconformable, must be exercised either on yourself, or on other objects at large. If exercised on yourself, the influence they possess must

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many cases be imperceptible. The two offences are, however, in themselves perfectly distinct: since the persons, by whom the prejudice is suffered, are in many cases altogether different. It may be observed, perhaps, that with regard to abuse of trust, there is but one species here mentioned; viz. that which corresponds to positive breach of trust: none being mentioned as corresponding to negative breach of trust. The reason of this distinction will presently appear. In favour of the parties, for whose benefit the trust was created, the trustee is bound to act; and therefore merely by his doing nothing they may receive a prejudice: but in favour of other persons at large he is not bound to act: and therefore it is only from some positive act on his part that any prejudice can ensue to them.

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either be such as operates immediately on your body, or such as operates immediately on your mind. In the latter case, again, the tendency of them must be to deprive you either of the knowledge, or of the power, or of the inclination*, which would be necessary to your maintaining such a conduct as shall be conformable to the purposes in question. If they be such, of which the tendency is to deprive you of the inclination in question, it must be by applying to your will the force of some *seducing* motive†. Lastly, This motive must be either of the *coercive*, or of the *alluring* kind; in other words, it must present itself either in the shape of a mischief or of an advantage. Now in none of all the cases that have been mentioned, except the last, does the offence receive any new denomination; according to the event it is either a disturbance of trust, or an abortive attempt to be guilty of that offence. In this last it is termed *bribery*; and it is that particular species of it which may be termed *active* bribery, or *bribe-giving*. In this case, to consider the matter on your part, either you accept of the bribe, or you do not: if not, and you do not afterwards commit, or go about to commit, either a breach or an abuse of trust, there is no offence, on your part, in the case: if you do accept it, whether

* See infra; and ch. xviii. [Indirect Legislation.]

† See ch. xi. [Dispositions] xxix.

you eventually do or do not commit the breach or the abuse which it is the bribe-givers intention you should commit, you at any rate commit an offence which is also termed bribery: and which, for distinction sake may be termed *passive* bribery, or *bribe-taking**. As to any farther distinctions, they will depend upon the nature of the particular sort of trust in question, and therefore belong not to the present place. And thus we have thirteen sub-divisions of offences against trust: viz. 1. Wrongful non-investment of trust 2. Wrongful interception of trust. 3. Wrongful divestment of trust. 4. Usurpation of trust. 5. Wrongful investment or attribution of trust. 6. Wrongful abdication of trust. 7. Wrongful detrectation of trust. 8. Wrongful imposition of trust. 9. Negative breach of trust. 10. Positive breach of trust. 11. Abuse of trust. 12. Disturbance of trust. 13. Bribery.

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* To bribe a trustee, as such, is in fact neither more nor less than to *suborn* him to be guilty of a breach or an abuse of trust. Now subornation is of the number of those *accessory* offences which every principal offence, one as well as another, is liable to be attended with. See infra, and B. I. tit. [Accessory offences.] This particular species of subornation however, being one that, besides its having a specific name framed to express it, is apt to engage a particular share of attention, and to present itself to view in company with other offences against trust, it would have seemed an omission not to have included it in that catalogue.

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Prodigality in trustees dismissed to Class 3.

XXVIII.

From what has been said, it appears that there cannot be any other offences, on the part of a trustee, by which a *beneficiary* can receive on any particular occasion any assignable specific prejudice. One sort of acts, however, there are by which a trustee may be put in some *danger* of receiving a prejudice, although neither the nature of the prejudice, nor the occasion on which he is in danger of receiving it, should be assignable. These can be no other than such acts, whatever they may be, as dispose the trustee to be acted upon by a given bribe with greater effect than any with which he could otherwise be acted upon: or in other words, which place him in such circumstances as have a tendency to encrease the quantum of his sensibility to the action of any motive of the sort in question*. Of these acts, there seem to be no others, that will admit of a description applicable to all places and times alike, than acts of *prodigality* on the part of the trustee. But in acts of this nature the prejudice to the *beneficiary* is contingent only and unliquidated; while the prejudice to the trustee himself is certain and liquidated. If therefore on any occasion it should be found adviseable to treat it on the footing of an offence, it will find its place more naturally in the class of self-regarding ones.

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* See ch. vi. [Sensibility] ii.

XXIX.

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The sub-divisions of offences against trust are also determined by the divisions of the preceding classes.

As to the sub-divisions of offences against trust, these are perfectly analogous to those of offences by falsehood. The trust may be private, semi-public, or public: it may concern property, person, reputation, or condition; or any two or more of those articles at a time: as will be more particularly explained in another place. Here too the offence, in running over the ground occupied by the three prior classes, will in some instances change its name, while in others it will not.

XXX.

Connection between offences by falsehood and offences against trust.

Lastly, If it be asked, What sort of relation there subsists between falsehoods on one hand, and offences concerning trust on the other hand; the answer is, they are altogether disparate. Falsehood is a circumstance that may enter into the composion of any sort of offence, those concerning trust, as well as any other: in some as an accidental, in others as an essential instrument. Breach or abuse of trust are circumstances which, in the character of accidental concomitants, may enter into the composition of any other offences (those against falsehood included) besides those to which they respectively give name.

Genera of Class I.

XXXI.

Analysis into *genera* pursued no farther than Class 1.

Returning now to class the first, let us pursue the distribution a step farther, and branch out the several divisions of that class, as above exhibited, into their respective *genera*, that is, into such minuter divisions as are capable of being characterised by denominations of which a great part are already current among the people*. In this place the analysis must stop. To apply it in the same regular form to any of the other classes seems scarcely practicable: to semi-public, as also to public offences, on account of the interference of local circumstances: to self-regarding ones, on account of the necessity it would create of deciding prematurely upon points which may appear liable to controversy: to offences by falsehood, and offences against trust, on account of the dependence there is between this class and the three former. What remains to be done in this way,

* In the enumeration of these genera, it is all along to be observed, that offences of an accessory nature are not mentioned; except unless it be here and there where they have obtained current names which seemed too much in vogue to be omitted. Accessory offences are those which, without being the very acts from which the mischief in question takes its immediate rise, are, in the way of causality, connected with those acts. See ch. vii. [Actions] xxiv. and B. I. tit. [Accessory offences.]

with reference to these four classes, will require discussion, and will therefore be introduced with more propriety in the body of the work, than in a preliminary part, of which the business is only to draw outlines.

XXXII.

Offences against an individual may be simple in their effects, or complex.

An act, by which the happiness of an individual is disturbed, is either *simple* in its effects or *complex*. It may be stiled simple in its effects, when it affects him in one only of the articles or points in which his interest, as we have seen, is liable to be affected: complex, when it affects him in several of those points at once. Such as are simple in ther effects must of course be first considered.

XXXIII.

Offences against person—their genera.

In a simple way, that is in one way at a time, a man's happiness is liable to be disturbed either 1. By actions referring to his own person itself; or 2. By actions referring to such external objects on which his happiness is more or less dependent. As to his own person, it is composed of two different parts, or reputed parts, his body and his mind. Acts which exert a pernicious influence on his person, whether it be on the corporeal or on the mental part of it, will operate thereon either immediately, and without affecting his will, or mediately, through the intervention of that faculty: viz. by means of the influence which they cause his will to exercise over his body. If with the intervention of his will, it must be by *mental coercion:*

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that is, by causing him to *will* to maintain, and thence actually to maintain, a certain conduct which it is disagreeable, or in any other way pernicious, to him to maintain. This conduct may either be positive or negative*: when positive, the coercion is stiled *compulsion* or *con*straint: when negative, *re*straint. Now the way in which the coercion is diagreeable to him, may be by producing either pain of body, or only pain of mind. If pain of body is produced by it, the offence will come as well under this as under other denominations, which we shall come to presently. Moreover, the conduct which a man, by means of the coercion, is forced to maintain, will be determined either specifically, and originally by the determination of the particular acts themselves, which he is forced to perform or to abstain from, or generally and incidentally, by means of his being forced to be or not to be in such or such a place. But if he is prevented from being in one place, he is confined thereby to another. For the whole surface of the earth, like the surface of any greater or lesser body, may be conceived to be divided into two, as well as into any other number of parts or spots. If the spot then, which he is confined to, be smaller than the spot which he is excluded from, his condition may be called *confinement*: if larger,

* Ch. vii. [Actions] viii.

*banishment**. Whether an act, the effect of which is to exert a pernicious influence on the person of him who suffers by it, operates with or without the intervention of an act of his will, the mischief it produces will either be *mortal* or *not mortal*. If not mortal, it will either be *reparable*, that is temporary; or *irreparable*, that is perpetual. If reparable, the mischievous act may be termed a *simple corporal injury*; if irreparable, an *irreparable corporal injury*. Lastly, a pain that a man experiences in his mind will either be a pain of actual *sufferance*, or a pain of *apprehension*. If a pain of apprehension, either the offender himself is represented as intending to bear a part in the production of it, or he is not. In the former case the offence may be stiled *menacement*: in the latter case, as also where the pain is a pain of actual sufferance, a *simple mental injury*. And thus we have nine genera or kinds of personal injuries; which, when ranged in the order most commodious for examination, will stand as follows; viz. 1. Simple corporal injuries. 2. Irreparable corporal injuries. 3. Simple injurious restrainment.

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* Of these, and the several other leading expressions which there is occasion to bring to view in the remaining part of this analysis, ample definitions will be found in the body of the work, conceived in *terminis legis*. To give particular references to these difinitions, would be incumbering the page to little purpose.

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4. Simple injurious compulsion*. 5. Wrongful confinement. 6. Wrongful banishment. 7. Wrongful homicide. 8. Wrongful menacement†. 9. Simple mental injuries‡.

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* Injurious restrainment at large, and injurious compulsion at large, are here stiled *simple*, in order to distinguish them from confinement, banishment, robbery, and extortion; all which are, in many cases, but so many modifications of one or other of the two first-mentioned offences.

To constitute an offence an act of simple injurious restrainment, or simple injurious compulsion, it is sufficient if the influence it exerts be, in the first place, pernicious; in the next place, exerted on the person by the medium of the will: it is not necessary that that part of the person on which it is exerted be the part to which it is pernicious: it is not even necessary that it should immediately be pernicious to either of these parts, though to one or other of them it must be pernicious in the long-run, if it be pernicious at all. An act in which the body, for example, is concerned, may be very disagreeable, and thereby pernicious to him who performs it, though neither disagreeable nor pernicious to his body: for instance, to stand or sit in public with a label on his back, or under any other circumstances of ignominy.

† It may be observed, that wrongful menacement is included as well in simple injurious restrainment, and simple injurious compulsion, except in the rare case where the motives by which one man is prevented by another from doing a thing that would have been materially to his advantage, or induced to do a thing that is materially to his prejudice, are of the *alluring* kind.

‡ Although, for reasons that have been already given, (supra xxxi.) no complete catalogue, nor therefore any ex-

XXXIV.

We come now to offences against reputation

haustive view, of either semi-public or self-regarding offences, can be exhibited in this chapter, it may be a satisfaction, however, to the reader, to see some sort of list of them, if it were only for the sake of having examples before his eyes. Such lists cannot any where be placed to more advantage than under the heads of the several divisions of private extra-regarding offences, to which the semi-public and self-regarding offences in question respectively correspond. Concerning the two latter, however, and the last more particularly, it must be understood that all I mean by inserting them here, is to exhibit the mischief, if any, which it is of the nature of them respectively to produce, without deciding upon the question, whether it would be *worth while* [See ch. xiii. Cases unmeet] in every instance, for the sake of combating that mischief, to introduce the evil of punishment. In the course of this detail, it will be observed, that there are several heads of extra-regarding private offences, to which the correspondent heads, either of semi-public or self-regarding offences, or of both, are wanting. The reasons of these deficiencies will probably, in most instances, be evident enough upon the face of them. Lest they should not, they are however specified in the body of the work. They would take up too much room were they to be inserted here.

I. SEMI-PUBLIC OFFENCES through calamity. Calamities, by which the persons or properties of men, or both, are liable to be affected, seem to be as follows: 1. Pestilence or contagion. 2. Famine, and other kinds of scarcity. 3. Mischiefs producible by persons deficient in point of understanding, such as infants, idiots, and maniacs, for want of their being properly taken care of. 4. Mischief producible by the ravages of noxious animals, such as beasts of prey,

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merely. These require but few distinctions. In point of reputation there is but one way of suffer-

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locusts, &c. &c. 5. Collapsion, or fall of large masses of solid matter, such as decayed buildings, or rocks, or masses of snow. 6. Inundation or submersion. 7. Tempest. 8. Blight. 9. Conflagration. 10. Explosion. In as far as a man may contribute, by any imprudent act of his, to give birth to any of the above calamities, such act may be an offence. In as far as a man may fail to do what is incumbent on him to do towards preventing them, such failure may be an offence.

II. SEMI-PUBLIC OFFENCES of mere delinquency. A whole neighbourhood may be made to suffer, 1. Simple corporal injuries: in other words, they may be made to suffer in point of health, by offensive or dangerous trades or manufactures: by selling or falsely puffing off unwholesome medicines or provisions: by poisoning or drying up of springs, destroying of aqueducts, destroying woods, walls, or other fences against wind and rain: by any kinds of artificial scarcity; or by any other calamities intentionally produced. 2 and 3. Simple injurious restrainment, and simple injurious compulsion: for instance, by obliging a whole neighbourhood, by dint of threatening hand-bills, or threatening discourses, publicly delivered, to join, or forbear to join, in illuminations, acclamations, outcries, invectives, subscriptions, undertakings, processions, or any other mode of expressing joy or grief, displeasure or approbation; or, in short, in any other course of conduct whatsoever. 4. and 5. Confinement and banishment: by the spoiling of roads, bridges, or ferry-boats: by destroying or unwarrantably pre-occupying public carriages, or houses of accommodation. 6. By menacement: as by incendiary letters, and tumultuous assemblies: by newspapers or hands-bills, denouncing vengeance against persons of

ing, which is by losing a portion of the good-will of others. Now, in respect of the good-will which others bear you, you may be a loser in either of two ways: 1. By the manner in which you are thought to behave *yourself;* and 2. By the manner in which *others* behave, or are thought to behave, towards you. To cause people to think that you yourself have so behaved, as to have been guilty of any of those acts which cause a man to possess less than he did before of the good-will of the community, is what may be stiled *defamation.* But such is the constitution of human nature, and such the force of prejudice, that a man merely by manifesting his own want of good-will towards you, though ever so unjust in itself, and ever so unlawfully expressed, may in a manner force others to withdraw from you a

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particular denominations: for example, against Jews, Catholics, Protestants, Scotchmen, Gascons, Catalonians, &c. 7. Simple mental injuries: as by distressful, terrifying, obscene, or irreligious exhibitions; such as exposure of sores by beggars, exposure of dead bodies, exhibitions or reports of counterfeit witchcrafts or apparitions, exhibition of obscene or blasphemous prints: obscene or blasphemous discourses held in public: spreading false news of public defeats in battle, or of other misfortunes.

III. Self-regarding offences against person. 1. Fasting. Abstinence from venery, self-flagellation, self-mutilation, and other self-denying and self-tormenting practices. 2. Gluttony, drunkenness, excessive venery, and other species of intemperance. 3. Suicide.

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part of theirs. When he does this by words, or by such actions as have no other effect than in as far as they stand in the place of words, the offence may be stiled *vilification*. When it is done by such actions as, besides their having this effect, are injuries to the person, the offence may be stiled a *personal insult*: if it has got the length of reaching the body, a *corporal insult*: if it stopt short before it reached that length, it may be stiled *insulting menacement*. And thus we have two *genera* or kinds of offences against reputation merely; to wit, 1. Defamation: and, 2. Vilification, or Revilement*. As to corporal insults, and insulting menacement, they belong to the compound title of offences against person and reputation both together.

XXXV.

Offences against property.

If the property of one man suffers by the delinquency of another, such property either was in trust with the offender, or it was not: if it was in trust, the offence is a breach of trust, and of whatever nature it may be in other respects, may be stiled *dissipation in breach of trust*, or *dissipation of property in trust*. This is a particular case: the

* I. SEMI-PUBLIC OFFENCES. 1. Calumniation and vilification of particular denominations of persons; such as Jews, Catholics, &c.

II. SELF-REGARDING OFFENCES. 1. Incontinence in females. 2. Incest.

opposite one is the more common: in such case the several ways in which property may, by possibility, become the object of an offence, may be thus conceived. Offences against property, of whatever kind it be, may be distinguished, as hath been already intimated *, into such as concern the legal possession of it, or right to it, and such as concern only the enjoyment of it, or, what is the same thing, the exercise of that right. Under the former of these heads come, as hath been already intimated †, the several offences of *wrongful non-investment*, *wrongful interception*, *wrongful divestment*, *usurpation*, and *wrongful attribution*. When in the commission of any of these offences a falsehood has served as an instrument, and that, as it is commonly called, a *wilful*, or as it might more properly be termed, an *advised* ‡ one, the epithet *fraudulent* may be prefixed to the name of the offence, or substituted in the room of the word *wrongful*. The circumstance of fraudulency then may serve to characterise a particular species, comprisable under each of those generic heads: in like manner the circumstance of *force*, of which more a little farther on, may serve to characterise another. With respect to wrongful interception in particular, the *investitive event* by which the title to the thing in question should have accrued to you, and for want of which such

* Supra xxvii. † Ib. ‡ See ch. ix. [Consciousness] ii.

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title is, through the delinquency of the offender, as it were, *intercepted*, is either an act of his own, expressing it as his will, that you should be considered by the law as the person who is legally in possession of it, or it is any other event at large: in the former case, if the thing, of which you should have been put into possession, is a sum of money to a certain amount, the offence is that which has received the name of *insolvency*; which branch of delinquency, in consideration of the importance and extent of it, may be treated on the footing of a distinct genus of itself*.

Payment, what.

* The light in which the offence of insolvency is here exhibited, may perhaps at first consideration be apt to appear not only novel but improper. It may naturally enough appear, that when a man owes you a sum of money, for instance, the right to the money is your's already, and that what he withholds from you by not paying you, is not the legal title to it, possession of it, or power over it, but the physical possession of it, or power over it, only. But upon a more accurate examination this will be found not to be the case. What is meant by payment, is always an act of investitive power, as above explained, an expression of an act of the will, and not a physical act: it is an act exercised *with relation* indeed *to* the thing said to be *paid*, but not in a physical sense exercised *upon* it. A man who owes you ten pounds, takes up a handful of silver to that amount, and lays it down on a table at which you are sitting. If then by words, or gestures, or any means whatever, addressing himself to you, he intimates it to be his will that you should take up the money, and do with it as you please, he is said to

Next, with regard to such of the offences against property as concern only the enjoyment

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have *paid* you: but if the case was, that he laid it down not for that purpose, but for some other, for instance, to count it and examine it, meaning to take it up again himself, or leave it for somebody else, he has *not* paid you: yet the physical acts, exercised upon the pieces of money in question, are in both cases the same. Till he does express a will to that purport, what you have is not, properly speaking, the legal possession of the money, or a right to the money, but only a right to have him, or in his default perhaps a minister of justice, compelled to render you that sort of service, by the rendering of which he is said to pay you: that is, to express such will as above-mentioned, with regard to some corporeal article, or other of a certain species, and of value equal to the amount of what he owes you: or, in other words, to exercise in your favour an act of investitive power with relation to some such article.

True it is, that in certain cases a man may perhaps not be deemed, according to common acceptation, to have *paid* you, without rendering you a further set of services, and those of another sort: a set of services, which are rendered by the exercising of certain acts of a physical nature upon the very thing with which he is said to pay you: to wit, by transferring the thing to a certain place where you may be sure to find it, and where it may be convenient for you to receive it. But these services, although the obligation of rendering them should be annexed by law to the obligation of rendering those other services, in the performance of which the operation of payment properly consists, are plainly acts of a distinct nature: nor are they essential to the operation: by themselves they do not constitute it, and it may be performed without them. It *must* be performed without them wherever

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of the object in question. This object must be either a service, or set of services*, which should have been rendered by some *person*, or else an article belonging to the class of *things*. In the former case, the offence may be stiled *wrongful withholding of services*†. In the latter case it may admit of farther modifications, which may be thus conceived: When any object which you have had the physical occupation or enjoyment of, ceases, in any degree, in consequence of the act of another man, and without any change made in so much

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the thing to be transferred happens to be already as much within the reach, physically speaking, of the creditor, as by any act of the debtor it can be made to be.

This matter would have appeared in a clearer light had it been practicable to enter here into a full examination of the nature of property, and the several modifications of which it is susceptible: but every thing cannot be done at once.

* Supra xxvi.

† Under wrongful withholding of services is included breach of contract: the obligation to render services may be grounded either on contract, or upon other titles: in other words, the event of a man's engaging in a contract is one out of many other investitive events from which the right of receiving them may take its commencement. See ch. xvii. [Limits] § iv.

Were the word *services* to be taken in its utmost latitude (negative included as well as positive) this one head would cover the whole law. To this place then are to be referred such services only, the withholding of which does not coincide with any of the other offences, for which seperate denominations have been provided.

of that power as depends upon the intrinsic physical condition of your person, to be subject to that power; this cessation is either owing to change in the intrinsic condition of the thing itself, or in its exterior situation with respect to you, that is, to its being situated out of your reach. In the former case, the nature of the change is either such as to put it out of your power to make any use of it at all, in which case the thing is said to be *destroyed*, and the offence whereby it is so treated may be termed *wrongful destruction*: or such only as to render the uses it is capable of being put to of less value than before, in which case it is said to be *damaged*, or to have sustained damage, and the offence may be termed *wrongful endamagement*. Moreover, in as far as the value which a thing is of to you is considered as being liable to be in some degree impaired, by any act on the part of any other person exercised upon that thing, although on a given occasion no perceptible damage should ensue, the exercise of any such act is commonly treated on the footing of an offence, which may be termed *wrongful using or occupation*.

If the cause of the thing's failing in its capacity of being of use to you, lies in the exterior situation of it with relation to you, the offence may be stiled *wrongful detainment**. Wrongful

* In the English law, *detinue* and *detainer*: detinue applied chiefly to moveables; detainer, to immoveables. Under

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detainment, or detention, during any given period of time, may either be accompanied with the intention of detaining the thing for ever, (that is for an indifferent time) or not: if it be, and if it be accompanied at the same time with the intention of not being amenable to law for what is done, it seems to answer to the idea commonly annexed to the word *embezzlement*, an offence which is commonly accompanied with breach of trust*. In the case of wrongful occupation, the physical faculty of occupying may have been obtained with

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detinue and detainer cases are also comprised, in which the offence consists in forbearing to transfer the legal possession of the thing: such cases may be considered as coming under the head of wrongful non-investment. The distinction between mere physical possession and legal possession, where the latter is short-lived and defeasible, seems scarcely hitherto to have been attended to. In a multitude of instances they are confounded under the same expressions. The cause is, that probably under all laws, and frequently for very good reasons, the legal possession, with whatever certainty defeasible upon the event of a trial, is, down to the time of that event, in many cases annexed to the appearance of the physical.

