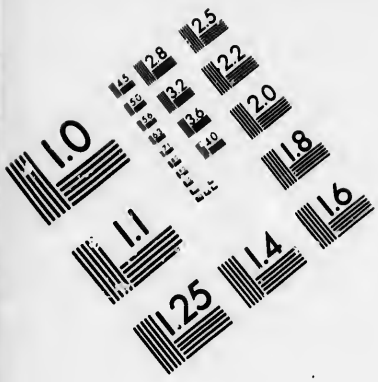

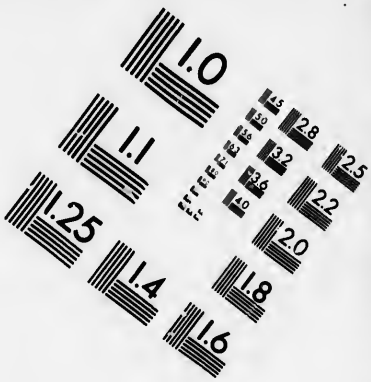

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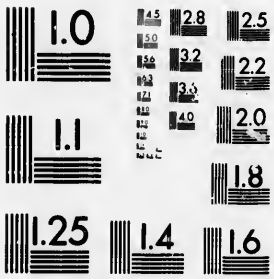

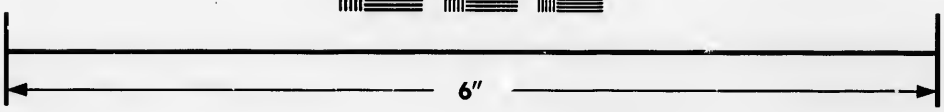

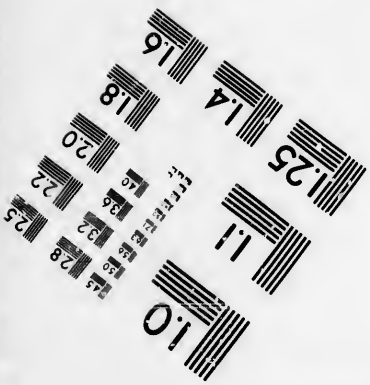

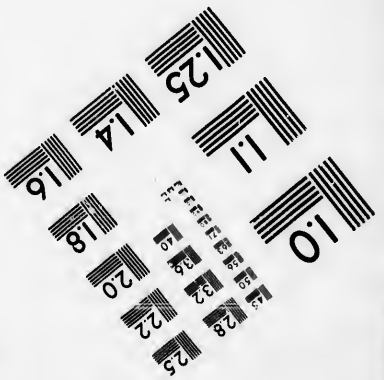

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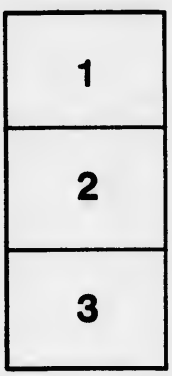

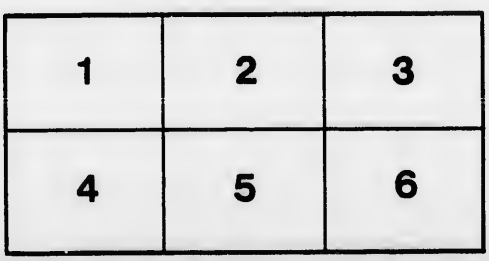

THE

CRIMINAL STATUTE LAW

OF THE

DOMINION OF CANADA,

RELATING TO INDICTABLE OFFENCES,

WITH FULL TEXT AS REVISED IN 1886, AND PUT INTO FORCE BY ROYAL PROCLAMATION ON THE 1ST DAY OF MARCH, 1887,

AND

Cases, Notes, Commentaries, Forms, etc., etc.

BY

HENRI ELZÉAR TASCHEREAU,

One of the Judges of the Supreme Court of Canada.

SECOND EDITION,

REVISED, RE-ARRANGED AND ENLARGED.

Toronto:

CARSWELL & CO., LAW PUBLISHERS.

1888.

MONTREAL:
PRINTED BY JOHN LOVELL & SON.
1883.

PREFACE.

THE passing into law, by Royal Proclamation, on the 1st day of March last, of the Revised Statutes of Canada, has rendered necessary the publication of a new edition of this work, adapting the references, notes, commentaries and forms contained in the previous edition to each section they respectively apply to of the Criminal Statutes as they now stand consolidated and revised.

The occasion could not be lost of bringing the collection of the English Crown cases down to the latest possible date, and this will be found to have been done, as completely as the character of the book would permit, down to the 1st day of January last.

To these have also been added a large number of cases from all the Provinces of the Dominion, principally selected, for obvious reasons, from those determined since the Criminal Statute Law was made uniform throughout the Dominion, in 1869.

The profession may judge, by the number of these additional references to the cases, of the extent of the enlargement of the book in this respect alone. The first edition contained 1984 references; this one has 800 more: in all 2784.

Another most important addition to the work, and one which, it is confidently believed, must greatly enhance its value, are Mr. Greaves' MSS. notes, on various subjects, which the author, at different times, has been

favored with, and which are now, for the first time, published, with the eminent writer's kind permission. These will be found scattered throughout the book under the sections of the Statutes upon which they respectively bear. Special attention is called, in this respect, to the note on new trials and *venire de novo*, page 991, and to the note on section 37 of the *Offences against the person* Act, page 1081.

A number of statutes, with full text, notes and cases, not comprised in the first edition, will also be found in this one. It was at first intended to give it a still wider scope, and to include, with notes, commentaries and the cases relating thereto from England and all the Provinces of the Dominion, the penal clauses comprised in the *Customs* Act, the *Inland Revenue* Act, the *Indian* Act, the *Government Railways* Act, the *Trade Marks* Act, the *Postal Service* Act, the *Banks and Banking* Act, the *Wrecks and Salvage* Act, and various other federal acts, throughout which are to be found enactments creating not only a large number of penalties recoverable under the *Summary Convictions* Act, but, also, in many instances, misdemeanors and felonies of a grave nature.

This would, however, have necessitated the publication of the work in two volumes, and would have added so much to its cost that, on the advice of the publishers, this intention had to be abandoned.

Limited as must necessarily be, in Canada, the circulation of any book on Criminal Law, it is obvious that, for a volume on that class of statutory offences, it would

be still more so, and consequently, altogether inadequate to its cost. Should the Federal Government deem it advisable to give any assistance towards defraying the disbursements, the volume may be published separately.

The present one as it is may, it is hoped, be of some use to the profession, and this will be a full reward for the no small amount of labor necessarily bestowed upon it.

To C. H. MASTERS, Esq., of the New Brunswick Bar, Assistant Reporter to the Supreme Court, I am indebted for much valuable assistance, and for the Index, Tables of Cases, Statutes, etc.

OTTAWA, February 16, 1888.

---

11 *Blandford Square,*
March 7, 1878.

Dear Mr. Justice Taschereau,

. . . . . *I send you by book post my notes.*

. . . . . .

They have been thrown together at intervals, and are rudis et indigesta moles, *and far from what I would have wished; indeed, so much so, that I have doubted about sending them; but, on the whole, feeling that you will be kind enough to look with an indulgent eye upon them, I think it better to send them, as they may suggest some points that have not been apparently so fully considered as they deserve.* . . . . .

I wrote these papers in order that they might as far as I could clear up these questions, and you are perfectly at liberty to make any use of them you may think fit; and should you deem them worthy of a place in your valuable work, I shall indeed deem it a very high honour in every way. . . . . . .

. . . . . .

C. S. GREAVES.

PREFACE TO THE FIRST VOLUME OF THE FIRST EDITION *(part.)*

The following pages are hardly any thing else but a compilation. They may, nevertheless, perhaps prove useful. . . . . .

. . . . . .

It has not been forgotten that

> Longum iter est per præcepta,
> Breve et efficax per exempla,—*Seneca.*

and the reported English Crown cases will be found numerously cited . . . . . The weight of their authority and their practical importance, for the Dominion of Canada, have been largely increased by the enactment of the Criminal Law Consolidation Acts of 1869, based, as these are, on the Imperial Criminal Law Consolidation Acts of 1861, and taken almost textually from them.

At the end of each clause will be found cited the corresponding clause of the Imperial Statute, and any material difference between both mentioned.

The annotations made by the learned Mr. GREAVES, Q.C., on "Lord Campbell's Acts," of 1851, and the Consolidated Acts of 1861, have been compiled and inserted (under each section.) These annotations are rendered the more valuable by the fact that these Statutes were framed by Mr. Greaves who, it will be remembered, was said by a high authority in England, in 1874, to be "the most eminent living writer on the subject of Criminal Law."

PREFACE TO THE SECOND VOLUME OF THE FIRST EDITION (*part.*)

"11 *Blandford Square,*

"*February* 18, 1875.

"*Mr. Greaves presents his respectful compliments to Mr. Justice Taschereau, and begs very cordially to thank him for his very valuable present, and still more so for the very great attention and weight which he has given to Mr. Greaves' notes and observations. It is, indeed, a very great gratification to Mr. Greaves to think that he may have been of some use towards the completion of the Canada Criminal Law. Mr. Greaves has not been able to do more than cursorily look into the book; but he has seen quite enough to satisfy him that it has been prepared with great care and ability; and he fully agrees with almost every remark in it, and especially with the objections to the new Larceny and Forgery clauses. On one point only, Mr. Greaves would crave to make the enclosed reply.*"

Mr. Greaves' reply is reprinted at page 375 of this volume (following the remarks it refers to.)

A TABLE OF REGNAL YEARS.

FOR CONVENIENCE OF REFERENCE TO THE ENGLISH STATUTES AND LAW REPORTS.

Sovereigns.	Commencement of Reign.	Length of Reign.
William I.	December 25, 1066	21
William II	September 26, 1087	13
Henry I.	August 5, 1100	36
Stephen	December 26, 1135	19
Henry II.	December 19, 1154	35
Richard I.	September 3, 1189	10
John	May 27, 1199	18
Henry III.	October 28, 1216	57
Edward I	November 20, 1272	35
Edward II.	July 8, 1307	20
Edward III.	January 25, 1327	51
Richard II.	June 22, 1377	23
Henry IV.	September 30, 1399	14
Henry V.	March 21, 1413	10
Henry VI.	September 1, 1422	39
Edward IV.	March 4, 1461	23
Edward V.	April 9, 1483	...
Richard III.	June 26, 1483	3
Henry VII.	August 22, 1485	24
Henry VIII	April 22, 1509	38
Edward VI.	January 28, 1547	7
Mary	July 6, 1553	2
Philip and Mary	July 25, 1554	4
Elizabeth	November 17, 1558	45
James I.	March 24, 1603	23
Charles I.	March 27, 1625	24
The Commonwealth	January 30, 1649	11
Charles II.*	May 29, 1660	37
James II.	February 6, 1685	4

*Although Charles II. did not ascend the throne until 29th May, 1660, his regnal years were computed from the death of Charles I., January 13, 1649, so that the year of his restoration is styled the twelfth of his reign.

Sovereigns.	Commencement of Reign.	Length of Reign.
William and Mary	February 13, 1689	14
Anne	March 8, 1702	13
George I	August 1, 1714	13
George II	June 11, 1727	34
George III	October 25, 1760	60
George IV	January 29, 1820	11
William IV	June 26, 1830	7
Victoria	June 20, 1837	...

1831.....1 & 2 Wm. IV.
1832.....2 & 3 "
1833.....3 & 4 "
1834.....4 & 5 "
1835.....5 & 6 "
1836.....6 & 7 "
1837.....7 Wm. IV. and 1 Vic.
1838.....1 & 2 Vic.
1839.....2 & 3 "
1840.....3 & 4 "
1841.....4 & 5 "
1841.....5 "
1842.....5 & 6 "
1843.....6 & 7 "
1844.....7 & 8 "
1845.....8 & 9 "
1846.....9 & 10 "
1847.....10 & 11 "
1848.....11 & 12 "
1849.....12 & 13 "
1850.....13 & 14 "
1851.....14 & 15 "
1852.....15 & 16 "
1853.....16 & 17 "
1854.....17 & 18 "
1855.....18 & 19 "
1856.....19 & 20 "
1857.....20 "
1857.....20 & 21 "
1858.....21 & 22 "
1859.....22 "
1859.....22 & 23 Vic.
1860.....23 & 24 "
1861.....24 & 25 "
1862.....25 & 26 "
1863.....26 & 27 "
1864.....27 & 28 "
1865.....28 & 29 "
1866.....29 & 30 "
1667.....30 & 31 "
1868.....31 & 32 "
1869.....32 & 33 "
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1880.....43 & 44 "
1881.....44 & 45 "
1882.....45 & 46 "
1883.....46 & 47 "
1884.....47 & 48 "
1885.....48 & 49 "
1886.....49 & 50 "
1887.....50 & 51 "
1888.....51 & 52 "

Length of Reign.
14
13
13
34
60
11
7
...

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LIST OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis, Reports
And.	Anderson's King's Bench Reports
B. & A.	Barnewall and Adolphus' "
B. & Ald.	Barnewall and Alderson's "
B. & C.	Barnewall and Cresswell's "
B. & P.	Bosanquet and Puiler's "
B. & S.	Best and Smith's "
Beav.	Beavan's Chancery "
Bing.	Bingham's K. B. "
Brod. & B.	Broderip and Bingham's "
Burr.	Burrows' "
C. B.	Common Bench "
C. & F.	Clark and Finelly's "
C. & K.	Carrington and Kirwan's N. P. Reports
C. & M.	Carrington and Marshman " "
C. & P.	Carrington and Payne's " "
Ca. Temp. H.	Cases *tempore* Hardwicke
Cald.	Caldecott's Reports
Camp.	Campbell's Reports
Carr. Supp.	Carrington's Criminal Law
Chit.	Chitty's " "
C. L. J	Canada Law Journal, Ont.
C. L. T.	Canadian Law Times, Ont.
C. M. & R.	Crompton, Meeson & Roscoe's Reports
Co.	Coke's Reports
C. P. D.	Law Reports, Common Pleas Division
Cro. El.	Croke's Reports, Elizabeth
Cro. Jac.	Croke's Reports, James
C. S. C.	Consolidated Statutes of Canada
C. S. L. C.	Consolidated Statutes of Lower Canada
C. S. U. C.	Consolidated Statutes of Upper Canada
D. & L.	Dowling and Lowndes' Reports
D. & M.	Davison and Merivale's "
D. & R.	Dowling and Ryland's "
D. C. C.	Deacon's Crown Cases
Dears.	Dearsley's " "
Dears. & B.	Dearsley and Bell's Crown Cases

Den.	Denison's Crown Cases
Doug.	Douglas Reports
Dy.	Dyer's "
E. & B.	Ellis and Blackburn's Reports
E. B. & E.	Ellis, Blackburn and Ellis' "
E. & E.	Ellis and Ellis' "
F. & F.	Foster and Finlason's "
Fost.	Foster's Crown Cases
G. & D.	Gale and Davison's Reports
G. & O.	Geldert and Oxley's Nova Scotia Reports
Greenl. Rep.	Greenleaf's Maine "
H. & C.	Hurlstone and Coltman's "
H. & N.	Hurlstone and Norman's "
Han.	Hannay's New Brunswick "
Ill.	Illinois State "
Inst.	Coke's Institutes
Ir. C. L. R.	Irish Common Law Reports
J. P.	Justice of the Peace
L. & C.	Leigh and Cave's Crown Cases
L. C. J.	Lower Canada Jurist
L. C. L. J.	Lower Canada Law Journal
L. C. R.	Lower Canada Reports
Ld. Raym.	Lord Raymond's "
L. J.	Law Journal (England)
L. N.	Legal News, P. Q.
L. R. C. C. R.	Law Reports, Crown Cases Reserved
L. R. C. P.	Law Reports, Common Pleas.
L. R. H. L.	Law Reports, English and Irish Appeals
L. R. P. C.	Law Reports, Privy Council
L. R. Q. B.	Law Reports, Queen's Bench
L. T.	Law Times Reports
M. & G.	Manning and Granger's Reports
M. & M.	Moody and Malkin's "
M. & Rob.	Moody and Robinson's "
M. & S.	Maule and Selwyn's "
M. & W.	Meeson and Welsby's "
Man. L. R.	Manitoba Law Reports
Marsh.	Marshall's Reports.
M. L. R. Q. B.	Montreal Law Reports, Queen's Bench

Mod.	Modern Reports
Moo. C. C.	Moody's Crown Cases
N. B. Rep.	New Brunswick Reports
O. R.	Ontario Reports
P. & B.	Pugsley and Burbidge, New Brunswick Reports
Plow.	Plowden's K. B. Report
P. R. (Ont.)	Practice Reports, Ontario
Pugs.	Pugsley's New Brunswick Reports
P. Wms.	Peere Williams, K. B. Reports
Q. B.	Queen's Bench "
Q. B. D.	Law Reports, Queen's Bench division
Q. B. R.	Dorion's Queen's Bench Report, Montreal
Q. L. R.	Quebec Law Reports
R. & C.	Russell & Chesley's Nova Scotia Reports
R. & M.	Ryan and Moody's Reports
R. & M. C. C. R.	Moody's Crown Cases
R & R.	Russell and Ryan's Reports
Rep.	Coke's Reports
R. L.	Revue Legale, P. Q.
R. S. B. C.	Revised Statutes of British Columbia
R. S. N. B.	Revised Statutes of New Brunswick
R. S. N. S.	Revised Statutes of Nova Scotia
Russ.	Russell on Crimes
Russ. & Geld.	Russell and Gelderts Nova Scotia Reports
Salk.	Salkeld's Reports
S. C. R.	Supreme Court of Canada Reports
Show.	Shower's Reports
St. Tr.	State Trials
Str.	Strange's Reports
Taun.	Taunton's "
T. R.	Term "
T. Raym.	T. Raymond's "
Tyr.	Tyrwhitt's "
U. C. C. P.	Upper Canada Common Pleas
U. C. Q. B.	Upper Canada Queen's Bench
W. R.	Weekly Reporter
Wils.	Wilson's K. B. Reports.

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DOMINION OF CANADA.

CHAPTER 141.

AN ACT RESPECTING EXTRA-JUDICIAL OATHS.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every justice of the peace, or other person who administers, or causes or allows to be administered, or receives or causes, or allows to be received, any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some law in force at the time being, or authorized or required by any such law, is guilty of a misdemeanor, and liable to a fine not exceeding fifty dollars, or to imprisonment for any term not exceeding three months.—37 *V.*, *c.* 37, *s.* 1, *part, and s.* 2.

2. Nothing herein contained shall be construed to extend to any oath, affidavit or solemn affirmation, before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, or to any oath, affidavit or affirmation required or authorized by any law of Canada, or by any law of the Province wherein such oath, affidavit or affirmation is received or administered, or is to be used, or to any oath, affidavit or affirmation which is required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.—37 *V.*, *c.* 37, *s.* 1, *part.*

3. Any judge, justice of the peace, public notary, or other functionary authorized by law to administer an oath, may receive the solemn declaration of any person voluntarily making the same before him, in the form in the schedule to this Act, in attestation of the execution of any written deed or instrument, or allegations of fact, or of any account rendered in writing.—37 *V.*, *c.* 37, *s.* 1, *part.*

4. Any affidavit, affirmation or declaration required by any fire, life or marine insurance company, authorized by law to do business in Canada, in regard to any loss of property or life insured or assured therein, may be taken before any commissioner authorized to take affidavits, or before any justice of the peace, or before any notary public for any Province of Canada; and any such officer is hereby required to take such affidavit, affirmation or declaration.—32-33 *V.*, *c.* 23, *s.* 4.

SCHEDULE.

I, A. B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the "*Act respecting extra-judicial oaths.*"

Sec. 1 is taken from sec. 13 of 5-6 W. 4, c. 62, of the Imperial Statutes, the preamble of which reads thus:

"Whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial enquiry, nor in any wise required or authorized by any law; and whereas doubts have arisen whether or not such proceeding is illegal, for the suppression of such practice and removing such doubts, Her Majesty, etc."

Sir William Blackstone, before this Statute, had said (Vol. IV, p. 137): "The law takes no notice of any perjury, but such as is committed in some Court of Justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority,

in some proceedings relative to a civil suit or a criminal prosecution, for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason, it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extra-judicial matter, as is now too frequent upon every petty occasion, since it is more than possible that, by such idle oaths, a man may frequently, *in foro conscientiæ*, incur the guilt, and, at the same time, evade the temporal penalties of perjury."

"And Lord Kenyon, indeed, in different cases, has expressed a doubt, whether a magistrate does not subject himself to a criminal information for taking a voluntary extra-judicial affidavit."—3 *Burn's Just.* v. *Oath.*

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S. on ..... at ..... being one of the Justices of Our said Lady the Queen, assigned to keep the peace in and for the said county *(or district)*, did unlawfully administer to and receive from a certain person, to wit, one A. B., a certain oath, touching certain matters and things, whereof the said J. S., at the time and on the occasion aforesaid, had not any jurisdiction or cognizance by any law in force at the time being, to wit, at the time of administering and receiving the said oath, or authorized, or required by any such law; the same oath not being in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence not being required or authorized by any law of the Dominion of Canada, or by any law of the said Province of ..... wherein such oath has been so received and administered, and was to be used *(if to be used in another Province, add* "or by any law of the Province of ..... wherein the said oath *(or affidavit)*

was *(or is)* to be used"); nor being an oath required by the laws of any foreign country to give validity to any instrument in writing, designed to be used in such foreign country; that is to say, a certain oath touching and concerning *(state the subject-matter of the oath or affidavit so as to show that it was not one of which the Justice had jurisdiction or cognizance, and was not within the exceptions)* against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—*Archbold*, 829.

A county magistrate complained to the bishop of the diocese of the conduct of two of his clergy; and to substantiate his charge, he swore witnesses before himself, as magistrate, to the truth of the facts: *held*, that the matter before the bishop was not a judicial proceeding, and therefore that the magistrate had brought himself within the Statute against voluntary and extra-judicial oaths, and that he had unlawfully administered voluntary oaths, contrary to the enactment of the Statute.—*R.* v. *Nott*, *Car. & M.* 288; 9 *Cox*, 301.

In the same case, on motion in arrest of judgment, it was held, that an indictment under this Statute (5 and 6 Will. 4, c. 62, s. 13) is bad, if it does not so far set out the deposition, that the Court may judge whether or not it is of the nature contemplated by the Statute, that the deposition and the facts attending it should have been distinctly stated, and the matter or writing relative to which the defendant was said to have acted improperly should have been stated to the Court in the indictment, so that the Court might have expressed an opinion whether the defendant had jurisdiction, the question whether the defendant had jurisdiction to administer the oath being one

of law, and to be decided by the Court; but the majority of the Court thought that it was not necessary to set out the whole oath. Greaves nevertheless thinks it prudent to set it out at full length, if practicable, in some counts.—1 *Russell*, 193, *note*.

Upon the trial, to establish that the defendant is a Justice of the Peace, or other person authorized to receive oaths or affidavits, evidence of his acting as such will, *primâ facie*, be sufficient.—*Archbold*, 830.

And it is not necessary to show that he acted wilfully in contravention of the Statute: the doing so, even inadvertently, is punishable.—*Idem*.

ACCESSORIES, AIDERS, ABETTORS, ETC.

THE general definition of a principal in the first degree is one who is the actor or actual perpetrator of the fact. But it is not necessary that he should be actually present when the offence is consummated; for if one lay poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree. *Vaux's case*, 4 *Rep.* 44 *b*; *Fost.* 349; *R.* v. *Harley*, 4 *C. & P.* 369. So, it is not necessary that the act should be perpetrated with his own hands; for if an offence be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree. *See R.* v. *Giles*, 1 *Mood. C. C.* 166; *R.* v. *Michael*, 2 *Mood. C. C.* 120; 9 *C. & P.* 356; *R.* v. *Clifford*, 2 *C. & K.* 202. Thus, if a child, under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the inciter, though absent when the fact was committed, is, *ex necessitate*, liable for the act of his agent, and a principal in the first degree, *Fost.* 349; 1 *Hawk. c.* 31, *s.* 7; *R.* v. *Palmer*, 1 *N. R.* 96; 2 *Leach*, 978; *R.* v. *Butcher, Bell*, 6; 28 *L. J. (M. C.)* 14. But if the instrument be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact. *R.* v. *Stewart*, *R. & R.* 363; *R.* v. *Williams*, 1 *Den.* 39; 1 *C. & K.* 589;

or, if he be present, as a principal in the second degree. *Fost.* 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent.—*R.* v. *Bannen*, 2 *Mood. C. C.* 309; 1 *C. & K.* 295.

Principals in the second degree.—Principals in the second degree are those who are present, aiding and abetting, at the commission of the fact.

Presence, in this sense, is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house, watching, to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. *Fost.* 347, 350. *See R.* v. *Borthwick*, 1 *Dougl.* 207; 1 *Leach*, 66; 2 *Hawk. c.* 29, *ss.* 7, 8; 1 *Russ.* 31; 1 *Hale*, 555; *R.* v. *Gogerly*, *R. & R.* 343; *R.* v. *Owen*, 1 *Mood. C. C.* 296. But he must be sufficiently near to give assistance. *R.* v. *Stewart*, *R. & R.* 363; and the mere circumstance of a party going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be *able* to assist in it. *R.* v. *Kelly*, *R. & R.* 421; 1 *Russ.* 27. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched the prisoner, who, being apprised of the robbery, assisted in carrying away the property, it was holden that he was

not a principal, but only an accessory. *R.* v. *King*, *R. & R.* 332. *See R.* v. *M'Makin*, *Id.*; *R.* v. *Dyer*, 2 *East*, *P. C.* 767. And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessories before the fact. *R.* v. *Soares*, *R. & R.* 25; *R.* v. *Davis*, *Id.* 113; *R.* v. *Else*, *Id.* 142; *R.* v. *Badcock*, *Id.* 249; *R.* v. *Manners*, 7 *C. & P.* 801; *R.* v. *Howel*, 9 *C. & P.* 437; *R.* v. *Tuckwell*, *C. & Mar.* 215. So, if one of them have been apprehended before the commission of the offence by the other, he can be considered only as an accessory before the fact. *R.* v. *Johnson*, *C. & Mar.* 218. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals. *R.* v. *Bingley*, *R. & R.* 446. *See* 2 *East*, *P. C.* 768. As, if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C., and D. may be indicted for the forgery, and A. as an accessory; *R.* v. *Dade*, 1 *Mood. C. C.* 307; for, if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others.—*R.* v. *Kirkwood*, 1 *Mood. C. C.* 304. *See R.* v. *Kelly*, 2 *C. & K.* 379.

There must also be a participation in the act; for although a man be present whilst a felony is committed, if he take no part in it and do not act in concert with

those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 *Hale*, 439; *Fost.* 350. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law, he was present aiding and abetting. So, a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entice the owner away, that he who has the goods may carry them off, all are guilty as principals. *R.* v. *Standley*, *R. & R.* 305; 1 *Russ.* 29; *R.* v. *Passey*, 7 *C. & P.* 282; *R.* v. *Lockett*, *Id.* 300. So, it has been holden, that to aid and assist a person to the jurors unknown, to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of the practice. *R.* v. *Moore*, 1 *Leach*, 314. So, if two persons driving carriages incite each other to drive furiously, and one of them run over and kill a man, it is manslaughter in both. *R.* v. *Swindall*, 2 *C. & K.* 230. If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the

attempt, the latter is a principal in the murder of the other. *R.* v. *Dyson*, *R. & R*, 523. *See R.* v. *Russell*, 1 *Mood. C. C.* 356; *R.* v. *Alison*, 8 *C. & P.* 418, *R.* v. *Jessop*, 16 *Cox*, 204. So, likewise, if several persons combine for an unlawful purpose to be carried into effect by unlawful means. *See Fost.* 351, 352; particularly, if it be to be carried into effect notwithstanding any opposition that may be offered against it; *Fost.* 353, 354; and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not. (*See the Sessinghurst-house case*, 1 *Hale*, 461), provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. 1 *Hawk. c.* 31, *s.* 52; *Fost.* 352; *R.* v. *Hodgson*, 1 *Leach*, 6; *R.* v. *Plummer*, *Kel.* 109. But it is not sufficient that the common purpose is merely unlawful; it must either be felonious, or, if it be to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. *R.* v. *Skeet*, 4 *F. & F.* 931. *See also R.* v. *Luck*, 3 *F. & F.* 483; *R.* v. *Craw*, 8 *Cox*, 335. And the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R.* v. *White*, *R. & R.* 99. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground, took from him his gun, pocket-book and money, *Park*, J. held that this was robbery in Williams only. *R.* v. *Hawkins*, 3 *C. & P.* 392. The purpose must also be unlawful;

for, if the original object be lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree.—*Fost.* 354, 355; 2 *Hawk. c.* 29, *s.* 9.

A mere participation in the act, without a felonious, participation in the design, will not be sufficient. 1 *East, P. C.* 258; *R.* v. *Plummer, Kel.* 109. Thus, if a master assault another with malice prepense, and the servant ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 *Hale,* 446. So, on an indictment under the statute 1 *V. c.* 85, *s.* 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life, with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge as against B., that he should have been aware of A's intention to commit murder.—*R.* v. *Cruse,* 8 *C. & P.* 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord *Hale* considers, that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree. 1 *Hale,* 422, 452. However, in a late case it was holden by *Patteson,* J., that all persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace.—*R.* v. *Perkins,* 4 *C. & P.* 537. *See R.* v. *Murphy,*

6 *C. & P.* 103, and *R.* v. *Coney*, 15 *Cox*, 46, and upon the same principle, the seconds in a duel, being participators in an unlawful act, would both be guilty of murder, if death were to ensue; and so the law was laid down in *R.* v. *Young*, 8 *C. & P.* 644; and in *R.* v. *Cuddy*, 1 *C. & K.* 210. If the principal was insane at the commission of the act, no person can be convicted as an aider and abettor of his act.—*R.* v. *Tyler*, 8 *C. & P.* 616.

Aiders and abettors were formerly defined to be accessories at the fact, and could not have been tried until the principal had been convicted or outlawed. *Fost.* 347. But this doctrine is exploded; and it is now settled, that all those who are present aiding and abetting when a felony is committed are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty; 2 *Hale*, 223; and may be convicted, though the party charged as principal in the first degree is acquitted.—*R.* v. *Taylor*, 1 *Leach*, 360; *Benson* v. *Offley*, 2 *Show.* 510; 3 *Mod.* 121: *R.* v. *Wallis*, *Salk.* 334; R. v. *Towle*, *R. & R.* 314; 3 *Price*, 145; 2 *Marsh.* 465.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree; 2 *Hawk. c.* 25, *s.* 64 (*see Mackally's case*, 9 *Co.* 67 *b*), *R.* v. *Rogers*, 37 *L. J. (M. C.)* 83, provided the offence permit of a participation; *Fost.* 345; or specially as aiders and abettors. *R.* v. *Crisham*, *C. & Mar.* 187. But where by particular statutes the punishment was different, then principals in the second degree must have been indicted specially as aiders and abettors. 1 *East*, *P. C.* 348, 350; *R.* v. *Sterne*, 1

Leach, 473. If indicted as aiders and abettors, an indictment charging that A. gave the mortal blow, and that B., C. and D. were present aiding and abetting, would be sustained by evidence that B. gave the blow, and that A., C. and D. were present aiding and abetting; and even if it appeared that the act was committed by a person not named in the indictment, the aiders and abettors might nevertheless be convicted. *R.* v. *Borthwick*, *Doug.* 207; 1 *East*, *P. C.* 350. *See R.* v. *Swindall*, 2 *C. & K.* 230. And the same, though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting. *R.* v. *Downing*, 1 *Den.* 52; 2 *C. & K.* 382. Where a prisoner was convicted upon an indictment which charged him with rape as a principal in the first count, and as an aider and abettor in the second, it was holden that the conviction upon the first count was good. *R.* v. *Folkes*, 1 *Mood. C. C.* 354; *R.* v. *Gray*, 7 *C. & P.* 164. *See R.* v. *Crisham*, *R.* v. *Downing*, *supra*. By *Sec.* 7, *c.* 145, *post*, "whosoever shall aid, abet, counsel or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law, or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender."—*R.* v. *Burton*, 13 *Cox*, 71.

Accessories before the fact.—An accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony.—1 *Hale*, 615.

If the party be actually or constructively present when the felony is committed, he is an aider and abettor, and not an accessory before the fact; for it is essential, to constitute the offence of accessory, that the party should

be absent at the time the offence is committed.—1 *Hale*, 615; *R.* v. *Gordon*, 1 *Leach*, 515; 1 *East*, *P. C.* 352, *R.* v. *Brown*, 14 *Cox*, 144.

The procurement may be personal, or through the intervention of a third person; *Fost.* 125; *R.* v. *Earl of Somerset*, 19 *St. Tr.* 804; *R.* v. *Cooper*, 5 *C. & P.* 535; it may also be direct, by hire, counsel, command, or conspiracy; or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony; 2 *Hawk. c.* 29, *s.* 16; but the bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact; 2 *Hawk. c.* 29, *s.* 23; nor will tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence. 1 *Hale*, 616. The procurement must be continuing; for if the procurer of a felony repent, and before the felony is committed, actually countermand his order, and the principal notwithstanding commit the felony, the original contriver will not be an accessory. 1 *Hale*, 618. So, if the accessory order or advise one crime, and the principal intentionally commit another; as, for instance, to burn a house, and instead of that he commit a larceny; or, to commit a crime against A., and instead of so doing he commit the same crime against B.—the accessory will not be answerable; 1 *Hale*, 617; but, if the principal commit the same offence against B. by mistake, instead of A., it seems it would be otherwise. *Fost.* 370, *et seq.*; *but see* 1 *Hale* 617; 3 *Inst.* 51. But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he dies, A. is accessory to the murder. 4 *Bl. Com.* 37; 1 *Hale*, 617. Or if A. command B. to burn the house of C., and in doing so the

house of D. is also burnt, A. is accessory to the burning of D.'s house. *R.* v. *Saunders, Plowd.* 475. So, if the offence commanded be effected, although by different means from those commanded, as, for instance, if J. W. hire J. S. to poison A., and, instead of poisoning him, he shoots him, J. W. is, nevertheless, liable as accessory. *Fost.* 369, 370. Where the procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act.—*R.* v. *Cooper*, 5 *C. & P.* 535.

Several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places.—*R.* v. *Barber*, 1 *C. & K.* 442.

It may be necessary to observe, that it is only in felonies that there can be accessories; in high treason, every instance of incitement, etc., which in felony would make a man an accessory before the fact, will make him a principal traitor. *Fost.* 341; and he must be indicted as such, 1 *Hale*, 235. Also, all those who in felony would be accessories before the fact, in offences under felony are principals, and indictable as such. 4 *Bl. Com.* 36; *R.* v. *Clayton*, 1 *C. & K.* 128; *R.* v. *Moland*, 2 *Mood. C. C.* 276; *R.* v. *Greenwood* 2 *Den.* 453; *Sec.* 7, c. 145 *post.* In manslaughter it has been said there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore, if A. be indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale*, 437, 466, 615; 1 *Hawk. P. C.*, c. 30, *s.* 2. Where, however, the prisoner procured and gave a woman poison in order that she might take it and so procure abortion, and she did take it in his absence, and died of its

effects, it was held that he mightb e convicted as an accessory before the fact to the crime of manslaughter. *R.* v. *Gaylor, Dears. & B.* 288. In the course of the argument in that case, *Bramwell, B.*, said: "Suppose a man for mischief gives another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, that another had counselled him to do it, would not he who counselled be an accessory before the fact?"

Formerly an accessory could not, without his own consent, unless tried with the principal, be brought to trial until the guilt of his principal had been legally ascertained by conviction (1 *Anne, st.* 2, *c.* 9) or outlawry. *Fost.* 360; 1 *Hale*, 623. But now, whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony if convicted as an accessory may be punished (Sec. 2, c. 145, post.). And "if any principal offender shall be in anywise *convicted* of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been *attainted* thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon

conviction suffer the same punishment as he would have suffered if the principal had been attainted." (Sec. 6, c. 145, post.) The 2nd section of this statute only applies where the accessory might at common law have been indicted with, or after the conviction of, the principal; and, therefore, where a defendant was indicted as an accessory before the fact to the murder of S. W., she having by his procurement killed herself, it was holden that a like statute did not apply. *R.* v. *Russell*, 1 *Mood. C. C.* 356; *R.* v. *Leddington*, 9 *C. & P.* 79. But by the 1st section it is enacted, that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted and punished *in all respects* as if he were a principal felon;" so that the conviction of the principal is not now in any sense a condition precedent to the conviction of the accessory. *R.* v. *Hughes, Bell*, 242. In *R.* v. *Chadwick, Stafford Sum. Ass.* 1850, the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person, but was absent when it was administered; and thereupon it was objected that the 11 & 12 *V.*, *c.* 46, *s.* 1, which is similar to the 24-25 *V.*, *c.* 94, *s.* 1, did not apply to murder, but Williams, J., overruled the objection, and refused to reserve the point. Where the principal and accessory are tried together, one being charged as principal and the other as accessory (which will now, probably, never occur), if the principal plead otherwise than the general issue, the accessory shall not be bound to answer until the principal's plea be first determined. 9 *H.* 7, *c.* 19; 1 *Hale*, 624; 2 *Inst.* 184. Where the principal was indicted for burglary and larceny in

a dwelling-house, and the accessory was charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny; it seems the judges were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should have been acquitted also. *R.* v. *Donnelly and Vaughan*, *R. & R.* 310; 2 *Marsh.* 571. Where three persons were charged with a larceny, and two others as accessories, in one count, and the latter were also charged separately in other counts with substantive felonies, it was held that, although the principals were acquitted, the accessories might be convicted on the latter counts. *R.* v. *Pulham*, 9 *C. & P.* 280. And now by section 133 of the Procedure Act, it is enacted, that "any number of accessories at different times to any felony, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or is not in custody or amenable to justice."

If a man be indicted as accessory in the same felony to several persons, and be found accessory to one, it is a good verdict, and judgment may be passed upon him.—*R.* v. *Lord Sanchar*, 9 *Co.* 189; *Fost.* 361; 1 *Hale*, 624.

Accessories after the fact.]—An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. 1 *Hale*, 618; 4 *Bl. Com.* 37; 2 *Hawk. c.* 29, *s.* 1; 3 *P. Wms.* 475. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory

after the fact; as, for instance, that he concealed him in the house; *Dalt.* 530, 531; or shut the door against his pursuers, until he should have an opportunity of escaping; 1 *Hale*, 619; or took money from him to allow him to escape; 9 *H.* 4, *pl.* 1; or supplied him with money, a horse, or other necessaries, in order to enable him to escape; *Hale's Sum.* 218; 2 *Hawk. c.* 29, *s.* 26; or that the principal was in prison, and J. W. bribed the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape.—1 *Hale*, 621.

But merely suffering the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission. 9 *H.* 4 *pl.* 1; 1 *Hale*, 619. So, if a person supply a felon in prison with victuals or other necessaries for his sustenance; 1 *Hale*, 620; or relieve and maintain him if he be bailed out of prison; *Id.*; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon; 1 *Hale*, 352; or if a person speak or write in order to obtain a felon's pardon or deliverance; 26 *Ass.* 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 *Inst.* 139; 1 *Hale*, 620; or even if he himself agree, for money, not to give evidence against the felon; *Moor*, 8; or know of the felony and do not discover it; 1 *Hale*, 371, 618; none of these acts would be sufficient to make the party an accessory after the fact. He must be proved to have done some act to assist the felon personally. *See R.* v. *Chapple*, 9 *C. & P.* 355. But if he employ another person to do so, he will be equally guilty as if he harboured or relieved him himself.—*R.* v. *Jarvis*, 2 *M. & Rob.* 40.

A wife is not punishable as accessory for receiving, etc.,

her husband, although she knew him to have committed felony; 1 *Hale*, 48, 621; *R.* v. *Manning*, 2 *C. & K.* 903, *n.*; for she is presumed to act under his coercion. But no other relation of persons can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. *Id.* Even one may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harboring the thief, or assisting in his escape. *Fost.* 123; *Cromp.* 41 *b. pl.* 4 *& 5.* If the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband. 1 *Hale*, 621. And if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted.—*Id.*

To constitute this offence, it is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony. 2 *Hawk. c.* 29, *s.* 32. It is also necessary, that the felony be completed at the time the assistance is given; for, if one wound another mortally, and after the wound given, but before death ensues, a person assist or receive the delinquent, this does not make him accessory to the homicide; for until death ensues no murder or manslaughter is committed.—2 *Hawk. c.* 29, *s.* 35; 4 *Bl. Com.* 38.

In high treason there are no accessories after the fact, those who in felony would be accessories after the fact being principals in high treason; yet in their progress to conviction they must be treated as accessories, and indicted specially for the receipt, etc., and not as principal traitors. 1 *Hale*, 238. So, in offences under felony there are no

accessories after the fact; 1 *Hale*, 613; although, if the act of the receiver amount to a rescue, or to obstructing an officer of justice in the execution of his duty; or the like, he would undoubtedly be indictable for it as for a misdemeanor. 2 *Hawk.*, *c.* 29, *s.* 4. Accessories after the fact could not, until the stat. 11 & 12 V., c. 46, be tried before the conviction of their principal, unless they consented to it. 1 *Hale*, 623; 2 *Hawk.*, *c.* 29, *s.* 45. But they might be tried with their principal; 1 *Hale*, 623; or separately, after the principal had been convicted; and having been once duly tried, they could not be again indicted or tried for the same offence. (7 G. 4, c. 64, s. 10.) And now, by Sec. 3, c. 145, post, whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

On an indictment charging a man as a principal felon only, he cannot be convicted of the offence of being an accessory after the fact.—*R.* v. *Fallon*, *L. & C.* 217.

The receipt of stolen goods did not at common law constitute the receiver an accessory, but was a distinct misdemeanor, punishable by fine and imprisonment; 1 *Hale*, 620; and although, by several statutes, receivers were made accessories after the fact, and, by the (repealed)

stat. 7 & 8 G. 4, c. 29, ss. 54, 55, 60, might in certain cases be indicted either as accessories after the fact to felony, or for a susbtantive felony, or might be prosecuted for a misdemeanor, or punished upon summary conviction: *(see now secs. 136, 137, 138 of the Procedure Act :)* yet the receipt of stolen goods is still a distinct and separate offence.

CHAPTER 145.

AN ACT RESPECTING ACCESSORIES.

(IMPERIAL ACT, 24-25 V., c. 94.)

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

FELONIES.

1. Every one who becomes an accessory before the fact to any felony, whether the same is a felony at common law, or by virtue of any Act, may be indicted, tried, convicted and punished in all respects as if he were a principal felon.—31 *V., c.* 69, *s.* 9, *part, and c.* 72, *s.* 1; 32-33 *V., c.* 20, *s.* 8, *part, and c.* 21, *s.* 107, *part. Sec.* 1, *Imp.*

As to venue, see sec. 17, Procedure Act. As to joinder of offenders, see sec. 133, Procedure Act.

Note by Greaves.—"This clause is taken from the 11 & 12 V., c. 46, s. 1, upon which it was held, that it was no objection to an accessory before the fact being convicted that his principal had been acquitted. Hall and Hughes were jointly indicted for stealing certain cotton. Hall was acquitted and called as a witness against Hughes; and it clearly appeared that Hall had stolen the cotton at the instigation of Hughes, and in his absence. It was contended, that as Hall had been acquitted, Hughes must be so also; for the statute had only altered the form of pleading, and not the law, as to accessories before the fact; but it was held, that the statute had made the offence of the accessory before the fact a substantive felony, and that the old law, which made the conviction of the principal a condition precedent to the conviction of the accessory, was done away by that enactment.—*R.* v. *Hughes, Bell, C. C.* 242.

In every case where there may be a doubt whether a

person be a principal or accessory before the fact, it may be advisable to prefer the indictment under this section, as such an indictment will be sufficient, whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other, but it is uncertain which he was.

It may be well to observe, however, that there are cases in which it is not clear that an indictment under this section would suffice. Suppose for instance that the offence of the principal be local; *e. g.*, a burglary committed in the county of Worcester, and that the accessory is indicted in the county of Stafford on the ground that the evidence shows that the acts, by which he became accessory were done in the latter county, it may be questionable whether the accessory could be indicted and tried under this section in that county; for it only authorises the accessory to be indicted and tried "as if he were a principal felon," and the principal could only be indicted and tried in Worcestershire. Possibly if such an objection were taken on the trial, it might be held that s. 7 of this Act authorised the indictment and trial in Staffordshire on the ground that the evidence showed the party to have become an accessory before the fact in that county. But supposing that to be so, the same question might be raised in arrest of judgment or on error, and on the face of the record all that would appear would be that the prisoner was indicted and tried as a principal in Staffordshire for a burglary committed in Worcestershire; but even here it might be held that the effect of the 11 & 12 V., c. 46, s. 1, is to make every indictment which charges a person as principal contain a charge of being accessory before the fact also, and consequently that there was nothing on the

face of the record inconsistent with the facts having proved that the prisoner was such an accessory in Staffordshire. However, in any such case, it would be prudent to insert a count framed under the next section.

In *R.* v. *Chadwick*, Stafford: Sum. Ass. 1850, MSS., C.S.G., the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person but was absent when it was administered; and thereupon it was objected that the 11 & 12 V., c. 46, s. 1, did not apply to murder; but Williams, J., overruled the objection. The learned Judge afterwards communicated the decision to myself, and I pointed out that in the 7 Geo. 4, c. 64, ss. 9, 10, 11; 4 Geo. 4, c. 48, s. 1; 7 & 8 Geo. 4, c. 28, ss. 1, 2, 3, 5, 13; 4 & 5 V., c. 22, and other statutes, it was manifest that "felony" included murder; and the learned Judge having given the matter full consideration, refused to reserve the point.

My Lord Hale in commenting on the jurisdiction of Justices of the Peace, says (2 Hale, 45)—"By the Statutes of 18 Ed. 3, c. 2; 34 Ed. 3, c. 1; 17 Rich. 2, c. 10; though they do only mention felonies, and do not expressly mention murders and manslaughters, and although the Commission of the Peace mentions not murders by express name, but only felonies generally, yet by these general words, in these Statutes and this Commission, they have power to hear and determine murders and manslaughters, and thus it has been resolved, 5 Ed. 6, Dy. 69, a.; Pref. to 10 Co. Rep. against the opinion of Fitzherbert in his Justice of Peace, and 9 Hen. 4, 24, Coron. 437." This shows that the decision of Williams, J., was correct.

Mr. Archbold (Criminal Acts, 530) strongly objects to this clause. After treating the rule in treason and misde-

meanors that all are principals as absurd, he says, "But there is no reason why felonies should be involved in the same absurdity. Supposing a man has been guilty, and accused as accessory before the fact to a murder, and he is then, according to the above section, indicted for having committed murder, how are the jury, who are bound by their oath to give their verdict according to the evidence, to find a man guilty of the murder, when the evidence is that he was not present at the murder—that he did not aid or abet those who committed it, but had merely advised it some months before?" Now the answer to this is very plain; the objection rests merely on a legal distinction, which would never have entered into the head of any one but a lawyer, and was not finally settled till *Rex* v. *Bircheenough*, R. & M. C. C. R. 477; and there are old authorities the other way in Stamforde, which were recognised by Lord Hale, 1 Hale, 626; 2 Hale 224, and Foster, 361. The distinction is this: that if A. procures B. to murder C., and this murder is committed by B. in A's absence, A. is guilty of murder if B. is an innocent agent, but is only an accessory before the fact if B. is a guilty agent. Now, it is obvious that there is no more difficulty in a jury understanding that they may convict A. of murder, where B. is a guilty agent than where he is an innocent one. In either case all they have to try is whether A. caused B. to commit the murder. Juries are perfectly well able to understand that he who causes a thing to be done by another is just as much responsible as if he did that thing himself—*qui facit per alium facit per se*—and there is no more difficulty in satisfying them that a man ought to be convicted of a murder who causes it to be done by another in his absence, than in satisfying them that where one man inflicts a mortal wound in the presence of another,

that wound is as much his wound as if he had inflicted it, if they were both concurring in the act that caused it. In both cases the jury must be satisfied that the act of the killer was caused by the other, and the advantage of this clause is, that it reduces the question for the jury to that single issue, and gets rid of the difficulty, which often formerly arose, whether the evidence proved the prisoner to be a principal or accessory before the fact. In all civil cases, and in the ordinary affairs of life, he who causes an act to be done, though he be absent when it is done, is treated as having done that act, and the same has always been the rule in treason and misdemeanor, and felony was the only exception, which the 11 and 12 V., c. 46, s. 1, very properly removed.

Mr. Archbold also says, p. 530, that in treason and misdemeanor all are principals, and "of course those who advise treason or misdemeanor, and are not present when it is committed, must necessarily be indicted as principals, there is no other mode of indicting them." This is a mistake. It may be laid either way, viz., charging it as principal, or laying it special as it will appear by the evidence. If one conspires the death of the Queen, and is committed to prison for the same, and one procures him to escape or harbours him after such a time as he knows him charged with treason, or to have committed treason, you may indict him upon the special matter, that A. committed treason, that B. knew of it and received him.—*R.* v. *Tracy*, 6 *Mod.* 30, *per Holt C. J.*

The mere fact of being stakeholder for a prize fight where one of the combatants was killed does not make one accessory before the fact to the manslaughter.—*R.* v. *Taylor*, 13 *Cox*, 68.

2. Every one who counsels, procures or commands any other person to commit any felony, whether the same is a felony at common law, or by virtue of any Act, is guilty of felony, and may be indicted, and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon,—or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice,—and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.—31 *V.*, *c.* 72, *s.* 2. *Sec.* 2, *Imp.*

Note by Greaves.—"The prosecutor may at his option prefer an indictment under this or the preceding section, and we have shown in the last note (under sec. 1, *ante.*) that there are cases in which it may be advisable to prefer an indictment under this section."

Notwithstanding this section, the soliciting and inciting a person to commit a felony, where no felony is in fact committed by the person so solicited, still remains a misdemeanor only.—*R.* v. *Gregory, L. R.*, 1 *C. C. R.* 77.

3. In every felony, every principal in the second degree shall be punishable in the same manner as the principal in the first degree is punishable.—31 *V.*, *c.* 69, *s.* 9, *part, and c.* 72, *s.* 3; 32-33 *V.*, *c.* 21, *s.* 107, *part.*

4. Every one who becomes an accessory after the fact to any felony, whether the same is a felony at common law or by virtue of any Act, may be indicted and convicted, either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished. —31 *V.*, *c.* 72, *s.* 4; 32-33 *V.*, *c.* 29, *s.* 8, *part.* *Sec.* 3, *Imp.*

See secs. 136 and 138 of the Procedure Act.
As to venue, sec. 17 of Procedure Act.

Four prisoners were indicted for murder jointly with two others indicted as accessories after the fact. The prisoners indicted for murder were found guilty of manslaughter, and the other two guilty of having been accessories after the fact to manslaughter. *Held*, on motion in arrest of judgment, that the conviction against the accessories was right.—*R.* v. *Richards*, 13 *Cox*, 611. See *R.* v. *Brannon*, 14 *Cox*, 394.

5. Every accessory after the fact to any felony (except when it is otherwise specially enacted), whether the same is a felony at common law, or by virtue of any Act, shall be liable to imprisonment for any term less than two years.—31 *V.*, *c.* 69, *s.* 9, *part*, *and c.* 72, *s.* 5, *part*; 32-33 *V.*, *c.* 19, *s.* 57, *part*. *Sec.* 4, *Imp.*

6. If any principal offender is, in any wise, convicted of any felony, any accessory, either before or after the fact, may be proceeded against in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon dies or is pardoned or otherwise delivered before such attainder; and every such accessory shall, upon conviction, suffer the same punishment as he would have suffered if the principal had been attainted.—31 *V.*, *c.* 72, *s.* 6; 32-33 *V.*, *c.* 20, *s.* 8, *part*. *Sec.* 5, *Imp.*

MISDEMEANORS.

7. Every one who aids, abets, counsels or procures the commission of any misdemeanor, whether the same is a misdemeanor at common law, or by virtue of any Act, is guilty of a misdemeanor and liable to be tried, indicted and punished as a principal offender.—31 *V.*, *c.* 72, *s.* 9; 32-33 *V.*, *c.* 19, *s.* 57, *part*, *and c.* 21, *s.* 107, *part*; 35 *V.*, *c.* 32, *s.* 13; 40 *V.*, *c.* 32, *s.* 1, *part*. *Sec.* 8, *Imp.* *R.* v. *Burton*, 13 *Cox*, 71.

OFFENCES PUNISHABLE ON SUMMARY CONVICTION.

8. Every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction, be liable for every first, second or subsequent offence, of aiding, abetting, counselling or procuring, to the same forfeiture and punishment to which a person guilty of a first, second or subsequent offence as a principal offender, is liable.—32-33 *V.*, *c.* 21, *s.* 108, *and c.* 22, *s.* 70, *and c.* 31, *s.* 15, *part*; 33 *V.*, *c.* 31, *s.* 5, *part*.

CHAPTER 146.

(11-12 V., c. 12, IMP.)

AN ACT RESPECTING TREASON AND OTHER OFFENCES AGAINST THE QUEEN'S AUTHORITY.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. Every one who compasses, imagines, invents, devises, or intends death or destruction, or any bodily harm, tending to death or destruction, maiming or wounding, imprisonment or restraint of our Sovereign Lady the Queen, Her Heirs or Successors, and expresses, utters or declares such compassings, imaginations, inventions, devices or intentions, or any of them by publishing any printing or writing, or by any overt act or deed, is guilty of treason and shall suffer death. 31 *V., c.* 69, *s.* 2; 32-33 *V., c.* 17, *s.* 1.

2. Every officer or soldier in Her Majesty's army, who holds correspondence with any rebel, or enemy of Her Majesty, or gives him advice or intelligence, either by letters, messages, signs or tokens, or in any manner or way whatsoever, or treats with such rebel or enemy, or enters into any condition with him without Her Majesty's license, or the license of the general, lieutenant general or chief commander, is guilty of treason and shall suffer death.—31 *V., c.* 69, *s.* 3.

3. Every one who compasses, imagines, invents, devises or intends to deprive or depose Our Sovereign Lady the Queen, Her Heirs or Successors, from the style, honor or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions or countries, — or to levy war against Her Majesty, Her Heirs or Successors, within any part of the United Kingdom or of Canada, in order, by force or constraint, to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both Houses or either House of Parliament, of the United Kingdom or of Canada, or to move or stir any foreigner or stranger with force to invade the United Kingdom or Canada, or any other of Her Majesty's dominions or countries under the obeisance of Her Majesty, Her Heirs or Successors, and expresses, utters or declares such compassings, imaginations, inventions, devices or intentions, or any of them, by pub-

lishing any printing or writing, or by open and advised speaking, or by any overt act or deed, is guilty of felony, and liable to imprisonment for life.—31 *V.*, *c.* 69, *s.* 5; 32-33 *V.*, *c.* 17, *s.* 1.

4. Every one who confederates, combines or conspires with any person to do any act of violence, in order to intimidate, or to put any force or constraint upon any Legislative Council, Legislative Assembly or House of Assembly in any Province of Canada, is guilty of felony, and liable to fourteen years' imprisonment.—31 *V.*, *c.* 71, *s.* 5.

5. No person shall be prosecuted for any felony by virtue of this Act in respect of such compassings, imaginations, inventions, devices or intentions as aforesaid, in so far as the same are expressed, uttered, or declared by open and advised speaking only, unless information of such compassings, imaginations, inventions, devices and intentions and of the words by which the same were expressed, uttered or declared, is given upon oath to one or more justices of the peace, within six days after such words are spoken, and unless a warrant, for the apprehension of the person by whom such words were spoken is issued within ten days next after such information is given as aforesaid; and no person shall be convicted of any such compassings, imaginations, inventions, devices or intentions as aforesaid, in so far as the same are expressed, uttered or declared by open or advised speaking as aforesaid, except upon his own confession in open court, or unless the words so spoken are proved by two credible witnesses.—31 *V.*, *c.* 69, *s.* 6.

6. If any person, being a citizen or subject of any foreign state or country at peace with Her Majesty, is or continues in arms against Her Majesty, within Canada, or commits any act of hostility therein, or enters Canada with design or intent to levy war against Her Majesty, or to commit any felony therein, for which any person would, in Canada, be liable to suffer death, the Governor General may order the assembling of a militia general court martial for the trial of such person, under "*The Militia Act;*" and upon being found guilty by such court martial of offending against the provisions of this section, such person shall be sentenced by such court martial to suffer death, or such other punishment as the court awards.—31 *V.*, *c.* 14, *s.* 2.

7. Every subject of Her Majesty, within Canada, who levies war against Her Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with Her Majesty, or enters Canada in company with any such subjects or citizens with

intent to levy war on Her Majesty, or to commit any such act of felony as aforesaid, or who, with the design or intent to aid and assist, joins himself to any person or persons whomsoever, whether subjects or aliens, who have entered Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same, may be tried and punished by a militia court martial, in the same manner as any citizen or subject of a foreign state or country, at peace with Her Majesty, may be tried and punished under the next preceding section.—31 *V.*, *c.* 14, *s.* 3.

8. Every subject of Her Majesty, and every citizen or subject of any foreign state or country, who offends against the provisions of the two sections next preceding, is guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried in any county or district of the Province in which such offence was committed, before any court of competent jurisdiction, in the same manner as if the offence had been committed in such county or district, and, upon conviction, shall suffer death as a felon.—31 *V.*, *c.* 14, *s.* 4.

9. Nothing herein contained shall lessen the force of or in any manner affect anything enacted by the statute passed in the twenty-fifth year of the reign of His Majesty King Edward the Third, intituled "*A declaration which offences shall be adjudged treason.*"—31 *V.*, *c.* 69, *s.* 1.

See Archbold, 779; Stephen's Crim. L., 32; Sir John Kelyng's Crown cases, p. 7 — and a treatise on treason, printed therein: Foster's Cr. Law, discourse on high Treason, 183.

Also, R. v. Gallagher, 15 Cox, 291; R. v. Deasy, 15 Cox, 334, for prosecutions under the Imperial Act. Secs. 106, 186 and 187 of the Procedure Act, are applicable to trials for offences under this Act; also, secs. 3 and 4 as to jurisdiction.

CHAPTER 147.

AN ACT RESPECTING RIOTS, UNLAWFUL ASSEMBLIES AND BREACHES OF THE PEACE.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every sheriff, deputy sheriff, mayor or other head officer, and justice of the peace, of any county, city or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, shall resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice, command, or cause to be commanded, silence, and, after that, openly and with loud voice, make or cause to be made a proclamation in these words, or to the like effect:—

"Our Sovereign Lady the Queen charges and commands all persons "being assembled immediately to disperse and peaceably to depart "to their habitations or to their lawful business, upon the pain of "being guilty of an offence, on conviction of which they may be "sentenced to imprisonment for life.

"GOD SAVE THE QUEEN."

31 *V.*, *c.* 70, *s.* 1, *part, and ss.* 2 *and* 3.

2. All persons who,—

(*a.*) With force and arms willfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made, or—

(*b.*) Continue together to the number of twelve, for one hour after such proclamation has been made, or if they know that its making was hindered as aforesaid, continue together and do not disperse themselves within one hour after such hindrance,—

Are guilty of felony and liable to imprisonment for life.

2. No person shall be prosecuted for any offence under this section unless such prosecution is commenced within twelve months after the offence is committed.—31 *V.*, *c.* 70, *ss.* 1, *part*, 6, 7 *and* 8.

3. If the persons so unlawfully, riotously and tumultuously assembled together as aforesaid, or twelve or more of them, continue

together, and do not disperse themselves, for the space of one hour after the proclamation is made, or after such hindrance as aforesaid, every such sheriff, mayor, justice and other officer as aforesaid, and every constable or other peace officer, and all persons required by them to assist, shall cause such persons to be apprehended and carried before a justice of the peace; and if any of the persons so assembled is killed or hurt, in the apprehension of such persons or in the endeavor to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, shall be indemnified against all proceedings of every kind in respect thereof.—31 *V.*, *c.* 70, *ss.* 4 *and* 5.

4. All meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms or for the purpose of practising military exercises, movements or evolutions, without lawful authority for so doing, are unlawful and prohibited.—31 *V.*, *c.* 15, *s.* 1, *part.*

5. Every one who is present at or attends any such meeting or assembly, for the purpose of training any other person or persons to the use of arms or to the practice of military exercises, movements or evolutions, or who, without lawful authority for so doing, trains or drills any other person or persons to the use of arms, or to the practice of military exercises, movements or evolutions, or who aids or assists therein, is guilty of a misdemeanor, and liable to two years' imprisonment.—31 *V.*, *c.* 15, *s.* 1, *part.*

6. Every one who attends or is present at any such meeting or assembly, for the purpose of being, or who, at any such meeting or assembly, is trained or drilled to the use of arms, or to the practice of military exercises, movements or evolutions, is guilty of a misdemeanor and liable to two years' imprisonment.—31 *V.*, *c.* 15, *s.* 1, *part.*

7. Any justice of the peace, constable or peace officer, or any person acting in his aid or assistance, may disperse any such unlawful meeting or assembly as in the three sections next preceding mentioned, and may arrest and detain any person present at or aiding, assisting or abetting any such assembly or meeting as aforesaid; and the justice of the peace who arrests any such person or before whom any person so arrested is brought, may commit such person for trial for such offence, unless such person gives bail for his appearance at the next court of competent jurisdiction, to answer to any indictment which is preferred against him for any such offence.—31 *V.*, *c.* 15, *s.* 2.

8. No one shall be prosecuted for any offence under the four sections next preceding, unless such prosecution is commenced within six months after the offence is committed.—31 *V.*, *c.* 15, *s.* 9.

9. All persons who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish, pull down or destroy or begin to demolish, pull down or destroy, any church, chapel, meeting-house or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof,—or any building other than such as are in this section before mentioned, belonging to Her Majesty, or to any county, municipality, riding, city, town, village, parish or place, or to any university or college or hall of any university, *or to any corporation, or to any unincorporated body or society or persons associated for any lawful purpose,* or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution,—or any machinery, whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof,—or any steam engine or other engine for sinking, working, ventilating or draining any mine, or any staith, building or erection used in conducting the business of any mine, or any bridge, wagon-way or track for conveying minerals, from any mine, are guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 15; 24-25 *V.*, *c.* 97, *s.* 11, *Imp.*

10. All persons who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, wagon-way or track, as in the next preceding section mentioned, are guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 16, *part; R. S. N. S.* (3*rd S.*), *c.* 162, *s.* 6; 24-25 *V.*, *c.* 97, *s.* 12, *Imp.*

11. Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose with force and violence, or in a manner calculated to create terror and alarm, are guilty of an unlawful assembly, and liable to two years' imprisonment.—*R. S. N. S.* (3*rd S.*), *c.* 162, *s.* 5; 1 *R. S. N. B.*, *c.* 147, *s.* 6.

12. Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose with force and violence, or in any manner calculated to create terror and alarm, and who endeavor to execute such purpose, are although such purpose is not executed, guilty of a rout, and liable to three years' imprisonment.—1 *R. S. N. B.*, *c.* 147, *s.* 7.

13. Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose with force and violence, and who, wholly or in part, execute such purpose in a manner calculated to create terror and alarm, are guilty of a riot, and liable to four years' imprisonment.—1 *R. S. N. B.*, c. 147, *s.* 8.

14. Two or more persons who fight together in a public place, in a manner calculated to create terror and alarm, are guilty of an affray, and liable, on summary conviction, to three months' imprisonment. *R. S. N. S.* (*3rd S.*), *c.* 162, *s.* 7; 1 *R. S. N. B.*, *c.* 147, *s.* 9.

Secs. 1, 2, 3 are from the I Geo. 1, st. 2, c. 5. See Archbold, 902.

Secs. 4, 5, 6, 7, 8 are from 60 Geo. 3,—I Geo. 4, c. 1.

Secs. 11, 12, 13, 14 are enactments from Nova Scotia and New Brunswick, extended to all the Dominion on unlawful assemblies, routs, riots and affrays.

The words in *italics* in sec. 9 are not in the Imperial Act.

Indictment under Sect. 9.—That on ..... at ..... J. S., J. W. and E. W., together with divers other evil-disposed persons, to the jurors aforesaid unknown, unlawfully, riotously and tumultuously did assemble together, to the disturbance of the public peace; and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there feloniously, unlawfully and with force begin to demolish and pull down the dwelling-house of one J. N., there situate, against the form.....

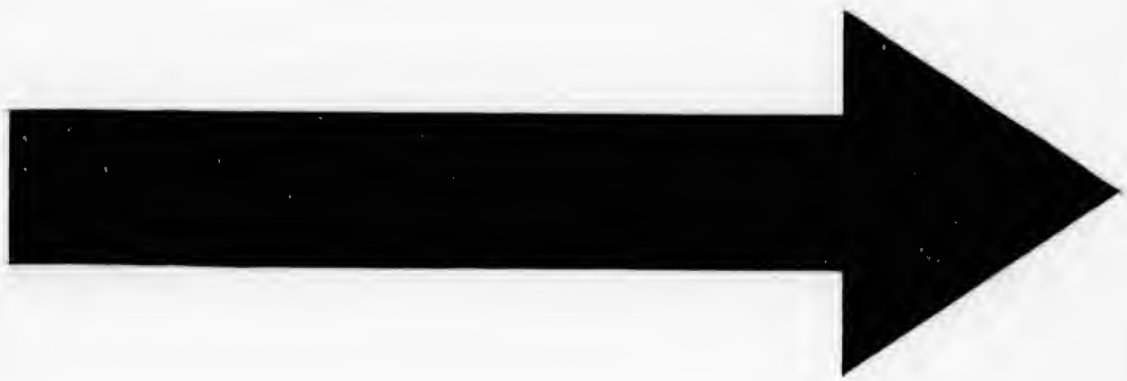
Local description necessary in the body of the indictment.—*R.* v. *Richards*, 1 *M. & Rob.* 177.

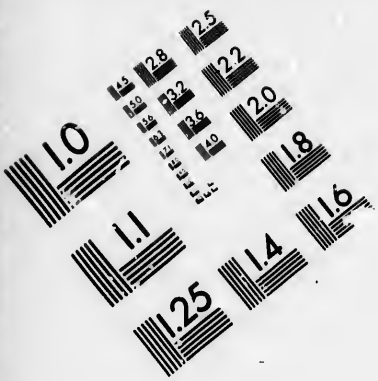
By sec. 206 of the Procedure Act, it is enacted that if upon the trial of any person, for any felony mentioned in the ninth section of "*Act respecting riots, unlawful assemblies, and breaches of the peace,*" the jury is not satisfied that such person is guilty thereof, but is satisfied that he is guilty of any offence mentioned in the tenth section of such Act, they may find him guilty thereof, and he may be punished accordingly.—32-33 *V., c.* 22, *s.* 16, *part;* 24-25 *V., c.* 9., *s.* 11 and 12, *Imp.*

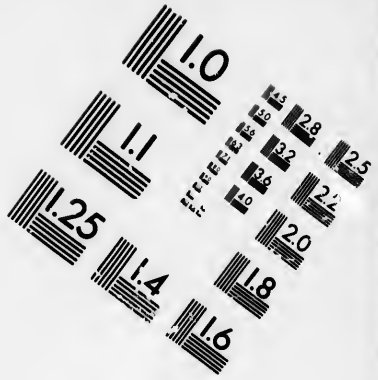
Indictment under Sect. 10.—That on ..... at ..... S., J. W. and E. W., together with divers other evil-disposed persons, to the said jurors unknown, unlawfully, riotously, and tumultuously did assemble together to the disturbance of the public peace, and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there unlawfully and with force injure a certain dwelling-house of one J. N., there situate, against the form ..... Add a count stating *damage* instead of *injure.*

Local descriptions necessary as under sec. 9.

The riotous character of the assembly must be proved, It must be proved that these three or more, but not less than three, persons assembled together, and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like. It is a sufficient terror and alarm, if *any one* of the Queen's subjects be in fact terrified.—Archbold, 842. Then prove that the assembly began with force to demolish the house in question. It must appear that they began to demolish some part of the *freehold;* for instance, the demolition of moveable shutters







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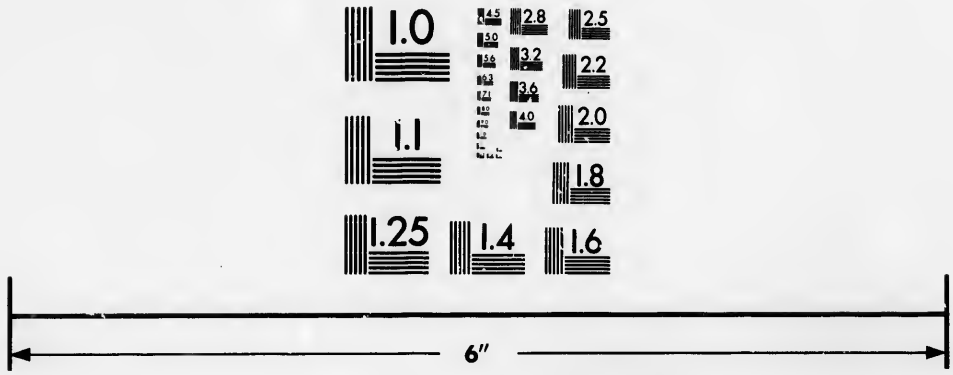

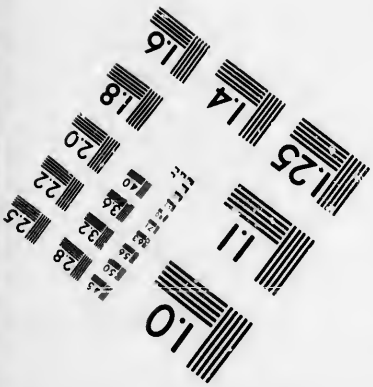

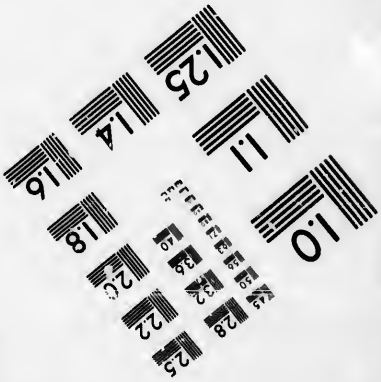

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is not sufficient.—R. v. Howell, 9 C. & P. 437. A demolition by fire is within the Statute. Prove that the defendants were either active in demolishing the house, or present, aiding and abetting. To convict under sect. 9, the jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that if they had carried their intention into effect, they would in point of fact have demolished it; for if the rioters merely do an injury to the house, and then of their own accord go away as having completed their purpose it is not a beginning to demolish within this section. But a total demolition is not necessary, though the parties were not interrupted, and the fact that the rioters left a chimney remaining will not prevent the Statute from applying.—*Archbold.* But if the demolishing or intent to demolish be not proved, and evidence of riot and injury or damage to the building is produced, the jury may find the defendant guilty of the misdemeanor created by sect. 10, by the proviso contained in the aforesaid sect. 206 of the Procedure Act.

Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as the second at prize fights. The combatants fought for about 40 minute with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators.

Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize fight, the Chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but, if the parties met intending to fight till one gave in from

exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize fight or not.

Held, that the jury were properly directed.—*R.* v. *Orton*, 14 *Cox*, 226. *See R.* v. *McNaughton*, 14 *Cox*, 576.

The appellants with a considerable number of other persons, forming a body called "Salvation Army," assembled together in the streets of a town for a lawful object, and with no intention of carrying out their object unlawfully, or by the use of physical force, but knowing that their assembly would be opposed and resisted by other persons, in such a way as would in all probability tend to the committing of a breach of peace on the part of such opposing persons. A disturbance of the peace having been created by the forcible opposition of a number of persons to the assembly and procession through the streets of the appellants and the Salvation Army, who themselves used no force or violence, it was—

Held, by Field and Cave, J. J. (reversing the decision of the justices), that the appellants had not been guilty of "unlawfully and tumultuously assembling," etc., and could not therefore be convicted of that offence, nor be bound over to keep the peace.

Held, also, that knowledge by persons peaceably assembling for a lawful object, that their assembly will be forcibly opposed by other persons, under circumstances likely to lead to a breach of the peace on the part of such other persons, does not render such assembly unlawful.—*Beatty* v. *Gillbanks*, 15 *Cox*, 138.

A procession being attacked by rioters a person in it fired a pistol twice. He appeared to be acting alone and nobody was injured.

Held, that he could not be indicted for riot, and, on a case reserved, a conviction on such an indictement was quashed.—*R.* v. *Corcoran*, 26 *U. C. C. P.* 134.

On the trial of an indictment for riot and unlawful assembly on the 15th Jan., evidence was given on the part of the prosecution of the conduct of the prisoners on the day previous, for the purpose of showing (as was alleged) that B., in whose office one act of riot was committed, had reason to be alarmed when the prisoners came to his office. The prisoner's counsel thereupon claimed the right to show that they had met on the 14th to attend a school meeting, and to give evidence of what took place at the school meeting, but the evidence was rejected.

Held, per Allen, C. J., and Fisher and Duff, J. J., Weldon and Wetmore, J. J., dis., that the evidence was properly rejected because the conduct of the prisoners on the 14th could not qualify or explain their conduct on the following day.

It is no ground for quashing a conviction for unlawful assembly on one day that evidence of an unlawful assembly on another day has been improperly received, if the latter charge was abandoned by the prosecuting counsel at the close of the case, and there was ample evidence to sustain the conviction.

If a man knowingly does acts which are unlawful, the presumption of law is that the *mens rea* exists; ignorance of the law will not excuse him.—*The Queen* v. *Mailloux*, 3 *Pugs. (N. B.)* 493.

CHAPTER 154.

AN ACT RESPECTING PERJURY.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every one who commits perjury or subornation of perjury is guilty of a misdemeanor, and liable to a fine in the discretion of the court and to fourteen years' imprisonment.—32-33 *V.*, *c.* 23, *s.* 1.

2. Every one who,—

(*a.*) Having taken any oath, affirmation, declaration or affidavit in any case in which by any Act or law in force in Canada, or in any Province of Canada, it is required or authorized that facts, matters or things be verified, or otherwise assured or ascertained, by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing,—

(*b.*) Knowingly, wilfully and corruptly, upon oath or affirmation, affirms, declares, or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit, as to any such fact, matter or thing,—such statement, affidavit, affirmation or declaration being untrue, in the whole or any part thereof, or—

(*c.*) Knowingly, wilfully and corruptly omits from any such affidavit, affirmation or declaration, sworn or made under the provisions of any law, any matter which, by the provisions of such law, is required to be stated in such affidavit, affirmation or declaration,—

Is guilty of wilful and corrupt perjury, and liable to be punished accordingly:

2. Provided, that nothing herein contained shall affect any case amounting to perjury at common law, or the case of any offence in respect of which other or special provision is made by any Act.—32-33 *V.*, *c.* 23, *s.* 2.

3. Every person who wilfully and corruptly makes any false affidavit, affirmation or declaration, out of the Province in which it is to be used, but within Canada, before any functionary authorized to

take the same for the purpose of being used in any Province of Canada, shall be deemed guilty of perjury, in like manner as if such false affidavit, affirmation or declaration had been made in the Province in which it is used, or intended to be used, before a competent authority. —33 *V.*, *c.* 26, *s.* 1, *part.*

4. Any judge of any court of record, or any commissioner, before whom any inquiry or trial is held, and which he is by law required or authorized to hold, may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination, answer or other proceeding made or taken before him, direct such person to be prosecuted for such perjury, if there appears to such judge or commissioner a reasonable cause for such prosecution,—and may commit such person so directed to be prosecuted until the next term, sittings, or session of any court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the court without leave,—and may require any person such judge or commissioner thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid.—32-33 *V.*, *c.* 23, *s.* 6.

5. All evidence and proof whatsoever, whether given or made orally or by or in any affidavit, affirmation, declaration, examination or deposition, shall be deemed and taken to be material with respect to the liability of any person to be proceeded against and punished for wilful and corrupt perjury or for subornation of perjury.—32-33 *V.*, *c.* 23, *s.* 7.

Perjury, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a "*co[illegible]*" of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. 3 *Russell*, 1.

Hawkins, Vol. 1, p. 429, has the word "*course*" of justice, instead of "*court*" of justice.

Bishop, Cr. Law, Vol. 2, 1015, says a "*course*" of justice, and thinks that the word "*court*" in Russell is a

misprint for "course." Though Bacon's abridgement, verb: *perjury*, also has "*court*." Roscoe, 747, has also "*court*" of justice, but says the proceedings are not confined to courts of justice; and a note by the editor of the American sixth edition says a "*course*" of justice is a more accurate expression than a "*court*" of justice.

There is no doubt, however, that, according to all the definitions of this offence, by the common law, the party must be lawfully sworn, the proceeding in which the oath is taken must relate to the administration of justice, the assertion sworn to must be false, the intention to swear falsely must be wilful, and the falsehood material to the matter in question. Promissory oaths, such as those taken by officers for the faithful performance of duties, cannot be the subject of perjury.—*Cr. L. Comrs., 5th Report*, 51.

False swearing, under a variety of circumstances, has been declared by numerous Statutes to amount to perjury, and to be punishable as such. But at common law, false swearing was very different from perjury. The offence of perjury, at the comm[illegible] law, is of a very peculiar description, say the Cr. L. Comrs., 5th Rep. 23, and differs in some of its essential qualities from the crime of false testimony, or false swearing, as defined in all the modern Codes of Europe. The definition of the word, too, in its popular acceptation, by no means denotes its legal signification. Perjury, by the common law, is the assertion of a falsehood upon oath in a judicial proceeding, respecting some fact material to the point to be decided in such proceeding; and the characteristic of the offence *is not the violation of the religious obligation of an oath, but the injury done to the administration of public justice by false testimony.*

Here, in Canada, the above Statute declares to be perjury all oaths, &c., taken or subscribed in virtue of any law,

or required or authorized by any such law; and voluntary and extra-judicial oaths being prohibited by c. 141, Rev. Stat., it may perhaps be said that, with us, every false oath, *knowingly, wilfully and corruptly* taken amounts to perjury, and is punishable as such. The interpretation Act, c. 1, Rev. Stat., enacts moreover that the word "oath" includes a solemn affirmation whenever the context applies to any person and case by whom and in which a solemn affirmation may be made instead of an oath, and in like cases the word *sworn* shall include the word *affirmed* or *declared*.

Sect. 5 *supra* is an important alteration of the law on perjury as it stands in England. As stated before, by the Common Law, to constitute perjury, the false swearing must be, besides the other requisites, in *a matter material* to the point in question. The above section may be said to have abolished this necessary ingredient of perjury.

See R. v. Ross, I. M. L. R. Q. B., 227.

See Stephen's Digest of Criminal Law, XXXIII.

This clause 5 of our Perjury Act has been taken from clause 272 of the Criminal Laws of Victoria, Australia.

As our law now stands, perjury may be defined a false oath, knowingly, wilfully and corruptly given by one, in some judicial proceeding, or on some other occasion where an oath is imposed, required, or sanctioned by law.

1st. *There must be a lawful oath.* *R.* v. *Gibson*, 7 *R. L.* 574; *R.* v. *Martin*, 21 *L. C. J.*, 156, 7 *R. L.* 772; *R.* v. *Lloyd*, 16 *Cox*, 235. And, therefore, it must be taken before a competent jurisdiction, or before an officer who had legal jurisdiction to administer the particular oath in question. And though it is sufficient *primâ facie* to show the ostensible capacity in which the judge or officer acted when the

oath was taken, the presumption may be rebutted by other evidence, and the defendant, if he succeed, will be entitled to an acquittal.—2 *Chitty*, 304; *Archbold*, 815. —*R.* v. *Roberts*, 14 *Cox*, 101; *R.* v. *Hughes*, 14 *Cox*, 284.

2nd.—*The oath must be false.* By this, it is intended that the party must believe that what he is swearing is fictitious; for, it is said, that if, intending to deceive, he asserts of his own knowledge that which may happen to be true, without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him.—2 *Chitty*, 303. Bishop's first book of the law, 117. And a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false.—*R.* v. *Pedley*, 1 *Leach*, 327.

3rd. *The false oath must be knowingly, wilfully, and corruptly taken.* The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made, for if it seems rather to have been occasioned by inadvertency or surprise, or a mistake in the import of the question, the party will not be subjected to those penalties which a corrupt motive alone can deserve.—2 *Chitty*, 303. If an oath is false to the knowledge of the party giving it, it is, in law, wilful and corrupt.—2 *Bishop, Cr. L.* 1043, *et seq.*

It hath been holden not to be material, upon an indictment of perjury at common law, whether the false oath were at all credited, or whether the party in whose prejudice it was intended were, in the event, any way aggrieved by it or not; insomuch as this is not a prosecution grounded on the damage of the party but on the abuse of public justice.—3 *Burn's Justice*, 1227.

Indictment for Perjury.—The Jurors for Our Lady the

Queen, upon their oath present, that heretofore, to wit, at the *(assizes)* holden for the county (*or district*) of ..... on the ..... day of ..... in the year of Our Lord, one thousand ..... before ..... (*one of the judges of Our Lady the Queen*), a certain issue between one E. F. and one J. H. in a certain action of *covenant* was tried, upon which trial A. B. appeared as a witness for and on behalf of the said E. F., and was then and there duly *sworn* before the said ..... and did then and there, upon his *oath* aforesaid, falsely, wilfully and corruptly depose and *swear* in substance and to the effect following, "*that he saw the said G. H. duly execute the deed on which the said action was brought*," whereas, in truth, the said A. B. did not see the said G. H. execute the said deed, and the said deed was not executed by the said G. H., and the said A. B. did thereby commit wilful and corrupt *perjury*.

Sect. 107 of the Procedure Act enacts as follows, concerning the form of indictment in perjury: "In any indictment for perjury, or for unlawfully, illegally, falsely, fraudulently, deceitfully, maliciously or corruptly taking, making, signing or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed."

No indictment for perjury or subornation of perjury can

be preferred, unless one or other of the preliminary steps required by sec. 140 of the Procedure Act has been taken.

Perjury is not triable at Quarter Sessions.—2 *Hawkins*, *c.* 8, *s.* 38; *R.* v. *Bainton*, 2 *Str.* 1088; *R.* v. *Yarrington*, 1 *Salk.* 406; *Dickinson's*, *Quarter Sessions*, 156; *R.* v. *Higgins*, 2 *East.* 18; *R.* v. *Currie*, 31 *U. C. Q. B.* 582.

The indictment must allege that the defendants swore falsely, wilfully and corruptly; where the word *feloniously* was inserted instead of *falsely*, the indictment, though it alleged that the defendant swore wilfully, corruptly and maliciously, was held bad in substance, and not amendable.—*R.* v. *Oxley*, 3 *C. & K.* 317; *Archbold*, 812.

If the same person swears contrary at different times, it should be averred on which occasion he swore wilfully, falsely and corruptly.—*R.* v. *Harris*, 5 *B. & Ald.* 926.

As to assignments of perjury, the indictment must assign positively the manner in which the matter sworn to is false. A general averment that the defendant falsely swore, etc., etc., upon the whole matter is not sufficient; the indictment must proceed by special averment to negative that which is false.—3 *Burn's Justice*, 1235.

Proof.—It seems to have been formerly thought that in proof of the crime of perjury, two witnesses were necessary; but this strictness, if it was ever the law, has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence. The oath of the opposing witness therefore will not avail, unless it be corroborated by material and independent circumstances; for otherwise there would be nothing more than the oath of one man against another, and the scale of evidence being

thus in one sense balanced, it is considered that the jury cannot safely convict. So far the rule is founded on substantial justice. But it is not precisely accurate to say that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose. Thus, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness. Still, evidence confirmatory of the single accusing witness, in some slight particulars only, will not be sufficient to warrant a conviction, but it must at least be strongly corroborative of his testimony, or to use the quaint but energetic language of Chief Justice Parker, "a strong and clear evidence, and more numerous than the evidence given for the defendant." When several assignments of perjury are included in the same indictment, it does not seem to be clearly settled whether, in addition to the testimony of a single witness, corroborative proof must be given with respect to each; but the better opinion is that such proof is necessary; and that too, although all the perjuries assigned were committed at one time and place. For instance, if a person, on putting in his schedule in the Bankruptcy Court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence. The principle that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that without any witness directly to disprove what is

sworn, circumstances alone, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America, that a man may be convicted of perjury on documentary and circumstantial evidence alone, *first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and *thirdly*, where the party is charged with taking an oath contrary to what he must necessarily have known to be true, the falsehood being shown by his own letter relating to the fact sworn to, or by any other writings which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.

If the evidence adduced in proof of the crime of perjury consists of two opposing statements by the prisoner, and nothing more, he cannot be convicted. For, if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that the declaration was the truth, and the other an error or a falsehood; though, the latter, being inconsistent with what he has sworn may form important evidence with other circumstances against him. And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, when no other evidence of the falsity is given. If, indeed, it can be shown that before making the statement on which perjury is assigned

the accused had been tampered with, or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained, and provided the nature of the statement was such, that one of them must have been false *to the prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that because a man has given contradictory accounts of a transaction on two occasions he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Moreover, when a man merely swears to the best of his memory and belief, it of course requires very strong proof to show that he is wilfully perjured. The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the falsity of the matter on which the perjury is assigned. Therefore the holding of the Court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient, were the prisoner charged with any other offence. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the as-

signment of perjury.—2 *Taylor on Evidence, par.* 876, *et seq.*

On an indictment for perjury alleged to have been committed at the Quarter Sessions, the chairman of the Quarter Sessions ought not to be called upon to give evidence as to what the defendant swore at the Quarter Sessions.—*R.* v. *Gazard*, 8 *C. & P.* 595.

But this ruling is criticized by Greaves, note *n*, 3 Russ. 86, and Byles, J., in R. v. Harvey, 8 Cox, 99, said that though the judges of Superior Courts ought not to be called upon to produce their notes, yet the same objection was not applicable to the judges of Inferior Courts, especially where the judge is willing to appear.—3 *Burn's Justice*, 1243.

In R. v. Hook, Dears & B. 606, will be found an interesting discussion on the evidence necessary upon an indictment for perjury.

By sect. 16 of the Procedure Act, every person accused of perjury may be dealt with, indicted, tried and punished in the district, county or place in which the offence is committed, or in which he is apprehended or is in custody.

The Imperial Statute, corresponding to sect. 4 of our revised Perjury Act, authorizes the judge to commit, *unless* such person shall enter into a recognizance and give sureties. Our statute gives power to commit *or* to permit such person to enter into a recognizance and give sureties.

Greaves remarks on this clause: "The crime of perjury has become so prevalent of late years, and so many cases of impunity have arisen, either for want of prosecution, or for defective prosecution, that this and the following sections were introduced to check a crime which so vitally affects the interests of the community.

"It was considered that by giving to every Court and

person administering oaths a power to order a prosecution for perjury at the public expense, coupled with a power of commitment in default of bail, many persons would be deterred from committing so detestable a crime, and in order to effectuate this object, the present clause was framed, and as it passed the Lords it was much better calculated to effect that object than as it now stands.

