Chapter VIII

TORT AND CRIME

OVER a hundred and fifty years ago, Lord Mansfield said, "there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions".[1] The whole attitude of English lawyers towards these distinctions is epitomized in this quotation. They have repeatedly assumed that these distinctions are well known and that they are clear, but very few of them from Lord Mansfield downwards have tried to explain what they are, and, upon the whole, the result at the present day is that, while every lawyer feels that there are obvious differences, none can state in exact terms what they are.

At the outset of the Common Law, the position was much the same. Both in theory and in practice there was a perception of the distinction between civil and criminal proceedings, but there was no sharply cut division between them. The two were a viscous intermixture.[2] Every cause for a civil action was an offence, and every cause for a civil action in the King's court was an offence against the King punishable by amercement, if not by fine and imprisonment. Even the line between Pleas of the Crown—a phrase which until quite modern times was equivalent to criminal cases—and Common Pleas was a blurred one,[3] and appeals of felony might well defy any classification. Then came another element of confusion, and a strong one. That was the double aspect of trespass in its old wide sense. It could be dealt

[1] *Atcheson* v. *Everitt* (1775) 1 Cowp. at p. 391.
[2] Winfield, *History of Conspiracy* (1921), 92.
[3] Pollock and Maitland, ii, 572–573.

with criminally on presentation at the tourn or before the King's judges, and such trespasses became the misdemeanours of later law.[1] Yet a civil action was also available. In fact, it is extraordinary how these civil actions supplemented to some extent the meagre list of crimes in our early law.

"The man who has put a cat into his neighbour's dovecot", says Sir William Holdsworth, "or who has extracted wine from his neighbour's casks and filled them with sea-water; the man who has removed his neighbour's landmark, or destroyed his neighbour's sea wall; the man who has laid waste his neighbour's fields, or besieged his house—all are sued by an action of trespass."[2]

And yet nowadays there is not a single one of these acts that is not also a crime. It is worth repeating here that so late as 1694, the defendant to a writ of trespass was theoretically liable to fine and imprisonment.[3] The same learned author has pointed out that the Star Chamber, while it widened the horizon of our criminal law, also tended to obscure still more the indeterminate boundary between crime and tort; for, though it treated certain acts as criminal, the Common Law courts remedied the same or similar acts by civil actions on the case for damages.[4]

Thus, historical antecedents leave us with nothing exact. Writers of the nineteenth and twentieth centuries have at least made efforts—some of them very strenuous ones—to remove the uncertainty. In the previous chapter on Tort and Quasi-contract, it was said that the chief difficulty of separating these topics was the perfunctory way in which the limits of quasi-contract had been treated by English authors. No such complaint can be made against those who have ex-

[1] Holdsworth, *History of English Law*, iii, 317–318.
[2] *Ibid.* iii, 370.
[3] Pollock, *Torts*, 590.
[4] Holdsworth, *op. cit.* viii, 306.

pounded criminal law. It is certainly not the lack of effort that is chargeable with the somewhat disappointing results which have been achieved. Such failure as there is must be attributed to the intractability of the subject-matter.

The following are some of the leading definitions of a crime:

(1) Sir James Stephen regarded it as

an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act.

But he was not much satisfied with his own definition.[1]

(2) Crimes are wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the Crown alone, if remissible at all.[2]

So the late lamented Professor Kenny in his brilliant *Outlines of Criminal Law*. He expended so much care on searching for the distinction between crime and tort that we shall have occasion to refer later to his analysis more often than to any other. It is safe to assume that every one is acquainted with the details of it and his reasons for rejecting wholly or in part other definitions.

(3) The term "crime" or "criminal offence" is applicable only to acts (and omissions) for which the law awards punishment.[3]

(4) A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment...it is as an act or default contrary to the order, peace, and well-being of society that a crime is punishable by the state.[4]

(5) The only certain lines of distinction are to be found in the nature of the remedy given, and the nature of the procedure to

[1] *History of Criminal Law* (1883), i, 1, 2, 3.
[2] 13th ed. (1929), 15–16.
[3] Harris, *Criminal Law* (14th ed. 1926), 1.
[4] 9 *Laws of England* (Halsbury), § 499.

enforce the remedy. If the remedy given is compensation, damages, or a penalty enforced by a civil action, the wrong so redressed is a civil wrong. If the remedy given is the punishment of the accused, which is enforced by a prosecution at the suit of the crown, the wrong so redressed is a crime or criminal in its nature. Even this test sometimes fails to establish a clear line of difference.[1]

These are fair specimens and we need burden the text with only one more. In one shape or another, other modern books have embodied it.