* In attempting to exhibit the import belonging to this and other names of offences in common use, I must be understood to speak all along with the utmost diffidence. The truth is, the import given to them is commonly neither determinate nor uniform: so that in the nature of things, no definition that can be given of them by a private person can be altogether an exact one. To fix the sense of them belongs only to the legislator.

or without the assistance or consent of the proprietor, or other person appearing to have a right to afford such assistance or consent. If without such assistance or consent, and the occupation be accompanied with the intention of detaining the thing for ever, together with the intention of not being amenable to law for what is done, the offence seems to answer to the idea commonly annexed to the word *theft* or *stealing*. If in the same circumstances a force is put upon the body of any person who uses, or appears to be disposed to use, any endeavours to prevent the act, this seems to be one of the cases in which the offence is generally understood to come under the name of *robbery*.

If the physical faculty in question was obtained with the assistance or consent of a proprietor, or other person above spoken of, and still the occupation of the thing is an offence, it may have been either because the assistance or consent was not fairly, or because it was not freely obtained. If not *fairly* obtained, it was obtained by falsehood, which, if *advised*, is in such a case termed *fraud*: and the offence, if accompanied with the intention of not being amenable to law, may be termed *fraudulent obtainment* or *defraudment* *. If not

* The remaining cases come under the head of usurpation, or wrongful investment of property. The distinction seems hardly hitherto to have been attended to: it turns like an-

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freely obtained, it was obtained by *force:* to wit, either by a force put upon the body, which has been already mentioned, or by a force put upon the mind. If by a force put upon the mind, or in other words, by the application of coercive motives *, it must be by producing the apprehension of some evil: which evil, if the act is an offence, must be some evil to which on the occasion in question the one person has no right to expose the other. This is one case, in which, if the offence be accompanied with the intention of detaining the thing for ever, whether it be or be not accompanied with the intention of not being amenable to law, it seems to agree with the idea of what is commonly meant by *extortion.* Now the part a man takes in exposing another to the evil in question, must be either a positive or a negative part. In the former case, again, the evil must either be present or distant. In the case then where the assistance or consent is obtained by a force put upon the body, or where, if by a force put upon the mind, the part taken in the exposing a man to the apprehension of the evil is positive, the evil present, and the object of it his person, and if at any rate the extortion, thus applied, be accompanied with the intention of not being amen-

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other, mentioned above, upon the distinction between legal possession and physical. The same observation may be applied to the case of extortion hereafter following.

* Vide supra. xxvii.

able to law, it seems to agree with the remaining case of what goes under the name of *robbery*.

As to dissipation in breach of trust, this, when productive of a pecuniary profit to the trustee, seems to be one species of what is commonly meant by *peculation*. Another, and the only remaining one, seems to consist in acts of occupation exercised by the trustee upon the things which are the objects of the fiduciary property, for his own benefit, and to the damage of the beneficiary. As to robbery, this offence, by the manner in which the assistance or consent is obtained, becomes an offence against property and person at the same time. Dissipation in breach of trust, and peculation, may perhaps be more commodiously treated of under the head of offences against trust *. After these exceptions, we have thirteen genera or principal kinds of offences against property, which, when ranged in the order most commodious for examination, may stand as follows, viz. 1. Wrongful non-investment of property. 2. Wrongful interception of property. 3. Wrongful divestment of property. 4. Usurpation

* Usury, which, if it must be an offence, is an offence committed with consent, that is, with the consent of the party supposed to be injured, cannot merit a place in the catalogue of offences, unless the consent were either unfairly obtained or unfreely: in the first case, it coincides with defraudment; in the other, with extortion.

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of property. 5. Wrongful investment of property. 6. Wrongful withholding of services. 7. Wrongful destruction or endamagement. 8. Wrongful occupation. 9. Wrongful detainment. 10. Embezzlement. 11. Theft. 12. Defraudment. 13. Extortion *.

We proceed now to consider offences which are complex in their effects. Regularly, indeed, we should come to offences against condition; but it will be more convenient to speak first of offences by which a man's interest is affected in two of the preceeding points at once.

XXXVI.

Offences against person and reputation.

First then, with regard to offences which affect person and reputation together. When any man, by a mode of treatment which affects the person,

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* I. SEMI-PUBLIC OFFENCES. 1. Wrongful divestment, interception, usurpation, &c. of valuables, which are the property of a corporate body; or which are in the indiscriminate occupation of a neighbourhood; such as parish churches, altars, relicks, and other articles appropriated to the purposes of religion; or things which are in the indiscriminate occupation of the public at large; such as mile-stones, market-houses, exchanges, public gardens, and cathedrals. 2. Setting on foot what have been called *bubbles*, or fraudulent partnership, or gaming adventures; propagating false news, to raise or sink the value of stocks, or of any other denomination of property.

II. SELF-REGARDING OFFENCES. 1. Idleness. 2. Gaming. 3. Other species of prodigality.

injures the reputation of another, his end and purpose must have been either his own immediate pleasure, or that sort of reflected pleasure, which in certain circumstances may be reaped from the suffering of another. Now the only immediate pleasure worth regarding, which any one can reap from the person of another, and which at the same time is capable of affecting the reputation of the latter, is the pleasure of the sexual appetite *. This pleasure, then, if reaped at all, must have been reaped either against the consent of the party, or with consent. If with consent, the consent must have been obtained either freely and fairly both, or freely but not fairly, or else not even freely; in which case the fairness is out of the question. If the consent be altogether wanting, the offence is called *rape:* if not fairly obtained, *seduction* simply: if not freely, it may be called *forcible seduction.* In any case, either the offence has gone the length of consummation, or has stopt short of that period; if it has gone that length, it takes one or other of the names just mentioned: if not, it may be included alike in all cases under the denomination of a *simple lascivious injury.* Lastly, to take the case where a man injuring you in your reputation, by proceedings that regard your person, does it for the sake of that

* See ch. v. [Pleasures and Pains.]

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sort of pleasure which will sometimes result from the contemplation of another's pain. Under these circumstances either the offence has actually gone the length of a corporal injury, or it has rested in menacement: in the first case it may be stiled a *corporal insult*; in the other, it may come under the name of *insulting menacement*. And thus we have six genera, or kinds of offences, against person and reputation together; which, when ranged in the order most commodious for consideration, will stand thus: 1. Corporal insults. 2. Insulting menacement. 3. Seduction. 4. Rape. 5. Forcible seduction. 6. Simple lascivious injuries *.

XXXVII.

Offences against person and property.

Secondly, with respect to those which affect person and property together. That a force put upon the person of a man may be among the means by which the title to property may be unlawfully taken away or acquired, has been already stated †. A force of this sort then is a circumstance which may accompany the offences of wrongful interception, wrongful divestment, usurpation, and wrongful investment. But in these cases the intervention of this circumstance does

* I. SEMI-PUBLIC OFFENCES—none.

II. SELF-REGARDING OFFENCES. 1. Sacrifice of virginity. 2. Indecencies not public.

† Supra.

not happen to have given any new denomination to the offence *. In all or any of these cases, however, by prefixing the epithet *forcible*, we may have so many names of offences, which may either be considered as constituting so many species of the genera belonging to the division of offences against property, or as so many genera belonging to the division now before us. Among the offences that concern the enjoyment of the thing, the case is the same with wrongful destruction and wrongful endamagement; as also with wrongful occupation and wrongful detainment. As to the offence of wrongful occupation, it is only in the case where the thing occupied belongs to the class of immoveables, that, when accompanied by the kind of force in question, has obtained a particular name which is in common use: in this case it is called *forcible entry*: forcible detainment, as applied also to immoveables, but only to immoveables, has obtained, among lawyers at least, the name of *forcible detainer* †. And thus we may

* In the technical language of the English law, property so acquired is said to be acquired by *duress*.

† Applied to moveables, the circumstance of force has never, at least by the technical part of the language, been taken into account: no such combination of terms as *forcible occupation* is in current use. The word *detinue* is applied to moveables only: and (in the language of the law) the word *forcible* has never been combined with it. The word applied

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distinguish 10 genera, or kinds of offences, against person and property together, which, omitting for conciseness sake the epithet *wrongful*, will stand thus: 1. Forcible interception of property. 2. Forcible divestment of property. 3. Forcible usurpation. 4. Forcible investment. 5. Forcible destruction or endamagement. 6. Forcible occupation of moveables. 7. Forcible entry. 8. Forcible detainment of moveables. 9. Forcible detainment of immoveables. 10. Robbery *.

XXXVIII.

Offences against condition.—Conditions, domestic or civil.

We come now to offences against *condition*. A man's condition or station in life is constituted by the legal relation he bears to the persons who are about him; that is, as we have already had occasion to shew †, by *duties*, which, by being imposed on one side, give birth to *rights* or *powers* on the other. These relations, it is evident, may be almost infinitely diversified. Some means, however, may be found of circumscribing the field

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to immoveables is *detainer*: this is combined with the word *forcible*: and what is singular, it is scarcely in use without that word. It was impossible to steer altogether clear of this technical nomenclature, on account of the influence which it has on the body of the language.

* I. SEMI-PUBLIC OFFENCES. 1. Incendiarism. 2. Criminal inundation.

II. SELF-REGARDING OFFENCES—none.

† Supra. XXV. note.

within which the varieties of them are displayed. In the first place, they must either be such as are capable of displaying themselves within the circle of a private family, or such as require a larger space. The conditions constituted by the former sort of relations may be stiled *domestic:* those constituted by the latter, *civil.*

XXXIX.

Domestic conditions grounded on natural relationships.

As to domestic conditions, the legal relations by which they are constituted may be distinguished into 1. Such as are superadded to relations purely natural: and 2. Such as, without any such natural basis, subsist purely by institution. By relations purely natural, I mean those which may be said to subsist between certain persons in virtue of the concern which they themselves, or certain other persons, have had in the process which is necessary to the continuance of the species. These relations may be distinguished, in the first place, into contiguous and uncontiguous. The uncontiguous subsist through the intervention of such as are contiguous. The contiguous may be distinguished, in the first place, into *connubial,* and *post-connubial**. Those which may be termed

* By the terms *connubial* and *post-connubial,* all I mean at present to bring to view is, the mere physical union, apart from the ceremonies and legal engagements that will afterwards be considered as accompanying it.

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connubial are two: 1. That which the male bears towards the female: 2. That which the female bears to the male*. The post-connubial are either *productive* or *derivative*. The productive is that which the male and female above-mentioned bear each of them towards the children who are

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Relations—two result from every two objects.

* The vague and undetermined nature of the fictitious entity, called a relation, is, on accasions like the present, apt to be productive of a good deal of confusion. A relation is either said to be *borne by* one of the objects which are parties to it, to the other, or to *subsist between* them. The latter mode of phraseology is, perhaps, rather the more common. In such case the idea seems to be, that from the consideration of the two objects there results but one relation, which belongs as it were in common to them both. In some cases, this perhaps may answer the purpose very well: it will not, however, in the present case. For the present purpose it will be necessary we should conceive two relations as resulting from the two objects, and *borne*, since such is the phrase, *by* the one of them to or towards the other: one relation borne by the first object to the second: another relation borne by the second object to the first. This is necessary on two accounts: 1. Because for the relations themselves there are in many instances separate names: for example, the relations of guardianship and wardship: in which case, the speaking of them as if they were but one, may be productive of much confusion. 2. Because the two different relationships give birth to so many conditions: which conditions are so far different, that what is predicated and will hold good of the one, will, in various particulars, as we shall see, not hold good of the other.

the immediate fruit of their union; this is termed the relation of *parentality*. Now as the parents must be, so the children may be, of different sexes. Accordingly the relation of parentality may be distinguished into four species: 1. That which a father bears to his son: this is termed *paternity*. 2. That which a father bears to his daughter: this also is termed paternity. 3. That which a mother bears to her son: this is called *maternity*. 4. That which a mother bears to her daughter: this also is termed maternity. Uncontiguous natural relations may be distinguished into *immediate* and *remote*. Such as are immediate, are what one person bears to another in consequence of their bearing each of them one simple relation to some third person. Thus the paternal grandfather is related to the paternal grandson by means of the two different relations, of different kinds, which together they bear to the father: the brother on the father's side, to the brother by means of the two relations of the same kind, which together they bear to the father. In the same manner we might proceed to find places in the system for the infinitely-diversified relations which result from the combinations that may be formed by mixing together the several sorts of relationships by *ascent*, relationships by *decent*, *collateral* relationships, and relationships by *affinity*: which latter, when the union between the two parties through whom the affinity takes place is

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sanctioned by matrimonial solemnities, are termed relationships by *marriage*. But this, as it would be a most intricate and tedious task, so happily is it, for the present purpose, an unnecessary one. The only natural relations to which it will be necessary to pay any particular attention, are those which, when sanctioned by law, give birth to the conditions of husband and wife, the two relations comprized under the head of parentality, and the corresponding relations comprized under the head filiality or filiation.

What then are the relations of a legal kind which can be superinduced upon the above-mentioned natural relations? They must be such as it is the nature of law to give birth to and establish. But the relations which subsist purely by institution exhaust, as we shall see, the whole stock of relationships which it is in the nature of the law to give birth to and establish. The relations then which can be superinduced upon those which are purely natural, cannot be in themselves any other than what are of the number of those which subsist purely by institution: so that all the difference there can be between a legal relation of the one sort, and a legal relation of the other sort, is, that in the former case the circumstance which gave birth to the natural relation serves as a mark to indicate where the legal relation is to fix: in the latter case, the place where the legal relation is to attach is determined not by that circumstance but

by some other. From these considerations it will appear manifestly enough, that for treating of the several sorts of conditions, as well natural as purely conventional, in the most commodious order, it will be necessary to give the precedence to the latter. Proceeding throughout upon the same principle, we shall all along give the priority, not to those which are first by nature, but to those which are most simple in point of description. There is no other way of avoiding perpetual anticipations and repetitions.

XL.

Domestic relations which are purely of legal institution.

We come now to consider the domestic or family relations, which are purely of legal institution. It is to these in effect, that both kinds of domestic conditions, considered as the work of law, are indebted for their origin. When the law, no matter for what purpose, takes upon itself to operate, in a matter in which it has not operated before, it can only be by imposing *obligation**. Now when a legal obligation is imposed on any man, there are but two ways in which it can in the first instance be enforced. The one is by giving the power of enforcing it to the party in whose favour it is imposed: the other is by reserving that power to certain third persons, who, in virtue of their possessing it, are stiled ministers of justice. In the first case, the party favoured is said to

* See ch. xvii. [Limits] § iii.

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possess not only a *right* as against the party obliged, but also a *power* over him: in the second case, a *right* only, uncorroborated by power. In the first case, the party favoured may be stiled a *superior*, and as they are both members of the same family, a *domestic superior*, with reference to the party obliged: who, in the same case, may be stiled a *domestic inferior*, with reference to the party favoured. Now in point of possibility, it is evident, that domestic conditions, or a kind of fictitious possession analogous to domestic conditions, might have been looked upon as constituted, as well by rights alone, without powers on either side, as by powers. But in point of utility* it

* Two persons, who by any means stand engaged to live together, can never live together long, but one of them will choose that some act or other should be done, which the other will choose should not be done. When this is the case, how is the competition to be decided? Laying aside generosity and good-breeding, which are the tardy and uncertain fruits of long-established laws, it is evident that there can be no certain means of deciding it but physical power: which indeed is the very means by which family, as well as other competitions, must have been decided long before any such office as that of legislator had existence. This then being the order of things which the legislator finds established by nature, how should he do better than to acquiesce in it? The persons who by the influence of causes that prevail every where, stand engaged to live together, are, 1. Parent and child, during the infancy of the latter: 2. Man and wife: 3. Children of the same parents. Parent and child, by necessity: since, if the child did not live with the parent (or

does not seem expedient: and in point of fact, probably owing to the invariable perception which

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with somebody standing in the place of the parent) it could not live at all: husband and wife, by a choice approaching to necessity: children of the same parents, by the necessity of their living each of them with the parents. As between parent and child, the necessity there is of a power on the part of the parent for the preservation of the child supersedes all farther reasoning. As between man and wife, that necessity does not subsist. The only reason that applies to this case is, the necessity of putting an end to competition. The man would have the meat roasted, the woman boiled: shall they both fast till the judge comes in to dress it for them? The woman would have the child dressed in green; the man, in blue: shall the child be naked till the judge comes in to clothe it? This affords a reason for giving a power to one or other of the parties: but it affords none for giving the power to the one rather than to the other. How then shall the legislator determine? Supposing it equally easy to give it to either, let him look ever so long for a reason why he should give it to the one rather than to the other, and he may look in vain. But how does the matter stand already? for there were men and wives (or, what comes to the same thing, male and female living together as man and wife) before there were legislators. Looking round him then, he finds almost every where the male the stronger of the two; and therefore possessing already, by purely physical means, that power which he is thinking of bestowing on one of them by means of law. How then can he do so well as by placing the legal power in the same hands which are beyond comparison the more likely to be in possession of the physical? in this way, few transgressions, and few calls for punishment: in the other way, perpetual transgressions, and perpetual calls for punishment. Solon is said to have transferred the same idea to the distribution of state

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men must have had of the inexpediency, no such conditions seem ever to have been constituted by such feeble bands. Of the legal relationships then, which are capable of being made to subsist within the circle of a family, there remain those only in which the obligation is enforced by power. Now then, wherever any such power is conferred, the end or purpose for which it was conferred (unless the legislator can be supposed to act without a motive) must have been the producing of a benefit to somebody: in other words, it must have been conferred for the *sake* of somebody. The person then, for whose sake it is conferred, must either be one of the two parties just mentioned, or a third party: if one of these two, it must be either the superior or the inferior. If the superior, such superior is commonly called a *master;* and the inferior is termed his *servant:* and the power may be termed a *beneficial* one. If it be for the sake of the inferior that the power is established,

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powers. Here then was *generalization:* here was the work of genius. But in the disposal of domestic power, every legislator, without any effort of genius, has been a Solon. So much for *reason**: add to which, in point of *motives*†, that legislators seem all to have been of the male sex, down to the days of Catherine. I speak here of those who frame laws, not of those who touch them with a sceptre.

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* Social motives: sympathy for the public: love of reputation, &c.

† Self-regarding motives: or social motives, which are social in a less extent: sympathy for persons of a particular description: persons of the same sex.

the superior is termed a *guardian;* and the inferior his *ward:* and the power, being thereby coupled with a trust, may be termed a *fiduciary* one. If for the sake of a third party, the superior may be termed a *superintendant;* and the inferior his *subordinate.* This third party will either be an assignable individual or set of individuals, or a set of unassignable individuals. In this latter case the trust is either a public or a semi-public one: and the condition which it constitutes is not of the domestic, but of the civil kind. In the former case, this third party or *principal,* as he may be termed, either has a beneficial power over the superintendant, or he has not: if he has, the superintendant is his servant, and consequently so also is the subordinate: if not, the superintendant is the master of the subordinate; and all the advantage which the principal has over his superintendant, is that of possessing a set of rights, uncorroborated by power; and therefore, as we have seen*, not fit to constitute a condition of the domestic kind. But be the condition what it may which is constituted by these rights, of what nature can the obligations be, to which the superintendant is capable of being subjected by means of them? They are neither more nor less than those which a man is capable of being subjected to by powers. It follows, therefore, that the functions of

* Supra, note, page 150.

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a principal and his superintendant coincide with those of a master and his servant; and consequently that the offences relative to the two former conditions will coincide with the offences relative to the two latter.

XLI.

Offences touching the condition of a master.

Offences to which the condition of a master, like any other kind of condition, is exposed, may, as hath been already intimated*, be distinguished into such as concern the existence of the condition itself, and such as concern the performance of the functions of it, while subsisting. First then, with regard to such as affect its existence. It is obvious enough that the services of one man may be a benefit to another: the condition of a master may therefore be a beneficial one. It stands exposed, therefore, to the offences of *wrongful non-investment*, *wrongful interception*, *usurpation*, *wrongful investment*, and *wrongful divestment*. But how should it stand exposed to the offences of *wrongful abdication*, *wrongful detrectation*, and *wrongful imposition*? Certainly it cannot of itself; for services, when a man has the power of exacting them or not, as he thinks fit, can never be a burthen. But if to the powers, by which the condition of a master is constituted, the law thinks fit to annex any obligation on the part of the master; for instance, that of affording main-

* Vide supra, xxvii.

tenance, or giving wages, to the servant, or paying money to any body else, it is evident, that in virtue of such obligation the condition *may* become a burthen. In this case, however, the condition possessed by the master will not, properly speaking, be the pure and simple condition of a master: it will be a kind of complex object, resolvable into the beneficial condition of a master, and the burthensome obligation which is annexed to it. Still however, if the nature of the obligation lies within a narrow compass, and does not, in the manner of that which constitutes a trust, interfere with the exercise of those powers by which the condition of the superior is constituted, the latter, notwithstanding this foreign mixture, will still retain the name of mastership *. In this case, therefore, but not otherwise, the condition of a master may stand exposed to the offences of *wrongful abdication*, *wrongful detrectation*, and *wrongful imposition*. Next as to the behaviour of persons, with reference to this condition, while considered as subsisting. In virtue of its being a

* In most civilized nations there is a sort of domestic condition, in which the superior is termed a master, while the inferior is termed sometimes indeed a servant, but more particularly and more frequently an *apprentice*. In this case, though the superior is, in point of usage, known by no other name than that of a master, the relationship is in point of fact a mixt one, compounded of that of *master* and that of *guardian*.

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benefit, it is exposed to *disturbance*. This disturbance will either be the offence of a stranger, or the offence of the servant himself. Where it is the offence of a stranger, and is committed by taking the person of the servant, in circumstances in which the taking of an object belonging to the class of things would be an act of theft, or (what is scarcely worth distinguishing from theft) an act of embezzlement, it may be termed *servant-stealing*. Where it is the offence of the servant himself, it is stiled *breach of duty*. Now the most flagrant species of breach of duty, and that which includes indeed every other, is that which consists in the servant's withdrawing himself from the place in which the duty should be performed. This species of breach of duty is termed *elopement*. Again, in virtue of the power belonging to this condition, it is liable, on the part of the master, to *abuse*. But this power is not coupled with a trust. The condition of a master is therefore not exposed to any offence which is analogous to breach of trust. Lastly, on account of its being exposed to abuse, it may be conceived to stand, in point of possibility, exposed to *bribery*. But considering how few, and how insignificant, the persons are who are liable to be subject to the power here in question, this is an offence which, on account of the want of temptation, there will seldom be any example of in practice. We may therefore reckon thirteen sorts of offences to which the condition of a master

is exposed; viz. 1. Wrongful non-investment of mastership. 2. Wrongful interception of mastership. 3. Wrongful divestment of mastership. 4. Usurpation of mastership. 5. Wrongful investment of mastership. 6. Wrongful abdication of mastership. 7. Wrongful detrectation of mastership. 8. Wrongful imposition of mastership. 9. Abuse of mastership. 10. Disturbance of mastership. 11. Breach of duty in servants. 12. Elopement of servants. 13. Servant-stealing.