"As it passed the Lords it applied to any justice of the peace. The committee in the Commons confined it to justices in petty and special sessions,—a change much to be regretted, as a large quantity of business is transacted before a single justice or one metropolitan or stipendiary magistrate, who certainly ought to have power to commit under this clause for perjury committed before them.

"Again, as the clause passed the Lords, if an affidavit, etc., were made before one person, and used before another judge or Court, etc., and it there appeared that perjury had been committed, such judge or Court might commit. The clause has been so altered, that the evidence must be given, or the affidavit, etc., made before the judge, etc., who commits. The consequence is, that numerous cases are excluded; for instance, a man swears to an assault or felony before one justice, and on the hearing before two it turns out he has clearly been guilty of perjury, yet he cannot be ordered to be prosecuted under this clause. Again, an affidavit is made before a commissioner, the Court refer the case to the master, and he reports that there has been gross perjury, or the Court see on the hearing of the case before them that there has been gross perjury committed, yet there is no authority to order a prosecution under this clause. So, again, a man is committed for trial on the evidence of a witness which is proved on the trial to be false beyond all doubt, yet

if such witness be not examined, and do not repeat the same evidence on the trial, the Court cannot order him to be prosecuted.

"It is to be observed, that before ordering a prosecution under this clause, the Court ought to be satisfied, not only that perjury has been committed, but that there is a 'reasonable cause for such prosecution.' Now it must ever be remembered that two witnesses, or one witness and something that will supply the place of a second witness, are *absolutely essential* to a conviction for perjury. The Court, therefore, should not order a prosecution, unless it sees that such proof is capable of being adduced at the trial; and as the Court has the power, it would be prudent, in every case, if practicable, at once to bind over such two witnesses to give evidence on the trial, otherwise it may happen that one or both may not be then forthcoming to give evidence. It would be prudent also for the Court to give to the prosecutor a minute of the point on which, in its judgment, the perjury had been committed, in order to guide the framer of the indictment, who possibly may be wholly ignorant otherwise of the precise ground on which the prosecution is ordered. It is very advisable also that where the perjury is committed in giving evidence, such evidence should be taken down in writing by some person who can prove it upon the trial, as nothing is less satisfactory or more likely to lead to an acquittal than that the evidence of what a person formerly swore should depend entirely upon mere memory. Indeed, it may well be doubted whether it would be proper to order a prosecution in any case under this Act, where there was no minute in writing of the evidence taken down at the time.

"Again, it ought to be clear, beyond all reasonable doubt, that perjury has been *willfully* committed before

a prosecution is ordered."—*Lord Campbell's Acts, by Greaves*, 22.

See sect. 225 of the Procedure Act as to proof of trial for felony or misdemeanor in which perjury was committed.

It is to be observed that this section is merely remedial, and will not prevent a regular record from being still admissible in evidence, and care must be taken to have such record drawn up in any case where the particular averments in the former indictment may be essential.—*Lord Campbell's Acts, by Greaves*, 27.

SUBORNATION OF PERJURY.

Sec. 108 and second schedule of Procedure Act, as to form of indictment.—14-15 *V.*, *c.* 100, *s.* 21, *Imp.*

Subornation of perjury is a misdemeanor, as perjury itself, and subject to the same punishment.—See remarks under sect. 1, *ante.*

Sect. 5, *ante*, declaring all evidence whatever material with respect to perjury, also applies to subornation of perjury.

Sect. 225 of the Procedure Act, *ante*, as to certificate of indictment and trial, applies also to subornation of perjury.

Sect. 16 of the Procedure Act, allowing perjury to be tried where the offender is apprehended or is in custody, does not appear to apply to subornation of perjury.

Subornation of perjury, by the common law, seems to be an offence in procuring a man to take a false oath, amounting to perjury, who actually taketh such oath.—1 *Hawkins*, 435.

But it seemeth clear that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury,

yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment.—1 *Hawkins, loc. cit.*

An attempt to suborn a person to commit perjury, upon a reference to the judges, was unanimously holden by them to be a misdemeanor.—1 *Russ.* 85.

And, upon an indictment for subornation of perjury, if it appears, at the trial, that perjury was not actually committed, but that the defendant was guilty of the attempt to suborn a person to commit the offence, such defendant may be found guilty of the attempt.—Sec. 183, Procedure Act.

In support of an indictment for subornation the record of the witness's conviction for perjury is no evidence against the suborners, but the offence of the perjured witness must be again regularly proved. Although several persons cannot be joined in an indictment for perjury, yet for subornation of perjury they may.—3 *Burn's Justice*, 1246.

Indictment, same as indictment for perjury to the end, and then procced:—And the Jurors aforesaid upon their oath aforesaid further present, that before the committing of the said offence, by the said A. B., to wit, on the ..... day of ..... at ..... C. D. unlawfully, wilfully and corruptly did cause and procure the said A. B. to do and commit the said offence in the manner and form aforesaid.

No indictment can be preferred for subornation of perjury unless one or other of the preliminary steps required by sect. 140 of the Procedure Act has been taken.

As perjury, *see ante*, subornation of perjury is not triable at Quarter Sessions.

Indictment quashed (for perjury) none of the formalities required by sec. 140 of the Procedure Act having been complied with.—*R.* v. *Granger*, 7 *L. N.* 247.

A person accused of perjury cannot have accomplices, and is alone responsible for the crime of which he is accused.—*R.* v. *Pelletier*, 1 *R. L.* 565.

Including two charges of perjury in one indictment would not be ground for quashing it. An indictment that follows the form given by the Statute is sufficient.—*R.* v. *Bain*, *Ramsay's App. Cas.* 191.

The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the defendant is alleged to have given false testimony, is not material when the assignment of perjury has no reference to the pleading, but the defendant may, if he wishes, in case the plea is not produced, prove its contents by secondary evidence. It is not essential to prove that the facts sworn to by the defendant, as alleged in the indictment, were material to the issue in the cause in which the defendant was examined.—*R.* v. *Ross*, 1 *M. L. R. Q. B.* 227; 28 *L. C. J.* 261.

CHAPTER 155.

AN ACT RESPECTING ESCAPES AND RESCUES.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every one who is convicted of a felonious rescue is liable to seven years' imprisonment, when no special punishment is otherwise provided by statute.—32-33 *V.*, *c.* 29, *s.* 84, *part.*

2. Every one who escapes from or rescues, or aids in rescuing any other person from lawful custody, or makes or causes any breach of prison, if such offence does not amount to felony, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 29, *s.* 84, *part.*

3. Every one who, being a prisoner ordered to be detained in any penitentiary, escapes from the person or persons having the lawful custody of him, when being conveyed thereto, or when being conveyed from one penitentiary to another, is guilty of felony, and liable to two years' imprisonment.—46 *V. c.* 37, *s.* 54, *part.*

4. Every one who, being a prisoner in a penitentiary, breaks prison or escapes, or attempts to escape from the custody of any officer, guard or other servant of the penitentiary while at work, or passing to or from work, either within or beyond the prison walls or penitentiary limits, is guilty of felony, and liable to three years' imprisonment.—46 *V.*, *c.* 37, *s.* 54, *part.*

5. Every one who, being a prisoner in any penitentiary, at any time attempts to break prison, or who forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom, whether successful or not, is guilty of felony, and liable to one year's imprisonment.—46 *V.*, *c.* 37, *s.* 55, *part.*

6. Every one who rescues or attempts to rescue any prisoner while being conveyed to any penitentiary, or while imprisoned therein, or while being conveyed from one penitentiary to another, or while passing to or from work at or near any penitentiary,—and every one who by supplying arms, tools or instruments of disguise, or otherwise, in any manner aids any such prisoner in any escape or attempt at escape, is guilty of felony, and liable to five years' imprisonment.—46 *V.*, *c.* 37, *s.* 57.

7. Every one who, having the custody of any such prisoner as aforesaid, or being employed by the person having such custody, as a keeper, turnkey, guard or assistant, carelessly allows any such prisoner to escape, is guilty of a misdemeanor, and liable to fine or imprisonment, or to both, in the discretion of the court; and every such person as aforesaid, who knowingly and wilfully allows any such convict to escape, is guilty of felony, and liable to five years' imprisonment.—46 *V.*, *c.* 37, *s.* 58.

8. Every one who, knowingly and unlawfully, under color of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged, is guilty of misdemeanor, and liable to imprisonment for any term less than two years, and the person so discharged shall be held to have escaped.—32-33 *V.*, *c.* 29, *s* 85.

9. Every one who, being sentenced to be detained in any reformatory prison or reformatory or industrial school, escapes therefrom, may at any time before the expiration of his term of detention, be apprehended without warrant, and brought before any justice of the peace or magistrate, who, on proof of his identity, shall remand him to such prison or school there to serve the remainder of his original sentence, with such additional term, not exceeding one year, as to such justice or magistrate seems proper.—32-33 *V.*, *c.* 34, *s.* 7; 33 *V.*, *c.* 32, *s.* 5; 43 *V.*, *c.* 41, *s.* 4; 47 *V.*, *c.* 45, *s.* 6.

10. Every one who,—

(*a.*) Knowingly assists, directly, or indirectly, any offender detained in a reformatory prison or reformatory or industrial school, to escape from such prison or school,—

(*b.*) Directly or indirectly induces such an offender to escape from such prison or school,—

(*c.*) Knowingly harbors, conceals or prevents from returning to the prison or school, or assists in harboring, concealing or preventing from returning to the prison or school, any offender who has escaped from such prison or school,—

Shall be liable, on summary conviction before two justices of the peace, to a penalty not exceeding eighty dollars, or to imprisonment with or without hard labor for any term not exceeding two months. —32-33 *V.*, *c.* 34, *s.* 8.

11. Every one who escapes from imprisonment shall, on being retaken, undergo, in the prison he escaped from, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape; and any imprisonment

awarded for such offence may be to the penitentiary or prison from which the escape was made.—32-33 *V.*, *c.* 29, *s.* 87.

What is an escape; when is an escape a felony, and when a misdemeanor; what is a prison-breaking, and when is it a felony or a misdemeanor; what is a rescue, and when is it a felony or a misdemeanor?

What is an escape.—An escape is where one who is arrested gains his liberty without force before he is delivered by due course of law. The general principle of the law on the subject is that as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice, and elude the vigilance of their keepers, are guilty of an offence of the nature of a misdemeanor. It is also criminal in a prisoner to escape from lawful confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he eacape in any other manner, without using any kind of force or violence, he will be guilty of a misdemeanor: *R.* v. *Nugent*, 11 Cox, 64. The officer by whose default a prisoner gains his liberty before he is legally discharged is also guilty of the offence of escape, divided in law, then, in two offences, a *voluntary* escape or a *negligent* escape. To constitute an escape, there must have been an actual arrest in a criminal matter.

A *voluntary* escape is where an officer, having the custody of a prisoner, knowingly and intentionally gives him his liberty, or by connivance suffers him to go free, either to save him from his trial or punishment, or to allow him a temporary liberty, on his promising to return, and, in fact,

so returning. *R.* v. *Shuttlework*, 22 *U. C. Q. B.* 372. Though, some of the books go to say that, in this last case, the offence would amount to a *negligent* escape only.

A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or has him in charge, and is not freshly pursued and taken again before he has been lost sight of. And in this case, the law presumes negligence in the officer, till evident proof on his part to the contrary. The sheriff is as much liable to answer for an escape suffered by his officers, as if he had actually suffered it himself. A justice of the peace who bails a person not bailable by law is guilty of a negligent escape, and the person so discharged is held to have escaped.

When is an escape a felony, and when a misdemeanor. —An escape by a prisoner himself is no more than a misdemeanor, whatever be the crime for which he is imprisoned. Of course, this does not apply to prison-breaking, but simply to the case of a prisoner running away from the officer or the prison without force or violence. This offence falls under s. 2, c. 155, *ante*, and is punishable by imprisonment for any period less than two years. An officer guilty of a *voluntary* escape is involved in the guilt of the same crime of which the prisoner is guilty, and subject to the same punishment, whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed, and whether the offence be treason, felony or misdemeanor, so that for instance, if a gaoler *voluntarily* allows a prisoner committed for larceny to escape he is guilty of a felonious escape, and punishable as for larceny; whilst if such prisoner so voluntarily by him allowed to escape was committed for obtaining money by false pretences, the gaoler is then guilty of a misdemeanor,

punishable under the common law by fine or imprisonment, or both, as c. 155, *ante* (except s. 7, for certain specified escapes), does not apply to escape as an offence by an officer or gaoler, either when a felony or a misdemeanor. Greaves, note *r*, 1 *Russ.* 587, says that the gaoler might also, in felonies, be tried as an accessory after the fact, for voluntary escape. A *negligent* escape is always a misdemeanor, and is punishable, at common law, by fine or imprisonment or both.

What is a prison-breaking, and when is it a felony or a misdemeanor. The offence of prison-breach is a breaking and going out of prison by force by one lawfully confined therein. Any prisoner who frees himself from lawful imprisonment, by what the law calls a breaking, commits thereby a felony or a misdemeanor, according as the cause of his imprisonment was of one grade or the other. *R.* v. *Haswell, R. & R.* 458. But a mere breaking is not sufficient to constitute this offence: the prisoner must have escaped. The breaking of the prison must be an actual breaking, and not such force and violence only as may be implied by construction of law. Any place where a prisoner is lawfully detained is a prison *quoad* this offence, so a private house is a prison if the prisoner is in custody therein. If the prison-breaking is by a person lawfully committed for a misdemeanor, it is, as remarked before, a misdemeanor, but if the breaking is by a person committed for felony, then his offence amounts to felony.

A prisoner was indicted for breaking out from the lock-up, being then in lawful custody for felony. It appeared that the prisoner and another man had been given into the custody of a police officer, without warrant, on a charge of stealing a watch from the person. They were taken before a magistrate. No evidence was taken upon oath, but the

prisoner was remanded for three days. The prisoner broke out of the lock-up and returned to his home. He appeared before the magistrate on the day to which the hearing of the charge had been adjourned, and on the investigation of the charge it was dismissed by the magistrate, who stated that in his opinion it was a lark, and no jury would convict. The prisoner contended that the charge having been dismissed by the magistrate, he could not be convicted of prison-breaking, citing 1 *Hale*, 610, 611, that if a man be subsequently indicted for the original offence and acquitted, such acquittal would be a sufficient defence to an indictment for breach of prison. But Martin, B., held that a dismissal by the magistrate was not tantamount to an acquittal upon an indictment, and that it simply amounted to this, that the justices did not think it advisable to proceed with the charge, but it was still open to them to hear a fresh charge against him. The prisoner was found guilty.—*R.* v. *Waters*, 12 *Cox*, 390.

What is a rescue, and when is it a felony or a misdemeanor.—Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment. A rescue in the case of one charged with felony is felony in the rescuer, and a misdemeanor, if the prisoner is charged with a misdemeanor. *R.* v. *Haswell, R. & R.*, 458. But though upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person or of an officer; yet, if he be in the custody of a private person, it seems that the rescuer should be shown to have knowledge of the party being under arrest for felony. The 16 Geo. II, c. 31, makes it a felony to aid or assist a prisoner to attempt to make his escape from any gaol, although no escape is actually

made, if such prisoner is committed for a felony, expressed in the warrant of commitment, and a misdemeanor, if such prisoner is detained for a misdemeanor, or for a sum amounting to one hundred pounds; also, under the same circumstances, either a felony or a misdemeanor, to convey any disguise or instruments into any prison, to facilitate the escape of prisoners. A rescue, either when a felony or a misdemeanor, is now punishable under the above Act.

See 1 *Russ.* 581, *et seq.*; 4 *Stephen's Comm.* 227, *et seq.*; 1 *Hale, P. C.* 595; 2 *Hawkins, p.* 183; 5 *Rep. Cr. L. Com.* (1840), *p.* 53; 2 *Bishop, Cr. L.* 1066.

Under sec. 6 of the Act, see *R.* v. *Payne*, 1 *L. R. C. C.*, 27.

For forms of indictment, see *Archbold*, 795; 2 *Chitty, Cr. L.* 165; 5 *Burn's Just.* 137; 3 *Burn's Just.* 1332; 2 *Burn's Just.* 10; *R.* v. *Young*, 1 *Russ.* 291.

By sec. 183 of the Procedure Act, upon an indictment for any of these offences, the defendant may be found guilty of the attempt to commit the offence charged, if the evidence warrants it.

CHAPTER 156.

AN ACT RESPECTING OFFENCES AGAINST RELIGION.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every one who, by threats or force, unlawfully obstructs or prevents, or endeavors to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place used for divine worship, or in or from the performance of his duty in the lawful burial of the dead, in any church-yard or other burial place, or strikes or offers any violence to, or upon any civil process, or under the pretence of executing any civil process, arrests any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in any of the rites or duties in this section mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 36. 24-25 *V.*, *c.* 100, *s.* 36, *Imp.*

2. Every one who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behavior, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting, is guilty of a misdemeanor and liable, on summary conviction, to a penalty not exceeding twenty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding one month,—and may be arrested on view by any peace officer present at such meeting, or by any other person present, verbally authorized thereto by any justice of the peace present thereat, and detained until he can be brought before a justice of the peace.—32-33 *V.*, *c.* 20, *s.* 37.

The word *school-house* in the first section is not in the English Act, and the words *used for* divine worship are substituted for *of* divine worship.

Indictment for obstructing a clergyman in the dis-

charge of his duty..... unlawfully did by force *(threats or force)* obstruct and prevent one J. N., a clergyman, then being the vicar of the parish of B., in the county of M., from celebrating divine service in the parish church of the said parish *(or in the performance of his duty in the lawful burial of the dead in the church-yard of the parish church of the said parish)* against the form .....

Prove that J. N. is a clergyman and vicar of the parish of B., as stated in the indictment; that the defendant by force obstructed and prevented him from celebrating divine service in the parish church, etc., etc., or assisted in doing so.—*Archbold.*

Indictment for arresting a clergyman about to engage in the performance of divine service ..... unlawfully did arrest one J. N., a clergyman, upon certain civil process, whilst he, the said J. N., as such clergyman as aforesaid, was going to perform divine service, he the said *(defendant)* then well knowing that the said J. N. was a clergyman, and was so going to perform divine service as aforesaid; against the form ..... *Archbold.*

The Imperial Statutes corresponding to the second clause are the 1 *W. & M. c.* 18; 52 *G.* 3, *c.* 155, *s.* 12; 15-16 *V.*, *c.* 36; 23-24 *V.*, *c.* 32.

The offences against the second clause are punishable by summary conviction. The clause seems to be based on c. 92, s. 18, C. S. Canada, and c. 22, s. 3, C. S. L. Canada.

CHAPTER 157.

AN ACT RESPECTING OFFENCES AGAINST PUBLIC MORALS AND PUBLIC CONVENIENCE.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. Every one who commits the crime of buggery, either with a human being or with any other living creature, is guilty of felony, and liable to imprisonment for life. 32-33 *V.*, *c.* 20, *s.* 63. 24-25 *V.*, *c.* 100, *s.* 61, *Imp.*

Indictment.— ..... in and upon one J. N. feloniously did make an assault, and then feloniously, wickedly, and against the order of nature had a venereal affair with the said J. N., and then feloniously carnally knew him, the said J. N., and then feloniously, wickedly, and against the order of nature, with the said J. N., did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form..... —*Archbold*, 716.

Sodomy or Buggery is a detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator and order of nature by mankind with mankind, or with brute and beast, or by womankind with brute beast.—3 *Inst.* 58.

If the offence be committed on a boy under fourteen years of age, it is felony in the agentonly.—1 Hale, 670. If by a boy under fourteen on a man over fourteen, it is felony in the patient only.—*Archbold*, 752.

The evidence is the same as in rape, with two exceptions: first, that it is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated; and secondly, both agent and

patient (if consenting) are equally guilty.—5 *Burn's Justice*, 644.

In R. v. Jacobs, R. and R. 331, it was proved that the prisoner had prevailed upon a child, a boy of seven years of age, to go with him in a back-yard; that he, then and there, forced the boy's mouth open with his fingers, and put his private parts into the boy's mouth, and emitted in his mouth; the judges decided that this did not constitute the crime of sodomy.

In one case, the majority of the judges were of opinion that the commission of the crime with a woman was indictable; also by a man with his wife.—1 Russ. 939.

As in the case of rape, penetration alone is sufficient to constitute the offence.

The evidence should be plain and satisfactory in proportion as the crime is detestable.

Upon an indictment under this section, the prisoner may be convicted of an attempt to commit the same.—Sect. 183 of the Procedure Act.

The punishment would then be under the next section.

The defendant may be convicted of an assault, if the evidence warrants it. Sect. 191, Procedure Act.

Indictment for bestiality.— ..... with a certain *cow (any animal)* feloniously, wickedly and against the order of nature had a venereal affair, and then feloniously, wickedly and against the order of nature, with the said cow did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form .....

2. Every one who attempts to commit buggery, or assaults any person with intent to commit buggery, or who, being a male, indecently assaults any other male, is guilty of a misdemeanor, and liable to ten years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 64. 24-25 *V.*, *c.* 100, *s.* 62, *Imp.*

Indictment.— ..... in and upon one J. N. did make an assault, and him, the said J. N. did then beat, wound and ill-treat, with intent that detestable and abominable crime called buggery with the said J. N. feloniously, wickedly, diabolically, and against the order of nature to commit and perpetrate against the form, &c., &c., &c.—*Archbold*, 718.

If the indictment be for an indecent assault, one or other of the preliminary steps required by sect. 140 of the Procedure Act must be taken.

Where there is a consent there cannot be an assault in point of law.—R. v. Martin, 2 Moo. C. C. 123. A man induced two boys above the age of fourteen years to go with him in the evening to an out of the way place, where they mutually indulged in indecent practices on each others' persons: *Held*, on a case reserved, that under these circumstances, a conviction for an indecent assault could not be upheld.—*R.* v. *Wollaston*, 12 *Cox*, 180.

But the definition of an assault that the act must be *against the will* of the patient implies the possession of an active will on his part, and, therefore, mere submission by a boy eight years old to an indecent assault and immoral practices upon his person, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of criminal law.—*R.* v. *Lock*, 12 *Cox*, 244.

The prisoner was indicted for an indecent assault upon a boy of about fourteen years of age. The boy had consented. *Held, on the authority of R.* v. *Wollaston*, 12 *Cox*, 180, that the charge was not maintainable, *R.* v. *Laprise*, 3 *L. N.* 139.

3. Every one who—

(*a.*) Seduces and has illicit connection with any girl of previously

chaste character, or who attempts to have illicit connection with any girl of previously chaste character, being in either case of or above the age of twelve years and under the age of sixteen years, or—

(*b.*) Unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile or insane woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the offence, that the woman or girl was an idiot or imbecile or insane,—

Is guilty of a misdemeanor, and liable to two years' imprisonment. —49 *V.*, *c.* 52, *s.* 1 *and s.* 8, *part.* 50-51 *V.*, *c.* 48.

4. Every one above the age of twenty-one years who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age, is guilty of a misdemeanor, and liable to imprisonment for a term not exceeding two years.—50-51 *V.*, *c.* 48, *s.* 2.

5. Every one who, being the owner and occupier of any premises, or having, or acting, or assisting in the management or control thereof, induces, or knowingly suffers, any girl of such age as in this section mentioned, to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally,—

(*a.*) If such girl is under the age of twelve years, is guilty of felony, and liable to ten years' imprisonment,—

(*b.*) If such girl is of or above the age of twelve and under the age of sixteen years, is guilty of a misdemeanor, and liable to two years' imprisonment:

Provided, that it shall be a sufficient defence to any charge under this section if it is made to appear to the court or jury before whom the charge is brought, that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years. —49 *V.*, *c.* 52, *s.* 4 *and s.* 8, *part.* 48-49 *V.*, *c.* 69, *Imp.*

6. No person shall be convicted of any offence under the three sections of this Act next preceding upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:

2. In every case arising under the said sections, the defendant shall be a competent witness in his own behalf upon any charge or complaint against him;

3. No prosecution under the said sections shall be commenced after

the expiration of one year from the time when the offence was committed.—49 *V., c.* 52, *ss.* 5, 6 *and* 7, *parts.*

A mother may be convicted under sec. 5, of knowingly, suffering her daughter aged 14 to be in or upon premises for the purpose of prostitution, even if the premises are their home.—*R.* v. *Webster*, 15 *Cox*, 775.

Under sec. 5, the reasonable belief that the girl was over sixteen is a question for the jury.—*R.* v. *Parker*, 16 *Cox*, 57.

The jury may find the defendant guilty of the attempt to commit the offence charged: s. 183, Proc. Act, *R.* v. *Adams* 50 *J. P.* 136.

7. Every one who, by false pretences, false representations, or other fraudulent means,—

(*a.*) Procures any woman or girl, under the age of twenty-one years, to have illicit carnal connection with any man other than the procurer, or—

(*b.*) Inveigles or entices any such woman or girl to a house of ill-fame or assignation, for the purpose of illicit intercourse or prostitution, or who knowingly conceals in such house any such woman or girl so inveigled or enticed,—

Is guilty of a misdemeanor, and is liable to two years' imprisonment;

2. Whenever there is reason to believe that any such woman or girl has been inveigled or enticed to a house of ill-fame or assignation, as aforesaid, then, upon complaint thereof being made under oath by the parent, master or guardian of such woman or girl, or in the event of such woman or girl having neither parent, master nor guardian in the province in which the offence is alleged to have been committed, by any other person, to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a warrant to enter, by day or night, such house of ill-fame or assignation, and to search for such woman or girl, and bring her, and the person or persons in whose keeping and possession she is, before such justice of the peace or judge of the court, who may, on examination, order her to be delivered to her parent, master or guardian, or to be discharged, as law and justice require.—48-49 *V., c.* 82, *s.* 1. 24-25 *V., c.* 100, *s.* 49, *Imp.*

Indictment..... That J. S., on the first day of June, in the year of our Lord ..... by falsely pretending and representing unto one A. B., that ..... (*here set out the false pretences or representations*) did procure the said A. B, to have illicit carnal connection with a certain man named ..... (*or to the jurors aforesaid unknown*) she, the said A. B., at the time of such procurement, being then a woman (*or girl*) under the age of twenty-one years, to wit, of the age of ..... whereas in truth and in fact (*negative the pretences or representations*) ..... *Archbold.*

The pretences and representations made by the defendant must be proved, as well as their falsehood. Also, that by means of these false pretences or representations, the defendant induced the woman, or girl, to have carnal connection with the man named in the indictment, and that she was then under twenty-one. On the trial of an indictment under this section, the prisoner may be convicted of an attempt to commit the offence, under the sec. 183 of the Procedure Act.

In Howard *v.* R. 10 Cox, 54, held, that indictment bad, even after verdict, if it does not allege what were the false pretences.

8. All persons who,—

(*a*) Not having visible means of maintaining themselves, live without employment,—

(*b.*) Being able to work and thereby or by other means to maintain themselves and families, wilfully refuse or neglect to do so,—

(*c.*) Openly expose or exhibit in any street, road, public place or highway, any indecent exhibition, or openly or indecently expose their persons,—

(*d.*) Without a certificate signed, within six months, by a priest, clergyman or minister of the gospel, or two justices of the peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wander about and beg, or go

about from door to door, or place themselves in any street, highway, passage or public place to beg or receive alms,—

(*e.*) Loiter on any street or highway, and obstruct passengers by standing across the footpaths or by using insulting language, or in any other way,—

(*f.*) Cause a disturbance in any street or highway by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers,—

(*g.*) By discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly or maliciously disturb the peace and quiet of the inmates of any dwelling house near such street or highway,—

(*h.*) Tear down or deface signs, break windows, doors or door plates, or the walls of houses, roads or gardens, or destroy fences,—

(*i.*) Are common prostitutes or night walkers, wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and not giving a satisfactory account of themselves,—

(*j.*) Are keepers or inmates of disorderly houses, bawdy-houses or houses of ill-fame, or houses for the resort of prostitutes, or persons in the habit of frequenting such houses, not giving a satisfactory account of themselves,—

(*k.*) Have no peaceable profession or calling to maintain themselves by, but who do, for the most part, support themselves by gaming or crime, or by the avails of prostitution,—

Are loose, idle or disorderly persons or vagrants, within the meaning of this section:

2. Every loose, idle or disorderly person or vagrant shall, upon summary conviction before two justices of the peace, be deemed guilty of a misdemeanor, and shall be liable to a fine not exceeding fifty dollars or to imprisonment, with or without hard labor, for any term not exceeding six months, or to both.

3. Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person hereinbefore described as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harbored or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid:

4. If provision is made therefor by the laws of the Province in which the conviction takes place, any such loose, idle or disorderly person may, instead of being committed to the common gaol or other public prison, be committed to any house of industry or correction, alms house, work house or reformatory prison.—32-33 *V., c.* 28; 37 *V., c.* 43; 44 *V., c.* 31; *R. S. N. S.* (*3rd S.*), *c.* 162, *s.* 9.

No indictment can be preferred for keeping a disorderly house without one of the preliminaries required by sec. 140 of the Procedure Act.

On an indictment for indecent exposure of the person, Held, that the exposure must be in an open and public place, but not necessarily generally public and open; if a person indecently exposed his person in a private yard, so that he might be seen from a public road where there were persons passing, an indictment would lie. *R.* v. *Levasseur*, 9 *L. N.* 386. *See R.* v. *Wellard*, 15 *Cox*, 559, *Ex. parte Walter*, *Ramsay's App. cas.* 183, *R.* v. *Harris*, 11 *Cox*, 659.

A conviction under 32-33 V., c. 28, D. for that V. L. on ..... was a common prostitute, wandering in the public streets of the city of Ottawa, and not giving a satisfactory account of herself contrary to this Statute:—Held, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself and did not do so satisfactorily.—*R.* v. *Leveque*, 30 *U. C. Q. B.* 509. *See R.* v. *Arscott*, 9 *O. R.* 541, *and Arscott & Lilly*, 11 *O. R.* 153.

Held, that under the Vagrant Act, it is not sufficient to allege that the accused was drunk on a public street, without alleging further that he caused a disturbance in such street by being drunk.—*Ex. parte, Despatie*, 9 *L. N.* 387.

It is unlawful for men to bathe, without any screen or covering, so near to a public footway frequented by

females that exposure of their persons must necessarily occur, and they who so bathe are liable to an indictment for indecency.—*R.* v. *Reed*, 12 *Cox*, 1.

To keep a booth on a race course for the purpose of an indecent exhibition is a crime.—*R.* v. *Saunders*, 13 *Cox*, 116.

Conviction under 32-33 V., c. 28, for keeping a house of ill-fame, imposed payment of a fine and costs to be collected by distress, and in default of distress ordered imprisonment. Held, good. *The Queen* v. *Walker*, 7 *O. R.* 186.

The charge against a prisoner, who was brought up on a writ of habeas corpus, was "for keeping a bawdy house for the resort of prostitutes in the City of Winnipeg." "Keeping a bawdy house" is, in itself, a substantial offence; so is "keeping a house for the resort of prostitutes."

Held, nevertheless, that there was but one offence charged and that the commitment was good.—*The Queen* v. *McKenzie*, 2 *Man. L. R.* 168.

CHAPTER 161.

AN ACT RESPECTING OFFENCES RELATING TO THE LAW OF MARRIAGE.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Every one who,—

(*a*) Without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage, or—

(*b.*) Procures any person to solemnize any marriage, knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony,—

Is guilty of a misdemeanor, and liable to a fine or to two years' imprisonment, or to both.—*C. S. U. C.*, *c.* 102, *ss.* 1 *and* 2; *R. S. N. S.* 3*rd S*), *c.* 161, *s* 3; 1 *R. S. N. B.*, *c.* 146, *s.* 2.

2. Every one who procures a feigned or pretended marriage between himself and any woman, and every one who knowingly aids and assists in procuring such feigned or pretended marriage, is guilty of a misdemeanor, and liable to two years' imprisonment:

2. No person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused;

3. In every case arising under this section the defendant shall be a competent witness in his own behalf upon any charge or complaint against him;

4. No prosecution under this section shall be commenced after the expiration of one year from the time when the offence was committed. —49 *V.*, *c.* 52, *ss.* 3 *and* 5, 6, 7 *and* 8, *parts.*

3. Every one who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the Province in which the marriage is solemnized, is guilty of a misdemeanor, and liable to a fine or to one year's imprisonment:

2. No prosecution for any offence against this section shall be commenced, except within two years after the offence is committed. —*C. S. U. C.*, *c.* 102, *ss.* 3 *and* 4 *parts*; 1 *R. S. N. B.*, *c.* 146, *s.* 3, *part*; *R. S. B. C.*, *c.* 89, *s.* 14.

See form of indictment in 2*d* Schedule, Procedure Act.

See secs. 157 and 158 of the Civil Code as to Province of Quebec for offences covered by Secs. 1 and 3 of this Act.

BIGAMY.

4. Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada, or elsewere, is guilty of felony, and liable to seven years' imprisonment:

2. Nothing in this section contained shall extend to,—

(*a*) Any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty resident in Canada and leaving the same with intent to commit the offence;

(*b*) Any person marrying a second time, whose husband or wife has been continually absent from such person for the space of seven years then last past, and who was not known by such person to be living within that time:

(*c*) Any person who, at the time of such second marriage, was divorced from the bond of the first marriage; or—

(*d*) Any person whose former marriage has been declared void by the sentence of any court of competent jurisdiction.—32-33 *V.*, *c.* 20, *s.* 58, *part.* 24-25 *V.*, *c.* 100, *s.* 57, *Imp.*

See sect. 16 of the Procedure Act as to venue.

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S. on ..... in the year of Our Lord ..... at the parish of ..... in the ..... did marry one A. C., spinster, and her the said A. C. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A. C., as aforesaid, to wit, on the ..... day ..... at ..... feloniously and unlawfully did marry and take to wife one M. Y., and to her the said M. Y. was then and there married, the said A. C., his former wife, being then alive; against the form ..... and the jurors aforesaid, upon ..... that the said J. S. afterwards, to wit, on ..... at ..... in the district of .....within the jurisdiction of the said Court,

was apprehended (or is now in custody in the common gaol of the said district of ..... at ..... within the jurisdiction of the said Court) for the said felony.—*Archbold.*

Bigamy is the felonious offence of a husband or wife marrying again during the life of the first wife or husband, It is not strictly correct to call this offence *bigamy*; it is more properly denominated *polygamy*, i. e., having a plurality of wives or husbands at once, while bigamy according to the canonists consists in marrying two virgins successively, one *after* the death of the other, or in once marrying a widow.—*Wharton's Law Lexicon* verbo *Bigamy.*

Upon an indictment for bigamy, the prosecutor must prove: 1st, the two marriages; 2nd, the identity of the parties.—*Roscoe*, 294.

The law will not, in cases of bigamy, presume a marriage valid to the same extent as in civil cases.—*R.* v. *Jacob*, 1 *Moo. C. C.* 140.

The first wife or husband is not a competent witness to prove any part of the case, but the second wife or husband is, after the first marriage is established, for she or he is not legally a wife or husband.—*R.* v. *Ayley*, 15 *Cox*, 328.

The first marriage must be a valid one. The time at which it was celebrated is immaterial, and whether celebrated in this country or in a foreign country is also immaterial.—*Archbold*, 883.

If celebrated abroad, it may be proved by any person who was present at it; and circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated. Proof that a ceremony was performed by a person appearing and officiating as a priest,

and that it was understood by the parties to be the marriage ceremony, according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it, so as to throw upon the defendant the *onus* of impugning its validity.—*Archbold.* *R.* v. *Cresswell*, 13 *Cox*, 126. See *R.* v. *Savage* 13 *Cox* 178 *and R.* v. *Griffin*, 14 *Cox*, 308 ; *followed in R.* v. *Brierly* 14 *O. R.* 535.

In the case of R. v. McQuiggan, 2 L. C. R., *Note*, 346, the proof of the first marriage was attempted to be made by the voluntary examination of the accused, taken before Thomas Clancy, the committing magistrate ; but this being irregular and defective, its reception was successfully objected to by the counsel for the prisoner. The Crown then tendered the evidence of Mr. Clancy as to the story the prisoner told him when taken before him after his arrest. This the Court held to be good evidence, and allowed it to go to the jury ; this was the only evidence of the first marriage, the prisoner having on that occasion, as Mr. Clancy deposed, confessed to him that he was guilty of the offence, as charged, and at the same time expressed his readiness to return and live with his first wife. The second marriage was proved by the evidence of the clergyman who solemnized it.

In R. v. Creamer, 10 L. C. R. 404, upon a case reserved, the Court of Queen's Bench ruled, that upon the trial of an indictment for bigamy, the admission of the first marriage by the prisoner, unsupported by other testimony, is sufficient to support a conviction.

In R. v. Newton, 2 Moo. C. C. 503, and R. v. Simmonds, 1 C. & K, 164, Wightman, J., held that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country, are sufficient evidence of such marriage, without proving it to have been celebrated accord-

ing to the law of the country where it is stated to have taken place.—*Contra, in R.* v. *Savage*, 13 *Cox*, 178.

A first marriage, though *voidable*, if not absolutely *void*, will support an indictment for bigamy.—*Archbold*, 886.

As to the second marriage, it is immaterial whether it took place in Canada, or elsewhere, provided, if it took place out of Canada, the defendant be a subject of Her Majesty resident in Canada, whence he had left to commit the offence.

It seems that the offence will be complete, though the defendant assume a fictitious name at the second marriage.—*R.* v. *Allison*, *R. & R.*, 109.

Same ruling on a case reserved, in *R.* v. *Rea*, 12 *Cox*, 190.

Though the second marriage would have been void, in any case, as for consanguinity or the like, the defendant is guilty of bigamy.—*R.* v. *Brown*, 1 *C. & K.* 144.

In R. v. Fanning, 10 Cox, 411, a majority of the judges of the Irish Court of Criminal Appeal held, contrary to R. v. Brown, that to constitute the offence of bigamy, the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage, but the English Court of Criminal Appeal, by sixteen judges, in R. v. Allen, 12 Cox, 193, since decided, as in R. v. Brown, that the invalidity of the second marriage, on account of relationship, does not prevent its constituting the crime of bigamy.

It must be proved that the first wife was living at the time the second marriage was solemnized; which may be done by some person acquainted with her and who saw her at the time or afterwards.—Archbold, 887. On a prosecution for bigamy, it is incumbent on the prosecutor to prove that the husband or wife, as the case may

be, was alive at the date of the second marriage. There is no presumption of law of the continuance of the life of the party for seven years after the date at which he or she was proved to have been alive. The existence of the party at an antecedent period may or may not afford a reasonable inference that he or she was alive at the date of the second marriage; but it is purely a question of fact for the jury.—*R.* v. *Lumley*, 11 *Cox*, 274.

On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage she knew that he was alive; but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. It was held that upon this finding, the conviction could not be supported.—*R.* v. *Briggs, Dears. and B.*, 98.

On this last case, Greaves, 1 Russell, 270, note 1, remarks: "The case was argued only on the part of the prisoner, and the Court studiously avoided determining on which side the onus of proof as to the knowledge of the first husband being alive lay, and yet the point seems very clear. It is plain that the latter part of the section in the 9 Geo. 4, c. 31, s. 22, and in the new Act is in the nature of proviso. Now no rule is better settled than that if an exception comes by way of proviso, whether it occurs in a subsequent part of the Act, or in a subsequent part of the same section containing the enactment of the offence, it must be proved in evidence by the party relying upon it. Hence it is that no indictment for bigamy ever negatives the exceptions as contained in the proviso, and hence it follows that the proof of those exceptions lies on the prisoner; if it was otherwise, the prosecutor would have to prove more than he has alleged. Then the proviso

in terms requires proof both of the absence of the party for seven years, *and* that the party shall not have been known by the prisoner to have been living within that time, and consequently it lies on the prisoner to give evidence of *both;* and as the Legislature has required proof of both, it never could have been intended that proof of the one should be sufficient evidence of the other. When, however, the prisoner has given evidence to negative his knowledge that the party is alive, the onus may be thrown on the prosecutor to show that he had that knowledge; and in accordance with this view is the dictum of Willes, J., in R. v. Ellis, 1 F. and F. 309, that 'if the husband has been living apart from his wife for seven years, under such circumstances as to raise a probability that he supposed that she was dead when he was re-married, evidence may be necessary that he knew his first wife was alive.' As to the manner in which the case should be left to the jury, it should seem that the proper course is to ask them whether they are satisfied that the prisoner was married twice, and that the person whom he first married was alive at the time of the second marriage; and, if they are satisfied of these facts, to tell them that it then lies upon the prisoner to satisfy them that there was an absence for seven years, and also that during the whole of those seven years he was ignorant that his first wife was alive, and that unless he has proved both those facts to their satisfaction they ought to convict him. It is perfectly clear that the question is not whether he knew that his first wife was alive *at the time of the second marriage,* for he may have known that she was alive within the seven years, and yet not know that she was alive at the time of the second marriage, and, if he knew that she was alive *at any time within the seven years,* he ought to be convicted."

On R. v. Turner, 9 Cox 145, Greaves, 1 Russell, 273, note w, says: "This is the first case in which it has ever been suggested that the belief of the death of the first husband or wife was a defence, and the case is probably misreported. The proviso that requires absence for seven years *and* ignorance of the first husband or wife being alive during the whole of that time, clearly shows that this case cannot be supported."

If it appears that the prisoner and his first wife had lived apart for seven years before he married again, mere proof that the first wife was alive at the time of the second marriage will not warrant a conviction, but some affirmative evidence must be given to show that the accused was aware of this fact.—*R.* v. *Curgerwen*, 10 *Cox*, 152; *R.* v. *Fontaine*, 15 *L. C. J.* 141. *See R.* v. *Jones*, 15 *Cox*, 284.

In 1863, the prisoner married Mary Anne Richards, lived with her about a week and then left her. It was not proved that he had since seen her. In 1867, he married Elizabeth Evans, his first wife being then alive. The Court left it to the jury to declare if they were satisfied that the prisoner knew his first wife was alive at the time of the second marriage, and ruled that positive proof on that point was not absolutely necessary. The prisoner was found guilty, and, on a case reserved the conviction was affirmed.—*R.* v. *Jones*, 11 *Cox*, 358.

In R. v. Horton, 11 Cox, 670, Cleasby, B., summed up as follows: "It is submitted that, although seven years had not passed since the first marriage, yet if the prisoner reasonably believed (which pre-supposes proper grounds of belief) that his first wife was dead, he is entitled to an acquittal. It would press very hard upon a prisoner if under such circumstances he could be convicted, when it

appeared to him as a positive fact that his first wife was dead. The case of R. v. Turner, 9 Cox, 145, shows that this was the view of Baron Martin, a judge of as great experience as any on the bench now, and I am not disposed to act contrary to his opinion. You must find the prisoner guilty, unless you think that he had fair and reasonable grounds for believing, and did honestly believe, that his first wife was dead." The jury returned a verdict of guilty, and the judge sentenced the prisoner to imprisonment for three days, remarking that he was quite satisfied with the verdict, and that he should inflict a light sentence, as he thought the prisoner really believed his first wife was dead, although he was not warranted in holding that belief.—*See, ante, Greaves' remarks on R.* v. *Turner.*

But in a later case, R. v. Gibbons, 12 Cox, 237, it was held, Brett and Willes, J.J., that *bonâ fide* belief that the first husband was dead was no defence by a woman accused of bigamy, unless he has been continuously absent for seven years. Same ruling, *R.* v. *Bennett*, 14 *Cox*, 45. *Contra, R.* v. *Moore*, 13 *Cox*, 544.

On an indictment for bigamy, a witness proved the first marriage to have taken place eleven years ago, and that the parties lived together some years, but could not say how long, it might be four years. Wightman, J., said: "How is it possible for any man to prove a negative? How can I ask the prisoner to prove that he did not know that his wife was living?" There is no evidence that the prisoner knew that his wife was alive, and there is no offence proved.—*R.* v. *Heaton*, 3 *F. & F.* 819.

Sec 16 of the Procedure Act provides that the offender may be tried in the district, county or place, where he is apprehended or is in custody. But this provision is only

cumulative, and the party may be indicted where the second marriage took place, though he be not apprehended; for in general where a statute directs that the offender may be tried in the county, district or place in which he is apprehended, but contains no negative words, he may be tried where the offence was committed.— 1 *Russ.* 274.

The averment of the prisoner's apprehension, as in the form given, [illegible] is only necessary where the second marriage took place in another district than where the defendant is indicted.—*Archbold*, 883.

In R. v. McQuiggan, 2 L. C. R., 340, the Court ruled that in an indictment for bigamy, under the Canadian Statute, it is absolutely necessary, when the second marriage has taken place in a foreign country, that the indictment should contain the allegations that the accused is a British subject, that he is or was resident in this Province, and that he left the same with intent to commit the offence. — *See also R.* v. *Pierce, post.*

On a trial for bigamy, the Crown having proved the prisoner's two marriages, it is for him then to prove the absence of his first wife during seven years preceding the second marriage; and when such absence is not proved, it is not incumbent on the Crown to establish the prisoner's knowledge that the first wife was living at the time of the second marriage.—*R.* v. *Dwyer*, 27 *L. C. J.* 201. *See R.* v. *Willshire*, 14 *Cox*, 541.

The prisoner was convicted of bigamy under 32-33 *V.*, *c.* 20, *s.* 58. The first marriage was contracted in Toronto and the second in Detroit. The judge at the trial directed the jury that if prisoner was married to his first wife in Toronto and to his second in Detroit, they should find him guilty.

Held, a misdirection, and that the jury should have been

told, in addition, that before they found him guilty they ought to be satisfied of his being, at the time of his second marriage, a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence.

Held, also, that it was incumbent on the Crown to prove these facts.

Quaere, per Wilson, C. J., whether the trial should not have been declared a nullity. — *The Queen* v. *Pierce*, 13 *O. R.* 226.

OFFENCES AGAINST THE PERSON.

MURDER AND MANSLAUGHTER.

THE law takes no cognizance of homicide unless death result from bodily injury, occasioned by some act or unlawful omission, or contra-distinguished from death occasioned by any influence on the mind, or by any disease arising from such influence. The terms "*unlawful omission*" comprehend every case where any one, being under any legal obligation to supply food, clothing or other aid or support, or to do any other act, or make any other provision for the sustentation of life, or prevention of injury to life, is guilty of any breach of duty. It is essential to homicide of which the law takes cognizance that the party die of the injury done within one year and a day thereafter. In the computation of the year and the day from the time of the injury, the whole of the day on which the act was done, or of any day on which the cause of injury was continuing, is to be reckoned the first. A child in the womb is not a subject of homicide in respect of any injury inflicted in the womb, unless it afterwards be born alive; it is otherwise if a child die within a year and a day after birth of any bodily injury inflicted upon such child, whilst it was yet in the womb.—4 *Cr. L. Com. Report, p. XXXII, 8th of March,* 1839.

If a man have a disease which in all likelihood would terminate his life in a short time, and another give him a wound or hurt which hastens his death, it is murder or other species of homicide as the case may be. And it has been ruled that though the stroke given is not in itself so mortal, but that with good care it might be cured, yet if

the party die of this wound within a year and a day, it is murder or other species of homicide as the case may be. And when a wound, not in itself mortal, for want of proper applications or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter, according to the circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of death, yet the wound being the cause of the gangrene or fever is the immediate cause of the death, *causa causati*. So if one gives wounds to another, who neglects the cure of them or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die, it is murder or manslaughter, according to the circumstances: because if the wounds had not been, the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them.—1 *Russ.* 700.

So if a man be wounded, and the wound become fatal from the refusal of the party to submit to a surgical operation.—R. v. Holland, 2 M. & Rob. 351; R. v. Pym, 1 Cox, 339; R. v. McIntyre, 2 Cox, 379; R. v. Martin, 5 C. & P. 128; R. v. Webb, 1 M. & Rob. 405. But it is otherwise if death results not from the injury done, but from unskilful treatment, or other cause subsequent to the injury.—*4th Rep. Cr. L. Comrs., p. XXXII, 8th of March*, 1839.

Murder is the killing any person under the king's peace, with malice prepense or aforethought, either express or implied by law. Of this description the malice prepense, *malitia precogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any

other species of homicide, and it will therefore be necessary to inquire concerning the cases in which such malice has been held to exist. It should, however, be observed that when the law makes use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the act has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. And in general any formed design of doing mischief may be called malice. And, therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked is adjudged to be of *malice prepense* and consequently murder.—1 *Russ.* 667.

Malice may be either *express* or *implied by law*. Express malice is, when one person kills another with a sedate deliberate mind and formed design; such formed design being evidenced by external circumstances discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden; thus, where a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. So if a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity be

proved. And where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief. And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse or justification; and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him. It should also be remarked that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And provocation will be no answer to proof of *express* malice: so that, if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that *he will have his blood*, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B. and they are reconciled again, and then upon a new and sudden falling out, A. kills B. this is not murder. It isnot to be presumed that the parties fought upon the old grudge, unless it appear from the whole circumstances of the fact; but if upon the circumstances it should appear that the

reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder.—1 *Russ.* 667.

If a man, after receiving a blow, feigns a reconciliation, and, after the lapse of a few minutes, invites a renewal of the aggression, with intent to use a deadly weapon, and on such renewal, uses such weapon with deadly effect, there is evidence of implied malice to sustain the charge of murder. But if, after such reconciliation, the aggressor renews the contest, or attempts to do so, and the other having a deadly weapon about him, on such sudden renewal of the provocation, uses it without previous intent to do so, there is evidence which may reduce the crime to manslaughter.—*R.* v. *Selton*, 11 *Cox*, 674. Mr. Justice Hannen in his charge to the jury in that case said: "Now, murder is killing with malice aforethought; but though the malice may be harbored for a long time for the gratification of a cherished revenge, it may, on the other hand, be generated in a man's mind according to the character of that mind, in a short space of time, and therefore it becomes the duty of the jury in each case to distinguish whether such motive had arisen in the mind of the prisoner, and whether it was for the gratification of such malice he committed the fatal act. But the law, having regard to the infirmity of man's nature, admits evidence of such provocation as is calculated to throw a man's mind off its balance, so as to show that he committed the act while under the influence of temporary excitement, and thus to negative the malice which is of the essence of the crime of murder. It must not be a light provocation, it must be a grave provocation; and undoubtedly a blow is regarded by the law as such a grave provocation; and supposing a deadly stroke inflicted promptly upon such provocation, a

jury would be justified in regarding the crime as reduced to manslaughter. But if such a period of time has elapsed as would be sufficient to enable the mind to recover its balance, and it appears that the fatal blow has been struck in the pursuit of revenge, then the crime will be murder." Verdict of manslaughter.

In a case of death by stabbing, if the jury is of opinion that the wound was inflicted by the prisoner, while smarting under a provocation so recent and so strong that he may be considered as not being at the moment the master of his own understanding, the offence will be manslaughter; but if there has been, after provocation, sufficient time for the blood to cool, for reason to resume its seat, before the mortal wound was given, the offence will amount to murder; and if the prisoner displays thought, contrivance and design in the mode of possessing himself of the weapon, and in again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion.—*R.* v. *Maynard*, 6 *C. & P.* 157.

Where a man finds another in the act of adultery with his wife, and kills him or her in the first transport of passion, he is only guilty of manslaughter and that in the lowest degree; for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion; and the Court in such cases will not inflict a severe punishment.—1 *Russ.* 786.

So it seems that if a father were to see a person in the act of committing an unnatural offence with his son and were instantly to kill him, it would only be manslaughter. —*R.* v. *Fisher*, 8 *C. & P.* 182.

But in the case of the most grievous provocation to

which a man can be exposed, that of finding another in the act of adultery with his wife, though it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately, and upon revenge, after the fact, and sufficient cooling time, it would undoubtedly be murder. For let it be observed that in all possible cases, deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of a nature for which the laws of society will give him an adequate remedy, thither he ought to resort; but be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High.—*Foster*, 296.

So, in the case of a father seeing a person in the act of committing an unnatural offence with his son, and killing him instantly, this would be manslaughter, but if he only hears of it, and goes in search of the person, and meeting him strikes him with a stick, and afterwards stabs him with a knife, and kills him, in point of law, it will be murder.—*R.* v. *Fisher*, 8 *C. & P.* 182.

In this last case, the Court said: "Whether the blood has had time to cool or not is a question *for the court* and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received and the act done. 1 *Russ.* 725. But *Greaves*, note *d*, *loc. cit.*, questions this dictum, and refers to *R.* v. *Lynch*, 5 *C. & P.* 324, and *R.* v. *Maynard*, *supra*, where Tenterden and Tindal left it *to the jury* to say if the blood had had time to cool or not.

If a blow without provocation is *wilfully* inflicted, the law infers that it was done with malice aforethought, and if death ensues the offender is guilty of murder, although

the blow may have been given in a moment of passion. —*R.* v. *Noon*, 6 *Cox*, 137.

Even blows previously received will not extenuate homicide upon deliberate malice and revenge, especially where it is to be collected from the circumstances that the provocation was sought for the purpose of coloring the revenge.—*R.* v. *Mason*, 1 *East, P. C.* 239.

In R. v. Welsh, 11 Cox, 336, Keating, J., in summing up the case to the jury, said: "The prisoner is indicted for that he killed the deceased feloniously and with malice aforethought, that is to say, intentionally, without such provocation as would have excused, or such cause as might have justified the act. Malice aforethought means intention to kill. Whenever one person kills another intentionally, he does it with malice aforethought; in point of law, the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does not appear, the malice aforethought implied in the intention remains. By the law of England, therefore, all intentional homicide is *primâ facie* murder. It rests with the party charged with and proved to have committed it to show, either by evidence adduced for the purpose, or upon the facts as they appear, that the homicide took place under such circumstances as to reduce the crime from murder to manslaughter. Homicide which would be *primâ facie* murder may be committed under such circumstances of provocation as to make it manslaughter, and show that it was not committed with malice aforethought. The question therefore is, first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and if there be any

such evidence, then it is for the jury, whether it was such that they can attribute the act to the violence of passion naturally arising therefrom and likely to be aroused thereby in the breast of a reasonable man. The law, therefore, is not, as was represented by the prisoner's counsel, that if a man commits the crime under the influence of passion it is mere manslaughter. The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion. When the law says that it allows for the infirmity of human nature, it does not say that if a man without sufficient provocation gives way to angry passion, and does not use his reason to control it,—the law does not say that an act of homicide intentionally committed under the influence of that passion is excused, or reduced to manslaughter. The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man might naturally be induced, in the anger of the moment, to commit the act. Now, I am bound to say that I am unable to discover in the evidence in this case any provocation which would suffice, or approach to such as would suffice, to reduce the crime to manslaughter. It has been laid down that mere words or gestures will not be sufficient to reduce the offence, and at all events the law is clear that the provocation must be serious. I have already said that I can discover no proof of such provocation in the evidence. If you can discover it, you can give effect to it, but you are bound not to do so unless satisfied that it was serious. What I am bound to tell you is that, in law, it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as for instance a blow,

and a severe blow, something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act." Verdict: Guilty of murder.

So also if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though he is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder for there is no previous malice: but it is manslaughter. But in this and every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.—4 *Blackstone*, 191.

A packer found a boy stealing wood in his master's ground; he bound him to his horse's tail and beat him; the horse took fright and ran away, and dragged the boy on the ground so that he died. This was holden to be murder, for it was a deliberate act and savored of cruelty. —*Foster*, 292.

At page 632 of Archbold, is cited, R. v. Rowley; a boy after fighting with another ran home bleeding to his father, the father immediately took a staff, ran three-quarters of a mile, and beat the other boy who died of this blow. And this was holden to be manslaughter only. But Mr. Justice Foster, 294, says that he always thought Rowley's case a very extraordinary one.

Though the general rule of law is that provocation by words will not reduce the crime of murder to that of manslaughter, special circumstances attending such a provocation might be held to take the case out of the general rule. In R. v. Rothwell, 12 Cox, 147, Blackburn, J.,

in summing up, said: "A person who inflicts a dangerous wound, that is to say a wound of such a nature as he must know to be dangerous, and death ensues, is guilty of murder; but there may be such heat of blood and provocation as to reduce the crime to manslaughter. A blow is such a provocation as will reduce the crime of murder to that of manslaughter. Where, however, there are no blows, there must be a provocation equal to blows; it must be at least as great as blows. For instance a man who discovers his wife in adultery, and thereupon kills the adulterer, is only guilty of manslaughter. As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter; but under special circumstances there may be such provocation of words as will have that effect, for instance, if a husband, suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee: I have done it once, and I'll do it again,' meaning adultery. Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did." Verdict of manslaughter.

In Sherwood's case, 1 C. & K. 556, Pollock, C. B., in summing up said: "It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; but it is equally true that every provo-

cation by blows will not have this effect, particularly when, as in this case, the prisoner appears to have resented the blow by using a weapon calculated to cause death. Still, however, if there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only."

When A, finding a trespasser upon his land, in the first transport of his passion, beat him and unluckily killed him, and it was holden to be manslaughter, it must be understood that he beat the trespasser, not with a mischievous intention, but *merely to chastise* him, and to deter him from a future commission of such a trespass. For if A had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. Moir was convicted of murder and executed. —1 *Russ.* 718.

As there are very many nice distinctions upon this subject of malice prepense, express and implied, the following additional quotations are given here.

Malitia in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation, it signifies a desire of revenge, or a settled anger against the particular person; but this is not the legal sense, and Lord Holt, C. J., says: "Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing for some considerable time before the commission of the fact, *which is a mistake*, arising from the not well distinguishing between *hatred* and *malice*. *Envy, hatred* and *malice* are three distinct passions of the mind. 1. *Envy* properly is a repining or being grieved at the happiness and prosperity of another, *Invidus alterius rebus macrescit opimis.* 2. *Hatred* which is *odium*, is as Tully said, *ira inveterata*, a rancour fixed and settled in the mind of one towards another which admits of several degrees. 3. *Malice* is a design formed of doing mischief to another; *cum quis data opera male agit*, he that designs and useth the means to do ill is malicious; he that doth a cruel act voluntarily doth it of malice prepensed." —*Kelyng's C. C. Stevens & Haynes' reprint*, 174.

But the meaning of the words "*malice aforethought*" is not to be determined in the same way as if they were found in a statute just enacted, and had never been construed. On the other hand, they were employed in a Statute on this subject as far back as 1389, were found also in several other early Statutes, and were first construed at a time when the Courts took more liberties with Statutes than they do now. Thus, it is said in an old book, "He that doth a cruel act voluntarily doth it of malice prepensed." ..... The doctrine was long ago and is now established that to constitute the *malice prepensed or aforethought*, which distinguishes murder from manslaughter, the slayer

need not have contemplated the injury beforehand, and need at no time have intented to take life. If he specifically meant not death, but bodily harm of a certain standard in magnitude or kind, or if he purposely employed a certain weapon, or did certain acts from which the law implies malice, the offence is murder when death follows within a year and a day, the same as though he intended to kill. The actual intent is in many circumstances an important element; but there may be murder as well without as with a murderous mind, and especially the fatal result need not be predetermined. Thus the words "*malice aforethought*" have a technical legal meaning, differing considerably from the popular idea of them. — *Bishop, Stat. Cr.* 467.

Malice in its legal sense denotes a wrongful act done intentionally, without just cause or excuse. Per Littledale, J., in McPherson v. Daniels, 10 B. & C. 272, and approved of by Cresswell, J., in R. v. Noon, 6 Cox, 137.

We must settle what is meant by the term *malice*. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind.

Thus, in the crime of murder which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional and done without any justifiable cause.— Per Best, J., in R. v. Harvey, 2 B. & C. 268.

The nature of implied malice is illustrated by the maxim "*Culpa lata dolo æquiparatur.*"

Malice aforethought, which makes a felonious killing murder, may be practically defined to be not *actual malice or actual aforethought*, or any other particular actual state of the mind, but any such combination of wrongful deed and mental culpability as judicial usage has determined to be sufficient to render that murder which else would be only manslaughter..... One proposition is plain: that an actual intent to take life is not a necessary ingredient in murder, any more than it is in manslaughter. Where the prisoner fired a loaded pistol at a person on horseback, and the ball took effect on another, whose death it caused, the offence was held to be murder; though the motive for firing it was not to kill the man, but only to frighten his horse, and cause the horse to throw him.—2 *Bishop, Cr. L.* 675, 676, 682.

In Grey's case, the defendant, a blacksmith, had broken, with a rod of iron, the skull of his servant, *whom* he *did not mean to kill*, and this was held to be murder; for, says the report, if a father, master, or school-master will correct his child, servant or scholar, he must do it with such things as are fit for correction, and not with such instruments as may probably kill them.—*Kelyng, C. C. Stevens & Haynes reprint*, 99.

A person driving a cart or other carriage happeneth to kill. If he saw or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder; for it was wilfully and deliberately done. If he might have seen the danger, but did not look before him, it will be manslaughter for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused.—*Foster*, 263.

Further, if there be an evil intent, though that intent

extendeth not to death, it is murder. Thus if a man, knowing that many people are in the street, throw a stone over a wall, intending only to frighten them or to give them a little hurt, and thereupon one is killed, this is murder: for he had an ill intent, though that intent extendeth not to death, and though he knew not the party slain. —3 *Instit.* 57.

Although the malice in murder is what is called "*malice aforethought*," yet there is no particular period of time during which it is necessary it should have existed, or the prisoner should have contemplated the homicide. If, for example, the intent to kill or to do other great bodily harm is excuted the instant it springs into the mind, the offence is as truly murder as if it had dwelt there for a longer period.—2 *Bishop, Cr. L.* 677.

Where a person fires at another a fire-arm, knowing it to be loaded, and therefore intending either to kill or to do grievous bodily harm, if death ensues the crime is murder; and if in such case, the person who fires the weapon, though he does not know that it is loaded, has taken no care to ascertain, it is manslaughter.—*R.* v. *Campbell*, 11 *Cox*, 323.

If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder. 1 *Russ.* 739. If a man deliberately shoot at A and miss him, but kill B, this is murder. 1 *Hale*, 438. So where A gave a poisoned apple to his wife, intending to poison her, and the wife, ignorant of the matter, gave it to a child who took it and died, this was held murder in A, though he, being present at the time, endeavored to dissuade his wife from giving the apple to the child.—*Hale, loc. cit.*

So if a person give medicine to a woman to procure an abortion, by which the woman is killed, the act was held clearly to be murder, for, though the death of the woman was not intended, the act is of a nature deliberate and malicious, and necessarily attended with great danger to the person on whom it was practised. 1 *East, P. C.* 230, 254.

Whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet, if the life of another is accidentally taken, his offence is murder. So if a man set fire to a house, whereby a person in it is burned to death, he is guilty of murder, even if he had no idea that any one was or was likely to be there. 1 *Russ.* 741.

In R. v. Lee, 4 F. & F. 63, Pollock, C. B., told the jury "that if two or more persons go out to commit a felony with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all guilty of murder, even although death was not intended."

Also, where the intent is to do some great bodily harm to another and death ensues, it will be murder; as if A intend only to *beat* B in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend *all* the mischief that followed; for what he did was *malum in se*, and he must be answerable for all its consequences; he beat B with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did. So, if a large stone be thrown at one with a deliberate intention to hurt, though not to kill him, and, *by accident*, it kill him, or any other, this is murder. —1 *Russ.* 742.

Where two persons go out with the common object of robbing a third person, and one of them, in pursuit of that

common object, does an act which causes the death of that third person, under such circumstances as to be murder in him who does the act, it is murder in the other also.—*R.* v. *Martin*, 7 *Cox*, 357.

CASES ILLUSTRATIVE OF GENERAL PRINCIPLES.

If a man intends to maim and causes death, and it can be made out most distinctly that he did not mean to kill, yet if he does acts and uses means for the purpose of accomplishing that limited object, and they are calculated to produce death, and death ensues, by the law of England, that is murder, although the man did not mean to kill. It is not necessary to prove an intention to kill; it is only necessary to prove an intention to inflict an injury that might be dangerous to life, and that it resulted in death. A party may be convicted upon an indictment for murder by evidence that would have no tendency to prove that there was any intent to kill, nay, by evidence that might clearly show that he meant to stop short of death, and even take some means to prevent death; but if that illegal act of his produces death, that is murder.—*R.* v. *Salvi*, 10 *Cox*, *note b*, 481.

"A common and plain rule on this subject," says Bishop, 2 Cr. L. 694, "is, that, whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet, if the life of another is accidentally taken, his offence is murder." Or in the language of Baron Bramwell, in *R.* v. *Horsay*, 3 *F.* & *F.* 287: "the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder, *even though he did not intend it.*"

And if the act committed or attempted is only a misdemeanor, yet the "*accidental*" causing of death, in

consequence of this act, is murder, if the misdemeanor is one endangering human life.—*Bishop*, 2 *Cr. L.* 691.

If a large stone be thrown at one with a deliberate intention to hurt, though not to kill him, and, by accident, it kill him, or any other, this is murder.—1 *Hale*, 440, 1 *Russ.* 742. Also, where the intent is to do some great bodily harm to another, and death ensues, it will be murder: as if A intend only to *beat* B in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed: for what he did was *malum in se*, and he must be answerable for all its consequences: he beat B with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did. *In Foster*, 261, it is said: "If an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue *against or beside the original intention of the party*, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful."

Extreme necessity of hunger does not justify an homicide. —*R.* v. *Dudley*, 15 *Cox*, 642.

If two persons enter into an agreement to commit suicide together, and the means employed kill one of them only, the survivor is guilty of murder.—*R.* v. *Jessop*, 16 *Cox*, 204.

The circumstance of a person, having acted under an irresistible influence to the commission of homicide, is no defence, if at the time he committed the act, he knew he

was doing what was wrong.—*R.* v. *Haynes*, 1 *F. & F.* 666.

On an indictment for murder, it being proved that the prisoner, a soldier, shot his officer through the head, the only evidence for the defence being that the act was sudden, without apparent motive, and that he had been addicted to drink, and had been suffering under depression. *Held*, that this was not enough to raise the defence of insanity, that the sole question was whether the prisoner fired the gun intending to kill, and that his expressions soon after the act were evidence of this, and that alleged inadequacy of motive was immaterial, the question being, not motive, but intent.—*R.* v. *Dixon*, 11 *Cox*, 341.

Killing a man who was out at night dressed in white as a ghost, for the purpose of frightening the neighborhood, is murder: it is no excuse that he could not otherwise be taken.—1 *Russ.* 749.

Forcing a person to do an act which is likely to produce and does produce death is murder; so, if the deceased threw himself out of a window, or in a river to avoid the violence of the prisoner.—1 *Russ.* 676; *R.* v. *Pitts, Car. & M.* 284.

If two persons fight, and one overpowers the other and knocks him down, and puts a rope round his neck, and strangles him, this will be murder.—*R.* v. *Shaw*, 6 *C. & P.* 372.

If a person being in possession of a deadly weapon enters into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually uses it, and kills the other, it will be murder; but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack

made upon him, it will be manslaughter. If he uses it to protect his own life or to protect himself from such serious bodily harm, as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far as he can, it will be justifiable homicide.—*R.* v. *Smith*, 8 *C. & P.* 160.

A person cannot be indicted for murder in procuring another to be executed, by falsely charging him with a crime of which he was innocent.--*R.* v. *Macdaniel*, 1 *Leach*, 44. *Sed quære?* 4 *Blackstone*, 196; 2*d Report*, 1846, *Cr. Law Comm.* 45.

Child murder.—To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which was born alive, the jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child has breathed in the progress of the birth.—R. v. Poulton, 5 C. & P. 329; R. v. Enoch, 5 C. & P. 539.—If a child has been wholly produced from the body of its mother, and she wilfully and of malice aforethought strangles it while it is alive, and has an independent circulation, this is murder, although the child is still attached to its mother by the umbilical cord.—*R.* v. *Trilloe*, 2 *Moo. C. C.* 260.—A prisoner was charged with the murder of her new-born child, by cutting off its head: *Held*, that, in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state; and that the fact of its having breathed is not a decisive proof that it was born alive, as it may have breathed and yet died before birth.—*R.* v. *Sellis*, 7 *C. & P.* 850.—*R.* v. *Handley*, 13 *Cox*, 79.

An infant in its mother's womb is not considered as a person who can be killed within the description of murder

or manslaughter. The rule is thus: it must be born, every part of it must have come from the mother, before the killing of it will constitute a felonious homicide.—*R.* v. *Wright*, 9 *C. & P.* 754; *R.* v. *Blain*, 6 *C. & P.* 349; 1 *Russ.* 670; 2 *Bishop, Cr. L.* 632. Giving a child, whilst in the act of being born, a mortal wound in the head, as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive and dies thereof, and there is malice, be murder; but if there is not malice, manslaughter.—*R.* v. *Senior*, 1 *Moo. C. C.* 346; 1 *Lewin, C. C.* 183.

Murder by poisoning.—Of all the forms of death, by which human nature may be overcome, the most detestable is that of poison: because it can, of all others, be the least prevented either by manhood or forethought.—3 Inst. 48. He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder; the reason is because it is an act of deliberation odious in law, and presumes malice.—1 Hale, 455. A prisoner was indicted for the murder of her infant child by poison. She purchased a bottle of laudanum, and directed the person who had the care of the child to give it a teaspoonful every night. That person did not do so, but put the bottle on the mantel-piece, where another little child found it, and gave part of the contents to the prisoner's child who soon after died: held, that the administering of the laudanum by the child was as much, in point of law, an administering by the prisoner, as if she herself had actually administered it with her own hand.—*R.* v. *Michael*, 2 *Moo. C. C.* 120. On a trial for murder by poisoning, statements, made by the deceased in a conversation shortly before the time at which the poison is supposed to have been administered, are evidence to prove the state of his health at that time.—*R.*

v. *Johnston*, 2 *C. & K.* 354. On an indictment for the murder of A, evidence is not admissible that three others in the same family died of similar poison, and that the prisoner was at all the deaths, and administered something to two of his patients.—*R.* v. *Winslow*, 8 *Cox*, 397. On an indictment against a woman for the murder of her husband by arsenic, in September, evidence was tendered, on behalf of the prosecution, of arsenic having been taken by her two sons, one of whom died in December and the other in March subsequently, and also by a third son, who took arsenic in April following, but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that she lived in the same house with her husband and sons, and that she prepared their tea, cooked their victuals, and distributed them to the four parties: *held*, that this evidence was admissible for the purpose of proving, first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony.—*R.* v. *Geering*, 18 *L. J. M. C.* 215. Upon the trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident, evidence was admitted that the male prisoner's first wife had been poisoned nine months previously; that the woman who waited upon her, and occasionally tasted her food, shewed symptoms of having taken poison; that the food was always prepared by the female prisoner; and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison.—*R.* v. *Garner*, 4 *F. & F.* 346. And Archbold, J., after consulting Pollock, C. B., in *R.* v. *Cotton*, 12

Cox, 400, *held*, that where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge after having been attended by her was admissible.—*See R.* v. *Roden*, 12 *Cox*, 630.

MURDER BY KILLING OFFICERS OF JUSTICE.

Ministers of justice, as bailiffs, constables, watchmen, etc. (either civil or criminal justice), while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom and equity, and in every principle of political justice; for without it the public tranquillity cannot possibly be maintained, or private property secured. For these reasons, the killing of officers so employed has been deemed murder of malice prepense as being an outrage wilfully committed in defiance of the justice of the kingdom. The law extends the same protection to any person acting in aid of an officer of justice, whether specially called thereunto or not. And a public officer is to be considered as acting strictly in discharge of his duty, not only while executing the process intrusted to him, but likewise while he is coming to perform, and returning from the performance of his duty.

He is under the protection of the law *eundo, morando et redeundo*. And, therefore, if coming to perform his office he meets with great opposition and retires, and in the retreat is killed, this will be murder. Upon the same principles, if he meets with opposition by the way, and is killed before he comes to the place (such opposition being intended to prevent his performing his duty), this will also be murder.—*Roscoe*, 697; 1 *Russ.* 732. But the defen-

dant must be proved to have known that the deceased was a public officer, and in the legal discharge of his duty as such; for if he had no knowledge of the officer's authority or business, the killing will be manslaughter only.

In order to render the killing of an officer of justice, whether he is authorized in right of his office or by warrant, amount to murder, upon his interference with an affray, it is necessary that he should have given some notification of his being an officer, and of the intent with which he interfered.—*R.* v. *Gordon*, 1 *East, P. C.* 315, 352.

Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder, and such as did not know it of manslaughter only.—1 *Hale*, 446. But it hath been adjuged that if a justice of the peace, constable or watchman, or even a private person, be killed in endeavoring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; yet it hath been resolved, that if the third person slain in such a sudden affray do not give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary; but if the person interposing in such case be an officer within his proper district, and known, or generally acknowledged to bear the office he assumeth, the law will presume that the party killing had due notice of his intent, especially if it be in the day time.—1 *Hawkins*, 101.

Killing an officer will amount to murder, though he had no warrant, and was not present when any felony was

committed, and takes the party upon a charge only, and though such charge does not in terms specify all the particulars necessary to constitute the felony.—*R.* v. *Ford R. & R.*, 329. *See Rafferty* v. *the People*, 12 *Cox*, 617; *R.* v. *Carey*, 14 *Cox*, 214.

Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the man has done nothing for which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer does not notify to him that he has such a charge.—*R* v. *Woolmer*, 1 *Moo. C. C.* 334.

So, where a man seen attempting to commit a felony on fresh pursuit kills his pursuer, it is as much murder as if the party were killed while attempting to take the defendant in the act, for any person, whether a peace officer or not, has power to arrest a person attempting to commit or actually committing a felony.—*R.* v. *Howarth*, 1 *Moo. C. C.* 207.

If a person is playing music in a public thoroughfare, and thereby collects together a crowd of people, a policeman is justified in desiring him to go on, and in laying his hand on him and slightly pushing him, if it is only done to give effect to his remonstrance; and if the person, on so small a provocation, strikes the policeman with a dangerous weapon and kills him, it will be murder, but otherwise if the policeman gives him a blow and knocks him down.—*R.* v. *Hagan*, 8 *C. & P.* 167.

MURDER.—KILLING BY OFFICERS OF JUSTICE.

Where an officer of justice, in endeavoring to execute his duty, kills a man, this is justifiable homicide, or manslaughter, or murder, according to circumstances. Where an officer of justice is resisted in the legal execu-

tion of his duty, he may repel force by force; and if in doing so, he kills the party resisting him, it is justifiable homicide; and this in civil as well as in criminal cases.—1 *Hale*, 494; 2 *Hale*, 118. And the same as to persons acting in aid of such officer. Thus if a peace officer have a legal warrant against B. for felony,or if B. stand indicted for felony, in these cases, if B-resist, and in the struggle be killed by the officer, or any person acting in aid of him, the killing is justifiable.—*Fost.* 318. So, if a private person attempt to arrest one who commits a felony inhis presence or interferes to suppress an affray, and be resisted, and kill the person resisting, this is also justifiable homicide.—1 *Hale*, 481, 484. Still there must be an apparent necessity for the killing: for if the officer were to kill after the resisting had ceased, or if there were no reasonable necessity for the violence used upon the part of the officer, the killing would be manslaughter at the least. Also, in order to justify an officer or private person in these cases, it is necessary that they should, at the time, be in the act of *legally* executing a duty imposed upon them by law, and under such circumstances that, if the officer or private person were killed, it would have been murder; for if the circumstances of the case were such that it would have been manslaughter only to kill the officer or private person, it will be manslaughter, at least, in the officer or private person to kill the party resisting.—*Fost.* 318; 1 *Hale*, 490. If the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he, in his defence, kill any of them, it is justifiable, for the sake of preventing an escape.—1 *Hale*, 496.

Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is

killed by the officer or private person in the pursuit, if the offence with which the man was charged were a treason or a felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable; but if charged with a breach of the peace or other misdemeanor merely, or if the arrest were intended in a civil suit, or if a press-gang kill a seaman or other person flying from them, the killing in these cases would be murder, unless, indeed, the homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other weapon not likely to kill, or the like; in which case the homicide, at most, would be manslaughter only. In case of a riot or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law, and by the Riot Act, if the riot cannot otherwise be suppressed.—*Archbold*, 646.

DUELLING.

Where words of reproach or other sudden provocations have led to blows and mutual combat, and death has ensued, the important enquiry will be, whether the occasion was altogether sudden and not the result of proconceived anger or malice; for in no case will the killing, though in mutual combat, admit of alleviation, if the fighting were upon a malice. Thus a party killing another in a deliberate duel is guilty of murder.—1 *Russ.* 727.

Where, upon a previous agreement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder, and the seconds also are equally guilty; and with respect to others shewn

to be present, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest: mere presence will not be sufficient; but if they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet, if they are present assisting and encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of the crime of murder.—*R.* v. *Young*, 8 *C. & P.* 644.

Where two persons go out to fight a deliberate duel and death ensues, all persons who are present, encouraging and promoting that death, will be guilty of murder. And the person who acted as the second of the deceased person in such a duel may be convicted of murder, on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned.—*R.* v. *Cuddy*, 1 *C. & K.* 210.

Verdict.—General Remarks.—By sect. 183 of the Procedure Act if upon the trial of any person charged with any felony or misdemeanor, it appears to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon, such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment.

And by sect. 191 of the Procedure Act, on the trial of any person for any felony whatever, where the crime *charged* includes an assault against the person, although an assault be not charged in terms, the jury may acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding. In England, a similar clause, 7 Will. 4 & 1 V., c. 85, sect. 11, has been repealed.

SELF-MURDER.

A *felo de se*, or felon of himself, is a person who, being of sound mind and of the age of discretion, voluntarily killeth himself.—3 *Inst.* 54.

If a man give himself a wound, intending to be *felo de se*, and dieth not within a year and a day after the wound, he is not *felo de se.—Ibid.*

The following passages from Hale and Hawkins may be usefully inserted here:

"It is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence, but are under such infirmities, but it must be such an alienation of mind that renders them to be madmen, or frantic, or destitute of the use of reason: a lunatic killing himself in the fit of lunacy is not *felo de se;* otherwise it is, if it be at another time." —1 *Hale*, 412.

"But here, I cannot but take notice of a strange notion which has unaccountably prevailed of late, that every one who kills himself must be *non compos* of course: for it is said to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason. If this argument be good, self-murder can be no crime, for a madman can be guilty of none; but it is wonderful that

the repugnancy to nature and reason, which is the highest aggravation of this offence, should be thought to make it impossible to be any crime at all, which cannot but be the necessary consequence of this position, that none but a madman can be guilty of it. May it not, with as much reason, be argued that the murder of a child or of a parent is against nature and reason, and consequently that no man in his senses can commit it."—1 *Hawkins*, c. 9, s. 2.

If one encourages another to commit a suicide, and is present abetting him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but failing in the attempt on himself, the latter is a principal in the murder of the first.—*R.* v, *Dyson*, *R. & R.* 523; *R.* v. *Allison*, 8 *C. & P.* 418; *R.* v. *Jessop*, 16 *Cox*, 204.

An attempt to commit suicide is not an attempt to commit murder, within 32–33 V., c. 20, but still remains a common law misdemeanor.—*R.* v. *Burgess*, *L. & C.* 258.

The finding of *felo de se* by the coroner's jury carries a forfeiture of goods and chattels.—2 *Burns' Just.* 1340.

An attempt to commit suicide is a misdemeanor at common law.— *R.* v. *Doody*, 6 *Cox*, 463. *See R.* v. *Malony*, 9 *Cox*, 6.

MANSLAUGHTER.

(SEC. 5, POST).

Indictment.— ..... The jurors ..... that A. B. on ..... at ..... in the county ..... did feloniously kill and slay one ..... against the peace .....

It need not conclude *contra formam statuti*. *R.* v. *Chatburn*, 1 *Moo. C. C.* 402. Nor is it necessary where the manslaughter arises from an act of omission, that such act of omission should be stated in the indictment.—*R.* v. *Smith*, 11 *Cox*, 210.

Manslaughter is principally distinguishable from murder, in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature.—*Roscoe*, 638; *Foster*, 290.

In this species of homicide, malice, which is the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution. In order to make an abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed. It was formerly considered that there could not be any accessories before the fact in any case of manslaughter, because it was presumed to be altogether sudden, and without premeditation. And it was laid down that if the indictment be

for murder against A. and that B. and C. were counselling and abetting as accessories before only (and not as *present* aiding and abetting, for such are principals), if A. be found guilty only of manslaughter, and acquitted of murder, the accessories before will be thereby discharged. But the position ought to be limited to these cases where the killing is sudden and unpremeditated; for there are cases of manslaughter where there may be accessories. Thus a man may be such an accessory by purchasing poison for a pregnant woman to take in order to procure abortion, and which she takes and thereby causes her death. *R.* v. *Gaylor, Dears. & B.* 288. If therefore upon an indictment against the principal and an accessory after the fact for murder, the offence of the principal be reduced to manslaughter, the accessory may be convicted as accessory to the manslaughter.—1 *Russ.* 783.

Manslaughter is homicide not under the influence of malice.—*R. v. Taylor*, 2 *Lewin*, 215.

The several instances of manslaughter may be considered in the following order: 1. Cases of provocation. 2. Cases of mutual combat. 3. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace. 4. Cases where the killing takes place in the prosecution of some criminal, unlawful or wanton act. 5. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.—1 *Russ. loc. cit.*

CASES OF PROVOCATION.

Whenever death ensues from the sudden transport of passion, or heat of blood upon a reasonable provocation,

and without malice, it is considered as solely imputable to human infirmity: and the offence will be manslaughter. It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury, unless they arise out of the evidence produced against him; as the presumption of law deems all homicide to be malicious, until the contrary is proved. The most grievous *words* of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or to do some great bodily harm, was otherwise manifested. But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear or strike with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter. Where an assault is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation. So if A. be passing along the street, and B. meeting him (there being convenient distance between A. and the wall take the wall) of him and justle him, and thereupon A. kill B. it is said that such justling would amount to provocation which would make the killing only manslaughter.

And again it appears to have been considered that where A. riding on the road, B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only man-

slaughter. But in the two last cases, it should seem that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation which, in point of law, amounts to an assault, that will of course reduce the crime of the party killing to manslaughter. Even a blow will not be considered as sufficient provocation to extenuate in cases where the revenge is disproportioned to the injury, and outrageous and barbarous in its nature; but where the blow which gave the provocation has been so violent as reasonably to have caused a sudden transport of passion and heat of blood, the killing which ensued has been regarded as the consequence of human infirmity, and entitled to lenient consideration.—1 *Russ.* 784. For cases on this defence of provocation, see under the head *Murder*.

In *R.* v. *Fisher*, 8 *C. & P.* 182, it was ruled that whether the blood has had time to cool or not is a question for the court and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received, and the act done. But in *R.* v. *Lynch*, 5 *C. & P.* 324; *R.* v. *Hayward*, 6 *C. & P.* 127; *R.* v. *Eagle*, 2 *F. & F.* 827, the question, whether or not the blow was struck before the blood had time to cool and in the heat of passion, was left to the jury; and this seems now settled to be the law on the question. The English commissioners, 4th Report, p. XXV, are also of opinion that "the law may pronounce whether any extenuating occasion of provocation existed, but it is for the jury to decide whether the offender acted solely on that provocation, or was guilty of a malicious excess in respect of the instrument used or the manner of using it."

Cases of mutual combat.—Where, upon words of reproach, or any other sudden provocation, the parties come

to blows, and a combat ensues, no undue advantage being sought or taken on either side, if death happen under such circumstances, the offence of the party killing will amount only to manslaughter. If A. has formed a deliberate design to kill B. and after this they meet and have a quarrel and many blows pass, and A. kills B. this will be murder, if the jury is of opinion that the death was in consequence of previous malice, and not of the sudden provocation.—*R.* v. *Kirkham*, 8 *C. & P.* 115. If after an exchange of blows on equal terms, one of the parties on a sudden and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will only amount to manslaughter; but it will amount to murder if he placed the weapon, before they began to fight, so that he might use it during the affray.—1 *Russ.* 731; *R.* v. *Kessel*, 1 *C. & P.* 437; *R.* v. *Whiteley*, 1 *Lewin*, 173.

Where there had been mutual blows, and then, upon one of the parties being pushed down on the ground, the other stamped upon his stomach and belly with great force, and thereby killed him, it was considered only to be manslaughter.—*R.* v. *Ayes*, *R. & R.* 166.

If two persons be fighting, and another interfere with intent to part them, but do not signify such intent, and he be killed by one of the combatants, this is but manslaugter.

A sparring match with gloves fairly conducted in a private room is not unlawful, and therefore death caused by an injury received during such a match does not amount to manslaughter.—*R.* v. *Young*, 10 *Cox*, 371.

Cases of resistance to officers of justice; to persons acting in their aid, and to private persons lawfully interfering to apprehend felons or to prevent a breach of the

peace. See under the head *murder;* sub-title *murder by killing officers of justice.* Attempting illegally to arrest a man is sufficient to reduce killing the person making the attempt to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt, if the prisoner was in such a situation that he could not have escaped from the arrest; and it is not necessary that he should have given warning to the person attempting to arrest him before he struck the blow.—*R.* v. *Thompson,* 1 *Moo. C. C.* 80.

If a constable takes a man without warrant upon a charge which gives him no authority to do so, and the prisoner runs away and is pursued by J. S., who was with the constable at the time, and charged by him to assist, and the man kills J. S. to prevent his retaking him, it will not be murder, but manslaughter only; because if the original arrest was illegal, the recaption would have been so likewise.—*R.* v. *Curvan,* 1 *Moo. C. C.* 132.

Where a common soldier stabbed a sergeant in the same regiment who had arrested him for some alleged misdemeanor, *held,* that as the articles of war were not produced, by which the arrest might have been justified, it was only manslaughter as no authority appeared for the arrest.—*R.* v. *Withers,* 1 *East, P. C.* 295.

A warrant leaving a blank for the christian name of the person to be apprehended, and giving no reason for omitting it but describing him only as the son of J. S. (it appears that J. S. had four sons, all living in his house), and stating the charge to be for assaulting A. without particularizing the time, place or any other circumstances of the assault, is too general and unspecific. A. resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder.—*R.* v. *Hood,* 1 *Moo. C. C.* 381.

A constable having a warrant to apprehend A. gave it to his son, who in attempting to arrest A. was stabbed by him with a knife which A. happened to have in his hand at the time, the constable then being in sight, but a quarter of a mile off: *Held*, that this arrest was illegal, and that if death had ensued, this would have been manslaughter only, unless it was shewn that A. had prepared the knife beforehand to resist the illegal violence.—*R.* v. *Patience*, 7 *C. & P.* 795.

In order to justify an arrest even by an officer, under a warrant, for a mere misdemeanor, it is necessary that he should have the warrant with him at the time. Therefore, in a case where the officer, although he had seen the warrant, had it not with him at the time, and it did not appear that the party knew of it; *held*, that the arrest was not lawful, and the person against whom the warrant was issued resisting apprehension and killing the officer; *held*, that it was manslaughter only.—*R.* v. *Chapman*, 12 *Cox*, 4.