(6) Blackstone's analysis is to be gleaned from these passages in his *Commentaries*.[2] He first says that a crime is "an act committed, or omitted, in violation of a public law". Then he goes on:

> The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist 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 and misdemeanours, are a breach and violation of the public rights and duties, due to the whole community, considered as a community in its social aggregate capacity.

And it is clear from a later sentence that he regards punishment as an essential consequence of crime, and an additional distinction between crimes and civil injuries.

When we turn to the law reports, we find that judicial definitions of crime are extremely scanty and not very informative. Here are three samples extending over a century. "The proper definition of the word 'crime' is

[1] Holdsworth, *op. cit.* viii, 306. The last paragraph is supported by a citation of *A-G.* v. *Bradlaugh* (1885) 14 Q.B.D. 667, where the proceedings, though conducted at the suit of the Crown, were nevertheless held to be civil, not criminal.

[2] Vol. iv, 5–7.

an offence for which the law awards punishment."[1] "An illegal act which is a wrong against the public welfare seems to have the necessary elements of a crime."[2] "An offence against the public law."[3]

Nor is any help to be derived from the legislature. When Parliament has had occasion to define a "crime", sometimes its interpretation of that word, though doubtless useful for the purposes of the particular statute in which it is contained, merely affords opportunities for parody from a scientific point of view.[4] Sometimes, however, the signification attached to the word has gone pretty near a good general working definition,[5] though not such as would be likely to be adopted if the law were "restated" or codified.

Another line of approaching the subject is to attempt a definition of "criminal proceedings" and to contrast them with "civil proceedings" rather than to define crime.[6] This is unquestionably a more practical adventure, for it is no exaggeration to say that in the law courts there has scarcely ever been any need to define crime, while there are scores of *dicta* or decisions on the distinction between criminal and civil "proceedings", or "causes" or "matters". Indeed, this accounts for the poverty of information about "crime" in the law reports. But the moment we pass from crime in the abstract to litigation in connection with it, consequences of importance at once emerge according to whether the proceedings are criminal or not. They differ from civil

[1] *Mann* v. *Owen* (1829) 9 B. & C. 595, 602.

[2] Lord Esher M.R. in *Mogul S.S. Co.* v. *McGregor, Gow and Co.* (1889) 23 Q.B.D. at p. 606.

[3] Viscount Cave in *Clifford* v. *O'Sullivan* [1921] 2 A.C. at p. 580; and the Judicial Committee of the P.C. in *Nadan* v. *R.* [1926] A.C. at p. 489, and in *Chung Chuck* v. *R.* [1930] A.C. at p. 250.

[4] E.g. Prevention of Crimes Act, 1871, s. 20. Prevention of Crime Act, 1908, Sched.

[5] Conspiracy and Protection of Property Act, 1875, s. 3.

[6] E.g. Russell, *Crimes* (8th ed. 1923) i, 1.

cases in the rules of evidence, in waiver of the rules of procedure, in the Crown's power of pardon, and in other ways.

It has been said that a civil proceeding has for its object the recovery of money or other property, or the enforcement of a right for the advantage of the persons suing, while a criminal proceeding has for its object the punishment of a public offence.[1] And it has also been indicated that the mildest grade of punishment—a fine —suffices to make the proceeding a criminal one.[2] But it is the phrase "criminal cause or matter" rather than "criminal proceeding" which has evoked most judicial interpretation. No appeal lies (except under the Criminal Appeal Act, 1907), from any judgment of the High Court in any criminal cause or matter.[3] It is well settled that this term must be taken in its widest sense. It applies to "a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises".[4] Thus an application for a writ of habeas corpus on extradition proceedings,[5] and the taxation of costs on a judgment for the accused in a criminal information for libel are criminal causes or matters.[6] It is obvious that many decisions of this nature can be of no assistance in determining the difference between crimes and civil injuries. If crime is in the air, so to speak, the cause or matter is

[1] 9 *Laws of England* (Halsbury), § 499. Practically the same as Platt B. in *A-G.* v. *Radloff* (1854) 10 Ex. 84, 101–102.

[2] Pollock C.B. in same case, at p. 109.