XLII.

Various modes of servitude.

As to the *power* by which the condition of a master is constituted, this may be either *limited* or *unlimited*. When it is altogether unlimited, the condition of the servant is stiled *pure slavery*. But as the rules of language are as far as can be conceived from being steady on this head, the term slavery is commonly made use of wherever the limitations prescribed to the power of the master are looked upon as inconsiderable. Whenever any such limitation is prescribed, a kind of fictitious entity is thereby created, and, in quality of an incorporeal object of possession, is bestowed upon the servant: this object is of the class of those which are called *rights:* and in the present case is termed, in a more particular manner, a *liberty:* and sometimes a *privilege*, an *immunity* or an *exemption*. Now those limitations on the one hand, and these liberties on the other, may, it is evident, be as various as the acts (positive or negative)

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which the master may or may not have the power of obliging the servant to submit to or to perform. Correspondent then to the infinitude of these liberties, is the infinitude of the modifications which the condition of mastership (or, as it is more common to say in such a case, that of servitude) admits of. These modifications, it is evident, may, in different countries, be infinitely diversified. In different countries, therefore, the offences characterised by the above names will, if specifically considered, admit of very different descriptions. If there be a spot upon the earth so wretched as to exhibit the spectacle of pure and absolutely unlimited slavery, on that spot there will be no such thing as any abuse of mastership; which means neither more nor less than that no abuse of mastership will there be treated on the footing of an offence. As to the question, Whether any, and what, modes of servitude ought to be established or kept on foot? this is a question, the solution of which belongs to the civil branch of the art of legislation.

XLIII.

Offences touching the condition of a servant.

Next, with regard to the offences that may concern the condition of a servant. It might seem at first sight, that a condition of this kind could not have a spark of benefit belonging to it: that it could not be attended with any other consequences than such as rendered it a mere burthen. But a burthen itself may be a benefit, in compa-

rison of a greater burthen. Conceive a man's situation then to be such, that he must, at any rate, be in a state of pure slavery. Still may it be material to him, and highly material, who the person is whom he has for his master. A state of slavery then, under one master, may be a beneficial state to him, in comparison with a state of slavery under another master. The condition of a servant then is exposed to the several offences to which a condition, in virtue of its being a beneficial one, is exposed *. More than this, where the power of the master is limited, and the limitations annexed to it, and thence the liberties of the servant, are considerable, the servitude may even be positively eligible. For amongst those limitations may be such as are sufficient to enable the servant to possess property of his own: being capable then of possessing property of his

* It may seem at first, that a person who is in the condition of a slave, could not have it in his power to engage in such course of proceeding as would be necessary, in order to give him an apparent title to be reckoned among the slaves of another master. But though a slave in point of *right*, it may happen that he has eloped for instance, and is not a slave in point *fact*: or, suppose him a slave in point of fact, and ever so vigilantly guarded, still a person connected with him by the ties of sympathy, might do that for him which, though willing and assenting, he might not be able to do for himself: might forge a deed of donation, for example, from the one master to the other.

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own, he may be capable of receiving it from his master: in short, he may receive *wages*, or other emoluments, from his master; and the benefit resulting from these wages may be so considerable as to outweigh the burthen of the servitude, and, by that means, render that condition more beneficial upon the whole, and more eligible, than that of one who is not in any respect under the controul of any such person as a master. Accordingly, by these means the condition of the servant may be so eligible, that his entrance into it, and his continuance in it, may have been altogether the result of his own choice. That the nature of the two conditions may be the more clearly understood, it may be of use to shew the sort of correspondency there is between the offences which affect the existence of the one, and those which affect the existence of the other. That this correspondency cannot but be very intimate is obvious at first sight. It is not, however, that a given offence in the former catalogue coincides with an offence of the same name in the latter catalogue: usurpation of servantship with usurpation of mastership, for example. But the case is, that an offence of one denomination in the one catalogue coincides with an offence of a different denomination in the other catalogue. Nor is the coincidence constant and certain: but liable to contingencies, as we shall see. First, then, wrongful non-investment of the condition of a servant, if

it be the offence of one who should have been the master, coincides with wrongful detrectation of mastership: if it be the offence of a third person, it involves in it non-investment of mastership, which, provided the mastership be in the eyes of him who should have been master a beneficial thing, but not otherwise is wrongful. 2. Wrongful interception of the condition of a servant, if it be the offence of him who should have been master, coincides with wrongful detrectation of mastership: if it be the offence of a third person, and the mastership be a beneficial thing, it involves in it wrongful interception of mastership. 3. Wrongful divestment of servantship, if it be the offence of the master, but not otherwise, coincides with wrongful abdication of mastership: if it be the offence of a stranger, it involves in it divestment of mastership, which, in as far as the mastership is a beneficial thing, is wrongful. 4. Usurpation of servantship coincides necessarily with wrongful imposition of mastership: it will be apt to involve in it wrongful divestment of mastership: but this only in the case where the usurper, previously to the usurpation, was in a state of servitude under some other master. 5. Wrongful investment of servantship (the servantship being considered as a beneficial thing) coincides with imposition of mastership; which, if in the eyes of the pretended master the mastership should chance to be a burthen, will be wrongful. 6. Wrongful

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abdication of servantship coincides with wrongful divestment of mastership. 7. Wrongful detrectation of servantship, with wrongful non-investment of mastership. 8. Wrongful imposition of servantship, if it be the offence of the pretended master, coincides with usurpation of mastership: if it be the offence of a stranger, it involves in it imposition of mastership, which, if in the eyes of the pretended master the mastership should be a burthen, will be wrongful. As to abuse of mastership, disturbance of mastership, breach of duty in servants, elopement of servants, and servant-stealing, these are offences which, without any change of denomination, bear equal relation to both conditions. And thus we may reckon thirteen sorts of offences to which the condition of a servant stands exposed: viz. 1. Wrongful non-investment of servantship. 2. Wrongful interception of servantship. 3. Wrongful divestment of servantship. 4. Usurpation of servantship. 5. Wrongful investment of servantship. 6. Wrongful abdication of servantship. 7. Wrongful detrectation of servantship. 8. Wrongful imposition of servantship. 9. Abuse of mastership. 10. Disturbance of mastership. 11. Breach of duty in servants. 12. Elopement of servants. 13. Servant-stealing.

XLIV.

Gardianship, what—

We now come to the offences to which the condition of a guardian is exposed. A guardian is one who

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Necessity of the institution.

is invested with power over another, living within the compass of the same family, and called a ward; the power being to be exercised for the benefit of the ward. Now then, what are the cases in which it can be for the benefit of one man, that another, living within the compass of the same family, should exercise power over him? Consider either of the parties by himself, and suppose him, in point of understanding, to be on a level with the other, it seems evident enough that no such cases can ever exist*. To the production of happiness on the part of any given person (in like manner as to the production of any other effect which is the result of human agency) three things it is necessary should concur: knowledge, inclination, and physical power. Now as there is no man who is so sure of being *inclined,* on all occasions, to promote your happiness as you yourself are, so neither is there any man who upon the whole can have had so good opportunities as you must have had of *knowing* what is most conducive to that purpose. For who should know so well as you

* Consider them *together* indeed, take the sum of the two interests, and the case, as we have seen (supra, xl.) is then the reverse. That case, it is to be remembered, proceeds only upon the supposition that the two parties are obliged to live together; for suppose it to be at their option to part, the necessity of establishing the power ceases.

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do what it is that gives you pain or pleasure* ? Moreover, as to power, it is manifest that no superiority in this respect, on the part of a stranger, could, for a constancy, make up for so great a deficiency as he must lie under in respect of two such material points as knowledge and inclination. If then there be a case where it can be for the advantage of one man to be under the power of another, it must be on account of some palpable and very considerable deficiency, on the part of the former, in point of intellects, or (which is the same thing in other words) in point of knowledge or understanding. Now there are two cases in which such palpable deficiency is known to take place. These are, 1. Where a man's intellect is not yet arrived at that state in which it is capable of directing his own inclination in the pursuit of happiness: this is the case of *infancy*†. 2. Where by some particular known or unknown circumstance his intellect has either never arrived at that state, or having arrived at it has fallen from it: which is the case of *insanity*.

By what means then is it to be ascertained whether a man's intellect is in that state or no? For exhibiting the quantity of sensible heat in a human body we have a very tolerable sort of instrument, the thermometer; but for exhibiting

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* Ch. xvii. [Limits] § i. † See ch. xiii. [Cases unmeet] § iii.

the quantity of intelligence, we have no such instrument. It is evident, therefore, that the line which separates the quantity of intelligence which *is* sufficient for the purposes of self-government from that which is *not* sufficient, must be, in a great measure, arbitrary. Where the insufficiency is the result of want of age, the sufficient quantity of intelligence, be it what it may, does not accrue to all at the same period of their lives. It becomes therefore necessary for legislators to cut the gordian knot, and fix upon a particular period, at which and not before, truly or not, every person whatever shall be deemed, as far as depends upon age, to be in possession of this sufficient quantity*. In this case then a line is drawn which may be the same for every man, and in the description of

* In certain nations, women, whether married or not, have been placed in a state of perpetual wardship: this has been evidently founded on the notion of a decided inferiority in point of intellects on the part of the female sex, analogous to that which is the result of infancy or insanity on the part of the male. This is not the only instance in which tyranny has taken advantage of its own wrong, alleging as a reason for the domination it exercises, an imbecillity, which, as far as it has been real, has been produced by the abuse of that very power which it is brought to justify. Aristotle, fascinated by the prejudice of the times, divides mankind into two distinct species, that of freemen, and that of slaves. Certain men were borne to be slaves, and ought to be slaves.—Why? Because they are so.

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which, such as it is, whatever persons are concerned may be certain of agreeing: the circumstance of time affording a mark by which the line in question may be traced with the utmost degree of nicety. On the other hand, where the insufficiency is the result of insanity, there is not even this resource: so that here the legislator has no other expedient than to appoint some particular person or persons to give a particular determination of the question, in every instance in which it occurs, according to his or their particular and arbitrary discretion. Arbitrary enough it must be at any rate, since the only way in which it can be exercised is by considering whether the share of intelligence possessed by the individual in question does or does not come up to the loose and indeterminate idea which persons so appointed may chance to entertain with respect to the quantity which is deemed sufficient.

XLV.

Duration to be given to it.

The line then being drawn, or supposed to be so, it is expedient to a man who cannot, with safety to himself, be left in his own power, that he should be placed in the power of another. How long then should he remain so? Just so long as his inability is supposed to continue: that is, in the case of infancy, till he arrives at that period at which the law deems him to be of full age: in the case of insanity, till he be of sound mind and understanding. Now it is evident, that this

period, in the case of infancy, may not arrive for a considerable time: and in the case of insanity, perhaps never. The duration of the power belonging to this trust must therefore, in the one case, be very considerable; in the other case, indefinite.

XLVI.

Powers that may, and duties that ought to be annexed to it.

The next point to consider, is what *may* be the extent of it? for as to what *ought* to be, that is a matter to be settled, not in a general analytical sketch, but in a particular and circumstantial dissertation. By possibility, then, this power may possess any extent that can be imagined: it may extend to any acts which, physically speaking, it may be in the power of the ward to perform himself, or be the object of if exercised by the guardian. Conceive the power, for a moment, to stand upon this footing: the condition of the ward stands now exactly upon a footing with pure slavery. Add the obligation by which the power is turned into a trust: the limits of the power are now very considerably narrowed. What then is the purport of this obligation? Of what nature is the course of conduct it prescribes? It is such a course of conduct as shall be best calculated for procuring to the ward the greatest quantity of happiness which his faculties, and the circumstances he is in, will admit of: saving always, in the first place, the regard which the guardian is permitted to shew to his own hap-

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piness; and, in the second place, that which he is obliged, as well as permitted, to shew to that of other men. This is, in fact, no other than that course of conduct which the ward, did he but know how, ought, in point of *prudence*, to maintain of himself: so that the business of the former is to govern the latter precisely in the manner in which this latter ought to govern himself. Now to instruct each individual in what manner to govern his own conduct in the details of life, is the particular business of private ethics: to instruct individuals in what manner to govern the conduct of those whose happiness, during non-age, is committed to their charge, is the business of the art of private education. The details, therefore, of the rules to be given for that purpose, any more than the acts which are capable of being committed in violation of those rules, belong not to the art of legislation: since, as will be seen more particularly hereafter *, such details could not, with any chance of advantage, be provided for by the legislator. Some general outlines might indeed be drawn by his authority: and, in point of fact, some are in every civilized state. But such regulations, it is evident, must be liable to great variation: in the first place, according to the infinite diversity of civil conditions which a man

* See ch. xvii. [Limits] § 1.

may stand invested with in any given state: in the next place, according to the diversity of local circumstances that may influence the nature of the conditions which may chance to be established in different states. On this account, the offences which would be constituted by such regulations could not be comprised under any concise and settled denominations, capable of a permanent and extensive application. No place, therefore, can be allotted to them here.

XLVII.

Offences touching the condition of a guardian.

By what has been said, we are the better prepared for taking an account of the offences to which the condition in question stands exposed. Guardianship being a private trust, is of course exposed to those offences, and no others, by which a private trust is liable to be affected. Some of them, however, on account of the special quality of the trust, will admit of some further particularity of description. In the first place, breach of this species of trust may be termed *mismanagement* of guardianship: in the second place, of whatever nature the duties are, which are capable of being annexed to this condition, it must often happen, that in order to fulfil them, it is necessary the guardian should be at a certain particular place. Mismanagement of guardianship, when it consists in the not being, on the occasion in question, at the place in question, may be termed *desertion* of guardianship.

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Third, It is manifest enough, that the object which the guardian ought to propose to himself, in the exercise of the powers to which those duties are annexed, is to procure for the ward the greatest quantity of happiness which can be procured for him, consistently with the regard which is due to the other interests that have been mentioned: for this is the object which the ward would have proposed to himself, and might and ought to have been allowed to propose to himself, had he been capable of governing his own conduct. Now, in order to procure this happiness, it is necessary that he should possess a certain power over the objects on the use of which such happiness depends. These objects are either the person of the ward himself, or other objects that are extraneous to him. These other objects are either things or persons. As to *things* then, objects of this class, in as far as a man's happiness depends upon the use of them, are stiled his *property*. The case is the same with the services of any *persons* over whom he may happen to possess a beneficial power, or to whose services he may happen to possess a beneficial right. Now when property of any kind, which is in trust, suffers by the delinquency of him with whom it is in trust, such offence, of whatever nature it is in other respects, may be stiled *dissipation* in breach of trust: and if it be attended with a profit to the trustee, it may be stiled *pecula-*

*tion**. Fourth, For one person to exercise a power of any kind over another, it is necessary that the latter should either perform certain acts, upon being commanded so to do by the former, or at least should suffer certain acts to be exercised upon himself. In this respect a ward must stand upon the footing of a servant: and the condition of a ward must, in this respect, stand exposed to the same offences to which that of a servant stands exposed: that is, on the part of a stranger, to *disturbance*, which in particular circumstances, will amount to *theft*: on the part of the ward, to *breach of duty*: which, in particular circumstances, may be effected by *elopement*. Fifth, There does not seem to be any offence concerning guardianship that corresponds to *abuse of trust*: I mean in the sense to which the last-mentioned denomination has been here confined†. The reason is, that guardianship, being a trust of a private nature, does not, as such, confer upon the trustee any power, either over the persons or over the property of any party, other than the *beneficiary* himself. If by accident it confers on the trustee a power over any persons whose services constitute a part of the property of the beneficiary, the trustee becomes thereby, in certain respects, the master of such servants‡. Sixth, Bribery also is a sort of offence to which, in this case, there

* Supra, xxxv. † Vide supra, xxv. ‡ Vide supra, xl.

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is not commonly much temptation. It is an offence, however, which by possibility is capable of taking this direction: and must therefore be aggregated to the number of the offences to which the condition of a guardian stands exposed. And thus we have in all seventeen of these offences: viz. 1. Wrongful non-investment of guardianship. 2. Wrongful interception of guardianship. 3. Wrongful divestment of guardianship. 4. Usurpation of guardianship. 5. Wrongful investment of guardianship. 6. Wrongful abdication of guardianship. 7. Detrectation of guardianship. 8. Wrongful imposition of guardianship. 9. Mismanagement of guardianship. 10. Desertion of guardianship. 11. Dissipation in prejudice of wardship. 12. Peculation in prejudice of wardship. 13. Disturbance of guardianship. 14. Breach of duty to guardians. 15. Elopement from guardians. 16. Ward-stealing. 17. Bribery in prejudice of wardship.

XLVIII.

Offences touching the condition of a ward.

Next, with regard to offences to which the condition of wardship is exposed. Those which first affect the existence of the condition itself are as follows: 1. Wrongful non-investment of the condition of a ward. This, if it be the offence of one who should have been guardian, coincides with wrongful detrectation of guardianship: if it be the offence of a third person, it involves in it non-investment of guardianship, which, provided

the guardianship is, in the eyes of him who should have been guardian, a desirable thing, is wrongful. 2. Wrongful interception of wardship. This, if it be the offence of him who should have been guardian, coincides with wrongful detrectation of guardianship: if it be the offence of a third person, it involves in it interception of guardianship, which, provided the guardianship is, in the eyes of him who should have been guardian, a desirable thing, is wrongful. 3. Wrongful divestment of wardship. This, if it be the offence of the guardian, but not otherwise, coincides with wrongful abdication of guardianship: if it be the offence of a third person, it involves in it divestment of guardianship, which, if the guardianship is, in the eyes of the guardian, a desirable thing, is wrongful. 4. Usurpation of the condition of a ward: an offence not very likely to be committed. This coincides at any rate with wrongful imposition of guardianship; and if the usurper were already under the guardianship of another guardian, it will involve in it wrongful divestment of such guardianship*. 5. Wrongful investment

* This effect it may be thought will not necessarily take place: since a ward may have two guardians. One man then is guardian by right: another man comes and makes himself so by usurpation. This may very well be, and yet the former may continue guardian notwithstanding. How then (it may be asked) is he divested of his guardianship?—The answer is—Certainly not of the whole of it: but,

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of wardship: (the wardship being considered as a beneficial thing) this coincides with imposition of guardianship, which, if in the eyes of the pretended guardian the guardianship should be a burthen, will be wrongful. 6. Wrongful abdication of wardship. This coincides with wrongful divestment of guardianship. 7. Wrongful detrectation of wardship. This coincides with wrongful interception of guardianship. 8. Wrongful imposition of wardship. This, if the offender be the pretended guardian, coincides with usurpation of guardianship: if a stranger, it involves in it wrongful imposition of guardianship. As to such of the offences relative to this condition, as concern the consequences of it while subsisting, they are of such a nature that, without any change of denomination, they belong equally to the condition of a guardian, and that of a ward. We may therefore reckon seventeen sorts of offences relative to the condition of a ward: 1. Wrongful non-investment of wardship. 2. Wrongful interception of wardship. 3. Wrongful divestment of wardship. 4. Usurpation of wardship. 5. Wrongful investment of wardship. 6. Wrongful abdication of wardship. 7. Wrongful detrectation of wardship. 8. Wrongful imposition of wardship.

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however, of a part of it: of such part as is occupied, if one may so say, that is, of such part of the powers and rights belonging to it as are exercised, by the usurper.

9. Mismanagement of guardianship. 10. Desertion of guardianship. 11. Dissipation in prejudice of wardship. 12. Peculation in prejudice of wardship. 13. Disturbance of guardianship. 14. Breach of duty to guardians. 15. Elopement from guardians. 16. Ward-stealing. 17. Bribery in prejudice of wardship.

XLIX.

Offences touching the condition of a parent.

We come now to the offences to which the condition of a parent stands exposed: and first, with regard to those by which the very existence of the condition is affected. On this occasion, in order to see the more clearly into the subject, it will be necessary to distinguish between the natural relationship, and the legal relationship, which is superinduced as it were upon the natural one. The natural one being constituted by a particular event, which, either on account of its being already past, or on some other account, is equally out of the power of the law, neither is, nor can be made, the subject of an offence. *Is* a man your father? It is not any offence of mine that can make you not his son. Is he *not* your father? It is not any offence of mine that can render him so. But although he does in fact bear that relation to you, I, by an offence of mine, may perhaps so manage matters, that he shall not be *thought* to bear it: which, with respect to any legal advantages which either he or you could derive from such relationship, will be the same thing as if he did not. In

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the capacity of a witness, I may cause the judges to believe that he is not your father, and to decree accordingly: or, in the capacity of a judge, I may myself decree him not to be your father. Leaving then the purely natural relationship as an object equally out of the reach of justice and injustice, the legal condition, it is evident, will stand exposed to the same offences, neither more nor less, as every other condition, that is capable of being either beneficial or burthensome, stands exposed to. Next, with regard to the exercise of the functions belonging to this condition, considered as still subsisting. In parentality there must be two persons concerned, the father and the mother. The condition of a parent includes, therefore, two conditions; that of a father, and that of a mother, with respect to such or such a child. Now it is evident, that between these two parties, whatever beneficiary powers, and other rights, as also whatever obligations, are annexed to the condition of a parent, may be shared in any proportions that can be imagined. But if in these several objects of legal creation, each of these two parties have severally a share, and if the interests of all these parties are in any degree provided for, it is evident that each of the parents will stand, with relation to the child, in two several capacities: that of a master, and that of a guardian. The condition of a parent then, in as far as it is the work of law, may be considered as a complex

condition, compounded of that of a guardian, and that of a master. To the parent then, in quality of guardian, results a set of duties, involving, as necessary to the discharge of them, certain powers: to the child, in the character of a ward, a set of rights corresponding to the parent's duties, and a set of duties corresponding to his powers. To the parent again, in quality of master, a set of beneficiary powers, without any other necessary limitation (so long as they last) than what is annexed to them by the duties incumbent on him in quality of a guardian: to the child, in the character of a servant, a set of duties corresponding to the parent's beneficiary powers, and without any other necessary limitation (so long as they last) than what is annexed to them by the rights which belong to the child in his capacity of ward. The condition of a parent will therefore be exposed to all the offences to which either that of a guardian or that of a master are exposed: and, as each of the parents will partake, more or less, of both those characters, the offences to which the two conditions are exposed may be nominally, as they will be substantially, the same. Taking them then all together, the offences to which the condition of a parent is exposed will stand as follows: 1. Wrongful non-investment of parentality *. 2. Wrongful interception of parentality.

