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THE EXTENT TO WHICH THE COMMON LAW IS APPLIED IN DETERMINING WHAT CONSTITUTES A CRIME, AND THE NATURE AND DEGREE OF PUNISHMENT CONSEQUENT THEREUPON.

PART I.

OF THE ORIGIN EARLY HISTORY, AND GENERAL PRINCIPLES OF THE COMMON LAW.

1. THERE is much conflict, by writers on the question, in reference to the origin of the common law. Hallam, for instance, says, that the English lawyers, prone to magnify the antiquity

like the other merits of their system, are apt to carry up the date of the common law, till, like the pedigree of an illustrious family, it loses itself in the obscurity of ancient time: Hallam's Middle Ages, vol. 1, p. 120. By his own showing, though, it seems that the comparison which he has himself instituted is peculiarly appropriate, and that the origin of the common law, very much like the pedigree of *some* "illustrious families," is lost in the obscurity of antiquity. His own admissions are, that some of the features of the common law may be distinguished in Saxon times, and that our limited knowledge prevents us from assigning many of its peculiarities to any determinate period.

2. Hume considers that the body of laws framed by Alfred, as a guide to the magistrates in the administration of justice, though now lost, served long as the basis of English jurisprudence, and he adds that "this body of laws is generally deemed the origin of what is denominated the common law:" Hume's Hist. of Eng., vol. 1, p. 105. And Hallam admits—notwithstanding he places the origin of the common law at a much later period—that the treatise denominated the laws of Henry I. (and which are merely a *compilation*) bears much of a Saxon character.

3. Neither Sir Edward Coke, Sir Matthew Hale, nor any of the other old common-law writers, contend that the common law was not very greatly changed after the accession of the Norman dynasty to the English throne. See 4 Bla. Com., ch. 33. It is of the *origin* of the common law that Sir Matthew Hale says—"It is as undiscoverable as that of the Nile." And, although the talented historian of the middle ages may be right in considering the establishment of a legal system as not being complete until about the end of Henry III.'s reign, when the unwritten usages of the common law, as well as the forms and precedents of the courts, were digested into the great work of Bracton, yet, this in nowise militates against the idea of the old writers, that the *origin* of those unwritten usages, and of those forms and precedents, is lost in the oblivion of much earlier periods.

4. The pecuniary compensation for crimes—referred to and dwelt strongly on by Hallam—which existed in the Saxon periods, was not, it is true, known in after ages, but, even in the time of Alfred,[1] there existed a law for the punishment of wilful murder

[1] "The good King Alfred's zeal against murder first caused it to be capitally punished:" Consd. on Cr. Law (A. D. 1772), p. 353.

by death (1 Hume's Hist., p. 223), and this seems to have continued in force until the time of William the Conqueror, who took away all capital punishment, substituting therefor various kinds of mutilations: Reeves's Hist. of Eng. Law, vol. 1, p. 193.

5. Mr. Reeves, in his History of English Law, in treating upon the early criminal law of England, says—"All injuries inflicted to person or property, were, under the early criminal law of the Anglo-Saxons, *commuted* by a payment of money; the idea of a *compensation* for a money-recompense going so far as to extend even to the taking of the life of a man; and radiating upward and downward on a scale proportioned to the greater or less value and elevation of the life and dignity of the person killed." These fines, in cases of homicide and in thefts of various kinds, were *in lieu of the punishment of death*, which also was redeemable by a great variety of inflictions of other corporal punishments. For the commission of certain infamous offences, there was also punishment, or trial, by ordeal, of persons who had previously been under accusations for violations of the law: Ibid., pp. 14, 15.

