BOOK IV.

OF PUBLIC WRONGS.

CHAPTER I.

OF THE NATURE OF CRIMES AND THEIR PUNISHMENT.

1. *What are to be considered in treating of public wrongs, or crimes and misdemeanors?*—1, 2.

1st. The general nature of crimes and punishments.

2d. The persons capable of committing crimes.

3d. The several degrees of guilt, as principals or accessaries.

4th. The several species of crimes, with the punishment annexed to each by the laws of England.

5th. The means of preventing their perpetration.

6th. The method of inflicting those punishments which the law has annexed to each several crime and misdemeanor.

2. *What do codes of criminal law embrace?*—2.

The discussion and admeasurement of crimes, and their punishment, form in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the pleas of the crown; so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights, belonging to that community, and is therefore in all cases the proper prosecutor for every public offense.

3. *Is the knowledge of this branch of jurisprudence of general importance?*—2.

Yes; the knowledge of this branch of jurisprudence, which

teaches the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For, (as a very great master of the crown law has observed) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

4. *What considerations should influence in properly forming and enforcing the criminal law?*—3, 4.

In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind; though it sometimes (provided there be no transgression of these external boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offense; from some, or from all of these causes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here

enter into any minute inquiries concerning the local constitutions of other nations: the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own. But even with us in England, where our crown law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike;—even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation should be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon. And surely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or cut down a cherry-tree in an orchard. Were even a committee appointed, but once in an hundred years, to revise the criminal law, it could not have continued to this hour a felony, without benefit of clergy,

to be seen for one month in the company of persons who call themselves, or are called, Egyptians.

5. *What is a crime or misdemeanor?*—5.

It is an act committed, or omitted, in violation of the public law, either forbidding or commanding it.

6. *How has common usage distinguished the one from the other?*—5.

In common usage, the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanors."

7. *In what does the distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, principally consist?*—5.

In this, that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes, or misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, in its social aggregate capacity.

8. *Does crime include an injury?*—6.

Yes; every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.

9. *Wherein is the distinction of crimes from civil injuries apparent?*—6, 7.

In injuries of an atrocious character, the private wrong is swallowed up in the public: we seldom hear of any satisfaction made to the individual. But in those of an inferior nature, room is left for a private compensation also.

10. *What double view has the law in taking cognizance of wrongs or unlawful acts?*—7.

To redress the party injured, and to benefit society.

11. *What are punishments?*—7.

Evils or inconveniences consequent upon crimes and misdemeanors.

12. *In whom is the right of punishing crimes against the law of nature, as murder and the like, vested by that law?*—7.

In every individual.

13. *What is the end of human punishment?*—11.

To serve as a precaution against future offenses of the same kind.

14. *How is the end of human punishment attained?*—11, 12.

It is attained in three ways: 1. By the amendment of the offender himself. 2. By deterring others, by the dread of his example, from offending in the like manner. 3. By depriving the party injuring of the power to do future mischief.

15. *What is the measure of human punishment?*—12.

The quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature, to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offenses.

16. *Why is death punished with death?*—13, 14.

Not because one is equivalent to the other, for that would be expiation and not punishment; but, for the reason that this is the highest penalty that man can inflict, and tends most to the security of mankind.

17. *Why is treason, in conspiring the king's death, punished with greater rigor than even actually killing any private subject?*—15.

The greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and the punishment should be more severe. In case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity.

18. *Why, generally, is a design to transgress not so flagrant an enormity as the actual completion of that design?*—15.

Because it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it.

19. *What crimes should be most severely punished?*—16.

Those which are the most destructive of the public safety and happiness; and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which, therefore, the offender has the strongest inducement to commit. Hence it is, that for a servant to rob his master is in more cases capital than for a stranger; if a servant kills his master it is a species of treason.

20. *Should crime be punished with great severity?*—17.

No; punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, than such as are more merciful in general, yet properly mixed with due distinctions of severity. Crimes are more effectually prevented by the certainty than the severity of punishment.

21. *What do a multitude of sanguinary laws prove?*—17.

They prove a manifest defect either in the wisdom of the legislature, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every species of difficulty.

22. *What is the result where no distinction is made in the nature and gradations of punishment?*—18.

The generality will be led to conclude there is no distinction in the guilt

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

1. *Who are exempted from the censures of the law?*—20.

The general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

2. *To what single consideration may all the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, be reduced?*—20.

To this single consideration, the want or defect of will.

3. *What two things must there be to constitute a crime against human laws?*—21.

There must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

4. *In what cases does the will not join with the act?*—21.

In three cases: 1. When there is a defect of understanding; for where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do, or to abstain from a particular action. 2. Where there is understanding and will sufficient, residing in the party, but not called forth and exerted at the time of the action done; which is the case of all offenses committed by chance or ignorance. 3. Where the action is constrained by some outward force or violence.

5. *What species of defect in will fall under the first of these general heads?*—21.

Infancy, idiocy, lunacy, and intoxication.

6. *What may be referred to the second head?*—21, 22.

Misfortune, and ignorance.

7. *What ranks under the third head?*—22.