* At first view it may seem a solecism to speak of the condition of parentality as one which a man can have need to

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3. Wrongful divestment of parentality. 4. Usurpation of parentality. 5. Wrongful investment of parentality. 6. Wrongful abdication of parentality. 7. Wrongful detrectation of parentality. 8. Wrongful imposition of parentality. 9. Mismanagement of parental guardianship. 10. Desertion of parental guardianship. 11. Dissipation in prejudice of filial wardship. 12. Peculation in prejudice of filial wardship. 13. Abuse of parental powers. 14. Disturbance of parental guardianship. 15. Breach of duty to parents. 16. Elopement from parents. 17. Child-stealing. 18. Bribery in prejudice of filial wardship.

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Offences touching the filial condition.

Next with regard to the offences to which the

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be invested with. The reason is, that it is not common for any ceremony to be required as necessary to a man's being deemed in law the father of such or such a child. But the institution of such a ceremony, whether advisable or not, is at least perfectly conceivable. Nor are there wanting cases in which it has actually been exemplified. By an article in the Roman law, adopted by many modern nations, an illegitimate child is rendered legitimate by the subsequent marriage of his parents. If then a priest, or other person whose office it was, were to refuse to join a man and woman in matrimony, such refusal, besides being a wrongful non-investment with respect to the two matrimonial conditions, would be a wrongful non-investment of parentality and filiation, to the prejudice of any children who should have been legitimated.

filial condition *, the condition of a son or daughter stands exposed. The principles to be pursued in the investigation of offences of this description, have already been sufficiently developed. It will be sufficient, therefore, to enumerate them without further discussion. The only peculiarities by which offences relative to the condition in question stand distinguished from the offences relative to all the preceding conditions, depend upon this one circumstance; viz. that it is certain every one must have had a father and a mother: at the same time that it is not certain that every one must have had a master, a servant, a guardian, or a ward. It will be observed all along, that where a person, from whom, if alive, the benefit would be taken, or on whom the burthen would be imposed, be dead, so much of the mischief is extinct along with the object of the offence. There still, how-

* In English we have no word that will serve to express with propriety the person who bears the relation opposed to that of parent. The word *child* is ambiguous, being employed in another sense, perhaps more frequently than in this: more frequently in opposition to *a person of full age*, an *adult*, than in correlation to a *parent*. For the condition itself we have no other word than *filiation*: an ill-contrived term, not analogous to *paternity* and *maternity*: the proper term would have been *filiality*: the word filiation is as frequently, perhaps, and more consistently, put for the act of establishing a person in the possession of the condition of filiality.

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ever, remains so much of the mischief as depends upon the advantage or disadvantage which might accrue to persons related, or supposed to be related, in the several remoter degrees, to him in question. The catalogue then of these offences stand as follows: 1. Wrongful non-investment of filiation. This, if it be the offence of him or her who should have been recognized as the parent, coincides with wrongful detrectation of parentality: if it be the offence of a third person, it involves in it non-investment of parentality, which, provided the parentality is, in the eyes of him or her who should have been recognized as the parent, a desirable thing, is wrongful. 2. Wrongful interception of filiation. This, if it be the offence of him or her who should have been recognized as the parent, coincides with wrongful detrectation of parentality: if it be the offence of a third person, it involves in it interception of parentality, which, provided the parentality is, in the eyes of him or her who should have been recognized as parent, a desirable thing, is wrongful. 3. Wrongful divestment of filiation. This, if it be the offence of him or her who should be recognized as parent, coincides with wrongful abdication of parentality: if it be the offence of a third person, it involves in it divestment of parentality: to wit, of paternity, or of maternity, or of both: which, if the parentality is, in the eyes of him or her who should be recognised as parent, a desirable thing,

are respectively wrongful. 4. Usurpation of filiation. This coincides with wrongful imposition of parentality; to wit, either of paternity, or of maternity, or of both: and necessarily involves in it divestment of parentality, which, if the parentality thus divested were, in the eyes of him or her who are thus divested of it, a desirable thing, is wrongful. 5. Wrongful investment of filiation: (the filiation being considered as a beneficial thing.) This coincides with imposition of parentality, which, if in the eyes of the pretended father or mother the parentality should be an undesirable thing, will be wrongful. 6. Wrongful abdication of filiation. This necessarily coincides with wrongful divestment of parentality; it also is apt to involve in it wrongful imposition of parentality; though not necessarily either to the advantage or to the prejudice of any certain person. For if a man, supposed at first to be your son, appears afterwards not to be your's, it is certain indeed that he is the son of some other man, but it may not appear who that other man is. 7. Wrongful detrectation of filiation. This coincides with wrongful non-investment or wrongful interception of parentality. 8. Wrongful imposition of filiation. This, if it be the offence of the pretended parent, coincides necessarily with usurpation of parentality: if it be the offence of a third person, it necessarily involves imposition of parentality; as also divestment of parentality: either or both

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of which, according to the circumstance above-mentioned, may or may not be wrongful. 9. Mismanagement of parental guardianship. 10. Desertion of parental guardianship. 11. Dissipation in prejudice of filial wardship. 12. Peculation in prejudice of filial wardship. 13. Abuse of parental power. 14. Disturbance of parental guardianship. 15. Breach of duty to parents. 16. Elopement from parents. 17. Child-stealing. 18. Bribery in prejudice of parental guardianship.

LI.

Condition of a husband. —Powers, duties, and rights, that may be annexed to it.

We shall now be able to apply ourselves with some advantage to the examination of the several offences to which the marital condition, or condition of a husband, stands exposed. A husband is a man, between whom and a certain woman, who in this case is called his wife, there subsists a legal obligation for the purpose of their living together, and in particular for the purpose of a sexual intercourse to be carried on between them. This obligation will naturally be considered in four points of view: 1. In respect of its commencement. 2. In respect of the placing it. 3. In respect of the nature of it. 4. In respect of its duration. First then, it is evident, that in point of possibility, one method of commencement is as conceivable as another: the time of its commencement might have been marked by one sort of event (by one sort of *signal*, as it may here be called) as well as by another. But in

practice the signal has usually been, as in point of utility it ought constantly to be, a contract entered into by the parties: that is, a set of signs, pitched upon by the law, as expressive of their *mutual consent*, to take upon them this condition. Second, and third, with regard to the placing of the obligations which are the result of the contract, it is evident that they must rest solely on one side, or mutually on both. On the first supposition, the condition is not to be distinguished from pure slavery. In this case, either the wife must be the slave of the husband, or the husband of the wife. The first of these suppositions has perhaps never been exemplified; the opposing influence of physical causes being too universal to have ever been surmounted: the latter seems to have been exemplified but too often; perhaps among the first Romans; at any rate, in many barbarous nations. Thirdly, With regard to the nature of the obligations. If they are not suffered to rest all on one side, certain rights are thereby given to the other. There must, therefore, be rights on both sides. Now, where there are mutual rights possessed by two persons, as against each other, either there are powers annexed to those rights, or not. But the persons in question are, by the supposition, to live together: in which case we have shewn *, that it is not only expedient, but in a manner necessary, that on

* Supra.

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one side there should be powers. Now it is only on one side that powers can be: for suppose them on both sides, and they destroy one another. The question is then, In which of the parties these powers shall be lodged? we have shewn, that on the principle of utility they ought to be lodged in the husband. The powers then which subsist being lodged in the husband, the next question is, Shall the interest of one party only, or of both, be consulted in the exercise of them? it is evident, that on the principle of utility the interests of both ought alike to be consulted: since in two persons, taken together, more happiness is producible than in one. This being the case, it is manifest, that the legal relation which the husband will bear to the wife will be a complex one: compounded of that of master and that of guardian.

LII.

Offences touching the condition of a husband.

The offences then to which the condition of a husband will be exposed, will be the sum of those to which the two conditions of master and guardian are exposed. Thus far the condition of a husband, with respect to the general outlines of it, stands upon the same footing as that of a parent. But there are certain reciprocal services, which being the main subject of the matrimonial contract, constitute the essence of the two matrimonial relations, and which neither a master nor guardian, as such, nor a parent, at any rate, have

usually been permitted to receive. These must of course have been distinguished from the indiscriminate train of services at large which the husband in his character of master is impowered to exact, and of those which in his character of guardian he is bound to render. Being thus distinguished, the offences relative to the two conditions have, in many instances, in as far as they have reference to these peculiar services, acquired particular denominations. In the first place, with regard to the contract, from the celebration of which the legal condition dates its existence. It is obvious that in point of possibility, this contract might, on the part of either sex, subsist with respect to several persons of the other sex at the same time: the husband might have any number of wives: the wife might have any number of husbands: the husband might enter into the contract with a number of wives at the same time: or, if with only one at a time, he might reserve to himself a right of engaging in a similar contract with any number, or with only such or such a number of other women afterwards, during the continuance of each former contract. This latter accordingly is the footing upon which, as is well known, marriage is and has been established in many extensive countries: particularly in all those which profess the Mahometan religion. In point of possibility, it is evident that the like liberty might be reserved on

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the part of the wife: though in point of practice no examples of such an arrangement seem ever to have occurred. Which of all these arrangements is, in point of utility, the most expedient, is a question which would require too much discussion to answer in the course of an analytical process like the present, and which belongs indeed to the civil branch of legislation, rather than to the penal*. In Christian countries, the solemnization of any such contract is made to exclude the solemnization of any subsequent one during the continuance of a former: and the solemnization of any such subsequent contract is accordingly treated as an offence, under the name of *Polygamy*. Polygamy then is at any rate, on the part of the man, a particular modification of that offence which may be stiled usurpation of the condition of a husband. As to its other effects, they will be different, according as it was the man only, or the woman only, or both, that were in a state of matrimony at the time of the commission of the offence. If the man only, then his offence involves in it *pro tanto* that of wrongful divestment of the condition of a wife, in prejudice of his prior wife†. If the woman only, then it involves

* See ch. xvii. [Limits] § iv.

† In this case also, if the woman knew not of the prior marriage, it is besides a species of seduction; and, in as far as it affects her, belongs to another division of the offences of this class. Vide supra, xxxvi.

in it *pro tanto* that of wrongful divestment of the condition of a husband, in prejudice of her prior husband. If both were already married, it of course involves both the wrongful divestments which have just been mentioned. And on the other hand also, the converse of all this may be observed with regard to polygamy on the part of the woman. Second, As the engaging not to enter into any subsequent engagement of the like kind during the continuance of the first, is one of the conditions on which the law lends its sanction to the first; so another is, the inserting as one of the articles of this engagement, an undertaking not to render to, or accept from, any other person the services which form the characteristic object of it: the rendering or acceptance of any such services is accordingly treated as an offence, under the name of *adultery:* under which name is also comprised the offence of the stranger, who, in the commission of the above offence, is the necessary accomplice. Third, Disturbing either of the parties to this engagement, in the possession of these characteristic services, may, in like manner, be distinguished from the offence of disturbing them in the enjoyment of the miscellaneous advantages derivable from the same condition; and on whichever side the blame rests, whether that of the party, or that of a third person, may be termed *wrongful withholding of connubial services.* And thus we have one-and-twenty sorts of of-

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fences to which, as the law stands at present in Christian countries, the condition of a husband stands exposed: viz. 1. Wrongful non-investment of the condition of a husband. 2. Wrongful interception of the condition of a husband. 3. Wrongful divestment of the condition of a husband. 4. Usurpation of the condition of a husband. 5. Polygamy. 6. Wrongful investment of the condition of a husband. 7. Wrongful abdication of the condition of a husband. 8. Wrongful detrectation of the condition of a husband. 9. Wrongful imposition of the condition of a husband. 10. Mismanagement of marital guardianship. 11. Desertion of marital guardianship. 12. Dissipation in prejudice of matrimonial wardship. 13. Peculation in prejudice of matrimonial wardship. 14. Abuse of marital power. 15. Disturbance of marital guardianship. 16. Wrongful withholding of connubial services. 17. Adultery. 18. Breach of duty to husbands. 19. Elopement from husbands. 20. Wife-stealing. 21. Bribery in prejudice of marital guardianship*.

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* I. SEMI-PUBLIC offences.—Falsehoods contesting, or offences against justice destroying, the validity of the marriages of people of certain descriptions: such as Jews, Quakers, Hugonots, &c. &c.

II. SELF-REGARDING offences.—Improvident marriage on the part of minors.

LIII.

Next with regard to the offences to which the condition of a wife stands exposed. From the patterns that have been exhibited already, the coincidences and associations that take place between the offences that concern the existence of this condition and those which concern the existence of the condition of a husband, may easily enough be apprehended without farther repetitions. The catalogue of those now under consideration will be precisely the same in every article as the catalogue last exhibited.

LIV.

Thus much for the several sorts of offences relative to the several sorts of domestic conditions: those which are constituted by such natural relations as are contiguous being included. There remain those which are uncontiguous: of which, after so much as has been said of the others, it will naturally be expected that some notice should be taken. These, however, do not afford any of that matter which is necessary to constitute a condition. In point of fact, no power seems ever to be annexed to any of them. A grandfather, perhaps, may be called by the law to take upon him the guardianship of his orphan grandson: but then the power he has belongs to him not as grandfather, but as guardian. In point of possibility, indeed, power might be annexed to these relations, just as it might to any other.

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But still no new sort of domestic condition would result from it: since it has been shewn that there can be no others, that, being constituted by power, shall be distinct from those which have been already mentioned. Such as they are, however, they have this in common with the before-mentioned relations, that they are capable of importing either benefit or burthen: they therefore stand exposed to the several offences whereby those or any other relations are liable to be affected in point of existence. It might be expected, therefore, that in virtue of these offences, they should be added to the list of the relations which are liable to be objects of delinquency. But the fact is, that they already stand included in it: and although not expressly named, yet as effectually as if they were. On the one hand, it is only by affecting such or such a contiguous relation that any offence, affecting uncontiguous relations can take place. On the other hand, neither can any offence, affecting the existence of the contiguous relations, be committed, without affecting the existence of an indefinite multitude of such as are uncontiguous. A false witness comes, and causes it to be believed that you are the son of a woman, who, in truth, is not your mother. What follows? An endless tribe of other false persuasions—that you are the grandson of the father and of the mother of this supposed mother: that you are the son of some husband of her's, or, at

least, of some man with whom she has cohabited: the grandson of his father and his mother; and so on: the brother of their other children, if they have any: the brother-in-law of the husbands and wives of those children, if married: the uncle of the children of those children: and so on.—On the other hand, that you are not the son of your real mother, nor of your real father: that you are not the grandson of either of your real grandfathers or grandmothers; and so on without end: all which persuasions result from, and are included in, the one original false persuasion of your being the son of this your pretended mother.

It should seem, therefore, at first sight, that none of the offences against these uncontiguous relations could ever come expressly into question: for by the same rule that one ought, so it might seem ought a thousand others: the offences against the uncontiguous being merged as it were in those which affect the contiguous relations. So far, however, is this from being the case, that in speaking of an offence of this stamp, it is not uncommon to hear a great deal said of this or that uncontiguous relationship which it affects, at the same time that no notice at all shall be taken of any of those which are contiguous. How happens this? Because, to the uncontiguous relation are annexed perhaps certain remarkable advantages or disadvantages, while to all the intermediate relations none shall be annexed which are

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in comparison worth noticing. Suppose Antony or Lepidus to have contested the relationship of Octavius (afterwards Augustus) to Caius Julius Cæsar. How could it have been done? It could only have been by contesting, either Octavius's being the son of Atia, or Atia's being the daughter of Julia, or Julia's being the daughter of Lucius Julius Cæsar, or Lucius Julius Cæsar's being the father of Caius. But to have been the son of Atia, or the grandson of Julia, or the great grandson of Lucius Julius Cæsar, was, in comparison, of small importance. Those intervening relationships were, comparatively speaking, of no other use to him than in virtue of their being so many necessary links in the genealogical chain which connected him with the sovereign of the empire.

As to the advantages and disadvantages which may happen to be annexed to any of those uncontiguous relationships, we have seen already that no powers over the correlative person, nor any corresponding obligations, are of the number. Of what nature then can they be? They are, in truth, no other than what are the result either of local and accidental institutions, or of some spontaneous bias that has been taken by the moral sanction. It would, therefore, be to little purpose to attempt tracing them out *a priori* by any exhaustive process: all that can be done is, to pick up and lay together some of the principal articles

in each catalogue by way of specimen. The advantages which a given relationship is apt to impart, seem to be referable chiefly to the following heads: 1. Chance of succession to the property, or a part of the property, of the correlative person. 2. Chance of pecuniary support, to be yielded by the correlative person, either by appointment of law, or by spontaneous donation. 3. Accession of legal rank; including any legal privileges which may happen to be annexed to it: such as capacity of holding such and such beneficial offices; exemption from such and such burthensome obligations; for instance, paying taxes, serving burthensome offices, &c. &c. 4. Accession of rank by courtesy; including the sort of reputation which is customarily and spontaneously annexed to distinguished birth and family alliance: whereon may depend the chance of advancement in the way of marriage, or in a thousand other ways less obvious. The disadvantages which a given relation is liable to impart, seem to be referable chiefly to the following heads: 1. Chance of being obliged, either by law, or by force of the moral sanction, to yield pecuniary support to the correlative party. 2. Loss of legal rank: including the legal disabilities, as well as the burthensome obligations, which the law is apt to annex, sometimes with injustice enough, to the lower stations. 3. Loss of rank by courtesy:

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including the loss of the advantages annexed by custom to such rank. 4. Incapacity of contracting matrimony with the correlative person, where the supposed consanguinity or affinity lies within the prohibited degrees*.

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* In pursuance of the plan adopted with relation to semi-public and self-regarding offences, it may here be proper to exhibit such a catalogue as the nature of the design will admit, of the several genera or inferior divisions of public offences.

I. OFFENCES against the EXTERNAL SECURITY of the state. 1. Treason (in favour of foreign enemies.) It may be positive or negative (negative consisting, for example, in the not opposing the commission of positive.) 2. *Espionage* (in favour of foreign rivals not yet enemies.) 3. Injuries to foreigners at large (including piracy.) 4. Injuries to privileged foreigners such as ambassadors.)

II. OFFENCES AGAINST JUSTICE. 1. Offences against judicial trust: viz. Wrongful non-investment of judicial trust, wrongful interception of judicial trust, wrongful divestment of judicial trust, usurpation of judicial trust, wrongful investment of judicial trust, wrongful abdication of judicial trust, wrongful detrectation of judicial trust, wrongful imposition of judicial trust, breach of judicial trust, abuse of judicial trust, disturbance of judicial trust, and bribery in prejudice of judicial trust.

Breach and abuse of judicial trust may be either intentional or unintentional. Intentional is culpable at any rate. Unintentional will proceed either from inadvertence, or from mis-supposal: if the inadvertence be coupled with heedlessness, or the missupposal with rashness, it is culpable: if not, blameless. For the particular acts by which the exercise of judicial trust may be *disturbed* see B. i. tit. [offences

LV. CHAP. XVI. Civil conditions.

We come now to civil conditions: these, it may well be imagined, may be infinitely various: as

against justice.] They are too multifarious, and too ill provided with names, to be examined here.

If a man fails in fulfilling the duties of this trust, and thereby comes either to break or to abuse it, it must be through some deficiency in the three requisite and only requisite endowments, of knowledge, inclination, and power. [See supra, xxvii.] A deficiency in any of those points, if any person be in fault, may proceed either from his own fault, or from the fault of those who should act with or under him. If persons who are in fault are persons invested with judical trust, the offence comes under the head of breach or abuse of trust: if other persons, under that of disturbance of trust.

The ill effects of any breach, abuse, or disturbance of judicial trust, will consist in the production of some article or articles in the list of the mischiefs which it ought to be the original purpose of judicial procedure to remedy or avert, and of those which it ought to be the incidental purpose of it to avoid producing. These are either primary (that is immediate) or remote: remote are of the 2d, 3d, or 4th order, and so on. The primary are those which import actual pain to persons assignable, and are therefore mischievous in themselves: the secondary are mischievous on account of the tendency they have to produce some article or articles in the catalogue of those of the first order; and are therefore mischievous in their effects. Those of the 3d order are mischievous only on account of the connection they have in the way of productive tendency, as before, with those of the 2d order: and so on.

Primary inconveniences, which it ought to be the object of procedure to provide against, are, 1. The continuance of

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various as the acts which a man may be either commanded or allowed, whether for his own benefit, or

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the individual offence itself, and thereby the encrease as well as continuance of the mischief of it. 2. The continuance of the whole mischief of the individual offence. 3. The continuance of a part of the mischief of the individual offence. 4. Total want of amends on the part of persons injured by the offence. 5. Partial want of amends on the part of persons injured by the offence. 6. Superfluous punishment of delinquents. 7. Unjust punishment of persons accused. 8. Unnecessary labour, expence, or other suffering or danger, on the part of superior judicial officers. 9. Unnecessary labour, expence, or other suffering or danger, on the part of ministerial or other subordinate judicial officers. 10. Unnecessary labour, expence, or other suffering or danger, on the part of persons whose co-operation is requisite *pro re natâ*, in order to make up the necessary complement of knowledge and power on the part of judicial officers, who are such by profession. 11. Unnecessary labour, expence, or other suffering or danger, on the part of persons at large, coming under the sphere of the operations of the persons above-mentioned.

Secondary inconveniences are, in the counsultative preinterpretative (or purely civil) branch of procedure. 1. Misinterpretation or adjudication. In the executive (including the penal) branch. 2. Total impunity of delinquents: (as favouring the production of other offences of the like nature.) 3. Partial impunity of delinquents. 4. Application of punishment improper in specie, though perhaps not in degree (this lessening the beneficial efficacy of the quantity employed.) 5. Uneconomical application of punishment, though proper, perhaps, as well in specie as in degree. 6. Unnecessary pecuniary expence on the part of the state.

that of others, to abstain from or to perform. As many different denominations as there are of per-

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Inconveniences of the 3d order are, 1. Unnecessary delay. 2. Unnecessary intricacy.

Inconveniences of the 4th order are, 1. Breach, 2. Abuse, 3. Disturbance, of judicial trust, as above: viz. in as far as these offences are preliminary to and distinct from those of the 2d and 3d orders.

Inconveniences of the 5th order are, Breach of the several regulations of procedure, or other regulations, made in the view of obviating the inconveniences above enumerated: viz. if preliminary and distinct as before.

III. OFFENCES against the PREVENTIVE branch of the POLICE. 1. Offences against *phthano-paranomic* trust: (φθανω, to prevent; παρανομια, an offence.) 2. Offences against *phthano-symphoric* trust: συμφορα, a calamity. The two trusts may be termed by the common appellation of *prophylactic*: (προ, before-hand, and φυλαττω, to guard against.)