6. In the reign of Henry I., murder was again made a capital offence, as it had been prior to the change in that respect made by William the Conqueror. Glanville, who wrote about A. D. 1181, says—"If, on the trial by ordeal, a person is convicted of a *capital offence*, then the judgment is of life and members, which are at the king's mercy, as in other pleas concerning felony:" Glanville, b. 14, ch. 1, p. 347.[1]

7. One of the earliest collections of laws was made by Edward the Confessor, which comprised the whole law of the kingdom, containing not only the unwritten customs, but the laws and customs made by the several kings. This volume was lost, and thus much relating to the early Anglo-Saxon customs, or common law, perished. From the remains of Saxon legislation, it is inferred, that the lost volume, like the Saxon laws that are in existence, was principally taken up with an enumeration of crimes and their punishment: 1 Reeves's Hist. 26. The laws adopted by William the Conqueror, says Sir Matthew Hale, consisted principally of those of Edward the Confessor: Hist. of Com. Law, p. 5.

8. Most of the early statutes which have come down to us were

[1] By the laws of King Athelstan, a thief who was upwards of twelve years old, and stole more than the value of twelve pence, was punished with death: Consdu. on Cr. Law, p. 399.

passed in affirmance of the common law, or declaratory of it. Thus, the statute declaring that a servant killing his master; a wife killing her husband; an ecclesiastical person killing his prelate or superior, to whom he owed faith or obedience, was guilty of petit treason; was, says Lord Coke, but declaratory of the common law as it had previously existed: 3d Inst. 20. The statute 25 Edw. 3 is also, for the most part, declaratory of the common law, and therefore the word declaration (*declarisement*) is used in it. And where the violation of the queen regnant is made treason, the Mirror (cap. 1, § 5) and Britton (c. 23, fo. 43) show that the common law is to the same effect. So, also, as to the violation of the king's eldest daughter unmarried; levying war within the realm without the king's authority; and other offences against the Statute of Treasons, are shown by Bracton, The Mirror, Britton, Fleta, and Glanville, to have been treason at common law. And Coke says (3d Inst. 16), for counterfeiting, the punishment was only as in petit treason, because the statute is but a declaration of the common law, and for counterfeiting the punishment at common law was only as for petit treason: Fleta, l. 1, c. 22. So the clause providing for the forfeiture of the escheats to the king is in affirmance of the common law: *John De Brittain's Case*, 20 Ed. 1, n. 2. The statute of 1 Edw. 6 is a plain declaration and resolution of the common law, as is also the statute of 1 Edw. 3: 3 Inst. 65. On this point, Hale, in his History of the Common Law, p. 49, says—"Now, as to matters criminal, whether capital or not, they are determinable by the common law, and not otherwise; and in affirmance of that law are the statutes of Magna Charta, cap. 29; 5 Edw. 3, c. 9; 25 Edw. 3, c. 4; 29 Edw. 3, c. 3; 27 Edw. 3, c. 17; 38 Edw. 3, c. 9, and 40 Edw. 3, c. 3; the effect of which is that no man shall be put out of his lands or tenements, or be imprisoned upon any suggestion, unless it be by indictment or presentment of lawful men, or by process at common law." And by the statute of 1 Hen. 4, in affirmance of this, it is enacted (cap. 14) that no appeals be sued in Parliament at any time to come. This extends to all accusations by particular persons, and that not only of treason or felony, but of other crimes and misdemeanors. Many of the statutes of Hen. 3, and Edw. 1 and 2, were made but in affirmance of the common law, and the rest of them are so ancient, that they are, as it were, incorporated, with the judicial resolu-