If a prisoner, having been lawfully apprehended by a police constable on a criminal charge, uses violence to the constable, or to any one lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily harm, he is guilty of murder; and so, if he does so, only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury, it would be manslaughter. Suppose a constable, having a good and bad warrant, arrest a man on the bad warrant only, which he allows the man to read, who sees it is void, and resists his arrest on that ground, and the result is the death of the officer; if this had been the only authority the officer had, the offence would have been only manslaughter; is the man guilty of murder by reason of the good

warrant of which he knew nothing? It would seem that there are strong reasons for saying that he would not be guilty of murder. The ground on which the killing an officer is murder is that the killer is wilfully setting the law at defiance, and killing an officer in the execution of his duty. The ground on which the killing of an officer whilst executing an unlawful warrant is manslaughter is that every man has a right to resist an unlawful arrest, and that such an arrest is a sufficient provocation to reduce the killing to manslaughter. In the supposed case the killer would not be setting the law at defiance, but would be resisting to what appeared to him to be an unlawful arrest; and the actual provocation would be just as great as if the bad warrant alone existed. It is of the essence of a warrant that "the party upon whom it is executed should *know* whether he is bound to submit to the arrest." (Per Coltman, J., in *Hoye* v. *Bush*, citing *R.* v. *Weir*, 1 *B. & C.* 288.) And where an arrest is made without a warrant, it is of the essence of the lawfulness of the arrest that the party arrested should have either express or implied notice of the cause of the arrest. Now, where a constable in the supposed case arrests on the void warrant, the party arrested has no express notice of the good warrant, for it is not shown, and no implied notice of it, for everything done by the constable is referable to the void warrant; and, besides, the conduct of the constable is calculated to mislead, and it may well be that the party is innocent, and knows nothing of the offence specified in the valid warrant. Lastly, it must be remembered that in such a case the criminality of the act depends upon the intention of the party arrested, and that intention cannot in any way be affected by facts of which he is ignorant.

On the other hand, it would seem to be clear that,

where an officer has two or more warrants, one of which is bad, and he shows all to the party to be arrested, who kills the officer in resisting the arrest, it would be murder, for he was bound to yield obedience to the lawful authority. *By Greaves, in notes on "arrest without warrant."* (*Cox & Saunder's Crim. Law. Consol. Acts. p. LXXVII.*)

Cases where the killing takes place in the prosecution of some criminal, unlawfal or wanton act.—Where from an action unlawful in itself, done deliberately and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder; and if such deliberation and mischievous intention do not appear, which is matter of fact and to be attested from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter.—*R.* v. *Fenton*, 1 *Lewin, C. C.* 179; *R.* v. *Franklin*, 15 *Cox*, 164.

As if a person breaking an unruly horse ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with the intent to do mischief, the crime will be manslaughter. —1 *Russ.* 849.

Where one having had his pocket picked, seized the offender, and being encouraged by a concourse of people, threw him into an adjoining pond by way of avenging the theft by ducking him; but without any intention of taking away his life, this was held to be manslaughter only.—*R.* v. *Fray*, 1 *East, P. C.* 236.

Causing the death of a child, by giving it spirituous liquors in a quantity quite unfit for its tender age, amounts to manslaughter.—*R.* v. *Martin*, 3 *C. & P.* 211.

If a man take a gun, not knowing whether it is loaded

or unloaded and using no means to ascertain, fires it in the direction of any other person, and death ensues, this is manslaughter.—*R.* v. *Campbell*, 11 *Cox*, 323.

The prisoner was charged with manslaughter. The evidence showed that the prisoner had struck the deceased twice with a heavy stick, that he had afterwards left him asleep by the side of a small fire in a country by-lane, during the whole of a frosty night in January, and the next morning finding him just alive, put him under some straw in a barn, where his body was found some months after. The jury were directed that if the death of the deceased had resulted from the beating or from the exposure during the night in question, such exposure being the result of the prisoner's criminal negligence, or from the prisoner leaving the body under the straw ill but not dead, the prisoner was guilty of manslaughter. Verdict, manslaughter.—*R.* v. *Martin*, 11 *Cox*, 137. See *R.* v. *Towers*, 12 *Cox*, 530, as to causing death through frightening the deceased); and *R.* v. *Dugal*, *post*.

Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.—Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot otherwise be taken. And the same rule holds if a felon, after arrest, break away as he is carried to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him, and the jury ought to enquire whether it were done of necessity or not.

In making arrests in cases of misdemeanor and breach of the peace (with the exception, however, of some cases

of flagrant misdemeanors), it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him, and generally speaking it will be murder; but under circumstances it may amount only to manslaughter, if it appear that death was not intended.—1 *Russ.* 858.

If an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to cause the party's death by excessive execution of the sentence, he will at least be guilty of manslaughter.—1 *Hawkins, P. C., c.* 29, *s.* 5.

Killing by correction.—Moderate and reasonable correction may properly be given by parents, masters and other persons, having authority in *foro domestico*, to those who are under their care; but if the correction be immoderate or unreasonable, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case. If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder; but, if with a cudgel or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter.—1 *Russ.* 861.

Where a master struck his servant with one of his clogs, because he had not cleaned them, and death unfortunately ensued, it was holden to be manslaughter only because the clog was very unlikely to cause death, and the master could not have the intention of taking away the servant's life by hitting him with it.—*R.* v. *Wiggs*, 1 *Leach*, 378.

A schoolmaster who, on the second day of a boy's return to school, wrote to his parent, proposing to beat him

severely in order to subdue his alleged obstinacy, and on receiving the father's reply assenting thereto, beat the boy for two hours and a half, secretly in the night, and with a thick stick, until he died, is guilty of manslaughter.—*R.* v. *Hopley*, 2 *F. & F.* 202.

Where a person in *loco parentis* inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies, the death being of consumption, but hastened by the ill-treatment, it will not be murder but only manslaughter in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness, and was really able to do the quantity of work required.—*R.* v. *Cheeseman*, 7 *C. & P.* 454.

An infant, two years and a half old, is not capable of appreciating correction; a father therefore is not justified in correcting it, and if the infant dies owing to such correction, the father is guilty of manslaughter.—*R.* v. *Griffin*, 11 *Cox*, 402.

Death caused by negligence.—Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter at least, if death is caused by such negligence.—1 *Russ.* 864.

That which constitutes murder when by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. The deceased was with others employed in walling the inside of a shaft. It was the duty of the prisoner to place a stage over the mouth of the shaft, and the death of deceased was occasioned by the negligent omission on his part to perform such duty.

He was convicted of manslaughter, and upon a case reserved the conviction was affirmed.—*R.* v. *Hughes*, 7 *Cox*, 301.

The prisoner, as the private servant of B., the owner of a tramway crossing a public road, was entrusted to watch it. While he was absent from his duty, an accident happened and C. was killed. The Private Act of Parliament, authorizing the road, did not require B. to watch the tramway: *Held*, that there was no duty between B. and the public, and therefore that the prisoner was not guilty of negligence.—*R.* v. *Smith*, 11 *Cox*, 210.

Although it is manslaughter, where the death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other person has intervened between his act or omission and the fatal result.—*R.* v. *Ledger*, 2 *F. & F.* 857.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication.—*R.* v. *Walker*, 1 *C. & P.* 320.

And it is no defence to an indictment for manslaughter where the death of the deceased is shown to have been caused in part by the negligence of the prisoner, that the deceased was also guilty of negligence, and so contributed to his own death. Contributory negligence is not an answer to a criminal charge.—*R.* v. *Swindall*, 2 *Cox*, 141.

In summing up in that case, Pollock, C. B., said:

"The prisoners are charged with contributing to the

death of the deceased by their negligence and improper conduct; and, if they did so, it matters not whether the deceased was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness and negligence of any one person has contributed to the death of another person."

In *R.* v. *Dant*, 10 *Cox*, 102; *L. & C.* 570, Blackburn, J., said: "I have never heard that upon an indictment for manslaughter, the accused is entitled to be acquitted because the person who lost his life was in some way to blame." And Erle, Channell, Mellor and Montague Smith, J. J., concurred, following *R.* v. *Swindall.*

And in *R.* v. *Hutchinson*, 9 *Cox*, 555, Byles, J., in his charge to the Grand Jury, said: "If the man had not been killed, and had brought an action for damages, or if his wife and family had brought an action, if he had in any degree contributed to the result, an action could not be maintained. But in a criminal case, it was different The Queen was the prosecutor and could be guilty of no negligence; and if both the parties were negligent the survivor was guilty."

And the same learned Judge, in *R.* v. *Kew*, 12 *Cox*, 355, said: "It has been contended if there was contributory negligence on the part of the deceased, then the

defendants are not liable. No doubt contributory negligence would be an answer to an action. But who is the plaintiff here? The Queen, as representing the nation; and if they were all negligent together I think their negligence would be no defence."

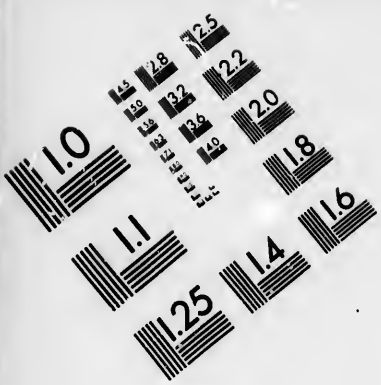
And Lush, J., in *R.* v. *Jones*, 11 *Cox*, 544, distinctly said that contributory negligence on the part of the deceased was no excuse in a criminal case.

In *R.* v. *Birchall*, 4 *F. & F.* 1087; Willes, J., however, held that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, observing that, until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. But that case has not been followed.

If a man undertakes to drive another in a vehicle, he is bound to take proper care in regard to the safety of the man under his charge; and if by culpable negligent driving he causes the death of the other, he will be guilty of manslaughter.—*R.* v. *Jones*, 11 *Cox*, 544.

In order to convict the captain of a steamer of manslaughter in causing a death by running down another vessel, there must be some act of personal misconduct or personal negligence shown on his part.—*R.* v. *Allen*, 7 *C. & P.* 153; *R.* v. *Green*, 7 *C. & P.* 156; *R.* v. *Taylor*, 9 *C. & P.* 672.

On an indictment against an engine driver and a fireman of a railway train, for the manslaughter of persons killed, while travelling in a preceding train, by the prisoner's train running into it, it appeared that on the day in question special instructions had been issued to them, which in



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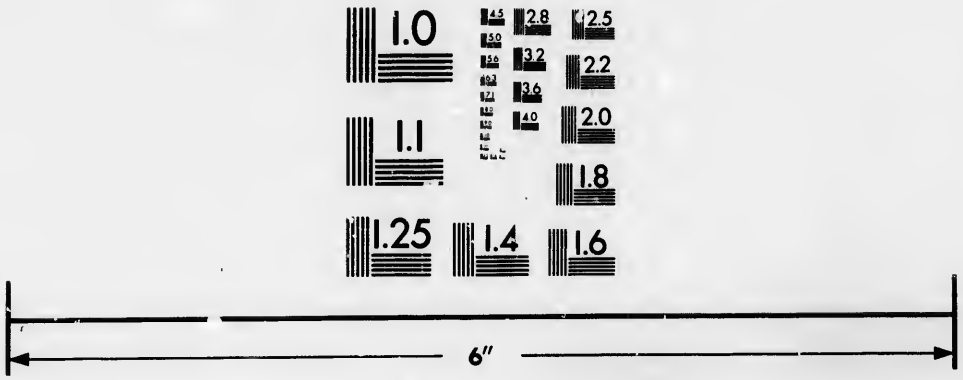

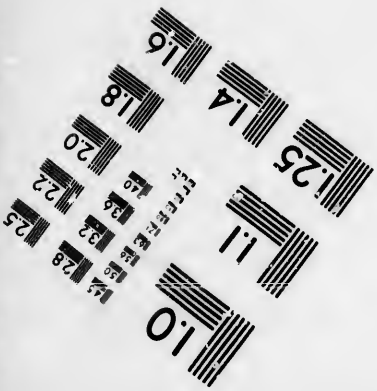

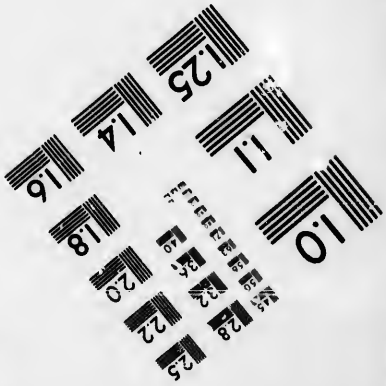

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some respects differed from the general rules and regulations, and altered the signal for danger so as to make it mean not "stop" but proceed with caution; that the trains were started by the superior officers of the company irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to the prisoners except the signal for caution; and that their train was being driven at an excessive rate of speed; and that then they did not slacken immediately on perceiving the signal, but almost immediately, and that as soon as they saw the preceding train they did their best to stop but without effect: *Held*, first, that the special rules, so far as they were not consistent with the general rules, superseded them; secondly, that if the prisoner honestly believed they were observing them, and they were not obviously illegal they were not criminally responsible; thirdly, that the fireman being bound to obey the directions of the engine driver, and so far as appeared, having done so, there was no case against him.—*R.* v. *Trainer*, 4 *F. & F.* 105.

Where a fatal railway accident had been caused by the train running off the line, at a spot where rails had been taken up, without allowing sufficient time to replace them, and also without giving sufficient, or at all events effective warning to the engine-driver; and it was the dutyo f the foreman of plate layers to direct when the work should be done: *Held*, that, though he was under the general control of an inspector of the district, the inspector was not liable, but that the foreman was, assuming his negligence to have been a material and a substantial cause of the accident, even although there had also been negligence on the part of the engine driver in not keeping a sufficient lookout.—*R.* v. *Benge*, 4 *F. & F.* 504.

By medical practitioners and quacks.—If a person, bonâ fide and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter, and it makes no difference whether such person is a regular surgeon or not, nor whether he has had a regular medical education or not.—*R.* v. *Van Butchell*, 3 *C. & P.* 629. A person in the habit of acting as a man midwife, tearing away part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, by means of which the patient dies, is not indictable for manslaughter, unless he is guilty of criminal misconduct arising either from the grossest ignorance or from the most criminal inattention.—*R.* v. *Williamson*, 3 *C. & P.* 635. A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or by gross inattention to his patient's safety.—*R.* v. *St. John Long*, 4 *C. & P.* 398. Where a person, undertaking the cure of a disease (whether he has received a medical education or not), is guilty of gross negligence in attending his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter.—*R.* v. *St. John Long* (*2nd case*), 4 C. & P. 423.

Where a person grossly ignorant of medicine administers a dangerous remedy to one laboring under a disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter.—*R.* v. *Webb*, 2 *Lewin*, 196.

In this case, Lord Lyndhurst laid down the following rule: "In these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without licence. In either case, if a party having a competent degree of skill and knowledge makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one laboring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter."

If a medical man, though lawfully qualified to practice as such, causes the death of a person by the grossly unskilful, or grossly incautious use of a dangerous instrument, he is guilty of manslaughter.—*R.* v. *Spilling*, 2 *M. & Rob.* 107. Any person, whether a licenced medical practitioner or not, who deals with the life or health of any of His Majesty's subjects, is bound to have competent skill, and is bound to treat his or her patients with care, attention and assiduity; and if a patient dies for want of either, the person is guilty of manslaughter.—*R.* v. *Spiller*, 5 *C. & P.* 333; *R.* v. *Simpson*, 1 *Lewin*, 172; *R.* v. *Ferguson*, 1 *Lewin*, 181. In cases of this nature, the question for the jury is always, whether the prisoner caused the death by his criminal inattention and carelessness.—*R.* v. *Crick, and R.* v. *Crook*, 4 *F. & F.* 519, 521; *R.* v. *McLeod*, 12 *Cox* 534. On an indictment for manslaughter, by reason of gross ignorance and negligence in surgical treatment, neither on one side nor on the other can evidence be gone into of former cases

treated by the prisoner.—*R.* v. *Whitehead*, 3 *C. & K.* 202.

A mistake on the part of a chemist in putting a poisonous liniment into a medicine bottle, instead of a liniment bottle, in consequence of which the liniment was taken by his customer internally with fatal results, the mistake being made under circumstances which rather threw the prisoner off his guard, does not amount to such criminal negligence as will warrant a conviction for manslaughter.—*R.* v. *Noakes*, 4 *F. & F.* 920. On an indictment for manslaughter against a medical man by administering poison by mistake for some other drug, it is not sufficient for the prosecution merely to show that the prisoner who dispensed his own drugs supplied a mixture which contained a large quantity of poison, they are bound also to show that this happened through the gross negligence of the prisoner.—*R.* v. *Spencer*, 10 *Cox*, 525. A medical man who administered to his mother for some disease prussic acid, of which she almost immediately died, is not guilty of manslaughter, it not appearing distinctly what the quantity was which he had administered, or what quantity would be too great to be administered with safety to life.—*R.* v. *Bull*, 2 *F. & F.* 201. An unskilled practitioner who ventures to prescribe dangerous medicines of the use of which he is ignorant, that is culpable rashness, for which he will be held responsible. —*R.* v. *Markuss*, 4 *F. & F.* 356; *R.* v. *McLeod*, 12 *Cox*, 534.

The prisoner was indicted for the manslaughter of an infant child: the prisoner, who practiced midwifery, was called in to attend a woman who was taken in labor, and when the head of the child became visible, the prisoner being grossly ignorant of the art which he pro-

fessed, and unable to deliver the woman with safety to herself and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant, and thereby occasioned its death immediately after it was born; the prisoner was found guilty; it was submitted that the child being *en ventre de sa mère* when the wound was given, the prisoner could not be guilty of manslaughter; but, upon a case reserved, the judges were unanimously of opinion that the conviction was right.—*R.* v. *Senior*, 1 *Moo. C. C.* 346.

NEGLECT OF NATURAL DUTIES.

Lastly, there are certain natural and moral duties towards others, which if a person neglect without malicious intention, and death ensue, he will be guilty of manslaughter. Of this nature is the duty of a parent to supply a child with proper food. When a child is very young, and not weaned, the mother is criminally responsible, if the death arose from her not suckling it, when she was capable of doing so.—*R.* v. *Edwards*, 8 *C. & P.* 611. But if the child be older, the omission to provide food is the omission of the husband, and the crime of the wife can only be the omitting to deliver the food to the child, after the husband has provided it.—*R.* v. *Saunders*, 7 *C. & P.* 277.

A master is not bound by the common law to find medical advice for his servant; but the case is different with respect to an apprentice, for a master is bound during the illness of his apprentice to find him with proper medicines, and if he die for want of them, it is manslaughter in the master.—*R.* v. *Smith*, 8 *C. & P.* 153. Where a person undertakes to provide necessaries for a person who is so aged and infirm that he is incapable of doing it for himself, and through his neglect to perform his under-

taking death ensues, he is criminally responsible. On an indictment for the murder of an aged and infirm woman by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines and other necessaries, and not allowing her the enjoyment of the open air, in breach of an alleged duty, if the jury think that the prisoner was guilty of wilful neglect, so gross and wilful that they are satisfied he must have contemplated her death, he will be guilty of murder; but if they only think that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter.—*R.* v. *Marriott*, 8 *C. & P.* 425.

To render a person liable to conviction for manslaughter through neglect of duty, there must be such a degree of culpability in his conduct as to amount to gross negligence. —*R.* v. *Finney*, 12 *Cox*, 625; *R.* v. *Nicholls*, 13 *Cox*, 75; *R.* v. *Handley*, 13 *Cox*, 79; *R.* v. *Morby*, 15 *Cox*, 35.

OTHER CASES OF MANSLAUGHTER.

Death resulting from fear, caused by menaces of personal violence and assault, though without battery, is sufficient in law to support an indictment for manslaughter.—*R.* v. *Dugal*, 4 *Q. L. R.* 350.

One who points a gun at another person, without previously examining whether it be loaded or not, will, if the weapon should accidentally go off and kill him towards whom it is pointed, be guilty of manslaughter.—*R.* v. *Jones*, 12 *Cox*, 628. *See R.* v. *Weston*, 14 *Cox*, 346.

Three persons went out together for rifle practice. They selected a field near to a house, and put up a target in a

tree at a distance of about a hundred yards. Four or five shots were fired, and by one of them a boy who was in a tree in a garden, at a distance of three hundred and ninety-three yards, was killed. It was not clear which of the three persons fired the shot, that killed the boy. *Held*, that all three were guilty of manslaughter.—*R.* v. *Salmon*, 14 *Cox*, 494.

If an injury is inflicted by one man upon another, which compelled the injured man, under medical advice, to submit to an operation during which he dies, for that death the assailant is guilty of manslaughter.—*R.* v. *Davis*, 15 *Cox*, 174.

An indictment for manslaughter will not lie against the managing director of a Railway Company by reason of the omission to do something which the Company, by its charter, was not bound to do, although he had personally promised to do it.—*Ex parte, Brydges*, 18 *L. C. J.* 141.

An indictment contained two counts, one charging the prisoner with murdering M. J. T., on the 10th of November, 1881; the other with manslaughter of the said M. J. T., on the same day. The Grand Jury found a "true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the indictment was sufficient.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th Nov., 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a bl or fall against a hard substance. About three weeks before her death (17th October preceding), the prisoner ıd knocked his wife down with a bottle; she fell

against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife, within a year of her death, by knocking her down and kicking her in the side.

The following questions were reserved, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th Nov. or the 17th Oct., 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the evidence was properly received, and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner.—*Theal* v. *R.*, 7 *S. C. R.* 397.

A corporal was tried for murder and convicted of manslaughter. The evidence showed that W. (the deceased), having been confined for intoxication, defendant with two men was ordered by a sergeant to tie him so that he could not make a noise. The order was not executed so as to stop the noise, and a second order was given to tie W. so that he could not shout. To effect this defendant caused W. to be tied in a certain manner, and he died in that position.

Held, that whether the illegality consisted in the order of the sergeant, or in the manner in which it was carried out, the defendant might be properly convicted.

Held, also, that the jury were justified in finding that the death of W. was caused or accelerated by the way in which he was tied by defendant, or by his directions. —*The Queen* v. *Stowe*, 2 *G. & O. (N. S.)* 121.

In the North West Territories it is not necessary that a trial for murder should be based upon an indictment by a grand jury or a coroner's inquest.—*The Queen* v. *O'Connor*, 2 *Man. L. R.* 235.

As to insanity as a defence in criminal cases, *see The Queen* v. *Riel*, 2 *Man. L. R.* 321.

Evidence of one crime may be given to show a motive for committing another; and where several felonies are part of the same transaction evidence of all is admissible upon the trial of an indictment for any of them; but where a prisoner indicted for murder, committed while resisting constables about to arrest him, had, with others, been guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of showing the prisoner's knowledge that he was liable to be arrested, and, therefore, had a motive to resist the officers.—*The Queen* v. *Chasson*, 3 *Pugs. (N. B.)* 546.

As to the admissibility of dying declarations, the most recent cases are: *R.* v. *Morgan*, 14 *Cox*, 337; *R.* v. *Bedingfield*, 14 *Cox*, 341; *R.* v. *Hubbard*, 14 *Cox*, 565; *R.* v. *Osmand*, 15 *Cox*, 1; *R.* v. *Goddard*, 15 *Cox*, 7; *R.* v. *Smith*, 16 *Cox*, 170.

CHAPTER 162.

AN ACT RESPECTING OFFENCES AGAINST THE PERSON.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. In this Act, unless the context otherwise requires, the expression "loaded arms" includes any gun, pistol or other arm loaded in the barrel with gunpowder or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air, and having ball, shot, slug or other destructive material in the barrel, although the attempt to discharge the same fails.—32-33 *V.*, *c.* 20, *s.* 18. *Imp. Act*, 24-25 *V.*, *c.* 100, *s.* 19.

"This clause is new, and is introduced to meet every case where a prisoner attempts to discharge a gun, etc., loaded in the barrel, but which misses fire for want of priming, or of a copper cap, or from any like cause. *R.* v. *Carr*, *R. & R.* 377; *Anon*, 1 *Russ.* 979; and *R* v. *Harris*, *C. & P.* 159, cannot therefore be considered as authorities under this Act."—*Greaves' Note.*

2. Every one who is convicted of murder shall suffer death as a felon.—32-33 *V.*, *c.* 20, *s.* 1. 24-25 *V.*, *c.* 100, *s.* 1, *Imp.*

Form of indictment in second schedule of Procedure Act.

Upon this indictment, the defendant may be acquitted of the murder and found guilty of manslaughter.

Sec. 109 of Procedure Act as to form of indictment, and sec. 9 as to the venue in certain cases—Not triable at Quarter Sess. Sec. 4 Procedure Act.

3. Every one who,—

(*a.*) Conspires, confederates or agrees with any person to murder

any other person, whether the person intended to be murdered is a subject of Her Majesty or not, or is within the Queen's dominions or not, or—

(*b.*) Solicits, encourages, persuades, endeavors to persuade, or proposes to any person to murder any other person, whether the person whose murder is solicited, encouraged or attempted to be procured is a subject of Her Majesty or not, or within the Queen's dominions or not,—

Is guilty of a misdemeanor, and liable to ten years' imprisonment. —32-33 *V.*, *c.* 20, *s.* 3. 24-25 *V.*, *c.* 100, *s.* 4, *Imp.*

Indictment ..... That J. S., J. T., and E. T., on ——— unlawfully and wickedly did conspire, confederate and agree together one J. N. feloniously, wilfully, and of their malice aforethought to kill and murder, against the form ..... (*you may add counts charging the defendants or any of them with "soliciting, encouraging, etc., or endeavoring to persuade, etc., if the facts warrant such a charge."—Archbold.*

See 1 *Russ.* 967; 3 *Russ.* 664.—*R.* v. *Bernard*, 1 *F. & F.* 240.

In *R.* v. *Banks*, 12 *Cox*, 393, upon an indictment under this clause, the defendants were convicted of an attempt to commit the misdemeanor charged; In *R.* v. *Most*, 14 *Cox*, 583, the defendant having written a newspaper article, encouraging the murder of foreign potentates, was found guilty of an offence under this clause.

4. Every accessory after the fact to murder is liable to imprisonment for life.—32-33 *V.*, *c.* 26, *s.* 4. 24-25 *V.*, *c.* 100, *s*, 67, *Imp.*

5. Every one who is convicted of manslaughter is liable to imprisonment for life, or to pay such fine as the Court awards, in addition to or without any such imprisonment.—32-33 *V.*, *c.* 20, *s.* 5. 24-25 *V.*, *c.* 100, *s.* 5, *Imp.*

Form of indictment in second schedule of Procedure Act. Also sec. 109, and sec. 9 of Procedure Act.

6. No punishment or forfeiture shall be incurred by anyp erson

who kills another by misfortune, or in his own defence, or in any other manner without felony.—32-33 *V.*, *c.* 20, *s.* 7. 24-25 *V.*, *c.* 100, *s.* 7, *Imp.*

Homicide in self-defence, *i.e.*, committed *se et sua defendendo* in defence of a man's person or property, upon some sudden affray, has been usually classed with homicide *per infortunium*, under the title of *excusable*, as distinct from *justifiable*, because it was formerly considered by the law as in some measure blameable, and the person convicted either of that or of homicide by misadventure forfeited his goods. The above clause has put an end to these distinctions, which Foster says "had thrown some darkness and confusion upon this part of the law."—*Fost.* 273.

Homicide *se defendendo* seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such inevitable necessity. And not only he, who on assault retreats to a wall or some such straight, beyond which he can go no farther, before he kills the other, is judged by the law to act upon unavoidable necessity; but also he who being assaulted in such a manner and such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all.—1 *Hawkins*, *c.* 11, *s.* 13-14.

In the case of justifiable self-defence, the injured party may repel force by force in defence of his person, habitation or property against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not

obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable.—*Fost.* 273.

Before a person can avail himself of the defence that he used a weapon in defence of his life, he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect himself from such bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance and no means of escape, in such cases, if he retreated as far as he could, he would be justified.—*R.* v. *Smith*, 8 *C. & P.* 160; *R.* v. *Bull*, 9 *C. & P.* 22.

Under the excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are justified; the act of the relation being construed as the act of the party himself.—1 *Hale*, 484.

Chance medley, or as it was sometimes written, *chaud medley*, has been often indiscriminately applied to any manner of homicide by misadventure; its correct interpretation seems to be a killing happening in a sudden encounter; it will be manslaughter or self-defence according to whether the slayer was actually striving and combating at the time the mortal stroke was given, or had *bonâ fide* endeavored to withdraw from the contest, and afterwards, being closely pressed, killed his antagonist to avoid his own destruction; in the latter case, it will be justifiable or excusable homicide, in the former, manslaughter.—1 *Russ.* 888.

A man is not justified in killing a mere trespasser; but

if, in attempting to turn him out of his house, he is assaulted by the trespasser he may kill him, and it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault or retain his lawful possession, and in such a case, a man need not fly as far as he can as in other cases of *se defendendo*, for he has a right to the protection of his own house.—1 *Hale*, 485.

But it would seem that in no case is a man justified in intentionally taking away the life of a mere trespasser, his own life not being in jeopardy; he is only protected from the consequences of such force as is reasonably necessary to turn the wrong-doer out. A kick has been held an unjustifiable mode of doing so.—*Child's case*, 2 *Lewin*, 214: throwing a stone has been held a proper mode.—*Hinchcliffe's Case*, 2 *Lewin*, 161.

Homicide committed in prevention of a forcible and atrocious crime, amounting to felony, is justifiable. As if a man come to burn my house, and I shoot out of my house, or issue out of my house and kill him. So, if A. makes an assault upon B., a woman or maid, with intent to ravish her, and she kills him in the attempt, it is justifiable, because he intended to commit a felony. And not only the person upon whom a felony is attempted may repel force by force, but also his servant or any other person present may interpose to prevent the mischief; and if death ensued, the party so interposing will be justified; but the attempt to commit a felony should be apparent and not left in doubt, otherwise the homicide will be manslaughter at least; and the rule does not extend to felonies without force, such as picking pockets, nor to misdemeanors of any kind.—2 *Burn*, 1314.

It should be observed that, as the killing in these cases is only justifiable on the ground of necessity, it cannot be

justified unless all other convenient means of preventing the violence are absent or exhausted; thus a person set to watch a yard or garden is not justified in shooting one who comes into it in the night, even if he should see him go into his master's hen roost, for he ought first to see if he could not take measures for his apprehension; but if, from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him.—*R.* v. *Scully*, 1 *C. & P.* 319. Nor is a person justified in firing a pistol on every forcible intrusion into his house at night; he ought, if he have reasonable opportunity, to endeavour to remove him without having recourse to the last extremity.—*Meade's Case*, 1 *Lewin*, 184.

As to justifiable homicide by officers of justice or other persons in arresting felons, see under the heads *Murder* and *Manslaughter*. Also, *Foster*, 258. As to homicide by misadventure, 2 *Burn*, 316.

7. Every offence which, before the abolition of the crime of petit treason, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence.—32-33 *V.*, *c.* 20, *s.* 8, *part.* 24-25 *V.*, *c.* 100, *s.* 8, *Imp.*

Petit treason was a breach of the lower allegiance of private and domestic faith, and considered as proceeding from the same principle of treachery in private life as would have led the person harboring it to have conspired in public against his liege lord and sovereign. At common law, the instances of this kind of crime were somewhat numerous and involved in some uncertainty; but by the 25 Edw. 3, ch. 2, they were reduced to the following cases: 1. Where a servant killed his master. 2. Where a wife killed her husband. 3. Where an ecclesiastical person, secular or regular, killed his superior, to whom he owed

faith and obedience. It was murder aggravated by the circumstance of the allegiance which the murderer owed to the deceased; and in consequence of that circumstance of aggravation, the judgment upon a conviction was more grievous than in murder. Petit treason is now nothing more than murder.—*Greaves' note*, 1 *Russ.* 710.

ATTEMPTS TO MURDER.

8. Every one who, with intent to commit murder, administers or causes to be administered, or to be taken by any person, any poison or other destructive thing, or by any means whatsoever wounds or causes any grievous bodily harm to any person, is guilty of felony, and liable to imprisonment for life.—40 *V.*, *c.* 28, *s.* 1. 24-25 *V.*, *c.* 100, *s.* 11, *Imp.*

In *R.* v. *Lawless*, Arthabaska, Nov., 1872, Taschereau (H. E.), J. an indictment under this sect. that "..... in and upon one Rose Ann Mace unlawfully did make an assault, and the said Rose Ann Mace did beat, wound and ill-treat ..... with intent then and there, the said Rose Ann Mace wilfully, feloniously and of his malice aforethought to kill and murder" ..... was quashed upon demurrer for want of the word "feloniously" before "unlawfully," and before "did beat wound and ill treat." Amendment refused. But the indictment was good as for a misdemeanor under sec. 34, *post.*

Indictment for administering poison with intent to murder.— ..... The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... feloniously and unlawfully did administer to one A. B. (*administer or cause to be administered to or to be taken by any person*), a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, (*any poison or other destructive thing*), with intent thereby then feloniously, wilfully, and of his malice aforethought the said A. B. to kill and

murder, against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity. (*Add counts stating that the defendant feloniously and unlawfully, "did cause to be administered to" and feloniously and unlawfully, "did cause to be taken by" a large quantity, etc., and if the description of poison be doubtful, add counts describing it in different ways and one count stating it to be "a certain destructive thing to the jurors aforesaid unknown."*)

The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the sponge to be destructive, was holden bad.—*R.* v. *Powler*, 4 *C. & P.* 571.

If there be any doubt whether the poison was intended for A. B. add a count, stating the intent to be to "commit murder" generally.—*R.* v. *Ryan*, 2 *M. & Rob.* 213; *R.* v. *Duffin*, *R. & R.* 365.

If a person mix poison with coffee, and tell another that the coffee is for her, and she takes it in consequence, it seems that this is an administering; and, at all events, it is causing the poison to be taken. In *R.* v. *Harley*, 4 *C. & P.* 369, it appeared that a coffee pot, which was proved to contain arsenic, mixed with coffee, had been placed by the prisoner by the side of the grate: the prosecutrix was going to put out some tea, but on the prisoner telling her that the coffee was for her, she poured out some for herself, and drank it, and it about five minutes became very ill. It was objected that the mere mixing of poison, and leaving it in some place for the person to take it was not sufficient to constitute an administering.—Park, J., said: "There has been much argument whether, in this

case, there has been an administering of this poison. It has been contended that there must be a manual delivery of the poison, and the law, as stated in Ryan & Moody's Reports, goes that way (*R.* v. *Cadman*, 1 *Moo. C. C.* 114); but as my note differs from that report, and also from my own feelings, I am inclined to think that some mistake has crept into that report. It is there stated that the judges thought the swallowing of the poison not essential, but my recollection is, that the judges held just the contrary. I am inclined to hold that there was an administering here; and I am of opinion that, to constitute an administering it is not necessary that there should be a delivery by the hand."—1 *Russ.* 988, *and Greaves, note n. to it.*

An indictment stating that the prisoner gave and administered poison is supported by proof that the prisoner gave the poison to A. to administer as a medicine to B. with intent to murder B. and that A. neglecting to do so, it was accidentally given to B. by a child, the prisoner's intention to murder continuing.—*R.* v. *Michael*, 2 *Moo.* C. C. 120.

Where the prisoner, having mixed corrosive sublimate with sugar, put it into a parcel, directing it to "*Mrs. Daws, Townhope,*" and left it on the counter of a tradesman, who sent it to Mrs. Daws who used some of the sugar, Gurney held it to be an administering.—*R.* v. *Lewis*, 6 *C. & P.* 161.

And if the indictment contains a count "*with intent to commit murder,*" generally, the proceeding case, *R.* v. *Lewis*, is clear law.—*Archbold*, 653.

Evidence of administering at different times may be given to show the intent.—*Archbold*, 650; 1 *Russ.* 1004 *et seq.* The intent to murder must be proved by circumstances from which that intent may be implied.

Indictment for wounding with intent to murder.—.....one J. N. feloniously and unlawfully did wound *(wound or cause any grievous bodily harm)* with intent etc. *(as in the last precedent).* Add a count "with the intent to commit murder" generally.—*Archbold*, 650.

The instrument or means by which the wound was inflicted need not be stated, and, if stated, would not confine the prosecutor to prove a wound by such means.—*R.* v. *Briggs*, 1 *Moo. C. C.* 318.

As the general term "wound" includes every "stab" and "cut" as well as other wound, that general term has alone been used in these Acts. All therefore that it is now necessary to allege in the indictment is, that the prisoner did wound the prosecutor; and that allegation will be proved by any wound, whether it be a stab cut, or other wound. *Graves, Cons. Acts.* 45. The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds.—*Archbold*, 664.

But to constitute a wound, within the meaning of this statute, the continuity of the skin must be broken.—*R.* v. *Wood*, 1 *Moo. C. C.* 278.

The whole skin, not the mere cuticle or upper skin, must be divided.—*Archbold*, 665.

But a division of the internal skin, within the cheek or lip, is sufficient to constitute a wound within the statute. —*Archbold*, 665.

The statute says "by any means whatsoever", so that it is immaterial by what means the wound is inflicted, provided it be inflicted with the intent alleged.—*R.* v. *Harris*, *R.* v. *Stevens*, *R.* v. *Murrow* and *Jenning's Case*, and other similar cases cannot therefore be considered as authorities under the present law."–*Greaves, Cons. Acts*, 45.

It it not necessary that the prosecutor should be in fact wounded in a vital part, for the question is not what the wound is, but what wound was intended.—*R.* v. *Hunt*, 1 *Moo. C. C.* 93.

There does not seem any objection to insert counts on the 8th and 13th secs. (Canada); and it is in all cases advisable where it is doubtful whether the prisoner intended to murder or merely to maim.—3 *Burn*, 752.—*Archbold, form of indictment*, 650; *R.* v. *Strange*, 8 *C. & P.* 172; *R.* v. *Murphy*, 1 *Cox*, 108.

On the trial of any indictment for wounding with intent to murder, if the intent be not proved, the jury may convict of unlawfully wounding.—*Archbold.*

This verdict would fall under sec. 189 of the Procedure Act; see *post.*

Archbold, 650, says that a defendant cannot, on an indictment for the felony, *plead guilty* to the misdemeanor. In R. v. Roxburg, 12 Cox, 8, the defendant was allowed to plead guilty of a common assault.

The defendant may also be found guilty of an attempt to commit the felony charged: *Sec.* 183, *Procedure Act.*

The jury also find a verdict of common assault, if the evidence warrants it. Sec. 191, Procedure Act; *R.* v. *Cruse*, 2 *Moo. C. C.* 53; *R.* v. *Archer*, 2 *Moo. C. C.* 283; though not on an indictment for poisoning.—*R.* v. *Delaworth*, 2 *M. & Rob.* 561; *R.* v. *Draper*, 1 *C. & K.* 176.

An attempt to commit suicide remains a misdemeanor at common law, and is not an attempt to commit murder within this statute.—*R.* v. *Burgess*, *L. & C.* 258.

In an indictment for wounding with intent to murder, the words "feloniously and of his malice aforethought" are necessary.—*R.* v. *Bulmer*, 5 *L. N.* 287; *Ramsay's App. Cas.* 189.

9. Every one who, by the explosion of gunpowder, or other explosive substance, destroys or damages any building, with intent to commit murder, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 11. 24-25 *V.*, *c.* 100, *s.* 12, *Imp.*

Indictment ..... feloniously, unlawfully and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy (*destroy or damage*) a certain building situate ..... with intent thereby then feloniously, wilfully and of his malice aforethought, one J. N. to kill and murder, against.....(*Add a count, stating the intent to be generally "to commit murder."*)

In *R.* v. *Ryan*, 2 *M. & Rob.* 213, Parke and Alderson held that a count alleging with intent *to commit murder*, generally, is sufficient.

The jury may return a verdict of guilty of an attempt to commit the felony. Sec. 183, Procedure Act.

10. Every one who, with intent to commit murder, sets fire to any ship or vessel, or any part thereof, or any part of the tackle, apparel or furniture thereof, or any goods or any chattels being therein, or casts away or destroys any ship or vessel, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 12. 24-25 *V.*, *c.* 100 *s.* 13, *Imp.*

Indictment. — ..... feloniously and unlawfully did set fire to *(cast away or destroy)* a certain ship called ..... with intent thereby then feloniously, wilfully and of his malice aforethought to kill and murder one ..... *(Add a count stating the intent to "commit murder" generally).*

11. Every one who, with intent to commit murder, attempts to administer to, or attempts to cause to be administered to, or to be taken by any person, any poison or other destructive thing, or shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge any kind of loaded arms at any person, or attempts to drown, suffocate or strangle any person, whether any bodily

injury is effected or not, is guilty of felony, and is liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 13. 24-25 *V.*, *c.* 100, *s.* 14, *Imp.*

If one draws, during a quarrel, a pistol from his pocket, but is prevented from using it by another person, there is no offence against this nor the following section.—*R.* v. *St-George*, 9 *C. & P.* 483; *R.* v. *Brown*, 15 *Cox*, 199.

Greaves (Cons. Acts, 48) on this clause remarks: "Where the prisoner delivered poison to a guilty agent, with directions to him to cause it to be administered to another in the absence of the prisoner, it was held that the prisoner was not guilty of an attempt to administer poison, within the repealed acts. R. v. Williams, 1 Den. 39; and the words 'attempt to cause to be administered to, or to be taken by' were introduced in this section to meet such cases."

Indictment for attempting to poison with intent.—..... feloniously and unlawfully did attempt to administer (*attempt to administer to, or attempt to cause to be administered to, or to be taken by*) to one J. N. a large quantity, to wit, two drachms of a certain deadly poison called white arsenic (*any poison or other destructive thing*), with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder, against ..... (*Add a count stating the intent "to commit murder," generally. Add counts charging that the defendant "attempted to cause to be administered to" and that he "attempted to cause to be taken by J. N. the poison.*")—*Archbold*, 651.

In *R.* v. *Cadman*, 1 *Moo. C. C.* 114, th edefendant gave the prosecutrix a cake containing poison, which the prosecutrix merely put into her mouth, and spit out again, and did not swallow any part of it. It is said in Archbold, 651, that these circumstances would now support an indictment under the above clause.

Where the prisoner put salts of sorrel in a sugar basin, in order that the prosecutor might take it with his tea, it was held an attempt to administer.—*R.* v. *Dale*, 6 *Cox*, 547.

Indictment for attempting to drown with intent to murder. — ..... feloniously and unlawfully did take one J. N. into both the hands of him the said J. S., and feloniously and unlawfully did cast, throw, and push the said J. N. into a certain pond, wherein there was a great quantity of water, and did thereby then feloniously and unlawfully attempt the said J. N. to drown and suffocate, with intent thereby then feloniously, wilfully and of his malice aforethought, the said J. N. to kill and murder, against ..... (*Add a count charging generally that the defendant did attempt to drown J. N. and counts charging the intent to be to commit murder*).—*Archbold*, 652.

It has been held upon an indictment for attempting to drown, it must be shown clearly that the acts were done with intent to drown. An indictment alleged that the prisoner assaulted two boys, and with a boat-hook made holes in a boat in which they were, with intent to drown them. The boys were attempting to land out of a boat they had punted across a river, across which there was a disputed right of ferry; the prisoner attacked the boat with his boat-hook in order to prevent them, and by means of the holes which he made in it caused it to fill with water, and then pushed it away from the shore, whereby the boys were put in peril of being drowned. He might have got into the boat and thrown them into the water; but he confined his attack to the boat itself, as if to prevent the landing, but apparently regardless of the consequences. Coltman, J., stopped the case, being of opinion that the evidence against the prisoner showed his intention to have been

rather to prevent the landing of the boys than to do them any injury.—*Sinclair's Case*, 2 *Lew.* 49; *R.* v. *Dart*, 14 *Cox*, 143.

Indictment for shooting with intent to murder..... a certain gun, then loaded with gunpowder and divers leaden shot, at and against one J. N. feloniously and unlawfully did shoot, with intent thereby then feloniously ..... (*as in the last precedent.*) (*Add also counts stating "with intent to commit murder" generally. Also a count for shooting with intent to maim, etc., under sect.* 13, *post*).—*Archbold*, 652.

In order to bring the case within the above section, it must be proved that the prisoner intended by the act charged to cause the death of the suffering party. This will appear either from the nature of the act itself, or from the conduct and expressions used by the prisoner.—*Roscoe*, 720.

Upon an indictment for wounding Taylor with intent to murder him, it appeared that the prisoner intended to murder one Maloney, and, supposing Taylor to be Maloney, shot at and wounded Taylor; and the jury found that the prisoner intended to murder Maloney, not knowing that the party he shot at was Taylor, but supposing him to be Maloney, and that he intended to murder the individual he shot at, supposing him to be Maloney, and convicted the prisoner; and upon a case reserved, it was held that the conviction was right, for though he did not intend to kill the particular person, he meant to murder the man at whom he shot.—*R.* v. *Smith*, *Dears.* 559; 1 *Russ.* 1001.

It seems doubtful whether it must not appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued.—*Archbold*, 652.

On this question, *Graves*, *note g*, 1 *Russ.* 1003, remarks: "It seems probable that the intention of the Legislature, in providing for attempts to commit murder, was to punish every attempt where, in case death had ensued, the crime would have amounted to murder..... The tendency of the cases, however, seems to be that an actual intent to murder the particular individual injured must have been showed ..... Where a mistake of one person for another occurs, the cases of shooting, etc., may, perhaps, admit of a different consideration from the cases of poisoning. In the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must intend to murder that individual at whom he shoots: it is true he may be mistaken in fact as to the person, and that it may be owing to such mistake that he shoots at such person, but still he shoots with intent to kill that person. So in the case of cutting; a man may cut one person under a mistake that he is another person, but still he must intend to murder the man whose throat he cuts. In *R.* v. *Mister*, the only count charging an intent to murder was the first, and that alleged the intent to be to murder Mackreth; and although on the evidence it was perfectly clear that Mister mistook Mackreth for Ludlow, whom he had followed for several days before, yet he was convicted and executed, and I believe the point never noticed at all. The case of poisoning one person by mistake for another seems different, if the poison be taken in the absence oft he prisoner; for in such case, he can have no actual intent to injure that person. These difficulties, however, seem to be obviated by the present statute, which, instead of using the words "with intent to murder such person," has the words "with intent to commit murder"..... In all cases of

doubt, as to the intention, it would be prudent to insert one count for shooting at A., with intent to murder him; another "with intent to commit murder;" and a third for shooting at A. with intent to murder the person really intended to be killed, and if the party intended to be killed were unknown, a count for shooting at A. with intent to murder a person to the jurors unknown.

In *R.* v. *Stopford*, 11 *Cox*, 643, Brett, J., after consulting Mellor, J., held, following *R.* v. *Smith*, *supra*, that an indictment charging the prisoner with wounding Haley, with intent to do him, Haley, grievous bodily harm, was good, although it was proved that the prisoner intended to wound somebody else, and that he mistook Haley for another man.—*See R.* v. *Hunt*, 1 *Moo. C. C.* 93.

A bodily injury is, in cases under this section, not material, "whether any bodily injury be effected or not."

Indictment for attempting to shoot with intent, etc.—..... did, by drawing the trigger *(drawing a trigger or in any other manner)* of a certain pistol then loaded in the barrel with gunpowder and one leaden bullet, feloniously and unlawfully attempt to discharge the said pistol at and against one J. N. with intent .....(*as in the last precedent.*) (*Add a count charging an intent to commit murder, and counts for attempting to shoot with intent to maim, under sect.* 13. *The indictment need not in the latter clause describe it as "the said pistol so loaded as aforesaid."*)—*Archbold*; *R.* v. *Baker*, 1 *C. & K.* 254.

A verdict of common assault may, in certain cases, be given, upon an indictment under this section.—Sect. 191, Procedure Act.

12. Every one who, by any means other than those specified in any of the preceding sections of this Act, attempts to commit murder, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 14. 24-25 *V.*, *c.* 100, *s.* 15, *Imp.*

See remarks under preceding section.

Indictment.—.....feloniously, unlawfully and maliciously did, by then *(state the act)* attempt feloniously, wilfully and of his malice aforethought, one J. N. to kill feloniously, wilfully and of his malice aforethought and murder against .....*(Add a count charging the intent to be to commit murder.)*—*Archbold*, 655.

Greaves, on this clause, says (Cons. Acts, 48): "This section is entirely new, and contains one of the most important amendments in these Acts. It includes every attempt to murder not specified in any preceding section. It will therefore embrace all those atrocious cases where the ropes, chains, or machinery used in lowering miners into mines have been injured with intent that they may break, and precipitate the miners to the bottom of the pit. So, also, all cases where steam engines are injured, set on work, stopped, or anything put into them, in order to kill any person, will fall into it. So, also, cases of sending or placing infernal machines with intent to murder. See *R.* v. *Mountford, R. & M. C. C.* 441. Indeed, the malicious may now rest satisfied that every attempt to murder, which their perverted ingenuity may devise, or their fiendish malignity suggest, will fall within some clause of this Act, and may be visited with penal servitude for life. In any case where there may be a doubt whether the attempt falls within the terms of any of the preceding sections, a count framed on this clause should be added."

13. Every one who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person, or shoots at any person, or by drawing a trigger, or in any other manner,

attempts to discharge any kind of loaded arms at any person, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 17. 24-25 *V.*, *c.* 100, *s.* 18, *Imp.*

An indictment charging that the prisoner did "inflict" grievous bodily harm instead of "cause" is sufficient.—*R.* v. *Bray*, 15 *Cox*, 197.

See section 1, *supra*, as to what constitutes a loaded arm within the meaning of this Act.

Indictment for wounding with intent to maim—..... That J. S., on ..... one J. N. feloniously, unlawfully and maliciously did wound, with intent in so doing, him the said J. N. thereby then to maim; against ..... (*Add count stating "with intent to disfigure," and one "with intent to disable." Also one stating with "intent to do some grievous bodily harm." And if necessary one "with intent to prevent (or resist) the lawful apprehension of.")*—*Archbold.*

An indictment charging the act to have been done "feloniously, wilfully and maliciously" is bad, the words of the statute being "unlawfully and maliciously."—*R.* v. *Ryan*, 2 *Moo. C. C.* 15. In practice the first count of the indictment is generally for wounding with intent to murder. These counts are allowed to be joined in the same indictment, though the punishments of the several offences specified in them are different.—*Archbold.*

The word "maliciously" in this section does not mean with malice aforethought; for if it did the offence would be included under the 11th section. This clause includes every wounding done without lawful excuse, with any of the intents mentioned in it, for from the act itself malice will be inferred.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and, if

stated, need not be proved as laid.—*R.* v. *Briggs*, 1 *Moo. C. C.* 318. And in the same case, it was held that upon an indictment which charged a wound to have been inflicted by striking with a stick and kicking with the feet, proof that the wound was caused either by striking with a stick or kicking was sufficient, though it was uncertain by which of the two the injury was inflicted.

In order to convict of the felony, the intent must be proved as laid; hence the necessity of several counts charging the offence to have been committed with different intents. If an indictment alleged that the defendant cut the prosecutor with intent to murder, to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension; *R.* v. *Duffin*, *R. & R.* 365; *R.* v. *Boyce*, 1 *Moo. C. C.* 29; unless for the purpose of effecting his escape the defendant also harbored one of the intents stated in the indictment; *R.* v. *Gillow*, 1 *Moo. C. C.* 85; for where both intents exist, it is immaterial which is the principal and which the subordinate. Therefore, where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was holden that he was guilty of cutting with intent to do her grievous bodily harm, notwithstanding his principal object was to commit the rape.—*R.* v. *Cox*, *R. & R.* 362. So also, if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm.—*Archbold.*

An indictment charging the prisoner with wounding A. with intent to do him grievous bodily harm, is good, although it is proved that he mistook A. for somebody else, and that he intended to wound another person.—*R.* v. *Stopford*, 11 *Cox*, 643.

The prisoner was indicted for shooting at A. with intent to do him grievous bodily harm. He fired a pistol into a group of persons who had assaulted and annoyed him, among whom was A., without aiming at A. or any one in particular, but intending generally to do grievous bodily harm, and wounded A. *Held*, on a case reserved, that he was rightly convicted.—*R.* v. *Fretwell, L. & C.* 443.

With respect to the intents mentioned in the statute, it may be useful to observe that to *maim* is to injure any part of a man's body, which may render him in fighting less able to defend himself, or annoy his enemy. To disfigure is to do some external injury which may detract from his personal appearance; and to disable, is to do something which creates a permanent disability, and not merely temporary injury.—*Archbold*, 666. It is not necessary that a grievous bodily harm should be either permanent or dangerous; if it be such as seriously to interfere with health or comfort, that is sufficient; and, therefore, where the defendant cut the private parts of an infant, and the wound was not dangerous, and was small, but bled a good deal, and the jury found that it was a grievous bodily harm, it was holden that the conviction was right.—*R.* v. *Cox, R. & R.* 362.

Where the intent laid is to prevent a lawful apprehension, it must be shown that the arrest would have been lawful; and where the circumstances are not such that the party must know why he is about to be apprehended, it must be proved that he was apprised of the intention to apprehend him.—*Archbold*, 667.

While the defendant was using threatening language to a third person, a constable in plain clothes came up and interfered. The defendant struck the constable with his fist, and there was a struggle between them. The constable went

away for assistance, and was absent for an hour; he changed his plain clothes for his uniform and returned to defendant's house with three other constables. They forced the door and entered the house. The defendant refused to come down, and threatened to kill the first man who came up to take him. The constables ran upstairs to take him, and he wounded one of them in the struggle that took place. *Held*, upon a case reserved, that the apprehension of the prisoner at the time was unlawful, and that he could not be convicted of wounding the constable with intent to prevent his lawful apprehension.—*R.* v. *Marsden*, 11 *Cox*, 90.

Under an indictment for a felonious assault with intent to do grievous bodily harm, a plea of guilty to a common assault may be received, if the prosecution consents.—*R.* v. *Roxburg*, 12 *Cox*, 8.

Upon an indictment for the felony under this clause, the jury may find a verdict of guilty of an attempt to commit it.—Sec. 183, Procedure Act.

A verdict of common assault may also be found.—Sec. 191, Procedure Act.

And, if the prosecutor fail in proving the intent, the defendant, in virtue of sec. 189 of the Procedure Act, may be convicted of the misdemeanor of unlawfully wounding, and sentenced under said sect.—*Archbold.*

And where three are indicted for malicious wounding with intent to do grievous bodily harm, the jury may convict two of the felony and the third of unlawfully wounding.—*R.* v. *Cunningham, Bell, C. C.* 72.

Where a prisoner was indicted for feloniously wounding with intent to do grevious bodily harm.

Held, that the intention might be inferred from the act. —*The Queen* v. *LeDante*, 2 *G. & O. (N. S.)* 401.

L. was tried on an indictment under 32-33 V., c. 20,

containing four counts. The first charged that he did unlawfully, etc., kick, strike, wound and do grevious bodily harm to W., with intent, &c., to maim; the second charged assault as in first with intent to disfigure; the third charged intent to disable; the fourth charged the intent to do some grevious bodily harm. The prisoner was found guilty of a common assault. Held, that L. was rightly convicted, sec. 51 of the act. 32-33 V., c. 20, authorising such conviction.—*The Queen* v. *Laskey*, 1 *P. & B. (N. B.)* 194.

An indictment for doing grevious bodily harm, which alleged that the prisoner did "feloniously" stab, cut and wound, etc., instead of alleging, in the terms of the 17th section of 32-33 V., c. 20, that he did "unlawfully" and "maliciously" stab, etc., is good.

A defective indictment is amendable under 32-33 V., c. 29, s. 32, and any objection to it for any defect apparent on the face thereof must be taken by demurrer or motion to quash the indictment before the defendant has pleaded and not afterwards.—*The Queen* v. *Flynn*, 2 *P. & B. (N. B.)* 321.

14. Every one who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V., c.* 20 *s.* 19, *part.* 24-25 *V., c.* 100, *s.* 18, *Imp.*

Indictment for unlawfully wounding.....one J. N. unlawfully and maliciously did wound (*wound or inflict any grievous bodily harm upon*) against the form..... (*Add a count charging that the defendant "did inflict grievous bodily harm upon J. N.*")—*Archbold*, 668.

The act must have been done maliciously. Malice would in most cases be presumed.)—3 *Burn*, 754; *R.* v. *Martin*, 14 *Cox*, 633.

But general malice alone constitutes the offence. Malice against the person wounded is not a necessary ingredient of the offence. So, if any one, intending to wound A., accidentally wounds B., he is guilty of an offence under this clause.—*R.* v. *Latimer*, 16 *Cox*, 70. See remarks under secs. 11 and 13, *ante*.

Upon an indictment for assaulting, beating, wounding and inflicting grievous bodily harm, the prisoner may be convicted of a common assault.—*R.* v. *Oliver, Bell, C. C.* 287.

Upon an indictment charging that the prisoner "unlawfully and maliciously did assault one H. R., and did then and there unlawfully and maliciously kick and wound him, the said H. R., and thereby then and there did unlawfully and maliciously inflict upon the said H. R. grievous bodily harm, against".....the jury may return a verdict of guilty of a common assault merely.—*R.* v. *Yeadon, L. & C.* 81.

In *R.* v. *Taylor*, 11 *Cox*, 261, the indictment was as follows:—....."That Taylor on ..... unlawfully and maliciously did wound one Thomas ..... and the jurors ..... that the said Taylor did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas." ..... Upon this indictment the jury returned a verdict of common assault, and upon a case reserved, the conviction was affirmed.

In *R.* v. *Canwell*, 11 *Cox*, 263, a verdict of common assault was also given upon an indictment containing only one count for maliciously and unlawfully inflicting grievous bodily harm, and the conviction was affirmed, upon a case reserved.

In *R.* v. *Ward*, 12 *Cox*, 123, the indictment charged a felonious wounding with intent to do grevious bodily

harm. The jury returned a verdict of unlawful wounding, under 14-15 V., c. 19, s. 5 (sec. 189 of the Procedure Act). Upon a case reserved, it was held that the words "*maliciously and*" must be understood to precede the word unlawfully in this section, and that to support the verdict, the act must have been done maliciously as well as unlawfully.

Greaves, in an article on this case, 1 *Law Magazine*, 379, censures severely this ruling. According to him, a new offence, that of unlawful wounding, was created by that clause, and the word *maliciously* had been purposely omitted from it. In a preceding number of the same magazine, p. 269, an anonymous writer attacks the decision in Ward's case from another point of view. The shooting was certainly proved not to have been intended to strike the prosecutor, but the Court, by twelve judges against three, found that there was proof of malice sufficient to support the conviction. On this appreciation of the facts of the case, this anonymous writer censures the judgment, at the same time admitting its correctness, so far as the Court held the *maliciously* as necessary as the *unlawfully* under this clause, though the word *maliciously* had been dropped in the statute.

The defendant may be found guilty of the attempt to commit the misdemeanor *charged* under sec. 183 of the Procedure Act.

And if, upon the trial of any person for any misdemeanor, it appears that the facts given in evidence, while they include such misdemeanor, amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor (and the person tried for such misdemeanor, if *convicted*, shall not be liable to

be afterwards prosecuted for felony, on the same facts), unless the Court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor. (Procedure Act, sec. 184.)

15. Every one who, with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence, or by any means whatsoever attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance, is guilty of felony, and liable to imprisonment for life, and to be whipped.—32-33 *V.*, *c.* 20, *s.* 20. 24-25 *V.*, *c.* 100, *s.* 21, *and* 26-27 *V.*, *c.* 44, *Imp.*

Indictment.—.....feloniously and unlawfully did attempt by then (*state the means or by any means whatsoever*) to choke, suffocate and strangle one J. N. (*suffocate or strangle any person, or*.....), with intent thereby then to enable him, the said A. B., the monies, goods, and chattels of the said J. N., from the person of the said J. N., feloniously and unlawfully to steal, take and carry away, against the form.....(*Add counts varying the statement of the overt acts and of the intent.*)—*Archbold*, 669.

This clause is new, and is directed against attempts at robbery which have been accompanied with violence to the throat.—*Greaves, Cons. Acts*, 54.

The clause gives the intent "to commit any *indictable* offence;" that is to say, either a misdemeanor or a felony.

In certain cases, a verdict of common assault may be given upon an indictment for this felony.—*Procedure Act, sec.* 191.

16. Every one who, with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence, unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing, is guilty of felony, and liable to imprisonment for life, and to be whipped.—32-33 *V.*, *c.* 20, *s.* 21.

Indictment.—..... feloniously and unlawfully did apply and administer to one J. N. (*or cause*.....) certain chloroform with intent thereby *(intent as in the last precedent).*

If it be not certain that it was chloroform, or laudanum, that was administered, add a count or counts stating it to be "a certain stupefying and overpowering drug and matter to the jurors aforesaid unknown." Add also counts varying the intent if necessary.

As to what constitutes an "administering, or attempting to administer," see remarks under sects. 8 and 11, *ante*.

17. Every one who unlawfully and maliciously administers to, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, is guilty of felony, and liable to ten years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 22. 24-25 *V.*, *c.* 100, *s.* 23, *Imp.*

See under next section.

18. Every one who unlawfully and maliciously administers to, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 23. 24-25 *V.*, *c.* 100, *s.* 24, *Imp.*

Under an indictment under sec. 17, the jury may find prisoner guilty of offence provided for in sec. 18.—Sec. 190, Procedure Act.

Indictment for administering poison so as to endan-

ger life.—.....feloniously, unlawfully and maliciously did administer to one J. N. *(or cause.....)*, a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, and thereby then did endanger the life of the said J. N. against.....

Add a count stating that the defendant "did cause to be taken by J. N. a large quantity....." and if the kind of poison be doubtful, add counts describing it in different ways, and also stating it to be "a certain destructive thing, (or a certain noxious thing) to the jurors aforesaid unknown." There should be also a set of counts stating that the defendant thereby "inflicted upon J. N. grievous bodily harm."—Archbold.

Administering cantharides to a woman with intent to excite her sexual passion, in order to obtain connexion with her, is an administering with intent to injure, aggrieve or annoy, within the meaning of the statute.—*R.* v. *Wilkins, L. & C.* 89.

If the poison is administered merely with intent to injure, aggrieve or annoy, which in itself would merely amount to a misdemeanor under sect. 18, yet if it does in fact inflict grievous bodily harm, this amounts to a felony under section 17.—*Tulley* v. *Corrie*, 10 *Cox*, 640.

But to constitute this offence, the thing administered must be noxious in itself, and not only when taken in excess.—*R.* v. *Hennah*, 13 *Cox*, 547.

19. Every one who, being legally liable, either as a *husband, parent, guardian,* or *committee,* master or mistress, *nurse or otherwise,* to provide for any person as *wife, child, ward, lunatic* or *idiot,* apprentice or servant, *infant or otherwise,* necessary food, clothing ro lodging, wilfully and without lawful excuse, refuses or neglects to provide the same, or unlawfully or maliciously does, or causes to be done, any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant is endangered, or the health of such apprentice or servant has been, or is likely to be, permanently injured, is guilty of a misdemeanor, and liable to three years' imprisonment:

2. In any prosecution of any person under this section, for refusing or neglecting to provide necessary food, clothing or lodging for his wife or child, his wife shall be competent to give evidence as a witness, either for or against her husband, and the person charged shall be a competent witness in his own behalf.—32-33 *V.*, *c.* 20, *s.* 25. 49 *V.*, *c.* 51, *s.* 1. 24-25 *V.*, *c.* 100, *s.* 26, *Imp.*

The words in *italics* are not in the Imperial Statute. They were in the bill as introduced in the House of Lords, but were struck out by the Commons.—*Greaves, Cons. Acts*, 56.

Indictment for not providing an apprentice with necessary food.....That J. S., on .....then being the master of J. N. his apprentice, and then being legally liable to provide for the said J. N., as his apprentice as aforesaid, necessary food *(clothing or lodging)*, unlawfully, wilfully and without lawful excuse did refuse and neglect to provide the same, so that the life of the said J. N. was thereby endangered *(or the health of the said J. N. has been or is likely to be permanently injured)* against the form ..... *(Add counts varying the statement of the injury sustained.)*

Prove the apprenticeship; if it was by deed, by production and proof of the execution of the deed, or in case it be in the possession of the defendant, and there be no counterpart, by secondary evidence of its contents, after due notice given to the defendant to produce it. The legal liability of the defendant to provide the prosecutor with necessary food, clothing or lodging will be inferred, even if it be not expressly stipulated for, from the apprenticeship itself. Prove the wilful refusal or neglect of the defendant to provide the prosecutor with necessary food, etc., as stated in the indictment. Whether it be necessary to prove that by such neglect the prosecutor's life was endangered, or his health was or was likely to be

permanently injured, depends upon the construction which is to be put upon the statute. If the words "so that the life of such person shall be endangered, or, etc.," apply to all the preceding matter, such proof will be necessary; if only to the branch of the section which relates to the actual doing of bodily harm to the apprentice or servant, such proof will be unnecessary. Until there has been some decision on the subject, it will be safer to allege "so that the life.....or health....." as the case may be, and to be prepared with evidence to sustain it. It would seem indeed to be the better opinion, that the words "so that, etc.," override all the preceding matter, otherwise a mere single wilful refusal to provide a dinner would be within the clause. Upon an indictment for unlawfully and maliciously assaulting an apprentice or servant, it is clear that such allegation and proof are necessary.—*Archbold.*

An indictment alleged in the first count that the prisoner unlawfully and wilfully neglected and refused to provide sufficient food for her infant child five years old, she being able and having the means to do so. The second count charged that the prisoner unlawfully and wilfully neglected and refused to provide her infant child with necessary food, but there was no allegation that she had the ability or means to do so. The jury returned a verdict of guilty, on the ground that if the prisoner had applied to the guardians for relief she would have had it: *Held*, that neither count was proved, as it was not enough that the prisoner could have obtained the food on application to the guardians, and that it is doubtful whether the second count is good in law.—*R.* v. *Rugg*, 12 *Cox*, 16.

It is to be remarked that the indictment in that case was under the common law, as, in England, the statute

applies only to masters and servants or apprentices. By the common law, an indictment lies for all misdemeanors of a public nature. Thus it lies, for a breach of duty, which is not a mere private injury, but an outrage upon the moral duties of society; as for the neglect to provide sufficient food or other necessaries for an infant of tender years, unable to provide for and take care of itself, for whom the defendant is obliged by duty to provide, so as thereby to injure its health.

But the parent must have a present means or ability to support the child; the possibility of obtaining such relief is not sufficient; and by the neglect of such duty, the child must have suffered a serious injury. An opportunity of applying to a relieving officer of the union, from which the mother would have received adequate relief on application, is not a sufficient proof of her having present means.—*R.* v. *Chandler*, *Dears.* 453; *R.* v. *Hogan*, 2 *Den.* 277; *R.* v. *Philpott*, *Dears.* 145. But these and similar cases, are no authorities under our present statute, in Canada.

In an indictment under this section, it is not necessary to allege that the defendant had the means and was able to provide the food or clothing, nor that his neglect to do so endangers the life or affects the health of his wife. —*R.* v. *Smith*, 2 *L. N.* 247.

A verdict of assault is legal on an indictment under this section charging bodily harm.—*R.* v. *Bissonnett*. *Ramsay's App. Cas.* 190.

In an indictment under sec. 19, it is not necessary to allege that by the refusal and neglect of the defendant to supply the food necessary, etc, ...to his wife, her life had been endangered, or her health permanently injured.—*R.* v. *Scott*, 28 *L. C. J.* 264. *Contrà.*—*R.* v. *Maher*, 7 *L. N.* 82. *See R.* v. *Nasmith*, 42 *U. C. Q. B.* 242.

Held, Armour, J. dissenting, that the evidence of a wife is inadmissible on the prosecution of her husband for refusal to support her under 32-33 V., c. 20, s. 25. (See now, sub. sect. 2, *ante*.) *The Queen* v. *Bissell*, 1 *O. R.* 514.

20. Every one who unlawfully abandons or exposes any child, being under the age of two years, whereby the life of such child is endangered, or the health of such child has been, or is likely to be, permanently injured, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V., c.* 20, *s.* 26. 24-25 *V., c.* 100, *s.* 27, *Imp.*

Greaves' Note. — This clause is new. It is intended to provide for cases where children are abandoned or exposed under such circumstances that their lives or health may be, or be likely to be, endangered. See *R.* v. *Hogan*, 2 *Den.* 277; *R.* v. *Cooper*, 1 *Den.* 459; 2 *C & K.* 876; *R.* v. *Philpot*, 1 *Dears*, 179; *R.* v. *Gray*, 1 *Dears. & B.* 303, which show the necessity for this enactment.

Indictment. — ..... unlawfully did abandon and expose a certain child called J. N., then being under the age of two years, whereby the life of the said child was endangered *(or whereby the health of such child was likely to be permanently injured)* against the form .....

This provision is new. In order to sustain an indictment under it, it is only necessary to prove that the defendant wilfully abandoned or exposed the child mentioned in the indictment; that the child was then under two years of age, and that its life was thereby endangered, and its health had been or then was likely to be permanently injured. — *Archbold*, 693.

A. and B. were indicted for that they "did abandon and expose a child then being under the age of two years, whereby the life of the child was endangered." A., the mother of a child five weeks old, and B. put the child into

a hamper, wrapped up in a shawl, and packed with shavings and cotton wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed "Mr. Carr's, Northoutgate, Gisbro, with care, to be delivered immediately," at which address the father of the child (a bastard) was then living. The hamper was carried by the ordinary passenger train, and delivered at its address the same evening. The child died three weeks afterwards, from causes not attributable to the conduct of the prisoners. On proof of these facts, it was objected for the prisoners that there was no evidence that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the statute. The objections were overruled and the prisoners found guilty. *Held*, that the conviction should be affirmed.—*R.* v. *Falkingham*, 11 *Cox*, 475.

A mother of a child under two years of age brought it and left it outside the father's house (she not living with her husband, the father of it). He was inside the house, and she called out "Bill, here's your child; I can't keep it. I am gone." The father some time afterwards came out, stepped over the child and went away. About an hour and a half afterwards, his attention was again called to the child still lying in the road. His answer was, "it must bide there for what he knew, and then the mother ought to be taken up for the murder of it." Later on, the child was found by the police in the road, cold and stiff; but, by care, it was restored to animation. *Held*, on a

case reserved, that, though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the statute.—*R.* v. *White*, 12 *Cox*, 83.

21. Every one who, unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burns, maims, disfigures, disables or does any grievous bodily harm to any person, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 27. 24-25 *V.*, *c.* 100, *s.* 28, *Imp.*

22. Every one who, with intent to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, unlawfully and maliciously causes any gunpowder or other explosive substance to explode, or sends or delivers to, or causes to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or puts or lays at any place, or casts or throws at or upon, or otherwise applies to any person, any corrosive fluid, or any destructive or explosive substance, and whether any bodily harm is effected or not, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20. *s.* 28. 24-25 *V.*, *c.* 100, *s.* 29, *Imp.*

23. Every one who unlawfully and maliciously places or throws in, into, upon, against or near any building, ship or vessel, any gunpowder or other explosive substance, with intent to do any bodily injury to any person, *whether or not any explosion takes place*, and whether or not any bodily injury is effected, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 29. 24-25 *V. c.* 1,00, *s.* 30, *Imp.*

The words in *italics* are not in the Imperial Act.

By Sec. 5 of the Procedure Act, no judge of the sessions nor recorder can try any offence against the above three sections.

Indictment for burning by gunpowder— ..... feloniously, unlawfully and maliciously, by the explosion of a certain explosive substance, that is to say, gunpowder, one J. N. did burn; against the form ..... (*Add counts, varying the statement of the injury, according to circumstances.*)—*Archbold.*

Indictment for sending an explosive substance with intent, etc ..... feloniously, unlawfully and maliciously did send *(or deliver to, or cause to be taken or received by)* to one J. N. a certain explosive substance and dangerous and noxious thing, to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent in so doing him the said J. N. thereby then to burn *(maim, disfigure or disable, or do some grievous bodily harm)* against ..... *(Add counts varying the injury and intent.)* — *Archbold.*

Indictment for throwing corrosive fluid, with intent, etc. ..... feloniously, unlawfully and maliciously did cast and throw upon one J. N. a certain corrosive fluid to wit, one pint of oil of vitriol, with intent in so doing him the said J. N. thereby then to burn..... *(Add counts varying the injury and the intent.)*—*Archbold.*

In *R.* v. *Crawford*, 1 *Den.* 100, the prisoner was indicted for maliciously throwing upon P. C. certain destructive matter, to wit, one quart of boiling water, with intent, etc. The prisoner was the wife of P. C., and when he was asleep, she, under the influence of jealousy, boiled a quart of water, and poured it over his face and into one of his ears, and ran off boasting she had boiled him in his sleep. The injury was very grievous. The man was for a time deprived of sight, and had frequently lost for a time the hearing of one ear. The jury having convicted, upon a case reserved, the judges held that the conviction was right.

In *R.* v. *Murrow*, 1 *Moo. C. C.* 456, it was held, where the defendant threw vitriol in the prosecutor's face, and so wounded him, that this wounding was not the "wounding" meant by the 9 Geo. 4, c. 31, s. 12.—*Archbold*, 665; but it would now fall under this statute.—The question of intent is for the jury.—*R.* v. *Saunders*, 14 *Cox*, 180.

Indictment charged defendants with having unlawfully, knowingly and willingly deposited in a room in a lodging or boarding house (described) in the city of Halifax, near to certain streets or thoroughfares and in close proximity to divers dwelling houses, excessive quantities of a dangerous and explosive substance called dynamite, in excessive and dangerous quantities, by reason whereof the inhabitants, etc., were in great danger.

Held, good, without alleging carelessness, or that the quantities deposited were so great that care would not produce safety.—*The Queen* v. *Holmes, et al.*, 5 *R. & G. (N. S.)* 498. *See c.* 150, *Rev. Stat.*

24. Every one who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm, upon any trespasser or other person coming in contact therewith, is guilty of a misdemeanor, and liable to three years' imprisonment;

2. Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is, or afterwards comes into his possession or occupation, to continue so set or placed shall be deemed to have set or placed such gun, trap or engine, with such intent as aforesaid;

3. Nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as is usually set or placed with the intent of destroying vermin.—32-33 *V., c.* 20, *s.* 30. 24-25 *V., c.* 100, *s.* 31, *Imp.*

The English Act has the following additional proviso: "Provided also that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed from sunset to sunrise, any spring-gun, man-trap or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling-house for the protection thereof."

Indictment.— ..... unlawfully did set and place, and caused to be set and placed, in a certain garden situate ..... a certain spring-gun which was then loaded and charged with gunpowder and divers leaden shot, with intent that the said spring-gun, so loaded and charged as aforesaid, should inflict grievous bodily harm upon any trespasser who might come in contact therewith, against.

Prove that the defendant placed or continued the spring-gun loaded in a place where persons might come in contact with it; and if any injury was in reality occasioned, state it in the indictment, and prove it as laid. The intent can only be inferred from circumstances, as the position of the gun, the declarations of the defendant, and so forth; any injury actually done will, of course, be some evidence of the intent.—*Archbold.*

A dog-spear set for the purpose of preserving the game is not within the statute, if not set with the intention to do grievous bodily harm to human beings.—1 *Russ.* 1052.

The instrument must be calculated to destroy life or cause grievous bodily harm, and proved to be such; and, if the prosecutor, while searching for a fowl among some bushes in the defendant's garden, came in contact with a wire which caused a loud explosion, whereby he was knocked down, and slightly injured about the face, it was *held* that the case was not within the statute, as it was not proved what was the nature of the engine or substance which caused the explosion, and it was not enough that the instrument was one calculated to create alarm.—1 *Russ.* 1053.

25. Every one who, with intent to injure or to endanger the safety of any person travelling or being upon any railway, unlawfully and maliciously puts or throws upon or across such railway, any wood,

stone, or other matter or thing, or unlawfully and maliciously takes up, removes or displaces any rail, railway switch, sleepers, or other matter or thing belonging to such railway, or injures or destroys any track, bridge or fence of such railway, or any portion thereof, or unlawfully and maliciously turns, moves or diverts any point or other machinery belonging to such railway, or unlawfully and maliciously makes or shows, hides or removes any signal or light upon or near to such railway, or unlawfully and maliciously does or causes to be done any other matter or thing, with such intent, is guilty of felony, [illegible] to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 31. 42 *V.*, *c.* [illegible] *art, and s.* 89. 44 *V.*, *c.* 25, *ss.* 116, *part, and* 117. 24-25 *V.*, [illegible]00, *s.* 32, *Imp.*

26. Every one who unlawfully and maliciously throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used upon any railway, any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck of any train, of which such first mentioned engine, tender, carriage or truck forms part, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 20, *s.* 32. 24-25 *V.*, *c.* 100, *s.* 33, *Imp.*

27. Every one who, by any unlawful act, or by any wilful omission or neglect of duty, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 33. 24-25 *V.*, *c.* 100, *s.* 34, *Imp.*

The words "of duty" in this last section are not in the English Act.

Indictment for endangering by wilful neglect the safety of railway passengers ..... that J. S. on ..... unlawfully did, by a certain wilful omission and neglect of his duty, that is to say, by then wilfully omitting and neglecting to turn certain points in and upon a certain railway called ..... in the parish ..... which points it was then the duty of him, the said J. S., to turn, endanger the safety of certain persons then conveyed and being in and upon the said railway, against the form .....

(Add counts varying the statement of defendant's duty, etc.)—Archbold.

An acquittal of the felony under sec. 25 is no bar to an indictment for the misdemeanor of sec. 27.—*R.* v. *Gilmore*, 15 *Cox*, 85.

See post, remarks under sec. 37, c. 168. The forms of indictments there given may form a guide for indictments under the present section.

Prove that it was the duty of the defendant to turn the points; that he wilfully omitted and neglected to do so; and that, by reason of such omission and neglect, the safety of the passengers or other persons conveyed or being on the railway was endangered (which words will include not only passengers but officers and servants of the railway company).—*Archbold.*

In *R.* v. *Holroyd*, 2 *M. and Rob.* 339, it appeared that large quantities of earth and rubbish were found placed across the railway, and the prosecutor's case was that this had been done by the defendant wilfully and in order to obstruct the use of the railway; and the defendant's case was that the earth and rubbish had been accidentally dropped on the railway: Maule, J., told the jury, that if the rubbish had been dropped on the rails by mere accident, the defendant was not guilty; but "it was by no means necessary, in order to bring the case within this Act, that the defendant should have thrown the rubbish on the rails expressly with the view to upset the train of carriages. If the defendant designedly placed these substances, having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the Act." And on one of the jury asking what was the meaning of the term "wilfully" used in the statute, the learned judge added "he should con-

sider the act to have been *wilfully* done, if the defendant *intentionally* placed the rubbish on the line, knowing that it was a substance likely to produce an obstruction; if, for instance, he had done so in order to throw upon the company's officers the necessary trouble of removing the rubbish." This decision may afford a safe guide to the meaning of the term *wilful* in this clause. *Greaves, Cons. Acts*, 62, *on s.* 34. (27 *of our statute*).—In the other clauses, the word *wilfully* is now replaced by *unlawfully*,

On s. 33 (26 *of our statute.*)—Greaves says; (Cons. Acts, 61.) "The introduction of the word *at* extends this clause to cases where the missile fails to strike any engine or carriage. Other words were introduced to meet cases where a person throws into or upon one carriage of a train, when he intended to injure a person being in another carriage of the same train, and similar cases. In *R.* v. *Court*, 6 *Cox*, 202, the prisoner was indicted for throwing a stone against a tender with intent to endanger the safety of persons on the tender, and it appeared that the stone fell on the tender, but there was no person on it at the time, and it was held that the section was limited to something thrown upon an engine or carriage having some person therein, and consequently that no offence within the statute was proved; but now, this case would clearly come within this clause."

In *R.* v. *Bradford, Bell, C. C*, 268, it was held that a railway not yet opened for passengers, but used only for the carriage of materials and workmen, is a railway within the statute.

In *R.* v. *Bowray*, 10 *Jur.* 211, 1 *Russ.* 1058, on an indictment for throwing a stone on a railway, so as to endanger the safety of passengers, it was held that the intention to injure is not necessary, if the act was done

wilfully, and its effect be to endanger the safety of the persons on the railway.

It is not necessary that the defendant should have entertained any feeling of malice against the railway company, or against any person on the train; it is quite enough to support an indictment under the statute, if the act was done mischievously, and with a view to cause an obstruction of a train.—*R.* v. *Upton*, 5 *Cox*, 298.

Two boys went upon premises of a railway company, and began playing with a heavy cart, which was near the line. Having started the cart, it ran down an embankment by its own impetus. One boy tried to divert its course; the other cried to him "Let it go." The cart ran on without pushing until it passed through a hedge, and a fence of posts and rails, and over a ditch on to the railway; it rested so close to the railway lines as to obstruct any carriages passing upon them. The boys did not attempt to remove it: *Held*, that as the first act of moving the cart was a trespass, and therefore an unlawful act, and as the jury found that the natural consequence of it was that the cart ran through the hedge and so on to the railway, the boys might be properly convicted. *R.* v. *Monaghan*, 11 *Cox*, 608.

Indictment under sec. 26 ..... *Berkshire* (to wit). The Jurors for our Lady the Queen upon their oath present that on the *first* day of *May*, in the year of our Lord 1852 at the parish of *Goring*, in the county of *Berks*, A. B. feloniously, unlawfully, and maliciously did cast (*cast, throw, or cause to fall or strike against, into or upon*) upon a certain carriage (*engine, tender, carriage, or truck*), then and there used upon a certain railway there, called "*The Great Western Railway*," a certain large piece of wood (*any wood, stone, or other matter or*

thing) with intent thereby then and there to endanger the safety of one C. D., then and there being in *(in or upon)* the said carriage *(engine, tender, carriage or truck)* against the form of the statute in such case made and provided.

28. Every one who, having the charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person whomsoever, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 20, *s.* 34. 24-25 *V., c.* 100, *s.* 35, *Imp.*

Indictment.—.....being then a coachman, and then having charge of a certain carriage and vehicle called an omnibus, unlawfully did, by the wanton and furious driving of the said carriage and vehicle by him the said..... *(defendant)* cause certain bodily harm to be done to one J. N. against the form..... —*Archbold*, 677.

This section includes all carriages and vehicles of every description, both public and private. *Wilful* means *voluntary.—Greaves, Cons. Acts*, 63.

29. Every one who cuts or makes, or causes to be cut or made for the purpose of harvesting or obtaining ice for sale or use, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein, is guilty of a misdemeanor, and liable to be punished by fine or imprisonment, on summary conviction, before any justice of the peace or district magistrate, having jurisdiction in any city, judicial district or county within which, or on the borders of which, such navigable or other water is wholly or partly situate.—49 *V., c.* 53, *s.* 1.

30. Every one who is the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in

which any excavation in search of mines or quarries has been or is hereafter made of a sufficient area and depth to endanger human life, and who leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein, is guilty of a misdemeanor, and liable to be punished by fine or imprisonment or both, on summary conviction before any justice of the peace having jurisdiction in the locality in which the said mine or quarry is situate. —49 *V.*, *c.* 53, *s.* 2.

31. If within five days after conviction for any offence referred to in either of the two sections next preceding, a suitable guard or fence is not constructed around or over the said exposed opening, to conform to the provisions of the said sections, the person liable for such omission may be again complained of and convicted for the said offence, and the plea of a former conviction therefor shall not avail to him as a relief from the said complaint and conviction.—49 *V.*, *c.* 53, *s.* 3.

32. If any person loses his life by accidentally riding, driving, walking, skating or falling into any such hole, opening, aperture or place unguarded as is mentioned in either of the three sections next preceding, the person or persons whose duty it was to guard such hole, opening, aperture or place, in manner aforesaid, is guilty of manslaughter.—49 *V.*, *c.* 53, *s.* 4.

33. Every one who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 35.

This clause is not in the English Act. It is in the same terms as s. 27, *ante*, except that this last one applies only to passengers by railway endangered by the unlawful act or neglect, or omission of duty.

An injury resulting from an omission does not subject the person causing it to punishment, unless such omission be unlawful. An omission is deemed unlawful whensoever it is a breach of some duty imposed by law, or gives cause to a civil action.—*2nd Report Cr. L. Com.* 14 *May*, 1846.

Mr. Starkie, one of the English Commissioners, in a separate report, objected strongly to such an enactment, and the framers of the Imperial Statutes have thought proper to leave it out.

ASSAULTS.

34. Every one who assaults any person with intent to commit any indictable offence,—or assaults, resists or wilfully obstructs any revenue or peace officer, or any officer seizing trees, logs, timber or other products thereof, in the due execution of his duty, or any person acting in aid of such officer,—or assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person for any offence,—or assaults, resists or wilfully obstructs any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 20, *s.* 39. 43 *V., c.* 28, *s.* 65, *part.* 46 *V., c.* 16, *s.* 6, *part, and c.* 17, *s.* 66, *part.* 24-25 *V., c.* 100, *s.* 38, *Imp.*

35. Every one who commits any assault which occasions actual bodily harm, is guilty of a misdemeanor, and liable to three year's imprisonment.—32-33 *V., c.* 20, *s.* 47, *part.* 24-25 *V., c.* 100, *s.* 47, *Imp.*

36. Every one who commits a common assault is guilty of a misdemeanor, and liable, if convicted upon an indictment, to one years' imprisonment, and, on summary conviction, to a fine not exceeding twenty dollars and costs, or to two months' imprisonment, with or without hard labor.—32-33 *V., c.* 20, *ss.* 43, *part, and* 47, *part.* 24-25 *V., c.* 100, *s.* 42-47, *Imp.*

As to costs as an additional punishment. See 248 of the Procedure Act.

On an indictment for assault and battery occasioning actual bodily harm, the defendant is not a competent witness on his own behalf under s. 216 of the Procedure Act.—*R.* v. *Richardson*, 46 *U. C. Q. B.* 375.

Indictment for assaulting a peace officer in the execution of his duty, ...in and upon one J. N., then being

a peace officer, to wit, a constable *(any peace officer in the execution of his duty, or any revenue officer in the execution of his duty, or any person acting in aid of)* and then being in the due execution of his duty as such constable, did make an assault, and him, the said J. N., so being in the execution of his duty as aforesaid, did then beat, wound and illtreat, and other wrongs to the said J. N., then did, to the great damage of the said J. N., against the form ..... *(Add a count for a common assault.)* —*Archbold.*

Prove that J. N. was a peace or revenue officer, as stated in the indictment, by showing that he had acted as such.

It is a maxim of law, that "*omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium,*" upon which ground it will be persumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed.—*R.* v. *Verelet*, 3 *Camp.* 432; *R.* v. *Gordon*, 1 *Leach*, 515; *R.* v. *Murphy*, 8 *C. & P.* 297; *R.* v. *Newton*, 1 *C. & K.* 469; *Taylor, on Evidence, per.* 139, 431. Prove that J. N. was in the due execution of his duty, and the assault. If you fail in proving that J. N. was a peace officer, or that he was acting lawfully as such, the defendant may be convicted of a common assault.

The fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, is no defence.—R. v. *Forbes*, 10 *Cox*, 362.

Revenue officers are not included in the corresponding clause of the English Act, assaults on them being, there, otherwise provided for.—*Greaves, Cons. Acts*, 65.

Indictment.— ..... in and upon one J. N. unlawfully did make an assault, and him the said J. N. did beat,

wound and ill-treat with intent him the said J. N. feloniously, wilfully and of his malice aforethought to kill and murder, and other wrongs to the said J. N. then did, to the great damage of the said J. N., against the form ..... *(Add a count for a common assault.)*—*Archbold.*

Every attempt to commit a felony against the person of an individual without his consent involves an assault. Prove an attempt to commit such a felony, and prove it to have been done under such circumstances, that had the attempt succeeded, the defendant might have been convicted of the felony. If you fail proving the intent, but prove the assault, the defendant may be convicted of the common assault.—*Archbold.*

Indictment for an assault to prevent arrest ..... in and upon one J. N. did make an assault, and him, the said J. N., did then beat, wound and ill-treat with intent in so doing to resist and prevent (*resist or prevent*) the lawful apprehension of ..... *(himself or of any other person)* for a certain offence, that is to say *(state the offence generally)* against the ..... *(Count for common assault).*—*Archbold,* 685.

It must be stated and proved that the apprehension was lawful. See *R.* v. *Davis, L. & C.* 64. If this and the intent be not proved, a verdict of common assault may be given. But it must be remembered that resistance to an illegal arrest is justifiable,—and if, in a case, where a warrant is necessary, the officer making an arrest, has not the warrant with him, the party whom he tries to arrest, resists and assaults him, he cannot be convicted of an assault on an officer in the due execution of his office. —*Codd* v. *Cabe,* 13 *Cox,* 202.

A common assault may be prosecuted either by indictment or under the Summary Convictions Act: 1 *Burn,* 319.—1 *Russ.* 1035.

If the charge is before the magistrate on a legal complaint, and the evidence goes to prove an offence committed which he has no jurisdiction to hear and determine, as if, on a complaint of an assault, the evidence go to show that a rape or assault with intent to commit a felony has been committed, he may, if he disbelieves the evidence as to the rape or intent, convict as to the residue of it of an assault.—*Wilkinson* v. *Dutton*, 3 *B. & S.* 821; *Anon*, 1 *B. & Ad.* 382.

In this last case Lord Tenterden held that the magistrate had *found* that the assault was not accompanied by any attempt to commit felony, and that, *quoad hoc*, his decision was final.

In *R.* v. *Walker*, 2 *M. & Rob.* 446, Coltman, J., gave the same interpretation to the clause.

In *R.* v. *Elrington*, 1 *B. & S.* 688, it was held that the magistrate's certificate of dismissal is a bar to an indictment for an unlawful assault occasioning actual bodily harm, arising out of the same circumstances.—*See Wemyss* v. *Hopkins*, *L. R.* 10 *Q. B.* 378.

In *R.* v. *Stanton*, 5 *Cox*, 324, Erle, J., said that in his opinion, a summary conviction before justices of the peace (in England, the law requires two) is a bar to an indictment for a felonious assault, arising out of the same facts.

But a summary conviction for assault is no bar to a subsequent indictment for manslaughter, upon the death of the man assaulted, consequent upon the same assault. —*R.* v. *Morris*, 10 *Cox*, 480; *R.* v. *Basset*, *Greaves*, *Cons. Acts*, 72.

Where an assault charged in an indictment and that referred to in a certificate of dismissal by a magistrate appear to have been on the same day, it is *primâ facie*

evidence that they are one and the same assault, and it is incumbent on the prosecutor to show that there was a second assault on the same day if he alleges that such is the case. The defendant having appeared before the magistrate, the recital in the certificate of the fact of a complaint having been made and of a summons having been issued is sufficient evidence of those facts.—*R.* v. *Westley*, 11 *Cox*, 139.

When a question of title to lands arises before him, the magistrate's jurisdiction is at an end, and he cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of a title to lands.—*R.* v. *Pearson*, 11 *Cox*, 493.

A person making a bonâ fide claim of right to be present as one of the public in a law court at the hearing of a suit is not justified in committing an assault upon a police constable and an official who endeavor to remove him, Such a claim of right does not oust the jurisdiction of the magistrate who has to try the charge of assault, and he may refuse to allow cross-examination and to admit evidence in respect of such a claim.—*R.* v. *Eardley*, 49 *J. P.* 551.

Indictment for an assault occasioning actual bodily harm.—..... that J. S., on ..... in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound and ill-treat, thereby then occasioning to the said J. N. actual bodily harm, and other wrongs to the said J. N. then did, to the great damage of the said J. N. against the form ..... —*Archbold.*

Indictment for a common assault.—..... that C. D., on the ....., at .... in and upon one A. B. an assault did make, and him the said A. B. then and there did beat, wound and ill-treat, and then and there to him other wrongs and injuries did, against the form.....

The defendant may be convicted of a common assault upon an indictment for occasioning actual bodily harm.—*R.* v. *Oliver, Bell, C. C.* 287; *R.* v. *Yeadon, L. & C.* 281.

The intent to do bodily harm, or premeditation, is not necessary to convict upon an indictment under this section; thus a man who commits an assault the result of which is to produce bodily harm is liable to be convicted under this section, though the jury find that the bodily harm formed no part of the prisoner's intention, and was done without premeditation, under the influence of passion.—*R.* v. *Sparrow, Bell, C. C.* 298.

An assault is an attempt or offer, with force and violence, to do a corporal hurt to another, whether from malice or wantonness; as by striking at him with or without a weapon, though the party striking misses his aim; so drawing a sword, throwing a bottle or glass, with intent to wound or strike, presenting a loaded gun or pistol at a person within the distance to which the gun or pistol will carry, or pointing a pitchfork at a person standing within reach; holding up one's fist at him, in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against his person, will amount to an assault.—1 *Burn*, 308.

It had been said that the presenting a gun or pistol at a person within the distance to which it will carry, though in fact not loaded, was an assault, but later authorities have held that if it be not loaded it would be no assault to present it and pull the trigger.—1 *Burn, loc. cit.*

One charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery; but every battery includes an assault; therefore on an indictment for assault and battery, in which the assault is ill-

laid, if the defendant be found guilty of the battery it is sufficient.—1 *Hawkins*, 110.

Mere words will not amount to an assault, though perhaps they may in some cases serve to explain a doubtful action.—1 *Burn*, 309.

If a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. But if A. advances in a threatening attitude with his fists clenched towards B., with an intention of striking him, so that his blow would have almost immediately reached B., if he had not been stopped by a third person, this would be an assault in point of law, though at the particular moment when A. was stopped, he was not near enough for his blow to take effect.—*Stephen* v. *Meyers*, 4 *C. & P.* 349.

To collect a number of workmen round a person who tuck up their sleeves and aprons and threaten to break his neck, if he did not go out of the place, through fear of whom he did go out, amounts to an assault. There is the intention and present ability and a threat of violence causing fear.—*Read* v. *Coker*, 13 *C. B.* 850.

So riding after a person and obliging him to run away into a garden to avoid being beaten is an assault.—*Martin* v. *Shoppee*, 3 *C. & P.* 373.

Any man wantonly doing an act of which the direct consequence is that another person is injured commits an assault at common law, though a third body is interposed between the person doing the act and the person injured. Thus to drive a carriage against another carriage in which a person is sitting, or to throw over a chair on which a person is sitting, whereby the person in the carriage or on the chair, as the case may be, is injured, is an assault. So by encouraging a dog to bite, or by wantonly riding over a person with a horse, is an assault.—1 *Burn*, 309; 1 *Russ.* 1021.

Where an act is done with the consent of the party it is not an assault; for in order to support a charge of assault, such an assault must be proved as could not be justified if an action were brought for it, and leave and licence pleaded; attempting therefore to have connection with a girl between the ages of ten and twelve, or under ten years of age, if done with the girl's con sent, is not an assault.—*R.* v. *Connolly*, 26 *U. C. Q. B.* 317. If the girl is between ten and twelve, the indictment in such a case should be for an attempt to commit a misdemeanor: if the girl is under ten, the indictment should be for an attempt to commit a felony.—1 *Russ.* 933, 1023; *R.* v. *Martin*, 9 *C. & P.* 213; *R.* v. *Meredith*, 8 *C. & P.* 589; *R.* v. *Cockburn* 3 *Cox*, 543; *R.* v. *Mehegan*, 7 *Cox*, 145; *R.* v. *Read*, 1 *Den.* 377; *R.* v. *Johnston*, 10 *Cox*, 114; *L. & C.* 132; *R.* v. *Ryland*, 11 *Cox*, 101; *R.* v. *Guthrie*, 11 *Cox*, 523. By sec. 183 of the Procedure Act, the defendant may be convicted of the attempt to commit the offence charged upon any indictment for any felony or misdemeanor, if the evidence warrants it, and the fact that the girl consented is immaterial, upon an indictment for an attempt to commit the felony or the misdemeanor.—*R.* v. *Beale*, 10 *Cox* 157.

In *R.* v. *Wollaston*, 12 *Cox*, 182, Kelly, C. B., said: "If anything is done by one being upon the person of another, to make the act an assault, it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case, there was actual participation by both parties in the act done, and complete mutuality:" and the defendant was acquitted as the boys, aged above fourteen, upon whom he

was accused of having indulged in indecent practices, had been willing and assenting parties to what was done.

But if resistance be prevented by fraud, it is an assault. If a man, therefore, have connection with a married woman, under pretence of being her husband, he is guilty of an assault.—*R.* v. *Williams*, 8 *C. & P.* 286; *R.* v. *Saunders*, 8 *C. & P.* 265.

In *R.* v. *Mayers*, 12 *Cox*, 311, it was held that if a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist, as she is then incapable of resisting.

In *R.* v. *Lock*, 12 *Cox*, 244, upon a case reserved, it was held, that the definition of an assault that the act must be *against the will* of the patient, implies the possession of an active will on his part, and, therefore, the mere submission by a child of tender years (eight years old) to an indecent assault, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of criminal law.

In *R.* v. *Woodhurst*, 12 *Cox*, 443, on an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault, it was held on the latter count that although consent would be a defence, consent extorted by terror or induced by the influence of a person in whose power the girl feels herself, is not really such consent as will have that effect; following *R.* v. *Day*, 9 *C. & P.* 722; *R.* v. *Nicholl*, *R. & R.* 130; *R.* v. *Rosinski*, 1 *Moo. C. C.* 19; *R.* v. *Case*, 1 *Den.* 580.

An unlawful imprisonment is also an assault; for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach

of the King's Peace, a loss which the State sustains by the confinement of one of its members, and an infringement of the good order of society. 4 *Blackstone*, 518. It has been supposed that every imprisonment includes a battery, but this doctrine was denied in a recent case, where it was said by the Court that it was absurd to contend that every imprisonment included a battery.—1 *Russ.* 1025.

A battery in the legal acceptation of the word includes beating and wounding. *Archbold*, 659. Battery seemeth to be, when any injury whatsoever, be it ever so small, is actually done to the person of a man in an angry or revengeful, or rude, or insolent manner, as by spitting in his face, or throwing water on him, or violently jostling him out of the way.—1 *Hawkins, c.* 15, *sec.* 2. For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stages of it, every man's person being sacred, and no other having a right to meddle with it in any the slightest manner.—1 *Russ.* 1021.

The touch or hurt must be with a hostile intention, and, therefore, a touch given by a constable's staff, for the purpose of engaging a person's attention only, is not a battery. —1 *Burn*, 312.

Whether the act shall amount to an assault must in every case be collected from the intention; and if the injury committed were accidental and undesigned, it will not amount to a battery.—1 *Russ.* 1025.

Striking a horse, whereon a person is riding and whereby he is thrown, is a battery on him, and the rider is justified in striking a person who wrongfully seizes the reins of his horse, and in using all the violence necessary to make him loose his hold. A wounding is where the violence is such that the flesh is opened; a mere scratch may constitute a wounding.—1 *Burn, loc. cit.*

The actual bodily harm mentioned in this section would include any hurt or injury calculated to interfere with the health or comfort of the prosecutors; it need not be an injury of a *permanent* character, nor need it amount to what would be considered to be *grievous* bodily harm.—*Archbold*, 660.

Even a mayhem is justifiable if committed in a party's own defence. But a person struck has merely a right to *defend* himself, and strike a blow in his defence, but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary, he commits an assault and battery. And in no case should the battery be more than necessary for self defence.—1 *Burn*, 312.

The mere offer of a person to strike another is sufficient to justify the latter's striking him: he need not stay till the other has actually struck him.

A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant and a servant in defence of his master; but in all these cases the battery must be such only as was necessary to the defence of the party or his relation, for it were excessive, if it were greater than was necessary for mere defence; the prior offence will be no justification. So a person may lay hands upon another to prevent him from fighting, or committing a breach of the peace, using no unnecessary violence. If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.

Churchwardens and private persons are justified in gently laying their hands on those who disturb the performance of any part of divine service, and turning them out of church. — 1 *Burn*, 314.

A parent may in a reasonable manner chastise his child or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, and a captain of a ship any of the crew who have mutinously or violently misconducted themselves.—1 *Burn loc. cit.*

So might a military officer order a moderate correction for disobedience of orders.—1 *Burn, loc. cit.*

A party may justify a battery by showing that he committed it in defence of his possession, as, for instance, to remove the prosecutor out of his close or house,—or to remove a servant, who, at night, is so misconducting himself as to disturb the peace of the household,—or to remove a person out of a public house, if the party be misconducting himself, or to prevent him from entering the defendant's close or house,—to restrain him from taking or destroying his goods,—from taking or rescuing cattle, etc., in his custody upon a distress,—or to retake personal property improperly detained or taken away,—or the like.

In the case of a trespass in law merely *without actual force*, the owner of the close, or house, etc., must first request the trespasser to depart, before he can justify, laying his hands on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to remove him. But if the trespasser use force, then the owner may oppose force to force; and in such a case, if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer to a justification in defence of his possession, it may be shown that the battery was excessive, or that the party assaulted, or some one by whose authority he acted, had a right of way or other easement over the close, or the like.—1 *Burn*, 313; *Archbold*, 661. On this part of

the subject, 1 Russ. 1028, has the following remarks: "It should be observed with respect to an assault by a man on a party endeavoring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such a case to oppose force by force; therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. If a person enters another's house with force and violence, the owner of the house may justify turning him out, using no more force than is necessary, without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without previous request."

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence; but a subsequent decision has established the contrary.—1 *Russ.* 1030.

If a man, who suffers from gonorrhœa, has connection with a woman, ignorant of his disease, and communicates it to her, this is an assault occasioning actual bodily harm. —*R.* v. *Sinclair*, 13 *Cox*, 28; *Contrà Hegarty* v. *Shine*, 14 *Cox*, 124, 145.

There is a manifest distinction between endeavoring to turn a person out of a house, into which he has previously entered quietly, and resisting a forcible attempt to enter; in the first case a request to depart is necessary but not in the latter.

In a criminal prosecution by the wife of O., for assault made upon her in entering her husband's house, the defence

was that she had no right to enter, and that her intention was to take away property which she had no legal right to take, but *held*, on a case reserved, that this would not justify the assault, there being no previous request made of her to leave the house, nor any statement of her intention, or of an attempt to take anything.—*The Queen* v. *O'Neill*, 3 *P. & B. (N. B.)* 49.

An indictment declaring that the prisoner did "beat, wound and ill-treat" A. was held to be substantially an indictment for a common assault.—*The Queen* v. *Shannon*, 23 *N. B. Rep.* 1.

RAPE.

37. Every one who commits the crime of rape is guilty of felony, and liable to suffer death as a felon, or to imprisonment for life, or for any term not less than seven years.—36 *V., c.* 50, *s.* 1, *part.* 24-25 *V., c.* 100, *s.* 48, *Imp.*

38. Every one who assaults any woman or girl with intent to commit rape is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding seven years and not less than two years.—36 *V., c.* 50, *s.* 1, *part.*

This last section is not in the Imperial Act.

Sect. 226 of the Procedure Act enacts what constitutes a sufficient proof of carnal knowledge.

Rape is not triable at quarter sessions.—Sec. 4 Procedure Act. See Appendix; note on Rape by Greaves.

Indictment.— ..... That A. B., on ..... in the year ..... in and upon one C. D. in the peace of God and Our Lady the Queen, then and there being, violently and feloniously did make an assault, and her, the said C. D., violently and against her will feloniously did ravish and carnally know; against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—*Archbold.*

Averment of woman's age unnecessary.—2 *Bishop, Cr. Proc.* 954.

Rape has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will.—1 *Russ.* 904.

To constitute the offence there must be a penetration. or *res in re*, in order to constitute the "carnal knowledge" which is a necessary part of this offence. But a very slight penetration is sufficient, though not attended with the deprivation of the marks of virginity.—1 *Russ.* 912.

A boy under fourteen years of age is presumed by law incapable to commit a rape, and therefore he cannot be guilty of it, nor of an assault with intent to commit it; and no evidence is admissible to show that, in point of fact, he could commit the offence of rape. But on an indictment for rape he may be found guilty of a common assault.—*R.* v. *Brimilow*, 2 *Moo. C. C.* 122. A husband cannot be guilty of a rape upon his wife. The offence of rape may be committed, though the woman at last yielded to the violence, if such her consent was forced by fear of death or by duress.

It will not be any excuse that the woman was first taken with her own consent if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher. Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favor of the party accused, especially in doubtful cases. The notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded.—1 *Russ.* 905.

Having carnal knowledge of a woman by a fraud which induces her to suppose it is her husband does not amount to a rape.—*R.* v. *Williams*, 8 *C. & P.* 286; *R.* v. *Clarke, Dear.* 397; 1 *Russ.* 908; *R.* v. *Barrow*, 11 *Cox*, 191; *R.* v. *Francis*, 13 *U. C. Q. B.* 116; *Contrà. R.* v. *Dee*, 15 *Cox*, 579. *But it is an assault.* See cases, *ante*, under sec. 36. In England, now, by 48-49 V., c. 69, it is rape.

A woman, with her baby in her arms, was lying in bed between sleeping and waking, and her husband was asleep beside her. She was completely awakened by a man having connection with her, and pushing the baby aside. Almost directly she was completely awakened, she found the man was not her husband, and awoke her husband. The Court of Criminal Appeal held that a conviction for a rape upon this evidence could not be sustained.—*R.* v. *Barrow*, 11 *Cox*, 191.

See, also, R. v. *Jackson, R. & R.* 487; and *contrà R.* v. *Young*, 14 *Cox*, 114.

Upon the trial of an indictment for rape upon an idiot girl, the proper direction to the jury is that if they are satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty.—*R.* v. *Barratt*, 12 *Cox*, 498. In *R.* v. *Fletcher*, 10 *Cox*, 248, the law was so given, but the evidence of non-consent was declared insufficient.

If a woman is incapable of resisting, it is no defence that she did not resist.—*R.* v. *Fletcher*, 8 *Cox*, 131; *Bell, C. C.* 63; *R.* v. *Camplin*, 1 *Den.* 89; *R.* v. *Flattery*, 13 *Cox*, 388. If a man has or attempts to have connection

with a woman while she is asleep, it is no defence that she did not resist, as she is then incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape.—*R.* v. *Mayers*, 12 *Cox*, 311.

It is clear that the party ravished is a competent witness. But the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony. Thus if she be of good fame; if she presently discovered the offence, and made search for the offender; if she showed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the act was done were remote from inhabitants or passengers; if the party accused fled for it; these, and the like, are concurring circumstances, which give greater probability to her evidence. But if, on the other hand, the witness be of evil fame, and stand unsupported by others; if without being under the control or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining; if the place where the fact is alleged to have been committed was near to persons by whom she might probably have been heard, and yet she made no outcry; if she has given wrong descriptions of the place; these, and the like circumstances, afford a strong though not conclusive presumption that her testimony is feigned.—1 *Russ.* 692.

The character of the prosecutrix, as to general chastity, may be impeached by *general* evidence, as by showing her general light character, etc., but evidence of connection with other persons than the prisoner cannot be received.

In *R.* v. *Hodgson*, *R.* & *R.* 211, the woman in the witness box was asked: Whether she had not before

had connection with other persons, and whether she had not before had connection with a particular person (named). The Court ruled that she was not obliged to answer the question. In the same case, the prisoner's counsel offered a witness to prove that the woman had been caught in bed about a year before this charge with a young man. The Court ruled that this evidence could not be received. These rulings were subsequently maintained by all the judges.

Although you may cross-examine the prosecutrix as to particular acts of connection with other men (and she need not answer the question, unless she likes), you cannot, if she deny it, call witnesses to contradict her.—*R.* v. *Cockcroft*, 11 *Cox*, 410; *R.* v. *Laliberté*, 1 *S. C. R.* 117.

But she may be cross-examined as to particular acts of connection with the prisoner, and if she dënies them, witnesses may be called to contradict her.—*R.* v. *Martin*, 6 *C. & P.* 562; *R.* v. *Riley*, 16 *Cox*, 191.

On the trial of an indictment for an indecent assault, the defence being consent on the part of the prosecutrix, she denied on cross-examination having had intercourse with a third person, S. *Held*, that S. could not be examined to contradict her upon this answer. This rule applies to cases of rape, attempt to commit a rape, and indecent assault in the nature of attempts to commit a rape.—*R.* v. *Holmes*, 12 *Cox*, 137.

This decision is by the Court of Criminal Appeal, composed of five judges, confirming *R.* v. *Hodgson*, and *R.* v. *Cockcroft*. The case of *R.* v. *Robins*, 2 *M. and Rob.* 512 is now overruled.—*Taylor, Evidence, par.* 336.

It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death, but it must be remembered that it is an accusation

easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.—1 *Hale*, 634.

Upon an indictment under section 37, the jury may find the prisoner guilty of an attempt to commit a rape. —*R.* v. *Hapgood*, 11 *Cox*, 471; or may find a verdict of common assault.

Under section 38, for an assault with intent to commit rape (misdemeanor), the indictment may be as follows: ..... in and upon one A. B., a woman (or girl), unlawfully did make an assault, with intent, her, the said A. B., violently and against her will, feloniously, to ravish and carnally know, against the form ..... *(Add a count for a common assault).—Archbold.*

If upon trial for this misdemeanor, the felony under section 37 be proved, the defendant is not therefore entitled to an acquittal.—*Sec.* 184 *Procedure Act.*

On an indictment for an assault with intent to commit a rape, Pateson, J., held that the evidence of the prisoner having, on a prior occasion, taken liberties with the prosecutrix, was not receivable to show the prisoner's intent; also, that in order to convict of assault with intent to commit rape, the jury must be satisfied, not only that the prisoner intended to gratify his passion on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part.—*R.* v. *Loyd*, 7 *C. & P.* 318.

When a man is charged with rape, all that the woman said to other persons in his absence shortly after the alleged offence is admissible in evidence.—*R.* v. *Wood*, 14 *Cox*, 47. See *R.* v. *Little*, 15 *Cox*, 319.

In *R.* v. *Gisson*, 2 *C. & K.* 781, it was held that an

acquittal on an indictment for a rape could not be successfully pleaded to a subsequent indictment for an assault with intent to commit a rape, because a verdict for the attempt to commit the offence could not be received on an indictment changing the offence itself. But that case was before 14-15 V., c. 156, s. 9, Imp. (Sec. 183 Proced. Act), which gives the right to convict of an attempt upon an indictment charging the offence. And the case of *R.* v. *Dungey*, 4 *F. & F.* 99, is a clear authority, that upon a trial for rape the defendant may be found guilty of an attempt to commit it. In fact there can now be no doubt upon this; sect. 183 of the Procedure Act is clear. See cases cited under that section.

An assault with intent to commit a rape, is very different from an assault with intent to have an improper connection. The former is with intent to have a connection by force and against the will of the woman.—*R.* v. *Stanton*, 1 *C. & K.* 415; *R.* v. *Wright*, 4 *F. & F.* 967; *R.* v. *Rudland*, 4 *F. & F.* 495; *R.* v. *Dungey*, 4 *F. & F.* 99.

An indictment for an attempt to commit rape is always in the form of an assault with intent to commit rape, as in *R.* v. *Riley*, 16 *Cox*, 191, for instance, and in *R.* v. *Dungey*, *ubi supra*, the judge charged the jury that they could, on an indictment for rape, find the prisoner guilty of an assault with intent to commit rape.

Sec. 38, *ante*, does not create the offence of attempt to commit a rape; that is and has always been a misdemeanor at common law. But this section merely provides for the punishment of the offence, and makes it greater than it would be either at common law or by sec. 34 of the same Act. The same as to sec. 37. It does not create the crime of rape, but merely provides for its punishment,

and as in cases of murder, larceny, sodomy, etc., the offence remains what it is at common law.

In a case of *R.* v. *John*, in British Columbia, November, 1887, upon a writ of error, the Supreme Court were divided on the question whether, upon an indictment for rape, the prisoner in that case had been lawfully convicted of an assault with intent to commit rape. An appeal has since been taken to the federal Supreme Court and is now pending.

In *R.* v. *Wright*, 4 *F. & F.*, 967, the prisoner was indicted for rape and for assault with intent to commit rape. It is now allowed, to join a felony with a misdemeanor in all cases where by statute, a verdict for the misdemeanor may be received on an indictment for the felony, though altogether unnecessary.

In a case of rape, the counsel for the prosecution should not tell the jury that to acquit the prisoner is to find the woman guilty of perjury.—*R.* v. *Rudland, and R.* v. *Puddick*, 4 *F. & F.* 495, 497.

39. Every one who unlawfully and carnally knows and abuses any girl under the age of ten years is guilty of felony, and liable to imprisonment for life or for any term not less than five years.—40 *V.*, *c.* 28, *s.* 2. 48-49 *V.*, *c.* 69, *s.* 4, *Imp.*

Indictment— ..... in and upon one A. N., a girl under the age of ten years, to wit, of the age of nine years, feloniously did make an assault, and her, the said A. N., then and there feloniously did unlawfully and carnally know and abuse, against the form.....—*Archbold*, 708.

The evidence is the same as in rape, with the exception that the consent or non-consent of the girl is immaterial. —*Archbold*, 709.

Upon the trial of an indictment under this clause, the jury may, under sect. 191 of the Procedure Act, find the defendant guilty of a common assault, in certain cases. But no such verdict can be returned, if the girl assented. —*R.* v. *Read*, 1 *Den.* 377; *R.* v. *Connolly*, 26 *U. C. Q. B.* 317; *R.* v. *Roadley*, 14 *Cox*, 463.

Under sect. 183 of the Procedure Act, the defendant may be convicted of an attempt to commit the offence charged, if the evidence warrants it. A boy under fourteen years of age cannot be convicted of this offence, nor of the attempt to commit it.—1 *Russ.* 931.

40. Every one who unlawfully and carnally knows and abuses any girl above the age of ten years and under the age of twelve years is guilty of a misdemeanor, and liable to seven years' imprisonment. —32-33 *V., c.* 20, *s.* 52. This offence is now in England a felony.—48-49 *V., c.* 69, *s.* 4, *Imp.*

Indictment.— ..... in and upon one A. N., a girl above the age of ten years and under the age of twelve years, to wit, of the age of eleven years, unlawfully did make an assault, and her the said A. N. did then unlawfully and carnally know and abuse, against the form..... —*Archbold*, 709.

Same evidence as in rape; but it will be no defence that the girl consented.

Remarks under preceding section are applicable here.

An indictment charged that G. in and upon D., a girl above the age of ten, and under the age of twelve, unlawfully did make an assault, and her, the said D., did then unlawfully and carnally know and abuse. *Held*, by the Court of Criminal Appeal, that the indictment contained two charges, one of common assault, and the other of the statutable misdemeanor (under this section), and that the prisoner might be convicted of a common assault upon it, *as*

no consent on the part of the girl had been proved.—*R.* v. *Guthrie*, 11 *Cox*, 522 ; *R.* v. *Catherall*, 13 *Cox*, 109.

On an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault: *Held*, Lush, J., on the count for assault, that although consent would be a defence, consent extorted by terror, or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect.—*R.* v. *Woodhurst*, 12 *Cox*, 443; *R.* v. *Lock*, 12 *Cox*, 244.

Upon an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt to commit that offence.—*R.* v. *Ryland*, 11 *Cox*, 101; *R.* v. *Catherall*, 13 *Cox*, 109.

The punishment would then be under next section.—*R.* v. *Meredith*, 8 *C. & P.* 589 ; *R.* v. *Webster*, 9 *L. C. R.*, 196.

If the girl has consented, there can be no verdict of assault.—*R.* v. *Johnston*, *L. & C.* 632 ; 1 *Russ.* 934 ; *R.* v. *Cockburn*, 3 *Cox*, 543; *R.* v. *Martin*, 2 *Moo. C. C.* 123; *R.* v. *Wollaston*, 12 *Cox*, 180.

But there is a difference between consent and submission.—1 *Russ.* 934; *R.* v. *Lock*, 12 *Cox*, 244.

If upon an indictment for having a carnal knowledge of a girl between ten and twelve years of age, it appear that in fact the girl was under ten, the indictment cannot be amended to make it agree *quoad hoc* with the proof, and the prisoner must be acquitted.—*R.* v. *Shott*, 3 *C. & K.* 206.

An indictment for the felony of rape still lies against one who ravishes a female between the age of ten and twelve.—*R.* v. *Dicken*, 14 *Cox*, 8; *R.* v. *Radcliffe*, 15 *Cox*, 127.

41. Every one who commits any indecent assault upon any female, or attempts to have carnal knowledge of any girl under twelve years of age, is guilty of a misdemeanor and liable to imprisonment for any term less than two years, and to be whipped.—32-33 *V.*, *c.* 20, *s.* 53. 24-25 *V.*, *c.* 100, *s.* 52; *and* 48-49 *V.*, *c.* 69, *s.* 4, *Imp.*

Indictment.—.....one A. D. unlawfully and indecently did assault, and her, the said A. D., did then beat, wound and ill treat, and other wrongs to the said A. D. did, to the great damage of the said A. D., against the form. —*Archbold.*

Sec. 140 of the Procedure Act applies to indictments for indecent assaults.

Consent is immaterial upon an indictments for the attempt to have carnal knowledge of a girl under twelve, but upon an indictment for indecent assault, if the girl, although under twelve, consented, the prisoner must be acquitted, as there can be no assault on a person consenting.—*R.* v. *Holmes*, 12 *Cox*, 137. *R.* v. *Paquet*, 9 *Q. L. R.* 361. See *R.* v. *Roadley*, 14 *Cox*, 463. See now as to England, 43-44 V., c. 45, Imp.

Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault evidence was tendered of the conduct of the prisoner towards her subsequent to the assault.

Held, that the evidence was admissible as tending to show the indecent quality of the assault, and as being, in effect, a part or continuation of the same transaction as that with which the prisoner was charged.—*R.* v. *Chute*, 46 *U. C. Q. B.* 555.

On an indictment for attempting to have connection with a girl under ten, consent is immaterial; but in such a

case there can be no conviction for assault if there was consent.—*R.* v. *Connolly*, 26 *U. C. Q. B.* 317.

42. Every one who,—

(*a.*) From motives of lucre, takes away or detains against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, any woman of any age, who has any interest, whether legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate, or who is a presumptive heiress or co-heiress or presumptive next of kin, or one of the presumptive next of kin to any one having such interest, or—

(*b.*) Fraudulently allures, takes away or detains such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person,—

Is guilty of felony, and liable to fourteen years' imprisonment.

2. Every one convicted of any offence under this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress or next of kin; and if any such marriage takes place, such property shall, upon such conviction, be settled in such manner as any court of competent jurisdiction, upon any information, at the instance of the Attorney General for the Province in which the property is situate, appoints.—32-33 *V.*, *c.* 20, *s.* 54. 24-25 *V.*, *c.* 100, *s.* 53, *Imp.*

On the trial of an indictment for an offence under sub-sec. *b.* of this section, it is not necessary to prove that the accused knew that the girl he abducted had an interest in any property.—*R.* v. *Kaylor*, 1 *Q. B. R.* 364.

It is not necessary that an actual marriage or defilement should take place. Under the first part of this section, the taking or detaining must be *from motives of lucre* and *against the will of the woman*, coupled with an intent to marry or carnally know her or cause her to be married or carnally known by another person.

Indictment under first part of this section.—.....

feloniously and from motives of lucre did take away and detain *("take away* or *detain")* one A. N. against her will, she, the said A. N., then having a certain present and absolute interest in certain real estate *(any interest, whether legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate)* with intent her, the said A. N., to marry *(or carnally know her, or cause her to be married or carnally known by.....)* against the form ..... *(Add a count stating generally the nature of some part of the property, and if the intent be doubtful, add counts varying the intent.) Archbold,* 699. The value of the property should be stated. See another form, in Chitty, C. L. 3rd V., 818.

Indictment under second part of this section.— ..... feloniously and fraudulently allured *(took away or detained)* one A. B. out of the possession and against the will of C. D., her father, she, the said A. B., then being under the age of twenty-one years, and having a certain present interest in.....with intent, her, the said A. B., to marry *(or carnally know, or cause to be married or, etc., etc., etc.,)* contrary to the statute, etc. *(Add counts, if necessary, varying the statement as to the property, possession, or intents.*

Under the second part of the section, the offence consists in the fraudulent allurement of a woman under twenty-one out of the possession of or against the will of her parent or guardian, coupled with an intent to marry or carnally know her, or cause her to be married or carnally known by another person, but, for this offence, no motives of lucre are mentioned, nor should it have been committed against the will of the woman, though she must be an heiress, or such a woman as described in the first lines of this section.

The taking under the first part of this section must be against the will of the woman; but it would seem that, although it be with her will, yet, if that be obtained by fraud practised upon her, the case will be within the Act; for she cannot whilst under the influence of fraud be considered to be a free agent.

If the woman be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, the offence is complete, because if she so refuse, she may from that time as properly be said to be taken against her will as if she had never given her consent at all, for, till the force was put upon her, she was in her own power.—1 *Burn*, 8.

Moreover the *detaining against* her will is by itself an offence.

It seems, also, it is not material whether a woman so taken contrary to her will at last consents thereto or not, for if she were in force at the time, the offence is complete at the time of the taking, and the offender is not to escape from the provisions of the statute by having prevailed over the weakness of the woman by such means.

The second part of this section expressly contemplates the case of a girl, under twenty-one, whose co-operation has been obtained by influence over her mind, and who has been taken out of the possession of her parent or guardian by means of a fraud practised upon them and against their will, or by force, against their will, but with her consent. If a girl, under twenty-one, is taken away or detained against her own will, or her consent is obtained through fear, that case would be within the first part of this section. The woman, though married, may be a witness against the offender.—*Archbold*, 700.

"If, therefore," says Taylor, on Evidence, No. 1236, "a

"man be indicted for the forcible abduction of a woman "with intent to marry her, she is clearly a competent "witness against him, if the force were continuing against "her till the marriage. Of this last fact also she is a com- "petent witness, and the better opinion seems to be that "she is still competent, notwithstanding her subsequent "assent to the marriage and her voluntary co-habitation: "for otherwise, the offender would take advantage of his "own wrong."

Under sec. 183 of the Procedure Act, the prisoner charged with the felony aforesaid may be found guilty of an attempt to commit the same, which is a misdemeanor at common law, *Roscoe*, 283, and punishable by fine, or imprisonment, or both. The Court may also, in misdemeanors, require the defendant to find sureties to keep the peace and be of good behaviour, at common law, and may order him to be imprisoned until such security is found—*R.* v. *Dunn*, 12 *Q. B.* 1026.—*Greaves' Cons. Acts*, 7. *See sects.* 24 *and* 31, *c.* 181, *post.*

Under sec. 191 of the Procedure Act, the prisoner may be acquitted of the felony, and found guilty of an assault, if the evidence warrants such finding.

43. Every one who, by force, takes away or detains against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, is guilty of felony, and liable to fourteen years' imprisonment. —32-33 *V.*, *c.* 20, *s.* 55. 24-25 *V.*, *c.* 100, *s.* 54, *Imp.*

The observations upon the last section will apply for the most part to this, which provides a very proper protection to women who happen to have neither any present nor future interest in any property.—*Greaves' Cons. Acts*, 80.

It may be that manual force may not in all cases be necessary, and, that though no actual force was used, yet,

if the taking away was accomplished under the fear and apprehension of a *present immediate threatened* injury, depriving the woman of freedom of action, the statute would be satisfied.—1 *Burn*, 9.

Indictment.— ..... feloniously and by force did take away *(or detain)* one A. B. against her will, with intent her, the said A. B., to marry ..... *(or .....)* against the form of the statute ..... *(If the intent is doubtful, add a count stating it to be to "carnally know," or to cause her to be married to one N. S., or to some persons to the jurors unknown, or to cause her to be carnally known by, etc.)*—1 *Burn*, 12.

A verdict for assault or for an attempt to commit the offence charged, may be given, as under the next preceding section.

ABDUCTION OF GIRLS UNDER SIXTEEN.

44. Every one who unlawfully takes or causes to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 56. 24-25 *V.*, *c.* 100, *s.* 55, *and* 48-49 *V.*, *c.* 69, *s.* 7, *Imp.*

The intent to marry, or carnally know is not an ingredient of this offence. The only intent which is material is the intent to deprive the parent or legal guardian of the possession of the child. — *Roscoe*, 248. No motives of lucre are necessary. A woman may be guilty of this offence.

It is immaterial whether the girl consents or not, and the taking need not be by force, actual or constructive. —*R.* v. *Mankletow*, 1 *Russ.* 954; *Dears*, 159. Where a parent countenances the loose conduct of the girl,

the jury may infer that the taking is not against the parent's will. Ignorance of the girl's age is no defence.—1 *Russ.* 952; *R.* v. *Robins*, 1 *C. & K.* 456. It is not necessary that the taking away should be for a permanency; it is sufficient if for the temporary keeping of the girl.— *R.* v. *Timmins*, *Bell, C. C.* 276.

On an indictment for abducting a girl under sixteen years of age, it appeared that the girl, when abducted, had left her guardian's house for a particular purpose with his sanction: *Held*, that she had not ceased to be in his possession under the statute.— *R.* v. *Mondelet*, 21 *L. C. J.* 154.

On a trial for taking an unmarried girl under the age of sixteen out of the possession of her guardian:

Held, 1st. That evidence of her being badly treated by her guardian is inadmissible. 2nd. That secondary evidence of the age of the child is admissible. 3rd. That in this case the defendant is not guilty of taking the child out of the possession of the guardian.—*R.* v. *Hollis*, 8 *L. N* 299.

To pick up a girl in the streets and take her away is not to take her out of the possession of any one. The prisoner met a girl under sixteen years of age in a street, and induced her to go with him to a place at some distance, where he seduced her and detained her for some hours. He then took her back to where he met her, and she returned home to her father. In the absence of any evidence that the prisoner knew, or had reason for knowing, or that he believed that the girl was under the care of her father at the time, *held* by the Court of Criminal Appeal that a conviction under this section could not be sustained.—*R.* v. *Green*, 3 *F. & F.* 274; *R.* v. *Hibbert*, 11 *Cox* 246.

One who takes an unmarried girl under the age of sixteen

years out of the possession and against the will of her father or mother is guilty of this offence, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go.—*R.* v. *Booth*, 12 *Cox*, 231; *R.* v. *Kipps*, 4 *Cox*, 167; *R.* v. *Prince*, 13 *Cox*, 138.

The defence in Booth's case was that the prisoner, actuated by religious and philanthropic motives, had taken the girl from her parents in order to save her from seclusion in a convent. He was found guilty and sentenced.

A girl who is away from her home is still in the custody or possession of her father, if she intends to return; it is not necessary to prove that the prisoner knew the girl to be under sixteen; the fact of the girl being a consenting party cannot absolve the prisoner from the charge of abduction; this section is for the protection of parents.—*R.* v. *Mycock*, 12 *Cox*, 28; *R.* v. *Olifier*, 10 *Cox*, 402; *R.* v. *Miller*, 13 *Cox*, 179.

Indictment.—.....unlawfully did take *(or cause to be taken)* one A. B. out of the possession and against the will of E. F., her father, she, the said A. B., being then an unmarried girl, and under the age of sixteen years, to wit, of the age of ..... against the form, etc. *(if necessary add a count stating E. F. to be a person having the lawful care and charge of the said A. B.. or that the defendant unlawfully did cause to be taken one .....)*—*Archbold. See R.* v. *Johnson*, 15 *Cox*, 481.

It is no defence to an indictment under this section that the prisoner believed the girl to be eighteen.—*See R.* v. *Prince*, 13 *Cox*, 138.

It was held in *R.* v. *Bishop*, 5 *Q. B. D.* 259, that under a statute which prohibits the receiving of lunatics for treatment in a house not duly licensed, the owner of a house

who had received lunatics was guilty of the offence created by the statute, though the jury found that he believed honestly and on reasonable grounds that the persons received were not lunatics.

"I do not think that the maxim as to the *mens rea* has so wide an application as it is sometimes considered to have. In old times, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowledge is of the essence of the offence created."—*Per Stephen, J. Cundy* v. *Lecocq*, 13 *Q. B. D.* 207.

CHILD STEALING.

45. Every one who,—

(*a*) Unlawfully, either by force or fraud, leads or takes away or decoys or entices away, or detains any child under the age of fourteen years, with intent to deprive any parent, guardian or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article belongs, or—

(*b*) With any such intent receives or harbors any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained, as in this section before mentioned,—

Is guilty of felony, and liable to seven years' imprisonment;

2. No person who has claimed any right to the possession of such child, or is the mother, or has claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof. —32-33 *V.*, *c.* 20, *s.* 57. 24-25 *V.*, *c.* 100, *s.* 56, *Imp.*

See R. v. *Johnson*, 15 *Cox*, 481; *and R.* v. *Barrett*, 15 *Cox*, 658.

Indictment.—..... feloniously and unlawfully did by force *(or fraud)* lead and take away *(lead or take away, or decoy, or entice away, or detain)* one A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to deprive one A. S., the father of the said A. N., of the possession of the said A. N., his said child, against.....And the jurors ..... that the said ..... afterwards, to wit, on the day and year aforesaid, feloniously and unlawfully did by force *(or fraud)* lead and take away *(or etc..)* the said A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then feloniously to steal, take and carry away divers articles, that is to say ..... then being upon and about the person of the said child, against ..... *(Add counts stating that the defendant did by fraud entice away,* or *did by fraud detain,* or *did by force detain,* if necessary*).—Archbold.*

Upon the trial of any offence contained in this section, the defendant may, under sec. 183 of the Procedure Act, be convicted of an attempt to commit the same.—1 *Russ.* 966.

All those claiming a right to the possession of the child are specially exempted from the operation of this section, by the proviso.

KIDNAPPING.

46. Every one who, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent,—

(*a.*) To cause such other person to be secretly confined or imprisoned in Canada against his will,—

(*b.*) To cause such other person to be unlawfully sent or transported out of Canada against his will, or—

(*c.*) To cause such other person to be sold or captured as a slave, or in any way held to service against his will,—

Is guilty of felony, and liable to seven years' imprisonment;

2. Upon the trial of any offence under this section, the non-resistance of the person so kidnapped or unlawfully confined thereto shall not be a defence, unless it appears that it was not caused by threats, duress or force or exhibition of force.—32-33 *V., c.* 20, *ss.* 69 *and* 70.

At common law, kidnapping is a misdemeanor punishable by fine and imprisonment.—1 *Russ.* 962.

The above sections are taken from the 29 V., c. 14. (1865).

The forcible stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish and also by the civil law. This is unquestionably a very heinous crime, as it robs the sovereign of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships.— 4 *Blackstone*, 219.

By our statute, transportation to a foreign country is not necessarily an ingredient in this offence.—See sec. 19 of Procedure Act, *post*, as to venue in such cases.

Under sec. 183 of the Procedure Act, the defendant may be found guilty of an attempt to kidnap, upon an indictment for kidnapping.

A verdict of assault may also be given, if the evidence warrants it.—*Sec.* 191 *Procedure Act.*

Indictment.— ..... with force and arms unlawfully and feloniously an assault did make on one A. B., and did then and there, without lawful authority, feloniously and forcibly seize and imprison the said A. B. within the Dominion of Canada (*or confine or kidnap*) with intent the said A. B. unlawfully, forcibly and feloniously to cause to be unlawfully transported out of Canada, against his will ..... against the form .....—2 *Bishop, Cr. L.* 750; 2 *Bishop, Cr. Proc.* 690.

Held, on the trial of an indictment for kidnapping

under 32–33 V., c. 20, s. 69, that the intent required applies to the seizure and confinement as well as to the kidnapping, and the indictment should state such intent.

Held, also, that an amendment changing the name Rufus Bratton to James Rufus Bratton was properly made.—*Cornwall* v. *The Queen*, 33 *U. C. Q. B.* 106.

ABORTION.

47. Every woman, being with child, who, with the intent to procure her own miscarriage, unlawfully administers, or permits to be administered, to herself any poison or other noxious thing, or unlawfully uses, or permits to be used on herself, any instrument or other means whatsoever with the like intent, and—

Every one who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent,—

Is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 20, *s.* 59. 24-25 *V., c.* 100, *s.* 58, *Imp.*

Greaves' Note.—This clause is framed on the 1 V., c. 85, s. 6.

The first part of it is new, and extends the former enactment to any woman, who, being with child, attempts to procure her own miscarriage.

The second part in terms makes it immaterial whether the woman were or were not with child, in accordance with the decision in *R.* v .*Goodhall*, 1 *Den.* 187

Indictment for woman administering poison to herself, with intent or, etc. ..... that C. D. late of ..... on ..... at ..... and being then with child, with intent to procure her own miscarriage, did unlawfully and feloniously administer to herself one drachm of a certain poison (or *noxious thing*) called ..... *(or did unlawfully and feloniously use a certain instrument* or *means) to wit,* ..... contrary to the statute ..... —1 *Burn*, 16.

Indictment for administering poison to a woman, with intent to procure abortion.—..... that C. D. on ..... unlawfully and feloniously did administer to (or *cause to be taken by)* one S. P. one ounce weight of a certain poison, called ..... *(or noxious thing called.....)* with intent then and thereby to cause the miscarriage of the said S. P. contrary to the statute. ..... 1 *Burn*, 16.

Indictment for using instrument with the like intent. —..... unlawfully and feloniously did use a certain instrument called a ..... upon the person of one S. P., with intent then and thereby to cause the miscarriage of the said S. P. .....—1 *Burn*, 16.

In order to constitute an offence under the first part of section 47, the woman must be with child, though not necessarily quick with child. The poison or other noxious thing must have been administered, or the instrument used, with the intent to procure the miscarriage. It must be proved, according to the fact stated in the indictment, that the woman administered to herself, etc., or that the defendant administered, etc., or caused to be taken, etc., the drug, as therein stated, and that the drug was noxious, or that the defendant used the instrument, *or other means*, mentioned in the manner described in the indictment.—1 *Burn*, 14.

Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix takes it for that purpose in the prisoner's absence, this was held to be a causing of it to be taken within the statute.—*R.* v. *Wilson, Dears & B.* 127; *R.* v. *Farrow, Dears & B.* 164.

A man and woman were jointly indicted for feloniously administering to C. a noxious thing to the jurors unknown with intent to procure miscarriage. C. being in the family way, went to the male prisoner, who said he would give

her some stuff to put her right, and gave her a light colored medicine, and told her to take two spoonfuls till she became in pain. She did so and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L. and gave her some more of the stuff, which he said would take effect when she got there. They went together to L. and met the female prisoner, who said she had been down to the station several times the day before to meet them. C. then began to feel pain and told the female prisoner. Then the male prisoner told what he had given C. They all went home to the female prisoner's, and the male prisoner then gave C. another bottle of similar stuff, in the female prisoner's presence, and told her to take it like the other. She did so and became very ill, and the next day had a miscarriage, the female prisoner attending her and providing all things: *Held*, that there was evidence that the stuff administered was a noxious thing within the 24-25 V., c. 100, s. 58, Imp. Also that there was evidence of the female being an accessory before the fact and a party, therefore, to the administration of the noxious thing.—*R.* v. *Hollis*, 12 *Cox*, 463.

Under the second part of this section, the fact of the woman being pregnant is immaterial. *R.* v. *Goodall*, 1 *Den*, 187. But the prisoner must have believed her to be pregnant, otherwise there could be no intent under the statute. Under an indictment for this offence the prisoner may be convicted of an attempt to commit it. Sec. 183 Procedure Act.- *See R.* v. *Cramp*, 14 *Cox*, 390 *and* 401.

48. Every one who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, is guilty of a misdemeanor, and liable to two years' imprisonment.—32-33 *V., c.* 20, *s.* 60. 24-25 *V., c.* 100, *s.* 59, *Imp.*

Indictment ..... unlawfully did procure *(supply or procure)* a large quantity, to wit, two ounces of a certain noxious thing called savin, he the said *(defendant)* then well knowing that the same was then intended to be unlawfully used and employed with intent to procure the miscarriage of one A. N. against the form ..... — *Archbold.*

The drug supplied must be a poison or noxious thing, and the supplying an innoxious drug, whatever may be the intent of the person supplying it, is not an offence against this enactment.—*R.* v. *Isaacs, L. & C.* 220.

In order to constitute the offence within the meaning of this section, it is not necessary that the intention of employing the noxious drug should exist in the mind of the woman: it is sufficient, if the intention to procure abortion exists in the mind of the defendant.—*R.* v. *Hillman, L. & C.* 343.

The prisoner may be convicted of an attempt to commit this offence, upon an indictment under this section. Sect. 183 of the Procedure Act.

Supplying a noxious thing with the intent to procure abortion is an offence under this section, whether the woman is pregnant or not.—*R.* v. *Titley,* 14 *Cox,* 502.

Giving oil of savin to procure abortion is indictable under 32-33 V., c. 20, s. 60.—*R.* v. *Stitt,* 30 *U. C. C. P.* 30.

CONCEALING THE BIRTH OF A CHILD.

49. Every one who, by any secret disposition of the dead body of any child of which any woman is delivered, whether such child died before, at or after its birth, endeavors to conceal the birth thereof, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 20, *s.* 61, *part.* 24-25 *V., c.* 100 *s.* 60, *Imp.*

See Greaves' note under sec. 188 of the Procedure Act.

Indictment.— ..... that A. S. on ..... was delivered of a child; and that the A. S., being so delivered of the said child as aforesaid, did then unlawfully endeavor to conceal the birth of the said child by secretly burying *(by any secret disposition of)* the dead body of the said child, against the form, etc., ... *(State the means of concealment specially, when it is otherwise than by secret burying.)*—*Archbold.*

In *R.* v. *Berriman*, 6 *Cox*, 388, Erle, J., told the jury that this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. But in a later case, *R.* v. *Colmer*, 9 *Cox*, 506, Martin, J., ruled that the offence is complete on a fœtus delivered in the fourth or fifth month of pregnancy, not longer than a man's finger, but having the shape of a child.

Final disposing of the body is not material, and hiding it in a place from which a further removal was contemplated, would support the indictment.—*R.* v. *Goldthorpe*, 2 *Moo. C. C.* 244; *R.* v. *Perry*, *Dears.* 471.

Leaving the dead body of a child in two boxes, closed but not locked or fastened, one being placed inside the other in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room, is not a secret disposition of the body, within the meaning of the statute.—*R.* v. *George*, 11 *Cox*, 41.

What is a secret disposition of the dead body of a child within the statute is a question for the jury, depending on the circumstances of the particular case: where the dead body of a child was thrown into a field, over a wall 4½ feet high, separating the yard of a public house from the field, and a person looking over the wall from the yard might have seen the body, but persons going through the yard or using it in the ordinary way

would no', it was held, on a case reserved, that this was an offence within the statute.—*R.* v. *Brown*, 11 *Cox*, 517.

Athough the fact of the prisoner having placed the dead body of her newly-born child in an unlocked box is not of itself sufficient evidence of a criminal concealment of birth, yet all the attendant circumstances of the case must be taken into consideration, in order to determine whether or not an offence has been committed.—*R.* v. *Cook*, 11 *Cox*, 542.

In order to convict a woman of attempting to conceal the birth of her child, see sec. 188 of the Procedure Act, a dead body must be found, and identified as that of the child of which she is alleged to have been delivered. A woman, apparently pregnant, while staying at an inn, at *Stafford*, received by post, on the *28th of August*, 1870, *a Rugby newspaper with the Rugby postmark upon it.* On the same day her appearance and the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsbury next morning, carrying a parcel. That afternoon a parcel was found in a waiting room at *Stafford* station. It contained the dead body of a newly-born child, wrapped in *a Rugby Gazette, of August 27th, bearing the Rugby postmark.* There is a railway from Stafford to Shrewsbury, but no proof was given of the woman having been at Stafford Station: *Held*, Montague Smith, J., that this evidence was insufficient to identify the body found as the child of which the woman was said to have been delivered, and would not therefore justify her conviction for concealment of birth.—*R.* v. *Williams*, 11 *Cox*, 684.

Where death not proved conviction is illegal.—*R.* v. *Bell*, 8 *Ir. R. C. L.* 541.

A. being questioned by a police-constable about the

concealment of a birth, gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie." *Held*, that a further statement made by A. to the policeman after the above inducement was inadmissible in evidence against her, as not being free and voluntary. A. was taken into custody the same day, placed with two accomplices, B. and C. and charged with concealment of birth. All three then made statements. *Held*, that those made by B. and C. could not be deemed to be affected by the previous inducement to A. and were, therefore, admissible against B. and C. respectively, although that made by A. was not so. The prisoners were sent for trial, but before their committal they received the formal caution from the magistrate as to anything they might wish to say. Whereupon A. made a statement which was taken down in writing, as usual, and attached to the deposition; *Held*, that this latter statement of A. might be read at the trial as evidence against herself. Mere proof that a woman was delivered of a child and allowed two others to take away its body is insufficient to sustain an indictment against her for concealment of birth.—*R.* v. *Bate*, 11 *Cox*, 686.

A woman delivered of a child born alive, endeavored to conceal the birth thereof by depositing the child while alive in a corner of a field, when it died from exposure. *Held*, that she could not be indicted under the above section.—*R.* v. *May*, 16 *L. T. Rep.* 362.

The prisoner who lived alone had placed the dead body of her new born child behind a trunk in the room she occupied, between the trunk and the wall. On being charged with having had a child, she at first denied it. *Held*, sufficient to support a conviction for concealment of birth.—*R.* v. *Piché*, 30 *U. C. C. P.* 409.

CHAPTER 163.

AN ACT RESPECTING LIBEL.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

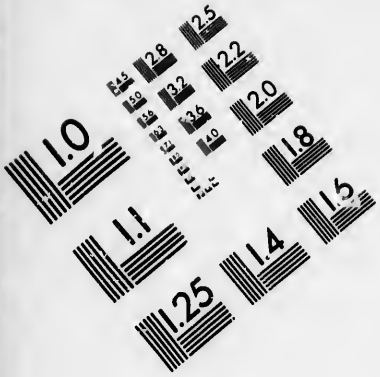
1. Every one who publishes or threatens to publish any libel upon any other person, or directly or indirectly threatens to print or publish, or proposes to abstain from printing or publishing of, or offers to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money or security for money or any valuable thing, from such person or from any other person, or with intent to induce any person to confer upon or procure for any person any appointment or office of profit or trust, is guilty of a misdemeanor, and liable to a fine not exceeding six hundred dollars, or to imprisonment for any term less than two years, or to both.—37 *V.*, *c.* 38, *s.* 1, *part.* 6-7 *V.*, *c.* 96, *s.* 3, *Imp.*

2. Every one who maliciously publishes any defamatory libel, knowing the same to be false, is guilty of a misdemeanor, and liable to a fine not exceeding four hundred dollars, or to imprisonment for any term less than two years, or to both.—37 *V.*, *c.* 38, *s.* 2. 6-7 *V.*, *c.* 96, *s.* 4, *Imp.*

3. Every one who maliciously publishes any defamatory libel is guilty of a misdemeanor, and liable to a fine not exceeding two hundred dollars, or to imprisonment for any term not exceeding one year, or to both.—37 *V.*, *c.* 38, *s.* 3. 6-7 *V.*, *c.* 96, *s.* 5, *Imp.*

4. It shall, if pleaded, be a defence to an indictment or information for a defamatory libel, that the defamatory matter was true, and that it was for the public benefit that such matter should be published.—37 *V.*, *c.* 38, *ss.* 5 *and* 6, *parts.* 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

5. Whenever, upon the trial of any indictment or information for the publication of a defamatory libel, to which a plea of not guilty has been pleaded, evidence is given which establishes against the defendant a presumptive case of publication by his authority, by the act of any other person, the defendant may prove, and, if proved, it shall be a good defence, that such publication was made without his authority, consent or knowledge, and that such publication did not arise from want of due care or caution on his part.—37 *V.*, *c.* 38, *s.* 10. 6-7 *V.*, *c.* 96, *s.* 7, *Imp.*



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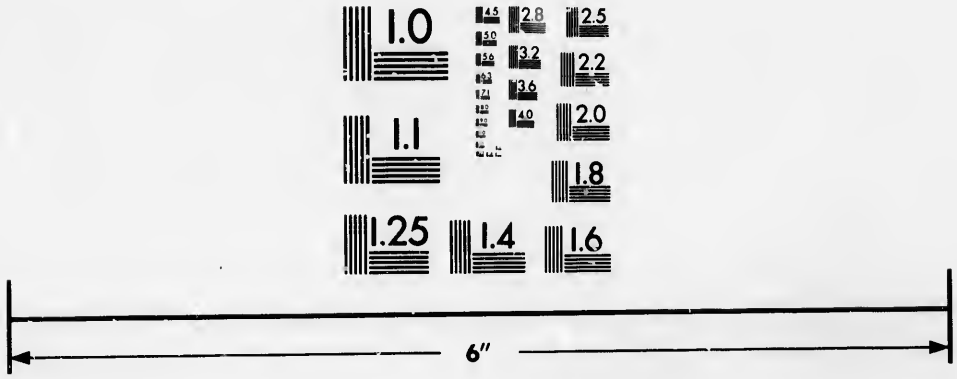

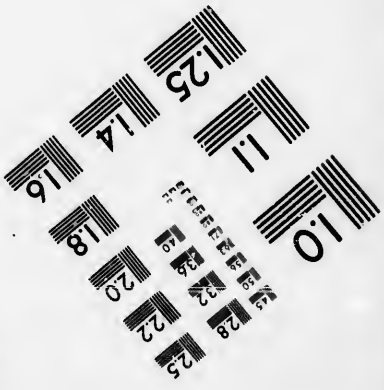

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6. Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, may bring before the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, first giving twenty-four hours' notice of his intention so to do, to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such criminal proceedings have been commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such criminal proceedings, and the same shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue hereof.—24 *V.* (*P. E. I.*), *c.* 31, *s.* 1. 3-4 *V.*, *c.* 9, *s.* 1, *Imp.*

7. In case of any criminal proceedings hereafter commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant, at any stage of the proceedings, may lay before the court or judge such report, paper, votes or proceedings, and such copy, with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy; and the court or judge shall immediately stay such criminal proceedings, and the same shall be and shall be deemed to be finally put an end to, determined and superseded by virtue hereof.—24 *V.* (*P. E. I.*, *c.* 31, *s.* 2. 3-4 *V.*, *c.* 9, *s.* 2, *Imp.*

8. In any criminal proceeding commenced or prosecuted, for printing any extract from or abstract of any such report, paper, votes or proceedings, such report, paper, votes or proceedings may be given in evidence, and it may be shown that such extract or abstract was published *bonâ fide* and without malice, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant. —24 *V.* (*P. E. I.*), *c.* 31, *s.* 3. 3-4 *V.*, *c.* 9, *s.* 3, *Imp.*

PROCEDURE ACT.

SECTIONS ON LIBEL.

148. Every one accused of publishing a defamatory libel may plead that the defamatory matter was true, and that it was for the public benefit that such matter should be published, to which plea the prosecutor may reply generally, denying the whole thereof.—37 *V.*, *c.* 38, *s.* 5, *part, and s.* 6, *part.* 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

149. Without such plea, the truth of the matters charged as libellous in any such indictment or information, or that it was for the public benefit that such matters should have been published, shall in no case be inquired into.—37 *V.*, *c.* 38, *s.* 7. 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

150. If, after such plea, the defendant is convicted on such indictment or information, the court, in pronouncing sentence, may consider whether the guilt of the defendant is aggravated or mitigated by such plea, and by the evidence given to prove or disprove the same.—37 *V.*, *c.* 38, *s.* 8. 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

151. In addition to such plea of justification, the defendant may plead not guilty; and no defence otherwise open to the defendant under the plea of not guilty shall be taken away or prejudiced by reason of such special plea.—37 *V.*, *c.* 38, *s.* 9. 6-7 *V.*, *c.* 96, *s.* 6, *Imp.*

152. On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty, upon the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or udge before whom such indictment or information is tried, to find the defendant guilty, merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury, on the matter in issue, as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do; and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of this Act.—37 *V.*, *c.* 38, *s.* 4. 32 *G.* 3, *c.* 60, *ss.* 1, 2, 3, 4, *Imp.*

153. In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment is given against the defendant he shall be liable for the costs sustained by the prosecutor, by reason of such indictment or information; and if judgment is given for the defendant he shall be entitled to recover from such prosecutor the costs incurred by him, by reason of such indictment or information; and such costs, so to be recovered by the prosecutor or defendant respectively, shall be taxed by the court, judge or the proper officer of the court before which such indictment or information is tried.—37 *V.*, *c.* 38, *s.* 12. 6-7 *V.*, *c.* 96, *s.* 8, *Imp.*

154. The costs mentioned in the next preceding section shall be recoverable, either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt.—37 *V.*, *c.* 38, *s.* 13.

The costs of showing cause against a rule for the filing of an information are covered by sec. 153.—*R.* v. *Steel*, 13 *Cox*, 159.

Indictment for a false defamatory Libel.—The Jurors for Our Lady the Queen upon their oath present, that J. S., contriving, and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice one J. N., and to deprive him of his good name, fame, credit and reputation, and to bring him into public contempt, scandal, infamy and disgrace, on the first day of June, in the year of our Lord ....., unlawfully, wickedly, and maliciously did write and publish, and cause and procure to be written and published, a false, scandalous, malicious and defamatory libel, in the form of a letter directed to the said J. N. *(or, if the publication were in any other manner, omit the words* "in the form," etc.), containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said J. N., and of and concerning, *etc. (here insert such of the subjects of the libel as it may be necessary to refer to by the innuendoes, in setting out the libel)*, according to the tenor and effect following, that is to say (*here, set out the libel, together*

with such innuendoes as may be necessary to render it intelligible), he the said J. S. then well knowing the said defamatory libel to be false ; to the great damage, scandal and disgrace of the said J. N.. to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Imprisonment not exceeding two years, and fine, c. 163, *s.* 2. *If the prosecutor fail to prove the scienter, the defendant may nevertheless be convicted of publishing a defamatory libel, and punished by fine, or imprisonment not exceeding one year, or both.—Id. s.* 3. *The defendant may plead, in addition to the plea of not guilty, that the matters charged were true, and that it was for the public benefit that they should be published, setting forth the particular facts, by reason of which the publication was for the public benefit.*

The offence of libel is not triable at quarter sessions. Sec. 4, *Procedure Act.*

The defendant may allege and prove the truth of the libel, in the manner and subject to the conditions mentioned.—*S.* 4, *c.* 163, *and s.* 148 *of the Procedure Act.*

The following may be the form of the special plea.—*And for a further plea in this behalf, the said* J. S. *saith that Our Lady the Queen ought not further to prosecute the said indictment against him, because he saith that it is true that* (etc., alleging the truth of every libellous part of the publication) : *and the said* J. S. *further saith, that before and at the time of the publication in the said indictment mentioned* (state here the facts which rendered the publication of benefit to the public); *by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published. And this, etc.* This plea may be pleaded with the general

issue. Evidence that the identical charges contained in a libel had, before the time of composing and publishing the libel which is the subject of the indictment, appeared in another publication which was brought to the prosecutor's knowledge, and against the publisher of which he took no legal proceedings, is not admissible under this section. *R.* v. *Newman, Dears.* 85; 1 *E. & B.* 268. Where the plea contains several charges, and the defendant fails in proof of any of the matters alleged in it, the jury must of necessity find a verdict for the crown; and the court, in giving judgment, is bound to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and form its own conclusion on the whole case.—*Id.* 1 *E. & B.* 558.

The replication may be as follows:—*And as to the plea of the said* J. S., *by him secondly above pleaded, the said* A. B. (the clerk of assize or clerk of the peace) *saith that by reason of anything in the said second plea alleged, Our said Lady the Queen ought not to be precluded from further prosecuting the said indictment against the said* J. S., *because he saith, that he denies the said several matters in the said second plea alleged, and saith that the same are not, nor are nor is any or either of them, true. And this he the said* A. B. *prays may be inquired of by the country, etc. And the said* J. S. *doth the like. Therefore, etc.*

Indictment for treatening to publish a libel, etc., with intent to extort money, etc......unlawfully did threaten one J. N. to publish a certain libel of and concerning him the said J. N. (" *if any person shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly threaten to print or publish, or*

shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing of any matter or thing touching any other person"), with intent thereby then to extort money from the said J. N. *("with intent to extort any money or security for money, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust"). If it be doubtful whether the matter threatened to be published be libellous, add a count charging that the defendant* "did propose to the said J. N. to abstain from printing and publishing a certain matter and thing touching the said J. N. (or one J. F.) with intent, etc."

What is a libel? Duties of grand jurors on an indictment for libel.—*Chief Justice Dorion*, 10 *L. N.* 361.

Information for a libel.—*Ex parte Gugy*, 8 *L. C. R.* 353.

Under sec. 4, *ante*, and sec. 148 of the Procedure Act, the magistrate has no jurisdiction to receive evidence of the truth of the libel, upon an information.—*R.* v. *Carden*, 5 *Q. B. D.* 1, 14 *Cox*, 359.

In a case of libel, it is no ground to change the venue that a fair trial cannot be had in a particular venue, that many of the defendant's witnesses reside at a distance, and the defendant has no funds to bring them to that venue.—*R.* v. *Casey*, 13 *Cox*, 614.

On sec. 4 of the Act, see *R.* v. *Laurier*, 11 *R. L.* 184.—On sec. 5, see *R.* v. *Holbrook*, 3 *Q. B. D.* 60; 4 *Q. B. D.* 42; 13 *Cox*, 650; 14 *Cox*, 185. As to right of the Crown to set aside jurors in cases of libel, see *R.* v. *Pateson*, 36, *U. C. Q. B.* 127, and *R.* v. *Maguire*, 13 *Q. L. R.* 99, under sec. 165 of the Procedure Act, *post.*

It must be proved that the defendant was proprietor or publisher of the journal at the time of the publication of the libel. That he is at the time of the trial is not sufficient.—*R.* v. *Sellars*, 6 *L. N.* 197.

Under sec. 152 of the Procedure Act, *ante*, see R. v. Dougall, 18 L. C. J. 85.

The defendant was indicted for a malicious libel, and specially pleaded the truth of the libel as well as the plea of not guilty. Under this plea he endeavoured to prove justification. *Held*, that evidence not admissible, as, under the statute, to be allowed to justify, the defendant has to plead not only that the publication was true, but also that it was made for the public good.—*R.* v. *Hickson*, 3 *L. N.* 139.

See *R.* v. *Labouchère*, 14 *Cox*, 419, as to the sufficiency of a plea of justification.

As to what constitutes a guilty knowledge under section 2 of the Libel Act, and that it is for the jury to decide under a plea of justification if the statement complained of is true, and if it was published for the public benefit. *See R.* v. *Tassé*, 8 *L. N.* 98.

No action for libel by a wife against her husband.—*R.* v. *Lord Mayor*, 16 *Q. B. D.* 772; 16 *Cox*, 81.

On an accusation for libel, it is no defence that the libel was published with "no personal malice."—*R.* v. "*The World*," 13 *Cox*, 305.

On an indictment for publishing an obscene book, the passages of the book upon which the charge is brought must be set out.—*R.* v. *Bradlaugh*, 14 *Cox*, 68.

The truth of a seditious or blasphemous libel cannot be pleaded to an indictment for such libel. Sec. 4, *ante*, of the Act does not apply to such libels, but sec. 5 applies.—*R.* v. *Bradlaugh*, 15 *Cox*, 217; *R.* v. *Ramsay*, 15 *Cox*, 231. *Ex parte O'Brien*, 15 *Cox*, 180.

Held, 1. A criminal information (for libel) will not be granted except in case of a libel on a person in authority, and in respect of duties pertaining to his office.

2. Where a libel was directed against M., who was at the time attorney general, but alleged improper conduct upon his part when he was a judge, an information was refused.

3. The applicant for a criminal information must rely wholly upon the court for redress, and must come there entirely free from blame.

4. Where there is foundation for a libel, though it falls far short of justification, an information will not be granted. —*The Queen* v. *Biggs*, 2 *Man. L. R.* 18.

LARCENY.

GENERAL REMARKS.

Larceny is the wrongful taking and carrying away of the personal goods of any one from his possession, with a felonious intent to convert them to the use of the offender, without the consent of the owner; 2 *East, P. C.* 553; the word "felonious" showing that there is no color of right to excuse the act, and the "intent" being to deprive the owner permanently of his property.—*R.* v. *Thurborn*, 1 *Den.* 388; *R.* v. *Guernsey*, 1 *F. & F.* 394; *R.* v. *Holloway*, 1 *Den.* 370; 3 *Burn*, 198; 2 *Russ.* 146, *note by Greaves; R.* v. *Middleton*, 12 *Cox*, 417.

It is not, however, an essential ingredient of the offence that the taking should be for a cause of gain, *lucri causâ*; a fraudulent taking, with intent wholly to deprive the owner of his property, or with intent to destroy it, is sufficient. But see *post*, on this question of intent in larceny.

Larceny is either *simple*, that is, unaccompanied by any other aggravating circumstance, or *compound*, that is, when it is accompanied by the aggravating circumstances of taking from the house or person, or both.

Larceny was formerly divided into grand larceny and petit larceny; but this distinction is now abolished. See *post*, sect. 3 of the Larceny Act.

By sect. 36 of the said Act, a more severe punishment may be inflicted when the value of the article stolen is over two hundred dollars, but then this value must be alleged in the indictment and duly proved on

the trial, otherwise the larceny is punishable under section 5 of the said Act.

The requisites of the offence are:

1. *The taking.*
2. *The carrying away.*
3. *The goods taken.*
4. *The owner of the goods.*
5. *The owner's dissent from the taking.*
6. *The felonious intent in taking.*

1.—THE TAKING.

To constitute the crime of larceny, there must be a taking or severance of the thing from the actual or constructive possession of the owner; for all felony includes trespass, and every indictment must have the words *feloniously took* as well as *carried away;* from whence it follows that, if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away.—1 *Hawkins, p.* 142. As in the case of a wife carrying away and converting to her own use the goods of her husband, for husband and wife are one person in law, and, consequently, there can be no taking so as to constitute larceny; 1 *Hale,* 514, and the same if the husband be jointly interested with others in the property so taken.—*R.* v. *Willis,* 1 *Moo. C. C.* 375.

The taking, however, may be by the hand of another; 2 *East, P. C.* 555; as if the thief procure a child within the age of discretion to steal goods for him, it will be the same as if he had taken them himself, and the taking in such case should be charged to him.—1 *Hale,* 507.

The possession of the owner may be actual or constructive; that is, he may have the goods in his manual possession, or they may be in the actual possession o

another, and at the same time be constructively in the owner's possession; and they may be his property by virtue of some contract, and yet not have been reduced by him into actual possession; in which case, his possession is constructive, as by placing them under his servant's care to be by him managed for him.

But besides the actual and constructive possession in the owner, who at the same time has the property in him, there is a possession distinct from the actual property, although arising out of an interest in the goods, acquired by contract, as in the case of one who has possession of goods in pledge, or of goods lent, or let. Such an one has a property, as well as possession, concurrent with the absolute property of the real owner, and either defeasible or reducible into an absolute property, according to the terms agreed upon between him and the actual owner.

Either of the above kinds of possession will be sufficient to sustain an indictment of larceny from the absolute owner.—3 *Burn*, 201.

This part of the law on larceny is laid down as follows in the draft of a Criminal Code for Canada, introduced in the Legislative Assembly, in 1850, by Mr. Justice Badgley, then Attorney General: "To constitute larceny, a thing must be owned by, or be the general or special property of some one, or belong to him, either by a proprietory or possessory right thereto. A proprietory right is that of one having a general or special property in a thing. A possessory right is that of one having and being entitled to the possession of a thing. One having the authorized custody of or being entrusted with a thing, so as to be answerable therefor, or for the value thereof, has a possessory right thereto. The

actual possession of a thing by any one is the constructive possession of all who have proprietory or possessory rights therein, general or special, absolute or qualified. A proprietory or a possessory right to a thing by one constitutes him the owner thereof as to larceny thereof by another."

As very nice questions frequently arise, as to what will amount to a sufficient taking, where the owner of the chattels has delivered them to the party accused, or to a third person, the subject will be inquired into in the following order:

1. *The taking where the owner has delivered the chattels, under a bare charge.*

2. *The taking where the possession of the goods has been obtained animo furandi.*

3. *The taking where the possession of the goods has been obtained bonâ fide, without any fraudulent intention in the first instance.*

4. *The taking where the offender has more than a special property in the goods.*—3 *Burn*, 201.

1. *The taking where the offender has a bare charge.*

The books notice cases in which, although the manual custody be out of the owner, and delivered by him to another, yet the possession, absolute as well as constructive, is deemed to remain in him, and the possession of the other to be no more than a bare charge.

Upon this difference between a possession and a charge, Lord Coke says: "There is a diversity between a possession and a charge: for, when I deliver goods to a man, he hath the possession of the goods, and may have an action of trespass if they be taken or stolen out of his possession. But my butler, or cook, that in my house hath charge of my vessels or plate, hath no possession of them,

nor shall have an action of trespass as the bailee shall; and, therefore, if they steal the plate, etc., it is larceny, and so it is of a shepherd, for these things be in *onere et non in possessione promi, coci, pastoris*, etc."

So he says: "If a taverner set a piece of plate before a man to drink in it, and he carry it away, it is larceny; for it is no bailment, but a special use to a special purpose."

The servant who keeps a key to my chamber may be guilty of felony in fraudulently taking away the goods therein, for he hath only a bare charge given him. And where a person employed to drive cattle sells them, it is larceny, for he has the custody merely, and not the right to the possession.—*R.* v. *McNamee*, 1 *Moo. C. C.* 368; although the intention to convert them were not conceived until after they were delivered to him.—*R.* v. *Harvey*, 9 *C. & P.* 353; *R.* v. *Jackson*, 2 *Moo. C. C.* 32. So a carter going away with his master's cart was holden to have been guilty of felony.—*R.* v. *Robinson*, 2 *East, P. C.* 565. If A. ask B., who is not his servant, to put a letter into the post, telling him that it contains money, and B. break the seal and abstract the money before he puts the letter in the post, he is guilty of larceny.—*R.* v. *Jones*, 7 *C. & P.* 151.

So if a master deliver property into the hands of a servant for a special purpose, as to leave it at the house of a friend, or to get change, or to deposit it with a banker, the servant will be guilty of felony in applying it to his own use; for it still remains in the constructive possession of its owner.—1 *Leach*, 302; 2 *Leach*, 870.

So where a lady asked the prisoner to get a railway ticket for her, and handed him a sovereign to pay for it, which he took, intending to steal, and instead of getting the ticket, ran away; it was held to be larceny.—*R.* v. *Thompson*, *L. & C.* 225.

If a banker's clerk is sent to the money room to bring cash for a particular purpose, and he takes the opportunity of secreting some for his own use, 1 *Leach*, 344; or if a tradesman intrust goods to his servant to deliver to a customer, and he appropriate them to himself, the parties are respectively guilty of larceny.—*R.* v. *Bass*, 2 *East, P. C.* 566; 1 *Leach*, 251; 1 *Cowp.* 294.

And if several people play together at cards, and deposit money for that purpose, not parting with their property therein, and one sweep it all away and take it to himself, he will be guilty of larceny, if the jury find that he acted with a felonious design.—1 *Leach*, 270; *R.* v. *William*, 6 *C. & P.* 390; *R.* v. *Robson*, *R. & R.* 413.

And if a bag of wheat be delivered to a warehouseman merely for safe custody, and he takes all the wheat out of the bag, and dispose of it, it is larceny.—*R.* v. *Brazier*, *R. & R.* 337.

An unauthorized gift by the servant of his master's goods is as much a felony as if he sold or pawned them.—*R.* v. *White*, 9 *C. & P.* 344.

Where goods have not been *actually* reduced into the owner's possession, yet, if he has intrusted another to deliver them to his servant, and they are delivered accordingly, and the servant embezzle them, he may be guilty of larceny.—*R.* v. *Spears*, 2 East, P. C. 568; *R.* v. *Abrahat*, 2 *East, P. C.* 569; *R.* v. *Reed*, *Dears.* 257.

On the trial of an indictment for larceny as a servant it appeared that the prisoner lived in the house of the prosecutor, and acted as the nurse to her sick daughter, the prisoner having board and lodging and occasional presents for her services, but no wages; while the prisoner was so residing, the prosecutor's wife gave the prisoner money to pay a coal bill, which money the prisoner kept, and brought

back a forged receipt to the coal bill: *Held*, that the prisoner was not the servant of the prosecutor, but that this was a larceny of the money.—*R.* v. *Frances*, 1 *C. & K.* 423.

These several cases were all founded upon the master having an actual or legal possession, prior to the delivery to the servant. But there are others in which the master has neither *property* nor *possession* in the goods, previously to the receipt of them by his servant from a third person, for the purpose of delivering them to him. And it has been held, that a servant so receiving goods, and then embezzling them, is not guilty of larceny at common law.—2 *East, P. C.* 568.

Therefore, if a shopman receive money from a customer of his master, and, instead of putting it into the till, secrete it, *R.* v. *Bull*, 2 *Leach*, 841; or if a banker's clerk receive money at the counter, and, instead of putting it into the proper drawer, purloin it, *R.* v. *Bazely*, 2 *Leach*, 835; or receive a bond for the purpose of being deposited in the bank, and, instead of depositing it, convert it to his own use, *R.* v. *Waite*, 1 *Leach*, 28: in these cases it has been holden that the clerk or shopman is not guilty of larceny, at common law.

But now, this offence is punishable under sec. 52 of the Larceny Act. See *post*.

2. *The taking where the possession of the goods has been obtained animo furandi.* Where the offender unlawfully acquired the possession of goods, as by fraud or force, with an intent to steal them, the owner still retaining his property in them, such offender will be guilty of larceny in embezzling them. Therefore, hiring a horse on pretence of taking a journey, and immediately selling it, is larceny; because the jury found the defendant acted

animo furandi in making the contract, and the parting with the *possession* merely had not changed the nature of the property.—*R.* v. *Pear*, 1 *Leach*, 212. And so, where a person hires a post-chaise for an indefinite period, and converts it to his own use, he may be convicted of larceny, if his original intent was felonious.—*R.* v. *Sample*, 1 *Leach*, 420.

So, where the prisoner, intending to steal the mail bags from the post office, procured them to be let down to him by a string, from the window of the post office, under pretence that he was the mail guard, he was held guilty of larceny.—*R.* v. *Pearce*, 2 *East*, *P. C.* 603.

Where the prisoner was hired for the special purpose of driving sheep from one fair to another, and, instead of doing so, drove them, the following morning after he received them, a different road, and sold them; the jury having found that, at the time he received the sheep, he intended to convert them to his own use, and not drive them to the specified fair, the judges were unanimously of opinion that he was rightly convicted of larceny.—*R.* v. *Stock*, 1 *Moo. C. C.* 87.

Where the prisoner covered some coals in a cart with slack, and was allowed to take the coals away, the owner believing the load to be slack, and not intending to part with his property in the coals, it was held a larceny of the coals.—*R.* v. *Bramley*, *L. & C.* 21.

Prevailing upon a tradesman to bring goods, proposed to be brought to a given place, under pretence that the price shall then be paid for them, and further prevailing upon him to leave them there in the care of a third person, and then getting them from that person without paying the price, is a felonious taking, if, *ab initio*, the intention was to get the goods from the tradesman and not pay for them.—*R.* v. *Campbell*, 1 *Moo. C. C.* 179.

In another case, a person by false pretences induced a tradesman to send by his servant to a particular house, goods of the value of two shillings and ten pence, with change for a crown piece. On the way, he met the servant, and induced him to part with the goods and the change for a crown piece, which afterwards was found to be bad. Both the tradesman and servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, though the former admitted that he intended to sell the goods, and never expected them back again: it was held that the offence amounted to larceny.—*R.* v. *Small*, 8 *C. & P.* 46.

The prosecutor met a man and walked with him. During the walk, the man picked up a purse, which he said he had found, and that it was dropped by the prisoner. He then gave it to the prisoner who opened it, and there appeared to be about forty pounds in gold in it. The prisoner appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public house and had some drink. Prisoner then showed some money, and said if the man would let him have ten pounds, and let him go out of his sight, he would not say what he would give him. The man handed what seemed to be ten pounds in money, and the prisoner and prosecutor then went out together. They returned, and prisoner appeared to give the ten pounds back and five pounds more. Prisoner then said he would do the same for the prosecutor, and by that means obtained three pounds in gold, and the prosecutor's watch and chain from him. The prisoner and the man then left the public house, and made off with the three pounds and the watch and chain. At the trial, the prosecutor said he handed the three pounds and the watch and chain to the men in terror,

being afraid they would do something to him, and not expecting they would give him five pounds. *Held*, that the prisoner was properly convicted of larceny.—*R.* v. *Hazell*, 11 *Cox*, 597.

Prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning. *Held*, that the conviction was right.—*R.* v. *Slowly, et al.*, 12 *Cox*, 269.

So, taking goods the prisoner has bargained to buy is felonious, if, by the usage, the price ought to be paid before they are taken, and the owner did not consent to their being taken, and the prisoner, when he bargained for them, did not intend to pay for them, but meant to get them into his possession and dispose of them for his own benefit, without paying for them.—*R.* v. *Gilbert*, 1 *Moo. C. C.* 185.

So, getting goods delivered into a hired cart, on the express condition that the price shall be paid for them before they are taken from the cart, and then, getting them from the cart, without paying the price, will be larceny, if the prisoner never had the intention to pay, but had, *ab initio*, the intention to defraud.—*R.* v. *Pratt*, 1 *Moo. C. C.* 250.

So, where the prosecutor, intending to sell his horse, sent his servant with it to a fair, but the servant had no authority to sell or deal with it in any way, and the defendants, by fraud, induced the servant to part with the possession of the horse, under color of an exchange for another, intending all the while to steal it; this was holden to be larceny.—*R.* v. *Sheppard*, 9 *C. & P.* 121.

So, where the prisoner, pretending to be the servant of a person who had bought a chest of tea deposited at the East India Company's warehouse, got a request paper and permit for the chest, and took it away with the assent of a person in the company's service who had the charge of it; it was held that this was larceny.—*R.* v. *Hench*, *R. & R.* 163.

Prisoner and a confederate went to prosecutor's shop to buy something, and put down a florin in payment. Prosecutor put the florin into the till and placed the change on the counter, which the prisoner took up. The confederate said, "You need not have changed," and threw down a penny on the counter, which the prisoner took up, and put a sixpence in silver and sixpence in copper down, and asked prosecutor to give him a shilling for it. Prosecutor took a shilling from the till, and put it on the counter when prisoner said, "You may as well give me the florin back and take it all." Prosecutor took the florin from the till, and put it on the counter, expecting to receive two shillings of the prisoner's money in lieu of it. Prisoner took up the florin, and prosecutor took up the silver sixpence and the sixpence in copper, and the shilling put down by herself, and was putting them in the drawer, when she saw that she had only got one shilling of the prisoner's money and her own shilling: but, at that moment, her attention was diverted by the confederate, and both confederate and prisoner quitted the shop. *Held*, upon a case reserved, that this was a case of larceny, for the transaction of exchange was not complete: prosecutor had not parted with the property in the florin.—*R.* v. *McKale*, 11 *Cox*, 32.

On the other hand, if the owner give his property voluntarily, whatever false pretence be used to obtain it, no felony can be committed.—1 *Hale*, 506; *R.* v. *Adams*, *R. & R.* 225.

Thus, where, in a case of ring-dropping, the prisoners prevailed on the prosecutor to buy the share of the other party, and the prosecutor was prevailed on to part with his money, intending to part with it for ever, and not with the possession of it only, it was held by Coleridge, J., that this was not a larceny.—*R.* v. *Wilson*, 8 *C. & P.* 111.

It was the duty of the prisoner to ascertain the amount of certain dock dues payable by the prosecutors, and having received the money from their cash keeper, to pay the dues to those who were entitled to them. He falsely represented a larger sum to be due than was due, and, paying over the real amount, converted the difference to his own use. This was held not to be a larceny.—*R.* v. *Thompson*, *L. & C.* 233.

So, where the prisoner was sent by his fellow workmen to get their wages, and received the money from the employer done up in separate pieces of paper, and converted the money to his own use, it was held upon an indictment laying the property in the employer that the prisoner could not be convicted, he being the agent of the workmen.—*R.* v. *Barnes*, 12 *Jur. N. S.* 549. *And see* *R.* v. *Jacobs*, 12 *Cox*, 151, *post.*

A cashier of a bank has a general authority to part with his employer's money in payment of such cheques as he may think genuine; where, therefore, money has been obtained from a cashier at a bank on a forged cheque knowingly, it does not amount to the crime of larceny. *R.* v. *Prince*, 11 *Cox*, 193. In this case, Bovill, C. J., said: "The distinction between larceny and false pretences is very material. The one is a felony and the other a misdemeanor; and, although, by reason of modern legislation, it has become not of so much importance as formerly, it is still desirable to keep up the distinction. To constitute a

larceny, there must be a taking of the property against the will of the owner, which is the essence of the crime of larceny. The authorities cited by the counsel for the prisoner show that where the property has been obtained voluntarily from the owner, or a servant acting within the scope of his authority, the offence does not amount to larceny. The cases cited for the prosecution were cases where the servant who parted with the property had a limited authority only. In the present case, the cashier of the bank was acting within his authority in parting with the possession and property in the money. Under these circumstances the conviction must be quashed."

And if credit be given for the property, for ever so short a time, no felony can be committed in converting it.—2 *East, P. C.* 677.

Thus, obtaining the delivery of a horse *sold*, on promise to return immediately and pay for it, and riding off, and not returning, is no felony.—*R.* v. *Harvey*, 1 *Leach*, 467.

So, where the prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him a piece of silk, to be paid for on delivery, and upon the silk being sent accordingly, gave the servant who brought it bills which were mere fabrications, and of no value; it was holden not to be larceny on the ground that the servant *parted with the property* by accepting such payment as was offered, though his master did not intend to give the prisoner credit.—*Parke's Case*, 2 *Leach*, 614.