IV. OFFENCES against the PUBLIC FORCE. 1. Offences against military trust, corresponding to those against judicial trust. Military desertion is a breach of military duty, or of military trust. Favouring desertion is a disturbance of it. 2. Offences against that branch of public trust which consists in the management of the several sorts of things appropriated to the purposes of war: such as arsenals, fortifications, dock-yards, ships of war, artillery, ammunition, military magazines, and so forth. It might be termed *polemotamientic*: from πολεμος, war: and ταμιενς, a steward *.

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* A number of different branches of public trust, none of which have yet been provided with appellatives, have here been brought to view: which then were best? to coin new names for them out of the Greek; or, instead of a word, to make use of a whole sentence? In English, and in French, there is no other alternative; no more than in any of the other southern languages. It rests with the reader to determine.

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sons distinguished with a view to such commands and allowances (those denominations only except-

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V. OFFENCES against the POSITIVE ENCREASE of the NATIONAL FELICITY. 1. Offences against *episturo-threptic* trust: (επιστημη, knowledge; and τρεφω, to nourish or promote.) 2. Offences against *eupædagogue* trust: ευ, well; and παιδαγωγεω, to educate. 3. Offences against *noso-comial* trust: νοσος, a disease; and κομιζω, to take care of. 4. Offences against *mioro-comial* trust: (μωρος, an insane person.) 5. Offences against *ptocho-comial* trust: (πτωχοι, the poor.) 6. Offences against *antembletic* trust: (αντεμβαλλω, to bestow in reparation of a loss.) 7. Offences against *hedonarchic* trust: (ηδοναι, pleasures; and αρχομαι, to preside over.) The above are examples of the principal establishments which should or might be set on foot for the purpose of making, in so many different ways, a positive addition to the stock of national felicity. To exhibit an exhaustive analysis of the possible total of these establishments would not be a very easy task: nor on the present occasion is it a necessary one; for be they of what nature and in what number they may, the offences to which they stand exposed will, in as far as they are offences against trust, be in point of denomination the same: and as to what turns upon the particular nature of each trust, they will be of too local a nature to come within the present plan.

All these trusts might be comprized under some such general name as that of *agatho-poieutic* trust: (αγαθοποιεω, to do good to any one.)

VI. OFFENCES against the PUBLIC WEALTH. 1. Non-payment of forfeitures. 2. Non-payment of taxes, including smuggling. 3. Breach of the several regulations made to prevent the evasion of taxes. 4. Offences against fiscal trust: the same as offences against judicial and military

ed which relate to the conditions above spoken of under the name of domestic ones) so many civil

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trusts. Offences against the original revenue, not accruing either from taxes or forfeitures, such as that arising from the public demesnes, stand upon the same footing as offences against private property. 5. Offences against *demosio-tamientic* trust: (δημοσια, things belonging to the public; and ταμιενς, a steward) viz. against that trust, of which the object is to apply to their several destinations such articles of the public wealth as are provided for the indiscriminate accommodation of individuals: such as public roads and waters, public harbours, post-offices, and packet boats, and the stock belonging to them; market-places, and other such public buildings; race-grounds, public walks, and so forth. Offences of this description will be apt to coincide with offences against *agatho-poieutic* trust as above, or with offences against *ethno-plutistic* trust hereafter mentioned, according as the benefit in question is considered in itself, or as resulting from the application of such or such a branch or portion of the public wealth.

VII. OFFENCES against POPULATION. 1. Emigration. 2. Suicide. 3. Procurement of impotence or barrenness. 4. Abortion. 5. Unprolific coition. 6. Celibacy.

VIII. OFFENCES against the NATIONAL WEALTH. 1. Idleness. 2. Breach of the regulations made in the view of preventing the application of industry to purposes less profitable, in prejudice of purposes more profitable. 3. Offences against *ethno-plutistic* trust; (λαος, the nation at large; πλουτιζω, to enrich.

IX. OFFENCES against the SOVEREIGNTY. 1. Offences against sovereign trust: corresponding to those against judicial, prophylactic, military, and fiscal trusts. Offensive rebellion includes wrongful interception, wrongful divestment,

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conditions one might enumerate. Means however, more or less explicit, may be found out of circumscribing their infinitude.

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usurpation, and wrongful investment, of sovereign trust, with the offences accessary thereto. Where the trust is in a single person, wrongful interception, wrongful divestment, usurpation, and wrongful investment, cannot any of them, be committed without rebellion; abdication and detrectation can never be deemed wrongful; breach and abuse of sovereign trust can scarcely be punished: no more can bribe-taking: wrongful imposition of it is scarce practicable. When the sovereignty is shared among a number, wrongful interception, wrongful divestment, usurpation, and wrongful investment, may be committed without rebellion: none of the offences against this trust are impracticable: nor is there any of them but might be punished. Defensive rebellion is disturbance of this trust. Political tumults, political defamation, and political vilification, are offences accessory to such disturbance.

Sovereign power (which, upon the principle of utility, can never be other than fiduciary) is exercised either by rule or without rule: in the latter case it may be termed *autocratic*: in the former case it is divided into two branches, the *legislative* and the *executive* *. In either case, where the designation of the person by whom the power is to be possessed, depends not solely upon mere physical events, such as that of natural succession, but in any sort upon the will of another person, the latter possesses an *ivestitive* power, or right of investiture, with regard to the power in question: in like manner may any person also possess a *divestitive* power. The powers above enumerated, such as judicial power, military power, and so forth, may therefore be exerciseable by a

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* See ch. xvii. [Limits] § iii.

What the materials are, if so they may be called, of which conditions, or any other kind of

man, either directly, *propriâ manu*; or indirectly, *manu aliená**. Power to be exercised *manu aliená* is investitive, which may or may not be accompanied by divestitive. Of sovereign power, whether autocratic, legislative, or executive, the several public trusts above-mentioned form so many subordinate branches. Any of these powers may be placed, either, 1. in an individual; or, 2. in a body politic: who may be either supreme or subordinate. Subordination on the part of a magistrate may be established, 1. By the person's being punishable: 2. By his being removeable: 3. By the orders being reversible.

X. OFFENCES against RELIGION. 1. Offences tending to weaken the force of the religious sanction: including blasphemy and profaneness. 2. Offences tending to misapply the force of the religious sanction: including false prophecies, and other pretended revelations; also heresy, where the doctrine broached is pernicious to the temporal interests of the community. 3. Offences against religious trust, where any such is thought fit to be established.

XI. OFFENCES against the NATIONAL INTEREST in general. 1. Immoral publications. 2. Offences against the trust of an ambassador; or, as it might be termed, *presbeutic* trust. 3. Offences against the trust of a privy-counsellor; or, as it might be termed, *smybouleutic* trust. 4. In pure or mixed monarchies, prodigality on the part of persons who are about the person of the sovereign, though without being invested with any specific trust. 5. Excessive gaming on the part of the same persons. 6. Taking presents from rival powers without leave.

* In the former case, the power might be termed in one word, *autochirous*: in the latter, *heterochirous*: (αυτος, a man's own; χειρ, a hand: ἑτερος another's.)

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legal possession, can be made up, we have already seen: beneficial powers, fiduciary powers, beneficial rights, fiduciary rights, relative duties, absolute duties. But as many conditions as import a power or right of the fiduciary kind, as possessed by the person whose condition is in question, belong to the head of trusts. The catalogue of the offences to which these conditions are exposed, coincides therefore exactly with the catalogue of offences against trust: under which head they have been considered in a general point of view under the head of offences against trust: and such of them as are of a domestic nature, in a more particular manner in the character of offences against the several domestic conditions. Conditions constituted by such duties of the relative kind, as have for their counterparts trusts constituted by fiduciary powers, as well as rights on the side of the correlative party, and those of a private nature, have also been already discussed under the appellation of domestic conditions. The same observation may be applied to the conditions constituted by such powers of the beneficial kind over persons as are of a private nature: as also to the subordinate correlative conditions constituted by the duties corresponding to those rights and powers. As to absolute duties, there is no instance of a condition thus created, of which the institution is upon the principle of utility to be justified; unless the several religious

conditions of the monastic kind should be allowed of as examples. There remain, as the only materials out of which the conditions which yet remain to be considered can be composed, conditions constituted by beneficial powers over things; conditions constituted by beneficial rights to things (that is, rights to powers over things) or by rights to those rights, and so on; conditions constituted by rights to services; and conditions constituted by the duties corresponding to those respective rights. Out of these are to be taken those of which the materials are the ingredients of the several modifications of property, the several conditions of proprietorship. These are the conditions, if such for a moment they may be stiled, which having but here and there any specific names, are not commonly considered on the footing of conditions: so that the acts which, if such conditions were recognized, might be considered as offences against those conditions, are not wont to be considered in any other light than that of offences against property.

Now the case is, as hath been already intimated*, that of these civil conditions, those which are wont to be considered under that name, are not distinguished by any uniform and explicit line from those of which the materials are wont

* Supra, xvii.

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to be carried to the head of property: a set of rights shall, in one instance, be considered as constituting an article of property rather than a condition: while, in another instance, a set of rights of the same stamp is considered as constituting rather a condition than an article of property. This will probably be found to be the case in all languages: and the usage is different again in one language from what it is in another. From these causes it seems to be impracticable to subject the class of civil conditions to any exhaustive method: so that for making a complete collection of them there seems to be no other expedient than that of searching the language through for them, and taking them as they come. To exemplify this observation, it may be of use to lay open the structure as it were of two or three of the principal sorts or classes of conditions, comparing them with two or three articles of property which appear to be nearly of the same complexion: by this means the nature and generation, if one may so call it, of both these classes of ideal objects may be the more clearly understood.

The several sorts of civil conditions that are not fiduciary may all, or at least the greater part of them, be comprehended under the head of rank, or that of profession; the latter word being taken in its most extensive sense, so as to include not only what are called the liberal professions, but those also which are exercised by the several

sorts of traders, artists, manufacturers, and other persons of whatsoever station, who are in the way of making a profit by their labour. Among ranks then, as well as professions, let us, for the sake of perspicuity, take for examples such articles as stand the clearest from any mixture of either fiduciary or beneficial power. The rank of knighthood is constituted, how? by prohibiting all other persons from performing certain acts, the performance of which is the symbol of the order, at the same time that the knight in question, and his companions, are permitted: for instance, to wear a ribbon of a certain colour in a certain manner: to call himself by a certain title: to use an armorial seal with a certain mark on it. By laying all persons but the knight under this prohibition, the law subjects them to a set of duties: and since from the discharge of these duties a benefit results to the person in whose favour they are created, to wit, the benefit of enjoying such a share of extraordinary reputation and respect as men are wont to yield to a person thus distinguished, to discharge them is to render him a service: and the duty being a duty of the negative class, a duty consisting in the performance of certain acts of the negative kind*, the service is what may be called *a service of forbearance*. It appears then, that to generate this condition there must be two

* See ch. [Actions] viii.

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sorts of services: that which is the immediate cause of it, a service of the negative kind, to be rendered by the community at large: that which is the cause again of this service, a service of the positive kind, to be rendered by the law.

The condition of a professional man stands upon a narrower footing. To constitute this condition there needs nothing more than a permission given him on the part of the legislator to perform those acts, in the performance of which consists the exercise of his profession: to give or sell his advice or assistance in matters of law or physic: to give or sell his services as employed in the executing or overseeing of a manufacture or piece of work of such or such a kind: to sell a commodity of such or such a sort. Here then we see there is but one sort of service requisite; a service which may be merely of the negative kind, to be rendered by the law: the service of permitting him to exercise his profession: a service which, if there has been no prohibition laid on before, is rendered by simply forbearing to prohibit him.

Now the ideal objects, which in the cases above specified are said to be conferred upon a man by the services that are respectively in question, are in both cases not articles of property but conditions. By such a behaviour on the part of the law, as shall be the reverse of that whereby they were respectively produced, a man may be made to forfeit them: and what he is then said to forfeit

is in neither case his property; but in one case, his rank or dignity: in the other case, his trade or his profession: and in both cases, his condition.

Other cases there are again in which the law, by a process of the same sort with that by which it constituted the former of the two above-mentioned conditions, confers on him an ideal object, which the laws of language have placed under the head of property. The law permits a man to sell books: that is, all sorts of books in general. Thus far all that it has done is to invest him with a condition: and this condition he would equally possess, although every body else in the world were to sell books likewise. Let the law now take an active part in his favour, and prohibit all other persons from selling books of a certain description, he remaining at liberty to sell them as before. It thereby confers on him a sort of exclusive privilege or monopoly, which is called a *copy-right*. But by investing him with this right, it is not said to invest him with any new sort of condition; and what it invests him with is spoken of as an article of property; to wit, of that sort of property which is termed incorporeal *: and so

* The reason probably why an object of the sort here in question is referred to the head of property, is, that the chief value of it arises from its being capable of being made a source of property in the more ordinary acceptations of the word; that is, of money, consumable commodities, and so forth.

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on in the case of an engraving, a mechanical engine, a medicine; or, in short, of a saleable article of any other sort. Yet when it gave him an exclusive right of wearing a particular sort of ribbon, the object which it was then considered as conferring on him was not an article of property but a condition.

By forbearing to subject you to certain disadvantages, to which it subjects an alien, the law confers on you the condition of a natural-born subject: by subjecting him to them, it imposes on him the condition of an alien: by conferring on you certain privileges or rights, which it denies to a *roturier*, the law confers on you the condition of a *gentilhomme*; by forbearing to confer on him those privileges, it imposes on him the condition of a *roturier* *. The rights, out of which the two advantageous conditions here exemplified are both of them as it were composed, have for their counterpart a sort of services of forbearance, rendered, as we have seen, not by private individuals, but by the law itself. As to the duties which it creates in rendering you these services, they are to be considered as duties imposed by the legislator on the ministers of justice.

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* The conditions themselves having nothing that corresponds to them in England, it was necessary to make use of foreign terms.

It may be observed, with regard to the greater part of the conditions here comprised under the general appellation of *civil*, that the relations corresponding to those by which they are respectively constituted, are not provided with appellatives. The relation which has a name, is that which is borne by the party favoured to the party bound: that which is borne by the party bound to the party favoured has not any. This is a circumstance that may help to distinguish them from those conditions which we have termed domestic. In the domestic conditions, if on the one side the party *to* whom the power is given is called a master; on the other side, the party *over* whom that power is given, the party who is the object of that power, is termed a servant. In the civil conditions this is not the case. On the one side, a man, in virtue of certain services of forbearance, which the rest of the community are bound to render him, is denominated a knight of such or such an order: but on the other side, these services do not bestow any particular denomination on the persons from whom such services are due. Another man, in virtue of the legislator's rendering that sort of negative service which consists in the not prohibiting him from exercising a trade, invests him at his option with the condition of a trader: it accordingly denominates him a farmer, a baker, a weaver, and so on: but the ministers of the law do not, in virtue of their rendering the

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man this sort of negative service, acquire for themselves any particular name. Suppose even that the trade you have the right of exercising happens to be the object of a monopoly, and that the legislator, besides rendering you himself those services which you derive from the permission he bestows on you, obliges other persons to render you those farther services which you receive from their forbearing to follow the same trade; yet neither do they, in virtue of their being thus bound, acquire any particular name.

After what has been said of the nature of the several sorts of civil conditions that have names, the offences to which they are exposed may, without much difficulty, be imagined. Taken by itself, every condition which is thus constituted by a permission granted to the possessor, is of course of a beneficial nature: it is, therefore, exposed to all those offences to which the possession of a benefit is exposed. But either on account of a man's being obliged to persevere when once engaged in it, or on account of such other obligations as may stand annexed to the possession of it, or on account of the comparative degree of disrepute which may stand annexed to it by the moral sanction, it may by accident be a burthen: it is on this account liable to stand exposed to the offences to which, as hath been seen, every thing that partakes of the nature of a burthen stands exposed. As to any offences which may concern

the exercise of the functions belonging to it, if it happens to have any duties annexed to it, such as those, for instance, which are constituted by regulations touching the exercise of a trade, it will stand exposed to so many breaches of duty; and lastly, whatsoever are the functions belonging to it, it will stand exposed at any rate to *disturbance*.

In the forming however of the catalogue of these offences, exactness is of the less consequence, inasmuch as an act, if it should happen not to be comprised in this catalogue, and yet is in any respect of a pernicious nature, will be sure to be found in some other division of the system of offences: if a baker sells bad bread for the price of good, it is a kind of fraud upon the buyer; and perhaps an injury of the simple corporal kind done to the health of an individual, or a neighbourhood: if a clothier sells bad cloth for good at home, it is a fraud; if to foreigners abroad, it may, over and above the fraud put upon the foreign purchaser, have pernicious effects perhaps in the prosperity of the trade at home, and become thereby an offence against the national wealth. So again with regard to *disturbance*: if a man be disturbed in the exercise of his trade, the offence will probably be a wrongful *interception of the profit* he might be presumed to have been in a way to make by it: and were it even to appear in any case that a man exercised a trade,

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or what is less unlikely, a liberal profession, without having profit in his view, the offence will still be reducible to the head of *simple injurious restrainment*, or *simple injurious compulsion*.

§ 4. *Advantages of the present method.*

LVI.

General idea of the method here pursued.

A few words, for the purpose of giving a general view of the method of division here pursued, and of the advantages which it possesses, may have their use. The whole system of offences, we may observe, is branched out into five classes. In the three first, the subordinate divisions are taken from the same source; viz. from the consideration of the different points, in respect whereof the interest of an individual is exposed to suffer. By this uniformity, a considerable degree of light seems to be thrown upon the whole system; particularly upon the offences that come under the third class: objects which have never hitherto been brought into any sort of order. With regard to the fourth class, in settling the precedence between its several subordinate divisions, it seemed most natural and satisfactory to place those first, the connection whereof with the welfare of individuals seemed most obvious and immediate. The mischievous effects of those offences, which tend in an immediate way to deprive individuals of the protection provided for them against the attacks of one another, and of those which tend to bring

down upon them the attacks of foreign assailants, seem alike obvious and palpable. The mischievous quality of such as tend to weaken the force that is provided to combat those attacks, but particularly the latter, though evident enough, is one link farther off in the chain of causes and effects. The ill effects of such offences as are of disservice only by diminishing the particular fund from whence that force is to be extracted, such effects, I say, though indisputable, are still more distant and out of sight. The same thing may be observed with regard to such as are mischievous only by affecting the universal fund. Offences against the sovereignty in general would not be mischievous, if offences of the several descriptions preceding were not mischievous. Nor in a temporal view are offences against religion mischievous, except in as far as, by removing, or weakening, or misapplying one of the three great incentives to virtue, and checks to vice, they tend to open the door to the several mischiefs, which it is the nature of all those other offences to produce. As to the fifth class, this, as hath already been observed, exhibits, at first view, an irregularity, which however seems to be unavoidable. But this irregularity is presently corrected, when the analysis returns back, as it does after a step or two, into the path from which the tyranny of language had forced it a while to deviate.

It was necessary that it should have two pur-

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poses in view: the one, to exhibit, upon a scale more or less minute, a systematical enumeration of the several possible modifications of delinquency, denominated or undenominated; the other, to find places in the list for such names of offences as were in current use: for the first purpose, nature was to set the law; for the other, custom. Had the nature of the things themselves been the only guide, every such difference in the manner of perpetration, and such only, should have served as a ground for a different denomination, as was attended with a difference in point of effect. This however of itself would never have been sufficient; for as on one hand the new language, which it would have been necessary to invent, would have been uncouth, and in a manner unintelligible: so on the other hand the names, which were before in current use, and which, in spite of all systems, good or bad, must have remained in current use, would have continued unexplained. To have adhered exclusively to the current language, would have been as bad on the other side; for in that case the catalogue of offences, when compared to that of the mischiefs that are capable of being produced, would have been altogether broken and uncomplete.

To reconcile these two objects, in as far as they seemed to be reconcileable, the following course has therefore been pursued. The logical whole, constituted by the sum total of possible offences,

has been bisected in as many different directions as were necessary, and the process in each direction carried down to that stage at which the particular ideas thus divided found names in current use in readiness to receive them. At that period I have stopped; leaving any minuter distinctions to be enumerated in the body of the work, as so many species of the genus characterized by such or such a name. If in the course of any such process I came to a mode of conduct which, though it required to be taken notice of, and perhaps had actually been taken notice of, under all laws, in the character of an offence, had hitherto been expressed under different laws, by different circumlocutions, without ever having received any name capable of occupying the place of a substantive in a sentence. I have frequently ventured so far as to fabricate a new name for it, such an one as the idiom of the language, and the acquaintance I happened to have with it, would admit of. These names consisting in most instances, and that unavoidably, of two or three words brought together, in a language too which admits not, like the German and the Greek, of their being melted into one, can never be upon a par, in point of commodiousness, with those univocal appellatives which make part of the established stock.

In the choice of names in current use, care has been taken to avoid all such as have been grounded on local distinctions, ill founded, perhaps, in the

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nation in which they received their birth, and at any rate not applicable to the circumstances of other countries.

The analysis, as far as it goes, is as applicable to the legal concerns of one country as of another: and where, if it had descended into further details, it would have ceased to be so, there I have taken care always to stop: and thence it is that it has come to be so much more particular in the class of offences against individuals, than in any of the other classes. One use then of this arrangement, if it should be found to have been properly conducted, will be its serving to point out in what it is that the legal interests of all countries agree, and in what it is that they are liable to differ: how far a rule that is proper for one, will serve, and how far it will not serve, for another. That the legal interests of different ages and countries have nothing in common, and they have every thing, are suppositions equally distant from the truth*.

LVII.

Its advantages. —1. It is convenient for the ap-

A natural method, such as it hath been here attempted to exhibit, seems to possess four capital advantages; not to mention others of inferior

* The above hints are offered to the consideration of the few who may be disposed to bend their minds to disquisitions of this uninviting nature: to sift the matter to the bottom, and engage in the details of illustration, would require more room than could in this place be consistently allowed.

note. In the first place, it affords such assistance to the apprehension and to the memory, as those faculties would in vain look for in any technical arrangement *. That arrangement of the objects of any science may, it should seem, be termed a *natural* one, which takes such properties to characterize them by, as men in general are, by the common constitution of man's nature, independently of any accidental impressions they may have received from the influence of any local or other particular causes, accustomed to attend to: such, in a word, as *naturally*, that is readily, and at first sight, engage, and firmly fix, the attention of any one to whom they have once been pointed out. Now by what other means should an object engage, or fix a man's attention, unless by interesting him? and what circumstance belonging to any action can be more interesting, or rather what other circumstance belonging to it can be at all interesting to him, than that of the influence it promises to have on his own happiness, and the happiness of those who are about him? By what other mark then should he more easily find the place which any offence occupies in the system, or by what other clue should he more readily recall it?

CHAP. XVI. prehension and the memory.

LVIII.

In the next place, it not only gives at first glance a general intimation of the nature of each division

—2. It gives room for general propositions.

