

PRESUMPTIONS IN CRIMINAL CASES.

little has been left to say in the way of reply to those who wish things as they are, that has not been already well said in the public press.

The matter is now before the public. I have obtained the object I aimed at in addressing Grand Juries, which was not to draw out an expression of opinion from the particular body addressed. I merely availed myself of these occasions, hoping to direct public attention to what I believed to be a great defect in the criminal law, which a long experience has convinced me required reform—a reform that could be economically, easily and safely accomplished.

SELECTIONS.

PRESUMPTIONS IN CRIMINAL CASES.

PRESUMPTION OF INTENT.

(Continued from p. 143.)

Now, in no one of the four cases above given does the intent square with the execution, yet of what are called malicious killings these categories constitute a large proportion. Taking them in connection with negligence, we may say, therefore, that in only a small proportion of offences does the offender execute that which he really intends. It is not generally true, therefore, but generally false, that an act is intended by its perpetrator.

Does this again, land us in scepticism? Because we have to reject the proposition that all offences are intended, are we to sweep out of existence the entire category of malicious crimes, and say that there is no way in which a malicious crime can be proved? So far from this being the case, the rejection of the false proposition here criticised leads us to the only logical and just way in which malice can be established. It undoubtedly imposes higher intellectual labour on bench and bar, and requires from them higher intellectual gifts than did the old system by which malice was at the outset assumed. It undoubtedly is an easy thing to say, "he did it, therefore he did it maliciously and intentionally." But it is an untruth in many cases, and in all cases is a *petitio principii*; sometimes leading to bad pleading, causing men to be indicted for the wrong crime instead of the crime really committed; sometimes oppressing innocent men, by throw-

ing the burden of proof on them, when the burden is really on the other side; sometimes producing acquittals because the jury feel that the assumption is an outrage on common sense, as when they are told that shooting a tame fowl, with intent to steal, when the ball glances and strikes B, whom the assailant did not see and had no reason to imagine to be in the neighbourhood, is shooting at B, "with intent the said B, feloniously, wilfully, and of malice aforethought, to kill and murder." The only logical and right way is to indict a man for what he really does. If he is trying to steal a tame fowl, then he is indictable for an attempt at larceny. If he kills a man negligently when trying to steal the fowl, then he is indictable for negligent homicide. And when he is indictable for an intentional and malicious act, then the conclusion is to be reached by a canvassing of all the circumstances of the case. No two cases are precisely alike. There is no rule which fits absolutely even two cases. We must put all the facts together, and examine whether from them by free logic, we can infer malice. The process is not deductive, but inductive. It is determinable not *a priori* by any postulate of positive jurisprudence, but, after the evidence is in, by inference from all the circumstances of the case. The question, therefore, is one of fact for the jury, to be adjusted by the law of sound reasoning, not by technical jurisprudence to be absolutely pronounced by the court. Yet, while for the jury, and, in the sense above stated, a question of fact, it is also a question of law in its most comprehensive sense, of the law of inductive proof. And to this law, as pouring its light upon all the circumstances of the case, should the attention of counsel be turned in their argument, and of the courts in their charge.

FALSIFICATION OF EVIDENCE.

In the days of Sir Elijah Impey, an English merchant in India was sued on a promissory note. "It is forged," said he to his attorney. "Never mind," was the reply, "We will make it all right." The client gave the attorney a list of witnesses who would prove the forgery, and went into court expecting to hear them called. To his surprise, his counsel, after