tions, decisions, and expositions connected with them, into the common law, and become a part of it: Hale's Com. Law 9. And Mr. Reeves says—"These statutes which were made before the time of memory, and have not since been repealed, nor altered by contrary usage, or subsequent Acts of Parliament, are considered as a part of the *leges non scriptæ*, being, as it were, incorporated into and become a part of our common law:" 1 Reeves's Hist. of Eng. Law 215. And, notwithstanding copies of these may be found, their provisions obtain at this day, not as Acts of Parliament, but by immemorial usage and custom, of which kind is, no doubt, a great part of our common law: Hale's Com. Law 3. "And, doubtless," adds Lord Hale, "many of those things that now obtain as common law, had their original by Act of Parliament, or constitutions, made in writing by the king, lords, and commons." For in many of the acts that are yet extant, numbers of those laws are to be found enacted, which now obtain merely as common law, or the general custom of the realm: Ibid. Blackstone says, that it is agreed by all our historians that the great charter of King John was, for the most part, compiled from the ancient customs of the realm, or the laws of King Edward the Confessor; by which they usually mean the old common law, which was established under our Saxon princes, before the rigors of feudal tenure and other hardships were imported from the continent by the kings of the Norman line: Blk. Law Tracts, pref. 12.

9. By statute 1 & 2 Ph. & Ma. it was enacted, that "all trials hereafter to be had, awarded, or made for any treason, shall be had and used only *according to the due order and course of the common law*." By the statute of 33 H. 8, c. 23, the right of peremptory challenge was taken away in cases of high treason. It was resolved in *Sir Walter Raleigh's Case*, cited Co. 3 Inst. 27 n, by all the judges, that the statute of 1 & 2 Mary abrogated the statute of 33 H. 8, for the end of challenge is to have an indifferent trial, and all Acts of Parliament made before the Act of 1 & 2 Ph. & Ma., for trial of high treason, petit treason, or misprision of treason, contrary to the due course of the common law, are abrogated by this act, and trials by the due course of the common law, with challenges incident in those cases, are restored: Ibid., p. 27. The statute of 33 H. 8, c. 23, was thus decided to be in derogation of the common law. It was provided by this

same act, that if a man, attainted of treason, became mad, notwithstanding this, he should be executed; "which cruel and inhuman law" (says Coke) "lived not long, but was repealed, for in that point, also, it was against the common law, because, by intendment of law, the execution of the offender is for example; but so it is not when a madman is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others:" Ibid., p. 6.

10. Again, the statutes of 1 Edw. 6 and 5 Edw. 6 provide, that, for treason, petit treason, &c., &c., there shall be two sufficient and lawful witnesses, &c.; the latter statute using the words "two lawful accusers," in reference to which it was adjudged in *Lord Lumley's Case*, Dyer's R., 1 Hil. 14 El., that, as there were no other "accusers" known to the common law, but lawful accusers or witnesses, they must be such as the common law requires, namely, lawful witnesses. And, by the ancient common law, one accuser or witness was not sufficient to convict any person of high treason, for, in that case, "it shall be tried before the constable and marshal by combat, as by many records appeareth. But the constable and marshal have no jurisdiction to hold plea of anything which may be determined or discussed by the common law:" Co. 3 Inst. 26. That two witnesses were required at common law appears also by the Mirror, ca. 3, *ord. deat.*, and by Bracton, l. 5, fol. 354; and "accusers" and "witnesses," in the above acts, were held to be synonymous.

11. Britton says, If felons come in judgment to answer, &c., they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer but at their free will: cap. 5, fo. 14. And, again, he says, "and of prisoners we will that none shall be put in irons but those which shall be taken for felony, or trespass in parks or vivaries, or which be found in arrearages upon account, and we defend that otherwise they shall not be punished nor tormented:" Britton, c. 11, fo. 17. And the Mirror—"It is an abuse that prisoners be charged with irons, or put to any pain, before they be attainted:" cap. 5, § 1. And Sir Edward Coke says—"It appeareth, that where the law requireth that a prisoner should be kept in *salva* and *arcta custodia*, yet that that must be without pain or torment to the prisoner:" Co. 3 Inst. 35. The Duke of Exter having brought in the rack or brake, which is allowed in

many cases by the civil law, Sir John Fortescue, Chief Justice of England, wrote his book in commendation of the laws of England, showing that all torments and tortures of parties accused were directly against the common law of England, and also showed the inconvenience thereof, by fearful example: Fortescue, ca. 22, fo. 24. A question, in reference to this matter, having been put to the judges, they unanimously declared that the rack was unknown to the laws of England: 4 Bla. Com. 326.