[3] Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, s-s. 1 (*a*), re-enacting in effect Judicature Act, 1873, s. 47.

[4] Lord Esher M.R. in *Ex parte Woodhall* (1888) 20 Q.B.D. at p. 836. This was approved in effect by the H.L. in *Provincial Cinematograph, etc. Ld.* v. *Newcastle-upon-Tyne, etc.* (1921) 125 L.T. 651. See too [1921] 2 A.C. at p. 580.

[5] *Ex parte Woodhall* (1888) 20 Q.B.D. 832.

[6] *R.* v. *Steel* (1876) 2 Q.B.D. 37.

a criminal one by a species of infection. But this much does seem to be clear. The cause or matter is criminal if the source of it is something which may result in imprisonment, or in a fine, with imprisonment as a possibility on non-payment of the fine.[1] But it would be wrong to deduce from this that such imprisonment or fine can be seized upon as the test of *crime*. Thus, in *Seaman* v. *Burley*[2] a judgment to enforce payment of a poor-rate by distress warrant was held by the Court of Appeal to be a judgment in a criminal cause or matter, because the proceedings *might*, though they *need not*, end in imprisonment. Yet two of the Lord Justices (Kay and A. L. Smith) seemed to regard the non-payment of the rate as not a crime; but the whole court attached no importance to the question whether it was or not, and concentrated attention on whether the proceeding was a criminal cause or matter.

Let us turn back to the various definitions of crime at the beginning of this chapter and see which, if any, of them can be adopted or adapted. It will be noticed that, however much they differ in other respects, there is one element common to them all. A crime always involves *punishment*. If an exact meaning can be attached to that term, then we can mark off crimes from civil injuries. But before we investigate this, we must dispose of an additional suggested test. Dr Kenny regarded the sanction of crime not only as punitive, but as "remissible by the Crown alone, if remissible at all". Now "sanction" in this context signifies punishment. It does not refer to any part of a criminal proceeding prior to punishment, e.g. a *nolle prosequi*; for Kenny himself rejected the supposed distinction between crimes and civil injuries that the redress of the former can be initiated

[1] Bramwell L.J. in *R.* v. *Whitchurch* (1881) 7 Q.B.D. 534. *Robson* v. *Biggar* [1908] 1 K.B. 672.

[2] [1896] 2 Q.B. 344.

by the Crown only, and he expressly uses "sanctions" as equivalent to "punishments".[1] "Remission" must therefore refer to pardon by the Crown, for the only way in which the Crown can remit a punishment is by pardon. If, then, it can be ascertained what the scope of pardon is, that ought to indicate also the scope of crime. This, unfortunately, is precisely where the definition breaks down. Coke tells us that a pardon cannot affect civil rights, but he does not explain what civil rights are.[2] And we learn from the law reports that crimes which are pardonable are only those which are against the public laws and statutes of the realm,[3] and that pardon extends to sentences of a punitive character.[4] But while the tendency of a wrong to injure the public is a factor by no means to be ignored in considering the criminality of such wrong it is too vague to rest the whole weight of a definition of crime upon it. And the description of pardon as applicable to sentences of a punitive character appears to put the question only one step further back—"What is punishment?" Other writers merely state that the prerogative of pardon applies to nothing but crime. This leads to a vicious circle. What is a crime? Something that the Crown alone can pardon. What is it that the Crown alone can pardon? A crime. Thus, it does not seem advisable to accept this part of Dr Kenny's definition.

What then is punishment? We should instantly

[1] *Criminal Law*, 14. He says just before this that interference by the Crown with *continuation* of proceedings is a mark of their being criminal, but it would appear that he is explaining Austin's analysis of criminal procedure.

[2] 3 Inst. 236.

[3] *Bentley* v. *Episc. Eliens.* (1731) 2 Stra. 912 (pardon does not extend to "crimes" constituted by breaches of the private statutes of a college. They are in the nature of domestic rules for the better ordering of a private family).