* See Fragment on Government, pref. p. xlv. edit. 1776.—pref. p. xlvii. edit. 1823.

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which has escaped him? in a natural arrangement, if at the same time an exhaustive one, he cannot fail to find it. Is he tempted ever to force innocence within the pale of guilt? the difficulty of finding a place for it advertises him of his error. Such are the uses of a map of universal delinquency, laid down upon the principle of utility: such the advantages, which the legislator as well as the subject may derive from it. Abide by it, and every thing that is arbitrary in legislation, vanishes. An evil-intentioned or prejudiced legislator durst not look it in the face. He would proscribe it, and with reason: it would be a satire on his laws.

LX.

—4. It is alike applicable to the laws of all nations.

In the fourth place, a natural arrangement, governed as it is by a principle which is recognized by all men, will serve alike for the jurisprudence of all nations. In a system of proposed law, framed in pursuance of such a method, the language will serve as a glossary by which all systems of positive law might be explained, while the matter serves as a standard by which they might be tried. Thus illustrated, the practice of every nation might be a lesson to every other: and mankind might carry on a mutual interchange of experiences and improvements as easily in this as in every other walk of science. If any one of these objects should in any degree be

attained, the labour of this analysis, severe as it has been, will not have been thrown away. CHAP. XVI.

§ 5. *Characters of the five classes.*

LXI.

Characters of the classes, how deducible from the above method.

It has been mentioned as an advantage possessed by this method, and not possessed by any other, that the objects comprized under it are cast into groupes, to which a variety of propositions may be applied in common. A collection of these propositions, as applied to the several classes, may be considered as exhibiting the distinctive characters of each class. So many of these propositions as can be applied to the offences belonging to any given class, so many properties are they found to have in common: so many of these common properties as may respectively be attributed to them, so many properties may be set down to serve as *characters* of the class. A collection of these characters it may here be proper to exhibit. The more of them we can bring together, the more clearly and fully will the nature of the several classes, and of the offences they are composed of, be understood.

LXII.

Characters of Class 1.

Characters of Class 1; composed of PRIVATE offences, or offences against assignable *individuals*.

1. When arrived at their last stage (the stage

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of *consummation* *) they produce, all of them, a primary mischief as well as a secondary †.

2. The indivduals whom they affect in the first instance ‡, are constantly *assignable*. This extends to all; to *attempts* and *preparations*, as well as to such as have arrived at the stage of consummation §.

3. Consequently they admit of *compensation* ||: in which they differ from the offences of all the other classes, as such.

4. They admit ¶ also of *retaliation* **; in which also they differ from the offences of all the other classes.

5. There is always some person who has a natural and peculiar interest to prosecute them. In this they differ from self-regarding offences: also from semi-public and public ones; except in as far as the two latter may chance to involve a private mischief.

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* Ch. vii. [Actions] xiv.

† See ch. xii. [Consequences] iii.

‡ [First Instance.] That is, by their primary mischief.

§ See supra, and B. I. tit. [Accessory offences.]

|| See ch. xiii. [Cases unmeet] ii. note.

¶ [Admit.] I mean, that retaliation is *capable* of being applied in the cases in question; not that it *ought* always to be employed. Nor is it capable of being applied in every *individual* instance of each offence, but only in some individual instance of each *species* of offence.

** See ch. xv. [Properties] viii.

6. The mischief they produce is obvious: more so than that of semi-public offences: and still more so than that of self-regarding ones, or even public.

7. They are every where, and must ever be, obnoxious to the censure of the world: more so than semi-public offences as such; and still more so than public ones.

8. They are more *constantly* obnoxious to the censure of the world than self-regarding offences: and would be so universally, were it not for the influence of the two false principles; the principle of asceticism, and the principle of antipathy*.

9. They are less apt than semi-public and public offences to require different descriptions† in different states and countries: in which respect they are much upon a par with self-regarding ones.

10. By certain circumstances of aggravation, they are liable to be transformed into semi-public offences: and by certain others, into public.

11. There can be no ground for punishing them, until they can be proved to have occa-

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* Ch. ii. [Principles adverse.]

† [Different descriptions.] It seems to be from their possessing these three last properties, that the custom has arisen of speaking of them, or at least of many of them, under the name of offences against the *law of nature*: a vague expression, and productive of a multitude of inconveniences. See ch. ii. [Principles adverse.]

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sioned, or to be about to occasion, some particular mischief to some particular individual. In this they differ from semi-public offences, and from public.

12. In slight cases, *compensation* given to the individual affected by them, may be a sufficient ground for remitting punishment: for if the primary mischief has not been sufficient to produce any alarm, the whole of the mischief may be cured by compensation. In this also they differ from semi-public offences, and from public ones.

LXIII.

Characters of Class 2.

Characters of Class 2; composed of SEMI-PUBLIC offences, or offences affecting a whole subordinate *class* of persons.

1. As such, they produce no primary mischief. The mischief they produce consists of one or other or both branches of the secondary mischief produced by offences against individuals, without the primary.

2. In as far as they are to be considered as belonging to this class, the persons whom they affect in the first instance are not individually assignable.

3. They are apt, however, to involve or terminate in some primary mischief of the first order, which when they do, they advance into the first class, and become private offences.

4. They admit not, as such, of compensation.

5. Nor of retaliation.

6. As such, there is never any one particular individual whose exclusive interest it is to prosecute them: a circle of persons may, however, always be marked out, within which may be found some who have a greater interest to prosecute than any who are out of that circle have.

7. The mischief they produce is in general pretty obvious; not so much so indeed as that of private offences, but more so upon the whole than that of self-regarding and public ones.

8. They are rather less obnoxious to the censure of the world than private offences; but they are more so than public ones: they would also be more so than self-regarding ones, were it not for the influence of the two false principles, the principle of sympathy and antipathy, and that of asceticism.

9. They are more apt than private and self-regarding offences to require different descriptions in different countries: but less so than public ones.

10. There may be ground for punishing them before they have been proved to have occasioned, or to be about to occasion, mischief to any particular individual; which is not the case with private offences.

11. In no cases can satisfaction given to any particular individual, affected by them be a sufficient ground for remitting punishment: for by

CHAP. XVI.

such satisfaction it is but a part of the mischief of them that is cured. In this they differ from private offences; but agree with public.

LXIV.

Characters of Class 3.

Characters of Class 3; consisting of SELF-REGARDING offences: offences against *one's self*.

1. In individual instances it will often be questionable, whether they are productive of any primary* mischief at all: secondary, they produce none.

2. They affect not any other individuals, assignable or not assignable, except in as far as they affect the offender himself; unless by possibility in particular cases; and in a very slight and distant manner the whole state.

3. They admit not, therefore, of *compensation*.

4. Nor of *retaliation*.

5. No person has naturally any peculiar interest to prosecute them; except in as far as in virtue of some *connection* he may have with the offender, either in point of *sympathy* or of *interest*†, a mischief of the *derivative* kind‡ may happen to devolve upon him§.

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* Because the person, who in general is most likely to be sensible to the mischief (if there is any) of any offence, viz. the person whom it most affects, shews by his conduct that he is not sensible of it.

† See ch. vi. [Sensibility] xxv. xxvi.

‡ See ch. xii. [Consequences] iv.

§ Among the offences, however, which belong to this

6. The mischief they produce is apt to be unobvious, and in general more questionable than that of any of the other classes*.

7. They are however apt, many of them, to be more obnoxious to the censure of the world than public offences; owing to the influence of the two false principles; the principle of asceticism, and the principle of antipathy. Some of them more even than semi-public, or even than private offences.

8. They are less apt than offences of any other class to require different descriptions in different states and countries†.

9. Among the inducements‡ to punish them, antipathy against the offender is apt to have a greater share than sympathy for the public.

10. The best plea for punishing them is founded on a faint probability there may be of their being

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class, there are some which in certain countries it is not uncommon for persons to be disposed to prosecute without any artificial inducement, and merely on account of an *antipathy*, which such acts are apt to excite. See ch. ii. [Principles adverse] xi.

* See note* in the preceding page.

† Accordingly, most of them are apt to be ranked among offences against the law of nature. Vide supra, Characters of the 1st class, lxii. note.

‡ [Inducements.] I mean the considerations, right or wrong, which induce or dispose the legislator to treat them on the footing of offences.

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productive of a mischief, which, if real, will place them in the class of public ones: chiefly in those divisions of it which are composed of offences against population, and offences against the national wealth.

LXV.

Characters of Class 4.

Characters of Class 4; consisting of PUBLIC offences, or offences against *the state* in general.

1. As such, they produce not any primary mischief; and the secondary mischief they produce, which consists frequently of danger without alarm, though great in *value*, is in *specie* very indeterminate.

2. The individuals whom they affect, in the first instance, are constantly unassignable; except in as far as by accident they happen to involve or terminate in such or such offences against individuals.

3. Consequently they admit not of compensation.

4. Nor of retaliation.

5. Nor is there any person who has naturally any particular interest to prosecute them; except in as far as they appear to affect the power, or in any other manner the private interest, of some person in authority.

6. The mischief they produce, as such, is comparatively unobvious; much more so than that of private offences, and more so likewise, than that of semi-public ones.

7. They are, as such, much less obnoxious to the censure of the world, than private offences; less even than semi-public, or even than self-regarding offences; unless in particular cases, through sympathy to certain persons in authority, whose private interests they may appear to affect.

8. They are more apt than any of the other classes to admit of different descriptions, in different states and countries.

9. They are constituted, in many cases, by some circumstances of aggravation superadded to a private offence: and therefore, in these cases, involve the mischief, and exhibit the other characters belonging to both classes. They are, however, even in such cases, properly enough ranked in the 4th class, inasmuch as the mischief they produce in virtue of the properties which aggregate them to that class, eclipses and swallows up that which they produce in virtue of those properties which aggregate them to the 1st.

10. There may be sufficient ground for punishing them, without their being proved to have occasioned, or to be about to occasion, any particular mischief to any particular individual. In this they differ from private offences, but agree with semi-public ones. Here, as in semi-public offences, the *extent* of the mischief makes up for the *uncertainty* of it.

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11. In no case can satisfaction, given to any particular individual affected by them, be a sufficient ground for remitting punishment. In this they differ from private offences; but agree with semi-public.

LXVI.

Characters of Class 5.

Characters of Class 5, or appendix: composed of MULTIFORM or ANOMALOUS offences; and containing offences by FALSEHOOD, and offences concerning trust.

1. Taken collectively, in the parcels marked out by their popular appellations, they are incapable of being aggregated to any systematical method of distribution, grounded upon the mischief of the offence.

2. They may, however, be thrown into subdivisions, which may be aggregated to such a method of distribution.

3. These sub-divisions will naturally and readily rank under the divisions of the several preceding classes of this system.

4. Each of the two great divisions of this class spreads itself in that manner over all the preceding classes.

5. In some acts of this class, the distinguishing circumstance which constitutes the essential character of the offence, will in some instances enter necessarily, in the character of a criminative circumstance, into the constitution of the offence; insomuch that, without the intervention of this

circumstance, no offence at all, of that denomination, can be committed*. In other instances, the offence may subsist without it; and where it interferes, it comes in as an accidental independent circumstance, capable of constituting a ground of aggravation†.

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* Instance, offences by falsehood, in the case of *defraudment*.

† Instance, offences by falsehood, in the case of simple corporal injuries, and other offences against person.

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§ 1. LIMITS BETWEEN PRIVATE ETHICS AND THE ART OF LEGISLATION.

I.

Use of this chapter.

So much for the division of offences in general. Now an offence is an act prohibited, or (what comes to the same thing) an act of which the contrary is commanded by the law: and what is it that the law can be employed in doing, besides prohibiting and commanding? It should seem then, according to this view of the matter, that were we to have settled what may be proper to be done with relation to offences, we should thereby have settled every thing that may be proper to be done in the way of law. Yet that branch which concerns the method of dealing with offences, and which is termed sometimes the *criminal*, sometimes the *penal*, branch, is universally understood to be but one out of two branches which compose the whole subject of the art of legislation; that which is termed the *civil* being the other*. Between

* And the *constitutional* branch, what is become of it? Such is the question which many a reader will be apt to put. An answer that might be given is—that the matter of it might without much violence be distributed under the two other heads. But, as far as recollection serves, that branch,

these two branches then, it is evident enough, there cannot but be a very intimate connection; so intimate is it indeed, that the limits between them are by no means easy to mark out. The case is the same in some degree between the whole business of legislation (civil and penal branches taken together) and that of private ethics. Of these several limits however it will be in a manner necessary to exhibit some idea: lest, on the one hand, we should seem to leave any part of the subject that *does* belong to us untouched, or, on the other hand, to deviate on any side into a track which does *not* belong to us.

In the course of this enquiry, that part of it I mean which concerns the limits between the civil and the penal branch of law, it will be necessary to settle a number of points, of which the connection with the main question might not at first sight be suspected. To ascertain what sort of a thing *a* law is; what the *parts* are that are to be found in it; what it must contain in order to be *complete;* what the connection is between that part of a body of laws which belongs to the subject of

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notwithstanding its importance, and its capacity of being lodged separately from the other matter, had at that time scarcely presented itself to my view in the character of a distinct one: the thread of my enquiries had not as yet reached it. But in the concluding note of this same chapter, in paragraphs xxii. to the end, the omission may be seen in some measure supplied.

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procedure; and the rest of the law at large:—All these, it will be seen, are so many problems, which must be solved before any satisfactory answer can be given to the main question above mentioned.

Nor is this their only use: for it is evident enough, that the notion of a complete law must first be fixed, before the legislator can in any case know what it is he has to do, or when his work is done.

II.

Ethics in general, what.

Ethics at large may be defined, the art of directing men's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view.

III.

Private ethics.

What then are the actions which it can be in a man's power to direct? They must be either his own actions, or those of other agents. Ethics, in as far as it is the art of directing a man's own actions, may be stiled the *art of self-government*, or *private ethics*.

IV.

The art of government: that is, of legislation and administration.

What other agents then are there, which, at the same time that they are under the influence of man's direction, are susceptible of happiness? They are of two sorts: 1. Other human beings who are stiled persons. 2. Other animals, which on account of their interests having been neglected by the insensibility of the ancient jurists, stand

degraded into the class of *things**. As to other human beings, the art of directing their actions

* Under the Gentoo and Mahometan religions, the interests of the rest of the animinal creation seem to have met with some attention. Why have they not, universally, with as much as those of human creatures, allowance made for the difference in point of sensibility? Because the laws that are have been the work of mutual fear; a sentiment which the less rational animals have not had the same means as man has of turning to account. Why *ought* they not? No reason can be given. If the being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have. The death they suffer in our hands commonly is, and always may be, a speedier, and by that means a less painful one, than that which would await them in the inevitable course of nature. If the being killed were all, there is very good reason why we should be suffered to kill such as molest us: we should be the worse for their living, and they are never the worse for being dead. But is there any reason why we should be suffered to torment them? Not any that I can see. Are there any why we should *not* be suffered to torment them? Yes, several. See B. I. tit. [Cruelty to animals.] The day has been, I grieve to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing, as, in England for example, the inferior races of animals are still. The day *may* come, when the rest of the animal creation may acquire those rights which never could have been witholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned

Interests of the inferior animals improperly neglected in legislation.

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to the above end is what we mean, or at least the only thing which, upon the principle of utility, we *ought* to mean, by the art of government: which, in as far as the measures it displays itself in are of a permanent nature, is generally distinguished by the name of *legislation:* as it is by that of *administration*, when they are of a temporary nature, determined by the occurrences of the day.

V.

Art of education.

Now human creatures, considered with respect to the maturity of their faculties, are either in an *adult*, or in a *non-adult* state. The art of government, in as far as it concerns the direction of the actions of persons in a non-adult state, may be termed the art of *education*. In as far as this business is entrusted with those who, in virtue of some private relationship, are in the main the best

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without redress to the caprice of a tormentor*. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate? What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog, is beyond comparison a more rational, as well as a more conversible animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason?* nor, Can they *talk?* but, Can they *suffer?*

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* See Lewis XIVth's Code Noir.

disposed to take upon them, and the best able to discharge, this office, it may be termed the art of *private education:* in as far as it is exercised by those whose province it is to superintend the conduct of the whole community, it may be termed the art of *public education.*

VI.

Ethics exhibits the rules of, 1. Prudence. 2. Probity. 3. Beneficence.

As to ethics in general, a man's happiness will depend, in the first place, upon such parts of his behaviour as none but himself are interested in; in the next place, upon such parts of it as may affect the happiness of those about him. In as far as his happiness depends upon the first-mentioned part of his behaviour, it is said to depend upon his *duty to himself.* Ethics then, in as far as it is the art of directing a man's actions in this respect, may be termed the art of discharging one's duty to one's self: and the quality which a man manifests by the discharge of this branch of duty (if duty it is to be called) is that of *prudence.* In as far as his happiness, and that of any other person or persons whose interests are considered, depends upon such parts of his behaviour as may affect the interests of those about him, it may be said to depend upon his *duty to others;* or, to use a phrase now somewhat antiquated, his *duty to his neighbour.* Ethics then, in as far as it is the art of directing a man's actions in this respect, may be termed the art of discharging one's duty to one's neighbour. Now the happiness of one's

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neighbour may be consulted in two ways: 1. In a negative way, by forbearing to diminish it. 2. In a positive way, by studying to encrease it. A man's duty to his neighbour is accordingly partly negative and partly positive: to discharge the negative branch of it, is *probity:* to discharge the positive branch, *beneficence.*

VII.

Probity and beneficence how they connect with prudence.

It may here be asked, How it is that upon the principle of private ethics, legislation and religion out of the question, a man's happiness depends upon such parts of his conduct as affect, immediately at least, the happiness of no one but himself: this is as much as to ask, What motives (independent of such as legislation and religion may chance to furnish) can one man have to consult the happiness of another? by what motives, or, which comes to the same thing, by what obligations, can he be bound to obey the dictates of *probity* and *beneficence?* In answer to this, it cannot but be admitted, that the only interests which a man at all times and upon all occasions is sure to find *adequate* motives for consulting, are his own. Notwithstanding this, there are no occasions in which a man has not some motives for consulting the happiness of other men. In the first place, he has, on all occasions, the purely social motive of sympathy or benevolence: in the next place, he has, on most occasions, the semi-social motives of love of amity and love of reputation. The motive

of sympathy will act upon him with more or less effect, according to the *bias* of his sensibility*: the two other motives, according to a variety of circumstances, principally according to the strength of his intellectual powers, the firmness and steadiness of his mind, the quantum of his moral sensibility, and the characters of the people he has to deal with.

VIII.

Every act which is a proper object of ethics is not of legislation.

Now private ethics has happiness for its end: and legislation can have no other. Private ethics concerns every member, that is, the happiness and the actions of every member of any community that can be proposed; and legislation can concern no more. Thus far, then, private ethics and the art of legislation go hand in hand. The end they have, or ought to have, in view, is of the same nature. The persons whose happiness they ought to have in view, as also the persons whose conduct they ought to be occupied in directing, are precisely the same. The very acts they ought to be conversant about, are even in a *great measure* the same. Where then lies the difference? In that the acts which they ought to be conversant about, though in a great measure, are not *perfectly and throughout* the same. There is no case in which a private man ought not to direct his own conduct to the production of his own happiness, and of

* Ch. vi. [Sensibility] iii.

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that of his fellow-creatures: but there are cases in which the legislator ought not (in a direct way at least, and by means of punishment applied immediately to particular *individual* acts) to attempt to direct the conduct of the several other members of the community. Every act which promises to be beneficial upon the whole to the community (himself included) each individual ought to perform of himself: but it is not every such act that the legislator ought to compel him to perform. Every act which promises to be pernicious upon the whole to the community (himself included) each individual ought to abstain from of himself: but it is not every such act that the legislator ought to compel him to abstain from.

IX.

The limits between the provinces of private ethics and legislation, marked out by the cases unmeet for punishment.

Where then is the line to be drawn?—We shall not have far to seek for it. The business is to give an idea of the cases in which ethics ought, and in which legislation ought not (in a direct manner at least) to interfere. If legislation interferes in a direct manner, it must be by punishment*. Now the cases in which punishment, meaning the punishment of the political sanction,

* I say nothing in this place of reward: because it is only in a few extraordinary cases that it can be applied, and because even where it is applied, it may be doubted perhaps whether the application of it can, properly speaking, be termed an act of legislation. See infra, § 3.

ought not to be inflicted, have been already stated*. If then there be any of these cases in which, although legislation ought not, private ethics does or ought to interfere, these cases will serve to point out the limits between the two arts or branches of science. These cases, it may be remembered, are of four sorts: 1. Where punishment would be groundless. 2. Where it would be inefficacious. 3. Where it would be unprofitable. 4. Where it would be needless. Let us look over all these cases, and see whether in any of them there is room for the interference of private ethics, at the same time that there is none for the direct interference of legislation.

X.

1. First then, as to the cases where punishment would be *groundless*. In these cases it is evident, that the restrictive interference of ethics would be groundless too. It is because, upon the whole, there is no evil in the act, that legislation ought not to endeavour to prevent it. No more, for the same reason, ought private ethics.

1. Neither ought to apply where punishment is *groundless*.

XI.

2. As to the cases in which punishment would be *inefficacious*. These, we may observe, may be divided into two sets or classes. The first do not depend at all upon the nature of the act: they turn only upon a defect in the timing of the

2. How far private ethics can apply in the cases where punishment would be, *inefficacious*.

* Ch. xiii. [Cases unmeet.]

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punishment. The punishment in question is no more than what, for any thing that appears, ought to have been applied to the act in question. It ought, however, to have been applied at a different time; viz. not till after it had been properly denounced. These are the cases of an *ex-post-facto* law; of a judicial sentence beyond the law; and of a law not sufficiently promulgated. The acts here in question then might, for any thing that appears, come properly under the department even of coercive legislation: of course do they under that of private ethics. As to the other set of cases, in which punishment would be ineffacious; neither do these depend upon the nature of the act, that is, of the *sort* of act: they turn only upon some extraneous *circumstances*, with which an act of *any* sort may chance to be accompanied. These, however, are of such a nature as not only to exclude the application of legal punishment, but in general to leave little room for the influence of private ethics. These are the cases where the will could not be deterred from any act, even by the extraordinary force of artificial punishment: as in the cases of extreme infancy, insanity, and perfect intoxication: of course, therefore, it could not by such slender and precarious force as could be applied by private ethics. The case is in this respect the same, under the circumstances of unintentionality with respect to the event of the action, unconscious-

ness with regard to the circumstances, and misupposal with regard to the existence of circumstances which have not existed; as also where the force, even of extraordinary punishment, is rendered inoperative by the superior force of a physical danger or threatened mischief. It is evident, that in these cases, if the thunders of the law prove impotent, the whispers of simple morality can have but little influence.

XII.

How far, where it would be unprofitable.