12. "By the common law, to avoid all extortions and grievances of the subject, no sheriff, coroner, gaoler, or other of the king's ministers, ought to take any reward for doing of his office, but only of the king, and this appeareth by our books, and is so declared and enacted by Act of Parliament of 3 Edw. 1. And a penalty is added to the prohibition of the common law by that act. But after that this rule of the common law was altered, and that the sheriff, coroner, gaoler, and other the king's ministers, might in some case take of the subject, it is not credible what extortions and oppressions have thereupon ensued." So dangerous a thing is it, adds Coke, to shake or alter any of the fundamental rules of the common law; which, in truth, are the main pillars and supporters of the fabric of the commonwealth: 2 Co. Inst. 73.

13. St. Germain, in his "Doctor and Student," c. 7, fo. 23 (said to have been written in 1518), says—"By the old custom of the realm, no man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answer by the law of the land. And this custom is confirmed by Magna Charta, cap. 26." Coke, in his 2 Inst. c. 29, p. 45, explains the phrase "by the law of the land," here used, to mean "by the common law, statute law, or custom of England, which have been declared and interpreted by authority of Parliament, by our books, and by precedents." He also renders it "by due process of the common law;" 2 Inst. 50; and, thus, "No man (shall) be put to answer without presentment before justices, or thing of record, or by due process, or by writ original, according to the old law of the land:" Ibid.

14. As regards these styles or appellations of the common law, Sir Matthew Hale furnishes an enumeration of them, and the reasons on which they are founded. Of that, above referred to, from St. Germain and Lord Coke, he says—"'Tis called sometimes by way of eminence, *Lex Terræ*, as in the statute of Magna

Charta, cap. 29:" Hale's Hist. of Com. Law 29; adding, that there the common law is principally intended by those words *aut per legem terræ*, as appears by the exposition thereof in several subsequent statutes, and particularly in the statute 28 Edw. 3, c. 3, which is but an exposition and declaration of Magna Charta.

15. "Sometimes 'tis called *Lex Angliæ*, as in the Statute of Merton; sometimes it is called *Lex et Consuetudo Regni*, as in all commissions of oyer and terminer, and in the statute *de quo warranto*, &c., but, most commonly, it is called 'The Common Law,' or The Common Law of England, as in the statute of *Articuli super chartas*, cap. 15; in the statute Edw. 5, c. 5, and in infinite more records and statutes:" Ibid. 53. It was called by William the Conqueror, in his confirmation of it, *Lex Communis* and *Lex Patriæ*. It is also called *Lex Non Scripta* (the unwritten law), to distinguish it from the *Lex Scripta*, or statute law: 1 Blk. Com. 63; 1 Steph. Com. 10, 45. This last-named designation, however, is not to be considered strictly accurate, for, as has been seen, much of the common law has been repeatedly collected and promulgated by royal authority, and the whole of it is to be found in the various treatises on the common law, and in the reports of the decisions of the courts from very early ages down to the present time. The term is also understood in a wider sense, as distinguishing the great body of law, whether statutory or otherwise, administered in common-law courts, as distinguished from the system of equity administered in courts of chancery. It has various other appellations, but in American jurisprudence the common law is chiefly used in the two last-named senses: per STORY, J., in *Lessee of Levy* v. *McCartee*, 6 Peters 102, 110; 1 Kent Com. 471. As equity has no criminal jurisdiction, the term is only sensible, in connection with the subject of this treatise, in the sense of being distinguished from the statute law; although, as will be hereafter more fully seen (see post, Part III., §§ 1–5), the term, in this sense, has even less force here than in England, as the common law of this country consists not only of the common law of England, but of such English statutes, also passed before the emigration of our ancestors, as were in amendment of the common law, and as were applicable to the circumstances of the country. And even some English statutes that have been passed since the settlement of

this country, have been adopted, and are in force, to a greater or less extent, in different states, as part of the American common law.