Compulsion, or necessity.

8. *How does the law privilege an infant?*—22.

In some cases, as to the common misdemeanors, the infant under twenty-one years is privileged, so as to escape fine, imprisonment, and the like, and particularly in cases of omission; but in cases of notorious breach of the peace, riot, battery, or the like, for these an infant, above the age of fourteen, is equally liable to suffer as a person of full age.

9. *By what is the capacity of doing ill, or contracting guilt, measured?*—23.

By the strength of the delinquent's understanding and judgment, as the law has stood since the time of Edward the Third.

10. *At what age may an infant be guilty of felony?*—23.

Under seven years of age an infant cannot be guilty of felony. Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax;* yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.

Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century (17th) when a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus, also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and, as the sparing this boy, merely on account of his tender years, might be of dangerous consequence to the public, by propagating a notion

that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment. But, in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

11. *In criminal cases, are idiots and lunatics chargeable for their own acts?*—24.

They are not, for acts committed under the incapacities of idiocy, or lunacy. If a man in his sound memory commit a capital offense, and before arraignment for it he becomes mad, he ought not be arraigned for it. If after he has pleaded the prisoner becomes mad, he shall not be tried. If after he be tried, and found guilty, he loses his senses before judgment, judgment shall not be pronounced. And if he becomes of nonsane memory after judgment, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment and execution.

12. *How shall it be ascertained whether the party be* compos *or not?*—25.

It shall be tried by a jury.

13. *Does drunkenness excuse criminal misbehavior?*—25, 26.

It does not. The law looks upon it as an aggravation, rather than an excuse.

14. *Under what circumstances is a man excused for acts done through unavoidable force and compulsion?*—27, 28.

He is excused, in the first place, by the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest; as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality.

He is excused, secondly, by *duress per minas;* or threats and menaces which induce a fear of death or other bodily harm, and which take away, for that reason, the guilt of many crimes and misdemeanors; at least before the human tribunal.

And, thirdly, where a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two.

15. *What is the principal case, where constraint of a superior is allowed as an excuse?*—28, 29.

In that of the matrimonial subjection of the wife to her husband. In some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband, or even in his company, which the law construes a coercion, she is not guilty of any crime: being considered as acting by compulsion, and not of her own will. Which doctrine is at least a thousand years old in the kingdom, being to be found among the laws of king Ina, the West Saxon. And it appears that among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed.

16. *Why, in treason, shall no plea of coverture or presumption of the husband's coercion, extenuate the offense of the wife?*—29.

As well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself, as a subject, has forgotten to pay.

17. *For what offense may a wife be indicted, and set in the pillory, with her husband?*—29.

For keeping a brothel; for this is an offense touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offense as the law presumes to be generally conducted by the intrigues of the female sex.

18. *When the wife offends alone, how far is she responsible for her offense?*—29.

In all cases where she offends alone, without the company

or coercion of her husband, she is responsible for her offense as much as any feme sole.

19. *If a man be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, may he kill that person?*—30.

No; the fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent man.

20. *When a man, by the commandment of the law, is bound to arrest another for any capital offense, or to disperse a riot, and resistance is made to his authority, may he kill the offenders?*—31.

It is here justifiable, and even necessary, to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue.

21. *May a man, in extreme want of food or clothing, justify stealing either, to relieve his present necessities?*—31, 32.

The law admits no such excuse.

22. *In whom does the law suppose an incapacity of doing wrong, from the excellence and perfection of the person?*—32, 33.

In the king.

CHAPTER III.

OF PRINCIPALS AND ACCESSARIES.

1. *What are the degrees of guilt among persons that are capable of offending?*—34.

They may offend as principals, or as accessaries.

2. *In what degrees may a man be principal in an offense?*—34.

In two degrees: a principal in the first degree is he that is the actor, or absolute perpetrator of the crime; and a principal

in the second degree is he who is present, aiding and abetting the act to be done.

3. *Must this presence of the principal in the second degree be an actual immediate standing by, within sight or hearing of the fact?*—34.

It need not; there may be a constructive presence.

4. *In cases of murder, committed in the absence of the murderer, by means which he had prepared beforehand, in what degree as principal is he guilty?*—34, 35.

He is guilty as principal in the first degree.

5. *What reason does the law assign for this?*—35.

That, in the case of preparing poison or laying a trap or pitfall for another, whereby he is killed; letting out a wild beast with an intent to do mischief, or exciting a madman to commit murder, so that death thereupon ensues, the party offending cannot be called an accessary, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As, therefore, he must be certainly guilty, either as principal or accessary, and cannot be so as accessary, it follows that he must be guilty as principal, and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.

6. *Who is an accessary?*—35.

An accessary is he who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either before or after the fact committed.

7. *Why are all principals in high treason?*—35.

Upon account of the heinousness of the crime.

8. *In what crimes may there be accessaries?*—36.

In *petit* treason, murder, and felonies, with or without the benefit of clergy; except only in those offenses which, by judgment of law, are sudden and unpremeditated, as manslaughter, and the like, which therefore cannot have any accessaries before the fact.