3. As to the cases where punishment would be *unprofitable*. These are the cases which constitute the great field for the exclusive interference of private ethics. When a punishment is unprofitable, or in other words too expensive, it is because the evil of the punishment exceeds that of the offence. Now the evil of the punishment, we may remember*, is distinguishable into four branches: 1. The evil of coercion, including constraint or restraint, according as the act commanded is of the positive kind or the negative. 2. The evil of apprehension. 3. The evil of sufferance. 4. The derivative evils resulting to persons in *connection* with those by whom the three above-mentioned original evils are sustained. Now with respect to those original evils, the persons who lie exposed to them may be two very different sets of persons. In the first place, persons who may have actually

* See ch. xiii. [Cases unmeet.] § iv.

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committed, or been prompted to commit, the acts really meant to be prohibited. In the next place, persons who may have performed, or been prompted to perform, such other acts as they fear may be in danger of being involved in the punishment designed only for the former. But of these two sets of acts, it is the former only that are pernicious: it is, therefore, the former only that it can be the business of private ethics to endeavour to prevent. The latter being by the supposition not mischievous, to prevent them is what it can no more be the business of ethics to endeavour at, than of legislation. It remains to shew how it may happen, that there should be acts really pernicious, which, although they may very properly come under the censure of private ethics, may yet be no fit objects for the legislator to controul.

XIII.

Which it may be, 1. Although confined to the guilty.

Punishment then, as applied to delinquency, may be unprofitable in both or either of two ways: 1. By the expence it would amount to, even supposing the application of it to be confined altogether to delinquency: 2. By the danger there may be of its involving the innocent in the fate designed only for the guilty. First then, with regard to the cases in which the expence of the punishment, as applied to the guilty, would outweigh the profit to be made by it. These cases, it is evident, depend upon a certain pro-

portion between the evil of the punishment and the evil of the offence. Now were the offence of such a nature, that a punishment which, in point of *magnitude*, should but just exceed the profit of it, would be sufficient to prevent it, it might be rather difficult perhaps to find an instance in which such punishment would clearly appear to be unprofitable. But the fact is, there are many cases in which a punishment, in order to have any chance of being efficacious, must, in point of magnitude, be raised a great deal above that level. Thus it is, wherever the danger of detection is, or, what comes to the same thing, is likely to appear to be, so small, as to make the punishment appear in a high degree uncertain. In this case it is necessary, as has been shewn*, if punishment be at all applied, to raise it in point of magnitude as much as it falls short in point of certainty. It is evident, however, that all this can be but guess-work: and that the effect of such a proportion will be rendered precarious, by a variety of circumstances: by the want of sufficient promulgation on the part of the law†: by the particular circumstances of the temptation‡: and by the circumstances influencing the

* Ch. xiv. [Proportion] xviii. Rule 7.

† Ch. xiii [Cases unmeet] § iii. Append. tit. [Promulgation.]

‡ Ch. xi. [Disposition] xxxv. &c.

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sensibility of the several individuals who are exposed to it*. Let the *seducing* motives be strong, the offence then will at any rate be frequently committed. Now and then indeed, owing to a coincidence of circumstances more or less extraordinary, it will be detected, and by that means punished. But for the purpose of example, which is the principal one, an act of punishment, considered in itself, is of no use: what use it can be of, depends altogether upon the expectation it raises of similar punishment, in future cases of similar delinquency. But this future punishment, it is evident, must always depend upon detection. If then the want of detection is such as must in general (especially to eyes fascinated by the force of the seducing motives) appear too improbable to be reckoned upon, the punishment, though it should be inflicted, may come to be of no use. Here then will be two opposite evils running on at the same time, yet neither of them reducing the quantum of the other: the evil of the disease and the evil of the painful and inefficacious remedy. It seems to be partly owing to some such considerations, that fornication, for example, or the illicit commerce between the sexes, has commonly either gone altogether unpunished, or been punished in a degree inferior to that in

* Ch. vi, [Sensibility.]

which, on other accounts, legislators might have been disposed to punish it.

XIV.

2. By enveloping the innocent.

Second, with regard to the cases in which political punishment, as applied to delinquency, may be unprofitable, in virtue of the danger there may be of its involving the innocent in the fate designed only for the guilty. Whence should this danger then arise? From the difficulty there may be of fixing the idea of the guilty action: that is, of subjecting it to such a definition as shall be clear and precise enough to guard effectually against misapplication. This difficulty may arise from either of two sources: the one permanent, to wit, the nature of the *actions* themselves: the other occasional, I mean the qualities of the *men* who may have to deal with those actions in the way of government. In as far as it arises from the latter of these sources, it may depend partly upon the use which the *legislator* may be *able* to make of language; partly upon the use which, according to the apprehension of the legislator, the *judge* may be *disposed* to make of it. As far as legislation is concerned, it will depend upon the degree of perfection to which the arts of language may have been carried, in the first place, in the nation in general; in the next place, by the *legislator* in particular. It is to a sense of this difficulty as it should seem, that we may attribute the caution with which most legislators have ab-

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stained from subjecting to censure, on the part of the law, such actions as come under the notion of rudeness, for example, or treachery, or ingratitude. The attempt to bring acts of so vague and questionable a nature under the controul of law, will argue either a very immature age, in which the difficulties, which give birth to that danger are not descried; or a very enlightened age, in which they are overcome*.

XV.

Legislation how far necessary for the enforcement of the dictates of *prudence*.

For the sake of obtaining the clearer idea of the limits between the art of legislation and private ethics, it may now be time to call to mind the distinctions above established with regard to ethics in general. The degree in which private ethics stands in need of the assistance of legislation, is different in the three branches of duty above distinguished. Of the rules of moral duty, those which seem to stand least in need of the assistance of legislation, are the rules of *prudence*. It can

* In certain countries, in which the voice of the people has a more especial controul over the hand of the legislator, nothing can exceed the dread which they are under of seeing any effectual provision made against the offences which come under the head of *defamation*, particularly that branch of it which may be stiled the *political*. This dread seems to depend partly upon the apprehension they may think it prudent to entertain of a defect in point of ability or integrity on the part of the legislator, partly upon a similar apprehension of a defect in point of integrity on the part of the judge.

only be through some defect on the part of the understanding, if a man be ever deficient in point of duty to himself. If he does wrong, there is nothing else that it can be owing to but either some *inadvertence* * or some *missupposal* *, with regard to the circumstances on which his happiness depends. It is a standing topic of complaint, that a man knows too little of himself. Be it so: but is it so certain that the legislator must know more † ‡? It is plain, that of individuals the legislator can know nothing: concerning those points of conduct which depend upon the particular circumstances of each individual, it is plain, therefore, that he can determine nothing to advantage. It is only with respect to those broad lines of conduct in which all persons, or very large and permanent descriptions of persons, may be in a way to engage, that he can have any pretence for interfering; and even here the propriety of his interference will, in most instances, lie very open

* See ch. ix. [Consciousness.]

† On occasions like this, the legislator should never lose sight of the well-known story of the oculist and the sot. A countryman who had hurt his eyes by drinking, went to a celebrated oculist for advice. He found him at table, with a glass of wine before him. "You must leave off drinking," said the oculist. "How so," says the countryman? "*You* don't, and yet methinks your own eyes are none of the best." —"That's very true, friend," replied the oculist: "but you "are to know, I love my bottle better than my eyes."

‡ Ch. xvi. [Division] lii.

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to dispute. At any rate, he must never expect to produce a perfect compliance by the mere force of the sanction of which he is himself the author. All he can hope to do, is to encrease the efficacy of private ethics, by giving strength and direction to the influence of the moral sanction. With what chance of success, for example, would a legislator go about to extirpate drunkenness and fornication, by dint of legal punishment? Not all the tortures which ingenuity could invent would compass it: and, before he had made any progress worth regarding, such a mass of evil would be produced by the punishment, as would exceed, a thousand-fold, the utmost possible mischief of the offence. The great difficulty would be in the procuring evidence; an object which could not be attempted, with any probability of success, without spreading dismay through every family*, tearing the bonds of sympathy asunder†, and rooting out the influence of all the social motives. All that he can do then, against offences of this nature, with any prospect of advantage, in the way of direct legislation, is to subject them, in cases of notoriety, to a slight censure, so as thereby to cover them with a slight shade of artificial disrepute.

* Evil of apprehension: third branch of the evil of a punishment. Ch. xiii. § iv.

† Derivative evils: fourth branch of the evil of a punishment. Ib.

XVI.

—Apt to go too far in this respect.

It may be observed, that with regard to this branch of duty, legislators have, in general, been disposed to carry their interference full as far as is expedient. The great difficulty here is, to persuade them to confine themselves within bounds. A thousand little passions and prejudices have led them to narrow the liberty of the subject in this line, in cases in which the punishment is either attended with no profit at all, or with none that will make up for the expence.

XVII.

—Particularly in matters of religion.

The mischief of this sort of interference is more particularly conspicuous in the article of religion. The reasoning, in this case, is of the following stamp. There are certain errors, in matters of belief, to which all mankind are prone: and for these errors in judgment, it is the determination of a Being of infinite benevolence, to punish them with an infinity of torments. But from these errors the legislator himself is necessarily free: for the men, who happen to be at hand for him to consult with, being men perfectly enlightened, unfettered, and unbiassed, have such advantages over all the rest of the world, that when they sit down to enquire out the truth relative to points so plain and so familiar as those in question, they cannot fail to find it. This being the case, when the sovereign sees his people ready to plunge headlong into an abyss of fire, shall he not stretch

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out a hand to save them? Such, for example, seems to have been the train of reasoning, and such the motives, which led Lewis the XIVth into those coercive measures which he took for the conversion of heretics, and the confirmation of true believers. The ground-work, pure sympathy and loving-kindness: the superstructure, all the miseries which the most determined malevolence could have devised*. But of this more fully in another place †.

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* I do not mean but that other motives of a less social nature might have introduced themselves, and probably, in point of fact, did introduce themselves, in the progress of the enterprize. But in point of possibility, the motive above mentioned, when accompanied with such a thread of reasoning, is sufficient, without any other, to account for all the effects above alluded to. If any others interfere, their interference, how natural soever, may be looked upon as an accidental and inessential circumstance, not necessary to the production of the effect. Sympathy, a concern for the danger they appear to be exposed to, gives birth to the wish of freeing them from it: that wish shews itself in the shape of a command: this command produces disobedience: disobedience on the one part, produces disappointment on the other: the pain of disappointment produces ill-will towards those who are the authors of it. The affections will often make this progress in less time than it would take to describe it. The sentiment of wounded pride, and other modifications of the love of reputation and the love of power, add fewel to the flame. A kind of revenge exasperates the severities of coercive policy.

† See B. I. tit. [Self-regarding offences.]

XVIII.

The rules of *probity* are those, which in point of expediency stand most in need of assistance on the part of the legislator, and in which, in point of fact, his interference has been most extensive. There are few cases in which it *would* be expedient to punish a man for hurting *himself:* but there are few cases, if any, in which it would *not* be expedient to punish a man for injuring his neighbour. With regard to that branch of probity which is opposed to offences against property, private ethics depends in a manner for its very existence upon legislation. Legislation must first determine what things are to be regarded as each man's property, before the general rules of ethics, on this head, can have any particular application. The case is the same with regard to offences against the state. Without legislation there would be no such thing as a *state:* no particular persons invested with powers to be exercised for the benefit of the rest. It is plain, therefore, that in this branch the interference of the legislator cannot any where be dispensed with. We must first know what are the dictates of legislation, before we can know what are the dictates of private ethics*.

* But suppose the dictates of legislation *are* not what they *ought to be:* what are then, or (what in this case comes to the same thing) what ought to be, the dictates of private ethics? Do they coincide with the dictates of legislation,

CHAP. XVII. —of the dictates of beneficence.

XIX.

As to the rules of beneficence, these, as far as concerns matters of detail, must necessarily be abandoned in great measure to the jurisdiction of private ethics. In many cases the beneficial quality of the act depends essentially upon the disposition of the agent; that is, upon the motives by which he appears to have been prompted to perform it: upon their belonging to the head of sympathy, love of amity, or love of reputation; and not to any head of self-regarding motives, brought into play by the force of political constraint: in a word, upon their being such as denominate his conduct *free* and *voluntary*, according to one of the many senses given to those ambiguous expressions*. The limits of the law on

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or do they oppose them, or do they remain neuter? a very interesting question this, but one that belongs not to the present subject. It belongs exclusively to that of private ethics. Principles which may lead to the solution of it may be seen in A Fragment on Government, p. 150. Lond. edit. 1776—and p. 114. edit. 1823.

* If we may believe M. Voltaire,* there was a time when the French ladies who thought themselves neglected by their husbands, used to petition *pour être embesoignées*: the technical word, which, he says, was appropriated to this purpose. These sort of law-proceedings seem not very well calculated to answer the design: accordingly we hear nothing of them now-a-days. The French ladies of the present age seem to be under no such difficulties.

* Quest. sur l'Encyclop. tom. 7. art. Impuissance.

this head seem, however, to be capable of being extended a good deal farther than they seem ever to have been extended hitherto. In particular, in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him? This accordingly is the idea pursued in the body of the work*.

XX.

Difference between private ethics and the art of legislation recapitulated.

To conclude this section, let us recapitulate and bring to a point the difference between private ethics, considered as an art or science, on the one hand, and that branch of jurisprudence which contains the art or science of legislation, on the other. Private ethics teaches how each man may dispose himself to pursue the course most conducive to his own happiness, by means of such motives as offer of themselves: the art of legislation (which may be considered as one branch of the science of jurisprudence) teaches

* A woman's head-dress catches fire: water is at hand: a man, instead of assisting to quench the fire, looks on, and laughs at it. A drunken man, falling with his face downwards into a puddle, is in danger of suffocation: lifting his head a little on one side would save him: another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle: another knowing this, lets him go in without warning. Who is there that in any of these cases would think punishment misapplied?

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how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conducive to the happiness of the whole community, by means of motives to be applied by the legislator.

We come now to exhibit the limits between penal and civil jurisprudence. For this purpose it may be of use to give a distinct though summary view of the principal branches into which jurisprudence, considered in its utmost extent, is wont to be divided.

§ 2. *Jurisprudence, its branches.*

XXI.

Jurisprudence, expository—censorial.

Jurisprudence is a fictitious entity: nor can any meaning be found for the word, but by placing it in company with some word that shall be significative of a real entity. To know what is meant by jurisprudence, we must know, for example, what is meant by a book of jurisprudence. A book of jurisprudence can have but one or the other of two objects: 1. To ascertain what the *law** is: 2. ascertain what it ought to be. In the former case it may be stiled a book of *expository* jurisprudence; in the latter, a book of

* The word *law* itself which stands so much in need of a definition, must wait for it awhile, (see § 3): for there is no doing every thing at once. In the mean time every reader will understand it according to the notion he has been accustomed to annex to it.

censorial jurisprudence: or, in other words, a book on the *art of legislation*.

XXII.

Expository jurisprudence, authoritative—unauthoritative.

A book of expository jurisprudence is either *authoritative* or *unauthoritative*. It is stiled authoritative, when it is composed by him who, by representing the state of the law to be so and so, causeth it so to be; that is, of the legislator himself: unauthoritative, when it is the work of any other person at large.

XXIII.

Sources of the distinctions yet remaining.

Now *law*, or *the law*, taken indefinitely, is an abstract and collective term; which, when it means any thing, can mean neither more nor less than the sum total of a number of individual laws taken together*. It follows, that of whatever other modifications the subject of a book of juris-

* In most of the European languages there are two different words for distinguishing the abstract and the concrete senses of the word *law*: which words are so wide asunder as not even to have any etymological affinity. In Latin, for example, there is *lex* for the concrete sense, *jus* for the abstract: in Italian, *legge* and *diritto*: in French, *loi* and *droit*: in Spanish, *ley* and *derecho*: in German, *gesetz* and *recht*. The English is at present destitute of this advantage.

In the Anglo-Saxon, besides *lage*, and several other words, for the concrete sense, there was the word *right*, answering to the German *recht*, for the abstract; as may be seen in the compound *folc-right*, and in other instances. But the word *right* having long ago lost this sense, the modern English no longer possesses this advantage.

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prudence is susceptible, they must all of them be taken from some circumstance or other of which such individual laws, or the assemblages into which they may be sorted, are susceptible. The circumstances that have given rise to the principal branches of jurisprudence we are wont to hear of, seem to be as follow: 1. The *extent* of the laws in question in point of dominion. 2. The *political quality* of the persons whose conduct they undertake to regulate. 3. The *time* of their being in force. 4. The manner in which they are *expressed*. 5. The concern which they have with the article of *punishment*.

XXIV.

Jurisprudence, local —universal.

In the first place, in point of extent, what is delivered concerning the laws in question, may have reference either to the laws of such or such a nation or nations in particular, or to the laws of all nations whatsoever: in the first case, the book may be said to relate to *local*, in the other, to *universal, jurisprudence*.

Now of the infinite variety of nations there are upon the earth, there are no two which agree exactly in their laws: certainly not in the whole; perhaps not even in any single article; and let them agree to-day, they would disagree to-morrow. This is evident enough with regard to the *substance* of the laws: and it would be still more extraordinary if they agreed in point of *form;* that is, if they were conceived in precisely the same strings

of words. What is more, as the languages of nations are commonly different, as well as their laws, it is seldom that, strictly speaking, they have so much as a single *word* in common. However, among the words that are appropriated to the subject of law, there are some that in all languages are pretty exactly correspondent to one another: which comes to the same thing nearly as if they were the same. Of this stamp, for example, are those which correspond to the words *power, right, obligation, liberty,* and many others.

It follows, that if there are any books which can, properly speaking, be stiled books of universal jurisprudence, they must be looked for within very narrow limits. Among such as are expository, there can be none that are authoritative: nor even, as far the *substance* of the laws is concerned, any that are unauthoritative. To be susceptible of an universal application, all that a book of the expository kind can have to treat of, is the import of words: to be, strictly speaking, universal, it must confine itself to terminology. Accordingly the definitions which there has been occasion here and there to intersperse in the course of the present work, and particularly the definition hereafter given of the word *law,* may be considered as matter belonging to the head of universal jurisprudence. Thus far in strictness of speech: though in point of usage, where a man, in laying down what he apprehends to be

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the law, extends his views to a few of the nations with which his own is most connected, it is common enough to consider what he writes as relating to universal jurisprudence.

It is in the censorial line that there is the greatest room for disquisitions that apply to the circumstances of all nations alike: and in this line what regards the substance of the laws in question is as susceptible of an universal application, as what regards the words. That the laws of all nations, or even of any two nations, should coincide in all points, would be as ineligible as it is impossible: some leading points, however, there seem to be, in respect of which the laws of all civilized nations might, without inconvenience, be the same. To mark out same of these points will, as far as it goes, be the business of the body of this work.

XXV.

—internal and international.

In the second place, with regard to the *political quality* of the persons whose conduct is the object of the law. These may, on any given occasion, be considered either as members of the same state, or as members of different states: in the first case, the law may be referred to the head of *internal*, in the second case, to that of *international** jurisprudence.

* The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant

Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of those states: the case is the same where the sovereign of the one has any immediate transactions with a private member of the other: the sovereign reducing himself, *pro re natâ*, to the condition of a private person, as often as he submits his cause to either tribunal; whether by claiming a benefit, or defending himself against a burthen. There remain then the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed *international**.

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way, the branch of law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D'Auguesseau has already made, I find, a similar remark: he says, that what is commonly called *droit* des *gens*, ought rather to be termed *droit* entre *les gens*†.

* In the times of James I. of England, and Philip III. of Spain, certain merchants at London happened to have a claim upon Philip, which his ambassador Gondemar did not think fit to satisfy. They applied for counsel to Selden, who advised them to sue the Spanish monarch in the court of King's Bench, and prosecute him to an outlawry. They did

† Oeuvres, Tom. II. p. 337, Edit. 1773, 12mo.

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With what degree of propriety rules for the conduct of persons of this description can come under the appellation of *laws*, is a question that must rest till the nature of the thing called *a law* shall have been more particularly unfolded.

It is evident enough, that international jurisprudence may, as well as internal, be censorial as well as expository, unauthoritative as well as authoritative.

XXVI.

Internal jurisprudence, national and provincial, local or particular.

Internal jurisprudence, again, may either concern all the members of a state indiscriminately, or such of them only as are connected in the way of residence, or otherwise, with a particular district. Jurisprudence is accordingly sometimes distinguished into *national* and *provincial*. But as the epithet *provincial* is hardly applicable to dis-

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so: and the sheriffs of London were accordingly commanded, in the usual form, to take the body of the defendant Philip, wherever it was to be found within their bailywick. As to the sheriffs, Philip, we may believe, was in no great fear of them: but, what answered the same purpose, he happened on his part to have demands upon some other merchants, whom, so long as the outlawry remained in force, there was no proceeding against. Gondemar paid the money*. This was internal jurisprudence: if the dispute had been betwixt Philip and James himself, it would have been international.

As to the word *international*, from this work, or the first of the works edited in French by Mr. Dumont, it has taken root in the language. Witness Reviews and Newspapers.

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* Selden's Table-Talk, tit. Law.

tricts so small as many of those which have laws of their own are wont to be, such as towns, parishes, and manors; the term *local* (where universal jurisprudence is plainly out of the question) or the term *particular*, though this latter is not very characteristic, might either of them be more commodious*.

XXVII.

Jurisprudence, ancient—living.

Third, with respect to *time*. In a work of the expository kind, the laws that are in question may either be such as are still in force at the time when the book is writing, or such as have ceased to be in force. In the latter case the subject of it might be termed *ancient*; in the former, *present* or *living* jurisprudence: that is, if the substantive *jurisprudence*, and no other, must at any rate be employed, and that with an epithet in both cases. But the truth is, that a book of the former kind is rather a book of history than a book of jurisprudence; and, if the word *jurisprudence* be expressive of the subject, it is only with some such words as *history* or *antiquities* prefixed. And as the laws which are any where in question are supposed, if nothing appears to the contrary, to

* The term *municipal* seemed to answer the purpose very well, till it was taken by an English author of the first eminence, to signify internal law in general, in contradistinction to international law, and the imaginary law of nature. It might still be used in this sense, without scruple, in any other language.

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be those which are in force, no such epithet as that of *present* or *living* commonly appears.

Where a book is so circumstanced, that the laws which form the subject of it, though in force at the time of its being written, are in force no longer, that book is neither a book of living jurisprudence, nor a book on the history of jurisprudence: it is no longer the former, and it never was the latter. It is evident that, owing to the changes which from time to time must take place, in a greater or less degree, in every body of laws, every book of jurisprudence, which is of an expository nature, must, in the course of a few years, come to partake more or less of this condition.