16. The common law, as the *Lex Non Scripta*, consists, then, in England, of those laws which are not comprised under the title of Acts of Parliament, but which are, for the most part, extant in records of pleas, proceedings, and judgments; in books of reports and judicial decisions; in treatises of learned men's arguments and opinions, preserved from ancient times and still extant in writing. But the authoritative and original institutions are not set down in writing in that manner, or with that authority, that Acts of Parliament are, but they are grown into use, and have acquired their binding power, and the force of laws, by a long and immemorial usage, and by the strength of custom and reception in the kingdom. A part of the common law, in this acceptation, is that by which proceedings and determinations in the ordinary courts of justice are directed and guided, and by which the processes, proceedings, judgments, and executions, of the ordinary courts of justice; the limits, bounds, and extents of courts, and their jurisdictions,—the several kinds of temporal offences and punishments at common law, and the manner of the application of the several kinds of punishments, with other particulars, extending as far as the many exigencies, in the distribution of ordinary justice, may require. See Hale's Hist. of Com. Law, p. 23 *et seq.*

17. Mr. Reeves also defines the common law in this sense. He says that the common law is the custom of the realm, on which courts of justice exercise their judgment, declaring, by their interpretation, what is, and what is not, that common law. Many of the statutes that have been enacted prior to the *Magna Charta* of 9 Hen. 3, have been blended with the custom of the realm, and have gone to make up the English common law, which common law, or custom of the realm, consists of those rules and maxims concerning the persons and property of men, that have obtained by the tacit assent and usage of the people of England; being of the same force with acts of the legislature. The consent and approbation of the people, with respect to the common law, being signified by their immemorial use and practice of it: 1 Reeves's Hist. of Eng. Law 1.

18. The nature of the common law is to be accommodated to

the condition, exigencies, and conveniences of the people, for, or by whom they are appointed, as those exigencies and conveniences insensibly grow upon the people. Thus, though it may be said of the common law of England, that it was otherwise in the time of Henry II., when Glanville wrote, or in the time of Henry III., when Bracton wrote, than it is now administered, yet it is not possible to assign the time when the change began; nor have we all the Acts of Parliament, or judicial resolutions, which might have induced or occasioned such alterations. The true constituents of the common law are the common usage or custom and practice of the kingdom in matters lying in usage or custom. The custom is not simply an unwritten one, as has been seen, nor orally derived down from one age to another, but it is a custom that is derived down in writing and transmitted from age to age, especially since the beginning of the reign of Edward I.; a monarch, whose wisdom in connection with the English laws, has aptly caused him to be designated the English Justinian. Secondly: The judicial decisions of courts of justice, consonant to one another in the series and successions of times. And, thirdly: The authority of Parliament manifested in introducing such laws. Much of that which is used and taken as common law is undoubtedly derived from old Acts of Parliament, the record of which, in its original state, is not now to be found. These were acts "before time of memory," and are taken as part of the common law and immemorial customs of the kingdom; though, in their first original, they were Acts of Parliament. The decisions of courts of justice are rather to be received as authorities or evidence of what the law is, than laws in themselves, and they have great weight as precedents in all subsequent cases that arise, based, as they are, upon the common reason of the thing. See Hale's Hist. of Com. Law 57–69.

19. As the common law has been the accumulation of various ages, so different nations, as the Britons, the Romans, the Saxons, the Danes, and the Normans, have all brought their contributions to enrich its stores. Not only so, but other systems of jurisprudence have furnished their quota to increase the value of "the gathered wisdom of a thousand years."