[4] *In the Matter of a Special Reference from the Bahama Islands* [1893] A.C. 138.

recognize a sentence of death, of penal servitude, of whipping, as such. A pecuniary fine, whether with or without imprisonment in default of payment is also in general a punishment,[1] but if a pecuniary payment is a civil debt, the order to pay it is not punitive. As to imprisonment, it cannot be said offhand whether it is a punishment or not. As a general rule if it is merely coercive, it is not.[2] If the delinquent is sent to prison simply to compel him to do something, and if he is to be released the moment he does it, then his incarceration is only coercive. Such is the case where a bailiff is sent to gaol because he will not make good his liability for excessive charges extorted by him in levying a distress.[3] Nothing but recourse to the statutes imposing imprisonment in any particular circumstances will help to decide whether it is coercive or punitive. The wrongful act itself gives no reliable assistance, and it is worth while repeating that decisions as to what is a criminal cause or matter within the Judicature Acts may quite conceivably throw no light whatever on whether a crime has been committed or not, and that they may well be a source of confusion as to the meaning of imprisonment. For instance, non-payment of a poor-rate is a criminal cause or matter, because it may result in imprisonment;[4] non-payment of a general district rate is not a criminal cause or matter, because such a rate is a mere civil debt.[5] Yet it may equally result in imprisonment. And in each case the imprisonment is only coercive and not punitive. Probably too, in neither case would the court have held the non-payment to be a crime, though in fact there was

[1] *Parker* v. *Green* (1862) 2 B. & S. 299, 309, 311.

[2] Kenny, *op. cit.* 14.

[3] *Robson* v. *Biggar* [1908] 1 K.B. 672. *R.* v. *Daly* (1911) 75 J.P. 333.

[4] *Seaman* v. *Burley* [1896] 2 Q.B. 344.

[5] *Southwark, etc. Water Co.* v. *Hampton U.D.C.* [1899] 1 Q.B. 273.

no necessity to pronounce whether it was such or not. It does not, however, seem to be an invariable rule that coercive imprisonment is never applicable to crime. A parent who does not send his child to school commits a criminal offence,[1] and he is liable to imprisonment if he will not pay the fine imposed on him for this.[2] Yet surely such imprisonment is coercive, not punitive. Still, in the vast majority of cases it is safe to say that coercive imprisonment is not a punishment.

Before summing up, one or two other points may be noted. Occasionally the idea of evil in punishment is stretched to breaking-point. One of the sanctions which can be imposed on a parent who does not send his child to school is not a fine, not imprisonment, but an order that the child shall go to a certified industrial school.[3] This is a proceeding which presumably benefits both child and parent; but perhaps it may be regarded as punitive in depriving the parent of the liberty of selecting the school to which the child is to be sent.

Again, two words used in connection with criminal law have a troublesome ambiguity. They are "penalty" and "offence". When they occur in statutes they generally connote a criminal act,[4] but judges have certainly not considered themselves bound always to interpret them in this way.[5] Non-payment of a cab fare is recoverable as a penalty before a justice of the peace; yet it is purely a civil debt.[6]

Finally, in determining whether disobedience to a statute is a misdemeanour (assuming that the statute itself is silent on the point except for the imposition of

[1] *Mellor* v. *Denham* (1880) 5 Q.B.D. 467.
[2] Education Act, 1921, s. 45.
[3] *Ibid.*
[4] *R.* v. *Paget* (1881) 8 Q.B.D. 151.
[5] Platt and Martin BB. in *A-G.* v. *Radloff* (1854) 11 Ex. 84. *Derbyshire C.C.* v. *Borough of Derby* [1896] 2 Q.B. 53.
[6] *R.* v. *Kerswill* [1895] 1 Q.B. 1.

a penalty), it is a question of construing the statute in each case; and the test has been stated as being whether the duty created is towards the public and whether the remedy is intended to be enforced in the interests of the public.[1]

The result, then, may be thus propounded. The essence of punishment is its inevitability. When once liability to it has been pronounced, no option is left to the offender as to whether he shall endure it or not. He can get rid of it, in general, only by suffering it. Contrast this with a civil case. There, if he is adjudged to pay a debt, or is cast in damages, or is put under an injunction, he can always compromise or get rid of his liability with the assent of the injured party.

Now the only tolerably certain test of crime is, "Does the conduct complained of render the offender liable to punishment?" Another consideration, which is a guide rather than a secondary test, is, "Does such conduct have an evil effect on the public?" But while it would be neither wise, nor indeed possible as matters now stand, to reject this as a guide, it is too nebulous to be incorporated in a definition. A crime may, therefore, be defined as *a wrong the sanction of which involves punishment*; and punishment signifies death, penal servitude, whipping, fine, imprisonment (but not, as a rule, non-coercive imprisonment), or some other evil which, when once liability to it has been decreed, is not avoidable by any act of the party offending.