The prisoner, having entered into a contract with the prosecutors for the purchase of some tallow, obtained the delivery orders from the prosecutors, by paying over to them a cheque for the price of the tallow, and, when the

cheque was presented, there were no assets. *Held*, not to be a larceny of the delivery orders by a trick, but a lawful possession of them by reason of the credit given to the prisoner in respect of the cheque.—*R.* v. *North*, 8 *Cox*, 433.

So, fraudulently winning money at gaming, where the injured party really intended to pay, is no larceny, though a conspiracy to defraud appear in evidence.—*R.* v. *Nicholson*, 2 *Leach*, 610.

To constitute larceny, there must an original felonious design. Lord Coke draws a distinction between such as gain possession *animo furandi*, and such as do not. He says: "The intent to steal must be when it comes to his hands or possession; for if he hath the possession of it once lawfully, though he hath the *animus furandi* afterwards, and carrieth it away, it is no larceny." Therefore, where a house was burning, and a neighbor took some of the goods to save them, but afterwards converted them to his own use, it was held no felony.—1 *Leach*, 411.

But if the original intent be wrongful, though not a felonious trespass, a subsequent felonious appropriation is larceny. So, where a man drove away a flock of lambs from a field, and in doing so inadvertently drove away along with them a lamb, the property of another person, and, as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it. *Held*, that as the act of driving the lamb from the field in the first instance was a trespass, as soon as he resolved to appropriate the lamb to his own use, the trespass became a felony.—*R.* v. *Riley*, *Dears.* 149; 6 *Cox*, 88.

It is peculiarly the province of the jury to determine

with what intent any act is done; and, therefore, though, in general, he who has a possession of anything on delivery by the owner cannot commit larceny thereof; yet, that must be understood, first, where the possession is absolutely changed by the delivery, and next, where such possession is not obtained by fraud, and with a felonious intent. For, if, under all the circumstances of the case, it be found that a party has taken goods from the owner, although by his delivery, with an intent to steal them, such taking amounts to felony.—2 *East, P. C.* 685.

Overtures were made by a person to the servant of a publican to induce him to join in robbing his master's till. The servant communicated the matter to the master, and, some weeks after, the servant, by the direction of the master, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master, having previously marked some money, it was, by his direction, placed upon the counter by the servant, in order that it might be taken up by the party who had come for the purpose. It was so taken up by him. *Held*, larceny in such party. —*R.* v. *Williams*, 1 *C. & K.* 195.

3.—*The taking, where the possession of the goods has been obtained bonâ fide without any fraudulent intention in the first instance.*—If the party obtained possession of the goods lawfully, as upon a trust for, or on account of, the owner, by which he acquires a special property therein, he cannot *at common law* be afterwards guilty of felony in converting them to his own use, unless by some new and distinct act of taking, as by severing part of the goods from the rest, with intent to convert them to his own use, he thereby determines the privity of the bailment and the special property thereby conferred upon him.—1 *Hale*, 504; 2 *East, P. C.* 554.

But now, by sect. 4 of the Larceny Act., it is provided that: "Every one who being a bailee of any chattel, money or valuable security, fraudulently takes or converts the same to his own use, or to the use of any person other than the owner thereof, although he does not break bulk or otherwise determine the bailment, is guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction."

See *R.* v. *Wells*, 1 *F. & F.* 109, where it was held that a carrier who receiving money to procure goods obtained and duly delivered the goods, but fraudulently retained the money, may be convicted of larceny as a bailee.

A man cannot, however, be convicted of larceny as a bailee, unless the bailment was to re-deliver the *very same* chattel or money.—*R.* v. *Hoare*, 1 *F. & F.* 647; *R.* v. *Garrett*, 2 *F. & F.* 14; *R.* v. *Hassall*, *L. & C.* 58.

The prisoner was intrusted by the prosecutor with money to buy a load of coals, which were to be brought to the prosecutor's by the prisoner in his own cart, the prisoner being paid for his services, including the use of his horse and cart. He bought a load of coals in his own name, and on the way to the prosecutor's abstracted a portion of the coal and converted it to his own use, delivering the rest of the coal to the prosecutor as and for the whole load. *Held*, that he was rightly convicted of larceny as a bailee.—*R.* v. *Bunkall*, *L. & C.* 371; 9 *Cox*, 419.

A carrier employed by the prosecutor to deliver in his, the prisoner's, cart, a boat's cargo of coals to persons named in a list, to whom only he was authorized to deliver them, and having fraudulently sold some of the coals and appropriated the proceeds, is properly convicted of larceny as a bailee.—*R.* v. *Davies*, 10 *Cox*, 239.

It seems that a married woman may be a bailee within the meaning of sect. 4 of the Larceny Act; *R.* v. *Robson*, *L. & C.* 93, notwithstanding a previous ruling to the contrary by Martin, B., in *R.* v. *Denmour*, 8 *Cox*, 440.

See, *post*, remarks under section 4 of the Larceny Act.

4. *The taking where the offender has more than a special property in the goods.* If the goods of a husband be taken with the consent or privity of the wife, it is not larceny.—*R.* v. *Harrison*, 1 *Leach*, 47 ; *R.* v. *Avery*, *Bell*, *C. C.* 150.

However, it is said that if a woman steal the goods of her husband, and give them to her avowterer, who, knowing it, carries them away, the avowterer is guilty of felony ; *Dalt. c.* 104. And where a stranger took the goods of the husband *jointly* with the wife, this was holden to be larceny in him, he being her adulterer.—*R.* v. *Tolfree*, 1 *Moo. C. C.* 243, *overruling R.* v *Clarke*, 1 *Moo. C. C.* 376, *note a.*

Also, in *R.* v. *Featherstone*, *Dears.* 369, the prisoner was charged with stealing twenty-two sovereigns and some wearing apparel. The prosecutor's wife took from the prosecutor's bedroom thirty-five sovereigns and some articles of clothing, and left the house, saying to the prisoner, who was in a lower room : "It's all right, come on." The prisoner and the prosecutor's wife were afterwards seen together, and were traced to a public house, where they slept together. When taken into custody, the prisoner had twenty-two sovereigns on him. The jury found the prisoner guilty on the ground that he received the sovereigns from the wife, knowing that she took them without the authority of her husband. Upon a case reserved, it was held that the conviction was right. Lord Campbell, C. J., in delivering the judgment, said : " We are of opinion that this conviction is right. The general rule of law is, that a wife

cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases."—*See R.* v. *Berry, Bell, C. C.* 95, where the same principle was maintained.

And so it is, even though no adultery has been committed, but the goods are taken with the intent that the wife shall elope and live in adultery with the stranger.—*R.* v. *Tollett, C. & M.* 112; *R.* v. *Thompson*, 1 *Den.* 549.

And if a servant, by direction of his master's wife, carries off his master's property, and the servant and wife go off together with the property with the intention of committing adultery, the servant may be indicted for stealing the property.—*R.* v. *Muttere, L. & C.* 511.

It seems, however, that if a wife elopes with an adulterer, it is no larceny in the adulterer to assist in carrying away her necessary wearing apparel.—*R.* v. *Fitch, Dears. & B.* 187, overruling on this point the direction of Coleridge, J., in *R.* v. *Tollett*, cited *supra*.

The prisoner who had lodged at the prosecutor's house left it, and the next day the prosecutor's wife also left, taking a bundle with her, which, however, was not large enough to contain the things which, the evening she left, it was found had been taken from the house. Two days after, all the things were found in the prisoner's cabin, or on his person, in a ship in which the prosecutor's wife was, the prisoner and the prosecutor's wife having taken their passage in the ship as man and wife. It was held that from these facts the jury were justified in drawing the inference that the prisoner had received the property,

knowing it to have been stolen.—*R.* v. *Deer*, *L. & C.* 240. But an adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his house, in which the adultery is afterwards committed, merely upon evidence of their being there, unless they be traced to his personal possession.—*R.* v. *Rosenberg*, 1 *C. & K.* 233. When a wife absconds from the house of her husband with her avowterer, the latter cannot be convicted of stealing the husband's money missing on their departure, unless he be proved to have taken some active part, either in carrying away or in spending the money stolen.—*R.* v. *Taylor*, 12 *Cox*, 627.

Nor can an avowterer be found guilty of felonious receiving of the husband's property taken by the wife, as a wife cannot steal her husband's property.—*R.* v. *Kenny*, 13 *Cox*, 397.

The prisoner eloped with the prosecutor's wife, travelling in a cart which the wife took from her husband's yard. The prisoner sold the pony, cart and harness in the presence of the wife, who did not object to the sale, and received the proceeds which she retained after paying the prisoner a sovereign he had expended in obtaining lodging, while they were living in a state of adultery. *Held*, that the presence of the woman did not alter the offence; that the fact that he negotiated the sale and received part of the proceeds was sufficient; from the circumstances, the prisoner must have known that the pony, cart and harness were not the property of the woman; and that if the jury were of opinion he had that knowledge, they were bound to convict him. *R.* v. *Harrison*, 12 *Cox*, 19.—*R.* v. *Flatman*, 14 *Cox*, 396.

Under certain circumstances, indeed, a man may commit felony of his own goods; as if A. bail goods to B. and

afterwards, *animo furandi*, steal the goods from B. with design to charge him for the value of them, this is felony. —1 *Hale*, 513; 2 *East, P. C.* 558.

So where A. having delivered money to his servant to carry to a certain place, disguised himself, and robbed the servant on the road, with intent to charge the hundred, this was held robbery in A.—2 *East, P. C.* 558.

If a man steal his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the King, yet, if the bailee had an interest in the possession and could have withheld it from the owner, the taking is a larceny.—*R.* v. *Wilkinson, R. & R.* 470. But it is said in *Roscoe, Cr. Evid.* 597: "It may be doubted whether the law has not been somewhat distorted in this case in order to punish a flagrant fraud."

Bishop, 2 *Cr. L.* 790, says: "If one, therefore, has transferred to another a special property in goods, retaining in himself the general ownership, or, if the law has made such transfer, he commits larceny by taking them with felonious intent."

So if a man steal his goods *in custodiâ legis*. But "if the goods stolen were the general property of the defendant, who took them from the possession of one to whose care they had been committed, as, for instance, from an officer seizing them on an execution against the defendant, it must be shown that the latter knew of the execution and seizure; otherwise the required intent does not appear. The presumption, in the absence of such knowledge, would be, that he took the goods, supposing he had the right so to do."—2 *Bishop, Cr. proc.* 749.

If a part owner of property steal it from the person in whose custody it is, and who is *responsible for its*

safety, he is guilty of larceny.—*R.* v. *Bramley*, *R. & R.* 478. See *post*, sect. 58 of the Larceny Act, and remarks under it.

A wife may steal the goods of her husband which have been bailed or delivered to another person, or are in the possession of a person who has a temporary special property in them.—1 *Hale*, 513.

The wife cannot commit larceny in the company of her husband; for it is deemed his coercion, and not her own voluntary act. Yet, if she do in his absence, and, by his mere command, she is then punishable as if she were sole.—*R.* v. *Morris*, *R. & R.* 270; *R.* v. *Robson*, *L. & C.* 93.

Husband and wife were jointly indicted for stealing. The husband was in the employ of the prosecutors, and was seen near the spot when the property stolen arrived at the prosecutor's. The next day, the wife was seen near the spot where her husband was engaged on his work. She was at a place where there was no road, with a bundle concealed, and was followed home. On the following day, she pledged the stolen property at two different places. At one of the places, where she was not known, she pledged it in a false name. *Held*, that, upon this evidence, the wife might be convicted of stealing the property.—*R.* v. *Cohen*, 11 *Cox*, 99.

The doctrine of coercion, as applicable to a crime committed by a married woman in the presence of her husband, only raises a disputable presumption of law in her favor, which is, in all cases, capable of being rebutted by the evidence: this disputable presumption of law exists in misdemeanors as well as in felonies, and the question for the jury is the same in both cases; the doctrine in question applies to the crime of robbery with violence

Semble; where a man and woman are indicted together for a joint crime, and it appears from the evidence for the prosecution that they had lived together for some months as husband and wife, having with them an infant who passed as their child, it is not necessary for the woman to give evidence of her marriage in order to entitle her to the benefit of the doctrine of coercion, although the indictment does not describe her as a married woman.—*R.* v. *Torpey*, 12 *Cox*, 45.

2.—THE CARRYING AWAY.

To constitute larceny, there must be a *carrying away*, asportation, as well as a taking. The least removing of the thing taken *from the place where it was before* is sufficient for this purpose, though it be not quite carried off. And, upon this ground, the guest, who, having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. So, also, was he, who, having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. And such was the case of him who, intending to steal plate, took it out of the trunk wherein it was, and laid it on the floor, but was surprised before he could remove it any further.—2 *East, P. C.* 555; 3 *Burn*, 214. Or if a servant, *animo furandi*, take his master's hay from his stable, and put it into his master's waggon.—*R.* v. *Gruncell*, 9 *C. & P.* 365.

H. was indicted for stealing a quantity of currants, which were packed in the forepart of a waggon. The prisoner had laid hold of this parcel of currants, and had got near the tail of the waggon with them, when he was apprehended; the parcel was afterwards found near the middle

of the waggon. On this case being referred to the twelve judges, they were unanimously of opinion that, as the prisoner had *removed* the property from the spot where it was originally placed, with intent to steal, it was a *taking and carrying away.*—*Coslett's Case*, 2 *East, P. C.* 556.

Prisoner had lifted up a bag from the bottom of a boot of a coach, but was detected before he had got it out; it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specified part occupied: *Held*, that this was a complete *asportation.*—*R.* v. *Walsh*, 1 *Moo. C. C.* 14.

The offence of simple larceny is complete, if the defendant drew a book from the inside pocket of the prosecutor's coat about an inch above the top of the pocket, though the prosecutor then suddenly putting up his hand, the defendant let the book drop, and it fell back into the prosecutor's pocket.—*R.* v. *Thompson*, 1 *Moo. C. C.* 78.

On the other hand, a mere change of *position* of the goods will not suffice to make out a carrying away. So, where W. was indicted for stealing a wrapper and some pieces of linen cloth, and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid length-way in a waggon, and that the prisoner set up the wrapper on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken anything; all the judges agreed that this was no larceny, although his intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were; and the felon, must, for the instant at least, have the entire and absolute possession of them.—*R.* v. *Cherry*, 2 *East, P. C.* 556.

So, where one had his keys tied to the strings of his purse in his pocket, which W. attempted to take from him, and was detected with the purse in her hand; but the strings of the purse still hung to the owner's pocket by means of the keys; this was ruled to be no asportation. —*Wilkinson's case*, 1 *Leach*, 321.

So in another case, where A. had his purse tied to his girdle, and B. attempted to rob him: in the struggle, the girdle broke, and the purse fell to the ground, B. not having previously taken hold of it, or picked it up afterwards, it was ruled to be no taking.—1 *Hale*, 533.

Upon an indictment for robbery, the prisoner was found to have stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down, or he would shoot him; on which the prosecutor laid the bed on the ground, but the prisoner was apprehended before he could take it up so as to remove it from the spot where it lay, the judges were of opinion that the offence was not complete.—*Farrell's case*, 2 *East, P. C.* 557.

Where the prisoner, by means of a pipe and stopcock turned off the gas belonging to a company before it came into the meter, and so consumed the gas, it was held that there was a sufficient severance of the gas in the entrance pipe to constitute an *asportavit*.—*R.* v. *White*, 1 *Dears. & B.* 203.

The same principle was upheld in R. v. Firth, 11 Cox, 234; see *post*, under section 202 of the Procedure Act.

In the cases cited before the two last preceding, a verdict of guilty of an attempt to commit the offence charged could now be given, under section 183 of the Procedure Act.

If the thief once take possession of the thing, the offence is complete, though he afterwards return it.—3 *Burn*, 215.

Where it is one continuing transaction, though there be several distinct asportations in law by several persons, yet all may be indicted as principals, who concur in the felony before the final carrying away of the goods from the virtual custody of the owner; 2 *East, P. C.* 557; and if several persons act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and another of them entice him away, that the man who has his goods may carry them off, all are guilty of felony; the receipt by one is a felonious taking by all.—*R.* v. *Standley, R. & R.* 305.

And where property which the prosecutors had bought, was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, who let other persons take away the cart, and dispose of the property for his benefit jointly with that of the other persons, it was held, that the carter's servant, as well as the other persons, was guilty of larceny at common law.—*R.* v. *Harding, R. & R.* 125.

3. THE GOODS TAKEN.

The property taken must, to constitute larceny at common law, be *personal* property, and of some intrinsic value, though it need not be of the value of some coin known to the law.—*R.* v. *Morris*, 9 *C. & P.* 349; 3 *Burn*, 216; *R.* v. *Walker*, 1 *Moo. C. C.* 155.

Things real, or which savour of the realty, choses in action, as deeds, bonds, notes, etc., cannot be the subject of larceny, at common law.

But now, for these, see the Larceny Act, *post;* as to larceny of stamps, see sec. 2. Larceny Act.

No larceny, at common law, can be committed of such

animals in which there is no property, either absolute or qualified; as of beasts that are *ferœ naturæ* and unreclaimed. But if they are reclaimed or confined, or are practically under the care and dominion of the prosecutor and may serve for food, it is otherwise.

So young pheasants, hatched by a hen, and under the care of the hen in a coop, although the coop is in a field at a distance from the dwelling-house, and although the pheasants are designed ultimately to be turned out and to become wild, are the subject of larceny.—*R.* v. *Cory*, 10 *Cox*, 23.

Partridges were reared from eggs by a common hen; they could fly a little, but still remained with the hen as her brood, and slept under her wings at night, and from their inability to escape were practically in the power and dominion of the prosecutor: *Held*, that they were the subject of larceny at common law—*R.* v. *Shickle*, 11 *Cox*, 189.

The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded, but was picked up or caught by the prisoner while it was alive but in a dying state: *Held*, that the indictment was not proved.—*R.* v. *Roe*, 11 *Cox*, 554.

Rabbits were netted, killed, and put in a place of deposit, viz: a ditch, on the land of the owner of the soil on which the rabbits were caught, and some three hours afterwards the poachers came to take them away, one of whom was captured by gamekeepers who had previously found the rabbits, and lay in wait for the poachers: *Held*, that this did not amount to larceny.—*R.* v. *Townley*, 12 *Cox*, 59. Water in the pipes of a company may be the subject of larceny.—*Ferens* v. *O'Brien*, 15 *Cox*, 332.

The flesh of such animals as are *ferœ naturæ* may be

the subject of larceny. In *R.* v. *Gallears*, 1 *Den.* 501, the prisoner was indicted for stealing a ham. The prisoner objected that it did not appear by the indictement that the article stolen was the subject of larceny; that it might have been the ham of an animal *feræ naturæ*, a wild boar, for instance, which had been stolen. Upon a case reserved the objection was overruled. "I don't understand the objection," said Patteson, J. "Supposing it turned out on proof to be the ham of a wild boar, why should the prisoner be at liberty to take it from the prosecutor without becoming criminally liable? The doctrine respecting the description of animals in an indictment applies only to live animals, not to parts of the carcasses of animals when dead, such as a boar's head. Do you find in works on natural history that there is any living animal called a ham?"

See the Larceny Act, *post*, as to larceny of pigeons, oysters, animals of different species, etc.

4. THE OWNER.

The goods taken, to constitute larceny, must be the property of another person, and not of the party taking them. But it has been seen, *ante*, that the owner, in certain cases, may commit larceny of his own goods.

See *post*, under head "Indictment."

5.—AGAINST OWNER'S CONSENT.

The taking must be against the will of the owner. The primary inquiry to be made is, whether the taking were *invito domino*, that is to say, without the will or approbation of the owner; for this is of the very essence of larceny and its kindred offence, robbery.—3 *Burn*, 218.

But where a servant, being solicited to become an

accomplice in robbing his master's house, informed his master of it, and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come: it was holden, that this conduct of the master was no defence to an indictment against the robbers.—*See Bishop*, 1 *Cr. L.* 262, *and* 2 *Cr. L.* 811.

An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. eleven pence, and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her one shilling, and refused to give her the nineteen shillings change: *Held*, that the prisoner could not be convicted upon this indictment of stealing nineteen shillings.—*R.* v. *Bird*, 12 *Cox*, 257.

B. making a purchase from the prisoner, gave him half a sovereign in mistake for a six pence. Prisoner looked at it and said nothing but put it into his pocket. Soon afterwards B. discovered the mistake, and returned and demanded the restoration of the half sovereign. Prisoner said "right, my boy; I'll give it to you," but he did not give it, and was taken into custody: *Held*, not to be a larceny.—*R.* v. *Jacobs*, 12 *Cox*, 151. Obtaining money from any one by frightening him, is larceny.—*R.* v. *Lovell*, 8 *Q. B. D.* 185.

6.—THE FELONIOUS INTENT.

The taking and carrying away must, to constitute lar-

ceny, be with a *felonious intent* entertained at the time of the taking.

Felony is always accompanied with an evil intention, and, therefore, shall not be imputed to a mere mistake or misanimadversion: as where persons break open a door in order to execute a warrant which will not justify such a proceeding: for in such case there is no *felonious* intention.—1 *Hawkins*, 142.

For it is the mind that make the taking of another's goods to be felony, or a bare tresspass only; but, because the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent or the contrary, the same must be left to the due and attentive consideration of the judge and jury: wherein, the best rule is, in doubtful matters, rather to incline to acquittal than conviction. Only, in general, it may be observed, that the ordinary discovery of a felonious intent is, the party doing it secretly, or, being charged with the goods, denying it.—1 *Hale*, 509.

And if goods be taken on claim of right or property in them, it will be no felony; at the same time, it will be matter of evidence whether they were, *bonâ fide*, so taken, or whether they were not taken from the person actually possessing them, with a thievish and felonious intent, and therefore, obtaining possession of goods by a fraudulent claim of right, or by a fraudulent pretence of law, and then running away with them, would be a felony.—1 *Hale*, 507. *Lemott's case and Farre's case, Kelyng's, C. C.*, 64, 65, *reprint by Stevens and Haynes.*

The prisoner had set wires, in which game was caught. The prosecutor, a game-keeper, took them away for the use of the lord of the manor, while the

prisoner was absent. The prisoner demanded his wires and game, with menaces, and under the influence of fear the prosecutor gave them up. The jury found that the prisoner acted under a *bonâ fide* impression that the game and wires were his property, and that he merely, by some degree of violence, gained possession of what he considered his own. It was held no robbery, there being no *animus furandi*.—*R.* v. *Hall*, 3 *C. & P.* 409.

And where a letter, directed to J. O. at St. Martin's Lane, Birmingham, inclosing a bill of exchange drawn in favor of J. O., was delivered to the defendant, whose name was J. O. and who resided near St. Martin's Lane, Birmingham; but, in truth, the letter was intended for a person of the name of J. O. who resided in New Hall Street; and the prisoner, who, from the contents of the letter, must have known that it was not intended for him, applied the bill of exchange to his own use; the judges held that it was no larceny, because at the time when the letter was delivered to him, the defendant had not the *animus furandi*.—*R. & Mucklow*, 1 *Moo. C. C.* 160;

And to constitute larceny, the intent must be to deprive the owner, not temporarily, but permanently, of his property. *R.* v. *Phillips*, 2 *East, P. C.* 662; *Archbold*, 326; 3 *Burn*, 220. But see *post*, sect. 85 of the Larceny Act, and remarks thereon.—*See R.* v. *Hemmings*, 4 *F. & F.* 50.

Money was given to the prisoner for the purpose of paying turnpike tolls at two gates on his journey. Twelve days afterwards, on being asked if he had paid the toll at one of the gates, the prisoner said he had not, that he had gone by a parish road which only crossed the road at that gate, and so no toll was payable there, and

that he had spent the money on beer for himself and his mates. The prisoner having been convicted of larceny of the money, but it not appearing on a case reserved as to whether the facts proved a larceny, and that the question of felonious intention had been distinctly left to the jury, the Court quashed the conviction.—*R.* v. *Deering*, 11 *Cox*, 298.

In all cases of larceny, the questions whether the defendant took the goods knowingly or by mistake; whether he took them *bonâ fide* under a claim of right or otherwise, and whether he took them with an intent to return them to the owner, or to deprive the owner of them altogether, and to appropriate and convert them to his own use, are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case.—1 *Leach.* 422; 3 *Burn*, 224.

Upon an indictment for larceny, it appeared that the prisoner had been instructed by the wife of the prosecutor to repair an umbrella. After the repairs were finished, and it had been returned to the prosecutor's wife, a dispute arose as to the bargain made. The prisoner thereupon carried away the umbrella as a security for the amount alleged by him to be due for repairing it. Blackburn, J., left it to the jury to say whether the taking by the prisoner was an honest assertion of his right, or only a colorable pretence to obtain possession of the umbrella: verdict, not guilty.—*R.* v. *Wade*, 11 *Cox*, 549.

A depositor in a post office savings bank obtained a warrant for the withdrawal of ten shillings, and presented it with his depositor's book to a clerk at the post office, who instead of referring to the proper letter of advice for ten shillings, referred by mistake to another letter of advice for eight pounds, sixteen shillings and ten pence, and placed

that sum upon the counter. The clerk entered eight pounds, sixteen shillings and ten pence in the depositor's book as paid, and stamped it. The depositor took up that sum and went away. The jury found that he had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the postmaster general when he took it up, and found him guilty of larceny. *Held*, by a majority of the judges, that he was properly convicted of larceny. Per Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman and Archibald, J. J., that the clerk and therefore, the postmaster general, having intended that the property in the money should belong to the prisoner through mistake, the prisoner knowing of the mistake, and having the *animus furandi* at the time, was guilty of larceny. Per Bovill, C. J., Kelly, C. B., and Keating, J., that the clerk, having only a limited authority under the letter of advice, had no power to part with the property in the money to the prisoner, and that therefore, the conviction was right. Per Pigott, B., that, before possession of the money was parted with, and while it was on the counter, the prisoner had the *animus furandi*, and took it up, and was therefore guilty of larceny. Per Martin, B., Bramwell, B., Brett, J., and Cleasby, B., that the money was not taken *invito domino*, and therefore that there was no larceny. Per Bramwell, B., and Brett, J., that the authority of the clerk authorized the parting with the possession and property in the entire sum laid down on the counter.—*R.* v. *Middleton*, 12 *Cox*, 260, 417.

Larceny by finding.—If a man lose goods, and another find them, and, not knowing the owner, convert them to his own use, this has been said to be no larceny, even although he deny the finding of them, or secrete them. But the doctrine must be taken with great limitation, and

can only apply where the finder *bonâ fide* supposes the goods to have been lost or abandoned by the owner, and not to a case in which he colors a felonious taking under that pretence.—*Archbold*, 330; *R.* v. *Kerr*, 8 *C. & P.* 176; *R.* v. *Reed*, *C. & M.* 306; *R.* v. *Peters*, 1 *C. & K.* 245; *R.* v. *Mole*, 1 *C. & K.* 417.

The true rule of law resulting from the authorities on the subject has been pronounced to be that "if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but, if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."—*R.* v. *Thurborn*, 1 *Den.* 388; *R.* v. *Dixon*, *Dears.* 580; *R.* v. *Christopher*, *Bell*, *C. C.* 27.

In *R.* v. *Moore*, *L. & C.* 1, on an indictment for stealing a bank note, the jury found that the prosecutor had dropped the note in the defendant's shop; that the defendant had found it there; that at the time he picked it up he did not know, nor had he reasonable means of knowing, who the owner was; that he afterwards acquired knowledge who the owner was, and after that converted the note to his own use; that he intended, when he found the note, to take it to his own use and deprive the owner of it, whoever he was; and that he believed, when he found it, that the owner could be found. It was held that upon these findings the defendant was rightly convicted of larceny. It is to be observed that in the last mentioned case, although the prisoner at the time he found the bank note did not know, nor had reasonable means of knowing who the owner was, yet that he *did*

believe at the time of the finding that the owner could be found.—*Archbold*, 330.

The case of *R.* v. *Glyde*, 11 *Cox*, 103, shows that the belief by the prisoner at the time of the finding of the chattel that he could find the owner is a necessary ingredient in the offence, and that it is not sufficient that he intended to appropriate the chattel at the time of finding it, and that he acquired the knowledge of who the owner was before he converted it to his own use. In that case, the prisoner found a sovereign on the highway, believing it had been accidentally lost; but, nevertheless, with a knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding it should become known to him who the owner was. The owner was speedily made known to him, and the prisoner refused to give up the sovereign. There was, however, no evidence that he believed, at the time of finding the sovereign, that he could ascertain who the owner was, and the prisoner was, therefore, held not guilty of larceny.

In *R.* v. *Deaves*, 11 *Cox*, 227, the facts were, that the prisoner's child, having found six sovereigns in the street, brought them to the prisoner, who counted them and told some bystanders that the child had found a sovereign. The prisoner and the child then went down the street to the place where the child had found the money, and found a half-sovereign and a bag. On the same evening, about two hours after the finding, the prisoner was told that a woman had lost money, upon which the prisoner told her informant to mind her own business, and gave her half a sovereign. It was held by the majority of the Irish Court of Criminal Appeal, that this case could not be distinguished from *R.* v. *Glyde*, *supra*; that there was nothing to show that at the time the child brought her the money, the prisoner

knew the property had an owner, or, at all events, to show that she was under the impression that the owner could be found, and that, therefore, the conviction of the prisoner for larceny must be quashed.

Prisoner received from his wife a ten pound Bank of England note, which she had found, and passed it away. The note was endorsed "E. May" only, and the prisoner, when asked to put his name and address on it by the person to whom he passed it, wrote on it a false name and address. When charged at the police station, the prisoner said he knew nothing about the note. The jury were directed that, if they were satisfied that the prisoner could, within a reasonable time, have found the owner, and if instead of waiting, the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted, but, upon a case reserved, it was held that the conviction was wrong, and that the jury ought to have been asked whether the prisoner, at the time he received the note, believed the owner could be found.—*R.* v. *Knight*, 12 *Cox*, 102.

It is clearly larceny if the defendant, at the time he appropriates the property, knows the owner; and, therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it which he kept and converted to his own use, it was holden to be larceny.—2 *Leach*, 952.

So if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is felony if he knows the owner, or if he took him or set him down at any particular place, where he might have inquired for him.—*R.* v. *Wynne*, 2 *East, P. C.* 664; *R.* v. *Lear*, 1 *Leach*, 415; *Archbold*, 331.

So, in every case, where the property is not, properly speaking, lost, but only mislaid, under circumstances which

would enable the owner to know where to look for and find it, as where a purchaser at a stall of the defendant in a market left his purse on the stall, the person who fraudulently appropriates property so mislaid is guilty of larceny. —*R.* v. *West, Dears.* 402.

And in every case, in which there is any *mark* upon the property by which the owner may be traced, and the finder, instead of restoring the property, converts it to his own use, such conversion will amount to larceny.—*R.* v. *Pope,* 6 *C. & P.* 346; *R.* v. *Mole,* 1 *C. & K.* 417; *R.* v. *Preston,* 2 *Den.* 353; *Archbold,* 331.

Doing an act openly doth not make it the less a felony, in certain cases. 3 *Burn,* 223. So, where a person came into a seamstress's shop, and cheapened goods, and ran away with the goods out of the shop, openly, in her sight, this was adjudged to be a felony.—*Chiser's Case, T. Raym.* 276.

Returning the goods will not purge the offence, if the prisoner took them originally with the intent of depriving the owner of them, and of appropriating them to his own use. In *R.* v. *Trebilcock, Dears. & B.* 453, the jury found the prisoner guilty, but recommended him to mercy, "believing that he intended immediately to return the property:" *Held,* that the conviction was right: the recommendation of the jury is no part of the verdict.

The felonious quality consists in the *intention* of the prisoner to defraud the owner, and to apply the thing stolen to his own benefit or use.—2 *Starkie on Evid.* 606.

The intent need not be *lucri causâ.*—3 *Burn,* 224; *R.* v. *Morfit, R. & R.* 307; *R.* v. *Gruncell,* 9 *C. & P.* 365; *R.* v. *Handley,* 1 *C. & M.* 547; *R.* v. *Privett,* 1 *Den.* 193; *R.* v. *Jones,* 1 *Den.* 188; *R.* v. *Cabbage, R. & R.* 292.

"The English courts seem to have overthrown the old notion of *lucri causâ*." "Will it be contended, asked Pollock, C. B., that picking a man's pocket, not to make yourself rich, but to make him poor, would not be a larceny?"—*R.* v. *Jones*, 1 *Den.* 188; 2 *Bishop, Cr. L.* 486.

Possession of stolen property recently after its loss, if unexplained is presumptive evidence that the party in, possession stole it. Such presumption will, however, vary, according to the nature of the property stolen, and whether it be or not likely to pass readily from hand to hand.—*R.* v. *Partridge*, 7 *C. & P.* 551; 3 *Burn*, 225; *Archbold*, 235.

Prisoner was found with dead fowls in his possession, of which he could give no account, and was tracked to a fowl house where a number of fowls were kept, and on the floor of which were some feathers corresponding with the feathers of one found on the prisoner, from the neck of which feathers had been removed. The fowl-house, which was closed over night, was found open in the morning, The spot where the prisoner was found was twelve hundred yards from the fowl-house, and the prosecutor, not knowing the number of fowls kept, could not swear that he had lost any: *Held*, that there was evidence to support a conviction for larceny.—*R.* v. *Mockford*, 11 *Cox*, 16.

On the first floor of a warehouse, a large quantity of pepper was kept in bulk. The prisoner was met, coming out of the lower room of the warehouse, where he had no business to be, having on him a quantity of pepper of the same kind as that in the room above. On being stopped, he threw down the pepper, and said, "I hope you will not be hard with me." From the large quantity in the warehouse, it could not be proved that any pepper had been taken from the bulk. It was objected that, as there was no direct

proof that any pepper had been stolen, the judge was bound to direct an acquittal, but the Court of Criminal Appeal held that there was evidence to warrant a conviction.—*R.* v. *Burton*, 6 *Cox*, 293.

Indictment.—The form of indictment for simple larceny, as given in Archbold, 313, is as follows:

The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... three pairs of shoes, and one waistcoat, of the goods and chattels of J. N., feloniously did steal, take and carry away, against the peace of Our Lady the Queen, her crown and dignity.

If the defendant has been guilty of other distinct acts of stealing, not exceeding three, committed by him against the same person within the space of six calendar months, one or two other counts, as the case may be, in the following from, may be added, under sect. 134 of the Procedure Act

And the Jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and within the space of six calendar months from the time of the committing of the said offence in the first count of this indictment, charged and stated, to wit, on ..... six silver teaspoons, of the goods and chattels of the said J. N., feloniously did steal, take and carry away; against the form of the statute in such case made and provided.

As to the punishment for simple larceny, see sects. 5 and 86 of the Larceny Act, *post*.

It is not necessary to allege the value of the property stolen, except where the value is of the essence of the offence, or has any bearing on the punishment, as by sect. 86 of the Larceny Act, where an additional punishment is decreed, in cases where the value of the property stolen exceeds two hundred dollars. But some value must be proved at the trial.—2 *Russ.* 344.

By sect. 195 of the Procedure Act, if upon the trial of any person indicted for larceny, it be proved that the defendant took the property in such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury may return as their verdict that the defendant is not guilty of larceny but is guilty of embezzlement. See this section and remarks under it, *post*.

And by section 198 of the Procedure Act, see *post*, if upon the trial of any person for larceny it appears that the offence proved amounts to an obtaining by false pretences, the jury may return as their verdict that the defendant is not guilty of larceny, but is guilty of obtaining by false pretences.

Also, by section 201 of the Procedure Act, if upon the trial of any person for larceny, the jury are of opinion that such person is not guilty of larceny, but are of opinion that he is guilty of an offence against the sec. 85 of the Larceny Act, they may find him so guilty.

But if the jury find a verdict of larceny, where the facts prove an embezzlement, or an obtaining by false pretences, or an offence against section 85 of the Larceny Act, the conviction is illegal.—*R.* v. *Gorbutt, Dears. & B.* 166; the offence found by the jury must be the offence proved.

By section 183 of the Procedure Act, if, on the trial of any person charged with any felony or misdemeanor it appears to the jury, upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, the jury may return as their verdict that the defendant is not guilty of the offence charged, but is guilty of an attempt to commit the same.

As to the venue, in indictments for larceny, etc., see sections 10, 11, 12, 16, 20, 21, 22, of the Procedure Act.

The time stated in the indictment need not be proved as laid; if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment, it will be sufficient. See sect. 128 of the Procedure Act.

The goods stolen must be proved to be the absolute or special property of the person named in the indictment. But any variance between the indictment and the evidence, in this respect, as well as in the description of the property stolen, may now be amended.

An indictment charged the prisoner with stealing nineteen shillings and six pence in money of the prosecutor. At the trial, it was objected that there was no case, for the evidence showed that if the prisoner was guilty of stealing anything, it was of stealing a sovereign. Thereupon the court amended the indictment by striking out the words "nineteen shillings and six pence" and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of stealing a sovereign. Upon a case reserved, the judges held that the court had power so to amend under 14-15 V., c. 100, s. 1, (sect. 238 of the Procedure Act).—*R.* v. *Gumble*, 12 *Cox*, 248; *R.* v. *Marks*, 10 *Cox*, 167.

See section 117 of the Procedure Act, as to cases where property need not be laid in any person.

See sections 118 and 119 of the said Procedure Act, as to stating the ownership, in cases of partnerships, joint-tenancies, or joint stock companies; also sections 120, 121, 122 of the said Act as to the statement of the ownership in certain other cases, and sections 129 and 130 as to the description of instruments and money in indictments.

Where goods are stolen out of the possession of the

bailee, they may be described in the indictment as the property of the bailor or of the bailee; but where a bailor steals his own goods from the bailee, they must be described as the goods of the bailee.—*Archbold*, 321, 322.

Prisoner was charged with stealing a mare, the property of E. The evidence was that prosecutor, in presence of the prisoner, agreed to buy of W. a mare for five pounds, and that W. assented to take a cheque for the five pounds. The prosecutor afterwards sent prisoner to W. with the cheque, and direction to take the mare to Bramshot farm. On the next day, prisoner sold a mare to S., which he said he had bought for five pounds. When charged before the magistrate with stealing E.'s mare, he said he sold the mare to S., with the intention of giving the money to E., but that he got drunk: *Held*, that that was sufficient evidence on which a jury might find that the mare sold to S. was the property of E.—*R.* v. *King*, 12 *Cox*, 134.

Prosecutor bought a horse, and was entitled to the return of ten shillings chap money out of the purchase money. Prosecutor afterwards, on the same day, met the seller, the prisoner, and others together in company, and asked the seller for the ten shillings, but said he had no change, and offered a sovereign to the prosecutor, who could not change it. The prosecutor asked whether any one present could give change: the prisoner said he could, but would not give it to the seller of the horse, but would give it to the prosecutor, and produced two half-sovereigns. The prosecutor then offered a sovereign of his own with one hand to the prisoner, and held out the other hand for change. The prisoner took the sovereign and put one half-sovereign only into the prosecutor's hand, and slipped the other into the hand of the seller, who refused to give it to the prosecutor, and ran off with it: *Held*, that the

indictment rightly charged the prisoner with stealing a sovereign.—*R.* v. *Twist*, 12 *Cox*, 509.

W. let a horse on hire for a week to C., who fetched the horse every morning from W.'s stable, and returned it after the day's work was done. The prisoner went to C. one day, just as the day's work was done, and fraudulently obtained it from him, by saying falsely "I have come for W.'s horse; he has got a job on, and wants it as quickly as possible." The same evening, the prisoner was found three miles off with the horse by a constable, to whom he stated that it was his father's horse, and that he was sent to sell it: *Held*, that the prisoner was rightly convicted of larceny on an indictment, alleging the property of the horse to be in W.—*R.* v. *Kendall*, 12 *Cox*, 598.

By section 135 of the Procedure Act, *post*, it is lawful to add a count or several counts for feloniously receiving the stolen property to any indictment for larceny, and *vice versâ*. And it is deemed more prudent always to do so. And where a prisoner is charged with stealing and receiving, the jury may convict of receiving, though the evidence might have warranted a verdict of guilty as principal in the second degree.—*R.* v. *Hilton*, *Bell. C. C.* 20; *R.* v. *Langmead*, *L. & C.* 427; *and Greaves' remarks upon it*, 3 *Russ.* 668.

See secs. 21 and 22 of the Procedure Act as to venue in certain cases; sec. 25 as to arrest without warrant of any person found committing any offence against the Larceny Act; sec. 52 as to search warrants; sec. 125 as to indictments for stealing postal cards, stamps, etc.; sec. 127 as to indictments for stealing by lodgers; secs. 134 and 135 as to joinder of offences; secs. 195, 196, 198, 199, 201, 202 as to verdict in certain cases; secs. 250 and 251 as to restitution of stolen property.

To obtain money by the trick known as "ringing the changes" is larceny.—*R.* v. *Hollis*, 15 *Cox*, 345.

A. was indicted for larceny under the following circumstances:—R., intending to lend A. a shilling, handed him a sovereign, believing it to be a shilling. A., when he received the sovereign, believed it to be a shilling, and did not know until subsequently that it was not a shilling. Immediately A. became aware that it was a sovereign, and although he knew that R. had not intended to part with the possession of a sovereign, but only with the possession of a shilling, and although he could easily have returned the sovereign to R., fraudulently appropriated it to his own use. Prisoner convicted of larceny. Upon a case reserved, seven judges held the conviction right, and seven were of opinion that these facts did not constitute larceny.—*R.* v. *Ashwell*, 16 *Cox*, 1.

In *R.* v. *Flowers*, 16 *Cox*, 33, *held*, that where money or goods have been innocently received, a subsequent fraudulent appropriation will not render the receiver guilty of larceny, the above lastly cited case not being an authority to the contrary.

A declaration made by a prisoner tried on an indictment for larceny, before he was charged with the crime in answer to a question asked him where he got the property, is evidence on his behalf.

On the trial of an indictment for larceny of a watch, the prisoner's counsel called a witness, W., who stated that the prisoner was drinking at a public house on the evening when the alleged offence was committed, and had the watch with him; that W. went home with the prisoner, and they sat down in the house; that while they where sitting there the prisoner fell upon the floor and the watch fell out of his pocket, and W. picked it up and asked him

where he got it. His answer to this question was rejected. The prisoner being convicted, it was *held* by the court on a case reserved, that the evidence should have been received, and the conviction was quashed.—*The Queen* v. *Ferguson*, 3 *Pugs. (N. B.)* 612.

H. and W. were jointly indicted for stealing. H. was found guilty, but the jury could not agree as to W. and were discharged from giving a verdict as to him. *Held*, that the verdict warranted the conviction of H.—*The Queen* v. *Hamilton and Walsh*, 23 *N. B. Rep.* 540.

CHAPTER 164.

AN ACT RESPECTING LARCENY AND SIMILAR OFFENCES.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

SHORT TITLE.

1. This Act may be cited as "*The Larceny Act.*"

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

(*a.*) The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehousekeeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to;

(*b.*) The expression "document of title to lands" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada, respecting registration of titles, and relating to such title;

(*c.*) The expression "trustee" means a trustee on some express trust created by some deed, will or instrument in writing, or a trustee of personal property created by parol, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the Province of Quebec, an "*administrateur;*" and the expression "trust," includes whatever is by that law an "*administration;*"

(*d.*) The expression "valuable security" includes any order, exchequer acquittance or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of Canada or of any Province thereof, or of the United Kingdom, or of Great Britain or Ireland, or of any British colony or possession, or of any foreign state, or in any fund of any body corporate company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security whatsoever, for money or for payment of money, whether of Canada or of any Province thereof, or of the United Kingdom, or of any British colony or possession, or of any foreign state, and any document of title to lands or goods as hereinbefore defined, and any stamp or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge, or other instrument evidencing payment of money, or the delivery of any chattel personal; and every such valuable security shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable, or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security;

(*e.*) The expression "property" includes every description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also not only such property as was originally in the possessi or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise, and also any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the Legislature of any Province of Canada, for the payment of any fee, rate or duty whatsoever, and whether still in the possession of the Crown, or of any person or corporation, or of any officer or agent of the Government of Canada, or of the Province by the authority of the Legislature whereof it was issued or prepared for issue; and such postal card or stamp shall be held to be a chattel, and to be equal in value to the amount of the postage, rate or duty which can be paid by it, and is expressed on its face in words or figures, or both;

(*f.*) The expression "cattle" includes any horse, mule, ass, swine, sheep or goat, as well as any neat cattle or animal of the bovine species, and whatever is the age or sex of the animal, and whether castrated or not, and by whatever technical or trivial name it is known, and shall apply to one animal as well as to many;

(*g.*) The expression "banker" includes any director of any incorporated bank or banking company;

(*h.*) The expression "writing" includes any mode in which and any material on which words or figures at length or abridged are written, printed or otherwise expressed, or any map or plan is inscribed;

(*i.*) The expression "testamentary instrument" includes any will codicil or any other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be, as after his death, whether the same relates to real or personal property, or both;

(*j.*) The expression "municipality" includes the corporation of any city, town, village, township, parish or other territorial or local division of any Province of Canada, the inhabitants whereof are incorporated or have the right of holding property for any purpose;

(*k.*) The night shall, for the purpose of this Act, be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day, and the day shall include the remainder of the twenty-four hours;

(*l.*) Whenever the having anything in the possession of any person is in this Act expressed to be an offence, then if any person has any such thing in his personal custody or possession, or knowingly or wilfully has any such thing in any dwelling-house or other building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter or thing is so had for his own use or benefit or for that of another, such person shall be deemed to have such matter or thing in his custody or possession within the meaning of this Act, and if there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, has any such thing in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of all of them.—32-33 *V.*, *c.* 21, *s.* 1. 35 *V.*, *c.* 33, *s.* 1, *part.* 40 *V.*, *c.* 29, *s.* 1. 24-25 *V.*, *c.* 96, *s.* 1, *Imp.*

SIMPLE LARCENY.

3. Every larceny, whatever is the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the distinction between grand and petit larceny was abolished.—32-33 *V.*, *c.* 21, *s.* 2. 24-25 *V.*, *c.* 96, *s.* 2, *Imp.*

Grand larceny was when the value of the thing stolen was above twelve pence; petit larceny, when the thing stolen was of the value of twelve pence or under. This distinction was abolished in England, on the 21st day of June, 1827.

LARCENY BY BAILEES.

4. Every one who, being a bailee of any chattel, money or valuable security, fraudulently takes or converts the same to his own use or to the use of any person other than the owner thereof, although he does not break bulk or otherwise determine the bailment, is guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.—32-33 *V.*, *c.* 21, *s.* 3. 24-25 *V.*, *c.* 96, *s.* 3, *Imp.*

See *R.* v. *Macdonald*, 15 *Cox*, 757, 15 *Q. B. D.* 323.

Greaves, on this clause, remarks: "Although there is no doubt that a person might have been convicted of any offence within this clause on a common indictment for larceny, *R.* v. *Haigh*, 7 *Cox*, 403, as it expressly enacts that the offender 'shall be guilty of larceny,' yet to prevent all doubt, it is provided (by the Consolidated Act) that the offender may be convicted on an indictment for larceny. It was *held*, that the bailment intended by the 20-21 V., c. 54, s. 4, was a deposit of something which was itself to be returned; and therefore a person with whom money had been deposited, who was under an obligation to return the amount, but not the identical coin deposited, was held not to be a bailee of the money within that section.—*R.* v. *Hassall*, *L. & C.* 58. The

object of this clause was simply to make those cases larceny, where the general property in the thing delivered was never intended to be parted with at all, but only the *possession*; where in fact the owner delivered the property to another under such circumstances as to deprive himself of the *possession* for some time, whether certain or uncertain, and whether longer or shorter, at the expiration or determination of which time the owner was to have restored to him the very same thing that had been so delivered. In order, therefore, to bring a case within this clause, in addition to the fraudulent disposal of the property, it must be proved, 1st. That there was such a delivery of the property as to divest the owner of the *possession*, and vest it in the prisoner for some time. 2nd. That at the expiration or determination of that time, the identical same property was to be restored to the owner. Proof of these facts will be all that is necessary under this clause. The decision in *R.* v. *Hassall* was clearly right, and will apply to the present clause."

The prisoner was a married woman living with her husband. They took in lodgers, but she exclusively had to deal with them. The prosecutor, who lodged with them, delivered to the prisoner, the woman, a box containing money to be taken care of. The prisoner stole the money, her husband being entirely innocent in the transaction. *Held*, that she was either guilty of simple larceny, or that she was a bailee, and guilty of larceny as a bailee, and by Pollock, C.B., and Martin, B., that a married woman may possibly be convicted of larceny as a bailee.—*R.* v. *Robson*, *L. & C.* 93. The authority of *R.* v. *Denmour*, 8 *Cox*, 440, in which it was held that a married woman could not be a bailee, must be regarded as shaken.—*Reporter's note*, *L. & C.* 97.

The proviso, says Greaves, was introduced to prevent the clause applying to the cases of persons employed in the silk, woollen, and other manufactures, who dispose of goods entrusted to them, and are liable to be summarily convicted under sundry statutes.

Who is a bailee What constitutes a bailment ..... "Bailment" (French, *bailler*), a compendious expression to signify a contract resulting from delivery. Sir William Jones has defined bailment to be "a delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions as soon as the purpose for which they are bailed shall be answered." He has again in the closing summary of his essay defined it in language somewhat different, as "a delivery of goods in trust, on a contract express or implied, that the trust shall be duly exercised and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed or be performed." Each of these definitions seems redundant and inaccurate, if it be the proper office of a definition to include these things only which belong to the genus or class. Both of these definitions suppose that the goods are to be restored or re-delivered. But in a bailment for sale, as in the case of a consignment to a factor, no re-delivery is contemplated between the parties. In some cases, no use is contemplated by the bailee, in others it is of the essence of the contract; in some cases time is material to terminate the contract; in others, time is necessary to give a new accessorial right. Mr. Justice Blackstone has defined a bailment to be "a delivery of goods in trust upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee." And in another place as a "delivery of goods to another person for a

particular use." It may perhaps be doubted, whether, although generally true, a faithful execution, if by faithful be meant a conscientious diligence or faithfulness, adequate to a due execution, or a particular use, if by use be meant an actual right of user by the bailee, constitutes an essential or proper ingredient in all cases of bailment. Mr. Chancellor Kent, in his commentaries, has blended, in some measure, the definitions of Jones and Blackstone. Without professing to enter into a minute criticism, it may be said that a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract express or implied to conform to the object or purpose of the trust. In the celebrated case of *Coggs* v. *Bernard, Lord Raym.* 909, 1 *Smith's L. C.* 177, Lord Holt divided bailments thus:

1. *Depositum*, or a naked bailment of goods, to be kept for the use of the bailor.

2. *Commodatum*, where goods or chattels that are useful are lent to the bailee *gratis*, to be used by him.

3. *Locato rei*, where goods are lent to the bailee to be used by him for hire.

4. *Vadium*, pawn or pledge.

5. *Locatio operis faciendi*, where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.

6. *Mandatum*, a delivery of goods to somebody, who is to carry them, or do something about them *gratis*. —*Wharton, law lexicon.* See also *R.* v. *Oxenham*, 13 *Cox*, 349.

A carrier who receives money to procure goods obtains and duly delivers the goods, but fraudulently retains the money, is within this section.—*R.* v. *Wells*, 1 *F. & F.* 109.

So one who takes a watch from the pocket of a tipsy man with his consent is a bailee of the watch.—*R.* v. *Reeves*, 5 *Jur. N. S.* 716.

The bailment intended is a deposit of something to be specifically returned, and therefore one who receives money with no obligation to return the identical coins received is not a bailee within the section.—*R.* v. *Hassall*, *L. & C.*, 58; *R.* v. *Garratt*, 2 *F. & F.* 14; *R.* v. *Hoare*, 1 *F. & F.* 647. See *R.* v. *de Banks*, 15 *Cox*, 450.

The prosecutor gave the prisoner money to buy half a ton of coals for him. He bought the coals and took a receipt in his own name, and used his own horse and cart to fetch them, but on the way home he appropriated a portion of the coals to his own use, and afterwards pretended to the prosecutor that he had delivered to him the full quantity: *Held*, that even if it was necessary to show a specific appropriation of the coals to the prosecutor, there was sufficient evidence of such appropriation, and that the prisoner was rightly convicted of larceny as a bailee.—*R.* v. *Bunkall*, *L. & C.* 371; 9 *Cox*, 419.

A carrier employed by the prosecutor to deliver in his, the prisoner's, cart a boat's cargo of coals to persons named in a list, to whom only he was authorized to deliver them, and having fraudulently sold some of the coals, and appropriated the proceeds, is properly convicted of larceny as a bailee.—*R.* v. *Davies*, 10 *Cox*, 239.

A., who was a trustee of a friendly society, was appointed by a resolution of the society to receive money from the treasurer and carry it to the bank. He received the money from the treasurer's clerk, but instead of taking it to the bank he applied it to his own purposes. He was indicted for stealing, as bailee of the money of the treasurer, and also for a common law larceny. The 18-19 V., c. 63, s.

18, vests the property of friendly societies in the trustees, and directs that in all indictments the property shall be laid in their names: *Held*, that A. could not be convicted either as a bailee or of a common law larceny.—*R.* v. *Loose*, *Bell*, *C. C.* 259; 8 *Cox*, 302.

On an indictment for larceny as a bailee, it appeared that the prisoner borrowed a coat from the prosecutor, with whom he lodged, for a day, and returned it. Three days afterwards he took it without the prosecutor's permission, and was seen wearing it by him, and he again gave him permission to wear it for the day. Some few days afterwards, he left the town, and was found wearing the coat on board a ship bound for Australia. Martin, B., stopped the case, stating that in his opinion there was no evidence of a conversion. There are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute; the determination of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. As for instance, in the case of a bailment of an article of silver for use, melting it would be evidence of conversion. So when money or a negotiable security is bailed to a person for safe keeping, if he spend the money or convert the security, he is guilty of a conversion within the statute. The prosecution ought to find some definite time at which the offence was committed. The taking the coat on board ship was subsequent to the prisoner's going on board himself.—*R.* v. *Jackson*, 9 *Cox*, 505.

Greaves, on this case, says: If the case is correctly reported it deserves reconsideration. The words are, "take *or* convert the same to his own use." The clause therefore does not require a conversion, but was studiously framed

to avoid the necessity of proving one. The evidence was sufficient to go to the jury that the prisoner took the coat on board for his own use with intent permanently to deprive the owner of it; and such a case seems clearly within the statute. Besides the case ought to have been left to the jury to say whether he did not return the coat to the prosecutor's house after the end of the last bailment for a day. If so the case was simply one of larceny.—3 *Russ.* 666.

M. was the owner of a wrecked ship. A. contracted with M. to save and recover the wrecked property. A. made a sub-contract with R. C. to act as diver and carry on the works of salvage; all goods saved to be forwarded to A., and the remuneration to be a percentage on the goods saved, but R. C. always to retain £150 as a guarantee. In his absence, R. C. put the defendant, his son, in charge of the wreck. The defendant corresponded with A. as to the sale of the salvage, and he was addressed by A. as a responsible party under the contract. A. deposed, however, that he had always considered R. C. as the party liable on the contract. The defendant sold and appropriated part of the salvage. The jury found that he did so *animo furandi*, but no question was asked them as to whether he was a bailee of A. *Held, dissentientibus*, Fitzgerald and George, J. J., that there was sufficient evidence to show that the defendant was a bailee so as to make him liable for larceny under the 4th section of the Larceny Act; also that the property was rightly laid in M.—*R.* v. *Clegg*, 11 *Cox*, 212.

A. delivered two brooches to the prisoner to sell for him at £200 for one, and £115 for the other, and the prisoner was to have them for a week for that purpose; but two or three days grace might be allowed. After ten days had elapsed, the prisoner sold them with other jewellery for £250, but arranged with the vendee that he might redeem

the brooches for £110 before September. *Held*, that this amounted to a fraudulent conversion of the brooches to his own use by a bailee, within sec. 4 of the Larceny Act.—*R.* v. *Henderson*, 11 *Cox*, 593.

A traveller was entrusted with pieces of silk, about 95 yards each, to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and adresses of the customers to whom any might have been sold, and the numbers, qualities and prices of the silk sold. All goods not so accounted for remained in his hands, and were counted by his employers as stock. At the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold silk. He was paid by a commission. Within six months after four pieces of silk had been delivered to him, the prisoner rendered an account of the same, and entered them as sold to two persons, with instructions to his employers to send invoices to the alleged customers. It turned out that this was false, and that he had appropriated the silk to his own use: *held*, on a case reserved, by the Court of Criminal Appeal unanimously, that the prisoner was rightly convicted of larceny as a bailee.—*R.* v. *Richmond*, 12 *Cox*, 495.

The prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on his, S.'s, marshes and had strayed, and a few days after that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them a long distance away on his own property to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. The jury found: 1. That at the time the prisoner found the heifers, he had reasonable expectation that the owner could

be found, and that he did not believe that they had been abandoned by the owner. 2. That at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently. 3. That the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use: *Held*, that a conviction of larceny, or of larceny as bailee, could not be sustained under the above circumstances.—*R.* v. *Matthews*, 12 *Cox*, 489; *R.* v. *Cosser*, 13 *Cox*, 187.

The prisoner was frequently employed by the prosecutor to fetch coals from C. Before each journey, the prosecutor made up to the prisoner £24, out of which he was to pay for the coals, keep 23 shillings for himself, and if the price of the coal, with the 23 shillings, did not amount to £24, to keep the balance in hand to the credit of the next journey. It was the prisoner's duty to pay for the coal, as he obtained it, with the money received from the prosecutor; and the prosecutor did not know but that he did so; but provided he was supplied with the coal, and not required to pay more than the proper price for it, it was immaterial to the prosecutor in what manner the prisoner paid for it. On the 20th of March, the prisoner had a balance of £3 in hand, and the prosecutor gave him £21 to make up £24 for next journey. The prisoner did not then buy any coal, but fraudulently appropriated the money: *Held*, that the conviction of the prisoner for larceny of the £21 as a bailee was right.—*R.* v. *Aden*, 12 *Cox*, 512. *See R.* v. *Tonkinson*, 14 *Cox*, 603; *R.* v. *Wynn*, 16 *Cox*, 231.

Boot and shoe manufacturers gave out to their workmen leather and materials to be worked up, which were entered in the men's books and charged to their debit. The men

might either take them to their own homes to work up, or work them up upon the prosecutor's premises; but in the latter case they paid for the seats provided for them. When the work was done they received a receipt for the delivery of the leather and materials and payment of the work. If the leather and materials were not re-delivered, they were required to be paid for. The prisoner Daynes was in the prosecutor's employ, and received materials for twelve pairs of boots; he did some work upon them, but instead of returning them sold them to the prisoner Warner. These materials were entered in the prosecutor's books to Daynes' debit, but omitted by mistake to be entered in Daynes' book: *Held*, that Daynes could not be convicted of larceny as a bailee, under the 3rd section of the Larceny Act, as the offence of which he had been guilty was punishable summarily under 13 Geo. 2, c. 8.—*R.* v. *Daynes*, 12 *Cox*, 514.

An indictment for larceny by a bailee may be in the general form of indictment for larceny at common law; and it is not necessary to allege that the defendant is a bailee.—3 *Burn*, 305.

The prisoner was indicted for larceny as a bailee of a sum of money. The complainant produced a receipt taken at the time of the deposit in the hands of the prisoner by which it appeared that the deposit was "en attendant le paiement qu'il pourrait faire d'une même somme à R. A. Benoit." *Held*, that this receipt implied that the prisoner was to pay a similar sum, and not actually the same pieces of money. That parol testimony could not be admitted to vary the nature of the transaction.—*R.* v. *Berthiaume*, 10 *L. N.* 365.

5. Every one who commits simple larceny or any felony hereby made punishable in the same manner as simple larceny is guilty of a

felony, and, except in the cases hereinafter otherwise provided for, is liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 4. 40 *V.*, *c.* 29, *s.* 3. 24-25 *V.*, *c.* 96, *s.* 4, *Imp.*

6. Every one who, having been convicted either summarily or upon indictment of a felony, commits the offence of simple larceny, is guilty of felony, and liable to ten years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 7 24-25 *V.*, *c.* 96, *s.* 7, *Imp.*

As to form of indictment and procedure in such cases, see Procedure Act, secs. 139 and 207, corresponding to s. 116 of the Imperial Larceny Act.

STEALING CATTLE.

7. Every one who steals any cattle is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 10. 24-25 *V.*, *c.* 96, *s.* 10, *Imp.*

See, *ante*, sect. 2, for the interpretation of the word *cattle*.

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... at ..... one horse of the goods and chattels of J. N. feloniously did steal, take and lead away; against the form ..... *(If the indictment be for stealing a bull or sheep, etc., say "drive away" instead of "lead away." The indictment must give the animal one of the descriptions mentioned in the statute; otherwise the defendant can be punished as for simple larceny merely.)*—*R.* v. *Beaney, R. & R.* 416; *Archbold*, 349.

If a person go to an inn, and direct the ostler to bring out his horse, and point out the prosecutor's horse as his, and the ostler leads out the horse for the prisoner to mount, but, before the prisoner gets on the horse's back, the owner of the horse comes up and seizes him, the offence of horse-stealing is complete.—*R.* v. *Pitman*, 2 *C. & P.* 243.

The prisoners enter another's stable at night, and take out his horses, and ride them 32 miles, and leave them at an inn, and are afterwards found pursuing their journey on foot. On a finding by the jury that the prisoners took the horses merely with intent to ride and afterwards leave them, and not to return or make any further use of them, *held*, trespass and not larceny.—*R.* v. *Philipps*, 2 *East, P. C.* 662.

If a horse be purchased and delivered to the buyer, it is no felony though he immediately ride away with it, without paying the purchase money.—*R.* v. *Harvey*, 1 *Leach*, 467.

If a person stealing other property take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony.—*R.* v. *Crump*, 1 *C. & P.* 658.

Obtaining a horse under the pretence of hiring it for a day, and immediately selling it, is a felony, if the jury find the hiring was *animo furandi*.—R. v. *Pear*, 1 *Leach*, 212; *R.* v. *Charlewood*, 1 *Leach*, 409. It is larceny (at common law) for a person hired for the special purpose of driving sheep to a fair, to convert them to his own use, the jury having found that he intended so to do at the time of receiving them from the owner.—*R.* v. *Stock*, 1 *Moo. C. C.* 87. Where the defendant removed sheep from the fold, into the open field, killed them, and took away the skins merely, the judges held that removing the sheep from the fold was a sufficient driving away to constitute larceny. —*R.* v. *Rawlins*, 2 *East, P. C.* 617.

But it has been questioned, whether the merely removing a live sheep for the purpose of killing it, with intent to steal part of the carcase, was an asportation of the live sheep, so as to constitute larceny of it.—*R.* v.

Williams, 1 *Moo., C. C.* 107.—*See* 2 *Russ.* 361, *and R.* v. *Yend*, 6 *C. & P.* 176.

Any variance between the indictment and the proof, in the description of the animal stolen, may now be amended. Sect. 238 Procedure Act.—*R.* v. *Gumble*, 12 *Cox*, 248.

8. Every one who wilfully kills any animal, with intent to steal the carcase, skin or any part of the animal so killed, is guilty of felony, and liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony.—32-33 *V.*, *c.* 21, *s.* 11. 24-25 *V.*, *c.* 96, *s.* 11, *Imp.*

Indictment ..... one sheep of the goods and chattels of J. N. feloniously and wilfully did kill, with intent feloniously to steal, take and carry away part of the carcase, that is to say, the inward fat of the said sheep, against the form .....

Cutting off part of a sheep, in this instance the leg, while it is alive, with intent to steal it, will support an indictment for killing with intent to steal, if the cutting off must occasion the sheep's death.—*R.* v. *Clay*, *R. & R.* 387.

So on the trial of an indictment for killing a ewe with intent to steal the carcase, it appeared that the prisoner wounded the ewe by cutting her throat, and was then interrupted by the prosecutor, and the ewe died of the wounds two days after. It was found by the jury who convicted the prisoner that he intended to steal the carcase of the ewe. The fifteen judges held the conviction right. —*R.* v. *Sutton*, 8 *C. & P.* 291. It is immaterial whether the intent was to steal the whole or part only of the carcase. —*R.* v. *Williams*, 1 *Moo. C. C.* 187.

9. Every one who steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic

purpose, *or for any lawful purpose of profit or advantage* not being the subject of larceny at common law, or wilfully kills any such dog, bird, beast or animal, with intent to steal the same, or any part thereof, shall, on summary conviction, be liable to a penalty not exceeding twenty dollar over and above the value of the dog, bird, beast or other animal, or to one month's imprisonment with hard labor;

2. Every one who, having been convicted of any such offence either against this or any other Act or Law, afterwards commits any offence in this section mentioned, is liable to three months' imprisonment with hard labor.—32-33 *V.*, *c.* 21, *s.* 12. 24-25 *V.*, *c.* 96, *ss.* 18-21, *Imp.*

The words in *Italics* are not in the English Act.

10. Every one who unlawfully and wilfully kills, wounds or takes any house-dove or pigeon under such circumstances as do not amount to larceny at common law, shall, on summary conviction, be liable to a penalty not exceeding ten dollars over and above the value of the bird.—32-33 *V.*, *c.* 21, *s.* 13. 24-25 *V.*, *c.* 96, *s.* 23, *Imp.*

This clause does not extend to killing pigeons under a claim of right.—*Taylor* v. *Newman*, 9 *Cox*, 314.

11. Every one who steals any oysters or oyster brood from any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, is guilty of felony, and liable to be punished as in the case of simple larceny;

2. Every one who unlawfully and wilfully uses any dredge or net instrument or engine whatsoever, within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none are actually taken, or unlawfully and wilfully with any net, instrument or engine, drags upon the ground of any such fishery, is guilty of a misdemeanor, and liable to three months' imprisonment;

3. Nothing in this section contained shall prevent any person from fishing for or catching any floating fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking floating fish only.—32-33 *V.*, *c.* 21, *s.* 14, *part.* 24-25 *V.*, *c.* 96, *s.* 26, *Imp.*

Indictment for sealing oysters or oyster brood.—..... from a certain oyster-bed called ..... the pro-

perty of J. N., and sufficiently marked out and known as the property of the said J. N., one thousand oysters feloniously did steal, take and carry away against the form .....,

Indictment for using a dredge in the oyster fishery of another.— ..... within the limits of a certain oyster-bed called ..... the property of J. N., and sufficiently marked out and known as the property of the said J. N., unlawfully and wilfully did use a certain dredge for the purpose of then and there taking oysters, against the form ..... —*Archbold*, 393.

In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence as, for instance, that the prosecutor and his father for 45 years had exercised the exclusive right of oyster fishing in the *locus in quo*, and that in 1846 an action had been brought to try the right, and the verdict given in favor of the prosecutor.—*R.* v. *Downing*, 11 *Cox*, 580.

See sec. 123 of the Procedure Act for form of indictment.

STEALING WRITTEN INSTRUMENTS.

12. Every one who steals or, for any fraudulent purpose, destroys, cancels, obliterates or conceals the whole or any part of any valuable security, other than a document of title to lands, is guilty of felony, of the same nature, and in the same degree, and punishable in the same manner as if he had stolen any chattel, of like value as the share, interest or deposit to which the security so stolen relates, or as the money due on the security so stolen or secured thereby and remaining unsatisfied, or as the value of the goods or other valuable thing represented, mentioned or referred to in or by the security.— 32-33 *V.*, *c.* 21, *s.* 15. 24-25 *V.*, *c.* 96, *s.* 27, *Imp.*

See R. v. Scott, 21 L. C. J. 225, reversed by Supreme Court, as follows :

S. was indicted, tried and convicted for stealing a note for the payment and value of $258.33, the property of A., McC. and another. The evidence showed that the promissory note in question was drawn by A., McC. and C. R., and made payable to S.'s order. The said note was given by mistake to S., it being supposed that the sum of $258.33 was due to him by the drawers, instead of a less sum of $145.00. The mistake being immediately discovered, S. gave back the note to the drawers, unstamped and unindorsed, in exchange for another note of $175.00. An opportunity occurring, S. afterwards, on the same day, stole the note; he caused it to be stamped, indorsed it, and tried to collect it.

Held, that S. was not guilty of larceny of "a note" or of a "valuable security," within the meaning of the statute, and that the offence for which he was guilty was not correctly described in the indictment.—*Scott* v. *The Queen*, 2 *S. C. R.* 349.

As to the interpretation of the words "valuable security," see, *ante*, sect. 2.

Indictment.— ..... a certain valuable security, other than a document of title to lands, to wit, one bill of exchange for the payment of ten pounds, the property of J. N., the said sum of ten pounds secured and payable by and upon the said bill of exchange being then due and unsatisfied to the said J. N., feloniously did steal, take and carry away, against the form .....

To constitute the offence it must be proved that the defendant stole the bill as stated. Where the defendant, a stockbroker, received from the prosecutor a cheque upon his banker, to purchase exchequer bills for him, and cashed the cheque, and absconded with the money, upon

an indictment for stealing the cheque and the proceeds of it, it was holden to be no larceny, although the jury found, that, before he received the cheque, the defendant had formed the intention of converting the money to his own use, not of the cheque, because the defendant had used no fraud or contrivance to induce the prosecutor to give it to him, and because being the prosecutor's own cheque, and of no value in his hands, it could not be called his goods and chattels, nor of the proceeds of the cheque, because the prosecutor never had possession of them, except by the hands of the defendant.—*R.* v. *Walsh*, *R. & R.* 215. But where the prosecutors gave to the defendant, who was occasionally employed as their clerk, a cheque payable to a creditor, to be delivered by him to the creditor, and he appropriated it to his own use, it was holden by the judges to be a larceny of the cheque. —*R.* v. *Metcalfe*, 1 *Moo. C. C.* 433; *R.* v. *Heath*, 2 *Moo. C. C.* 33.

With respect to what instrument or security is within the Act, the following decisions are cited:

At a conference of the judges in Easter term, 1781, Nares, J., mentioned that a person was convicted before him for privately stealing from the person of another a pocket-book containing a note of the Bristol Bank, signed by some one on behalf of himself and partners, promising to pay to the prosecutor or order a sum of money, but which the prosecutor had not indorsed. All the judges were of opinion that this was a capital felony within the statute, 2 Geo. 2, c. 25, which made the stealing promissory notes felony, with the same consequence as goods of the like purported value; that this was a promissory note, and that its not being indorsed was immaterial.—*Anon*, 2 *East, P. C.* 598.

So an indictment for stealing a bill of exchange in London was sustained by proof that, when found in the prisoner's possession there, it had an indorsement, made afterwards and not laid in the indictment, for the addition of a third name made no difference, it being the same bill that was originally stolen.—*Austin and King's Case*, 2 *East, P. C.* 602.

When one was compelled by duress to make a promissory note on stamped paper before prepared by the prisoner, who was present during the time, and withdrew the note as soon as it was made, this was holden not to be a felony within the statute. For according to some of the judges, that is confined to available securities in the hands of the party robbed, which this was not, being of no value while in the hands of the maker himself, yet even if it were, according to others, this was never in his possession, his signature having been procured by duress to a paper which during the whole continuing transaction was in possession of the prisoner.—*Phipoe's Case*, 2 *Leach*, 673. See now sec. 5, c. 173, *post.*

And where, in consequence of an advertisement, A. applied to B. to raise money for him, who promised to procure £5000, and produced ten blank 6 shillings stamps, across which A. wrote an acceptance, and B. took them up without saying anything, and afterwards filled up the stamps as bills for £500 each, and put them in circulation, it was holden by Littledale, Rolland and Bosanquet that the stamps so filled up were not bills of exchange, orders for the payment of money or securities for money within the meaning of the statute.—*R.* v. *Minter Hart*, 6 *C. & P.* 106.

This offence would now be punishable under sect. 78, *post.* *R.* v. *Danger, Dears. & B.* 307, would also now fall under the said section.

A cheque on a banker written on unstamped paper, payable to D. F. G., and not made payable to bearer, is not a valuable security, for it would be a breach in the law for the bankers to pay it.—*R.* v. *Yates*, 1 *Moo. C. C.* 170.

The case of *R.* v. *Clarke, R. & R.* 182, where the prisoner was indicted for stealing re-issuable notes after payment and before re-issuing, does not decide whether such notes were considered as valuable within the statute, for the judges held the conviction right on the counts for the value of the stamps and paper, not referring to the objections as to the value of the note. But in *R.* v. *Ransom*, 2 *Leach*, 1090, which was against a clerk in the post-office for secreting a letter containing country bank-notes paid in London and not re-issued, it was contended that they were not available within the Act, but the majority of the judges thought otherwise, and as upon the face of them they remained uncancelled, they would, in the hands of a holder for a valuable consideration, be available against the makers. And in the case of *R.* v. *Vyse*, 1 *Moo. C. C.* 218, it was decided that re-issuable notes, if they cannot properly be called valuable securities whilst in the hands of the maker, may be called goods and chattels.

Wherever, therefore, the instrument would, in the hands of an innocent holder, be *available* against the maker, such an instrument would, it is apprehended, be considered of value. It may be worth while to consider, further, whether the possession of the subject matter of the instrument is not sufficient to bring the offender within the Act. The object of the statute is to put the securities mentioned therein upon the same footing as the money they represent. The property consists in the power of disposing; if therefore the power of disposal is taken away, the posses-

sion and property are gone. The disposal of such property is effected by means of those instruments; every such act of disposal, therefore, it is apprehended, must be considered as an exercise of property, and the making of such a note, under any circumstances, an act of possession. If, therefore, such a promissory note so obtained would be *accounted of value*, and to have been in the possession of the prosecutor, the offence would now, beyond doubt, come within the section.—3 *Burn*, 237.

In *R.* v. *West, Dears. & B.* 109, the case of *R.* v. *Ramson* was relied on in the argument, and it appeared that A. stole notes of a provincial bank which were not then in circulation for value, but which were paid in at one branch of the bank, and were in course of transmission to another branch, in order to be re-issued; but it was held that, upon these facts, A. was rightly convicted.

The following instruments also have been held valuable securities: a post office money order, *R.* v. *Gilchrist*, 2 *Moo. C. C.* 233; a cheque on a banker, *R.* v. *Heath*, 2 *Moo. C. C.* 33; a pawnbroker's certificate, *R.* v. *Morrison, Bell, C. C.* 158; and a scrip certificate, of a foreign railway company, *R.* v. *Smith, Dears.* 56.

It is to be observed that *valuable security* includes also *document of title to goods* and *document of title to lands*, see, *ante*, sect. 2, but that *documents of title to lands* are especially exempted in this section. It is, therefore, material, in drawing an indictment under this section, to show the sort of valuable security in order to bring it within the section; and a variance between such description and the evidence will be fatal, unless amended.—*R.* v. *Lowrie, L. R.*, 1 *C. C. R.* 61.

Bank notes are properly described as "money," although, at the time of the larceny, they were not in circulation, but

were in the hands of the bankers themselves.—*R.* v. *West*, 7 *Cox*, 183.

Halves of notes should be described as goods and chattels.—*R.* v. *Meagle*, 4 *C. & P.* 535.

If the instrument is void as a security, as, for instance, by being unstamped, it should be described as a piece of paper.—*R.* v. *Pooley*, *R. & R.* 12; *R.* v. *Perry*, 1 *Den.* 69.

But where an executory contract was unstamped, it was held not to be the subject of larceny, being merely evidence of a chose in action; and that the prisoner could not be convicted on a count charging him with stealing a piece of paper.—*R.* v. *Watts*, 6 *Cox*, 304.

An insufficient or defectively stamped promissory note, the holder being ignorant of the defect in the stamping, may be the subject of larceny as a valuable security under 32-33 V., c. 21, s. 15.—*The Queen* v. *Dewitt*, 21 *N. B. Rep.* 17.

13. Every one who steals or, for any fraudulent purpose, destroys, cancels, obliterates or conceals the whole or any part of any document of title to lands, is guilty of felony, and liable to three years' imprisonment.—32-33 *V., c.* 21, *s.* 16, *part.* 24-25 *V., c.* 96, *s.* 28, *Imp.*

As to form of indictment. See sec. 110 of Procedure Act.

As to the interpretation of the words "document of title to lands," see sec. 2, *ante*.

Indictment.—..... a certain deed, the property of J. N., being evidence of the title of the said J. N. to a certain real estate called ..... in which said real estate the said J. N. then had and still hath an interest, feloniously did steal, take and carry away, against the form ..... *Archbold*, 357, *(Add a second count, describing the nature of the instrument more particularly.)* It seems that in

an indictment under this section, and the two following, for destroying, etc., for a fraudulent purpose the purpose should be stated.—*R.* v. *Morris*, 9 *C. & P.* 89.

A mortgage deed cannot be described as goods and chattels.—*R.* v. *Powell*, 2 *Den.* 403. See sub-sec. 3 of next section.

14. Every one who, either during the life of the testator or after his death, steals or, for any fraudulent purpose, destroys, cancels, obliterates or conceals the whole or any part of any will, codicil or other testamentary instrument, whether the same relates to real or personal property, or to both, is guilty of felony, and liable to imprisonment for life;

2. Nothing in this or the next preceding section mentioned, and no proceeding, conviction or judgment had or taken thereupon, shall prevent, lessen or impeach any remedy at law or in equity, which any person aggrieved by any such offence might or would have had if this Act had not been passed;

3. No conviction of any such offender shall be received in evidence in any action or suit against him; and no person shall be liable to be convicted of any of the felonies in this and the next preceding section mentioned by any evidence whatever, in respect of any act done by him, if he has, at any time previously to his being charged with such offence, first disclosed such act, on oath, in consequence of any compulsory process of any court, in any action, suit or proceeding *bonâ fide* instituted by any person aggrieved, or if he has first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.—32-33 *V., c.* 21, *s.* 17, *part.* 24-25 *V., c.* 96, *s.* 29, *Imp.*

Indictment.— ..... a certain will and testamentary instrument of one J. N. feloniously did steal, take and carry away, against the form ..... *Archbold.—(Add counts varying description of the will, etc.)*

The cases of *R.* v. *Skeen, Bell, C. C.* 97, and *R.* v. *Strahan*, 7 *Cox*, 85, are not now law.—*Greaves, Cons. Acts*, 126.

15. Every one who steals or, for any fraudulent purpose, takes from its place of deposit, for the time being, or from any person having the custody thereof, or unlawfully and maliciously cancels,

obliterates, injures or destroys the whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill, petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever, of or belonging to any court of justice, or relating to any cause or matter, begun, depending or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any government or public office, is guilty of felony, and liable to three years' imprisonment.—32-33 *V., c.* 21, *s.* 18, *part.* 24-25 *V., c.* 96, *s.* 30, *Imp.*

The words "*court of justice*" are not in the English Act.

Indictment for stealing a record.—..... a certain judgment-roll of the Court of Our Lady the Queen, before the Queen herself, feloniously did steal, take and carry away, against.....

Indictment for taking a record from its place of deposit.—..... a certain judgment-roll of the court of our said lady the Queen, before the Queen herself, from its place of deposit for the time being, to wit, from the treasury of the said court, feloniously and for a fraudulent purpose did take, against ..... *(If for obliterating, etc., say, feloniously, unlawfully and maliciously did obliterate, etc.)* .....—*Archbold*, 354, 355.

Stealing rolls of parchment will be larceny at common law, though they be the records of a court of justice, unless they concern the realty.—*R.* v. *Walker*, 1 *Moo. C. C.* 155; but it is not so if they concern the realty.—*R.* v. *Westbeer*, 1 *Leach*, 13.

A commission to settle the boundaries of a manor is an instrument concerning the realty, and not the subject of larceny at common law.—*R.* v. *Westbeer, loc. cit.*

Upon an indictment for taking a record from its place of deposit, with a fraudulent purpose, the mere taking is

evidence from which fraud may fairly be presumed, unless it be satisfactorily explained.—*Archbold*, 355.

The prisoner was indicted under this section of the Larceny Act. The first count charged the prisoner with stealing a certain process of a court of record, to wit, a certain warrant of execution issued out of the county court of Berkshire, in an action wherein one Arthur was plaintiff and the prisoner defendant. The second count stated that at the time of committing the offence hereinafter mentioned, one Brooker had the lawful custody of a certain process of a court of record, to wit, a warrant of execution out of the county court ..... that defendant intending to prevent the due course of law, and to deprive Arthur of the rights, benefits and advantages from the lawful execution of the warrant, did take from Brooker the said warrant, he, Brooker, having then the lawful custody of it. Brooker was the bailiff who had seized the defendant's goods, under the said writ of execution. The prisoner, a day or two afterwards, forcibly took the warrant out of the bailiff's hand, and kept it. He then ordered him away, as having no more authority, and, on his refusal to go, forcibly turned him out. The prisoner was found guilty, and the conviction affirmed upon a case reserved. Cockburn, C. J., said: "I think that the first count of the indictment which charges larceny will not hold. There was no taking *lucri causâ*, but for the purpose of preventing the bailiff from having lawful possession. Neither was the taking *animo furandi*. I may illustrate it by the case of a man, who, wishing to strike another person, sees him coming along with a stick in his hand, takes the stick out of his hand, and strikes him with it. That would be an assault, but not a felonious taking of the stick. There is, however, a second count in the indictment which charges in effect that the prisoner

took the warrant for a fraudulent purpose. The facts show that the taking was for a fraudulent purpose. He took the warrant forcibly from the bailiff, in order that he might turn him out of possession. That was a fraud against the execution creditor, and was also contrary to the law. I am therefore of opinion that it amounts to a fraudulent purpose within the enactment, and that the conviction must be affirmed."—*R.* v. *Bailey*, 12 *Cox*, 129.

Maliciously destroying an information or record of the police court is a felony within 32-33 V., c. 21, s. 18.—*R.* v. *Mason*, 22 *U. C. C. P.* 246.

An indictment describing an offence within 32-33 V., c. 21, s. 18, as feloniously stealing an information taken in a police court, is sufficient after verdict.—*R.* v. *Mason*, 22 *U. C. C. P.* 246.

16. Every one who steals any railway or steamboat ticket, or any order or receipt for a passage on any railway or in any steamer or other vessel, is guilty of felony, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 21, *s.* 19.

This clause is not in the Imperial Statute.

STEALING THINGS ATTACHED TO OR GROWING ON LAND.

17. Every one who steals, or rips, cuts, severs or breaks, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground, is guilty of felony, and liable to be punished as in the case of simple larceny.—32-33 *V., c.* 21, *s.* 20, *part.* 24-25 *V., c.* 96, *s.* 31, *Imp.*

At common law, larceny could not be committed of things attached to the freehold.

As to punishment for simple larceny, see, *ante*, sect. 5.

This enactment extends the offence much further than the prior acts did, as it includes all utensils and fixtures of whatever materials made, either fixed to building or in land, or in a square or street. A church, and indeed all buildings are within the Act, and an indictment for stealing lead fixed to a certain building without further description will suffice.—*R.* v. *Parker*, 1 *East, P. C.* 592; *R.* v. *Norris*, *R. & R.*, 69. An unfinished building boarded on all sides, with a door and a lock, and a roof of loose gorse, was held a building within the statute.—*R.* v. *Worrald*, 7 *C. & P.* 516. So also where the lead stolen formed the gutters of two sheds built of brick, timber and tiles upon a wharf fixed to the soil, it was held that this was a building within the Act.—*R.* v. *Rice*, *Bell*, *C. C.* 87. But a plank used as a seat, and fixed on a wall with pillars, but with no roof, was held not to be a building.—*R.* v. *Reece*, 2 *Russ.* 254. Where a man, having given a false representation of himself, got into possession of a house, under a treaty for a lease of it, and then stripped it of the lead, the jury being of opinion that he obtained possession of the house with intent to steal the lead, found him guilty, and he afterwards had judgment.—*R.* v. *Munday*, 2 *Leach*, 850.

A prisoner, however, cannot, upon an indictment for this statutable felony, be convicted of simple larceny.—*R.* v. *Gooch*, 8 *C. & P.* 293.

The prisoners were found guilty of having stolen a copper sun-dial fixed upon a wooden post in a churchyard. Conviction held right.—*R.* v. *Jones*, *Dears. & B.* 655.

The ownership of the building from which the fixture is stolen must be correctly laid in the indictment.—2 *Russ.* 255.

Indictment for stealing metal fixed in land being pri-

vate property.— ..... two hundred pounds weight of iron, the property of J. N., then being fixed in a certain land which was then private property, to wit, in a garden of the said J. N., situate..... feloniously did steal, take and carry away, against.....—*Archbold.*

18. Every one who steals, or cuts, breaks, roots up, or otherwise destroys or damages, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the value of the article or articles stolen or the amount of the injury done, exceeds the sum of five dollars), is guilty of felony, and liable to be punished as in the case of simple larceny;

2. Every one who steals, or cuts, breaks, roots up, or otherwise destroys or damages, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned (if the value of the article or articles stolen, or the amount of the injury done, exceeds the sum of twenty-five dollars), is guilty of felony, and liable to be punished as in the case of simple larceny.—32-33 *V.*, *c.* 21, *s.* 21. 24-25 *V.*, *c.* 96, *s.* 32, *Imp.*

See sect. 5, *ante*, as to punishment for simple larceny.

The words "grounds adjoining" mean ground in active contact with the dwelling-house. Whether the ground be a park or garden, etc., is a question for the jury. It seems it is not material that it should be in every part of it a park or garden.—*R.* v. *Hodges*, *M. & M.* 341. The amount of injury mentioned in this and the following section must be the actual injury to the tree or shrub itself, and not the consequential injury resulting from the act of the defendant.—*R.* v. *Whiteman*, *Dears.* 353. The respective values of several trees, or of the damage thereto, may be added to make up the £5, in case the trees were cut down, or the damage done as part of one continuous transaction. —*R.* v. *Shepherd*, 11 *Cox*, 119.

Indictment for stealing trees, etc., in parks, etc., of the value above five dollars.—.....one oak tree of the value of eight dollars, the property of J. N., then growing in a certain park of the said J. N., situate ..... in the said park, feloniously did steal, take and carry away, against .....—*Archbold.*

Indictment under second part of the section.—..... one ash-tree of the value of thirty dollars, the property of J. N., then growing in a certain close of the said J. N., situate ..... in the said close, feloniously did steal, take and carry away, against the form.....

It is not necessary to prove that the close was not a park or garden, etc.—*Archbold*, 362.