20. The civil and canon laws, says a writer before quoted (Mr. Reeves, Hist. of Eng. Law, vol. 2, p. 37), besides exciting an emulation in the professors of the common law to cultivate their

own municipal customs, afforded, from their treasures, ample means of doing it. The use made of those laws was much nobler than borrowing their language. To enlarge the plan and scope of the municipal customs; to settle them upon principle; to give consistency, uniformity, and elegance to the whole;—these were the objects the lawyers of those days had in view; and, to further them, they refused not to make a free use of those refined systems. Many of the maxims of the civil law were transplanted into ours; its rules were referred to as part of our own customs; and arguments, grounded upon the principles of that system of jurisprudence, were attended to as a sort of authority.

21. The application the professors of the common law made, whether of the canon or civil law, in treating subjects of discussion in the law of England, is visible from the account given by Bracton, whose treatise contains much that is taken from those systems of law. See Coxe's translation of Gütterbock's Bracton, Phila. 1866.

22. Sir Walter Scott, in his Life of Napoleon, in describing the advantages to be derived from the existence of such a system as the common law of England, says—"Each principle of English law has been the subject of illustration for many ages, by the most learned and wise judges, acting upon pleadings conducted by the most acute and ingenious men of each successive age. This current of legal judgments has been flowing for centuries, deciding, as they occurred, every question of doubt which could arise upon the application of general principles to particular circumstances; and each individual case, so decided, fills up some point which was previously disputable; and, becoming a rule for similar questions, tends, to that extent, to diminish the debateable ground of doubt and argument, with which the law must be surrounded like an unknown territory, when it is first partially discovered:" Scott's Life of Napoleon, p. 56.

23. But as comprehensive as the common law is in England, it is much more comprehensive in this country. In ancient times (1 H. 7, fo. 6) adultery and fornication were punishable by fine and imprisonment in the courts of common law. But now, these offences, in England, are cognisable in the ecclesiastical courts: Co. 3 Inst. 205. Or, at least, were so until the comparatively-recent constitution of the court for "Divorce and Matrimonial

Causes:" 20 & 21 Vict. c. 85.[1] In this country such offences have frequently been held indictable at common law, as will be seen hereafter. See post, Part III., §§ 19, 20.

24. Malicious mischief, too, has received a far more extensive interpretation here than it has received in England: see post, Part III., § 25 *et seq.* There, says Wharton, in his Treatise on American Criminal Law, § 2002, each object of investment, as it arose into notice, became the subject of legislative protection; and as far back as the reports go, there has been scarcely a single article of property which was likely to prove the subject of mischievous injury, which was not sheltered from such assaults by severe penalties. Thus, for instance, a series of statutes, upwards of twelve in number, beginning with the 37 Hen. 8, c. 6, and ending with "The Black Act," were provided for the single purpose of preventing wanton mischief to cattle and other beasts of certain kinds. Upwards of eighteen hundred sections, it is estimated, of acts, running from Hen. 8 to Geo. 3, repealed or otherwise, were enacted for the especial purpose of providing against malicious mischief. In this country, in numerous cases where there were no such statutes, malicious mischief has been made the subject of adjudication at common law.

25. The comprehensiveness of the common law, however, is illustrated in England, by a series of cases which show that there is no public wrong, unprovided for by special statute, which is not the subject of a criminal action. Thus it has been held indictable wantonly and injuriously to carry a child infected with small-pox, along the public streets (*The King* v. *Vantandillo*, 4 M. & Sel. 73; *King* v. *Burnett*, Ibid. 272); to refuse to provide necessities for an infant of tender years, whether child, apprentice, or servant (*Regina* v. *Smith*, 8 C. & P. 153; *Regina* v. *Marriott*, Ibid. 425); to show a monster for money (*Herring* v. *Walround*, 2 Ch. Cas. 110); to put combustible materials on board a ship without giving notice of the contents (*Williams* v. *The East India Co.*, 3 East 192); and to overwork children in a factory (Twiss's Life of Lord Eldon 36).

