have been useful and even necessary; but that is not the case at the present day. Parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, Parliament will soon supply them. If Parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct against which the moral feeling and good sense of the community are the best protection. Besides, there is every reason to believe that the criminal law is and for a considerable time has been sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals, which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought in our opinion to be left in the hands of Parliament. If it should turn out that we have overlooked some common law offence, we think it better to incur the risk of giving a temporary immunity to the offender than to leave any one liable to a prosecution for an act or omission which is not declared to be an offence by the Draft Code itself or some other Act of Parliament.

But whilst we exclude from the category of indictable offences any culpable act or omission not provided for by this or some other Act of Parliament, there is another branch of the unwritten law which introduces different considerations; namely, the principles which declare what circumstances amount to a justification or excuse for doing that which would be otherwise a crime, or at least would alter the quality of the crime. In the cases of ordinary occurrence, the decisions of the Courts and the opinions of great lawyers enable us to say how the principles of the law are to be applied. And so far the unwritten law may be digested without extreme difficulty and with practical advantage, and so far also it may be settled and rendered certain.

In our opinion the principles of the common law on such subjects, when rightly understood, are founded on sense and justice. There are a few points on which we venture to suggest alterations, which we shall afterwards state in detail. At present we desire to state that in our opinion it is, if not absolutely impossible, at least not practicable, to foresee all the various combinations of circumstances which may happen, but which are of so unfrequent occurrence that they have not hitherto been the subject of judicial consideration, although they might constitute a justification or excuse, and to use language at once so precise and clear and comprehensive as to include all cases that ought to be included, and not to include any case that ought to be excluded.

We have already expressed our opinion that it is on the whole expedient that no crimes not specified in the Draft Code should be punished, though in consequence some guilty persons may thus escape punishment. But we do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risk of a Code being so framed as to deprive an accused person of a defence to which the common law entitles him, and that it might become the duty of the judge to direct the jury that they must find him guilty, although the facts proved did show that he had a defence on the merits, and would have an undoubted claim to be pardoned by the Crown. While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law so far as it affords a defence should be preserved in all cases not expressly provided for. This we have endeavoured to do by Section 19 of the Draft Code.

Perhaps our meaning cannot be better explained than by stating the reasons why we have on revision altered the clause on Compulsion which formed the twenty-second section of the Bill, and have altogether struck out the clause on Necessity, which formed the twenty-third section. (These reasons will be found in Note A to this Report.)

The mode in which we suggest that the principles of the common law should be dealt with will be found in Part III of the Draft Code. It would be easy to enunciate in general terms and as abstract propositions the common law maxims which guide the judges in administering the law; and the adoption of such a course would much shorten any Code, but would be attended with the disadvantages we have already pointed out. The principle which is derived from a number of decisions is applied to a new state of things, not according to the words in which it was originally expressed, but according to its substance. But if it were laid down in a Code, it would either have to be applied as it was expressed in the Code, or a latitude would be left which would deprive the Code of all certainty. We have been guided in

framing this Part of the Draft Code by principles, several of which we may here enunciate with sufficient accuracy for the purpose of this Report.

We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and justify many of our suggestions. It does not seem to have been universally admitted*; and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognised as the law in future, but that it is the law at present. But as this is in the nature of an argument, we have thought it better to print it as a note. (See Note B to this Report.)

Again, it is a principle of the common law that what the law requires it justifies —*Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud* (5 Rep. 115 *b.*) It it is also a principle of the common law that all powers, the exercise of which may do harm to others, must be exercised in a reasonable manner, and that if there is excess, the person guilty of such excess is liable for it according to the nature and quality of his act.† It may also be said to be a principle of the common law that where a person is under a legal duty on notice of certain facts to take certain action, he will be protected in acting on the honest belief, formed without negligence and on reasonable grounds, that those facts did exist, though that belief was mistaken.

For the reasons already given, instead of endeavouring to enunciate these principles in abstract and general terms, we have judged it better to declare expressly what the law is in cases of such frequent or probable occurrence, that the law in respect of them has been settled,—suggesting some few alterations,—and leaving the general principles to be applied to cases so extraordinary that the law as applicable to them has never yet been decided, when if ever they arise.

There is a difference in the language used in the sections in this Part which probably requires explanation. Sometimes it is said that the person doing an act is "justified" in so doing under particular circumstances. The effect of an enactment using that word would be not only to relieve him from punishment, but also to afford him a statutable defence against a civil action for what he had done. Sometimes it is said that the person doing an act "is protected from criminal responsibility" under particular circumstances. The effect of an enactment using this language is to relieve him from punishment, but to leave his liability to an action for damages to be determined on other grounds, the enactment neither giving a defence to such an action where it does not exist, nor taking it away where it does. This difference is rendered necessary by the proposed abolition of the distinction between felony and misdemeanour.

We think that in all cases where it is the duty of a peace officer to arrest, (as it is in cases of felony,) it is proper that he should be protected, as he now is, from civil as well as from criminal responsibility. And as it is proposed to abolish the distinction between felony and misdemeanour, on which most of the existing law as to arresting without a warrant depends, we think it is necessary to give a new protection from all liability (both civil and criminal) for arrest, in those cases which by the scheme of the Draft Code are (so far as the power of arrest is concerned) substituted for felonies. In those cases therefore which are provided for in sects. 32, 33, 34, 37, 38, the word "justified" is used. A private person is by the existing law protected from civil responsibility for arresting without warrant a person who is on reasonable grounds believed to have committed a felony, provided a felony has actually been committed, but not otherwise. In sect. 35, providing an equivalent for this law, the word used is "justified." On the other hand, where we suggest an enactment which extends the existing law for the purpose of protecting the person from criminal proceedings, we have not thought it right that it should deprive the person injured of his right to damages. And in cases in which it is doubtful whether the enactment extends the existing law or not, we have thought it better not to prejudice the decision of the civil courts by the language used. In cases therefore such as those dealt with by sects. 29, 30, 31, 36, 39, 46, 47, we have used the words "protected from criminal responsibility."

* See Lord St. Leonards' Bill of 1853 (No. 106).