19. Every one who steals, or cuts, breaks, roots up or otherwise destroys or damages, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is respectively growing (the stealing of such article, or the injury done, being to the amount of twenty-five cents at the least), shall, on summary conviction, be liable to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done;

2. Every one who, having been convicted of any such offence, either against this or any other act or law, afterwards commits any of the said offences in this section before mentioned, shall, on summary conviction, be liable to three months' imprisonment with hard labor;

3. Every one who, having been convicted of any such offence (whether both or either of such convictions have taken place before or after the passing of this Act), afterwards commits any of the offences in this section before mentioned, is guilty of felony, and liable to be punished as in the case of simple larceny.—32-33 *V.*, *c.* 21, *s.* 22. 24-25 *V.*, *c.* 96, *s.* 33, *Imp.*

Indictment. — The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... one oak sapling of the value of forty cents, the property of J. N., then growing in certain land situate ..... unlawfully did

steal, take and carry away, against the form of the statute in such case made and provided; and the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence herein before mentioned, to wit, on ..... at ..... the said J. S. was duly convicted before J. P., one of Her said Majesty's justices of her peace for the said district of ..... for that he, the said J. S., on ..... *(as in the first conviction)* against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged, for his said offence, to forfeit and pay the sum of twenty dollars, over and above the value of the said tree so stolen as aforesaid, and the further sum of forty cents, being the value of the said tree, and also to pay the further sum of ..... for costs; and in default of immediate payment of the said sums, to be imprisoned in the common gaol of the said district of ..... for the space of ..... unless the said sums should be sooner paid. And the jurors aforesaid, upon their oath aforesaid, do further say, that heretofore and before the committing of the offence first hereinbefore mentioned, to wit, on ..... at ..... the said J. S. was duly convicted before O. P., one of Her said Majesty's justices of the peace for the said district of ..... for that he .....*(setting out the second conviction in the same manner as the first, and proceed thus.)* And so, the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the day and year first aforesaid, the said oak sapling of the value of forty cents, the property of the said J. N., then growing in the said land situate ..... feloniously did steal, take and carry away, against the form of the statute in such case made and provided.—*Archbold*, 363; *Greaves on sect.* 116 *of the Larceny Act, and* 37 *of the Coin Act; Archbold*, 959; *R.* v. *Martin*, 11 *Cox*, 343.

See secs. 139 and 207 of the Procedure Act as to form of indictment and proceedings on trials when previous offences are charged.

20. Every one who receives or purchases any tree or sapling, or any timber made therefrom, exceeding in value the sum of ten dollars, knowing the same to have been stolen or unlawfully cut or carried away, is guilty of a misdemeanor, and liable to the same punishment as the principal offender, and may be indicted and convicted thereof, whether the principal offender has or has not been convicted, or is or is not amenable to justice;

2. Nothing in this or in either of the two sections next preceding contained, and no proceeding, conviction or judgment had or taken thereupon, shall prevent, lessen or impeach any remedy which any person aggrieved by any of the said offences would have had if this Act had not been passed; nevertheless, the conviction of the offender shall not be received in evidence in any action or suit against him; and no person shall be convicted of either of the offences aforesaid, by any evidence disclosed by him on oath, in consequence of the compulsory process of a court, in any action, suit or proceeding instituted by any person aggrieved.—32-33 *V.*, *c.* 21, *s.* 23.

This clause is not in the English Act.

21. Every one who steals, cuts or breaks or throws down, with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, shall, on summary conviction, be liable to a penalty not exceeding twenty dollars, over and above the value of the article or articles so stolen, or the amount of the injury done;

2. Every one who, having been convicted of any such offence, either against this or any other Act or law, afterwards commits any of the said offences in this section mentioned, shall, on summary conviction, be liable to three months' imprisonment with hard labor. —32-33 *V.*, *c.* 21, *s.* 24. 24-25 *V.*, *c.* 96, *s.* 34, *Imp.*

22. Every one who, having in his possession, or on his premises with his knowledge, the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile or gate, or any part thereof, of the value of twenty-five cents at the least, is taken or summoned before a justice of the peace, and does not satisfy such justice that he came

lawfully by the same, shall, on summary conviction, be liable to a penalty not exceeding ten dollars, over and above value of the article so in his possession or on his premises.—32-33 *V.*, *c.* 21, *s.* 25. 24-25 *V.*, *c.* 96, *s.* 35, *Imp.*

This sect. does not apply to cordwood.—*R.* v. *Caswell*, 33 *U. C. Q. B.* 303.

23. Every one who steals or destroys, or damages with intent to steal, any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, green-house or conservatory, shall, on summary conviction, be liable to a penalty not exceeding twenty dollars, over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment, with or without hard labor;

2. Every one who, having been convicted of any such offence, either against this or any other Act or law, afterwards commits any of the offences in this section mentioned, is guilty of felony and liable to be punished as in the case of simple larceny.—32-33 *V.*, *c.* 21, *s.* 26. 24-25 *V.*, *c.* 96, *s.* 36, *Imp.*

The words *plant* and *vegetable production* do not apply to young fruit trees.—*R.* v. *Hodges*, *M. & M.* 341. Stealing trees would fall under sections 18 and 19.

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... twenty pounds' weight of grapes, the property of J. N., then growing in a certain garden of the said J. N., situate ..... unlawfully did steal, take and carry away, against the form of the statute in such case made and provided; and the jurors aforesaid, upon their oath aforesaid, do say that, heretofore, and before the committing of the offence hereinbefore mentioned, to wit, on ..... at ..... the said J. S. was duly convicted before J. P., one of Her Majesty's justices of the said district of ..... for that he, the said J. S., on ..... *(as in the previous conviction)* against the form of the statute in such case made and provided, and the said J. S. was thereupon then and there adjudged for the

said offence to forfeit and pay the sum of twenty dollars, over and above the amount of the article so stolen as aforesaid, and the further sum of six shillings, being the amount of the said injury; and also to pay the sum of ten shillings for costs, and in default of immediate payment of the said sums, to be imprisoned in ..... for the space of ..... unless the said sum should be sooner paid, and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the day and in the year first aforesaid, the said twenty pounds' weight of grapes, the property of the said J. N., then growing in the said garden of the said J. N., situate ..... feloniously did steal, take and carry away, against the form of the statute in such case made and provided.—*Archbold.*

24. Every one who steals or destroys, or damages, with intent to steal, any cultivated root, or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure ground, or nursery ground, shall, on summary conviction, be liable to a penalty not exceeding five dollars, over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with hard labor;

2. Every one who, having been convicted of any such offence, either against this or any other act or law, afterwards commits any of the offences in this section mentioned, is liable to three month's imprisonment with hard labor.—32-33 *V.*, *c.* 21, *s.* 27. 24-25 *V.*, *c.* 96, *s.* 37, *Imp.*

Clover has been held to be a cultivated plant, *R.* v. *Brunsby*, 3 *C. & K.* 315; but it was doubted whether grass were so.—*Morris* v. *Wise*, 2 *F. & F.* 51.

STEALING ORES OR MINERALS.

25. Every one who steals, or severs with intent to steal, ore of any metal, or any quartz, lapis calaminaris, manganese, or mundic, or any piece of gold, silver or other metal, or any wad, black cawlk, or black lead, or any coal, or cannel coal, or any marble, stone or

other mineral, from any mine, bed or vein thereof respectively, is guilty of felony, and liable to imprisonment for any term less than two years;

2. No person shall be deemed guilty of any offence for having, for the purpose of exploration or scientific investigation, taken any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging. —32-33 *V.*, *c.* 21, *s.* 28. 24-25 *V.*, *c.* 96, *s.* 38, *Imp.*

26. Every one who, being employed in or about any mine, quarry or digging, takes, removes or conceals any ore of any metal, or any quartz, lapis calaminaris, manganese, mundic, or any piece of gold, silver or other metal, or any mineral found or being in such mine, quarry or digging, with intent to defraud any proprietor of, or any adventurer in the same, or any workman or miner employed therein, is guilty of felony, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, *s.* 29. 24-25 *V.*, *c.* 96, *s.* 39, *Imp.*

The words "or any marble, stone, or other mineral," in sec. 25 are not in the English Act.

The words "or any piece of gold, silver or any other metal" in sec. 26 are not in the English Act.

R. v. *Webb*, 1 *Moo. C. C.* 421; *R.* v. *Holloway*, 1 *Den.* 370; *R.* v. *Poole*, *Dears. & B.* 345, would now fall under sect. 26. It must be alleged and proved that the ore was stolen from the mine.—*R.* v. *Trevenner*, 2 *M. & Rob.* 476.

Indictment under sect. 25..... twenty pounds' weight of copper ore, the property of J. N., from a certain mine of copper ore of the said J. N., situate ..... feloniously did steal, take and carry away, against the form..... —*Archbold.*

Indictment under sect. 26 ..... at ..... being then and there employed in a certain copper mine there situate, called ..... the property of ..... feloniously did take *(or remove or conceal)* fifty pounds' weight of copper ore found in the said mine, with intent thereby then to defraud the said .....—3 *Burn*, 313.

See sec. 124 of the Procedure Act as to form of indictment for offence under secs. 25 to 29 of this Act.

27. Every one who, being the holder of any lease or license issued under the provisions of any Act relating to gold or silver mining, or by any person owning land supposed to contain any gold or silver, by any fraudulent device or contrivance, defrauds or attempts to defraud Her Majesty, or any person, of any gold, silver or money payable or reserved by such lease, or with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, *s.* 30.

28. Every one who, not being the owner or agent of mining claims then being worked, and not being thereunto authorized in writing by the proper officer in that behalf, named in any Act relating to mines in force in any Province of Canada, sells or purchases (except to or from such owner or authorized person) any quartz containing gold, or any smelted gold or silver, at or within three miles of any gold district or mining district, or gold mining division, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, *s.* 31.

29. Every one who purchases any gold in quartz, or any unsmelted or smelted gold or silver, or otherwise unmanufactured gold or silver, of the value of one dollar or upwards (except from such owner or authorized person as in the next preceding section mentioned), and does not, at the same time, execute in triplicate an instrument in writing, stating the place and time of purchase, and the quantity, quality and value of gold or silver so purchased, and the name or names of the person or persons from whom the same was purchased, and file the same with the officer in the next preceding section mentioned, within twenty days next after the date of such purchase, is guilty of a misdemeanor, and liable to a penalty not exceeding in amount double the value of the gold or silver purchased, and to imprisonment for any term less than two years.—32-33 *V.*, *c.* 21, s. 32.

30. The possession, contrary to the provisions of any law in that behalf of any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, by any operative, workman or laborer actively engaged in or on any mine, is *primâ facie* evidence that the same had been stolen by him.—32-33 *V.*, *c.* 21, *s.* 35.

See sec. 53 Procedure Act as to search warrants.

31. Every one who, with intent to defraud his co-partner, co-adventurer, joint tenant or tenant in common, in any claim, or in any

share or interest in any claim, secretly keeps back or conceals any gold or silver found in or upon or taken from such claim, is guilty of felony, and liable to be punished as in the case of simple larceny.—32-33 *V.*, *c.* 21, *s.* 37.

The above five sections are not in the English Act.

STEALING FROM THE PERSON, AND OTHER LIKE OFFENCES.

32. Every one who robs any person, or steals any chattel, money or valuable security from the person of another, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 39. 24-25 *V.*, *c.* 96, *s.* 40, *Imp.*

On trial for robbery, conviction may be under next clause. Sec. 192 Procedure Act.

33. Every one who assaults any person with intent to rob is guilty of felony, and, except in cases where a greater punishment is provided by this Act, liable to three years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 41. 24-25 *V.*, *c.* 96, *s.* 42, *Imp.*

Indictment for stealing from the person under sect. 32.— ..... one watch, one pocket-book and one pocket handkerchief of the goods and chattels of J. N., of ..... from the person of the said J. N. feloniously did steal, take, and carry away, against the form ..... —*Archbold*, 419.

The words "from the person of the said J. N." constitute the characteristic of this offence, as distinguished from simple larceny; the absence of force, violence or fear distinguishes it from robbery.

The indictment need not negative the force or fear necessary to constitute robbery; and though it should appear upon the evidence that there was such force or fear, the punishment for stealing from the person may be inflicted. —*R.* v. *Robinson*, *R. & R.* 321; *R.* v. *Pearce*, *R. & R.* 174.

To constitute a stealing from the person, the thing taken must be completely removed from the person. Where it appeared that the prosecutor's pocket-book was in the inside front pocket of his coat, and the prosecutor felt a hand between his coat and waistcoat attempting to get the book out, and the prosecutor thrust his right hand down to his book, and on doing so brushed the prisoner's hand; the book was just lifted out of the pocket an inch above the top of the pocket, but returned immediately into the pocket; It was held by a majority of the judges that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor, but the judges all agreed that the simple larceny was complete. Of ten judges, four were of opinion that the stealing from the person was complete.—*R.* v. *Thompson*, 1 *Moo. C. C.* 78.

Where the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through a button-hole of the waiscoat, and kept there by a watch-key at the other end of the chain; and the defendant took the watch out of the pocket, and forcibly drew the chain and key out of the button-hole, but the point of the key caught upon another button, and the defendant's hand being seized, the watch remained there suspended, this was held a sufficient severance. The watch was no doubt temporarily, though but for a moment, in the possession of the prisoner. —*R.* v. *Simpson*, *Dears.* 621. In this case, Jervis, C. J. said he thought the minority of the judges in Thompson's case, *supra*, were right.

Where a man went to bed with a prostitute, leaving his watch in his hat, on the table, and the woman stole it whilst he was asleep, it was held not to be stealing from the per-

son, but stealing in the dwelling-house.—*R.* v. *Hamilton*, 8 *C. & P.* 49.

Upon the trial of any indictment for stealing from the person, if no asportation be proved, the jury may convict the prisoner of an attempt to commit that offence, under sect. 183 of the Procedure Act.

In *R.* v. *Collins, L. & C.* 471, it was held that there can only be an attempt to commit an act, where there, is such a beginning as if uninterrupted would end in the completion of the act, and that if a person puts his hand into a pocket with intent to steal, he cannot be found guilty of an attempt to steal, if there was nothing in the pocket. But Bishop, Cr. Law, Vol. 1, 741, censures this decision. By sects. 47 and 48 of c. 162, attempting to procure abortion is a crime, *whether the woman be with child or not.* And rightly so; it is the criminal intent, the *mens rea*, which deserves punishment. But why not so for the other case? What is the difference between putting the hand into the pocket and not finding there anything to be removed, and penetrating to the womb, and there finding no embryo or fœtus, in the first case to steal whatever may be in the pocket, in the second case to destroy whatever there may be in the womb.—*Bishop, loc. cit.*

Indictment for robbery under sect. 33.—..... in and upon one J. N. feloniously did make an assault, and him, the said J. N., in bodily fear and danger of his life then feloniously did put, and the moneys of the said J. N., to the amount of ten pounds, from the person and against the will of the said J. N. then feloniously and violently did steal, take and carry away, against the form ..... —*Archbold.*

The indictment may charge the defendant with having

assaulted several persons, and stolen different sums from such, if the whole was one transaction.—*Archbold.*

The crime of robbery is a species of theft, aggravated by the circumstances of a taking of the property *from the person or whilst it is under the protection of the person by means either of violence* "or" *putting in* fear.—*4th Rep. Cr. L. Commrs. LXVII.*

Robbery is larceny committed by violence from the person of one put in fear.—2 *Bishop, Cr. Law.* 1156.

This definition differs in the form of expression, though not in substance, from what has been given by preceding authors.

To constitute this offence, there must be: 1. A larceny embracing the same elements as a simple larceny; 2. violence, but it need only be slight, for anything which calls out resistance is sufficient, or what will answer in place of actual violence, there must be such demonstrations as put the person robbed in fear. The demonstrations of fear must be of a physical nature; and 3. the taking must be from what is technically called the "person," the meaning of which expression is, not that it must necessarily be from the actual contact of the person, but it is sufficient if it is from the personal protection and presence.—*Bishop, Stat. Crimes,* 517.

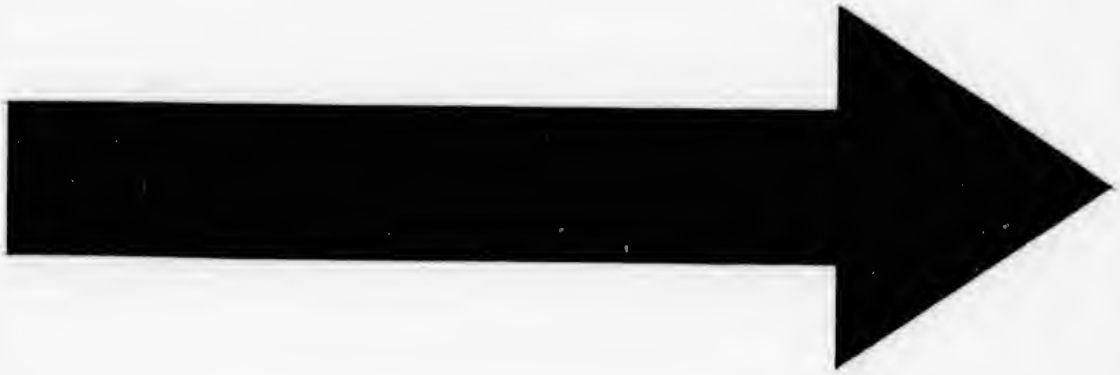
1. *Larceny.*—Robbery is a compound larceny, that is, it is larceny aggravated by particular circumstances. Thus, the indictment for robbery must contain the description of the property stolen as in an indictment for larceny; the ownership must be in the same way set out, and so of the rest. Then if the aggravating matter is not proved at the trial, the defendant may be convicted of the simple larceny. If a statute makes it a larceny to steal a thing of which there could be no larceny at common law, then it becomes,

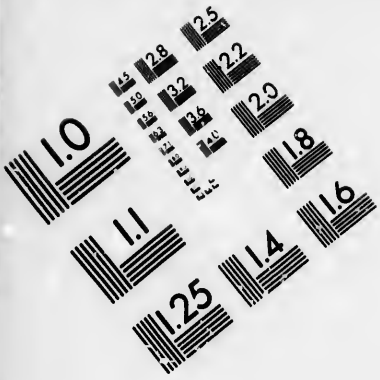
by construction of law, a robbery, to take this thing forcibly and feloniously from the person of one put in fear.—*2 Bishop, Cr. Law*, 1158, 1159, 1160. An actual taking either by force or upon delivery must be proved, that is, it must appear that the robber actually got *possession* of the goods. Therefore if a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up, this would not be robbery, because the purse was never in the possession of the robber.—*1 Hale, P. C.* 553.

But it is immaterial whether the taking were by force or upon delivery, and if by delivery it is also immaterial whether the robber have compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colorable pretence.—*Archbold* 417.

A carrying away must also be proved as in other cases of larceny. And therefore where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended, the judges held that the robbery was not complete.—*R.* v. *Farrell*, 1 *Leach*, 362; 2 *East, P. C.* 557.

But a momentary possession, though lost again in the same instant, is sufficient. James Lapier was convicted of robbing a lady, and taking from her person a diamond earring. The fact was that as the lady was coming out of the Opera house she felt the prisoner snatch at her earring and tear it from her ear, which bled, and she was much hurt, but the earring fell into her hair, where it was found after she returned home. The judges were all of opinion that the earring being in the possession of the prisoner for a moment, separate from the lady's person,





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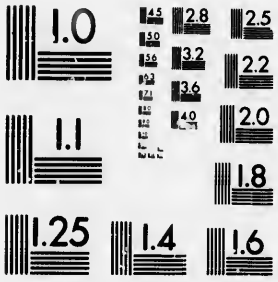

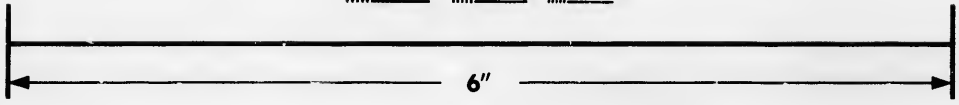

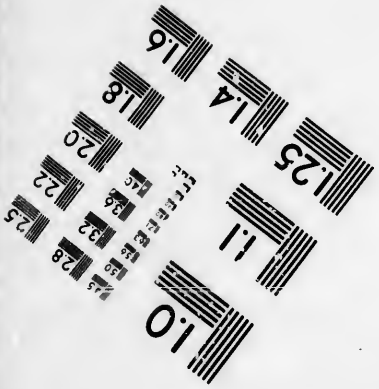

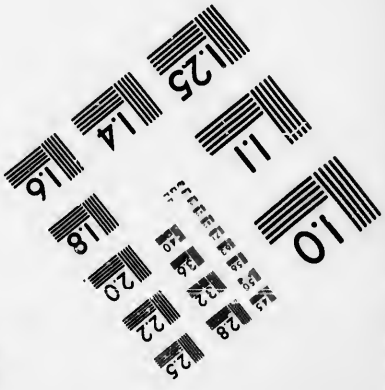

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was sufficient to constitute robbery, although he could not retain it, but probably lost it again the same instant. —2 *East, P. C.* 557.

If the thief once takes possession of the thing, the offence is complete, though he afterwards return it; as if a robber, finding little in a purse which he had taken from the owner, restored it to him again, or let it fall in struggling, and never take it up again, having once had possession of it.—2 *East, loc. cit.*; 1 *Hale*, 533; *R.* v. *Peat*, 1 *Leach*, 228; *Archbold*, 417.

The taking must have been feloniously done, that is to say *animo furandi*, as in larceny, and against the will of the party robbed, that is, that they were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery.—*Archbold*, 417.

Where on an indictment for robbery, it appeared that the prosecutor owed the prisoner money, and had promised to pay him five pounds, and the prisoner violently assaulted the prosecutor, and so forced him then and there to pay him his debt, Erle, C. J., said that it was no robbery, there being no felonious intent.—*R.* v. *Hemmings*, 4 *F. & F.* 50.

2. *Violence.*—The prosecutor must either prove that he was actually in bodily fear from the defendant's actions, at the time of the robbery, or he must prove circumstances from which the court and jury may presume such a degree of apprehension of danger as would induce the prosecutor to part with his property; and in this latter case, if the circumstances thus proved be such as are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the

fear actually existed. Therefore, if a man knock another down, and steal from him his property whilst he is insensible on the ground, that is robbery. Or suppose a man makes a manful resistance, but is overpowered, and his property taken from him by the mere dint of superior strength, this is a robbery.—*Fost.* 128; *R.* v. *Davies*; 2 *East, P. C.* 709.

One Mrs. Jeffries, coming out of a ball, at St. James' Palace, where she had been as one of the maids of honor, the prisoner snatched a diamond pin from her head-dress with such force as to remove it with part of the hair from the place in which it was fixed, and ran away with it: *Held*, to be a robbery.—*R.* v. *Moore*, 1 *Leach*, 335. *See supra, Lapier's Case*, 1 *Leach*, 320.

Where the defendant laid hold of the seals and chain of the prosecutor's watch, and pulled the watch out of his fob, but the watch, being secured by a steel chain which went round the prosecutor's neck, the defendant could not take it until, by pulling and two or three jerks, he broke the chain, and then ran off with the watch; this was holden to be robbery.—*R.* v. *Mason, R. & R.* 419. But merely snatching property from a person unawares, and running away with it, will not be robbery.—*R.* v. *Steward*, 2 *East, P. C.* 702; *R.* v. *Horner, Id.* 703; *R.* v. *Baker*, 1 *Leach*, 290; *R.* v. *Robins, do. do.*; *R.* v. *Macauly*, 1 *Leach*, 287; *Archbold*, 414, because fear cannot in fact be presumed in such a case. When the prisoner caught hold of the prosecutor's watch-chain, and jerked his watch from his pocket with considerable force, upon which a scuffle ensued, and the prisoner was secured, Garrow, B., held that the force used to obtain the watch did not make the offence amount to robbery, nor did the force used afterwards in the scuffle; for the force necessary to

constitute robbery must be either immediately before or at the time of the larceny, and not after it.—*R.* v. *Gnosil*, 1 *C. & P.* 304. The rule, therefore, appears to be well established, that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery, unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it.—*Archbold*, *loc. cit.*; 2 *Russ.* 104.

If a man take another's child, and threaten to destroy him, unless the other give him money, this is robbery.—*R.* v. *Reane*, 2 *East, P. C.* 735; *R.* v. *Donally*, *Id.* 713. So where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destory the house unless the money were given, the prosecutor therefore gave him five shillings, but he insisted on more, and the prosecutor, being terrified, gave him five shillings more; the defendant and the mob then took bread, cheese and cider from the prosecutor's house, without his permission, and departed, this was holden to be a robbery as well of the money as of the bread, cheese and cider.—*R.* v. *Simons*, 2 *East, P. C.* 731; *R.* v. *Brown*, *Id.* So where during some riots at Birmingham, the defendant threatened the prosecutor that unless he would give a certain sum of money, he should return with the mob and destroy his house, and the prosecutor, under the impression of this threat, gave him the money, this was holden by the judges to be robbery.—*R.* v. *Astley*, 2 *East, P. C.* 729. So where during the riots of 1780, a mob headed by the defendant came to the prosecutor's house, and demanded half a crown, which the prosecutor, from terror of the mob, gave, this was holden to be robbery, although no threats were uttered.—*R.* v. *Taplin*, 2 *East, P. C.* 712. Upon an indictment for

robbery, it appeared that a mob came to the house of the prosecutor, and with the mob the prisoner who advised the prosecutor to give them something to get rid of them, and prevent mischief, by which means they obtained money from the prosecutor; and Parke, J., after consulting Vaughan and Anderson, J. J., admitted evidence of the *acts of the* mob at other places before and after on the same day, to show that the advice of the prisoner was not *boná fide*, but in reality a mere mode of robbing the prosecutor.—*R.* v. *Winkworth*, 4 *C. & P.* 444; *Archbold*, 414. Where the prosecutrix was threatened by some person at a mock auction to be sent to prison, unless she paid for some article they pretended was knocked down to her, although she never bid for it; and they accordingly called in a pretended constable, who told her that unless she gave him a shilling she must go with him, and she gave him a shilling accordingly, not from any apprehension of personal danger, but from a fear of being taken to prison, the judges held that the circumstances of the case were not sufficient to constitute the offence of robbery; it was nothing more than a simple duress, or a conspiracy to defraud.—*R.* v. *Knewland*, 2 *Leach*, 721; 2 *Russ.* 118. This case is now provided for by sect. 2, c. 173, post. In *R.* v. *MacGrath*, 11 *Cox*, 347, a woman went into a mockauction room, where the prisoner professed to act as auctioneer. Some cloth was put up by auction, for which a person in the room bid 25 shillings. A man standing between the woman and the door said to the prisoner that she had bid 26 shillings for it, upon which the prisoner knocked it down to the woman. She said she had not bid for it, and would not pay for it, and turned to go out. The prisoner said she must pay for it, before she would be allowed to go out, and she was prevented from going out. She then paid 26 shil-

lings to the prisoner, because she was afraid, and left with the cloth; the prisoner was indicted for larceny, and having been found guilty, the conviction was affirmed; but Martin, B., was of opinion that the facts proved also a robbery. Where the defendant with an intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her whilst thus handcuffed, put her into a hackney coach for the purpose of carrying her to prison, and then took four shillings from her pocket for the purpose of paying the coach hire: the jury finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held clearly that this was robbery.—*R.* v. *Gascoigne*, 2 *East, P. C.* 709. Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she, without any demand from him, gave him some money to desist, which he put into his pocket, and then continued his attempt until he was interrupted; this was holden by the judges to be robbery, for the woman from violence and terror occasioned by the prisoner's behaviour and to redeem her chastity, offered the money which it is clear she would not have given voluntarily, and the prisoner, by taking it, derived that advantage to himself from his felonious conduct, though his original intent was to commit a rape.—*R.* v. *Blackham*, 2 *East, P. C.* 711.

And it is of no importance under what pretence the robber obtains the money, if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the court can presume it. As, for instance, if a man with a sword drawn ask alms of me, and I give it him through mistrust and apprehension of violence,

this is a felonious robbery. Thieves come to rob A., and finding little about him enforce him by menace of death to swear to bring them a greater sum, which he does accordingly, this is robbery ; not for the reason assigned by Hawkins, because the money was delivered while the party thought himself bound in conscience to give it by virtue of the oath, which in his fear he was compelled to take ; which manner of stating the case affords an inference that the fear had ceased at the time of the delivery, and that the owner then acted solely under the mistaken compulsion of his oath. But the true reason is given by Lord Hale and others ; because the fear of that menace still continued upon him at the time he delivered the money.—2 *East, P. C.* 714. Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit ; after some altercation, he went with the driver, under pretence of going before a magistrate, and during their absence the mob pillaged the cart ; this was holden to be a robbery.—*Merrimam* v. *Hundred of Chippenham*, 2 *East, P. C.* 709. On this case, it is well observed that the opinion that it amounted to a robbery must have been grounded upon the consideration that the first seizure of the cart and goods by the defendant, being by violence and while the owuer was present, constituted the offence of a robbery.—2 *Russ.* 111.

So where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling under pretence of payment for them, this was holden to be a robbery.—*Simon's Case* and *Spencer's Case*, 2 *East, P. C.* 712. The fear must precede the taking. For if a man privately steal money from the person of another, and afterwards keep it by putting him in fear, this is no robbery, for the fear is subsequent

to the taking.—*R.* v. *Harman*, 1 *Hale*, 534; *and R.* v. *Gnosil*, *ante*; *Archbold*, 416.

"It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because it is nowhere defined in any of the acknowledged treatises upon the subject. Lord Hale proposes to consider what shall be said a putting in fear, but he leaves this part of the question untouched. Lord Coke and Hawkins do the same. Mr. Justice Foster seems to lay the greatest stress upon the necessity of the property's being taken *against the will of* the party, and he leaves the circumstance of fear out of the question; or that at any rate, when the fact is attended with circumstances of evidence or terror, the law, *in odium spoliatoris*, will presume fear if it be necessary, where there appear to be so just a ground for it. Mr. Justice Blackstone leans to the same opinion. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist. Staundford defines robbery to be a felonious taking of anything from the person or in the presence of another, *openly and against his will*; and Bracton also rests it upon the latter circumstance. I have the authority of the judges, as mentioned by Willes, J., in delivering their opinion in *Donally's Case*, in 1779, to justify me in not attempting to draw the exact line in this case; but thus much, I may venture to state, that on the one hand the fear is not confined to an apprehension of bodily injury, and, on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an

actual taking by violence, or assault upon the person."—2 *East, P. C.* 713.

It has been seen, *ante*, *R.* v. *Astley*, 2 *East, P. C.* 729, that a threat to destroy the prosecutor's house is deemed sufficient by law to constitute robbery, if money is obtained by the prisoner in consequence of it. This is no exception to the law, which requires violence or fear of bodily injury, because one without a house is exposed to the inclement elements; so that to deprive a man of his house is equivalent to inflicting personal injury upon him. In general terms, the person robbed must be, in legal phrase, put in fear. But if force is used there need be no other fear than the law will imply from it; there need be no fear in fact. The proposition is sometimes stated to be that there must be either force or fear, while there need not be both. The true distinction is doubtless that, where there is no actual force, there must be actual fear, but where there is actual force, the fear is conclusively inferred by the law. And within this distinction, assaults, where there is no actual battery, are probably to be deemed actual force. Where neither this force is employed, nor any fear is excited, there is no robbery, though there be reasonable grounds for fear.—2 *Bishop, Cr. Law*, 1174. Thus to constitute a robbery from the person, if there is no violence, actual or constructive, the party beset must give up his money through fear; and when his fears are not excited, but his secret motive for yielding is to prosecute the offender, this crime is not committed. When, however, there is an assault, such as would furnish a reasonable ground for fear, the offence of robbery is held to be complete, though the person assaulted parts with his money for the purpose of apprehending and bringing to punishment the wrong doer.—1 *Bishop, Cr. Law*, 438.

From the person.—The goods must be proved to have been taken *from the person* of the prosecutor. The legal meaning of the word *person*, however, is not here, that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection, that will suffice. Within this doctrine, the person may be deemed to protect all things belonging to the individual, within a distance not easily defined, over which the influence of the personal presence extends. If a thief, says Lord Hale, come into the presence of A., and, with violence and putting A. in fear, drive away his horse, cattle or sheep, he commits robbery. But if the taking be not either directly from his person, or in his presence, it is not robbery.—2 *Bishop, Cr. Law*, 1178; *Blackstone Com.* 4 *vol.* 242. In robbery, says *East*, 2 *P. C.* 707, it is sufficient if the property be taken in the presence of the owner, it need not be taken immediately from his person, so that there be violence to his person, or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown it into a bush. Or, adds Hawkins, rob my servant of my money before my face, *after having first assaulted me.*—1 *Hawkins*, 214. Where, on an indictment for robbery, it appeared that the prosecutor gave his bundle to his brother to carry for him, and while they were going along the road the prisoner assaulted the prosecutor, upon which his brother laid down his bundle in the road, and ran to his assistance, and one of the prisoners then ran away with the bundle; Vaughan, B., intimated an opinion that under these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the

assault was committed. Highway robbery was a felonious taking of the property of another by violence against his will, either from his person or in his presence : the bundle in this case was not in the prosecutor's possession. If these prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it.—*R.* v. *Fallows*, 2 *Russ.* 107. The prisoners were convicted of a simple larceny. *Quære*, whether if the indictment had been for robbing the brother, who was carrying the bundle, it might not have been sustained, as it was the violence of the prisoners that made him put it down and it was taken in his presence. In *R.* v. *Wright*, *Styles*, 156, it was holden that if a man's servant be robbed of his master's goods in the sight of his master, this is robbery of the master.—*Note by Greaves.*

Where on an indictment for robbery and stealing from the person, it was proved that the prosecutor who was paralyzed, received, whilst sitting on a sofa in a room, a violent blow on the head from one prisoner, whilst the other prisoner went and stole a cash-box from a cupboard in the same room; it was held that the cash-box being in the room in which the prosecutor was sitting, and he being aware of that fact, it was virtually under his protection; and it was left to the jury to say whether the cash-box was under the protection of the prosecutor at the time it was stolen.—*R.* v. *Selway*, 8 *Cox*, 235.

Indictment.—The offence of robbery being felony, it is necessary for the indictment to charge the act to have been committed "feloniously." There is some reason to suppose that, if this word "feloniously" is prefixed to the first material allegation, its force will extend through and qualify the rest.—*R.* v. *Nicholson*, 1 *East*, 346. But, however this may be, if the violence which enters into the offence,

as one of its ingredients, is the first thing stated in the indictment, and the word "feloniously" is not employed to qualify it, but is inserted in a subsequent part of the indictment, the whole will be insufficient. Thus, if the allegation is that the defendant "in the king's highway, therein and upon one ..... did make an assault, and him the said ..... in corporal fear and danger of his life, then and there feloniously did put, and one metal watch of the property of the said ..... then and there feloniously did steal, take and carry away" ..... it will be inadequate, because it does not charge the assault to have been feloniously made.—*R.* v. *Pelfryman*, 2 *Leach*, 563; 2 *Bishop*, *Cr. Proc.* 1003. The taking must be charged to be with violence from the person, and against the will of the party; but it does not appear certain that the indictment should also charge that he was put in fear, though this is usual, and, therefore, safest to be done.

But in the conference on Donally's case, where the subject was much considered, it was observed by Eyre, B., that the more ancient precedents did not state the putting in fear, and that though others stated the putting in corporeal fear, yet the putting in fear of life was of modern introduction. Other judges considered that the gist of the offence was the taking by violence, and that the putting in fear was only a constructive violence, supplying the place of actual force. In general, however, as was before observed, no technical description of the fact is necessary, if upon the whole it plainly appears to have been committed with violence against the will of the party.—2 *East*, *P. C.* 783.

The ownership of the property must be alleged the same as in an indictment for larceny. The value of the articles stolen need not be stated. In *R.* v. *Bingly*, 5 *C. & F.* 602, the prisoner robbed the prosecutor of a piece of paper, con-

taining a memorandum of money that a person owed him, and it was held sufficient to constitute robbery.

If the robbery be not proved, the jury may return a verdict of an assault with intent to rob, if the evidence warrants it, and then the defendant is punishable as under sec. 33. By sec. 191 of the Procedure Act, if the intent be not proved, a verdict of common assault may be given.—*R.* v. *Archer*, 2 *Moo. C. C.* 283; *R.* v. *Hagan*, 8 *C. & P.* 174; *R.* v. *Ellis*, 8 *C. & P.* 654; *R.* v. *Nicholls*, 8 *C. & P.* 269. *R.* v. *Woodhall*, 12 *Cox*, 240, is not to be followed here, as the enactment to the same effect is now, in England, repealed.

The word "together" is not essential in an indictment for robbery against two persons to show that the offence was a joint one.—*R.* v. *Provost*, 1 *M. L. R. Q. B.* 477.

A prisoner accused of assault with intent to rob may be found guilty of simple assault.—*R.* v. *Oncil*, 11 *R. L.* 334.

34. Every one who, being armed with an offensive weapon or instrument, robs, or assaults with intent to rob, any person, or together with one or more other person or persons, robs or assaults with intent to rob any person, or robs any person, and at the time of, or immediately before, or immediately after such robbery, wounds, beats, strikes or uses any other personal violence to any person, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 21, *s.* 42. 24-25 *V., c.* 96, *s.* 43, *Imp.*

This clause provides for five offences: 1. Being armed with any offensive weapon or instrument, robbing any person.

2. Being so armed, assaulting any person with intent to rob this person.

3. Together with one or more person or persons, robbing any other person.

4. Together with one or more person or persons, assaulting any person with intent to rob this person.

5. Robbing any person, and at the time of or imme-

diately before, or immediately after such robbery, wounding, beating, striking, or using any other personal violence to *any* person.

1. *Indictment for a robbery by a person armed*.....that J. S., on ..... at ..... being then armed with a certain offensive weapon and instrument, to wit, a bludgeon, in and upon one D. feloniously did make an assault, and him the said D. in bodily fear and danger of his life then feloniously did put, and a sum of money, to wit, the sum of ten pounds, of the moneys of the said D., then feloniously and violently did steal, take and carry away against .....

2. *Indictment for an assault by a person armed with intent to commit robbery*.....that J. S. on .....at..... being then armed with a certain offensive weapon and instrument, called a bludgeon, in and upon one D. feloniously did make an assault, with intent the moneys, goods and chattels of the said D. from the person and against the will of him the said D., then feloniously and violently to steal, take and carry away, against the form .....

3. *Indictment for robbery by two or more persons in company*.....that A. B. and D. H. together, in and upon one J. N. feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then and there together feloniously did put, and the moneys of the said J. N. to the amount of ..... from the person and against the will of the said J. N., then feloniously and violently together did steal, take and carry away, against the form ..... (*If one only of them be apprehended, it will charge him by name together with a certain other person, or certain other persons, to the jurors aforesaid unknown).—Archbold*, 418; 2 *Russ.* 142.

4. *Indictment for, together with one or more person,*

or persons, assaulting with intent to rob.—Can be drawn on forms 2 and 3.

5. *Robbery accompanied by wounding, etc.*—That J. N. at ..... on ..... in and upon one A. M. feloniously die make an assault, and him the said A. M. in bodily fear and danger of his life then feloniously did put, and the moneys of the said A. M. to the amount of ten pounds, and one gold watch, of the goods and chattels of the said A. M. from the person and against the will of the said A. M. then feloniously and violently did steal, take and carry away; and that the said J. N. immediately before he so robbed the said A. M. as aforesaid, the said A. M. feloniously did wound, against ..... (*It will be immaterial, in any of these indictments, if the place where the robbery was committed be stated incorrectly.*)—*Archbold*, 412.

The observation, *ante*, applicable to robbery generally, will apply to these offences.

Under indictment number 1, the defendant may be convicted of the robbery only, or of an assault with intent to rob. The same, under indictments numbers 3 and 5. And wherever a robbery with aggravating circumstances, that is to say, either by a person armed, or by several persons together, or accompanied with wounding, is charged in the indictment, the jury may convict of an assault with intend to rob, attended with the like aggravation, the assault following the nature of the robbery.—*R.* v. *Mitchell*, 2 *Den.* 468, *and remarks upon it, in Dears.* 19.

By sect. 191 of the Procedure Act, a verdict of common assault may be returned, if the evidence warrants it. And by sect. 183, if the offence has not been completed, a verdict of guilty of the attempt to commit the offence charged may be given, if the evidence warrants it.

Upon an indictment for robbery charging a wounding,

the jury may, under sec. 189 of the Procedure Act, convict of unlawfully wounding.—2 *Russ.* 144.

See *R.* v. *Provost*, under preceding section.

BURGLARY.

GENERAL REMARKS.

Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law, was called *hamesecken*, has always been looked upon as a very heinous offence. For it always tends to occasion a frightful alarm, and often leads by natural consequence to the crime of murder itself. Its malignity also is strongly illustrated by considering how particular and tender a regard is paid by the laws of England to the immunity of a man's house, which it styles its castle, and will never suffer to be violated with impunity; agreeing herein with the sentiments of Ancient Rome, as expressed in the words of Tully *(Pro Domo.* 41*)* "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason no outward doors can, *in general*, be broken open to execute any civil process, though, in criminal cases, the public safety supersedes the private. Hence, also, in part arises the animadversion of the law upon eavesdroppers, nuisancers, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven), without danger of raising a riot, rout or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. —*Stephens' Blackstone, Vol.* 4, 104.

Burglary is a breaking and entering the mansion-house of another in the night, with intent to commit some

felony within the same, whether such felonious intent be executed or not.—2 *Russ.* 1. In which definition there are four things to be considered, the *time*, the *place*, the *manner*, and the *intent*.

The time.—The time must be by night and not by day, for in the day time there is no burglary. As to what is reckoned night and what day for this purpose, anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion afterwards was that if there were daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was no burglary. But this did not extend to moonlight, for then many midnight burglaries would have gone unpunished; and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all creation is at rest. But the doctrines of the common law on this subject are no longer of practical importance, as it is enacted by sect. 2 of the Larceny Act, that for the purposes of that Act, and in reference to the crime now under consideration, "the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day, and the day shall include the remainder of the twenty-four hours." The breaking and entering must both be committed in the night-time; if the breaking be in the day, and the entering in the night, or *vice versâ*, it is no burglary.—1 *Hale*, 551. But the breaking and entering need not be both done in the same night; for if thieves break a hole in a house one night, with intent to enter another night and commit felony and come accordingly another night and commit a felony, seems to be burglary, for the breaking and entering were both *noctanter*, though not the same

night.—2 *Russ.* 39. The breaking on Friday night with intent to enter at a future time, and the entering on the Sunday night constitute burglary.—*R.* v. *Smith*, *R. & R.* 417. And then, the burglary is supposed to have taken place on the night of the entry, and is to be charged as such.—1 *Hale*, 551. In *Jordan's Case*, 7 *C. & P.* 432, it was held that where the breaking is on one night and the entry on another, a party present at the breaking, but absent at the entry, is a principal.

The place.—The breaking and entering must take place in a *mansion* or *dwelling-house* to constitute burglary. At common law, Lord Hale says that a church may be the subject of burglary, 1 *Hale*, 559, on the ground, according to Lord Coke, that a church is the mansion house of God, though *Hawkins*, 1 *vol.* 133, does not approve of that *nicety*, as he calls it, and thinks that burglary in a church seems to be taken as a distinct burglary from that in a house. However, this offence is now provided for by sections 35 and 42 of the Larceny Act.

What is a *dwelling-house*?—From all the cases, it appears that it must be a place of actual *residence*. Thus a house under repairs, in which no one lives, though the owner's property is deposited there, is not a place in which burglary can be committed; *R.* v. *Lyons*, 1 *Leach*, 185; in this case, neither the proprietor of the house, nor any of his family, nor any person whatever had yet occupied the house.

In *Fuller's Case*, 1 *Leach*, *note*, *loc. cit.*, the defendant was charged of a burglary in the dwelling-house of Henry Holland. The house was new built, and nearly finished; a workman who was constantly employed by Holland slept in it for the purpose of protecting it; but none of Holland's family had yet taken possession of the house, and the Court held that it was not the dwelling-house of

Holland, and where the owner has never by himself or by any of his family, slept in the house, it is not his dwelling-house, so as to make the breaking thereof burglary, though he has used it for his meals, and all the purposes of his business.—*See R.* v. *Martin, R. & R.* 108.

If a porter lie in a warehouse for the purpose of protecting goods, *R.* v. *Smith*, 2 *East*, 497, or a servant lie in a barn in order to watch thieves, *R.* v. *Brown*, 2 *East*, 501, this does not make the warehouse or barn a dwelling-house in which burglary can be committed. But if the agent of a public company reside at a warehouse belonging to his employers, this crime may be committed by breaking it, and he may be stated to be the owner.—*R.* v. *Margetts*, 2 *Leach*, 931. Where the landlord of a dwelling-house, after the tenant, whose furniture he had bought, had quitted it, put a servant into it to sleep there at night, until he should re-let it to another tenant, but had no intention to reside in it himself; the judges held that it could not be deemed the dwelling-house of the landlord.—*R.* v. *Davis*, 2 *Leach*, 876. So where the tenant had put all his goods and furniture into the house, preparatory to his removing to it, with his family, but neither he nor any of his family had as yet slept in it, it was holden not to be a dwelling-house in which burglary can be committed.—*R.* v. *Hallard*, 2 *East*, 498; *R.* v. *Thompson*, 2 *Leach*, 771. And the same has been ruled, when under such circumstances the tenant had put a person, not being one of the family, into the house, for the protection of the goods and furniture in it, until it should be ready for his residence.—*R.* v. *Harris*, 2 *Leach*, 701; *R.* v. *Fuller*, 1 *Leach*, 187. A house will not cease to be the house of its owner, on account of his occasional or temporary absence, even if no one sleep in it provided the owner has an *animus revertendi*.—*R.* v.

Murray, 2 *East*, 496; and in *R.* v. *Kirkham*, 2 *Starkie, Ev.* 279, Wood, B., held that the offence of stealing in a dwelling-house had been committed, although the owner and his family had left six months before, having left the furniture and intending to return.—*Idem*, *Nutbrown's Case*, 2 *East*, 496. And though a man leaves his house and never means to live in it again, yet if he uses part of it as a shop, and lets his servant and his family live and sleep in another part of it, for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling-house.—*R.* v. *Gibbons*, *R. & R.* 442. But where the prosecutor and upholsterer, left the house in which he had resided with his family, without any intent of returning to live in it, and took a dwelling-house elsewhere, but still retained the former house as a warehouse and workshop; two women employed by him as workwomen in his business, and not as domestic servants, slept there to take care of the house, but did not have their meals there, or use the house for any other purpose than sleeping in it as a security to the house; the judges held that this was not properly described as the dwelling-house of the prosecutor.—*R.* v. *Flannagan*, *R. & R.* 187. The occupation of a servant in that capacity, and not as tenant, is in many cases the occupation of a master, and will be a sufficient residence to render it the dwelling-house of the master.—*R.* v. *Stock*, *R. & R.* 185; *R.* v. *Wilson*, *R. & R.* 115. Where the prisoner was indicted for burglary in the dwelling-house of J. B., J. B. worked for one W. who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining. J. B. received no more wages after than before he went to

live in the house. It was held not rightly laid.—*R.* v. *Rawlings*, 7 *C. & P.* 150. If a servant live in a house of his master's at a yearly rent, the house cannot be described as the master's house.—*R.* v. *Jarvis*, 1 *Moo. C. C.* 7. Every permanent building, in which the renter or owner and his family dwell and lie, is deemed a dwelling-house, and burglary may be committed in it. Even a set of chambers in an inn or court or college is deemed a distinct dwelling-house for this purpose.—*Archbold*, 490. And it will be sufficient if any part of his family reside in the house, Thus where a servant boy of the prosecutor always slept over his brew-house, which was separated from his dwelling-house by a public passage, but occupied therewith, it was holden, upon an indictment for burglary, that the brew-house was the dwelling-house of the prosecutor, although, being separated by the passage, it could not be deemed to be part of the house in which he himself actually dwelt.—*R.* v. *Westwood, R. & R.* 495. Burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it, because it is a temporary not a permanent edifice, 1 *Hale*, 557; but if it be a permanent building, though used only for the purpose of a fair, it is a dwelling-house.—*R.* v. *Smith*, 1 *M. & Rob.* 256. So even a loft, over a stable, used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken.—*R.* v. *Turner*, 1 *Leach*, 305. If a house be divided, so as to form two or more dwelling-houses, within the meaning of the word in the definition of burglary, and all internal communication be cut off, the partitions become distinct houses and each part will be regarded as a mansion.—*R.* v. *Jones*, 1 *Leach*, 537. But a house the joint property of partners in trade in which their business is carried on may be described as the

dwelling-house of all the partners, though only one of the partners reside in it.—*R.* v. *Athea*, 1 *Moo. C. C.* 329. If the owner, who lets out apartments in his house to other persons, sleep under the same roof and have but one outer door common to him and his lodgers, such lodgers are only inmates and all their apartments are parcel of the one dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer-doors, the apartments so let out are the mansion for the time being of each lodger respectively, even though the rooms are let by the year.—2 *East*, 505. If the owner let off a part, but do not dwell in the part he reserves for himself, then the part let off is deemed in law the dwelling-house of the party who dwells in it, whether it communicates internally with the other part or not; but the part he has reserved for himself is not the subject of burglary; it is not his dwelling-house, for he does not dwell in it, nor can it be deemed the dwelling-house of the tenant, for it forms no part of his lodging.—*R.* v. *Rodgers*, *R.* v. *Carrell*, *R.* v. *Trapshaw*, 1 *Leach*, 89, 237, 427. If the owner let the whole of a dwelling-house, retaining no part of it for his or his family's dwelling, the part each tenant occupies and dwells in is deemed in law to be the dwelling-house of such tenant, whether the parts holden by the respective tenants communicate with each other internally or not.—*R.* v. *Bailey*, 1 *Moo. C. C.* 23; *R.* v. *Jenkins*, *R. & R.* 244; *R.* v. *Carrell*, 1 *Leach*, 237.

The term *dwelling-house* includes in its legal signification all out-houses occupied with and immediately communicating with the dwelling-house. But by sec. 36 of the Larceny Act, *post*, no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of

the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other. Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a wash-house on the ground floor, and of three bedrooms upstairs, one of them over the wash-house and the bedroom over the house-place communicated with that over the wash-house, but there was no internal communication between the wash-house and any of the rooms of the house, but the whole was under the same roof, and the defendant broke into the wash-house, and was breaking through the partition-wall between the wash-house and the house-place, it was holden that the defendant was properly convicted of burglary in breaking the house.—*R.* v. *Burrowes*, 1 *Moo. C. C.* 274. But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining to the kiln a dairy, one end of which was supported by the wall of the kiln, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy.—*R.* v. *Higgs*, 2 *C. & K.* 322. To be within the meaning of this section, the building must be occupied with the house in the same right; and therefore where a house let to and occupied by A. adjoined and communicated with a building let to and occupied by A. and B., it was holden that the building could not be considered a part of the dwelling-house of A.—*R.* v. *Jenkins*, *R. & R.* 224. If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage, under sect. 40, *post*.

It is necessary to state with accuracy in the indictment, to whom the dwelling-house belongs.—1 *Burn*, 554. But in all cases of doubt, the pleader should vary in different counts the name of the owner, although there can be little doubt that a variance in this respect would be amended at the trial.—*Archbold*, 496; 2 *Russ.* 47, 49. As to the local description of the house, it must be proved as laid; if there be a variance between the indictment and evidence in the parish, etc., where the house is alleged to be situate, the defendant must be acquitted of the burglary, unless an amendment be made. To avoid difficulty, different counts should be inserted, varying the local description. If the house be not proved to be a dwelling-house, the defendant must be acquitted of the burglary but found guilty of the simple larceny, if larceny is proved.— *Archbold*, 489, 496.

The manner.—There must be both a *breaking* and an *entering* of the house. The breaking is either actual or constructive. Every entrance into the house by a trespasser is not a breaking in this case. As if the door of a mansion-house stand open, and the thief enter this is not breaking; so if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of a window, and, with a hook or other engine, draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house.—1 *Hale*, 551. Where a window was a little open, and not sufficiently so to admit a person, and the prisoner pushed it wide open and got in, this was held to be sufficient breaking.—*R.* v. *Smith*, 1 *Moo. C. C.* 178.

If there be an aperture in a cellar window to admit

light, through which a thief enter in the night, this is not burglary.—*R.* v. *Lewis*, 2 *C. & P.* 628; *R.* v. *Spriggs*, 1 *M. & Rob.* 357. There is no need of any demolition of the walls or any manual violence to constitute a breaking. Lord Hale says: "and these acts amount to an actual breaking, *viz.*, opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger." In *Robert's alias Chambers' case*, 2 *East*, 487, where a glass window was broken, and the window opened with the hand, but the shutters on the inside were not broken, this was ruled to be burglary by Ward, Powis and Tracy, justices; but they thought this the extremity of the law; and, on a subsequent conference, Holt, C. J., and Powell, C. J., doubting and inclining to another opinion, no judgment was given. In *Bailey's Case*, *R. & R.* 341, it was held by nine judges that introducing the hand between the glass of an outer window and an inner shutter is a sufficient entry to constitute burglary. If a thief enter by the chimney, it is a breaking; for that is as much closed as the nature of things will permit. And it is burglarious breaking, though none of the rooms of the house are entered. Thus in *R.* v. *Brice*, *R. & R.* 450, the prisoner got in at a chimney and lowered himself a considerable way down, just above the mantel piece of a room on the ground floor. Two of the judges thought he was not in the dwelling-house, till he was below the chimney-piece. The rest of the judges, however, held otherwise; that the chimney was part of the dwelling-house, that the getting in at the top was breaking of the dwelling-house, and that the lowering himself was an entry therein.

Where the prisoner effected an entry, by pulling down the upper sash of a window, which had not been fastened but merely kept in its place by the pulley weight, the judges held this to be a sufficient breaking to constitute burglary, even although it also appeared that an outside shutter, by which the window was usually secured, was not closed or fastened at the time.—*R.* v. *Haines*, *R. & R.* 451. Where an entry was effected, first into an outer cellar, by lifting up a heavy iron grating that led into it, and then into the house by a window, and it appeared that the window, which opened by hinges, had been fastened by means of two nails as wedges, but could, notwithstanding, easily be opened by pushing, the judges held that opening the window, so secured, was a breaking sufficient to constitute burglary.—*R.* v. *Hall*, *R. & R.* 355. So where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and removed the fastenings of the window and opened it.—*R.* v. *Robinson*, 1 *Moo. C. C.* 327.

But, if a window thus opening on hinges, or a door, be not fastened at all, opening them would not be a breaking within the definition of burglary. Even where the heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, was opened; it had bolts by which it might have been fastened on the inside, but it did not appear that it was so fastened at the time, the judges were divided in opinion whether the opening of this door was such a breaking of the house as constituted burglary; six thinking that it was, and six that it was not.—*R.* v. *Callan*, *R. & R.* 157. It was holden in *Brown's Case* that it was.—2 *East*, 487. In *R.* v. *Lawrence*, 4 *C. & P.* 231, it was holden that it was not. In *R.* v. *Russell*, 1 *Moo. C. C.* 377, it was holden that it was.

Where the offender, with intent to commit a felony, obtains admission by some artifice or trick for the purpose of effecting it, he will be guilty of burglary, for this is a constructive breaking. Thus, where thieves, having an intent to rob, raised the hue-and-cry, and brought the constable, to whom the owner opened the door; and when they came in, they bound the constable and robbed the owner, this was held a burglary. So if admission be gained under pretence of business, or if one take lodging with a like felonious intent, and afterwards rob the landlord, or get possession of a dwelling-house, by false affidavits, without any color of title, and then rifle the house, such entrance being gained by fraud, it will be burglarious. In *Hawkins' Case*, she was indicted for burglary; upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country, and meeting with the boy who kept the key, she prevailed upon him to go with her to the house, by the promise of a pot of ale; the boy accordingly went with her, opened the door and let her in, whereupon she sent the boy for the pot of ale, robbed the house and went off, and this being in the night time it was adjudged that the prisoner was clearly guilty of burglary. —2 *East, P. C.* 485. If a servant conspire with a robber, and let him into the house by night, this is burglary in both, 1 *Hale*, 553, for the servant is doing an unlawful act; and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open.— *R.* v. *Johnson, C. & M.* 218.

And the breaking necessary to constitute burglary is not restricted to the breaking of the outer wall or doors, or

windows of a house; if the thief got admission into the house by the outer door or windows being open, and afterwards breaks or unlocks an inner door, for the purpose of entering one of the rooms in the house, this is burglary.—1 *Hale*, 553; 2 *East, P. C.* 488. So if a servant open his master's chamber door, or the door of any other chamber not immediately within his trust, with a felonious design, or if any other person lodging in the same house, or in a public inn, open and enter another's door with such evil intent, it is burglary.—2 *East, P. C.* 491; 1 *Hale*, 553; *R.* v. *Wenmouth*, 8 *Cox*, 348. The breaking open chests is not burglary.—1 *Hale*, 554. The breaking must be of some part of the house; and, therefore, where the defendant opened an area gate with a skeleton key, and then passed through an open door into the kitchen, it was holden not to be a breaking, there being no free passage from the area to the house in the hours of sleep.—*R.* v. *Davis*, *R. & R.* 322; *R.* v. *Bennett*, *R. & R.* 289; *R.* v. *Paine*, 7 *C. & P.* 135. It is essential that there should be an entry as well as a breaking, and the entry must be connected with the breaking.—1 *Hale*, 555; *R.* v. *Davis*, 6 *Cox*, 369; *R.* v. *Smith*, *R. & R.* 417. It is deemed an entry when the thief breaketh the house, and his body or any part thereof, as his foot or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, though the hand be not in, or into a hole of the house which he hath made, with intent to murder or kill, this is an entry and breaking of the house; but if he doth barely break the house, without any such entry at all, this is no burglary.—3 *Inst.* 64; 2 *East, P. C.* 490. Thieves came by night to rob a house; the owner went out and struck one of them; another made a pass with a sword at persons he saw in the entry, and, in so doing, his hand was

over the threshold: this was adjudged burglary by great advice.—2 *East, P. C.* 490.

In *Gibbon's Case*, evidence that the prisoner in the night time cut a hole in the window-shutters of a shop, part of a dwelling-house, and putting his hand through the hole took out watches, etc. was holden to be burglary, although no other entry was proved.—2 *East, P. C.* 490. Introducing the hand through a pane of glass, broken by the prisoner, between the outer window and an inner shutter, for the purpose of undoing the window latch, is a sufficient entry.—*R.* v. *Bailey, R. & R.* 341. So would the mere introduction of the offender's finger.—*R.* v. *Davis. R. & R.* 499. So an entry down a chimney is a sufficient entry in the house for a chimney is part of the house.—*R.* v. *Brice, R. & R.* 450.

It is even said that discharging a loaded gun into a house is a sufficient entry.—1 *Hawkins*, 132. Lord Hale. 1 vol. 155, is of a contrary opinion, but adds *quære*? 2 East, P. C. 490, seems to incline towards Hawkins' opinion. Where thieves bored a hole through the door with a centre-bit, and parts of the chips were found in the inside of the house this was holden not a sufficient entry to constitute burglary. —*R.* v. *Hughes*, 2 *East, P. C.* 491. If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch at a distance, this is burglary in all.—1 *Burn* 550.

The entry need not be at the same time as the breaking. —*R.* v. *Smith, R. & R.* 417.

In *R.* v. *Spanner*, 12 *Cox*, 155, Bramwell, B., held, that an attempt to commit a burglary may be established, on proof of a breaking with intent to rob the house, although there be no proof of an actual entry. The prisoner was indicted for burglary, but no entry having been proved a verdict for an attempt to commit a burglary was given.

The intent.—There can be no burglary but where the indictment both expressly alleges, and the verdict also finds, an intention to commit some felony; for if it appear that the offender meant only to commit a trespass, as to beat the party or the like, he is not guilty of burglary.—1 *Hale*, 561; whether a felony at common law or by statute is immaterial. The intent must be proved as laid. Where the intent laid was to kill a horse, and the intent proved was merely to lame him, in order to prevent him from running a race, the variance was holden fatal.—*R.* v. *Dobbs*, 2 *East, P. C.* 513. It is immaterial whether the felonious intent be executed or not; thus, they are burglars who, with a felonious intent, break any house or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that something be taken, though it be not material of what value. The felonious intent with which the prisoner broke and entered the house cannot be proved by positive testimony; it can only be proved by the admission of the party, or by circumstances from which the jury may presume it. Where it appears that the prisoner actually committed a felony after he entered the house, this is satisfactory evidence, and almost conclusive that the intent with which he broke and entered the house was to commit that felony. Indeed, the very fact of a man's breaking and entering a dwelling-house in the night time is strong presumptive evidence that he did so with intent to steal, and the jury will be warranted in finding him guilty upon this evidence merely.—*R.* v. *Brice, R. & R.* 450; *R.* v. *Spanner*, 12 *Cox*, 155. If the intent be at all doubtful, it may be laid in different ways in different counts.—*R.* v. *Thomson*, 2 *East, P. C.* 515; 2 *Russ.* 45. It seems sufficient in all cases where a felony has actually

been committed, to allege the commission of it, as that is sufficient evidence of the intention. But the intent to commit a felony, and the actual commission of it, may both be alleged; and in general this is the better mode of statement.—*R.* v. *Furnival, R. & R.* 445.

As to punishment, see *post*, on sect. 38.

It will be observed that the entry may be before the breaking as well as after: for, though there were once different opinions upon the question as to whether the breaking *out* of a house to escape, by a man who had previously entered by an open door with intent to commit a felony, was burglary, all doubts are now removed by sect. 37 of the Larceny Act, *post*.

BURGLARY AND HOUSE-BREAKING.

35. Every one who breaks and enters any church, chapel, meeting-house or other place of divine worship, and commits any felony therein; or being in any church, chapel, meeting-house or other place of divine worship, commits any felony therein and breaks out of the same, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 21, *s.* 49. 24-25 *V.*, *c.* 96, *s.* 50, *Imp.*

Greaves says: "This clause clearly includes every place of public worship; the former enactments were confined not only to stealing, but to stealing any chattel.—(Sect. 17 c. 92 Cons. Stat. Can.) Therefore stealing fixtures was not within them.—*R.* v. *Barker*, 3 *Cox*, 581. The present clause includes *any* felony, and this clause and the eight subsequent clauses are in this respect made uniform."

The breaking and entering required to constitute an offence under this section are of the same nature as in burglary, except that they need not be in the night time.

If the breaking is with intent to commit a felony, but no felony be actually committed, the offence falls under sect. 42, *post*. A tower of a parish church is parcel of a

church; *R.* v. *Wheeler*, 3 *C. & P.* 585; so is the vestry.—*R.* v. *Evans*, *C. & M.* 298.

The goods of a dissenting chapel, vested in trustees, cannot be described as the goods of a servant, put in charge of the chapel and the things in it.—*R.* v. *Hutchinson*, *R. & R.* 412. Where the goods belonging to a church are stolen, they may be laid in the indictment to be the goods of the parishioners.—2 *Russ.* 73.

Indictment for breaking and entering a church and stealing therein.— ..... the church of the parish of ..... in the county of ..... feloniously did break and enter, and then, in the said church, one silver cup of the goods and chattels of the parishioners of the said parish feloniously did steal, take and carry away against the form .....—*Archbold.*

Local description is necessary in the body of the indictment.—*R.* v. *Jarrald*, *L. & C.* 320.

Indictment for stealing in and breaking out of a church.—..... one silver cup, of the goods and chattels of the parishioners of the parish of ..... in the county of ..... in the church of the said parish there situate, feloniously did steal, take and carry away; and that the said *(defendant)* so being in the said church as aforesaid, afterwards, and after he had so committed the said felony in the said church, as aforesaid, on the day and year aforesaid, feloniously did break out of the said church, against the form .....—*Archbold*, 397.

If a chapel which is private property be broken and entered, lay the property as in other cases of larceny. If the evidence fails to prove the breaking and entering a church, etc., the defendant may be convicted of simple larceny.—*Archbold*, 396. Upon the trial of any offence under this section, the jury may, under sect. 183 of the

Procedure Act, convict of an attempt to commit such offence.—2 *Russ.* 74.

36. No building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there is a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other.—32-33 *V.*, *c.* 21, *s.* 52. 24-25 *V.*, *c.* 96, *s.* 53, *Imp.*

See remarks on burglary, and under sect. 40 *post.*

Where the burglary is in an outhouse, falling within this clause, it must still be laid to have been done in the dwelling-house.—2 *East, P. C.* 512; *R.* v. *Garland,* 2 *East, P. C.* 493.

"Curtilage" is a court-yard, enclosure or piece of land near and belonging to a dwelling-house.—*Toml. Law Dict.*

37. Every one who enters the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house, commits any felony therein, and, in either case, breaks out of such dwelling-house in the night, is guilty of burglary.—32-33 *V.*, *c.* 21, *s.* 50. 24-25 *V.*, *c.* 96, *s.* 51, *Imp.*

Sect. 2, *ante,* declares what is night in the interpretation of this Act.

There was some doubt, at common law, on this point Lord Bacon thought it was burglary, and Sir Matthew Hale that it was not.—4 *Steph. Comm.* 109.

If a person commits a felony in a house, and afterwards breaks out of it in the night-time, this is burglary, although he might have been lawfully in the house ; if, therefore, a lodger has committed a larceny in the house and in the night-time even lifts a latch to get out of the house with the stolen property, this is a burglariously breaking out of the house.—*R.* v. *Wheeldon,* 8 *C. & P.* 747.

It has been held that getting out of a house by pushing up a new trap door, which was merely kept down by its own weight, and on which fastenings had not yet been put, but the old trap-door, for which this new one was substituted, had been secured by fastenings, was not a sufficient breaking out of the house.—*R.* v. *Lawrence*, 4 *C. & P.* 231. On this case Greaves says: "unless a breaking *out* of a house can be distinguished from the breaking *into* a house, this case seems overruled by *R.* v. *Russell*, 1 *Moo. C. C.* 377."

If the felon, to get out of the dwelling-house, should break an inside door, the case would plainly enough be within the statute. But the facts of the cases seem not to have raised the question, absolutely to settle it, whether where the intent is not to get out, the breach of an inner door by a person already within, having made what is tantamount to a felonious entry, but not by breaking, is sufficient to constitute burglary, if there is no entry through the inner door thus broken. There are indications that the breaking alone in such circumstances may be deemed enough.—(*R.* v. *Wheeldon, supra*). On the other hand, in an English case, it was held that burglary is not committed by an entry, with felonious intent, into a dwelling-house, without breaking, followed by a mere breaking, without entry, of an inside door.—*R.* v. *Davis*, 6 *Cox*, 369; 2 *Bishop Cr. L.* 100. But in Kelyng's Cr. C. 104, *Stevens & Haynes' re-print*, it is said that if a servant in the house, lodging in a room remote from his master in the night-time, draweth the latch of a door to come into his master's chamber, with an intent to kill him, this is burglary.

See next section for punishment and form of indictment.

Local description is necessary in the indictment.—2 *Russ.* 47.

38. Every one who commits the crime of burglary is liable to imprisonment for life.—32-33 *V., c.* 21, *s.* 51. 24-25 *V., c.* 96, *s.* 52, *Imp.*

On any indictment for burglary the prisoner may be convicted of the offence of breaking the dwelling-house with intent to commit a felony therein under sec. 42, *post*; sec. 193 Procedure Act.

On an indictment for burglary, the prisoner cannot be found guilty of felonious receiving.—*St. Laurent* v. *R.* 7 *Q. L. R.* 47. (But see sec. 135 Procedure Act.)

Indictment for burglary and larceny to the value of twenty-five dollars.—The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... about the hour of eleven of the clock, of the night of the same day, the dwelling-house of J. N., situate ..... feloniously and burglariously did break and enter, with intent the goods and chattels of one K. O. in the said dwelling-house then being, feloniously and burglariously to steal, take and carry away; and then, in the said dwelling-house, one silver sugar basin, of the value of ten dollars, six silver table-spoons of the value of ten dollars, and twelve silver tea-spoons of the value of ten dollars, of the goods and chattels of the said K. O. in the said dwelling-house then being found, feloniously and burglariously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity. *(Local description necessary.)*—*R.* v. *Jarrald, L. & C.* 320.

Upon this indictment, the defendant, if all the facts are proved as alleged, may be convicted of burglary; if they are all proved, with the exception that the breaking was

by night, the defendant may be convicted of house-breaking, under sect. 41, *post;* if no breaking he proved, but the value of the property stolen proved to be as alleged, over twenty-five dollars, the verdict may be of stealing in a dwelling-house to that amount, under sect. 45, *post;* if no satisfactory evidence be offered to show, either that the house was a dwelling-house or some building communicating therewith, or that it was the dwelling-house of the party named in the indictment, or that it was locally situated as therein alleged, or that the stolen property was of the value of twenty-five dollars still the defendant may be convicted of a simple larceny.—1 *Taylor, Evid.* 216; *Archbold,* 489; *R.* v. *Withal,* 1 *Leach,* 88; *R.* v. *Comer,* 1 *Leach,* 36; *R.* v. *Hungerford,* 2 *East, P. C.* 518. Where several persons are indicted together for burglary and larceny, the offence of some may be burglary and of the others only larceny.—*R.* v. *Butterworth R. & R.* 520. See *post* remarks under sec. 39.

If no felony was committed in the house, the indictment should be as follows:—

That A. B., on ..... about the hour of eleven in the night of the same day, at ..... the dwelling-house of J. N. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said J. N. in the said dwelling-house then & there being found, then and there feloniously and burglariously to steal, take and carry away, against ..... 3 *Chitty,* 1118.

The terms of art usually expressed by the averment "feloniously and burglariously did break and enter" are essentially necessary to the indictment. The word *burglariously* cannot be expressed by any other word or circumlocution; and the averment that the prisoner broke

and entered is necessary, because a breaking without an entering, or an entering without a breaking, will not make burglary.—2 *Russ.* 50. The offence must be laid to have been committed in a mansion-house or dwelling-house, the term *dwelling-house* being that more usually adopted in modern practice. It will not be sufficient to say a *house*.—2 *Russ.* 46; 1 *Hale*, 550. It has been said that the indictment need not state whose goods were intended to be stolen, or were stolen.—*R.* v. *Clarke*, 1 *C. & K.* 421; *R.* v. *Nicholas*, 1 *Cox*, 218; *R.* v. *Lawes*, 1 *C. & K.* 62; nor specify which goods, if an attempt or an intent to steal only is charged.—*R.* v. *Johnson*, *L. & C.* 489.

It is better to state at what hour of the night the acts complained of took place, though it is not necessary that the evidence should correspond with the allegation as to the exact hour; it will be sufficient if it shows the acts to have been committed in the night, as this word is interpreted by the statute. However, in *R.* v. *Thompson*, 2 *Cox*, 377, it was held that the hour need not be specified, and that it will be sufficient if the indictment alleges *in the night*.

The particular felony intended must be specified in the indictment.—2 *Bishop, Cr. Proc.* 142.

Indictment under sect. 37, *for burglary by breaking out*.—The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... about the hour of eleven in the night of the same day, being in the dwelling-house of K. O., situate ..... one silver sugar-basin of the value of ten dollars, six silver table-spoons of the value of ten dollars, and twelve silver tea-spoons of the value of ten dollars, of the goods and chattels of the said K. O., in the said dwelling-house of the said K. O., then

being in the said dwelling-house, feloniously did steal, take and carry away; and that he, the said J. S., being so as aforesaid in the said dwelling-house, and having committed the felony aforesaid, in manner and form aforesaid, afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, feloniously and burglariously did break out of the said dwelling-house of the said K. O. against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity. —*Archbold.*

An indictment alleging "did break to get out" or "did break and get out" is bad; the words of the statute are "break out."—*R.* v. *Compton*, 7 *C. & P.* 139. See, *ante*, *R.* v. *Lawrence*, 4 *C. & P.* 231; *R.* v. *Wheeldon*, 8 *C. & P.* 747, and remarks on burglary. If it be doubtful whether a felony can be proved, but there be sufficient evidence of an intent to commit a felony, a count may be added stating the intent. To prove this count, the prosecutor must prove the entry, the intent as in other cases, and the breaking out.—*Archbold*, 501.

Upon the trial of any offence hereinbefore mentioned, the jury may convict of an attempt to commit such offence, if the evidence warrants it, under sect. 183 of the Procedure Act.

39. Every one who enters any dwelling-house in the night, with intent to commit any felony therein, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 53. 24-25 *V.*, *c.* 96, *s.* 54, *Imp.*

Greaves says: "This clause is new, and contains a very great improvement of the law. It frequently happened on the trial of an indictment for burglary where no pro-

perty had been stolen that the prisoner escaped altogether for want of sufficient proof of the house having been broken into, though there was no moral doubt that it had been so. This clause will meet all such cases. It will also meet all cases where any door or window has been left open, and the prisoner has entered by it in the night. It is clear that if, on the trial of an indictment for burglary with intent to commit a felony, the proof of a breaking should fail, the prisoner might nevertheless be convicted of the offence created by this clause for such an indictment contains everything that is required to constitute an offence under this clause, in addition to the allegation of the breaking, and the prisoner may be acquitted of the breaking and convicted of the entering with intent to commit felony, in the same way as on an indictment for burglary and stealing, he may be acquitted of the breaking, and convicted of the stealing. And this affords an additional reason why in an indictment for burglary and committing a felony, there should always be introduced an averment of an intent to commit a felony, so that if the proof of the commission of the felony and of the breaking fail, the prisoner may nevertheless be convicted of entering by night with intent to commit it."

Indictment.— ..... that J. S., on ..... about the hour of eleven in the night of that same day, the dwelling of K. O., situate ..... feloniously did enter, with intent the goods and chattels of the said K. O. in the said dwelling-house then being, feloniously to steal, take and carry away, against the form ..... —*Archbold*, 489.

As to what is night, and what is a dwelling-house, in the interpretation of this clause, the same rules as for burglary must be followed. Under sect. 183 of the Procedure Act, the jury may, if the evidence warrants it,

convict of an attempt to commit the offence charged, upon an indictment under this section.

Local description is necessary in the indictment. See next section.

40. Every one who breaks and enters any building and commits any felony therein, such building being within the curtilage of a dwelling-house and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, or being in any such building, commits any felony therein and breaks out of the same, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 21, *s.* 54. 24-25 *V., c.* 96, *s.* 55, *Imp.*

The breaking and entering must be proved in the same manner as in burglary, except that it is immaterial whether it was done in the day or night. If this proof fail, the defendant may be convicted of simple larceny.

The building described in the statute is "any building within the *curtilage* of a dwelling-house, and occupied therewith, not being part of the dwelling-house, according to the provision hereinbefore mentioned" that is, not communicating with the dwelling-house, either immediately or by means of a covered and enclosed passage leading from the one to the other." To break and enter such a building was, before the present statute, burglary, or house-breaking, and although this enactment, which expressly defines the building meant thereby to be a building within the *curtilage*, appears to exclude many of those buildings which were formerly deemed parcel of the dwelling-house, from their adjoining to the dwelling-house, and being occupied therewith, although not within any common enclosure or curtilage, yet some of the cases decided upon these subjects may afford some guide to the construction of the present section. Where the defendant broke into a goose-house, which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the

yard was surrounded, partly by other buildings of the homestead, and partly by a wall in which there was a gate leading to the road, and some of the buildings had doors opening into the lane, as well as into the yard, the goose-house was holden to be part of the dwelling-house.—R. v. *Clayburn, R. & R.* 360. Where the prosecutor's house was at the corner of the street, and adjoining thereto was a work-shop, beyond which a coach-house and stable adjoined, all of which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, and was altogether enclosed, but the shop had no internal communication with the house, had a door opening into the street, and its roof was higher than that of the house, the workshop was holden to be a parcel of the dwelling-house.—*R.* v. *Chalking, R. & R.* 334. So, a warehouse which had a separate entrance from the street, and had no internal communication with the dwelling-house, with which it was occupied. but was under the same roof, and had a back door opening into the yard, into which the house also opened and which enclosed both, was holden to be part of the dwelling-house.—*R.* v. *Lithgo, R. & R.* 357. So, where in one range of buildings the prosecutor had a warehouse and two dwelling-houses, formerly one house, all of which had entrances into the street, but had also doors opening into an enclosed yard belonging to the prosecutor; and the prosecutor let one of the houses between his house and the warehouse together with certain easements in the yard, it was holden that the warehouse was parcel of the dwelling-house of the prosecutor; it was so before the division of the house, and remained so afterwards.—*R.* v. *Walters*, 1 *Moo. C. C.* 13. And where the dwelling-house of the prosecutor was in the centre of a space of about an acre of land, surrounded by a garden

wall, the front wall of a factory, and the wall of the stable-yard, the whole being the property of the prosecutor, who used the factory, partly for his own business and partly in a business in which he had a partner, and the factory opened into an open passage, into which the outer door of the dwelling-house also opened, it was holden that the factory was properly described as the dwelling-house of the prosecutor.—*R.* v. *Hancock, R. & R.* 170. But a building separated from the dwelling-house by a public thoroughfare cannot be deemed to be part of the dwelling-house.—*R.* v. *Westwood, R. & R.* 495. So neither is a wall, gate or other fence, being part of the outward fence of the curtilage, and opening into no building but into the yard only, part of the dwelling-house.—*R.* v. *Bennett, R. & R.* 289. Nor is the gate of an area, which opens into the area only, if there be a door or fastening to prevent persons from passing from the area into the house, although that door or other fastening may not be secured at that time.—*R.* v. *Davis, R. & R.* 322.

Where the building broken into was in the fold-yard of the prosecutor's farm, to get to which from the house it was necessary to pass through another yard called the pump-yard, into which the back door of the house opened, the pump-yard being divided from the fold-yard by a wall four feet high, in which there was a gate, and the fold-yard being bounded on all sides by the farm buildings, a wall from the house, a hedge and gates, it was held that the building was within the curtilage.—*R.* v. *Gilbert*, 1 *C. & K.* 84. *See R.* v. *Egginton*, 2 *Leach*, 913; *Archbold*, 405.

Indictment.— ..... a certain building of one J. N., situate ..... feloniously did break and enter, the said building then being within the curtilage of the dwelling-house of the said J. N. there situate, and by the said J. N.

then and there occupied therewith, and there being then and there no communication between the said building and the said dwelling-house, either immediate or by means of any covered and enclosed passage leading from the one to the other, with intent the goods and chattels of the said J. N. in the said building then being, feloniously to steal, take and carry away, and that the said J. S. then and there, in the said building, one silver watch, of the goods and chattels of the said J. N. feloniously did steal, take and carry away, against the form .....

This count may be added to an indictment for burglary, housebreaking or stealing in a dwelling-house to the amount of twenty-five dollars, and should be added, whenever it is doubtful whether the building is in strictness a dwelling-house. If the evidence fail to prove the actual stealing, but the breaking, entry and intent to steal be proved, the prisoner may be convicted, under this indictment, of the felony described in sect. 42, *post*, as this indictment alleges the intent as well as the act.—*Archbold*, 404.

Under sect. 183 of the Procedure Act, a verdict of guilty of an attempt to commit the offence charged may be given upon an indictment on this section, if the evidence warrants it.

Local description is necessary in the indictment.—*R.* v. *Bullock*, 1 *Moo. C. C.* 324, *note a.*

41. Every one who breaks and enters any dwelling-house, school-house, shop, warehouse or counting-house, and commits any felony therein, or being in any dwelling-house, school-house, shop, warehouse or counting-house, commits any felony therein, and breaks out of the same, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 21, *s.* 55. 24-25 *V., c.* 96, *s.* 56, *Imp.*

The breaking and entering must be proved in the same manner as in burglary, except that it need not be proved

to have been done in the night time. But if it be proved to have been done in the night-time, so as to amount to burglary, the defendant may, notwithstanding, be convicted upon this indictment.—*R.* v. *Pearce*, *R. & R.* 174; *R.* v. *Robinson*, *R. & R.* 321; *Archbold*, 399. And so, also, any breaking and entering, which would be sufficient in a case of burglary, would be sufficient under this section. Thus, where the prisoner burst open an inner door in the inside of a house, and so entered a shop, in order to steal money from the till, it was held that this was a sufficient breaking to support an indictment for housebreaking.—*R.* v. *Wenmouth*, 8 *Cox*, 348. The value of the goods is immaterial, if a breaking and entry be proved; but if proved and alleged to be of the value of twenty-five dollars, the prisoner may be convicted of the felony described in sect. 45, *post*; if the prosecutor succeed in proving the larceny, but fail in proving any of the other aggravating circumstances, the defendant may be convicted of simple larceny.—*Archbold*, 399. The same accuracy in the statement of the ownership and situation of the dwelling-house is necessary in an indictment for this offence as in burglary. But it must be remembered that any error in these matters may now be amended under the Procedure Act.—2 *Russ.* 76.

Sec. 36, *ante*, applies to this clause, as well as the rules which govern the interpretation of the words *dwelling-house* in burglary.—2 *Russ.* 76.

As in simple larceny, the least removal of the goods from the place where the thief found them, though they are not carried out of the house, is sufficient upon an indictment for house-breaking. It appeared that the prisoner, after having broken into the house, took two half-sovereigns out of a bureau in one of the rooms, but being detected, he threw them under the grate in that room; it was held that

if they were taken with a felonious intent, this was a sufficient removal of them to constitute the offence.—*R.* v. *Amier*, 6 *C. & P.* 344.

As to what is a shop under this section, it was once said that it must be a shop for the sale of goods, and that a mere workshop was not within the clause.—*R.* v. *Sanders*, 9 *C. & P.* 79; but in *R.* v. *Carter*, 1 *C. & K.* 173, Lord Denman, C. J., declined to be governed by the preceding case, and held that a blacksmith's shop, used as a workshop only, was within the statute. A warehouse means a place where a man stores or keeps his goods, which are not immediately wanted for sale.—*R.* v. *Hill*, 2 *Russ.* 95. Upon an indictment for breaking and entering a counting-house, owned by Gamble, and stealing therein, it appeared that Gamble was the proprietor of extensive chemical works, and that the prisoner broke and entered a building, part of the premises, which was commonly called the machine-house, and stole therein a large quantity of money. In this building, there was a weighing machine, at which all goods sent out were weighed, and one of Gamble's servants kept in that building a book, in which he entered all goods weighed and sent out. The account of the time of the men employed in different departments was taken in that building and their wages were paid there; the books in which their time was entered were brought to that building for the purpose of making the entries and paying the wages. At other times, they were kept in another building called the office, where the general books and accounts of the concern were kept. It was objected that this was not a counting-house; but, upon a case reserved, the judges held that it was a counting house within the statute.—*R.* v. *Potter*, 2 *Den.* 235.

An indictment for house-breaking is good, if it alleges

that the prisoner broke and entered the dwelling-house, and the goods of ..... in the said dwelling-house then and there being found, then and there (omitting "in the said dwelling-house") feloniously did steal, take and carry away.—*R.* v. *Andrews, C. & M.* 121, overruling *R.* v. *Smith,* 2 *M. & Rob.* 115, which Coleridge, J., said Patteson, J., was himself since satisfied had been wrongly decided.—2 *Russ.* 76, *note by Greaves.*

Indictment.— ..... the dwelling-house of J. N., situate ..... feloniously did break and enter, with intent the goods and chattels of the said J. N., in the said dwelling-house then being, feloniously to steal, take and carry away, and one dressing-case of the value of twenty-five dollars, of the goods and chattels of the said J. N., then in the said dwelling-house, then feloniously did steal, take and carry away, against the form ..... —*Archbold,* 398.

Upon the trial of an indictment for an offence under this section, the jury may, under sect. 183 of the Procedure Act, convict the defendant of an attempt to commit the same, if the evidence warrants it. But they can only convict of the attempt to commit the identical offence charged in the indictment; the prisoner was indicted for breaking and entering a dwelling-house, and stealing therein certain goods specified in the indictment, the property of the prosecutor. It was proved at the trial that, at the time of the breaking, the goods specified were not in the house, but there were other goods there, the property of the prosecutor; the prisoner had not had time to steal anything, having been caught immediately after his entering the house. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein. *Held,* that the con-

viction was wrong, and that an attempt must be to do that which, if successful, would amount to the felony charged.—*R.* v. *McPherson, Dears. & B.* 197. As said in Archbold, 399, the prisoner, under such circumstances, may be convicted of breaking and entering *with intent* to commit a felony, under sect. 42, *post.* But only if, as in the form above given, the intent is alleged, which was not the case in *R.* v. *McPherson, ubi supra.*

Local description necessary in the indictment.—*R.* v. *Bullock,* 1 *Moo. C. C.* 324, *note a.*

42. Every one who breaks and enters any dwelling-house, church, chapel, meeting-house or other place of divine worship, or any building within the curtilage, or school-house, shop, warehouse or counting-house, with intent to commit any felony therein, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V., c.* 21, *s.* 56. 24-25 *V., c.* 96, *s.* 57, *Imp.*

See sec. 193 of Procedure Act.

Indictment— ..... on ..... the dwelling-house of J. N., situate ..... feloniously did break and enter, with intent to commit a felony therein, to wit, the goods and chattels of the said J. N., in the said dwelling-house there being, then feloniously to steal, take and carry away against the form of the statute is such case made and provided.—*Archbold,* 403.

Where there is only an attempt, it is not always possible to say what goods the would-be thief meant to steal, and an indictment for an attempt to commit larceny need not specify the goods intended to be stolen.—*R.* v. *Johnson, L. & C.* 489.

Upon an indictment under this section the prisoner may be convicted, under sec. 183 of the Procedure Act, of the misdemeanor of attempting to commit the felony charged.—*R.* v. *Bain, L. & C.* 129.

Greaves says: "This clause is new, and contains a very

important improvement in the law. Formerly the offence here provided was only a misdemeanor at common law. Now it often happened that such an offence was very inadequately punished as a misdemeanor, especially since the night was made to commence at nine in the evening; for at that time, in the winter, in rural districts, the poor were often in bed. Nor could anything be much more unreasonable than [illegible] same acts done just after nine o'clock at night should be liable to penal servitude for life, but if done just before nine they should only be punishable as a misdemeanor. It is clear that if, on the trial of an indictment for burglary, with intent to commit a felony, it should appear that the breaking and entry were before nine o'clock, the prisoner might be convicted under this clause. But upon an indictment *in the ordinary form* for house-breaking, the prisoner could not be convicted under this clause, because it does not allege an intent to commit a felony (as in McPherson's case, *ante*, under last preceding section). It will be well, however, to alter the form of these indictments, and to allege a breaking and entry with intent to commit some felony, in the same manner as in an indictment for burglary with intent to commit felony, and then to allege the felony that is supposed to have been committed in the house. If this be done, then, if the evidence fail to prove the commission of that felony, but prove that the prisoner broke and entered with intent to commit it, he may be convicted under this clause."

The form of indictment given under the last preceding section is in conformity with these remarks.

Under any indictment under this section, it is no defence that the prosecution has proved a burglary.—*Sect.* 194 *Procedure Act.*

Local description necessary in the indictment.—*R.* v. *Bullock*, 1 *Moo. C. C.* 324. *Note a.*

43. Every one who is found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or is found by night having in his possession, without lawful excuse,—the proof of which excuse shall lie on him—any picklock key, crow, jack, bit or other implement of house-breaking, or any match or combustible or explosive substance, or is found by night having his face blackened or otherwise disguised, with intent to commit any felony, or is found by night in any dwelling-house or other building whatsoever, with intent to commit any felony therein, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V., c.* 21, *s.* 59. 24-25 *V., c.* 96, *s.* 58, *Imp.*

44. Every one who, having been convicted of any such misdemeanor as in the next preceding section mentioned, or of any felony, commits any such misdemeanor, is liable to ten years' imprisonment. —32-33 *V., c.* 21, *s.* 60. 24-25 *V., c.* 96, *s.* 59, *Imp.*

The distinction between this clause and sect. 39, as far as relates to being in a dwelling-house with intent to commit a felony, is this, that under the previous section the entry must be proved to have been in the night, but under this clause, proof that the prisoner was in the dwelling-house by night with the intent to commit felony is enough, and it is unnecessary to prove whether he entered by day or by night.