The most common and most useful object of a history of jurisprudence, is to exhibit the circumstances that have attended the establishment of laws actually in force. But the exposition of the dead laws which have been superseded, is inseparably interwoven with that of the living ones which have superseded them. The great use of both these branches of *science*, is to furnish examples for the *art* of legislation*.

* Of what stamp are the works of Grotius, Puffendorf, and Burlamaqui? Are they political or ethical, historical or juridical, expository or censorial?—Sometimes one thing, sometimes another: they seem hardly to have settled the matter with themselves. A defect this to which all books must almost unavoidably be liable, which take for their subject the

XXVIII.

Jurisprudence, statutary—customary.

Fourthly, in point of *expression*, the laws in question may subsist either in the form of *statute* or in that of *customary* law.

As to the difference between these two branches (which respects only the article of form or expression) it cannot properly be made appear till some progress has been made in the definition of a law.

XXIX.

Jurisprudence, civil—penal—criminal.

Last, The most intricate distinction of all, and that which comes most frequently on the carpet, is that which is made between the *civil* branch of jurisprudence and the *penal*, which latter is wont, in certain circumstances, to receive the name of *criminal*.

Question, concerning the distinction between the civil branch and the penal, stated.

What is a penal code of laws? What a civil code? Of what nature are their contents? Is it that there are two sorts of laws, the one penal the other civil, so that the laws in a penal code are all

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pretended *law of nature*; an obscure phantom, which, in the imaginations of those who go in chace of it, points sometimes to *manners*, sometimes to *laws*; sometimes to what law *is*, sometimes to what it *ought* to be*. Montesquieu sets out upon the censorial plan: but long before the conclusion, as if he had forgot his first design, he throws off the censor, and puts on the antiquarian. The Marquis Beccaria's book, the first of any account that is uniformly censorial, concludes as it sets out with penal jurisprudence.

* See Chap. II. [Principles adverse] xiv.

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penal laws, while the laws in a civil code are all civil laws? Or is it, that in every law there is some matter which is of a penal nature, and which therefore belongs to the penal code and at the same time other matter which is of a civil nature, and which therefore belongs to the civil code? Or is it, that some laws belong to one code or the other exclusively, while others are divided between the two? To answer these questions in any manner that shall be tolerably satisfactory, it will be necessary to ascertain what *a law* is; meaning one entire but single law: and what are the parts into which a law, as such, is capable of being distinguished: or, in other words, to ascertain what the properties are that are to be found in every object which can with propriety receive the appellation of *a* law. This then will be the business of the third and fourth sections: what concerns the import of the word *criminal*, as applied to law, will be discussed separately in the fifth*.

Occasion and purpose of this concluding note.

* Here ends the original work, in the state into which it was brought in November, 1780. What follows is now added in January, 1789.

The third, fourth, and fifth sections intended, as expressed in the text, to have been added to this chapter, will not here, nor now be given; because to give them in a manner tolerably complete and satisfactory, might require a considerable volume. This volume will form a work of itself, closing the series of works mentioned in the preface.

What follows here may serve to give a slight intimation of

the nature of the task, which such a work will have to atchieve: it will at the same time furnish, not any thing like a satisfactory answer to the questions mentioned in the text, but a slight and general indication of the course to be taken for giving them such an answer.

By a *law* here is not meant a *statute*.

What is a law? What the parts of a law? The subject of these questions, it is to be observed, is the *logical*, the *ideal*, the *intellectual* whole, not the *physical* one: the *law* and not the *statute*. An inquiry, directed to the latter sort of object, could neither admit of difficulty nor afford instruction. In this sense whatever is given for law by the person or persons recognized as possessing the power of making laws, is *law*. The Metamorphoses of Ovid, if thus given, would be law. So much as was embraced by one and the same act of authentication, so much as received the touch of the sceptre at one stroke, is *one* law: a whole law, and nothing more. A statute of George II. made to substitute an *or* instead of an *and* in a former statute is a complete law; a statute containing an entire body of laws, perfect in all its parts, would not be more so. By the word *law* then, as often as it occurs in the succeeding pages, is meant that ideal object, of which the part, the whole, or the multiple, or an assemblage of parts, wholes, and multiples mixed together, is exhibited by a statute; not the statute which exhibits them.

Every law is either a command or a revocation of one.

Every law, when complete, is either of a *coercive* or *uncoercive* nature.

A coercive law is a *command*.

An uncoercive, or rather a *dis*coercive, law is the *revocation*, in whole, or in part, of a coercive law.

A declaratory law is not, properly speaking, a law.

What has been termed a *declaratory* law, so far as it stands distinguished from either a coercive or a discoercive law, is not properly speaking a law. It is not the expression of an act of the will exercised at the time: it is a mere notification of the existence of a law, either of the coercive or the discoercive kind, as already subsisting: of the existence of some document expressive of some act of the will, exercised, not at the

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time, but at some former period. If it does any thing more than give information of this fact, viz. of the prior existence of a law of either the coercive or the discoercive kind, it ceases *pro tanto* to be what is meant by a declaratory law, and assuming either the coercive or the discoercive quality.

V. Every coercive law creates an offence.

Every coercive law creates an *offence*, that is, converts an act of some sort or other into an offence. It is only by so doing that it can *impose obligation*, that it can *produce coercion*.

VI. A law creating an offence, and one appointing punishment are distinct laws.

A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws: not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal;* and, *Let the judge cause whoever is convicted of stealing to be hanged.*

They might be stiled; the former, a *simple imperative* law; the other, a *punitory*; but the punitory, if it commands the punishment to be inflicted, and does not merely permit it, is as truly *imperative* as the other: only it is punitory besides, which the other is not.

VII. A discoercive law can have no punitory one appertaining to it but through the intervention of a coercive one.

A law of the discoercive kind, considered in itself, can have no punitory law belonging to it: to receive the assistance and support of a punitory law, it must first receive that of a simply imperative or coercive law, and it is to this latter that the punitory law will attach itself, and not to the discoercive one. Example; discoercive law. *The sheriff has power to hang all such as the judge, proceeding in due course of law, shall order him to hang.* Example of a coercive law, made in support of the above discoercive one. *Let no man hinder the sheriff from hanging such as the judge, proceeding in due course of law, shall order him to hang.* Example of a punitory law, made in support of the above coercive one. *Let the judge cause to be imprisoned whosoever attempts to hinder the sheriff from hanging*

one, whom the judge, proceeding in due course of law, has ordered him to hang.

VIII. But a punitory law involves the simply imperative one it belongs to.

But though a simply imperative law, and the punitory law attached to it, are so far distinct laws, that the former contains nothing of the latter, and the latter, in its direct tenor, contains nothing of the former; yet by *implication*, and that a necessary one, the punitory does involve and include the import of the simple imperative law to which it is appended. To say to the judge, *Cause to be hanged whoever in due form of law is convicted of stealing*, is, though not a direct, yet as intelligible a way of intimating to men in general that they must not steal, as to say to them directly, *Do not steal:* and one sees, how much more likely to be efficacious.

IX. The simply imperative one might therefore be spared, but for its expository matter.

It should seem then, that, wherever a simply imperative law is to have a punitory one appended to it, the former might be spared altogether: in which case, saving the exception, (which naturally should seem not likely to be a frequent one) of a law capable of answering its purpose without such an appendage, there should be no occasion in the whole body of the law for any other than punitory, or in other words than *penal*, laws. And this, perhaps, would be the case, were it not for the necessity of a large quantity of matter of the *expository* kind of which we come now to speak.

X. Nature of such expository matter.

It will happen in the instance of many, probably of most, possibly of all commands endued with the force of a public law, that, in the expression given to such a command, it shall be necessary to have recourse to terms too complex in their signification, to exhibit the requisite ideas, without the assistance of a greater or less quantity of matter of an expository nature. Such terms, like the symbols used in algebraical notation, are rather substitutes and indexes to the terms capable of themselves of exhibiting the ideas in question, than the real and immediate representatives of those ideas.

Take for instance the law, *Thou shalt not steal:* Such a command, were it to rest there, could never sufficiently answer the purpose of a law. A word of so vague and unex-

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plicit a meaning can no otherwise perform this office, than by giving a general intimation of a variety of propositions, each requiring, to convey it to the apprehension, a more particular and ample assemblage of terms. Stealing, for example, (according to a definition not accurate enough for use, but sufficiently so for the present purpose) is *the taking of a thing which is another's, by one who has no* TITLE *so to do,* and *is conscious of his having none.* Even after this exposition, supposing it a correct one, can the law be regarded as completely expressed? Certainly not. For what is meant by *a man's having a* TITLE *to take a thing?* To be complete, the law must have exhibited, amongst a multitude of other things, two catalogues; the one of events to which it has given the quality of *conferring title* in such a case; the other of the events to which it has given the quality of *taking it away.* What follows? That for a man to have *stolen,* for a man to *have had no title to what he took,* either no one of the articles contained in the first of those lists must have happened in his favour, or if there has, some one of the number of those contained in the second, must have happened to his prejudice.

XI. The vastness of its comparative bulk is not peculiar to legislative commands.

Such then is the nature of a general law, that while the imperative part of it, the *punctum saliens* as it may be termed, of this artificial body, shall not take up above two or three words, its expository appendage, without which that imperative part could not rightly perform its office, may occupy a considerable volume.

But this may equally be the case with a private order given in a family. Take for instance one from a bookseller to his foreman. *Remove, from this shop to my new one, my whole stock, according to this printed catalogue.—Remove, from this shop to my new one, my whole stock,* is the imperative matter of this order; the catalogue referred to contains the expository appendage.

XII. The same mass of

The same mass of expository matter may serve in common for, may appertain in common to, many commands, many

masses of imperative matter. Thus, amongst other things the catalogue of *collative* and *ablative* events, with respect to *titles* above spoken of, (see No. IX. of this note) will belong in common to all or most of the laws constitutive of the various offences against property. Thus, in mathematical diagrams, one and the same base shall serve for a whole cluster of triangles.

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expository matter may serve in common for many laws.

XIII. The imperative character essential to law, is apt to be concealed in and by expository matter.

Such expository matter, being of a complexion so different from the imperative, it would be no wonder if the connection of the former with the latter should escape the observation: which, indeed, is perhaps pretty generally the case. And so long as any mass of legislative matter presents itself, which is not itself imperative or the contrary, or of which the connection with matter of one of those two descriptions is not apprehended, so long and so far the truth of the proposition, *That every law is a command or its opposite*, may remain unsuspected, or appear questionable; so long also may the incompleteness of the greater part of those masses of legislative matter, which wear the complexion of complete laws upon the face of them, also the method to be taken for rendering them really complete, remain undiscovered.

XIV. The concealment is favoured by the multitude of indirect forms in which imperative matter is capable of being couched.

A circumstance, that will naturally contribute to increase the difficulty of the discovery, is the great variety of ways in which the imperation of a law may be conveyed—the great variety of forms which the imperative part of a law may indiscriminately assume: some more directly, some less directly expressive of the imperative quality. *Thou shalt not steal. Let no man steal. Whoso stealeth shall be punished so and so. If any man steal, he shall be punished so and so. Stealing is where a man does so and so; the punishment for stealing is so and so. To judges*, so and so named, and so and so constituted, *belong the cognizance of such and such offences*; viz. *stealing*—and so on. These are but part of a multitude of forms of words, in any of which the command, by which stealing is prohibited might equally be couched: and it is

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manifest to what a degree, in some of them, the imperative quality is clouded and concealed from ordinary apprehension.

XV. Number and nature of the laws in a code, how determined.

After this explanation, a general proposition or two, that may be laid down, may help to afford some little insight into the structure and contents of a complete body of laws.—So many different sorts of *offences* created, so many different laws of the *coercive* kind: so many *exceptions* taken out of the descriptions of those offences, so many laws of the *discoercive* kind.

To class *offences*, as hath been attempted to be done in the preceding chapter, is therefore to class *laws*: to exhibit a complete catalogue of all the offences created by law, including the whole mass of expository matter necessary for fixing and exhibiting the import of the terms contained in the several laws, by which those offences are respectively created, would be to exhibit a complete collection of the laws in force: in a word, a complete body of law; a *pannomion*, if so it might be termed.

XVI. General idea of the limits between a civil and a penal code.

From the obscurity in which the limits of a *law*, and the distinction betwixt a law of the civil or simply imperative kind and a punitory law, are naturally involved, results the obscurity of the limits betwixt a civil and a penal *code*, betwixt the civil branch of the law and the penal.

The question, *What parts of the total mass of legislative matter belong to the civil branch, and what to the penal?* supposes that divers political states, or at least that some one such state, are to be found, having as well a civil code as a penal code, each of them complete in its kind, and marked out by certain limits. But no *one* such state has ever yet existed.

To put a question to which a true answer can be given, we must substitute to the foregoing question some such one as that which follows:

Suppose two masses of legislative matter to be drawn up at this time of day, the one under the name of a civil code, the

other of a penal code, each meant to be complete in its kind—in what general way, is it natural to suppose, that the different sorts of matter, as above distinguished, would be distributed between them?

To this question the following answer seems likely to come as near as any other to the truth.

The *civil* code would not consist of a collection of civil laws, each complete in itself, as well as clear of all penal ones.

Neither would the *penal* code (since we have seen that it *could* not) consist of a collection of punitive laws, each not only complete in itself, but clear of all civil ones. But

XVII. Contents of a civil code.

The civil code would consist chiefly of mere masses of expository matter. The imperative matter, to which those masses of expository matter respectively appertained, would be found—not in that same code—not in the civil code—nor in a pure state, free from all admixture of punitory laws; but in the penal code—in a state of combination—involved, in manner as above explained, in so many correspondent punitory laws.

XVIII. Contents of a penal code.

The penal code then would consist principally of punitive laws, involving the imperative matter of the whole number of civil laws: along with which would probably also be found various masses of expository matter, appertaining, not to the civil, but to the punitory laws. The body of penal law, enacted by the Empress-Queen Maria Theresa, agrees pretty well with this account.

XIX. In the Code Frederic the imperative character is almost lost in the expository matter.

The mass of legislative matter published in French as well as German, under the auspices of Frederic IId. of Prussia, by the name of Code Frederic, but never established with force of law*, appears, for example, to be almost wholly composed of masses of expository matter, the relation of which to any imperative matter appears to have been but very imperfectly apprehended.

* Mirabeau sur la Monarchie Prussienne, Tom. v. Liv. 8. p. 215.

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XX. So in the Roman law.

In that enormous mass of confusion and inconsistency, the ancient Roman, or, as it is termed by way of eminence, the *civil* law, the imperative matter, and even all traces of the imperative character, seem at last to have been smothered in the expository. *Esto* had been the language of primæval simplicity: *esto* had been the language of the twelve tables. By the time of Justinian (so thick was the darkness raised by clouds of commentators) the penal law had been crammed into an odd corner of the civil—the whole catalogue of offences, and even of crimes, lay buried under a heap of *obligations*—*will* was hid in *opinion*—and the original *esto* had transformed itself into *videtur*, in the mouths even of the most despotic sovereigns.

XXI. In the barbarian codes it stands conspicuous.

Among the barbarous nations that grew up out of the ruins of the Roman Empire, Law, emerging from under the mountain of expository rubbish, reassumed for a while the language of command: and then she had simplicity at least, if nothing else, to recommend her.

XXII. Constitutional code, its connexion with the two others.

Besides the civil and the penal, every complete body of law must contain a third branch, the *constitutional*.

The constitutional branch is chiefly employed in conferring, on particular classes of persons, *powers*, to be exercised for the good of the whole society, or of considerable parts of it, and prescribing *duties* to the persons invested with those powers.

The powers are principally constituted, in the first instance, by discoercive or permissive laws, operating as exceptions to certain laws of the coercive or imperative kind. Instance: *A tax-gatherer, as such, may, on such and such an occasion, take such and such things, without any other* TITLE.

The duties are created by imperative laws, addressed to the persons on whom the powers are conferred. Instance: *On such and such an occasion, such and such a tax-gatherer shall take such and such things. Such and such a judge shall, in such and such a case, cause persons so and so offending to be hanged.*

The parts which perform the function of indicating who the individuals are, who, in every case, shall be considered as belonging to those classes, have neither a permissive complexion, nor an imperative.

They are so many masses of expository matter, appertaining in common to all laws, into the texture of which, the names of those classes of persons have occasion to be inserted. Instance; imperative matter:—*Let the judge cause whoever, in due course of law, is convicted of stealing, to be hanged.* Nature of the expository matter:—Who is the person meant by the word *judge?* He who has been *invested* with that office in such a manner: and in respect of whom no *event* has happened, of the number of those, to which the effect is given, of reducing him to the condition of one *divested* of that office.

XXIII. Thus the matter of one law may be divided among all three codes.

Thus it is, that one and the same law, one and the same command, will have its matter divided, not only between two great codes, or main branches of the whole body of the laws, the civil and the penal; but amongst three such branches, the civil, the penal, and the constitutional.

XXIV. Expository matter a great quantity of it exists every where, in no other form than that of common or judiciary law.

In countries, where a great part of the law exists in no other shape, than that of what in England is called *common* law but might be more expressively termed *judiciary*, there must be a great multitude of laws, the import of which cannot be sufficiently made out for practice, without referring to this common law, for more or less of the expository matter belonging to them. Thus in England the exposition of the word *title*, that basis of the whole fabrick of the laws of property, is no where else to be found. And, as uncertainty is the very essence of every particle of law so denominated (for the instant it is clothed in a certain authoritative form of words it changes its nature, and passes over to the other denomination) hence it is that a great part of the laws in being in such countries remain uncertain and incomplete. What are those countries? To this hour, every one on the surface of the globe.

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XXV. Hence the deplorable state of the science of legislation, considered in respect of its *form*.

Had the science of architecture no fixed nomenclature belonging to it—were there no settled names, for distinguishing the different sorts of buildings, nor the different parts of the same building from each other—what would it be? It would be what the science of legislation, considered with respect to its *form*, remains at present.

Were there no architects who could distinguish a dwelling-house from a barn, or a side-wall from a ceiling, what would architects be? They would be what all legislators are at present.

XXVI. Occasions affording an exemplification of the difficulty as well as importance of this branch of science;—attempts to limit the powers of supreme representative legislatures.

From this very slight and imperfect sketch, may be collected not an answer to the questions in the text but an intimation, and that but an imperfect one, of the course to be taken for giving such an answer; and, at any rate, some idea of the difficulty, as well as of the necessity, of the task.

If it were thought necessary to recur to experience for proofs of this difficulty, and this necessity, they need not be long wanting.

Take, for instance, so many well meant endeavours on the part of popular bodies, and so many well meant recommendations in ingenious books, to restrain supreme representative assemblies, from making laws in such and such cases, or to such and such an effect. Such laws, to answer the intended purpose, require a perfect mastery in the science of law, considered in respect of its form—in the sort of anatomy spoken of in the preface to this work: but a perfect, or even a moderate insight into that science, would prevent their being couched in those loose and inadequate terms, in which they may be observed so frequently to be conceived; as a perfect acquaintance with the dictates of utility on that head would, in many, if not in most, of those instances, discounsel the attempt. Keep to the letter, and in attempting to prevent the making of bad laws, you will find them prohibiting the making of the most necessary laws, perhaps even of all laws: quit the letter, and they express no more than if

each man were to say, *Your laws shall become ipso facto void, as often as they contain any thing which is not to my mind.*

Of such unhappy attempts, examples may be met with in the legislation of many nations: but in none more frequently than in that newly-created nation, one of the most enlightened, if not the most enlightened, at this day on the globe.

XXVII. Example. American declarations of rights.

Take for instance, the *Declaration of Rights*, enacted by the state of North-Carolina, in convention, in or about the month of September, 1788, and said to be copied, with a small exception, from one in like manner enacted by the state of Virginia*.

The following, to go no farther, is the first and fundamental article.

"That there are certain natural rights, of which men, "when they form a social compact, cannot deprive or divest "their posterity, among which are the enjoyment of life and "liberty, with the means of acquiring, possessing, and pro-"tecting property, and pursuing and obtaining happiness "and safety.

Not to dwell on the oversight of confining to posterity the benefit of the rights thus declared, what follows? That—as against those whom the protection, thus meant to be afforded, includes—every law, or other order, *divesting* a man of *the enjoyment of life or liberty*, is void.

Therefore this is the case, amongst others, with every coercive law.

Therefore, as against the persons thus protected, every order, for example, to pay money on the score of taxation, or of debt from individual to individual, or otherwise, is void; for the effect of it, if complied with, is "to *deprive* and *divest him*," *pro tanto*, of the enjoyment of liberty, viz. the liberty of paying or not paying as he thinks proper: not to mention

* Recherches sur Les Etats Unis, 8vo. 1788, Vol. I. p. 158.

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the species opposed to imprisonment, in the event of such a mode of coercion's being resorted to: likewise, of property, which is itself, a "*means of acquiring, possessing, and protecting property, and of pursuing and obtaining happiness and safety.*"

Therefore also, as against such persons, every order to attack an armed enemy, in time of war, is also void: for, the necessary effect of such an order is, "to *deprive* some of them of *the enjoyment of life.*"

The above-mentioned consequences may suffice for examples, amongst an endless train of similar ones*.

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* The Virginian Declaration of Rights, said, in the French work above quoted, to have been enacted the 1st of June, 1776, is not inserted in the publication entitled "*The Constitutions of the several independent states of America, &c.*" *Published by order of Congress: Philadelphia printed. Reprinted for Stockdale and Walker, London,* 1782: though that publication contains the form of government enacted in the same convention, between the 6th of May and the 5th of July in the same year.

But in that same publication is contained a *Declaration of Rights,* of the province of *Massachusets,* dated in the years 1779 and 1780, which in its first article is a little similar: also one of the province of *Pennsylvania,* dated between July 15th and September 28th, in which the similarity is rather more considerable.

Moreover, the famous *Declaration of Independence,* published by Congress July 5th, 1776, after a preambular opening, goes on in these words: "*We hold these truths to be self-evident; that all men are created equal: that they are endued* by the creator *with certain unalienable rights*: that *amongst those are life, liberty, and the pursuit of happiness.*

The Virginian Declaration of Rights is that, it seems, which claims the honour of having served as a model to those of the other Provinces; and in respect of the above leading article, at least, to the above-mentioned general Declaration of Independency. See Recherches, &c. I. 197.

Who can help lamenting, that so rational a cause should be rested upon reasons, so much fitter to beget objections, than to remove them?

But with men who are unanimous and hearty about *measures,* nothing so weak but may pass in the character of a *reason*: nor is this the first instance in the world, where the conclusion has supported the premises, instead of the premises the conclusion.

Leaning on his elbow, in an attitude of profound and solemn meditation, "*What a multitude of things there are,*" (exclaimed the dancing-master Marcel,) "*in a minuet?*"—May we now add?—*and in a law.*

THE END.

ERRATUM.

Pages 57 to 73, head line, *for* "Classes of offences," *read* "Division of Offences."

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