We may be reproached with having expended a good deal of energy in getting no further than Blackstone and his successors have done. That may be so, but at least the line of investigation has been an independent one, and hitherto most writers, with the exception of Dr Kenny, have assumed that punishment needs no explanation. It may likewise be urged that the attempt

[1] Bowen L.J. in *R.* v. *Tyler*, etc. [1891] 2 Q.B. at p. 594.

to define crime is unpractical, and that it would have been better to centre attention on criminal proceedings. But it has been shewn that this would be a mere exchange of one obscure topic for another. Nor is it clear why, in the interests of scientific exposition, we should be driven to put what is really a piece of substantive law wholly under the law of procedure.

Tort can be distinguished from crime in that the sanction for crime is punishment, while the sanction for tort is an action for damages. These damages may be exemplary or punitive, but they are not within the definition of punishment which has just be developed.

But it must not be hastily inferred that damages can never be awarded in connection with a crime. We do not refer to the fact that the same circumstances may constitute both a crime and a tort, for that is hardly worth stating. What we are here considering is that it is possible in some criminal proceedings to claim unliquidated damages. This will appear when the various pecuniary payments procurable in such proceedings are examined.

A fine is often one of the punishments that can be inflicted for crime. It has usually an upward limit, but its amount within that limit is in the discretion of the court. It is therefore indefinite until the court has fixed it, and in that sense is quite as uncertain as the amount of damages claimable in an action in tort until these are assessed by the judge or jury. Till that moment the sum is as unliquidated in the one case as in the other. But the very notable difference is that whereas the damages in a civil action go to the injured party, the fine in a criminal proceeding does not (subject to exceptions shortly to be noticed) enure to the injured party, but to the Crown. In other words, a fine cannot be described as "damages" at all, for it benefits the injured party nothing. And so far we could rule out fines as having no bearing on the matter under discussion.

But there are circumstances in which pecuniary compensation is payable by a convicted criminal to the injured private party, who is therefore actually benefited. In the first place, "fine" includes (at any rate in a Court of Summary Jurisdiction) "any pecuniary penalty or pecuniary forfeiture or pecuniary compensation payable under a conviction".[1] Thus, on a summary conviction for wilful or malicious damage (not exceeding £20) to property, the court, in addition to inflicting fine or imprisonment, may award reasonable compensation to the party aggrieved.[2] Again, it is possible for criminal courts in general to award compensation in other circumstances. Under the Probation of Offenders Act, 1907, s. 1 (3), such damages for injury or compensation for loss as the court thinks reasonable may be ordered to be paid by the offender. This is in addition to any other order which the court may make. More generally still, where an accused person has been convicted of felony, the court may, on the application of any person aggrieved, immediately after conviction, award any sum not exceeding £100 by way of satisfaction or compensation for any loss of property suffered by means of the felony.[3] This compensation is in addition to, and not a substitute for, the punishment appropriate to the crime.[4]

Now these species of compensation[5] are undoubtedly just as much unliquidated as are damages for a tort; and they unquestionably benefit the injured private party and not the Crown. But there is one feature peculiar to

[1] Summary Jurisdiction Act, 1879, s. 49.

[2] Criminal Justice Administration Act, 1914, s. 14.

[3] Forfeiture Act, 1870, s. 4.

[4] *R.* v. *Lovett* (1870) 23 L.T. 95.

[5] Discretionary rewards payable in connection with the apprehension of persons charged with crime are irrelevant to the discussion. Their source is not any property of the accused, and the person whom they benefit is not necessarily the person injured by the crime. Information with respect to them will be found in Russell, *Crimes* (8th ed. 1923), 1888–1891.

them all which marks them off from damages in tort. In every case they are obtainable only *in addition to* some punishment, or order in the nature of punishment, inflicted or made by the court. They are not the primary remedy in the criminal proceeding; but only a secondary one. In a civil action, on the other hand, the claim for damages can always be made in priority to any other claim. It is true that under the Probation of Offenders Act, 1907, it is possible for the court to award the compensation if, in the opinion of the court, "it is inexpedient to inflict any punishment". But even then the court must, before it can make the award, pronounce an order of some sort, whether it be a dismissal of the charge, a discharge on recognizances, or a release on probation; and none of these courses is permissible unless the court holds that the offence charged is proved.

Hence, in crime unliquidated damages benefiting the injured party are not claimable in the first instance; in tort they are.