Indictment for being found by night armed, with intent, etc.—The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... about the hour of eleven in the night of the same day, at ..... was found unlawfully armed with a certain dangerous and offensive instrument, that is to say, a crow-bar, with intent then to break and enter into a certain dwelling-house of A. B., there situate, and the goods and chattels in the said dwelling-house then being, feloniously to steal take and

carry away, against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—*Archbold*, 501.

It is not necessary to aver that the goods and chattels were the property of any particular person.—*R.* v. *Lawes*, 1 *C. & K.* 62; *R.* v. *Nicholas*, 1 *Cox*, 218; *R.* v. *Clarke*, 1 *C. & K.* 421.

See, *ante*, sect. 2, as to the interpretation of the word "night."

In *R.* v. *Jarrald*, *L. & C.* 301, it was held, upon a case reserved, that an indictment under this section, for being found by night armed with a dangerous and offensive weapon and instrument, with intent to break and enter into a building, and commit a felony therein, must specify, as in burglary, the building to be broken into. Crompton, J., was of opinion that the particular felony intended must also be specified.

On this case, Greaves, 2 *Russ.* 70, note *g.*, says: "With all deference it is submitted that this decision is clearly erroneous. The ground on which Cockburn, C. J., rests the decision of the first point (as to a particular house to be specified) is answered by the second clause of the same section; for, under it, the mere possession, without lawful excuse, of any instrument of house-breaking in the night, constitutes the offence without any intent to commit any felony at all; (see *post*, as to this part of the clause) and this offence is plainly one step further from the attempt to commit a felony than where the intent to commit some felony exists, though the particular felony is not yet, fixed ..... As to the rules of criminal pleading, these seem, in this case, to have been misconceived. It is quite a mistake to suppose that these rules require the specification of particulars where it is impracticable to specify

them. Wherever this is the case the rules allow general or other statements instead ..... It cannot be doubted that this decision, instead of promoting the object of the Act in this respect, is substantially a repeal of it, for it is hardly conceivable that, in the majority of cases, it will be possible to prove an intent to commit any particular felony.....

To this, Cave answers, (3 *Burn*, 252, *note a*): "..... But a close consideration of the statute appears to confirm it (the decision in *Jarrald's Case*): it may well be that in all the other cases except "having implements of house-breaking" an intent must be clearly proved; for the "being armed with a dangerous weapon" or "having the face blacked" or "being by night in a dwelling-house" are clearly no offences unless done for a felonious purpose, and the very essence of the offence is such felonious purpose But, with regard to "having instruments of house-breaking," the statute implies the intent from the nature of the instrument, and throws the proof of innocence upon the prisoner. The general intention of the statute is thus well carried out; for if a man be found by night anywhere with house-breaking implements, or such as the jury shall think he intended to use as such, he may be indicted for that offence.—*R.* v. *Oldham*, 2 *Den.* 472, *post.* But if he has not any house-breaking implements, but is "armed with a dangerous weapon" not usable for house-breaking, or has "his face blacked" or is "in a dwelling-house" without instruments of house-breaking, then the particular intent must be laid and proved as laid."

Indictment for having in possession, by night, implements of house-breaking.— ..... on ..... about the hour of eleven in the night of the same day, at ..... was found, he the said *(defendant)* then and there, by night

as aforesaid, unlawfully having in his possession, without lawful excuse, certain implements of house-breaking, that is to say, two crows, three jacks and one bit against the form .....—*Archbold*, 502.

It seems that local description is necessary.—*R.* v. *Jarrald*, *L. & C.* 301.

Any instrument, capable of being used for lawful purposes is within the statute, if the jury find that such instrument may also be used for the purposes of house-breaking, and that the prisoner intended to use it as an implement of house-breaking, when found, at night, in possession of it.—*R.* v. *Oldham*, 2 *Den.* 472.

Where, on an indictment for having in possession without lawful excuse certain implements of house-breaking, the jury found the prisoners guilty of the possession without lawful excuse, but that there was no evidence of an intent to commit a felony, and the indictment omitted the words "with intent to commit a felony," it was held that the omission did not render the indictment bad, and that it was not necessary to prove an intent to commit a felony. *R.* v. *Bailey*, *Dears.* 244.

Indictment for being found by night with a disguised face with intent to commit felony ..... Somersetshire (to wit.)—The Jurors for Our Lady the Queen upon their oath present that on the *first* day of *May*, in the year of our Lord 1852, about the hour of eleven in the night of the same day, at the parish of *Swindon*, in the county of *Somerset*, A. B. was found by night as aforesaid then and there having his face blackened *(blackened or otherwise disguised)*, with intent then and there by night as aforesaid feloniously, wilfully, and of his malice aforethought, to kill and murder one C. D. *(to commit any felony)*.

Indictment for being found by night in a house with

intent to commit a felony therein ..... *Yorkshire* (to wit.)—The Jurors for Our Lady the Queen upon their oath present, that on the *first* day of *May*, in the year of our Lord 1852, about the hour of eleven in the night of the the same day, at the parish of *Filey*, in the county of *York*, A. B. was found by night as aforesaid in the dwelling-house *(dwelling-house or other building whatsoever)* of one C. D., there situate, with intent then and there by night as aforesaid in the said *dwelling-house* feloniously to steal, take, and carry away the goods and chattels of the said C. D. then and there being in the said dwelling-house *(to commit any felony therein.)*

In *R.* v. *Thompson*, 11 *Cox*, 362, *held*, that where several persons are found out together by night, for the common purpose of house-breaking, and one only is in possession of house-breaking implements, all may be found guilty of the misdemeanor created by this section, for the possession of one is in such case the possession of all.

STEALING IN THE HOUSE.

45. Every one who steals in any dwelling-house any chattel, money or valuable security, to the value in the whole of twenty-five dollars or more, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 61. 24-25 *V.*, *c.* 96, *s.* 60, *Imp.*

As to the meaning of the words "valuable security." *See*, *ante*, sect. 2.

Local description necessary in the indictment.—*R.* v. *Napper*, 1 *Moo. C. C.* 44.

Indictment ..... one silver sugar basin, of the value of twenty-five dollars, of the goods and chattels of A. B., in the dwelling-house of the said A. B., situate ..... feloniously did steal, take and carry away, against the form ..... —*Archbold*, 401.

If no larceny is proved the defendant must of course be

acquitted altogether, except if the jury should find him guilty of the attempt to commit the offence *charged*, under sec. 183 of the Procedure Act, but the jury could not find him guilty of an attempt to commit simple larceny.—*R.* v. *McPherson, Dears. & B.* 197. See *supra*, under sect. 41.

The word "*dwelling-house*" has the same meaning as in burglary and sec. 36, *ante*. If the proof fails to prove the larceny to have been committed in a dwelling-house or in the dwelling-house described, or that the value of the things stolen at any one time amounts to twenty-five dollars, the defendant must be acquitted of the compound offence, and may be found guilty of the simple larceny only.—*Archbold*, 402.

The goods must be stolen to the amount of twenty-five dollars or more at one and the same time.—*R.* v. *Petrie*, 1 *Leach*, 294; *R.* v. *Hamilton*, 1 *Leach*, 348; 2 *Russ.* 85.

It had been held in several cases that, if a man steal the goods of another in his own house, *R.* v. *Thompson*, *R.* v. *Gould*, 1 *Leach*, 338, it is not within the statute, but these cases appear to be overruled by R. v. *Bowden*, 2 *Moo. C.C.* 285. Bowden was charged with having stolen Seagall's goods, in his, Bowden's, house, and having been found guilty, the conviction was affirmed. Where a lodger invited an acquaintance to sleep at his lodgings, without the knowledge of his landlord, and, during the night, stole his watch from his bed's head, it was doubted at the trial whether the lodger was not to be considered as the owner of the house with respect to the prosecutor; but the judges held that the defendant was properly convicted of stealing in the dwelling-house of the landlord; the goods were under the protection of the dwelling-house.—*R.* v. *Taylor*, *R. & R.* 418. If the goods be under the protection of the *person* of the prosecutor, at

the time they were stolen, the case will not be within the statute; as, for instance, where the defendant procured money to be delivered to him for a particular purpose and then ran away with it.—*R.* v. *Campbell*, 2 *Leach*, 564, and so, where the prosecutor, by the trick of ring-dropping, was induced to lay down his money upon the table, and the defendant took it up and carried it away.—*R.* v. *Owen*, 2 *Leach*, 572. For a case to be within the statute, the goods must be under the protection of the house. But property left at a house for a person supposed to reside there, will be under the protection of the house, within the statute. Two boxes belonging to A., who resided at 38 Rupert street, were delivered by a porter, whether by mistake or design did not appear, at No. 33 in the same street; the owner of the house imagining that they were for the defendant who lodged there, delivered them to him; the defendant converted the contents of the boxes to his own use, and absconded; it was doubted at the trial whether the goods were sufficiently within the protection of the dwelling-house to bring the case within the statute, but the judges held that they were.—*R.* v. *Carroll*, 1 *Moo. C.C.* 89. If one on going to bed put his clothes and money by the bedside, these are under the protection of the dwelling-house and not of the person; and the question whether goods are under the protection of the dwelling-house, or in the personal care of the owner, is a question for the court, and not for the jury.—*R.* v. *Thomas*, *Carr. Supp.* 295. So where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while he was asleep; this was held to be a stealing in a dwelling-house, and not a stealing from the person.—*R.* v. *Hamilton*, 8 *C. & P.* 49. But if money

be stolen from under the pillow of a person sleeping in a dwelling-house, this is not stealing in the dwelling-house within the meaning of the Act.—2 *Russ.* 84. In ascertaining the value of the articles stolen, the jury may use that general knowledge which any man can bring to the subject, but if it depends on any particular knowledge of the trade by one of the jurymen, this juryman must be sworn and examined as a witness.—*R.* v. *Rosser*, 7 *C. & P.* 648.

46. Every one who steals any chattel, money or valuable security in any dwelling-house, and by any menace or threat puts any one therein in bodily fear, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 62. 24-25 *V.*, *c.* 96, *s.* 61, *Imp.*

The indictment must expressly allege that some person in the house was put in fear by the defendant.—*R.* v. *Etherington*, 2 *Leach*, 671.

Sect. 36, *ante*, and the observations under the head "Burglary" upon questions which may arise as to what shall be deemed a dwelling-house, will apply to the offence under this clause.—2 *Russ.* 78.

The value, if amounting to twenty-five dollars, had better always be inserted, as then, if no menace or threat, or no person in the house being put in fear, are proved, the defendant may be convicted of stealing in the dwelling-house to the value of twenty-five dollars, under sect. 45. If there is no proof of a larceny in a dwelling house, or the dwelling-house alleged, or if the goods stolen are not laid and proved to be of the value of twenty-five dollars, the defendant may still be convicted of simple larceny, if the other aggravating circumstances are not proved.

The value is immaterial, if some person was in the house at the time, and was put in bodily fear by a menace

or threat of the defendant, which may be either by words or gesture.—*R.* v. *Jackson*, 1 *Leach*, 267.

It is clear that no breaking of the house is necessary to constitute this offence; and it should seem that property might be considered as stolen in the dwelling-house within the meaning of the statute, if a delivery of it out of the house should be obtained by threats, or an assault upon the house by which some persons therein should be put in fear. But questions of difficulty may perhaps arise as to the degree of fear which must be excited by the thief. Where, however, the prosecuter in consequence of the threat of an armed mob, fetched provisions out of his house and gave them to the mob, who stood outside the door, this was holden not to be a stealing in the dwelling-house.—*R.* v. *Leonard*, 2 *Russ* 78. But Greaves adds: "It is submitted with all deference that this decision is erroneous; the law looks on an act done under the compulsion of terror as the act of the person causing that terror just as much as if he had done it actually with his own hands. Any asportation, therefore, of a chattel under the effects of terror is in contemplation of law the asportation of the party causing the terror."—*Note g*, 2 *Russ.*, *loc. cit.* If so, in Leonard's case, suppose the prisoner had been taken up by the police just before the prosecutor gave him the provisions, and as he, the prosecutor, was coming with them towards the prisoner, under the influence of terror, the offence would have been larceny, according to Greaves, as the asportation by the prosecutor was in law the asportation of the prisoner; this would be going far.

To this remark, in the first edition of this work, Greaves replied: "When an offence is committed through the agency of an innocent person, the employer, though absent when the act is done, is answerable as principal.—1 *Russ.* 53;

Kel. 52. If a madman, or a child not at years of discretion, commits murder or other felony on the incitement of another, the latter, though absent, is guilty as principal; otherwise he would be wholly unpunishable.—*Fost.* 349. Every act done by an innocent agent is in point of law exactly the same as if it were done at the same time and place by the employer. In burglary, if a man in the night breaks a window and inserts an instrument through the hole, and draws out any chattel, he is not only guilty of burglary with intent to steal, but of burglary *and* stealing *in* the house. The amotion by the instrument is the same as if it were by the prisoner's hand. Now, an innocent agent is merely the living instrument (Εμψυχον όργανον. Arist. Eth. 8, c. 13) of the employer. Then it is clear that any terror, which is sufficient to overpower a reasonably firm mind, will make an innocent agent; and the threats of an *armed mob* to a *single* individual are certainly sufficient to constitute such terror. In Leonard's case, therefore, the prosecutor was an innocent agent; and the moment he asported any of the provisions in the house a single inch, a larceny was committed *in the house;* and that was a larceny by the prisoner, for the prosecutor was his innocent agent. In the case put, therefore, the prisoner was guilty of larceny, though he never had the provisions; just as the inciter of an innocent agent is guilty of murder, though he may be miles off when the murder is committed. The rule as to innocent agency is exactly the same, whether the offence consists of an asportation, as in larceny, or of a single act, as in murder, by stabbing or shooting. The act is the act of the inciter in every case alike."

Obtaining money from any one by frightening him is larceny.—*R.* v. *Lovell,* 8 *Q. B. D.* 185.

It does not appear to have been expressly decided by the repealed statute whether or not it was necessary to prove the actual sensation of fear felt by some person in the house, or whether fear was to be implied, if some person in the house were conscious of the fact at the time of the robbery. But it was suggested as the better opinion, and was said to have been the practice, that proof should be given of an actual fear excited by the fact, when committed out of the presence of the party, so as not to amount to a robbery at common law. And it was observed that where the fact was committed in the presence of the party, possibly it would depend upon the particular circumstances of the transaction, whether fear would or would not be implied; but that clearly, if it should appear that the party in whose presence the property was taken was not conscious of the fact at the time, the case was not within that statute. But now, by the express words of the statute, the putting in fear must have been by an actual menace or threat.—2 *Russ.* 79; *Archbold*, 401.

A person outside a house may be a principal in the second degree to menaces used in the house; menaces used out of the house may be taken into consideration with menaces used in the house.—R. v. *Murphy*, 6 *Cox*, 340.

Upon the trial of any offence mentioned in this section the jury may, under sec.183 of the Procedure Act, convict of an attempt to commit such offence.—2 *Russ.* 81.

Indictment.—..... one silver basin *(of the value of twenty-five dollars)* of the goods and chattels of J. N., in the dwelling-house of the said J. N., situate ..... feloniously did steal, take and carry away; one A. B. then, to wit, at the time of the committing of the felony aforesaid being in the said dwelling-house, and therein by the said ..... *(defendant)* by a certain menace and threat

then used by the said ..... *(defendant)* then being put in bodily fear, against the form ..... —*Archbold.* (As to value, see *ante.*)

Local description necessary in the indictment.—*R.* v. *Napper*, 1 *Moo. C. C.* 44.

STEALING IN MANUFACTORIES.

47. Every one who steals to the value of two dollars, any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of such materials mixed with each other or mixed with any other material, whilst laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 63. 24-25 *V.*, *c.* 96, *s.* 62, *Imp.*

If you prove the larceny, but fail to prove the other circumstances so as to bring the case within the statute, the defendant may be found guilty of the simple larceny only.—*Archbold*, 407.

Goods remain in "a stage, process or progress of manufacture," though the texture be complete, if they be not yet brought into a condition fit for sale.—*R.* v. *Woodhead*, 1 *M. & Rob.* 549. See *R.* v. *Hugill*, 2 *Russ.* 517; *R.* v. *Dixon*, *R. & R.* 53.

Upon the trial of any offence mentioned in this section, the jury may, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 518.

Indictment.—..... on ..... thirty yards of linen cloth, of the value of four dollars, of the goods and chattels of J. N., in a certain building of the said J. N., situate .....feloniously did steal, take and carry away, whilst the same were laid, placed and exposed in the said building, during a certain state, process and progress of manufacture,

against the form of the statute in such case made and provided. *(Other counts may be added, stating the particular process and progress of manufacture in which the goods were when stolen.)—Archbold.*

48. Every one who, having been intrusted for the purpose of manufacture or for a special purpose connected with manufacture, or employed to make any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax or silk, or any such materials mixed with one another, or having been so intrusted, as aforesaid, with any other article, materials, fabric or thing, or with any tools or apparatus for manufacturing the same, sells, pawns, purloins, secretes, embezzles, exchanges or otherwise fraudulently disposes of the same, or any part thereof, when the offence is not within the next preceding section, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 21, *s.* 64. 6-7 *V., c.* 40, *s.* 2, *Imp.*

STEALING FROM SHIPS, WHARVES, ETC.

49. Every one who steals any goods or merchandise in any vessel, barge or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal, or steals any goods or merchandise from any dock, wharf or quay, adjacent to any such haven, port, river, canal, creek or basin, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 21, *s,* 65. 24-25 *V., c.* 96, *s.* 63, *Imp.*

Indictment for stealing from a vessel on a navigable river ..... on ..... twenty pounds weight of indigo of the goods and merchandise of J. N., then being in a certain ship called the Rattler upon the navigable river Thames, in the said ship, feloniously did steal, take and carry away, against the form ..... —*Archbold.*

Indictment for stealing from a dock.— ..... *on* ..... twenty pounds weight of indigo of the goods and merchandise of J. M., then being in and upon a certain dock adjacent to a certain navigable river called the Thames, from the said dock, feloniously did steal, take and carry away, against the form ..... —*Archbold.*

The value is immaterial, and need not be laid. If the prosecutor fails to prove any of the circumstances necessary to bring the case within the statute, but proves a larceny, the defendant may be convicted of the simple larceny.—*Archbold.*

The construction of the repealed statute was generally confined to such goods and merchandise as are usually lodged in ships, or on wharves or quays; and therefore where Grimes was indicted on this statute for stealing a considerable sum of money out of a ship in port, though great part of it consisted in Portugal money, not made current by proclamation, but commonly current; it was ruled not to be within the statute.—*R.* v. *Grimes, Fost.* 79; *R.* v. *Leigh*, 1 *Leach*, 52. The same may be said of the present statute, by reason of the substitution of the words "goods and merchandise" for the words "chattel, money or valuable security" which are used in other parts of the Act."—*Archbold.*

It would not be sufficient, in an indictment for stealing goods from any vessel on a certain navigable river to prove in evidence that the vessel was aground in a dock in a creek of the river, unless the indictment were amended.—*R.* v. *Pike*, 1 *Leach*, 317. The words of the statute are "*in* any vessel," and it is therefore immaterial whether the defendant succeeded in taking the goods from the ship or not, if there was a sufficient asportation in the ship to constitute larceny.—3 *Burn*, 254.

The words of the statute are "from the dock," so that, upon an indictment for stealing from a dock, wharf, etc., a mere removal will not suffice; there must be an actual removal *from* the dock, etc.—*Archbold*, 409.

A man cannot be guilty of this offence in his own ship.—*R.* v. *Madox, R. & R.* 92; but see *R.* v. *Bowden*,

2 *Moo. C. C.* 285. And now, sect. 4, *ante*, would apply to such a case, being larceny by a bailee.

The luggage of a passenger going by steamer is within the statute. The prisoners were indicted for stealing a portmanteau, two coats and various other articles, in a vessel, upon the navigable River Thames. The property in question was the luggage of a passenger going on board the Columbian steamer from London to Hamburg; and it was held that the object of the statute was to protect things on board a ship, and that the luggage of a passenger came within the general description of goods.—*R.* v. *Wright*, 7 *C. & P.* 159.

Upon an indictment for any offence mentioned in this section, the jury may convict of an attempt to commit the same, under sec. 183 of the Procedure Act if the evidence warrants it.—2 *Russ.* 381.

STEALING THINGS UNDER SEIZURE.

50. Every one who, whether pretending to be the owner or not, secretly or openly, and whether with or without force or violence, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention, steals such property, and is guilty of felony and liable to be punished accordingly.—43 *V.*, *c.* 28, *s.* 66, *part.* 46 *V.*, *c.* 17, *s.* 67. *C. S. C.*, *c.* 23, *s.* 10.

This is a new enactment. It is an extension of statutes relating to Indians and to timber seized by Crown officers. —At common law, a man may be guilty of larceny by taking his own goods *in custodiâ legis*.—2 *Bishop. Cr. Proc.* 749.

STEALING OR EMBEZZLEMENT BY CLERKS OR SERVANTS OR PERSONS IN THE PUBLIC SERVICE.

51. Every one who, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, steals any

chattel, money or valuable security belonging to or in the possession or power of his master or employer, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 69. 24-25 *V.*, *c.* 96, *s.* 67, *Imp.*

As to what is a "valuable security," see, *ante*, sect. 2. See next section, and the cases there cited.

Indictment.— ..... on ..... was clerk to J. N., and that the said J. S., whilst he was such clerk to the said J. N. as aforesaid, to wit, on the day and year aforesaid, certain money to the amount of forty dollars, ten yards of linen cloth, and one hat, of and belonging to the said J. N., his master, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—*Archbold.*

If the defendant is not shown to be the clerk or servant of J. N. but a larceny is proved, he may be convicted of the larceny merely.—*Archbold*, 348; *R.* v. *Jennings, Dears. & B.* 447. It is not necessary by the statute that the goods stolen should be the property of the master; the words of the statute are, belonging to, or in the possession or power of the master. A second count stating the goods "then being in the possession and power" of the master may be added. If it appear that the money, etc., was received by the clerk for and on account of his master, and was not received into the possession of the master otherwise than by the actual possession of the clerk so as not to amount to larceny but to embezzlement, the defendant is nevertheless not entitled to be acquitted, but the jury may return as their verdict that the defendant was not guilty of larceny, but was guilty of embezzlement and thereupon he shall be liable to be punished in the same manner as if he had been convicted on an indictment for embezzlement; but

he cannot be afterwards prosecuted for embezzlement on the same facts. Sec. 195 Procedure Act.

Upon the trial of any offence under this section, the jury, if the evidence warrants it, may convict of an attempt to commit the same, under sec. 183 of the Procedure Act.

As to what is sufficient evidence of an attempt to steal, see *R.* v. *Cheeseman, L. & C.* 140.

On an indictment for larceny as servants, the evidence showed that the complainant advanced money to the prisoners to buy rags, which they were to sell to the complainant at a certain price, their profit to consist in the difference between the rate they could buy the rags, and this fixed price. The prisoners consumed the money in drinks and bought no rags: *Held*, no larceny.—*R.* v. *Charest*, 9 *L. N.* 114.

52. Every one who, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, fraudulently embezzles any chattel, money or valuable security, or any part thereof, delivered to or received or taken into possession by him, for or in the name or on the account of his master or employer, feloniously steals the same from his master or employer, although such chattel, money or security was not received into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant or other person so employed, and is liable to fourteen years' imprisonment.—32-33 *V., c.* 21, *s.* 70. 24-25 *V., c.* 96, *s.* 68, *Imp.*

See sec. 195 of Procedure Act, and R. v. *De Banks*, 15 *Cox*, 450.

It was the prisoner's duty as a country traveller to collect moneys and remit them at once to his employers. On the 18th of April, he received money in county. On the 19th and 20th, he wrote to his employers not mentioning that he had received the money; on the 21st, by another letter, he gave them to understand that he had not received

the money. The letters were posted in county Y. and received in county M. *Held*, that the prisoner might be tried in county M. for the offence of embezzling the money. —*R.* v. *Rogers*, 14 *Cox*, 22.

Embezzlement is the appropriation to his own use by a servant or clerk of money or chattels received by him for or on account of his master or employer. Embezzlement differs from larceny in this, that in the former the property misappropriated is not at the time in the actual or legal possession of the owner, whilst in the latter it is. The distinctions between larceny and embezzlement are often extremely nice and subtle; and it is sometimes difficult to say under which head the offence ranges.

Greaves says: "The words of the former enactments were "shall *by virtue of such employment* receive or take into his possession any chattel, etc., for, or in the name, or on the account of his master." In the present clause, the words "by virtue of such employment" are advisedly omitted in order to enlarge the enactment, and get rid of the decisions on the former enactments. The clause is so framed as to include every case where any chattel, etc., is delivered to, received or taken possession of by the clerk or servant, for *or* in the name *or* on account of the master. If therefore a man pay a servant money for his master, the case will be within the statute, though it was neither his duty to receive it, nor had he authority to do so; and it is perfectly just that it should be so; for, if my servant receive a thing, which is delivered to him for me, his possession ought to be held to be my possession just as much as if it were in my house or in my cart. And the effect of this clause is to make the possession of the servant the possession of the master wherever any property comes into his possession within the terms of

this clause, so as to make him guilty of embezzlement, if he converts it to his own use. The cases of *R.* v. *Snowley*, 4 *C. & P.* 390; *Crow's Case*, 1 *Lewin*, 88; *R.* v. *Thorley*, 1 *Moo. C. C.* 343; *R.* v. *Hawtin*, 7 *C. & P.* 281; *R.* v. *Mellish*, *R. & R.* 80, and similar cases are consequently no authorities on this clause. It is clear that the omission of the words in question, and the change in the terms in this clause render it no longer necessary to prove that the property was received by the defendant by virtue of his employment; in other words that it is no longer necessary to prove that the defendant had authority to receive it ....." Greaves adds: Mr. Davis says "still it must be the master's money which is received by the servant, and not money wrongfully received by the servant by means of false pretences or otherwise:" this is plainly incorrect. A.'s servant goes to B., who owes A. £10, and falsely states that A. has sent him for the money, whereupon B. pays him the money. This case is clearly within the clause; for the money is delivered to *and* received *and* taken into possession by him for *and* in the name *and* on the account of his master, so that the case comes within every one of the categories of the clause, and if it came within any one it would suffice; in fact, no case can be put where property is delivered to a servant for his master that does not come within the clause, and it is perfectly immaterial what the moving cause of the delivery was.—*Greaves, Cons. Acts*, 156.

In larceny a wrongful taking is essential, whilst in embezzlement the offence consists in some actual fraudulent appropriation of that which is not unlawfully in the possession of the offender.—*Cr. Law Com. 4th Rep. LV, LXXVIII.*

By sect. 195 of the Procedure Act, it would seem that

the distinction, often so difficult to establish, between larceny and embezzlement, is no more of practical importance as, if upon an indictment for embezzlement, a larceny is proved, the jury shall be at liberty to return a verdict of guilty of larceny, and vice versâ. But practically, this distinction has still to be made, as the jury must specify by their verdict, of which special offence they find the defendant guilty; and, if, for instance, upon an indictment for larceny, the jury return a general verdict of guilty, when the evidence proves an embezzlement and not a larceny, the conviction will be illegal.—*R.* v. *Gorbutt, Dears. & B.* 166; *R.* v. *Betts, Bell, C. C.* 90; *Broom's Comment.* 973; *Stephens Cr. L. XL.* See *Rudge's Case,* 13 *Cox,* 17.

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S., on.....being then employed as clerk to A. B., did then, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit, to the amount of ..... for and in the name and on the account of the said A. B., his master, and the said money then fraudulently and feloniously did embezzle; and so the jurors aforesaid upon their oath aforesaid do say that the said J. S. then, in the manner and form aforesaid, the said money, the property of the said A. B., his said master, from the said A. B. his said master feloniously did steal, take and carry away, against the form .....

If the defendant has been guilty of other acts of embezzlement within the period of six months against the same master, the same, not exceeding three in number, may be charged in the same indictment in separate counts, (s. 111 of Procedure Act,) as follows: And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, and within six calendar months from the

time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on.....in the year aforesaid, being then employed as clerk to the said A. B., did then, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of .....for and in the name and on the account of the said A. B., his said master, and the said last mentioned money then, and within the said six calendar months, fraudulently and feloniously did embezzle; and so the jurors aforesaid upon their oath aforesaid, do say, that the said J. S. then, in manner and form aforesaid, the said money, the property of the said A. B., his said master, from the said A. B., his said master, feloniously did steal, take and carry away, against the form ..... *(And so, on for a third count, if required.)—Archbold.*

The indictment must show *by express words* that the different sums were embezzled within the six months.—*R.* v. *Noake*, 2 *C. & K.* 620; *R.* v. *Purchase*, *C. & M.* 617.—It was the duty of the defendant, an agent and collector of a coal club, to receive payment, by small weekly instalments, and to send in weekly accounts on Tuesdays, and on each Tuesday to pay the gross amount received into the bank to the credit of the club; the defendant was a shareholder and co-partner in the society, and indicted as such; the indictment charged him with three different acts of embezzlement during six months: each amount as charged was proved by the different payments of smaller sums, making altogether each amount charged; *held*, that the indictment might properly charge the embezzlement of a gross sum and be proved by evidence of smaller sums received at different times by the prisoner, and that it was not necessary to charge the embezzlement

of each particular sum composing the gross sum, and that, although the evidence might show a large number of small sums embezzled, the prosecution was not to be confined to the proof of three of such small sums only.—*R.* v. *Balls*, 12 *Cox*, 96; *R.* v. *Furneaux*, *R. & R.* 325; *R.* v. *Flower*, 8 *D. & R.* 512; *R.* v. *Tyers*, *R. & R.* 402, holding it necessary in all cases of embezzlement to state specifically in the indictment some article embezzled, are not now law, as now by sec. 111 of the Procedure Act it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security, except where the offence relates to a chattel, which must be described as in an indictment for larceny. In case the indictment alleges the embezzlement of money, such allegation, so far as regards the description of the property, is sustained by proof that the offender embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or by proof that he embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly; but an indictment for embezzling money is not proved by showing merely that the prisoner embezzled a cheque without evidence that the cheque had been converted into money.—*R.* v. *Keena*, 11 *Cox*, 123. The indictment must allege the goods embezzled to be the property of the master, *R.* v. *McGregor*, 3 *B. & P.* 106, *R. & R.* 23; *R.* v. *Beacall*, 1 *Moo. C. C.* 15; and it has been said that it must show that the defendant was servant at the time.—*R.* v. *Somerton*, 7 *B. & C.* 463. See, however,

R. v. *Lovell*, 2 *M. & Rob.* 236. It is usual and prudent to state that the defendant *feloniously* did embezzle, but it is not absolutely necessary, if the conclusion state that he *feloniously* stole.—*R.* v. *Crighton*, *R. & R.* 62. It is not necessary to state from whom the money was received.—*R.* v. *Beacall*, 1 *C. & P.* 454; and note in *R.* v. *Crighton*, *R. & R.* 62. But the judge may order a particular of the charge to be furnished to the prisoner.—*R.* v. *Bootyman*. 5 *C. & P.* 300; *R.* v. *Hodgson*, 3 *C. & P.* 422—*Archbold.*

A female servant is within the meaning of the Act.—*R.* v. *Smith*, *R. & &.* 267; so is an apprentice though under age, *R.* v. *Mellish*, *R. & R.* 80; and any clerk or servant, whether to person in trade or otherwise.—*R.* v. *Squire*, *R. & R.* 349; *R.* v. *Townsend*, 1 *Den.* 167; *R.* v. *Adey*, 1 *Den.* 571. A clerk of a savings bank, though elected by the managers, was held to be properly described as clerk to the trustees.—*R.* v. *Jenson*, 1 *Moo. C. C.* 434. The mode by which the defendant is remunerated for his services is immaterial, and now, if he has a share or is a co-partner in the society whose monies or chattels he embezzled, he may be indicted as if he was not such shareholder or co-partner; sect. 58, *post.*—*R.* v. *Hartley*, *R. & R.* 139; *R.* v. *Macdonald*, *L. & C.* 85; *R.* v. *Balls*, 12 *Cox*, 96. So, where the defendant was employed as a traveller to take orders and collect money, was paid by a percentage upon the orders he got, paid his own expenses, did not live with the prosecutors, and was employed as a traveller by other persons also, he was holden to be a clerk of the prosecutors within the meaning of the Act.—*R.* v. *Carr*, *R. & R.* 198; *R.* v. *Hoggins*, *R. & R.* 145; *R.* v. *Tite*, *L. & C.* 29; 8 *Cox*, 458. Where the prisoner was employed by the prosecutors as their agent for the sale of coals on commission, and to collect monies in connection with his orders, but he

was at liberty to dispose of his time as he thought best, and to get or abstain from getting orders as he might choose, he was held not to be a clerk or servant within the statute.—*R.* v. *Bowers*, 10 *Cox*, 254. In delivering judgment in that case, Erle, C. J., observed: "The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the monies of his employer, to be within the statute; but if a man be intrusted to get orders and to receive money, getting the orders where and when he chooses, and getting the money where and when he chooses, he is not a clerk or servant within the statute." See *R.* v. *Walker, Dears. & R.* 600; *R.* v. *May, L. & C.* 13; *R.* v. *Hall*, 13 *Cox*, 49. A person whose duty it is to obtain orders where and when he likes, and forward them to his principal for execution, and then has three months within which to collect the money for the goods sent, is not a clerk or servant; if such a person, at the request of his principal, collects a sum of money from a customer, with the obtaining of whose order he has had nothing to do, he is a mere volunteer, and is not liable to be prosecuted for embezzlement, if he does not pay over or account for the money so received.—*R.* v. *Mayle*, 11 *Cox*, 150. The prisoner was employed by a coal merchant under an agreement whereby "he was to receive one shilling per ton procuration fee, payable out of the first payment, four per cent for collecting, and three pence on the last payment; collections to be paid on Friday evening before 5 P. M., or Saturday before 2 P.M." He received no salary, was not obliged to be at the office except on the Friday or Saturday to account for what he had received; he was at liberty to go where he pleased for orders: *Held*, that the prisoner was not a clerk or servant within the statute relating to embezzlement.—*R.* v. *Marshall*, 11 *Cox*, 490.

Prisoner was engaged by U. at weekly wages to manage a shop; U. then assigned all his estate and effects to R., and a notice was served on prisoner to act as the agent of R. in the management of the shop. For fourteen days afterwards R. received from U. the shop moneys. Then the shop money was taken by U. as before. Prisoner received his weekly wages from U. during the whole time. Some time after a composition deed was executed by R. and U. and U.'s creditors, by which R. re-conveyed the estate and effects to U.; but this deed was not registered until after the embezzlement charged against the prisoner; *Held*, that prisoner was the servant of U. at the time of the embezzlement.—*R.* v. *Dixon*, 11 *Cox*, 178. The prisoner agreed with the prosecutor, a manufacturer of earthenware, to act as his traveller, and "diligently employ himself in going from town to town, in England, Ireland and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by the prosecutor, and that he would not, without the consent in writing of the prosecutor, take or execute any order for vending or disposing of any goods, of the nature or kind aforesaid for or on account of himself or any other person." It was further agreed that the prisoner should be paid by commission, and should render weekly accounts. The prosecutor subsequently gave the prisoner written permission to take orders for two other manufacturers. The prisoner being indicted for embezzlement: *Held*, that he was a clerk or servant of the prosecutor within the meaning of the statute.—*R.* v. *Turner*, 11 *Cox*, 551. Lush, J., in this case, said: "If a person says to another carrying on an independent trade, 'if you get any orders for me I will pay you a commission,' and that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a *clerk* or

servant; but if a man says: 'I employ you and will pay you, not by salary, but by commission' the person employed is a servant. In the first case, the person employing has no control over the person employed; in the second case, the person employed is subject to the control of the employer. And on this, this case was distinguished from *R.* v. *Bowers*, and *R.* v. *Marshall*, *supra*. So, in *R.* v. *Bailey*, 12 *Cox*, 56, the prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. The prisoner had no salary but was paid by commission. The prisoner might get orders where and when he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time, the whole of every day, to their service. *Held*, that the prisoner was a clerk and servant within the statute." See *R.* v. *Foulkes*, 13 *Cox*, 63.

A person engaged to solicit orders and paid by commission on the sums received, which sums he was forthwith to hand over to the prosecutors, was at liberty to apply for orders, when he thought most convenient, and was not to employ himself for any other person: *Held*, not a clerk or servant within the statute; the prisoner was not under the control and bound to obey the orders of the prosecutors.—*R.* v. *Negus*, 12 *Cox*, 492; *R.* v. *Hall*, 13 *Cox*, 49; *R.* v. *Coley*, 16 *Cox*, 227.

Prisoner was employed by O. to navigate a barge, and was entitled to half the earnings after deducting the expenses. His whole time was to be at O.'s service, and his duty was to account to O. on his return after every voyage. In October, prisoner was sent with a barge load of bricks to London, and was there forbidden by O. to take

manure for P. Notwithstanding this, prisoner took the manure, and received £4 for the freight, which he appropriated to his own use. It was not proved that he carried the manure, or received the freight for his master, and the person who paid the £4 did not know for whom it was paid: *Held*, that the prisoner could not be convicted of embezzlement, as the money was not received by him in the name, or for, or on account of his master.—*R.* v. *Cullum*, 12 *Cox*, 469. *See R.* v. *Gale*, 13 *Cox*, 340.

It is not necessary that the employment should be permanent; if it be only occasional, it will be sufficient. Where the prosecutor having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was holden to be a servant within the meaning of the Act.—*R.* v. *Spencer*, *R. & R.* 299; *R.* v. *Smith*, *R. & R.* 516. And in *R.* v. *Hughes*, 1 *Moo. C. C.* 370, where a drover, who was employed to drive two cows to a purchaser, and receive the purchase money, embezzled it, he was holden to be a servant within the meaning of the Act, by the judges; but the judge presiding the trial seemed to be of a contrary opinion, and *R.* v. *Nettleton*, 1 *Moo. C. C.* 259; *R.* v. *Burton*, 1 *Moo. C.C.* 237, appear to be adverse to *R.* v. *Hughes*. See *R.* v. *Tongue*, *Bell* 289; *R.* v. *Hall*, 1 *Moo. C.C.* 374; *R.* v. *Miller*, 2 *Moo. C.C.* 249; *R.* v. *Proud*, *L. & C*, 97; 9 *Cox*, 22. The treasurer of a friendly society, into whose hands the monies received on behalf of the society were to be paid, and who was to pay no money except by an order signed by the secretary and countersigned by the chairman or a trustee, and who by the statute was bound to render an account to the trustees, and to pay over the balance on such accounting when required, but

was not paid for his services, is not a clerk or servant, and cannot be indicted for embezzlement of such balance.—*R.* v. *Tyrie*, 11 *Cox*, 241. And before the statute making it larceny or embezzlement for a partner to steal or embezzle any of the co-partnership property, the secretary of a friendly society, and himself a member of it, could not be convicted on an indictment for embezzling the society's monies, laying the property in, and describing him as the servant of A. B. (another member of the society) and others, because the "others" would have comprised himself, and so the indictment would in fact have charged him with embezzling his own money, as his own servant.—*R.* v. *Diprose*, 11 *Cox*, 185; *R.* v. *Taffs*, 4 *Cox*, 169; *R.* v. *Bren.* *L. & C.* 346. But a stealing or embezzlement by a partner is now provided for by sec. 58, *post*.

The trustees of a benefit building society borrowed money for the purpose of their society on their individual responsibility, the money, on one occasion, was received by their secretary and embezzled by him: *Held*, that the secretary might be charged in the indictment for embezzlement of the property of W. and others, W. being one of the trustees, and a member of the society.—*R.* v. *Bedford*, 11 *Cox*, 367. A person cannot be convicted of embezzlement as clerk or servant to a society, which, in consequence of administering an unlawful oath to its members, is unlawful, and prohibited by law.—*R.* v. *Hunt*, 8 *C. & P.* 642. But an unregistered friendly society or trades union may prosecute its servants for embezzlement of its property, though some of its rules may be void as being in restraint of trade, and contrary to public policy. Rules in a trades union or society imposing fines upon members for working beyond certain hours, or for applying for work at a firm where there is no vacancy, or for taking a person into a

shop to learn weaving where no vacant loom exists, though void as being in restraint of trade, do not render the society criminally responsible.—*R.* v. *Stainer*, 11 *Cox*, 483. If the clerk of several partners embezzle the private money of one of them, it is an embezzlement within the Act, for he is a servant of each. So where a traveller is employed by several persons and paid wages, to receive money, he is the individual servant of each.—*R.* v. *Carr*, *R. & R.* 198; *R.* v. *Batty*, 2 *Moo. C. C.* 257; *R.* v. *Leach*, *Archbold*, 450. So a coachman, employed by one proprietor of a coach to drive a certain part of the journey, and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money, when received, would belong to him and his partners.—*R.* v. *White*, 2 *Moo.* 91.

In *R.* v. *Glover*, *L. & C.* 466, it was held that a county court bailiff, who has fraudulently misappropriated the proceeds of levies, made under county court process, cannot be indicted for embezzling the monies of the high-bailiff, his master; these monies are not the property of the high bailiff. A distraining broker employed exclusively by the prosecutor, and paid by a weekly salary and by a commission, is a servant within the statute.—*R.* v. *Flanagan*, 10 *Cox*, 561.

Where the prisoner was charged with embezzlement, but his employer who made the engagement with him was not called to prove the terms thereof, but only his managing clerk, who knew them through repute alone, having been informed of them by his employer, it was held that there was no evidence to go to the jury that the prisoner was servant to the prosecutor.—*R.* v. *Taylor*, 10 *Cox*, 544.

Money received by the defendant from his master himself, for the purpose of paying it to a third person, is not

within the embezzlement section; it is larceny.—*R.* v. *Peck*, 2 *Russ.* 449; *R.* v. *Smith*, *R. & R.* 267; *R.* v. *Hawkins*, 1 *Den.* 584; *R.* v. *Goodenough*, *Dears.* 210. The principle in these and the following cases, is that in law, the possession by the servant is possession by the master, and that the master who places money in his servant's hands for paying bills, etc., does not loose the possession of his money; so, that the servant, in fraudulently misappropriating this money, takes it wrongfully, in law, in his master's possession, *inde*, commits larceny, not embezzlement. And the principle is the same, when money is constructively in the possession of the master by the hands of any other clerk or servant.—*R.* v. *Murray*, 1 *Moo. C. C.* 276; *R.* v. *Watts*, 2 *Den.* 15; *R.* v. *Reed*. *Dears.* 168-257.

So, where the defendant's duty was to place every night in an iron safe, provided by his employer for that purpose, in an office where he conducted the business of his employer, though in his own house, the monies received by him on his employer's account and not used during the day, it was held that by placing it there, he determined his own exclusive possession of the money, and that, by afterwards taking some of it out of the safe, *animo furandi*, he was guilty of larceny.—*R.* v. *Wright*, *Dears. & B.* 431. The fraudulent appropriation of money, which has never been in the master's own possession, and which the defendant has received from a fellow-servant to give to his master, is embezzlement.—*R.* v. *Masters*, 1 *Den.* 332. *Greaves*, *note d*, 2 *Russ.* 450, thinks this is a wrong decision. Where the master gave a stranger some marked money, for the purpose of purchasing goods from the master's shopman, in order to try the shopman's fidelity; the stranger bought the goods, and the shopman embezzled the money, the

judges held this to be a case within the Act.—*R.* v. *Headge*, *R. & R.* 160; *R.* v. *Gill*, *Dears.* 289. Where the defendant's duty was to sell his master's goods, entering the sales in a book, and settling account with his master weekly, and upon such a sale the defendant fraudulenty omitted to make an entry of it in the book, and appropriated the money which he received from the buyer, this was held to be embezzlement and not larceny.—*R.* v. *Betts*, *Bell*, *C. C.* 90. A defendant, whose business it was to receive orders, to take the materials from his master's shop, work them up, deliver the goods, receive the price for them, and pay it over to his master, who at the end of the week paid the defendant a proportion of the price for his work, received an order for certain goods, took his master's materials, worked them up on his premises, delivered them and received the price, but concealed the transaction, and embezzled the money; upon a conviction for embezzlement, it was doubted whether this was not a larceny of the materials, rather than a case within the statute: the judges held the conviction right. —*R.* v. *Hoggins*, *R. & R.* 145.

But where it appeared that the defendant was employed as a town traveller and collector, to receive orders from customers, and enter them in the books and receive the money for the goods supplied thereon, but had no authority to take or direct the delivery of goods from his master's shop, and a customer having ordered two articles of the defendant, he entered one of them only in the order book, for which an invoice was made out by the prosecutor for the customer; but the defendant entered the price of the other at the bottom of the invoice, and having caused both to be delivered to the customer received the price of both, and accounted to the prosecutor only for the former; this was held not to be embezzlement but larceny.—*R.* v. *Wil-*

son, 9 *C. & P.* 27. The prisoner, as foreman, by fraudulently misrepresenting that twenty-one pounds, eighteen shillings was due for wages to the men under him, obtained that sum from his master's cashier. On the pay-sheet made out by the prisoner, one pound ten shillings and four pence was set down as due to W., whereas only one pound, eight shillings was due, and that amount only was paid by prisoner to W. out of the twenty-one pounds, eighteen shillings; the excess, two shillings and four pence, was appropriated, out of the twenty-one pounds eighteen shillings, to the prisoner's own use, he intending so to appropriate it at the time he received the twenty-one pounds eighteen shillings: *Held*, that the prisoner was guilty of larceny of his master's two shillings and four pence.—*R.* v. *Cooke*, 12 *Cox*, 10. See *R.* v. *Beaumont*, *Dears.* 270; *R.* v. *Thorp*, *Dears. & B.* 262; *R.* v. *Harris* *Dears.* 344; *R.* v. *Sullens*, 1 *Moo. C. C.* 129. A correct entry of money received in one book out of several is not answer to a charge of embezzlement, where the prisoner has actually appropriated the money.—*R.* v. *Lister*, *Dears. & B.* 118.

The usual presumptive evidence of embezzlement is that the defendant never accounted with his master for the money, etc., received by him, or that he denied his having received it. But merely accounting for the money is not sufficient, if there is a misappropriation of it.—*R.* v. *Lister*, *supra*. Greaves says, *note n*, 2 *Russ.* 455: "A fallacy is perpetually put forward in cases of embezzlement; the offence consists in the conversion of the *thing* received; no entry or statement is anything more than evidence bearing on the character of the disposal of the thing; and, yet entries are constantly treated as the offence itself. If a man made every entry in due course, it would only, at

most, amount to evidence that he did not, when he made them, intend to convert the money; and yet he might have converted it before, or might do so afterwards. If he were proved to have converted it before he made the entries, the offence would be complete, and no entry afterwards made could alter it. So, on the other hand, if he made no entries or false entries but actually paid the money to his master, he would be innocent." See *R.* v. *Guelder*, *Bell*, 284, and Brett's, J., remarks in *R.* v. *Walstenholme*, 11 *Cox*. 313; *R.* v. *Jackson*, 1 *C. & K.* 384. The fact of not paying over monies received by a servant is proof of embezzlement, even if no precise time can be fixed at which it was his duty to pay them over, if his not accounting for them is found to have been done fraudulently.—*R.* v. *Welch*, 1 *Den.* 199; *R.* v. *Wortley*, 2 *Den.* 333.

In *R.* v. *Grove*, 1 *Moo. C. C.* 447, a majority of the judges (eight against seven) are reported to have held that an indictment for embezzlement might be supported by proof of a general deficiency of monies that ought to be forthcoming, without showing any particular sum received and not accounted for. See, also, *R.* v. *Lambert*, 2 *Cox*, 309; *R.* v. *Moah*, *Dears.* 626. But in *R.* v. *Jones*, 8 *C. & P.* 288, where, upon an indictment for embezzlement, it was opened that proof of a general deficiency in the prisoner's accounts would be given, but none of the appropriation of a specific sum, Anderson, B., said: "Whatever difference of opinion there might be in *R.* v. *Grove*, *(ubi supra)* that proceeded more upon the particular facts of that case than upon the law; it is not sufficient to prove at the trial a general deficiency in account; some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen. See, also,

R. v. *Chapman*, 1 *C. & K.* 119, 2 *Russ.* 460, and *R.* v. *Wolstenholme*, 11 *Cox*, 313.

A conductor of a tramway car was charged with embezzling three shillings. It was proved that on a certain journey there were fifteen threepenny fares, and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way bills for each journey to a clerk, and to hand in all the money received during each day on the following morning. The prisoner's money should have been £3 1s. 9d., according to his way bills for the day, but he paid in only £3 0s. 8d. *Held*, that there was sufficient evidence of the receipt of seven shillings and eleven pence, the total amount of fares of the particular journey, and of the embezzlement of three shillings, part thereof.—*R.* v. *King*, 12 *Cox*, 73.

Where the indictment contains only one count, charging the receipt of a gross sum on a particular day, and it appears in evidence that the money was received in different sums on different days, the prosecutor will be put to his election, and must confine himself to one sum and one day.—*R.* v. *Williams*, 6 *C. & P.* 626.

The prisoner, not having been in the employment of the prosecutor, was sent by him to one Milner with a horse as to which Milner and the prosecutor, who owned the horse, had had some negotiations, with an order to Milner to give the bearer a cheque if the horse suited. On account of a difference as to the price the horse was not taken and the prisoner brought him back. Afterwards the prisoner, without any authority from the owner, took the horse to

Milner and sold it as his own property, or professing to have a right to dispose of it, and received the money, giving a receipt in his own name.

Held, that a conviction for embezzlement could not be sustained as the prisoner, when he received the money, did not receive it as a servant or clerk but sold the horse as his own and received the money to his own use.—*The Queen* v. *Topple*, 3 *R. & C.* (*N. S.*) 566.

Upon the trial for any offence, mentioned in these sections, the jury may convict of an attempt to commit the same, under sec. 183 of the Procedure Act, if the evidence warrants it.

On a trial for embezzlement, *held*, that evidence of a general deficiency having been given, the conviction was right, though it was not proved that a particular sum coming from a particular person on a particular occasion, was embezzled by the prisoner.—*R.* v. *Glass*, 1 *L. N.* 41.

But a general deficiency alone is not sufficient.—*R.* v. *Glass*, *Ramsay's App. Cas.* 186-195.

53. Every one who, being employed in the public service of Her Majesty, or of the Lieutenant Governor or government of any Province of Canada, or of any municipality, steals any chattel, money or valuable security belonging to or in the possession or power of Her Majesty, or of such Lieutenant Governor, government or municipality, or intrusted to or received or taken into possession by him by virtue of his employment, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 71. 24-25 *V.*, *c.* 96, *s.* 69, *Imp.*

54. Every one who, being employed in the public service of Her Majesty, or of the Lieutenant Governor, or government of any Province in Canada, or of any municipality, and intrusted, by virtue of such employment, with the receipt, custody, management or control of any chattel, money or valuable security, embezzles any chattel, money or valuable security, intrusted to or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently applies or disposes of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever

except for the public service, or for the service of such Lieutenant Governor, government or municipality, feloniously steals the same from Her Majesty, or from such municipality, and is liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 72, *part.* 24-25 *V.*, *c.* 96, *s.* 70, *Imp.*

55. Every one who, being employed in the public service of Her Majesty, or of the Lieutenant Governor, or government of any Province of Canada, or of any municipality, and intrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it, is guilty of a fraudulent embezzlement thereof, and liable to fourteen years' imprisonment;

2. Nothing herein shall affect any remedy of Her Majesty, of the municipality, or of any person against the offender or his sureties, or any other person, nor shall the conviction of such offender be receivable in evidence in any suit or action against him.—41 *V.*, *c.* 7, *s.* 70, *part.* *C. S. C. c.* 16, *s.* 40, *part.* 29-30 *V.* (*Can.*), *c.* 51, *s.* 157, *part.*

See sec. 16 of Procedure Act, *post*, for venue in cases under the three preceding sections.

Where the registrar and treasurer of the late Trinity House was charged with embezzling a portion of the fund known as "The Decayed Pilots Fund." *Held*, that this was an embezzlement of moneys the property of "Our Lady the Queen."—*R.* v. *David*, 17 *L. C. J.* 310. (under sec. 54 of the Larceny Act.) See *R.* v. *Graham*, 13 *Cox*, 57.

These clauses have the effect of extending sections 51 and 52, as to larceny and embezzlement by clerks or servants, to public and municipal officers, and the remarks under the said sections, *ante*, may be applied here.

Indictment under sect. 53.— ..... on ..... at ..... being then employed in the public service of Her Majesty, to wit, being then and there ..... one ..... belonging to Her Majesty, feloniously did steal, take and carry away, against the form .....—3 *Burn*, 319.

This form has not the word "feloniously" in 3 *Burn, loc. cit.*

Indictment under sec. 54.— ..... on ..... at ..... being employed in the public service of Her Majesty, and being entrusted, by virtue of such employment, with the receipt, custody, management and control of a certain valuable security, to wit,..... did then and there, whilst he was so employed as aforesaid, receive and take into his possession the said valuable security, and the said valuable security then fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid do say, that,..... *(defendant)* in manner and form aforesaid, the said valuable security, the property of Her Majesty, from Her Majesty, feloniously did steal, take and carry away, against the form ..... 3 *Burn*, 319. *A second count laying what particular office the defendant held may be added.*

Evidence of acting in the capacity of an officer employed by the crown is sufficient to support an indictment; and the appointment need not be regularly proved.—*R.* v. *Townsend, C. & M.* 178; *R.* v. *Borrett*, 6 *C. & P.* 124. Proof of a general deficiency in account would probably not be sufficient; the embezzlement of a specific sum would have to be proved. See cases under sec. 52.

Sec. 126 of the Procedure Act contains an enactment as to the form of indictment under these three clauses.

56. Every one who steals, or unlawfully or maliciously, either by violence or stealth, takes from any person having the lawful custody thereof, or from its lawful place of deposit for the time being, or aids, counsels or assists in so stealing or taking any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, or any document or paper made, prepared or drawn out according to or for the requirements of any law in regard to provincial, municipal or civic elections, is guilty of a

felony, and liable to a fine, in the discretion of the court, or to seven years' imprisonment, or to both fine and imprisonment.—29-30 *V.* (*Can.*), *c.* 51, *s.* 188, *part.* *R. S. B. C.*, *c.* 157, *ss.* 99 *and* 100, *parts.*

This clause does not apply to writs of election or documents relating to elections for the Dominion Parliament.

STEALING BY TENANTS OR LODGERS.

57. Every one who steals any chattel or fixture let to be used by him, or her, in or with any house or lodging, whether the contract has been entered into by him or her, or by her husband, or by any person on behalf of him or her or her husband, is guilty of felony, and liable to imprisonment for any term less than two years, and if the value of such chattel or fixture exceeds the sum of twenty-five dollars, is liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 75, *part.* 24-25 *V.*, *c.* 96, *s.* 74, *Imp.*

If the indictment be for stealing a chattel, it may be, by sec. 127 of the Procedure Act, in the common form for larceny, and in case of stealing a fixture, the indictment may be in the same form as if the offender were not a tenant or lodger, and the property may be laid either in the owner or person letting to hire. If the indictment be for stealing a fixture, use form under sec. 17, *ante*, and describe the dwelling-house as that of the landlord, as in burglary.—3 *Burn.* 319.

There may be a conviction of an attempt to commit any offence mentioned in this section, upon a trial for that offence. Sec. 183 of the Procedure Act.

By common law, a lodger had a special property in the goods which were let with his lodgings; during the lease he, and not the landlord, had the possession; therefore the landlord could not maintain trespass for taking the goods; in consequence, the taking by the lodger was not felonious. —*Meere's Case*, 2 *Russ.* 519; *R.* v. *Belstead*, *R. & R.* 411. Hence, the statutory enactments on the subject.

STEALING BY PARTNERS.

58. Every one who, being a member of any co-partnership owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles or unlawfully converts the same or any part thereof to his own use, or that of any person other than the owner, is liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership, or one of such beneficial owners.—32-33 *V.*, *c.* 21, *s.* 38. 31-32 *V.*, *c.* 116, *s.* 1 *Imp.*

The Imperial clause reads as follows: "If any person being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods or effects, bills, notes, securities or other property, of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners."

A partner stole goods belonging to the firm, and rendered himself liable to be dealt with as a felon under the 31-32 V., c. 116, sect. 1 *(the present clause)*, and sold the same to the prisoner who knew of their having been stolen: *Held*, that the prisoner could not be convicted on an indictment for feloniously receiving, but might have been convicted as an accessory after the fact on an indictment properly framed.—*R.* v. *Smith*, 11 *Cox*, 511.

An indictment framed upon the 31-32 V., c. 116, sect. 1, alleged that B. was a member of a co-partnership consisting of B. and L., and that B., then being a member of the same, eleven bags of cotton waste, the property of the said co-partnership, feloniously did steal, take and carry away: *Held*, that the indictment was not bad for introduc-

ing the word "feloniously."—R. v. *Butterworth*, 12 *Cox*, 132. In this case, Cottingham, for the prisoner, said: "The indictment is bad because it does not follow the words of the statute. That enactment creates a new offence, one which did not exist at common law; it does not say that the offence shall be a felony, and the indictment is bad for using the word "feloniously." There are offences of stealing, which are not felonious, such as dog stealing." Lush, J., said: "If the offence created by this section is not a felony, what is it?" And the court, without calling upon the counsel for the prosecution, affirmed the conviction, holding the objection not arguable.

Indictment.—The Jurors for Our Lady the Queen, upon their oath present, that on ..... at ..... Thomas Butterworth, of ..... was a member of a certain co-partnership, to wit, a certain co-partnership carrying on the business of and trading as waste dealer, and which said co-partnership was constituted and consisted of the said Thomas Butterworth and of John Joseph Lee, trading as aforesaid; and, thereupon, the said Thomas Butterworth, at ..... aforesaid, during the continuance of the said co-partnership, and then being a member of the same as aforesaid, to wit, on the day and year aforesaid, eleven bags of cotton waste of the property of the said co-partnership feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of Our said Lady the Queen, her crown and dignity.—*R.* v. *Butterworth*, *supra*.

See *R.* v. *Ball*, 12 *Cox*, 96, for an indictment against a partner for embezzlement of partnership property; also, *R.* v. *Blackburn*, 11 *Cox*, 157.

A partner, at common law, may be guilty of larceny of the partnership's property; so may a man be guilty of lar-

ceny of his own goods; *R.* v. *Webster*, *L. & C.* 77; *R.* v. *Burgess*, *L. & C.* 299; *R.* v. *Moody*. *L. & C.* 173; of course, that is when the property is stolen from another person in whose custody it is, and who is responsible for it. See, also, Bovill's, C. J., opinion in *R.* v. *Diprose*, 11 *Cox*, 185. Upon an indictment for larceny, under this section, the prisoner may be found guilty of embezzlement.—*R.* v. *Rudge*, 13 *Cox*, 17.

FRAUDS BY AGENTS, BANKERS OR FACTORS.

59. Every one who, being a cashier, assistant cashier, manager, officer, clerk or servant of any bank, or savings bank, secretes, embezzles or absconds with any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects intrusted to him as such cashier, assistant cashier, manager, officer, clerk or servant, whether the same belongs to the bank or belongs to any person, body corporate, society or institution, and is lodged with such bank, is guilty of felony, and liable to imprisonment for life or for any term not less than two years.—34 *V.*, *c.* 5, *s.* 60, *and c.* 7, *s.* 32. 24-25 *V.*, *c.* 96, *s.* 73, *Imp.*

60. Every one who,—

(*a.*) Having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, in violation of good faith and contrary to the terms of such direction, in anywise converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such money, security or proceeds, or any part thereof respectively, or—

(*b.*) Having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom or any part thereof, or of Canada, or of any Province thereof, or of any British colony or possession, or of any foreign state, or in any stock or fund of any body corporate,

company or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer or pledge, in violation of good faith, and contrary to the object or purpose for which such chattel, security or power of attorney has been intrusted to him, sells, negotiates, transfers, pledges, or in any manner converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney relates, or any part thereof,—

Is guilty of a misdemeanor, and liable to seven years' imprisonment.

2. Nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect to any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money due or to become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed; nor from selling, transferring or otherwise disposing of any securities or effects in his possession, upon which he has any lien, claim or demand, entitling him by law so to do, unless such sale, transfer, or other disposal extends to a greater number or part of such securities or effects than are requisite for satisfying such lien, claim or demand.—32-33 *V.*, *c.* 21, *s.* 76. 24-25 *V.*, *c.* 96, *s.* 75, *Imp.*

Greaves says: "The former enactments did not extend to a direction to apply any security for the payment of money; the present clause is extended to that case, and the words "pay or deliver" "to any person" are introduced to include cases where the direction is to pay or deliver a bill of exchange or other security to a particular person. The words "or the use or benefit of any person other than the person" are introduced to include cases where the banker, etc., converts the property not to his own use, but to that of some person other than the person employing him. If it should be suggested that these words are too large, as they

would include a payment to the use of A. by the direction of the party intrusting the money to the banker, the answer is, that to bring a case within this clause, three things must concur; the property must be disposed of, first, in violation of good faith; secondly, contrary to the term of the direction; thirdly, to the use of the banker or of some one other than the party intrusting the banker, and consequently no case where the banker obeys the direction of the party intrusting him can come within the clause.

By sec. 6 of the Procedure Act, no court of general or quarter sessions has power to try any offence under sects. 60 to 76 of the Larceny Act. And by sec. 197, the defendant, under said sections, is not to be acquitted, if larceny is proved.

Sub sec. *b* of sec. 60 applies only to persons whose occupation is similar to those specially enumerated in the section, and does not include any ordinary agent who may from time to time be entrusted with valuable securities. *R.* v. *Portugal*, 16 *Q. B. D.* 487.

61. Every one who, being a banker, merchant, broker, attorney or agent, and being intrusted, either solely or jointly with any other person, with the property of any other person for safe custody, with intent to defraud, sells, negotiates, transfers, pledges or in any other manner converts or appropriates the same, or part thereof, to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 77. 24-25 *V.*, *c.* 96, *s.* 76, *Imp.*

62. Every one who, being intrusted, either solely or jointly with any other person, with any power of attorney, for the sale or transfer of any property, fraudulently sells or transfers, or otherwise converts the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 78. 24-25 *V.*, *c.* 96, *s.* 77, *Imp.*

63. Every one who, being a factor, or agent intrusted, either solely or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document or title to goods, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, makes any consignment, deposit, transfer or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien or security for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer or delivery, or intended to be thereafter borrowed or received, or contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accepts any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer or deliver any such goods or document of title, is guilty of a misdemeanor, and liable to seven years' imprisonment;

2. Every one who knowingly and wilfully acts and assists in making any such consignment, deposit, transfer or delivery, or in accepting or procuring such advance as aforesaid, is guilty of a misdemeanor, and liable to the same punishment;

3. No such factor or agent shall be liable to any prosecution for consigning, depositing, transferring or delivering any such goods or documents of title, if the same are not made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such consignment, deposit, transfer or delivery, was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent.—32-33 *V.*, *c.* 21, *s.* 79. 24-25 *V.*, *c.* 96, *s.* 78, *Imp.*

64. Any factor or agent intrusted, as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid, shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be

deemed to be possessed of such goods or document, whether the same are in his actual custody or held by any other person subject to his control, or for him, or on his behalf; and whenever any loan or advance is *bonâ fide* made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer or deliver such goods or document of title, and such goods or document of title is or are actually received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title, within the meaning of the next preceding section, though such goods or document of title are not actually received by the person making such loan or advance till a period subsequent thereto; and any contract or agreement, whether made direct with such factor or agent or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange, or other negotiable security, shall be deemed to be an advance within the meaning of the next preceding section; and a factor or agent in possession, as aforesaid, of such goods or document, shall be taken, for the purpose of the next preceding section, to have been intrusted therewith by the owner thereof, unless the contrary is shown in evidence.—32-33 *V.*, *c.* 21, *s.* 80. 24-25 *V.*, *c.* 96, *s.* 79, *Imp.*

65. Every one who, being a trustee of any property for the use or benefit, either in whole or in part, of some other person, or for any public or charitable purpose, with intent to defraud, converts or appropriates the same, or any part thereof, to or for his own use or benefit or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise disposes of or destroys such property or any part thereof, is guilty of a misdemeanor, and liable to seven years' imprisonment.

2. No proceeding or prosecution for any offence mentioned in this section shall be commenced without the sanction of the attorney general or solicitor general for the province in which the same is to be instituted;

3. When any civil proceeding has been taken against any person to whom the provisions of this section apply, no person who has taken such civil proceeding shall commence any prosecution under

this section without the sanction of the court or judge before whom such civil proceeding has been had or is pending.—32-33 *V.*, *c.* 21, *s.* 81. 24-25 *V.*, *c.* 96, *s.* 80, *Imp.*

66. Every one who, being a director, member, manager or officer of any body corporate or company, fraudulently takes or applies, for his own use or benefit, or for any use or purpose other than the use or purpose of such body corporate or company, any of the property of such body corporate or company is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 82. 24-25 *V.*, *c.* 96, *s.* 81, *Imp.*

67. Every one who, being a director, member, manager or officer of any body corporate or company, as such receives or possesses himself of any of the property of such body corporate or company, otherwise than in payment of a just debt or demand, and, with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or company, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 83. 24-25 *V.*, *c.* 96, *s.* 82, *Imp.*

68. Every one who, being a director, manager, officer or member of any body corporate or company, with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing or valuable security belonging to the body corporate or company, or makes or concurs in the making of any false entry, or omits or concurs in omitting any material particular in any book of account or document, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 84. 24-25 *V.*, *c.* 96, *s.* 83, *Imp.*

69. Every one who, being a director, manager, officer or member of any body corporate or company, makes, circulates or publishes, or concurs in making, circulating or publishing any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or company, or to enter into any security for the benefit thereof, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 85. 24-25 *V.*, *c.* 96, *s.* 84, *Imp.*

70. Every one who, being an officer or member of any unincorporated body or society, associated together for any lawful purpose, fraudulently takes or applies to his own use or benefit, or for any use

or purpose other than the use or purpose of such body or society, the whole or any portion of the funds, moneys or other property of the society, and continues to withhold such property after due demand has been made for the restoration and payment of the same by some one or more of the members or officers duly appointed by and on behalf of the body or society, is guilty of a misdemeanor, and liable to three years imprisonment.—*C. S. C.*, *c.* 71, *s.* 8. *R. S. B. C.*, *c.* 126, *s.* 9.

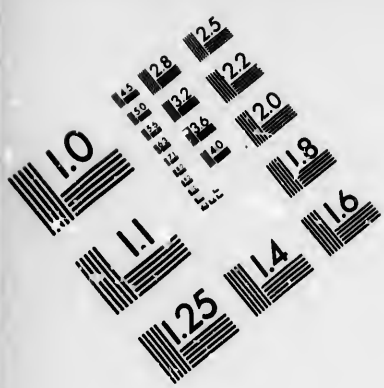
Not in the English Act.

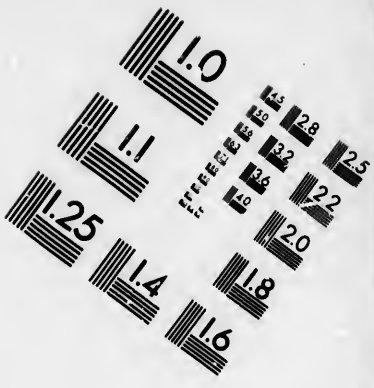
71. Nothing in any of the twelve sections next preceding shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in the said sections mentioned by any evidence whatsoever, in respect of any act done by him, if, at any time previously to his being charged with such offence, he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding *bonâ fide* instituted by any party aggrieved, or if he has first disclosed the same in any compulsory examination or deposition before any court, upon the hearing of any matter in bankruptcy or insolvency.—32-33 *V.*, *c.* 21, *s.* 86. 24-25 *V.*, *c.* 96, *s.* 85, *Imp.*

72. Nothing in the thirteen sections next preceding, nor any proceeding, conviction or judgment had or taken thereon against any person under any of the said sections shall prevent, lessen or impeach any remedy at law or in equity, which any person aggrieved by any offence against any of the said sections would have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action or suit against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or payment of any trust property misappropriated.—32-33 *V.*, *c.* 21, *s.* 87. 24-25 *V.*, *c.* 96, *s.* 86, *Imp.*

73. Every one who,—

(*a.*) Being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbor or other place for storing timber, deals, staves, boards or lumber, curer or





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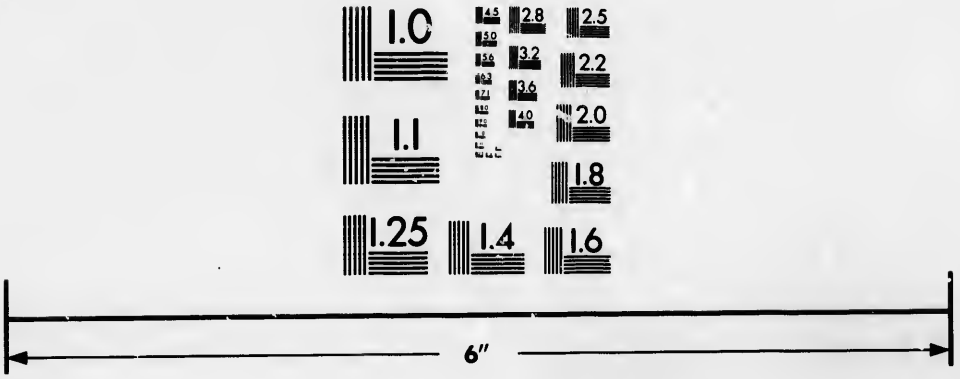

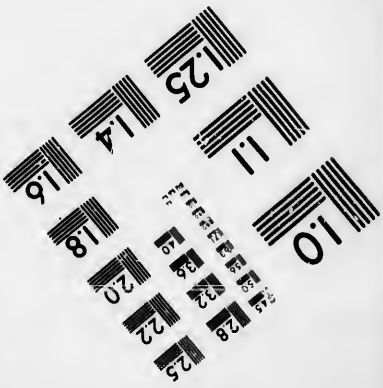

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packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for or an acknowledgment of any goods or other property as having been received into his warehouse, vessel, cove, wharf or other place, or in any such place about which he is employed, or in any other manner received by him, or by the person in or about whose business he is employed, before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person whomsoever, although such person is then unknown to him, or—

(*b.*) Knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing,—

Is guilty of a misdemeanor, and liable to three years' imprisonment. —32-33 *V.*, *c.* 21, *s.* 83. 34 *V.*, *c.* 5, *s.* 64.

Not in the English Act.

74. Every one who,—

(*a.*) Having, in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or carried, any merchandise, upon which the consignee has advanced any money or given any valuable security, afterwards with intent to deceive, defraud or injure such consignee, in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time of or before such money was so advanced, or such negotiable security so given, or—

(*b.*) Knowingly and wilfully acts and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee,—

Is guilty of a misdemeanor, and liable to three years' imprisonment;

2. No person shall be subject to prosecution under this section who, before making such disposition of the merchandise aforesaid, pays or tenders to the consignee the full amount of any advance made thereon. —32-33 *V.*, *c.* 21, *s.* 89.

Not in the English Act.

75. Every one who,—

(*a.*) Wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property, which can be used for any of the purposes mentioned in "*The Bank Act*," or—

(*b.*) Having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place, any such receipt, certificate or acknowledgment, for any such grain, timber or other goods or property, or having obtained any such receipt, certificate or acknowledgment, and after having indorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or indorsee, in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or indorsee of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned,

Is guilty of a misdemeanor, and liable to three years' imprisonment. —32-33 *V.*, *c.* 21, *s.* 90, *part.* 34 *V.*, *c.* 5, *s.* 65.

Not in the English Act.

76. If any misdemeanor mentioned in any of the three sections next preceding is committed by the doing of anything in the name of any firm, company or co-partnership of persons, the person by whom such thing is actually done or who connives at the doing thereof, is guilty of the misdemeanor and not any other person.—32-33 *V.*, *c.* 21, *s.* 91. 34 *V.*, *c.* 5, *s.* 66.

Not in the English Act.

By sec. 197 of the Procedure Act, if upon the trial of any person for any misdemeanor under sects. 60 to 76, both inclusive, of the Larceny Act, it appears that the offence proved amounts to larceny, he shall not by reason there of be entitled to be acquitted of the misdemeanor.—14-15 *V.*, *c.* 100, *s.* 12, *Imp.*

W. deposited title deeds with D. as security for a loan, and requiring a further loan, the defendant, an attorney, obtained for W. a sum of money from T. and delivered to her a mortgage deed as security. There were no directions in writing to the defendant to apply the money to

any purpose, and he was entrusted with the mortgage deed, with authority to hand it over to T. on receipt of the mortgage money, which was to be paid to D. and W., less costs of preparing the deed. The defendant fraudulently converted a substantial part of the money to his own use; *Held*, that as there was no direction in writing, the defendant was not guilty of a misdemeanor under sec. 75 of the Larceny Act, sec. 60 of our statute; *Held*, also, that he was not guilty under sect. 76, sec. 61 of our statute.—*R.* v. *Cooper*, 12 *Cox*, 600. *See R.* v. *Golde*, 2 *Russ.* 481; *R.* v. *Prince*, 2 *C. & P.* 517; *R.* v. *White*, 4 *C. & P.* 46; *R.* v. *Gomm*, 3 *Cox*, 64; *R.* v. *Fletcher*, *L. & C.* 180.—*R.* v. *Tatlock*, 13 *Cox*, 328; *R.* v. *Brownlow*, 14 *Cox*, 216; *R.* v. *Fullagar*, 14 *Cox*, 370.

A stock and share dealer was in the habit of buying for S. gratuitously and receiving cheques on account. On the 27th of November, he wrote informing S. that £300 Japanese bonds had been offered to him in one lot, and that he had secured them for her, and that he had no doubt of her ratifying what he had done, and enclosing her a sold note for £336, signed in his own name. S. wrote in reply "that she had received the contract note for Japan shares and had inclosed a cheque for £336 in payment, and that she was perfectly satisfied that he had purchased the shares for her." In fact, the bonds had not been offered to the dealer in one lot, but he had applied to a stock jobber, and agreed to buy three at £112 each, but never completed the purchase. *Held*, that S.'s letter was a sufficient written direction within the meaning of 24-25 V., c. 96, sect. 75 (sect. 60, *ante*, of Canadian Statute) to apply the cheque to a particular purpose, viz., in payment for the bonds.—*R.* v. *Christian*, 12 *Cox*, 502.

Indictment, under sect. 60, *against a banker for a*

fraudulent conversion of money intrusted to him.—..... that A. B., on ..... did intrust C. D., as a banker, with a certain large sum of money, to wit, the sum of one hundred pounds, with a direction to the said C. D. in writing to pay the said sum of money to a certain person specified in the said direction, and that the said C. D., as such banker as aforesaid, afterwards, to wit, on ..... in violation of good faith and contrary to the terms of such direction, unlawfully did convert to his own use and benefit the said sum of money so to him intrusted as aforesaid against ..... *(In case of a security for money the indictment must allege a written direction as to the application of the proceeds. A count should be added stating particularly the purpose to which the money was to be applied, and the person to whom it was to be paid.)* —3 *Burn*, 320. See *R.* v. *Cronmire*, 16 *Cox*, 42.

Indictment, under sect. 60, *against a banker, for selling or converting goods or valuable securities intrusted to him for safe keeping, or for a special purpose "not" in writing.*—..... that A. B., on ..... did intrust to C. D. as a banker, for safe custody, a certain bill of exchange the property of the said A. B., drawn by ..... on ..... dated ..... for the payment of the sum of one hundred pounds, without any authority to sell, negotiate, transfer or pledge the same; and that the said C. D. then being such banker, as aforesaid, and being so intrusted, as aforesaid, in violation of good faith and contrary to the object and purpose for which the said bill of exchange so intrusted to him as aforesaid, and whilst so intrusted as aforesaid, unlawfully did negotiate, transfer and convert to his own use and benefit, the said bill of exchange, against ..... *(Add other counts, as the case may suggest.)*—3 *Burn*, 320.

Indictments, under sections 61 and 62, may readily be

framed from the above, omitting the special allegations as to safe custody, etc.—3 *Burn*, 320.

Indictment under sect. 63 *against a factor for pledging goods.*—.....that A. B., on ..... did intrust to C. D., he, the said C. D. then being a factor and agent, one hundred bales of cotton, of the value of one thousand pounds, for the purpose of selling the same, and that the said C. D. afterwards, contrary to and without the authority of the said A. B., for his own benefit, and in violation of good faith, unlawfully did deposit the said cotton with E. F. of ..... as and by way of a pledge, lien and security, for a sum of money, to wit, one hundred pounds, by the said C. D. then borrowed and received of and from the said E. F. against the .....—3 *Burn*, 320.

Indictment under sect. 65, *against a trustee for fraudulent conversion.*—The Jurors for Our Lady the Queen upon their oath present, that, before and at the time of the committing of the offences hereinafter mentioned, to wit, on ..... C. D. was a trustee for certain property, to wit, five thousand pounds, three per centum Consolidated Bank annuities wholly (or partially) for the benefit of J. N., and that he, the said C. D. so being such trustee as aforesaid, on the day and year aforesaid, unlawfully and wilfully did convert and appropriate the said property to his own use, with intent thereby then to defraud, against the form..... *(Add counts alleging that the defendant disposed of, showing the mode of disposition, or destroyed the property, if necessary.)*—3 *Burn*, 321. See *R.* v. *Townshend*, 15 *Cox*, 466.

Indictment under sect. 66 *against a director for fraudulent conversion of the company's money.*—The Jurors for Our Lady the Queen upon their oath present, that before and at the time of the committing of the offence herein-

after mentioned, C. D. was a director of a certain public company, called ..... and that he, the said C. D., so being such director as aforesaid, on the ..... did unlawfully and fraudulently take and apply for his own use and benefit certain money, to wit, one thousand pounds, of and belonging to the said company, against the .....—3 *Burn*, 321.

Indictment, under sect 67 *against directors for keeping fraudulent accounts.*—.....that C. D. on..... then being a director of a certain body corporate, called ..... unlawfully did, as such director, receive and possess himself of certain of the property of the said body corporate, otherwise than in payment of a just debt or demand, to wit, the sum of one hundred pounds, and lawfully, with intent to defraud, did omit to make a full and true entry of the said sum, in the books and accounts of the said body corporate, against .....—3 *Burn*, 321.

Indictment under sect. 68 *against a director for destroying or falsifying books, etc.*—..... ...that C. D. on ..... then being a director of a certain body corporate, called ..... unlawfully, with intent to defraud, did destroy *(alter, or mutilate, or falsify)* a certain book *(or paper, or writing, or valuable security)*, to wit, ... belonging to the said body corporate, against the form .....—3 *Burn*, 321.

Indictment under sect. 69 *against a director for publishing fraudulent statements.*—..... that before and at the time of the committing of the offences hereinafter mentioned, C. D. was a director of a certain public company, called ..... and that he, the said C. D., so being such director as aforesaid, on ..... did unlawfully circulate and publish a certain written statement and

account, which said written statement was false in certain material particulars, that is to say, in this, to wit, that it was therein falsely stated that *(state the particulars)*, he the said C. D. then well knowing the said written statement and account to be false in the several particulars aforesaid, with intent thereby then to deceive and defraud J. N., then being a shareholder of the said public company *(or with intent.....)* against the form ..... *(Add counts stating the intent to be to deceive and defraud "certain persons to the jurors aforesaid unknown, being shareholders of the said public company," and also varying the allegation of the intent as in the section.)*—3 *Burn*, 321; *Archbold*, 467.

Offences against sects. 60 to 76 of Larceny Act, not triable at quarter sessions. Sec. 6 Procedure Act.

As to who is an agent under sec. 60. See *R.* v. *Cosser*, 13 *Cox*, 187.

The power of attorney mentioned in sec. 62 of the Larceny Act, must be a written power of attorney.—*R.* v. *Chouinard*, 4 *Q. L. R.* 220.

In an indictment of a trustee for fraudulently converting property, under sec. 65 of Larceny Act, it is sufficient to set out that A. "being a trustee" did, etc., instead of that A. "was a trustee and being such trustee" did ..... It is not necessary to set out the trust in the indictment. —*R.* v. *Stansfield*, 8 *L. N.* 123.

OBTAINING MONEY BY FALSE PRETENCES.

77. Every one who, by any false pretence, obtains from any other person any chattel, money or valuable security, with intent to defraud, is guilty of a misdemeanor, and liable to three years' imprisonment;

2. Every one who, by any false pretence, causes or procures any money to be paid, or any chattel or valuable security to be delivered to any other person, for the use or benefit or on account of the person

making such false pretence or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel or valuable security within the meaning of the next preceding sub-section. —32-33 *V., c.* 21, *s.* 93, *part, and s.* 94.

The first part of this section is based on 24-25 V., c. 96, s. 88 of the Imperial Act, the second part, on s. 89 of the said Imperial Act. See sec. 198 of the Procedure Act.

By sect. 183 of the Procedure Act, upon an indictment under any of these sections, the jury may return a verdict of guilty of an attempt to commit the offence charged, if the evidence warrants it.—*R.* v. *Roebuck, Dears. & B.* 24; *R.* v. *Eagleton, Dears.* 376, 515; *R.* v. *Hensler*, 11 *Cox*, 570; *R.* v. *Goff*, 9 *U. C. C. P.* 438. A verdict under sec. 85 may also be given, sec. 201 Procedure Act. No indictment can be preferred for obtaining money or other property by false pretences, unless one or other of the preliminary steps required by sect. 140 of the Procedure Act has been taken.

By sec. 112 of the Procedure Act, in indictments for obtaining or attempting to obtain under false pretences, a general intent to defraud is a sufficient allegation, and it is not necessary to allege any ownership of the chattel, money or valuable security; and on the trial, it is not necessary to prove an intent to defraud any particular person, but it is sufficient to prove that the defendant did the act charged with an intent to defraud.

To constitute the offence of obtaining goods by false pretences, three elements are necessary. 1st, the statement upon which the goods are obtained must be untrue; 2nd, the prisoner must have known at the time he made the statement that it was untrue; 3rd, the goods must have been obtained by reason and on the representation of that false statement.—*R.* v. *Burton*, 16 *Cox*, 62.

The following is quoted from an American case, reported in 12 *Cox*, 208, *the Commonwealth* v. *Yerker:* "The distinction between larceny and false pretences is a very nice one in many instances. In some of the old English cases the difference is more artificial than real, and rest purely upon technical grounds. Much of this nicety is doubtless owing to the fact that at the time these cases were decided larceny was a capital felony in England, and the judges naturally leaned to a merciful interpretation of the law out of a tender regard for human life. But whatever may have been the cause, the law has come down to us with such distinctions. The distinction between larceny and false pretences is well stated in *Russell on Crimes*, 2*nd Vol.*, 4th *Edit.* "The correct description in cases of this kind seems to be that, if by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods, but the right of property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretences." See *R.* v. *Feithenheimer*, 26 *U. C. C. P.* 139.

Indictment.— ..... that J. S. on ..... unlawfully, knowingly and designedly did falsely pretend to one A. B. that the said J. S. then was the servant of one O. K., of ..... tailor, *(the said O. K. then and long before being well known to the said A. B, and a customer of the said A. B. in his business and way of trade as a woollen draper)*, and that the said J. S. was then sent by the said O. K. to the said A. B. for five yards of superfine woollen cloth, by means of which said false pretences, the said J. S did then unlawfully obtain from the said A. B. five yards

of superfine woollen cloth, with intent to defraud; whereas, in truth and in fact, the said J. S. was not then the servant of the said O. K., and whereas in truth and in fact the said J. S. was not then sent by the said O. K. to the said A. B. for the said cloth, or for any cloth whatsoever, as he the said J. S. well knew at the time when he did so falsely pretend as aforesaid, against the form.....—*Archbold.*

By sec. 196 of the Procedure Act, if, upon the trial for the misdemeanor provided for by this section, a larceny is proved, on the facts as alleged, the prisoner is not, by reason thereof, entitled to an acquittal. So far, this is in conformity with the English Act but our statute goes further, and, by section 198, provides that, if upon an indictment for larceny, the facts proved establish an obtaining by false pretences, the jury may find the defendant *guilty of such obtaining by false pretences.* This constitutes an important difference between the English statute and our own statute on the subject. But it is probable that the rule laid down in *R.* v. *Gorbutt, Dears. & B.* 166, would apply here, and that, upon an indictment for larceny, if the facts proved constitute an obtaining by false pretences, a general verdict of guilty would be wrong. It would be finding the defendant guilty of a felony, where a misdemeanor only has been proved against him.—*R.* v. *Adam,* 1 *Den.* 38; *R.* v. *Rudge,* 13 *Cox,* 17.

Moreover, in such a case, the only verdict authorized by the statute, is "guilty of obtaining such property by false pretences with intent to defraud," and such must be the words of a verdict, under such circumstances. Under section 196 of the Procedure Act, the words of the statute are different, and, if larceny is proved, upon an indictment for obtaining by false pretences, the verdict must be for the latter. "Shall not by reason thereof be entitled to be

acquitted of *such misdemeanor*" are the words of the statute. See Greaves' note to *R.* v. *Bryan*, 2 *Russ.* 664. It would have been impossible and against the spirit of the law to allow a verdict for a felony upon an indictment for a misdemeanor.—See sec. 184 of the Procedure Act.

A defendant indicted for misdemeanor in obtaining money under false pretences, cannot under C. S. C. c. 99, s. 62, be found guilty of larceny, that clause only authorizes a conviction for the misdemeanor, though the facts proved amount to larceny.—*R.* v. *Ewing*, 21 *U. C. Q. B.* 523; *R.* v. *Bertles*, 13 *U. C. C. P.* 607.

The pretence must be set out in the indictment.—*R.* v. *Mason*, 2 *T. R.* 581; *R.* v. *Goldsmith*, 12 *Cox*, 479. See notes to form in 2d schedule of Procedure Act. And it must be stated to be false.—*R.* v. *Airey*, 2 *East, P. C.* 30. And it must be some existing fact; a pretence that the defendant will do some act, or that he has got to do some act is not sufficient.—*R.* v. *Goodall*, *R. & R.* 461; *R.* v. *Johnston*, 2 *Moo. C. C.* 254; *R.* v. *Lee*, *L. & C.* 309. Where the pretence is partly a misrepresentation of an existing fact, and partly a promise to do some act, the defendant may be convicted, if the property is parted with in consequence of the misrepresentation of fact, although the promise also acted upon the prosecutor's mind.—*R.* v. *Fry*, *Dears. & B.* 449; *R.* v. *West*, *Dears. & B.* 575; *R.* v. *Jennison*, *L. & C.* 157.