26. Mr. Wharton, in referring to the deficiences for the protection of the family and social relations, by the most polished

[1] And this act, perhaps, only takes away the jurisdiction of the ecclesiastical courts in strictly matrimonial causes.

nations of antiquity, says—Even in the most refined classical eras, no violation of social or domestic duty was held punishable, unless it fell within the very few overt acts which were prohibited by statute. Now, observe how different from this it is with the common law of England and America. With us it is held indictable for any one to refuse succor to another to whom he is bound by social or domestic ties: *e. g.*, parent to child, child to parent, husband to wife, master to servant; or, even, when, by peculiar circumstances, the duty of protection is created from one to the other,—stranger to stranger. Few criminal cases are now more frequent than those in which the law steps in and enforces these very duties. The man who refuses to supply his apprentice with suitable food; the husband who neglects the proper nurture of his wife; the stranger who lets a helpless infant starve at his gate, have each, when injuries have ensued, been held penally liable. Now, on what principle do these cases rest? Certainly, not on statute, because there is no statute on the subject. They are sustained on that broad principle of common law, that, when a duty is violated, a penalty will be imposed. But what is there to declare this duty? The only method of solving this difficulty is by resort to the great substratum of Christian ethics, on which the common law, as declared judicially by the English courts, from whence we took it, is founded: Whart. Cr. Law, § 2544.

27. The common law is also defined to be the experience of the past, and the wisdom of the present, age, applied to the exigencies of the particular case. See *Cottrill* v. *Myrick*, 3 Fairf. 222. In this sense it includes not only the decisions of the courts, but the opinions of experts on the particular branches to which their attention has been devoted. Thus, the evidence of persons acquainted with navigation is admissible upon the facts as developed in cases of collision, or loss from alleged unseaworthiness; of persons conversant with handwriting, as to whether a paper was forged; of seal-engravers, as to the genuineness of an impression; of artists, as to whether a painting is an original or a copy; of postmasters, as to the genuineness of a postmark; of scientific engineers, as to the effect of an embankment on a harbor; of practical surveyors, as to whether certain marks were intended as boundaries or terriers; and of naturalists, as to whether the habits of certain fish were such as to enable them to overcome certain obstructions in a river. And so, nothing is

more common than to examine a surgeon as to whether death resulted from natural causes, or from certain artificial agencies which may be the subject of inquiry. On this principle the opinion of medical men as to whether particular symptoms, supposing them to exist, constitute insanity, is part of the law of the case: Whart. Cr. Law, § 47.

28. As a further illustration of the use that is made of the common law, the following is selected:—Murder, defined at common law, is where a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm, any reasonable creature *in rerum natura*, under the king's peace, with malice forethought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c., die of the wound, or hurt, &c., within a year and a day after the same: Bracton, l. 3, fo. 20 *et seq.*; Britton, fo. 5, 18; Fleta, l. 1, c. 23 and 30.

29. Every word of any importance in the above definition, has been made the subject of judicial decisions in various ages, and the meaning and force of each of them, with the various consequences arising directly out of, or collateral to them, have been, by those adjudications, absolutely fixed and determined. These, and similar adjudications relating to crimes, comprise some of the most important features of the common law. Thus, in the definition selected, as to what is sound memory; what the age of discretion; what unlawfully killing; what a reasonable creature *in rerum natura;* what under the king's peace; and what express and implied malice, have all been judicially declared. So have the various questions connected with killing within any county of the realm; how the year and a day are to be accounted; who are principals and who accessories; whether the offence is murder, or manslaughter, or justifiable homicide, and numerous other incidental questions that have been brought practically before the courts during the thousand years that the principles of the common law have been in force in the nation from which we derived it.

30. As much space as could be spared has now been devoted to a consideration of the origin, early history, and general principles of the common law. Further consideration will be given to these last, in detail, in subsequent parts of this article. The following brief extracts are given from a learned defender of the