Where the pretence, gathered from all the circumstances, was that the prisoner had power to bring back the husband of the prosecutrix, though the words used were merely promissory that she, the prisoner, would bring him back, it was held a sufficient pretence of an existing fact, and that it is not necessary that the false pretence should be made in express words, if it can be inferred from all the

circumstances attending the obtaining of the property.—*R.* v. *Giles, L. & C.* 502.

An indictment for obtaining money by false pretences must state the false pretences with certainty, so that it may clearly appear that there was a false pretence of an existing fact; where the indictment alleged that the prisoner pretended to A.'s representative that she was to give him twenty shillings for B., and that A. was going to allow B. ten shillings a week, it was held that it did not sufficiently appear that there was any false pretence of an existing fact.—*R.* v. *Henshaw, L. & C.* 444.

An indictment alleged that the prisoner obtained a coat by falsely pretending that a bill of parcels of a coat, value £0 14s. 6d. of which £0 4s. 6d. had been paid on account, and £0 10s. 0d. only was due, was a bill of parcels of another coat of the value of twenty-two shillings. The evidence was that the prisoner's wife had selected the £0 14s. 6d. coat for him, subject to its fitting him, and had paid £0 4s. 6d. on account, for which she received a bill of parcels giving credit for that amount. On trying on the coat, it was found to be too small, and the prisoner was then measured for one to cost twenty-two shillings. When that was made, it was tried on by the prosecutor, who was not privy to the former part of the transaction. The prisoner when the coat was given to him handed the bill of parcels for the £0 14s. 6d. and also £0 10s. 0d. to the prosecutor, saying "There is £0 10s. 0d. to pay." The bill was receipted, and the prisoner took the twenty-two shillings coat away with him. The prosecutor stated that believing the bill of parcels to refer to the twenty-two shillings coat, he parted with that coat on payment of £0 10s. 0d. otherwise he should not have done so; *Held*, that there was evidence to support a conviction on the indictment.—*R.* v. *Steels*, 11 *Cox*, 5.

So the defendant may be convicted, although the pretence is of some existing fact, the falsehood of which might have been ascertained by inquiry by the party defrauded.—*R.* v. *Wickham*, 10 *A. & E.* 34; *R.* v. *Woolley*, 1 *Den.* 559; *R.* v. *Ball*, *C. & M.* 249; *R.* v *Roebuck*, *Dears. & B.* 24; or against which common prudence might have guarded; *R.* v. *Young*, 3 *T. R.* 98; *R.* v. *Jessop*, *Dears. & B.* 442; *R.* v. *Hughes*, 1 *F. & F.* 355. If, however, the prosecutor knows the pretence to be false, *R.* v. *Mills*, *Dears. & B.* 205; or does not part with the goods in consequence of defendant's representation, *R.* v. *Roebuck*, *Dears. & B.* 24; or parts with them before the representation is made, *R.* v. *Brooks*, 1 *F. & F.* 502; or in consequence of a representation as to some future fact, *R.* v. *Dale*, 7 *C. & P.* 352; or if the obtaining of the goods is too remotely connected with the false pretence, which is a question for the jury, *R.* v. *Gardner*, *Dears. & B.* 40; *R.* v. *Martin*, 10 *Cox*, 383; or if the prosecutor continues to be interested in the money alleged to have been obtained, as partner with the defendant, *R.* v. *Watson*, *Dears. & B.* 348; *R.* v. *Evans*, *L. & C.* 252; or the object of the false pretence is something else than the obtaining of the money, *R.* v. *Stone*, 1 *F. & F.* 311, the defendant cannot be convicted.

Falsely pretending that he has bought goods to a certain amount, and presenting a check-ticket for them, *R.* v. *Barnes*, 2 *Den.* 59; or overstating a sum due for dock dues or custom duties, *R.* v. *Thompson*, *L. & C.* 233, will render the prisoner liable to be convicted under the statute. (See reporter's note to this last case.)

The pretence need not be in words, but may consist of the acts and conduct of the defendant. Thus the giving a cheque on a banker, with whom the defendant has no account, *R.* v. *Flint*, *R. & R.* 460; *R.* v. *Jackson*, 3 *Camp.*

370; *R.* v. *Parker*, 2 *Moo. C. C.* 1; *R.* v. *Spencer*, 3 *C. & P.* 420; *R.* v. *Wickman*, 10 *A. & E.* 34; *R.* v. *Philpott*, 1 *C. & K.* 112; *R.* v. *Freeth*, *R. & R.* 127, or the fraudulently assuming the name of another to whom money is payable, *R.* v. *Story*, *R. & R.* 81; *R.* v. *Jones*, 1 *Den.* 551; or the fraudulently assuming the dress of a member of one of the universities, *R.* v. *Barnard*, 2 *C. & P.* 784, is a false pretence within the statute.

The prisoner obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk. The jury found that the prisoner was not carrying on that business at all: *Held*, that this was an indictable false pretence.—*R.* v. *Crab*, 11 *Cox*, 85; *R.* v. *Cooper*, 13 *Cox*, 617.

The defendant, knowing that some old country bank notes had been taken by his uncle forty years before, and that the bank had stopped payment, gave them to a man to pass, telling him to say, if asked about them, that he had taken them from a man he did not know. The man passed the notes, and the defendant obtained value for them. It appears that the bankers were made bankrupt: *Held*, that the defendant was guilty of obtaining money by false pretences, and that the bankruptcy proceedings need not be proved.—*R.* v. *Dowey*, 11 *Cox*, 115.

The indictment alleged that the prisoner was living apart from her husband under a deed of separation, and was in receipt of an income from her husband, and that he was not to be liable for her debts, yet that she falsely pretended to the prosecutor that she was living with her husband, and was authorized to apply for and receive from the prosecutor goods on the account and credit of her husband, and

that her husband was then ready and willing to pay for the goods. The evidence at the trial was that the prisoner went to the prosecutor's shop and selected the goods, and said that her husband would give a cheque for them as soon as they were delivered, and that she would send the person bringing the goods to her husband's office, and that he would give a cheque. When all the goods were delivered, the prisoner told the man who delivered them to go to her husband's office, and that he would pay for them. The man went, but could not see her husband, and ascertained that there was a deed of separation between the prisoner and her husband, which was shown to him. He communicated what he had learned to the prisoner, who denied the deed of separation. The goods were shortly after removed and pawned by the prisoner. The deed of separation between the prisoner and her husband was put in evidence, by which it was stipulated that the husband was not to pay her debts; and it was proved that she was living apart from her husband, and receiving an annuity from him, and that she was also cohabiting with another man: *Held*, that the false pretences charged were sufficiently proved by this evidence.—*R*, v. *Davis*, 11 *Cox*, 181.

On an indictment for fraudulently obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well known practice was for buyers to engage a room at a public house, and that the prisoner, pretending to be a buyer, conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief: *Held*, there being no evidence than the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay

for the goods there, the conviction could not be sustained.—*R.* v. *Burrows*, 11 *Cox*, 258.

On the trial of an indictment against the prisoner for pretending that his goods were unencumbered, and obtaining thereby eight pounds from the prosecutor with intent to defraud, it appeared that the prosecutor lent money to the prisoner at interest, on the security of a bill of sale on furniture, a promissory note of prisoner and another person and a declaration made by prisoner that the furniture was unencumbered. The declaratiou was untrue at the time it was handed to the prosecutor, the prisoner having a few hours before given a bill of sale for the furniture to another person, but not to its full value: *Held*, that there was evidence to go to the jury in support of a charge of obtaining money by false pretences.—*R.* v. *Meakin*, 11 *Cox*, 270.

A false representation as to the value of a business will not sustain an indictment for obtaining money by false pretences. On an indictment for obtaining money by false pretences, it appeared that the prisoner, on engaging an assistant from whom he received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless and he had been bankrupt: *Held*, that the indictment could not be sustained upon either of the representations.—*R.* v. *Williamson*, 11 *Cox*, 328.

It has been seen, *ante*, that in *R.* v. *Mills*, *Dears. & B.* 205, it was held, that the defendant cannot be convicted, if the prosecutor knows the pretence to be false. The defendant, however, in such cases may, under sect. 183 of the Procedure Act, be found guilty of an attempt to commit the offence charged. Or be, in the first instance, indicted for the attempt. In *R.* v. *Hensler*, 11 *Cox*, 570, the prisoner

was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent the prisoner five shillings; but he stated in his evidenee at the trial that he knew that the statements contained in the letter were untrue; it was held, upon a case reserved that the prisoner might be convicted, on this evidence, of attempting to obtain money by false pretences. But an indictment for an attempt to obtain property by false pretences must specify the attempt.—*R.* v. *Marsh*, 1 *Den.* 505. The proper course is to allege the false pretences, and to deny their truth in the same manner as in an indictment for obtaining property by false pretences, and then to allege that by means of the false pretences, the prisoner attempted to obtain the property. *Note by Greaves*, 2 *Russ.* 698. But it must be remembered that by sect. 185 of the Procedure Act, "no person shall be tried or prosecuted for an attempt to commit any felony or misdemeanor, who has been previously tried for committing the same offence."

An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad. The evidence was that the prisoner was at E., assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills. That three days after he came to T. and induced prosecutor to part with goods on the representation that he had just come from abroad and had shipped a large quantity of wine to R. from England, and expected his carriage and pair to come down, and that he had taken a large house at T., and was going to furnish it: *Held*, that the false pretences charged were sufficient in point of law, and also that the evidence was sufficient to sustain a conviction.—*R.* v. *Howarth*, 11 *Cox*, 588.

Prisoner was indicted for obtaining from George Hislop, the master of the warehouse of the Strand Union, one pint of milk and one egg, by falsely pretending that a certain child then brought by him had been by him found in Leicester Square, whereas these facts were untrue. The facts were that the prisoner was waiter at an hotel in George Street, Hanover Square. A female servant there, named Spires, had been delivered of a child by him, which was put out to nurse. The child falling ill, the nurse brought it to the hotel, and the prisoner, saying that he would find another nurse, took the woman with him to Westminster, where the nurse put the child into his arms and went away. He took it to the work-house of St. Martin-in-the-Fields, which is in the Strand Union, and delivered it to the master, stating that he had found it in Leicester Square. It was by the master delivered to the nurse to be taken care of, and the nurse fed it with the pint of milk and egg which was the subject of the charge of the indictment as the property obtained by the false pretences alleged: *Held*, that this evidence did not sustain the indictment, and that the food given to the child was too remote an object.—*R.* v. *Carpenter*, 11 *Cox*, 600.

In *R.* v. *Walne*, 11 *Cox*, 647, the conviction was also quashed, on the deficiency of the evidence, as no false pretence of an existing fact was proved.—See *R.* v. *Speed*, 15 *Cox*, 24.

Prisoner by falsely pretending to a liveryman that he was sent by another person to hire a horse for him for a drive to E. obtained the horse. The prisoner returned in the same evening but did not pay for the hire: *Held*, that this was not an obtaining of a chattel with intent to defraud within the meaning of the statute. To constitute such an offence, there must be an intention to deprive the owner of

the property.—*R.* v. *Kilham*, 11 *Cox*, 561. But see now, for Canada, sec. 85, *post*.

There may be a false pretence made in the course of a contract, by which money is obtained under the contract; *R.* v. *Kenrick*, *D. & M.* 208; *R.* v. *Abbott*, 2 *Cox*, 430; *R.* v. *Burgon*, *Dears. & B.* 11; *R.* v. *Roebuck*, *Dears. & B.* 24; as to weight or quantity of goods sold when sold by weight or quantity, *R.* v. *Sherwood*, *Dears. & B.* 251; *R.* v. *Bryan*, *Dears. & B.* 265; *R.* v. *Ragg*, *Bell, C. C.* 214; *R.* v. *Goss*, *Bell, C. C.* 208; *R.* v. *Lees*, *L. & C.* 418; *R.* v. *Ridgway*, 3 *F. & F.* 838; but, in all such cases, there must be a misrepresentation of a definite fact.

But a mere false representation as to quality is not indictable; *R.* v. *Bryan*, *Dears. & B.* 265, and the comments upon it by the judges, in *Ragg's case*, *Bell, C. C.* 214; *R.* v. *Pratt*, 8 *Cox*, 334. *See R.* v. *Foster*, 13 *Cox*, 393. Thus representing a chain to be gold, which turns out to be made of brass, silver and gold, the latter very minute in quantity, is not within the statute.—*R.* v. *Lee*, 8 *Cox*, 233; *sed quære?* And see Greaves' observations, 2 *Russ.* 664, and *R.* v. *Suter*, 10 *Cox*, 577; also, *R.* v. *Ardley*, 12 *Cox*, 23 *post*.

It is not a false pretence, within the statute, that more money is due for executing certain work than is actually due; for that is a mere wrongful overcharge.—*R.* v. *Oates*, *Dears* 459. So, where the defendant pretended to a parish officer, as an excuse for not working, that he had no clothes, and thereby obtained some from the officer, it was held that he was not indictable, the statement being rather a false excuse for not working than a false pretence to obtain goods.—*R.* v. *Wakeling*, *R. &. R.* 504.

Where the prisoner pretended, first, that he was a

single man, and next, that he had a right to bring an action for breach of promise, and the prosecutrix said that she was induced to pay him money by the threat of the action, but she would not have paid it had she known the defendant to be a married man, it was held that either of these two false pretences was sufficient to bring the case within the statute.—*R.* v. *Copeland*, *C. & M.* 516; *R.* v. *Jennison*, *L. & C.* 157.

Where the prisonner represented that he was connected with J. S., and that J. S. was a very rich man, and obtained goods by that false representation, it was held within the statute.—*R.* v. *Archer*, *Dears.* 449. Obtaining by falsely pretending to be a medical man or an attorney is within the statute.—*R.* v. *Bloomfield*, *C. & M.* 537; *R.* v. *Asterley*, 7 *C. & P.* 191.

It is no objection that the moneys have been obtained only by way of a loan, *R.* v. *Crossley*, 2 *M. & Rob.* 17; but perhaps this is true only of moneys, and not of other goods, 2 *Russ.* 668, and *R.* v. *Kilham*, 11 *Cox*, 561.

Obtaining goods by false pretences intending to pay for them is within the statute.—*R.* v. *Naylor*, 10 *Cox*, 149.

It must be alleged and proved that the defendant knew the pretence to be false at the time of making it.—*R.* v. *Henderson*, 2 *Moo. C C.* 192; *R.* v. *Philpotts*, 1 *C. & K.* 112. After verdict, however, an indictment following the words of the statute is sufficient.—*R.* v. *Bowen*, 3 *Cox*, 483; *Hamilton* v. *R. in error*, 2 *Cox*, 11. It is no defence that the prosecutor laid a trap to draw the prisoner into the commission of the offence.—*R.* v. *Adamson*, 2 *Moo. C. C.* 286; *R.* v. *Ady*, 7 *C. & P.* 140.

Upon a charge of obtaining money by false pretences it is sufficient if the actual substantial pretence, which is

the main inducement to part with the money, is alleged in the indictment, and proved, although it may be shewn by evidence that other matters not laid in the indictment in some measure operated upon the mind of the prosecutor as an inducement for him to part with his money.—*R.* v. *Hewgill, Dears.* 315. The indictment must negative the pretences by special averment, and the false pretence must be proved as laid. Any variance will be fatal, unless amended. 3 *Burn,* 277. But proof of part of the pretence, and that the money was obtained by such proof is sufficient.—*R.* v. *Hill, R. & R.* 190; *R.* v. *Wickham,* 10 *A. & E.* 34; *R.* v. *Bates,* 3 *Cox,* 201.

But the goods must be obtained by means of some of the pretences laid.--*R.* v. *Dale,* 7 *C. & P.* 352; *R.* v. *Hunt,* 8 *Cox,* 495; *R.* v. *Jones,* 15 *Cox,* 475. And where the indictment alleged a pretence which in fact the prisoner did at first pretend, but the prosecutor parted with his property in consequence of a subsequent pretence, which was not alleged, it was held that the evidence did not support the indictment.—*R.* v. *Bulmer, L & C.* 476.

Where money is obtained by the joint effect of several misstatements, some of which are not and some are false pretences within the statute, the defendant may be convicted, *R.* v. *Jennison, L. & C.* 157; but the property must be obtained by means of one of the false pretences charged, and a subsequent pretence will not support the indictment.—*R.* v. *Brooks,* 1 *F. & F.* 502.

Parol evidence of the false pretence may be given, although a deed between the parties, stating a different consideration for parting with the money is produced, such deed having been made for the purpose of the fraud.—*R.* v. *Adamson,* 2 *Moo. C. C.* 286. So also parol evidence of a lost written pretence may be given.—*R.* v. *Chadwick.*

6 *C. & P.* 181.—On an indictment for obtaining money from A., evidence that the prisoner about the same time obtained money from other persons by similar false pretences is not admissible.—*R.* v. *Holt*, 8 *Cox*, 411; *Bell*, *C. C.* 280. But other false pretences at other times to the same person are admissible, if they are so connected as to form one continuing representation, which it is the province of the jury to determine.—*R.* v. *Welman*, *Dears.* 188; 6 *Cox*, 153.

Inducing a person by a false pretence to accept a bill of exchange is not within this section.—*R.* v. *Danger*, *Dears. & B.* 307. In such a case the indictment should be under sect. 78, *post*.

A railway ticket obtained by false pretences is within the statute, *R.* v. *Boulton*, 1 *Den.* 508; *R.* v. *Beecham*, 5 *Cox*, 181; and so is an order by the president of a burial society on a treasurer for the payment of money.—*R.* v. *Greenhaigh*, *Dears.* 267.

Where the defendant only obtains credit and not any specific sum by the false pretences, it is not within the statute.—*R.* v. *Wavill*, 1 *Moo. C. C.* 224; *R.* v. *Garrett*, *Dears.* 233; *R.* v. *Crosby*, 1 *Cox*, 10.

There must be an intent to defraud. Where C. B.'s servant obtained goods from A.'s wife by false pretences, in order to enable B., his master, to pay himself a debt due from A., on which he could not obtain payment from A., it was held that C. could not be convicted.—*R.* v. *Williams*, 7 *C. & P.* 554. But it is not necessary to allege nor to prove the intent to defraud any person in particular. *With intent to defraud* are the words of the statute.

But these words "with intent to defraud" are a material and necessary part of the indictment; their omission is fatal, and cannot be remedied by an amendment inserting them. By Lush, J., *R.* v. *James*, 12 *Cox*, 127.

An indictment for false pretences charged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags. The evidence was that defendant saw prosecutor and gave him his card, "J. W. and Co., timber and coal merchants," and said that he was largely in the coal and timber way, and inspected some coal bags, but objected to the price. The next day, he called again, showed prosecutor a lot of correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. Prosecutor had only forty bags ready, and it was arranged that defendant was to have them, and pay for them in a week. They were delivered to defendant, and prosecutor said he let the defendant have the bags in consequence of his having the trucks of coal under demurrage, at the station; there was evidence as to the defendant having taken premises, and doing a small business in coal, but he had no trucks of coals on demurrage at the station. The jury convicted the prisoner, and on a case reserved, the judges held, that the false pretence charged was not too remote to support the indictment, and that the evidence was sufficient to maintain it.—*R.* v. *Willot*, 12 *Cox*, 68.

The prisoner induced the prosecutor to buy a chain by knowingly and falsely asserting, *inter alia*, "it is a 15-carat fine gold, and you will see it stamped on every link." In point of fact, it was little more than 6-carat gold: *Held*, upon a case reserved, that the above assertion was sufficient evidence of the false representation of a definite matter of fact to support a conviction for false pretences.—*R.* v. *Ardley*, 12 *Cox*, 23; *R.* v. *Bryan*, *Dears. & B.* 265, was said by the judges not to be a different decision,

but that there was no definite matter of fact falsely represented.

On an indictment for inducing the prosecutor, by means of false pretences, to enter into an agreement to take a field for the purpose of brick-making, in the belief that the soil of the field was fit to make bricks, whereas it was not, he being himself a brickmaker, and having inspected the field and examined the soil: *Held*, that nevertheless, if he had been induced to take the field by false and fraudulent representations by the defendant of the specific matters of fact relating to the quality and character of the soil, as, for instance, that he had himself made good bricks therefrom, the indictment would be sustained: *Held*, also, that it would be sufficient, if he was partly and materially, though not entirely, influenced by the false pretences.—*R.* v. *English*, 12 *Cox*, 171.

The prisoner had obtained goods from the prosecutor, upon the false pretences, as charged in the indictment, that he then lived at and was then the landlord of a certain beer house. At the trial, it was proved that the prisoner had never stated that he was the landlord of the beer house, but only that he lived there. *Held*, that he was guilty of the offence charged; that the statement might be divided, and that it is sufficient to prove part only of the false pretences charged. Also, that it is immaterial that the prosecutor was influenced by other circumstances than the false pretence charged.—*R.* v. *Lince*, 12 *Cox*, 451.

If the possession only and not the property has been passed by the prosecutor, the offence is larceny and not false pretences.—*R.* v. *Radcliffe*, 12 *Cox*, 474.

All persons who concur and assist in the fraud are principals, though not present at the time of making the pretence or obtaining the property.—*R.* v. *Mooland*, 2 *Moo. C. C.* 376; *R.* v. *Kerrigan*, *L. & C.* 383.

If, upon the trial of an indictment for obtaining by false pretences, a forgery is proved, the prisoner nevertheless, if the fact proved include the misdemeanor, may be convicted of the misdemeanor, unless the Court see fit to discharge the jury, and direct the prisoner to be indicted for the felony: sec. 184 of the Procedure Act. And it is prudent, in consequence of this section, to indict for obtaining money by false pretences, wherever it is doubtful whether an instrument be a forgery or not. —2 *Russ.* 677.

On the second part of this section 77, Greaves says: "This clause is new. It is intended to meet all cases where any person by means of any false pretence, induces another to part with property to any person other than the party making the pretence. It was introduced to get rid of the narrow meaning which was given to the word 'obtain' in the judgments in *R.* v. *Garrett*, *Dears.* 232, according to which it would have been necessary that the property should either have been actually obtained by the party himself, or for his benefit. ..... This clause includes every case where a defendant by any false pretence causes property to be delivered to *any other person*, for the use either of the person making the pretence, or *of any other person.* It, therefore, is a very wide extension of the law as laid down in *R.* v. *Garrett*, and plainly includes every case where any one, with intent to defraud, causes any person by means of any false pretence to part with any property to any person whatsoever."

Prisoner was indicted for an attempt to obtain money from a pawnbroker by false pretences, *(inter alia)* that a ring was a diamond ring. To show guilty knowledge, evidence that he had shortly before offered other false articles of jewellery to other pawnbrokers was held to be properly admissible.—*R.* v. *Francis*, 12 *Cox*, 612.

Goods fraudulently obtained by prisoner on his cheque on a bank where he had no funds: *Held*, that he cannot be found guilty of having falsely represented that he had money in the bank, but that he was guilty of falsely representing that he had authority to draw the cheque, and that they were good and valid orders for the payment of money.—*R.* v. *Hazelton*, 13 *Cox*, 1.

See *R.* v. *Holmes*, 15 *Cox*, 343, as to where is the jurisdiction when offence is committed by a letter.

Prisoner convicted of obtaining his wages by false pretences in representing falsely that he had performed, a condition precedent to his right to be paid.—*R.* v. *Bull*, 13 *Cox*, 608.

The indictment must state the pretence which is pretended to have been false, and must negative the truth of the matter so pretended with precision.—*R.* v. *Kelleher*, 14 *Cox*, 48. See *R.* v. *Perrott*, 2 *M. & S.* 379.

Obtaining by false pretences. What constitutes false pretences.—*R.* v. *Durocher*, 12 *R. L.* 697; *R.* v. *Judah*, 7 *L. N.* 385.

To prove intent to defraud, evidence of similar frauds having recently been practised upon others is admissible.—*R.* v. *Durocher*, 12 *R. L.* 697.

An indictment for obtaining board under false pretences, is too general.—*R.* v. *McQuarrie*, 22 *U. C. Q. B.* 600.

A clause of a deed by which the borrower of a sum of money falsely declares a property well and truly to belong to him may constitute a false pretence.—*R.* v. *Judah*, 8 *L. N.* 122.

On a trial for obtaining under false pretences property of a joint stock company, parol evidence that the company has acted as an incorporated company is sufficient evidence of its incorporation.—*R.* v. *Langton*, 13 *Cox*, 345.

The prisoner who had been discharged from the service of A. went to the store of D. and S. and represented herself as still in the employ of A., who was in the habit of dealing there, and asked for goods in A.'s name, which were put up accordingly, but sent to A.'s house instead of being delivered to the prisoner. The prisoner, however, went directly from the store to A.'s house, and remaining in the kitchen with the servant until the clerk delivered the parcel, snatched it from the servant, saying "that is for me, I was going to see A." but, instead of going in to see A., went out of the house with the parcel.—Conviction for having obtained goods from D. & S. by false pretences, held good.—*R.* v. *Robinson*, 9 *L. C. R.* 278.

Where the prosecutor had laid a trap for the prisoner who had writien to induce him to buy counterfeit notes, and prisoner gave him a box which he pretended contained the notes, but which, in fact, contained waste paper and received the prosecutor's watch and $50.

Held, that the prisoner was rightly convicted of obtaining the prosecutor's property under false pretences.—*The Queen* v. *Corey*, 22 *N. B. Rep.* 543.

78. Every one who, with intent to defraud or injure any other person, by any false pretence fraudulently causes or induces any other person to execute, make, accept, indorse or destroy the whole or any part of any valuable security, or to write, impress or affix his name, or the name of any other person, or of any company, firm or co-partnership, or the seal of any body corporate, company or society, upon any paper or parchment, so that the same may be afterwards made or converted into or used or dealt with as a valuable security, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 95. 24-25 *V.*, *c.* 96, *s.* 90, *Imp.*

79. Every one who, for any purpose or with any intent, wrongfully and with wilful falsehood, pretends or alleges that he inclosed and sent or caused to be inclosed and sent in any post letter, any money, valuable security or chattel, which, in fact, he did not so inclose and

send, or cause to be inclosed and sent therein, is guilty of a misdemeanor, and liable to be punished as if he had obtained the money, valuable security or chattel so pretended to be inclosed or sent by false pretences.—32-33 *V., c.* 21, *s.* 96, *part.*

Not in the English Act.

See sec 113 Procedure Act as to this clause 79.

On clause 78, Greaves says: "This clause is principally, new ..... it will include such cases as *R.* v. *Danger*, *Dears. & B.* 307."

Indictment.— ..... that A. B., on ..... unlawfully, knowingly and designedly did falsely pretend to one J. N. that ..... by means of which false pretence the said A. B. did then unlawfully and fraudulently induce the said J. N. to accept a certain bill of exchange, that is to say a bill of exchange for one hundred pounds, with intent thereby then to defraud and injure the said J. N., whereas, in truth and in fact *(here negative the false pretences, as in the form, under sect.* 77, *ante)* against the form .....

Prisoner was indicted at the Court of Queen's Bench for having induced, by false and fraudulent pretences, one B., a farmer, to endorse a promissory note for $170.45 and moved to quash on the ground that the indictment did not state that the endorsement in question had been declared false in any manner by competent authority, etc., nor that the said endorsement had been obtained for the purpose of converting the said note or paper-writing into money. Motion rejected. And a motion to quash, on the ground that the crown prosecutor, representing the attorney general, had refused to furnish to prisoner the particulars of the false pretences charged, although demanded, was refused. —*R.* v. *Boucher*, 10 *R. L.* 183.

Proof that the defendant had obtained from the prosecutor a promissory note on a promise to pay the plaintiff what

he owed him out of the proceeds of the note when discounted is not sufficient to sustain a conviction of obtaining a signature with intent to defraud under section. 78.—*R.* v. *Pickup*, 10 *L. C. J.* 310.

80. Every one who, by any fraud or unlawful device or ill practice in playing any game of cards or dice, or of any other kind, or at any race, or in betting on any event, wins or obtains any money or property from any other person, shall be held to have unlawfully obtained the same by false pretences, and shall be punishable accordingly.—32-33 *V., c.* 21, *s.* 97. 8-9 *V., c.* 109, *s.* 17, *Imp.*

Indictment.—The Jurors for Our Lady the Queen, upon their oath present, that W. M., on ..... by fraud, unlawful device and ill-practice in playing at and with cards, unlawfully did win from one A. B., and obtain for himself, the said W. M., a sum of money, to wit, fifty pounds, of the monies of the said A. B., and so the jurors aforesaid, upon their oath aforesaid, do say that the said W. M. then, in manner and form aforesaid, unlawfully did obtain the said sum of money, to wit, fifty pounds, so being the monies of the said A. B. as aforesaid, from the said A. B. by a false pretence, with intent to cheat and defraud the said A. B. of the said sum of money, to wit, fifty pounds, against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

(2nd count): And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. M. afterwards, to wit, on the day and year aforesaid, by fraud, unlawful device and ill-practice, in playing at and with cards, unlawfully did win from the said A. B.and obtain for himself, the said W.M., a certain sum of money with intent to cheat him, the said A. B., to the evil example of all others in the like case offending, against the form of the statute in such

case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—*Archbold.*

An indictment in the form contained in the above second count was held good after verdict, although it was objected that it should have alleged that the money won was the property of the person defrauded.—*R.* v. *Moss, Dears. & B.* 104.

Where the offence was committed by two or more, and there is any doubt whether the game or fraud comes within this section, a count should be added as in *R.* v. *Hudson, Bell, C. C.* 263, charging a conspiracy to cheat.

The fraud or unlawful device, or ill-practice must be proved.—*R.* v. *Darmely*, 1 *Stark. R.* 259; *R.* v. *Rogier*, 2 *D. & R.* 431. It does not seem necessary to state the name of the game.—*Archbold. See R.* v. *Bailey*, 4 *Cox*, 390.

Winning by fraud at tossing with coins falls under this section.—*R.* v. *O'Connor*, 15 *Cox*, 3.

81. Every one who, by means of any false ticket or order, or of any other ticket or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any railway, or in any steam or other vessel, is guilty of a misdemeanor, and liable to six months' imprisonment.—32-33 *V., c.* 21, *s.* 98.

The clause provides for the offence and the attempt to commit the offence ..... Under sect. 183 of the Procedure Act, upon the trial of an indictment for any offence against this clause, the jury may convict of the attempt to commit the offence charged, if the evidence warrants it.

RECEIVING STOLEN GOODS.

82. Every one who receives any chattel, money, valuable security or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling and otherwise disposing whereof amounts to felony, either at common law or by virtue of this Act, knowing the same to have

been feloniously stolen, taken, extorted, obtained, embezzled or disposed of, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 100, *part.* 24-25 *V.*, *c.* 96, *s.* 91, *Imp.*

83. Every one who receives any chattel, money, valuable security or other property whatsoever, the stealing, taking, obtaining, converting or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted or disposed of, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 104, *part.* 24-25 *V.*, *c.* 96, *s.* 95, *Imp.*

84. Every one who receives any property whatsoever, knowing the same to be unlawfully come by, the stealing or taking of which property is by this Act punishable on summary conviction, either for every offence, or for the first and second offence only, shall, on summary conviction, be liable, for every first, second or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second or subsequent offence of stealing or taking such property is by this Act liable.—32-33 *V.*, *c.* 21, *s.* 106. 24-25 *V.*, *c.* 96, *s.* 97, *Imp.*

See sec. 20 of Procedure Act, as to venue.

Clause 82 applies to all cases where property has been feloniously extorted, obtained, embezzled, or otherwise disposed of, within the meaning of any section of this act. —*Greaves, Cons. Acts*, 179.

See secs. 135, 136, 137, 138, 199, 200, 203, and 204 of the Procedure Act.

As to the meaning of the words "valuable security," "property" and "having in possession," see, *ante*, sect. 2.

Indictment against a receiver of stolen goods, under sect. 82, *as for a substantive felony.*—..... that A. B., on..... at..... one silver tankard, of the goods and chattels of J. N. before then feloniously stolen, taken and carried away, feloniously did receive and have, he the said A. B. at the time when he so received the said silver tankard as aforesaid, then well knowing the same to have been feloniously stolen, taken and carried away, against the form.....*Archbold*, 434.

Any number of receivers at different times of stolen property may now be charged with substantive felonies in the same indictment. Sec. 138 Procedure Act.

And where the indictment contains several counts for larceny, describing the goods stolen as the property of different persons, it may contain the like number of counts, with the same variations, for receiving the same goods.—*R.* v. *Beeton*, 1 *Den.* 414. It not necessary to state by whom the principal felony was committed, *R.* v. *Jervis*, 6 *C. & P.* 156; and, if stated, it is not necessary to aver that the principal has not been convicted. *R.* v. *Baxter*, 5 *T. R.* 83. Where an indictment charged Woolford with stealing a gelding, and Lewis with receiving it, knowing it to have been "so feloniously stolen as aforesaid," and Woolford was acquitted, Patteson, J., *held* that Lewis could not be convicted upon this indictment, and that he might be tried on another indictment, charging him with having received the gelding, knowing it to have been stolen by some person unknown.—*R.* v. *Woolford*, 1 *M. & Rob.* 384; 2 *Russ.* 556.

An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that C. D. and E. F. feloniously received the said goods, knowing them to be stolen, was holden good against the receivers, as for a substantive felony.—*R.* v. *Caspar*, 2 *Moo. C. C.* 101. The defendant may be convicted both on a count charging him as accessory before the fact and on a count for receiving.—*R.* v. *Hughes*, *Bell*, *C. C.* 242.—The first count of the indictment charged the prisoner with stealing certain goods and chattels; and the second count charged him with receiving "the goods and chattels aforesaid of the value aforesaid, so as aforesaid feloniously stolen." He was acquitted on the first count but found guilty on the

second: *Held*, that the conviction was good.—*R.* v. *Huntley*, *Bell*, *C. C.* 238; *R.* v. *Craddock*, 2 *Den.* 31.

Indictment against the principal and receiver jointly.—The Jurors for Our Lady the Queen, upon their oath present that C. D. on ..... at ..... one silver spoon and one table-cloth, of the goods and chattels of A. B., feloniously did steal, take and carry away, against the peace of Our Lady the Queen, her crown and dignity; and the jurors aforesaid, upon their oath aforesaid, do further present, that J. S. afterwards, on.....the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, he the said J. S. then well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, against the form..... *Archbold*, 440; 3 *Burn*, 323.

Indictment against the receiver as accessory, the principal having been convicted.—The Jurors for Our Lady the Queen upon their oath present, that heretofore, to wit, at the general sessions of the..... holden at..... on .....it was presented, that one J. T. *(continuing the former indictment to the end; reciting it, however, in the past and not in the present tense:)* upon which said indictment the said J. T., at..... aforesaid, was duly convicted of the felony and larceny aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. after the committing of the said larceny and felony as aforesaid, to wit, on..... the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, he the said A. B. then well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, against the from..... *Archbold*, 440.

Indictment against a receiver, under sect. 83, *where*

the principal offence is a misdemeanor.—.....on..... at.....one silver tankard of the goods and chattels of J. N. then lately before unlawfully, knowingly, and designedly obtained from the said J. N. by false pretences, unlawfully did receive and have, he the said A. B. at the time when he so received the said silver tankard as aforesaid, then well knowing the same to have been unlawfully, knowingly, and designedly obtained from the said J. N. by false pretences against the form.....*Archbold*, 439.

The indictment must allege the goods to have been obtained by false pretences, and known to have been so; it is not enough to allege them to have been "unlawfully obtained, taken and carried away."—*R.* v. *Wilson*, 2 *Moo. C. C.* 52.

In *R.* v. *Goldsmith*, 12 *Cox*, 479, upon an indictment, under this section, an objection was taken that the indictment did not set out what the particular false pretences were as in the form above given. It was held that the objection, not having been taken before plea, was cured by the verdict of guilty, but the judges did not adjudicate upon the merit of the objection itself; Bramwell, B., intimated, that, for the future, it might be safer, in indictments of this nature, to state specifically what the false pretences were, as in indictments for obtaining under false pretences; see *R.* v. *Hill, note r*, 2 *Russ.* 554, where it was held that an indictment, for so receiving goods obtained by false pretences would be held bad on demurrer (or motion to quash) if it did not allege what were the false pretences.

At common law, receivers of stolen goods were only guilty of a misdemeanor, even when the thief had been convicted of felony.—*Fost.* 373. *See Secs.* 136, 137 *of Procedure Act.*

The goods must be so received as to divest the possession out of the thief.—*R.* v. *Wiley*, 2 *Den.* 37. But a person having a joint possession with the thief may be convicted as a receiver.—*R.* v. *Smith*, *Dears.* 494. Manual possession is unnecessary, it is sufficient if the receiver has a control over the goods.—*R.* v. *Hobson*, *Dears.* 400; *R.* v. *Smith*, *Dears.* 494; see, *ante*, sect. 2, as to the words "having in possession." The defendant may be convicted of receiving, although he assisted in the theft.—*R.* v. *Dyer*, 2 *East*, 767; *R.* v. *Craddock*, 2 *Den.* 31; *R.* v. *Hilton*, *Bell*, *C. C.* 20; *R.* v. *Hughes*, *Bell*, *C. C.* 242. But not if he actually stole the goods.—*R.* v. *Perkins*, 2 *Den.* 459. Where the jury found that a wife received the goods without the knowledge or control of her husband, and apart from him, and that he afterwards adopted his wife's receipt, no active receipt on his part being shown, it was held that the conviction of the husband could not be sustained.—*R.* v. *Dring*, *Dears. & B.* 329; but see *R.* v. *Woodward*, *L. & C.* 122.

There must be a receiving of the thing stolen, or of part of it; and where A. stole six notes of £100 each, and having changed them into notes of £20 each, gave some of them to B.: it was held that B. could not be convicted of receiving the said notes, for he did not receive the notes that were stolen.—*R.* v. *Walkley*, 4 *C. & P.* 132. But where the principal was charged with sheep-stealing, and the accessory with receiving "twenty pounds of mutton, parcel of the goods," it was held good.—*R.* v. *Cowell*, 2 *East*, *P. C.* 617, 781. In the last case, the thing received is the same, for part, as the thing stolen, though passed under a new denomination, whilst in the first case nothing of the article or articles stolen have been received, but only the proceeds thereof. And says *Greaves' note*, 2 *Russ.* 561, it

is conceived that no indictment could be framed for receiving the proceeds of stolen property. The section only applies to receiving *the* chattel stolen, knowing *that* chattel to have been stolen. In the case of gold or silver, if it were melted after the stealing, an indictment for receiving it might be supported, because it would still be the *same* chattel, though altered by the melting; but where a £100 note is changed for other notes, the identical chattel is gone, and a person might as well be indicted for receiving the money, for which a stolen horse was sold, as for receiving the proceeds of a stolen note.

The receiving must be subsequent to the theft. If a servant commit a larceny at the time the goods are received both servant and receiver are principals, but if the goods are received subsequently to the act of larceny, it becomes a case of principal and receiver.—*R.* v. *Butteris*, 6 *C. & P.* 147; *R.* v. *Gruncell*, 9 *C. & P.* 365; *R.* v. *Roberts*, 3 *Cox*, 74.

The receiving need not be *lucri causâ*; if it is to conceal the thief, it is sufficient.—*R.* v. *Richardson*, 6 *C. & P.* 365; *R.* v. *Davis*, 6 *C. & P.* 177.

There must be some evidence that the goods were stolen by another person.—*R.* v. *Densley*, 6 *C. & P.* 399; *R.* v. *Cordy*, 2 *Russ.* 556.

A husband may be convicted of receiving property which his wife has voluntarily stolen, *R.* v. *M'Athey*, *L. & C.* 250, if he receive it, knowing it to have been stolen.

The principal felon is a competent witness to prove the larceny.—*R.* v. *Haslam*, 1 *Leach*, 418. But his confession is not evidence against the receiver, *R.* v. *Turner*, 1 *Moo. C. C.* 347, unless made in his presence and assented to by him.—*R.* v. *Cox*, 1 *F. & F.* 90. If the principal has been convicted, the conviction, although erroneous, is evidence

against the receiver until reversed.—*R.* v. *Baldwin, R. & R.* 241.

To prove guilty knowledge, other instances of receiving similar goods stolen from the same person may be given in evidence, although they form the subject of other indictments, or are antecedent to the receiving in question.—*R.* v. *Dunn.* 1 *Moo. C. C.* 146; *R.* v. *Davis,* 6 *C. & P.* 177; *R.* v. *Nicholls,* 1 *F. & F.* 51; *R.* v. *Mansfield, C. & M.* 140. But evidence cannot be given of the possession of goods stolen from a different person.—*R.* v. *Oddy,* 2 *Den.* 264. Where the stolen goods are goods that have been found, the jury must be satisfied that the prisoner knew that the circumstances of the finding were such as to constitute larceny.—*R.* v. *Adams,* 1 *F. & F.* 86. Belief that the goods are stolen, without actual knowledge that they are so, is sufficient to sustain a conviction.—*R.* v. *White.* 1 *F. & F.* 665. *See secs.* 203 *and* 204 *of Procedure Act.*

Recent possession of stolen property is not generally alone sufficient to support an indictment under this section, —2 *Russ.* 555. However, in *R.* v. *Langmead, L. & C.* 427, the judges would not admit this as law, and maintained the conviction for receiving stolen goods, grounded on the recent possession by the defendant of stolen property. See also *R.* v. *Deer, L. & C.* 240.

A partner stole goods belonging to the firm, and rendered himself liable to be dealt with as a felon, under sec. 58 of our Larceny Act, and sold the same to the prisoner, who knew of their having been stolen. *Held,* that the prisoner could not be convicted on an indictment for feloniously receiving, but might have been convicted as an accessory after the fact on an indictment properly framed.—*R.* v. *Smith,* 11 *Cox,* 511. It is observed, in *Archbold,* 436, that in this last case, if the only thing that could have been

proved against the prisoner was the receiving with a guilty knowledge, he ought to have been indicted for the common law misdemeanor of receiving stolen property. *Sed quære?*

An indictment charged S. with stealing eighteen shillings and sixpence, and G. with receiving the same. The facts were: S. was a barman at a refreshment bar, and G. went up to the bar, called for refreshments and put down a florin. S. served G. took up the florin, and took from his employer's till some money, and gave G. as his change eighteen shillings and six pence, which G. put in his pocket and went away with it. On leaving the place he took some silver from his pocket, and was counting it when he was arrested. On entering the bar, signs of recognition took place between S. and G., and G. was present when S. took the money from the till. The jury convicted S. of stealing and G. of receiving. *Held*, that this was evidence which the judge ought to have left to the jury as reasonable evidence upon which G. might have been convicted as a principal in the second degree, and that therefore the conviction for receiving could not be sustained.—*R.* v. *Coggins*, 12 *Cox*, 517.

On the trial of a prisoner on an indictment charging him with receiving property which one M. had feloniously stolen, etc., the crime charged was proved, and evidence for the defence was given to the effect that M. had been tried on a charge of stealing the same property and acquitted. The counsel for the crown then applied to amend the indictment by striking out the allegation that M. had stolen the property, and inserting the words "some evil disposed person" which was allowed.

Held, 1. That the record of the previous acquittal of M. formed no defence on the trial of this indictment, and was improperly received in evidence.

2. That the amendment was improperly allowed. The *Queen* v. *Ferguson*, 4 *P. & B. (N. B.)* 259.

Defendant sold to C., among other things, a horse power and belt, part of his stock in the trade of a butcher in which he also sold a half interest to C. The horse power had been hired from one M. and at the time of the sale the term of hiring had not expired. At its expiry M. demanded it and C. claimed that he had purchased it from the defendant. Defendant then employed a man to take it out of the premises where it was kept and deliver it to M., which he did. Defendant was summarily tried before a police magistrate and convicted of an offence against 32-33 V., c. 21, s. 100.

Held, that the conviction was bad, there being no offence against that section.

Remarks upon the improper use of criminal law in aid of civil rights.—*The Queen* v. *Young*, 5 *O. R.* 400.

OFFENCES NOT OTHERWISE PROVIDED FOR.

85. Every one who, unlawfully and with intent to defraud, by taking, by embezzling, by obtaining by false pretences, or in any other manner whatsoever, appropriates to his own use or to the use of any other person any property whatsoever, so as to deprive any other person temporarily or absolutely of the advantage, use or enjoyment of any beneficial interest in such property in law or in equity, which such other person has therein, is guilty of a misdemeanor, and liable to be punished as in the case of simple larceny; and if the value of such property exceeds two hundred dollars, the offender shall be liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 110, *part.*

The words "real or personal, in possession or in action," after the words "any property whatsoever," have been expunged from the 32-33 V., c. 21, s. 110.

This clause is not in the English Act.

The court would not inflict the additional punishment

provided for in the last part of this clause, unless it be *alleged in the indictment* and duly *proved upon the trial* that the property stolen, embezzled or obtained by false pretences is over two hundred dollars in value.

Sec. 85 of the Larceny Act applies only to a temporary privation of the property.—*R.* v. *Warner*, 7 *R. L.* 116.

An indictment under 32-33 V., c. 21, s. 110, for unlawfully taking and appropriating property with intent to defraud need not state the value of the property taken, although, perhaps, a prisoner could not be tried, under the second clause of the section, if the value was not stated.

On the trial of such an indictment it is a proper direction to tell the jury that they should acquit the prisoner if they thought he bonâ fide believed he had a claim of right in the property taken.—*The Queen* v. *Horseman*, 4 *P. & B.* (*N. B.*) 529.

By sec. 201 of the Procedure Act, it is enacted that

"If, on the trial of any person for larceny, for embezzlement, or for obtaining any property by false pretences, the jury is of opinion that such person is not guilty of the offence charged in the indictment, but is of opinion that he is guilty of an offence against section eighty-five of "*The Larceny Act*," it may find him so guilty, and he shall be liable to be punished as therein provided, as if he had been convicted on an indictment under such section."

The offence created by this section 85 of the Larceny Act is unknown in the English criminal law, and, it is believed, was unknown throughout the whole of the Dominion of Canada before the act of 1869.

In answer to our enquiries about it, Mr. R. J. Wicksteed, of the Law Department of the House of Commons, the author of the valuable "Table of the Statutes of the Dominion of Canada," had the kindness to give us the following information, inserted here with his permission:

"..... C. 21 of 32-33 V. (1869) or the act respecting larceny, was prepared, as well as the other criminal acts, by the law clerk. In the preparation, old materials were used as much as possible, the provisions found in the laws of the various Provinces of the Dominion, and the English Acts being freely used; but, in some instances, new sections were written to meet cases at that time unprovided for. Section 110 of chap. 21, as to which you enquire, whence taken, etc., was new, written by my father to supply a deficiency. He informs me that it was suggested to him by some work on English Criminal Law, and thinks it was the book entitled 'General View of the Criminal Law of England,' by J. Fitz Stephen. This book, having been removed from the Parliamentary library, I cannot give you the writer's exact arguments, but the sense you have in section 110 of chap. 21. The English Commissioners on criminal law, in their fourth report to Her Majesty, of 8th of March, 1839 (Vol. 1), remarking on the law of England as to theft or larceny, observe, page 52: 'It is further observable, that the intent essential to the offence must extend to the fraudulent appropriation of the whole property, and that the mere intent to deprive the owner of the temporary possession only is not sufficient to constitute the offence. For, although, under particular circumstances, a fraudulent privation of possession may justly be made penal, such an offence cannot, without great inconvenience, be included with so general a predicament as that of theft. A law designed for the protection of the right of property would be far too general in its operation, were it to be extended to mere temporary privations of possession. In practice, this would be to injure, if not to destroy, the important boundary between the crime of theft and a mere civil trespass.' And again, on

page 56: 'And although the intent be not to commit a collateral fraud, but to enjoy the temporary possession in fraud of another's right of possession, the offence cannot properly constitute a theft; for this is an offence, as we have already observed, against the right of property, as distinguished from the mere right of possession, and the law of Engiand does not, as the Roman law did, notice the *furtum possessionis* as constituting a branch of the law of theft. The offence properly consists in the unlawful appropriation of that which belongs to another, which cannot be where another has not the property, but only the right of temporary possession. A law might no doubt be made to comprehend mere wrongs to the temporary right of possession; but the same principles of policy and convenience, which occasion the distribution of offences into defined classes, must also regulate the limits of each separate class of offences, and we have already observed that to extend the class of thefts to mere injuries to the possession, would be to extend its boundaries too widely, and render the limits between theft and a mere trespass indistinct.' But, see *Bishop, on Criminal Law, 2nd Edition, vol.* 1, *section* 429 *(section* 579 *of the fifth edition).* 'Then we have a very extensive influence exerted by the universal rule that the law does not regard small things. We have seen that in the application of this rule, the general, rather than the particular, consequence of the act is to be regarded. Therefore, although it is criminal to steal personal property which is of some value, however small the value may be, yet it is not so for a trespasser to take and carry away such property, be the value great or small, with the intent of appropriating to himself, not the property itself, but its mere *use*, too small a thing, in respect of the general consequence, for the criminal law, not for the civil, to notice.

But this rule of small things can be accurately understood only as we see it applied in the cases, for the decisions are not harmonious with any general principle. There is no reason, in principle, why many things deemed too small for the law to notice, should not in fact be noticed by it; for instance, if a man converts to his own use, with a bad motive, a valuable thing, which he takes, intending to return it after he has served his end, there is no reason of principle why he should not be as severely punished as he who converts the entire property in a piece of paper worth one mill.' It was upon reasoning similar to this of Mr. Bishop, that my father submitted section 110 to Sir John Macdonald, then Minister of Justice, who approved of it and the act passed with it included ....."

Certainly, Bishop's observations are entitled to great consideration, but it must be admitted, that, in practice, the legislation contained in the clause in question, "destroys the important boundary between the crime of theft and a mere civil trespass."—*Crim. L. Comm. Report, loc. cit.* And is it very clear, as stated by Bishop, that the rule of the English criminal law, that *possession* or *use* of property is not the subject of larceny, is based on the maxim "*de minimis non curat lex.*" And the English Commissioners, in a footnote to page 56 of their report, cited, *ante*, say: "It is worthy of remark, that the necessity of abandoning this principle of the Roman law has been felt in nations whose systems depend more immediately upon that law than our own, inasmuch as the doctrine of the *furtum possessionis*, as well as the *furtum usus*, has no place in any of the modern German codes."

Is the full extent of the Roman law, on the subject, to be now considered as forming part of our law? "*Furtum*

autem fit, non solum quum quis intercipiendi causâ rem alienam amovet, sed generaliter quum quis alienam rem invito domino contractat. Itaque, sive creditor pignore, sive is apud quem res deposita est, eâ re utatur; sive is qui rem utendam accepit, in alium usum eam transferat quam cujus gratiâ ei data est, furtum committat; veluti, si quis argentum utendum acceperit quasi amicos ad cœnam invitaturus, et id peregre secum tulerit, aut si quis equum, gestandi causâ commodatum sibi, longuis aliquo duxerit.—Ins. lib. 4, tit. 1, par. 6.

Would the defendants in *R.* v. *Philips*, 2 *East, P. C.* 662; *R.* v. *Holloway*, 1 *Den.* 370; *R.* v. *Poole, Dears. & B.* 345; *R.* v. *Kilham*, 11 *Cox*, 561, have been convicted under such a clause?

86. Every one who is convicted of an offence against this Act by stealing, embezzling or obtaining by false pretences any property whatsoever, the value of which is over two hundred dollars, is liable to seven years' imprisonment, in addition to any punishment to which he would otherwise be liable for such offence.—32-33 *V., c.* 21, *s.* 110, *part.*

The value of over two hundred dollars must be inserted in the indictment.

87. Every one who, without the consent of the owner thereof, takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log or other description of lumber which is found adrift in any river, stream or lake, or cast ashore on the bank or beach of any river, stream or lake, or without the consent of the owner thereof, wholly or partially defaces or adds, or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log or other description of lumber, or makes, or causes, or procures to be made any false or counterfeit mark on any such timber, mast, spar, saw-log or other description of lumber,—or refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or

authorized by such owner to receive the same, any such timber, mast, spar, saw-log or other description of lumber, is guilty of a misdemeanor and liable to be punished as in the case of simple larceny.—38 *V.*, *c.* 40, *s.* 1, *part.*

See sec. 228 of Procedure Act, *post*, as to evidence on trials for offences against the above clause, and sec. 54 as to search warrants.

88. Every one who brings into Canada, or has in his possession therein, any property stolen, embezzled, converted or obtained by fraud or false pretences in any other country, in such manner that the stealing, embezzling, converting or obtaining it in like manner in Canada would, by the laws of Canada, be a felony or misdemeanor, knowing it to have been so stolen, embezzled or converted, or unlawfully obtained, is guilty of an offence of the same nature and punishable in like manner as if the stealing, embezzling, converting or unlawfully obtaining such property had taken place in Canada.—32-33 *V.*, *c.* 21, *s.* 112, *part.*

This clause is not in the English Act.

Under sect. 8, chap. 158, of the Revised Statutes of New Brunswick, it was held that, upon an indictment in New Brunswick, for a larceny committed in Maine, the goods stolen having been brought into New Brunswick, it was necessary to prove that the taking was larceny, *according to the law of Maine.—Clark's Crim. L.* 317. This clause was as follows: When any person shall be feloniously hurt or injured at any place out of this Province, and shall die in this Province of such hurt or injury, or when any person shall steal any property out of this Province and shall bring the same within the Province, any such offence, whether committed by any person as principal or accessory before or after the fact, may be dealt with in the county in which such death may happen, or such property shall be brought. The words "in such manner that the stealing, etc., would by the laws of Canada be a felony or misdemeanor," in the present Act, sect 88, *ante*, constitute a wide difference from this New Brunswick Act, and the

case noticed by Mr. Clark would probably not now be followed.

See special remarks under sec. 21 of Procedure Act as to the power of parliament to pass the above clause.

89. Every one who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security or other property whatsoever, which, by any felony or misdemeanor, has been stolen, taken, obtained, extorted, embezzled, converted or disposed of, as in this Act before mentioned (unless he has used all due diligence to cause the offender to be brought to trial for the same), is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 21, *s.* 115. 24-25 *V.*, *c.* 96, *s.* 101, *Imp.*

As to the meaning of the words "valuable security" and "property," see, *ante*, sect. 2.

Indictment.—The Jurors for Our Lady the Queen upon their oath present that A. B. on ..... feloniously, unlawfully and corruptly did take and receive from one J. N. certain money and reward, to wit, the sum of five pounds of the monies of the said J. N. under pretence of helping the said J. N. to certain goods and chattels of him the said J. N. before then feloniously stolen, taken and carried away, the said A. B. not having used all due diligence to cause the person by whom the said goods and chattels were so stolen, taken and carried away as aforesaid, to be brought to trial for the same; against the form. ..... —*Archbold*, 837.

It was held to be an offence within the repealed statute to take money under pretence of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had no power to restore them.—*R.* v. *Ledbitter*, 1 *Moo. C. C.* 76. The section

of the repealed statute, under which this case was decided, was similar to the present section.—2 *Russ.* 575.

If a person know the persons who have stolen any property, and receive a sum of money to purchase such property from the thieves, not meaning to bring them to justice, he is within the statute, although the jury find that he did not mean to screen the thieves, or to share the money with them, and did not mean to assist the thieves in getting rid of the property by procuring the prosecutrix to buy it.—*R.* v. *Pascoe*, 1 *Den.* 456.

A person may be convicted of taking money on account of helping a person to a stolen horse, though the money be paid after the return of the horse. *R.* v. *O'Donnell*, 7 *Cox*, 337. As to the meaning of the words "*corruptly* takes," see *R.* v. *King*, 1 *Cox*, 36.

90. Every one who publicly advertises a reward for the return of any property whatsoever, which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked, or makes use of any words in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost, without seizing or making any inquiry after the person producing such property, or promises or offers in any such public advertisement to return to any pawnbroker or other person who advanced money by way of loan on, or has bought any property stolen or lost, the money so advanced or paid, or any other sum of money for the return of such property, or prints or publishes any such advertisement, shall incur a penalty of two hundred and fifty dollars for every such offence, recoverable with costs by any person who sues for the same in any court of competent jurisdiction;

2. No action to recover any forfeiture under this section shall be brought against the printer or publisher of a newspaper, defined as a newspaper for the purposes of the acts, for the time being in force, relating to the carriage of newspapers by post, except within six months after the forfeiture is incurred.—32-33 *V.*, *c.* 21, *s.* 116. 35 *V.*, *c.* 35, *ss.* 2 *and* 3. 24-25 *V.*, *c.* 96, *s.* 102, *Imp.*

91. Every one who, being a seller or mortgagor of land, or of any chattel, real or personal or chose in action, or the solicitor or agent

of any such seller or mortgagor, and having been served with a written demand of an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage, conceals any settlement, deed, will or other instrument, material to the title, or any incumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce him to accept the title offered or produced to him, is guilty of a misdemeanor and liable to a fine or to two years' imprisonment or to both;

2. No prosecution for any such offence shall be commenced without the consent of the Attorney General of the Province within which the offence is committed, given after previous notice to the person intended to be prosecuted of the application to the Attorney General for leave to prosecute;

3. Nothing in this section, and no proceeding, conviction or judgment had or taken thereon, shall prevent, lessen or impeach any remedy which any person aggrieved by any such offence would otherwise have had.—29 *V.* (*Can.*), *c.* 28, *s.* 20, *part.*

92. The three sections next following apply only to the Province of Quebec.

93. Every one who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or incumbrance, of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof, is guilty of a misdemeanor, and liable to a fine not exceeding two thousand dollars, and to one year's imprisonment.—*C. S. L. C.*, *c.* 37, *s.* 113.

Conviction under this sect.—*R.* v. *Palliser*, 4 *L. C. J.* 277.

94. Every one who pretends to hypothecate any real property to which he has no legal title, is guilty of a misdemeanor, and liable to a fine not exceeding one hundred dollars and to one year's imprisonment, and the proof of the ownership of the real estate shall rest with the person so pretending to hypothecate the same.—*C. S. L. C.*, *c.* 37, *s.* 114.

95. Every person who, knowingly, wilfully, and maliciously causes or procures to be seized and taken in execution, any lands and tenements, or other real property, situate within any township in the Province of Quebec, not being, at the time of such seizure, the *bonâ fide* property of the person or persons against whom, or whose estate, the execution is issued, knowing the same not to be the property of

the person or persons against whom the execution is issued, is guilty of a misdemeanor, and liable to one year's imprisonment;

2. Nothing in this section, and no proceeding, conviction or judgment had or taken thereunder, shall prevent, lessen or impeach any remedy which any person aggrieved by any such offence would otherwise have had.—*C. S. L. C., c.* 46, *ss.* 1 *and* 2.

96. The following sections apply only to the Province of British Columbia.

97. Every one who, in any proceeding to obtain the registration of any title to land or otherwise, or in any transaction relating to land, which is or is proposed to be put on the register, acting either as principal or agent, knowingly and with intent to deceive, makes or assists or joins in, or is privy to the making of any material false statement or representation, or suppresses, conceals, assists or joins in, or is privy to the suppression, withholding or concealing from any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter of information, is guilty of a misdemeanor, and liable to three years' imprisonment;

2. Nothing in this section, and no proceeding, conviction or judgment had or taken thereon, shall prevent, lessen or impeach any remedy which any person aggrieved by any such offence would otherwise have had;

3. Nothing in this section shall entitle any person to refuse to make a complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court; but no answer to any such bill, question or interrogatory shall be admissible against any such person in evidence in any criminal proceeding.—*R. S. B. C., c.* 143, *ss.* 81, 82, 83 *and* 85.

98. Every one who steals, or without the sanction of the Lieutenant Governor of the Province, cuts, breaks, destroys, damages or removes any image, bones, article or thing deposited in or near any Indian grave, or induces or incites any other person so to do, or purchases any such article or thing after the same has been so stolen, or cut or broken, destroyed or damaged, knowing the same to have been so acquired or dealt with, shall, on summary conviction, be liable, for a first offence, to a penalty not exceeding one hundred dollars, or to three months' imprisonment, and for a subsequent offence, to the same penalty and to six months' imprisonment with hard labor;

2. In any proceeding under this section it shall be sufficient to state that such grave, image, bones, article or thing, is the property of the crown.—*R. S. B. C., c.* 69, *ss.* 2, 3 *and* 4.

FORGERY.

GENERAL REMARKS.

"To forge is metaphorically taken from the smith who beateth upon his anvil, and forgeth what fashion and shape he will; the offence is called *crimen falsi*, and the offender *falsarius*, and the Latin word, to forge, is *falsare* or *fabricare*."—*Coke, 3rd Inst.* 169.

"Forgery is the fraudulent making or alteration of a writing, to the prejudice of another's right."—4 *Blackstone*, 247.

In *Coogan's Case* (1 *Leach*, 448), Buller, J., said "it is the making of a false instrument with intent to deceive," and Eyre, B., in Taylor's case, defined it to be "a false signature made with intent to deceive." In the word "deceive" must doubtless be intended to be included an intent to "defraud"[?]—and so it was defined by Grose, J., in delivering the opinion of the judges in the case of Parkes and Brown, viz.: "the false making a note or other instrument with intent to defraud." Again Eyre, B., in the case of Jones and Palmer, defined it to be "the false making an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons."—(1 *Leach*, 367.) 2 *East, P. C.* 853. And East himself, 2 *P. C.* 852, says "forgery at common law denotes a false making, which includes every alteration of or addition to a true instrument, a making *malo animo*, of any written instrument for the purpose of fraud and deceit."

"Forgery is the false making of an instrument with intent to prejudice any public or private right."—*3rd Rep. Crim. Law Comm. 10th June*, 1847, *p.* 34.

"Forgery is the fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy."—*Bishop*, 2 *Cr. L.* 523.

"The characteristic of the crime of forgery is the false making of some written or other instrument for the purpose of obtaining credit by deception. The relation this offence bears to the general system may be thus briefly established. In most affairs of importance, the intentions, assurances, or directions, of men are notified and authenticated by means of written instruments. Upon the authenticity of such instruments the security of many civil rights, especially the right of property, frequently depends; it is, therefore, of the highest importance to society to exclude the numerous frauds and injuries which may obviously be perpetrated by procuring a false and counterfeited written instrument, to be taken and acted on as genuine. In reference to frauds of this description, it is by no means essential that punishment should be confined to cases of actually accomplished fraud; the very act of falsely making and constructing such an instrument with the intention to defraud is sufficient, according to the acknowledged principles of criminal jurisprudence, to constitute a crime,—being in itself part of the endeavour to defraud, and the existence of the criminal intent is clearly manifested by an act done in furtherance and in part execution of that intention. The limits of the offence are immediately deducible from the general principle already adverted to. As regards the subject matter, the offence extends to every writing used for the purpose of authentication.....

..... The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality or genuineness of any

article is warranted; and, consequently, where a party may be deceived and defrauded, from having been by false signs induced to give credit where none was due. With respect to the false making of any such instrument, the offence extends to every instance where the instrument is, under the circumstances, so constructed as to induce a party to give credit to it as genuine and authentic in a point where it is false and deceptive. And in this respect, a forged instrument differs from one which is merely false and untrue in stating facts which are false. Where the instrument is forged, as where a certificate purporting to be signed by an authorized officer was not, in truth, signed by him, a party to whom it is shown is deceived in being induced to suppose that the fact certified is accredited by the officer whose certificate it purports to be, and he is deceived in that respect, whether the fact certified be true or false. If, on the other hand, such a certificate be in truth signed by the officer whose name it bears, the instrument is not forged although the fact certified be falsely certified, for here the party receiving the certificate is deceived, not by being falsely induced to believe that the officer had accredited the instrument by his signature, but from the officer having falsely certified the fact. The instrument may, therefore, be forged, although the fact authenticated be true. The instrument may be genuine, although the fact stated be false. Where money or other property is obtained by an instrument of the latter description, that is, where it is false merely, as containing a false statement or representation, the offence belongs to the class of obtaining money or other property by false pretences."—*5th Rep. Crim. L. Comm. 22nd of April*, 1840.

"Consistently with the principles which govern the offence of forgery, an instrument may be falsely made,

although it be signed or executed by the party by whom it purports to be signed or executed. This happens where a party is fraudulently induced to execute a will, a material alteration having been made, without his knowledge, in the writing; for, in such a case, although the signature be genuine, the instrument is false, because it does not truly indicate the testator's intentions, and it is the forgery of him who so fraudulently caused such will to be signed, for he made it to be the false instrument which it really is."—*Cr. L. Comm. Rep. loc. cit.*

This passage of the Criminal Law Commissioners seems to be based on a very old case, cited in *Noy's Reports*, 101, *Combe's Case*; but in a more recent case, *R.* v. *Collins*, 2 *M. and Rob.* 461, it was held that, fraudulently to induce a person to execute an instrument, on a misrepresentation of its contents, is not a forgery; and, in a case of *R.* v. *Chadwick*, 2 *M. and Rob.* 545, that to procure the signature of a person to a document, the contents of which have been altered without his knowledge, is not a forgery.

The report *(loc. cit.)* of the criminal law Commissioners continues as follows: "Upon similar grounds, an offender may be guilty of a false making of an instrument, although he sign or execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic where it is false and deceptive. This happens where one, having conveyed land, afterwards, for the purpose of fraud, executes an instrument, purporting to be a prior conveyance of the same land; here again, the instrument is designed to obtain credit by deception, as purporting to have been made at a time earlier than the true time of its execution."—*5th Report, loc. sit.*

This doctrine was approved of in a case, in England, of *R.*

v. *Ritson*, 11 *Cox*, 352, and it was there held, upon a case reserved, that a man may be guilty of forgery by making a false deed in his own name. Kelly, C. B., delivering the judgment of the Court, said: "I certainly entertained some doubt at one time upon this case, because most of the authorities are of an ancient date, and long before the passing of the statutes of 11 Geo. 4 and 1 Will. 4, and 24-25 V. However, looking at the ancient authorities and the text-books of the highest repute, such as *Com. Dig.*, *Bacon's Abr.*, 3 *Co. Inst.*, *and Foster's C. L.* 117, they are all uniformly to the effect, not that every instrument containing a false statement is a forgery, but that every instrument which is false in a material part, and which purports to be that which it is not, or to be executed by a person who is not the real person, or which purports to be dated on a day which is not the real day, whereby a false operation is given to it, is forgery."

"Forgery, *at common law*, is an offence in falsely and fraudulently making and altering any matter of record, of any other authentic matter of a public nature, as a parish register or any deed or will, and punishable by fine and imprisonment. But the mischiefs of this kind increasing, it was found necessary to guard against them by more sanguinary laws. Hence we have several acts of Parliament declaring what offences amount to forgery, and which inflict severer punishment than there were at the common law."—*Bacon's Abr. Vol.* 3, 277. Curwood, 1 *Hawkins*, 263, is of opinion that this last definition is wholly inapplicable to the crime of forgery *at common law*, as, even at *common law*, it was forgery to make false "*private*" writings.

"The notion of forgery does not seem so much to consist in the counterfeiting a man's hand and seal, which

may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and justice it ought not to have."—1 *Hawkins*, 264.

The definitions containing only the words "with intent to defraud" without the words "with intent to deceive" seem defective. In fact, there are many acts held to be forgery, where no intent to defraud, as this expression is commonly understood, exists in the mind of the person committing the act; as, for instance, if the man, forging a note, means to take it up, and even has taken it up, so as not to defraud any one, this is clearly forgery, if he issued it, and got money or credit, or anything upon it.—*R.* v. *Hill*, 2 *Moo. C. C.* 30; *R.* v. *Geach*, 9 *C. and P.* 499; or forging a bill payable to the prisoner's own order, and uttering it without indorsement, *R.* v. *Birkett*, *R. and R.* 86; or if one, while knowingly passing a forged bank note, agrees to receive it again should it prove not to be genuine, or if a creditor executes a forgery of the debtor's name, to get from the proceeds payment of a sum of money due him, *R.* v. *Wilson*, 1 *Den.* 284; or if a party forges a deposition to be used in court, stating merely what is true, to enforce a just claim. All these acts are forgery; yet where is the intent to defraud, in these cases? It may be said that the law infers it. But why make the law infer the existence of what does not exist? Why not say that "forgery is the false making of an instrument with intent to defraud or *deceive*." The word "*deceive*" would cover all the cases

above cited; in each of these cases, the intent of the forger is that the instrument forged should be used as good, should be taken and received as signed and made, by the person whose name is forged, in consequence, to deceive *quoad hoc*, and for this, though he did not intend to defraud, though no one could possibly be defrauded by his act, he is in law guilty of forgery. See 2 *Russ.* 774.

It is true that the Court of Crown cases reserved, in England, held in *R.* v. *Hodgson, Dears. & B.* 3, that, upon an indictment for forgery at common law, it is necessary to prove, not only an intent to defraud, but also an intent to defraud a particular person, though, when this case was decided, the statute, in England (14-15 V., c. 100, s. 8,) enacted that it was not necessary in indictments for forgery to allege an intent to defraud any particular person. S. 114 of our Procedure Act. In this, *Hodgson's Case*, the prisoner had forged and uttered a diploma of the college of surgeons; the jury found that the prisoner forged the document with the general intent to induce the belief that it was genuine, and that he was a member of the college, and that he showed it to certain persons with intent to induce such belief in them; but that he had no intent, in forging or uttering it, to commit any particular fraud or specific wrong to any individual .....

Though the offence charged in this case was under the common law, it must be remembered that s. 8, of 14-15 V., c. 100, applied to indictments under the common law as well as to indictments under the statutes, as now also do sect. 44 of the English Forgery Act and sect. 114 of our Procedure Act.

Greaves remarks on the decision in this case :—

"As the clause of which this is a re-enactment (44

of the English Act, was considered in *R.* v. *Hodgson*, and as that case appears to me to have been erroneously decided, it may be right to notice it here. The prisoner was indicted at common law for forging and uttering a diploma of the college of surgeons, and the indictment was in the common form. The college of surgeons has no power of conferring any degree or qualification, but before admitting persons to its membership, it examines them as to their surgical knowledge, and, if satisfied therewith, admits them, and issues a document called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the college of surgeons, erased the name of the person mentioned in it, and substituted his own. He hung it up in his sitting room, and, on being asked by two medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion. When a candidate for an appointment as vaccinating officer, he stated he had his qualification, and would show it, if the clerk of the guardians, who were to appoint to the office, would go to his gig; he did not, however, then produce or show it.

The prisoner was found guilty: the fact to be taken to be, that he forged the document with the general intent to induce a belief that it was genuine, and that he was a member of the college of surgeons, and that he showed it to two persons with the particular intent to induce such belief in these two persons; but that he had no intent in forging or in altering, to commit any particular fraud, or any specific wrong to any individual. And, upon a case reserved, it was held that the 14-15 V., c. 100, s. 8, altered the form of pleading only, and did not alter the character of the offence charged, and that the law as to that is the

same as if the statute had not been passed; and that, in order to make out the offence of forgery at common law, there must have been at the time the instrument was forged, an intention to defraud some particular person. Now, this judgment is clearly erroneous. The 14-15 V., c. 100, s. 8, does, in express terms, alter the law as well as the form of indictment, for it expressly enacts, that "*on the trial* of any of the offences in this section mentioned *(forging, uttering, disposing of or putting off any instrument whatsoever)* it shall not be necessary to *prove* that the defendant did the act charged with an intent to defraud." The judgment, therefore, and the clause in the act are directly in contradiction to each other, and, consequently, the former cannot be right. The clause was introduced advisedly for the very purpose of altering the law. See my note to Lord Campbell's Acts, page 13. It is a fallacy to suppose that there must have been an intent to defraud any particular person at the time of forging the document. In *Tatlock* v. *Harris*, 3 *T. R.* 176, that great lawyer, Shepherd, said in argument, "it is no answer to a charge of forgery to say that there was no *special* intent to defraud any *particular* person, because *general intent* to defraud is sufficient to constitute the crime;" and this position was not denied by that great lawyer, Wood, who argued on the other side, and was apparently adopted by the court. It is cited in 1 *Leach*, 216, *note a*; 3 *Chitty, Cr. L.* 1036, and, as far as we are aware, was never doubted before this case. Indeed, in *R.* v. *Tylney*, 1 *Den.* 319, it seems to have been assumed on all hands to be the law. There the prisoners forged a will, but there was no evidence to show that any one existed who could have been defrauded by it, and the judges were equally divided whether a count for forgery with intent to defraud some

person unknown, could, under such circumstances, be supported. It is obvious that this assumed that, if there had been evidence that there was any one who might have been defrauded, though there was no evidence that the prisoners even knew of the existence of any such person, the offence would have been forgery. Indeed it would be very startling to suppose that a man who forged a will, intending to defraud the next of kin, whoever they might happen to be, was not guilty of forgery because he had only that general intent.

The point is too obvious to have escaped that able criminal lawyer, Mr. Prendergast, and, as he did not take it, he clearly thought it wholly untenable, and so, also, must the judges who heard the case. See also the observations of Cresswell, J., in *R.* v. *Marcus*, 2 *C. & K.* 356. In *R.* v. *Nash*, 2 *Den.* 493, Maule, J., expressed a very strong opinion that it was not necessary in order to prove an intent to defraud that there should be any person who could be defrauded, and this opinion was not dissented from by any of the other judges.

It has long been settled that making any instrument, which is the subject of forgery, in the name of a non-existing person, is forgery, and in *Wilks' Case*, 2 *East, P. C.* 957, all the judges were of opinion that a bill of exchange drawn in fictitious names was a forged bill. Now, every one knows that, at the time when such documents are forged, the forger has no intent to defraud any particular person, but only an intent to defraud any person whom it may afterwards meet with, and induce to cash the bill; and no suggestion has ever been made in any of these cases that that offence was not forgery. The ground of the present judgment seems to have been that formerly the particular person who was intended to be

defrauded must have been named in the indictment; no doubt, it is a general rule of criminal pleading that the names of persons should be stated, but this rule is subject to the exception that, wherever the stating the name of any person in an indictment is highly inconvenient or impracticable, the name need not be stated, for *lex neminem cogit ad vana seu impossibilia.* Therefore, the names of inhabitants of counties, hundreds and parishes need never be stated; so, too, where there is a conspiracy to defraud tradesmen in general the names need not be stated. So, where there is a conspiracy to raise the funds, it is not necessary to state the names of the persons who shall afterwards become purchasers of stock "for the defendants could not, except by a spirit of prophecy, divine who would be the purchasers on a subsequent day," per Lord Ellenborough, C. J., *R.* v. *de Berenger*, 3 *M. and S.* 68; which reason is equally applicable to the case, where, at the time of forging an instrument, there is no intent to defraud any particular person. Indeed, it is now clearly settled that, where a conspiracy is to defraud indefinite individuals, it is unnecessary to name any individuals.—*R.* v. *Peck*, 9 *A. & E.*, 686; *R.* v. *King*, 7 *Q. B.* 782. This may be taken to be a general rule of criminal pleading, and it has long been applied to forgery. In *R.* v. *Birch*, 1 *Leach*, 79, the prisoners were convicted of forging a will, and one count alleged the intent to be "to defraud the person or persons who would by law be entitled to the messuages" whereof the testator died seized. And it has been the regular course in indictments for forging wills, at least ever since that case, to insert counts with intent to defraud *the heir-at-law* and *the next of kin*, generally.—3 *Chitty Cr. L.* 1069. It is true that in general there have

also been counts specifying the heir-at-law or the next of kin by name. But in *R.* v. *Tylney* there was no such count. No objection seems ever to have been taken to any such general count. So, also, in any forgery with intent to defraud the inhabitants of a county, hundred or parish, the inhabitants may be generally described. These instances clearly show that it is not necessary in forgery any more than in other cases to name individuals where there is either great inconvenience or inpractibility in doing so. A conviction for conspiracy to negotiate a bill of exchange, the drawers of which were a fictitious firm, and thereby fraudulently to obtain goods from the *King's subjects*, although it did not appear that any particular person to be defrauded was contemplated at the time of the conspiracy, has been held good; *R.* v. *Hevey*, 2 *East, P. C.* 858, *note a*; and this case bears considerably on the present question. If a person forged a bill of exchange with intent to defraud any one whom he might afterwards induce to cash it, and he uttered it to A. B., it cannot be doubted that he would be guilty of uttering with intent to defraud A. B., and it would indeed be strange to hold that he was guilty of uttering, but not of forging, the bill. No doubt the offence of forgery consists in the intent to deceive or defraud; but a general intent to defraud is just as criminal as to defraud any particular individual. In each case, there is a wrongful act done with a criminal intent, which, according to *R.* v. *Higgins*, 2 *East*, 5, is sufficient to constitute an indictable offence. In the course of the argument, Erle, J., said: "Would it not have been enough to allege an intent to deceive divers persons to the jurors unknown, to wit, all the patients of his late master?" This approaches very nearly to the correct

view, viz., that it would have been enough before the 14-15 V., c. 100, s. 8, to have alleged and proved an intent to deceive any persons who should afterwards become his patients. Wightman, J., during the argument said: "The question is, whom did he intend to deceive when the forgery was committed?" And Jervis, C. J., said: "The intent must not be a roving intent, but a specific intent." Now, if these remarks are confined to a count for forging, they are correct; though, in *Bolland's Case*, 1 *Leach*, 83, the prisoner was executed for forging an indorsement in the name of a non-existing person, with intent to defraud a person whom he does not even seem to have known when he forged the indorsement.

But it cannot be doubted that a man may be guilty of intending to defraud divers persons at different times by the same instrument, as where he tries to utter a forged note to several persons one after another, in which case he may be convicted of uttering with intent to defraud each of them. Thus much has been said, because it is very important that the law on the subjects discussed in this note should not be left in uncertainty, and it is much to be regretted that *R.* v. *Hodgson* was ever decided as it was, as it may encourage ignorant pretenders to fabricate diplomas, and thereby not only to defraud the poor of their money, but to injure their health." —*Greaves, Cons. Acts*, 303.

The case of *Tatlock* v. *Harris*, hereinbefore cited by Greaves, is cited by almost all who have treated this question; 2 *Russ.* 774; 2 *East, P. C.* 854, etc. In *R.* v. *Nash*, 2 *Den.* 493, Maule, J., said: "The recorder seems to have thought, that, in order to prove an intent to defraud there should have been some person defrauded or who might

possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque, either to try his credit, or to imitate his handwriting, there would be no intent to defraud, though there would be parties who might be defrauded. But where another person has no account at his bankers, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case although no person could be defrauded."

And in *R.* v. *Mazagora*, *R. & R.* 291, it has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose upon him; and although the object was general to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. See *R.* v. *Crooke*, 2 *Str.* 901; *R.* v. *Goate*, 1 *Ld. Raym.* 737; *R.* v. *Holden*, *R. & R.* 154. And even, if the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him, and swears it, this will not repel the presumption of an intention to defraud.—*R.* v. *Sheppard*, *R. & R.* 169. *R.* v. *Trenfield*, 1 *F. & F.* 43, is wretchedly reported, and cannot be relied upon.—2 *Russ.* 790, *note by Greaves*. See also *R.* v. *Crowther*, 5 *C. & P.* 316, and *R.* v. *James*, 7 *C. & P.* 853, on the question of the necessary intent to defraud, in forgery; and *R.* v. *Boardman*, 2 *M. & Rob*, 147; *R.* v. *Todd*, 1 *Cox*, 57. Though the

present statute, see s. 114 of the Procedure Act, has the words "where it shall be necessary to allege an intent to defraud," showing evidently that there are cases where such an averment is not necessary, it has been held, in *R.* v. *Powner*, 12 *Cox*, 235, that, in all cases, an intent to defraud must be alleged. This doctrine seems to have been since repudiated by Martin, B., in *R.* v. *Asplin*, 12 *Cox*, 391.

It should be observed that the offence of forgery may be complete, though there be no publication or uttering of the forged instrument, for the very making with a fraudulent intention, and without lawful authority, of any instrument which, at common law or by statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication, and though the publication of the instrument be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence.—2 *East, P. C.* 855. Thus in a case where the note, which the prisoner was charged with having forged was never published, but was found in his possession at the time he was apprehended, the prisoner was found guilty, and no one even thought of raising the objection that the note had never been published.—*R.* v. *Elliot*, 1 *Leach*, 175. At the present time, most of the statutes which relate to forgery make the publication of the forged instrument, with knowledge of the fact, a substantive felony.

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in *any material part* of a true instrument, and even if it be afterwards executed by another person, he not knowing of the deceit, or the fraudulent application of a true signature to a false instrument, for which it was not intended or *vice versâ*, are as much

forgeries as if the whole instrument had been fabricated. As by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated.—2 *East, P. C.* 855.

Even where a man, upon obtaining discount of a bill, indorsed it in a fictitious name, when he might have obtained the money as readily by indorsing it in his own name, it was holden to be a forgery.—*R.* v. *Taft*, 1 *Leach*, 172; *R.* v. *Taylor*, 1 *Leach*, 214; *R.* v. *Marshall. R. & R.* 75; *R.* v. *Wiley, R. & R.* 90; *R.* v. *Francis, R. & R.* 209.

It is a forgery for a person having authority to fill up a blank acceptance or a cheque for a certain sum, to fill up the bill or cheque for a larger sum.—*R.* v. *Hart*, 1 *Moo. C. C.* 486: and the circumstance of the prisoner, alleging a claim on his master for the greater sum, as salary then due, is immaterial, even if true.—*R.* v. *Wilson*, 1 *Den.* 284.

In respect of the persons who might formerly be witnesses in cases of forgery, it was an established point that a party by whom the instrument purported to be made was not admitted to prove it forged, if, in case of its being genuine, he would have been liable to be sued upon it.—2 *Russ.* 817. But now, see *sects.* 214 *and* 218 *of the Procedure Act.*

A forgery must be of some document or writing; therefore the putting an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery.—*R.* v. *Close, Dears & B.* 460; though it may be a cheat at common law.

The false signature *by a mark* is forgery.—*R.* v. *Dunn*, 1 *Leach*, 57.

When the writing is invalid on its face, it cannot be the subject of forgery, because it has no legal tendency to effect a fraud. It is not indictable, for example, to forge a will attested by a less number of witnesses than the law requires.

—*R.* v. *Wall*, 2 *East* 953; *R.* v. *Martin*, 14 *Cox*, 375; *R.* v. *Harper*, 14 *Cox*, 574; *R.* v. *Moffat*, 1 *Leach*, 431.

But a man may be indicted for forging an instrument, which, if genuine, could not be made available by reason of some circumstance not appearing upon the face of the instrument, but to be made out by extrinsic evidence.—*R.* v. *McIntosh*, 2 *Leach*, 883. So, a man may be indicted for forging a deed, though not made in pursuance of the provisions of particular statutes, requiring it to be in a particular form.—*R.* v. *Lyon*, *R.* & *R.* 255.

And a man may be convicted of forging an unstamped instrument, though such instrument can have no operation in law.—*R.* v. *Hawkeswood*, 1 *Leach*, 257. This question, a few years afterwards, again underwent considerable discussion, and was decided the same way, though, in the meantime, the law, with regard to the procuring of bills and notes to be subsequently stamped, upon which in *R.* v. *Hawkeswood*, the judges appear in some degree to have relied, had been repealed. The prisoner was indicted for knowingly uttering a forged promissory note. Being convicted the case was argued before the judges, and for the prisoner it was urged that the 31 Geo. 3., c. 25, s. 19, which prohibits the stamps from being afterwards affixed, distinguished the case from *R.* v. *Hawkeswood*. Though two or three of the judges doubted at first the propriety of the latter case if the matter were *res integra*, yet they all agreed that, being an authority in point, they must be governed by it; and they held that the statute 31 Geo. 3 made no difference in the question. Most of them maintained the principle in *R.* v. *Hawkeswood* to be well founded, for the acts of Parliament referred to were mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide

that the instrument should not be available for recovering upon it in a court of justice, though it might be evidence for a collateral purpose; that it was not necessary to constitute forgery, that the instrument should be available; that the stamp itself might be forged, and it would be a strange defence to admit, in a court of justice, that because the man had forged the stamp, he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another.—*R.* v. *Morton*, 2 *East*, *P. C.* 955. The same principle was again recognized in *R.* v. *Roberts*, and *R.* v. *Davies*, 2 *East*, *P. C.* 955, *and in R.* v. *Teague*, 2 *East*, *P. C.* 979, where it was holden that supposing the instrument forged to be such on the face of it as would be valid, provided it had a proper stamp, the offence was complete.

As to the uttering.—These words, *utter*, *uttering*, occur frequently in the law of forgery, counterfeiting and the like; meaning, substantially, to offer. If one offers another a thing, as, for instance, a forged instrument or a piece of counterfeit coin, intending it shall be received as good, he utters it, whether the thing offered be accepted or not. It is said that the offer need not go so far as a tender.—*R.* v. *Welch*, 2 *Den.* 78; *R.* v. *Ion.*, 2 *Den.* 475. (See Greaves' remarks on this case, 2 *Russ.* 830.) But, to constitute an uttering, there must be a complete attempt to do the particular act the law forbids, though there may be a complete conditional uttering, as well as any other, which will be criminal. The words "pay," "put off," in a statute are not satisfied by a mere uttering or by a tender; there must be an acceptance also.—*Bishop*, *Stat. Crimes*, 306.

The Forgery Act now describes the offence of uttering by the words "offer, utter, dispose of or put off," which

include attempts to make use of a forged instrument, as well as the cases where the defendant has actually succeeded in making use of it.

Showing a man an instrument, the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering. Nor with the leaving it, afterwards, sealed up, with the person to whom it was shown, under cover, that he may take charge of it, as being too valuable to be carried about, be an uttering.—*R.* v. *Shukard*, *R. & R.* 200. But the showing of a forged receipt, to a person with whom the defendant is claiming credit for it, was held to be an offering or uttering, though the defendant refused to part with the possession of it.—*R.* v. *Radford*, 1 *Den.* 59.

In *R.* v. *Ion*, 2 *Den.* 475, *supra*, cited by Bishop, the rule laid down by the Court is, that a using of the forged instrument in some way, in order to get money or credit upon it *or by means of it*, is sufficient to constitute the offence described in the statute.

Giving a forged note to an innocent agent or an accomplice that he may pass it is a disposing of and putting it away.—*R.* v. *Giles*, 1 *Moo. C. C.* 166. So, if a person knowingly deliver a forged bank note to another, who knowingly utters it accordingly, the prisoner who delivered such note to be put off may be convicted of having disposed of and put away the same.—*R.* v. *Palmer*, *R. & R.* 72.

On the charge of uttering, the guilty knowledge is a material part of the evidence. *Actus non facit reum, nisi mens sit rea.* If there is no guilty knowledge, if the person who utters a forged instrument really thinks it genuine, there is no *mens rea* with him; he commits no offence. Therefore, the prosecutor must prove this guilty knowledge by the defendant, to obtain a conviction.

This is not capable of direct proof. It is nearly in all cases proved by evidence of facts, from which the jury may presume it.—*Archbold*, 570. And by a laxity of the general rules of evidence, which has long prevailed in the English Courts, the proof of collateral facts is admitted to prove the guilty knowledge of the defendant. Thus, on an indictment for knowingly uttering a forged instrument, or a counterfeit bank note, or counterfeit coin, proof of the possession, or of the prior or *subsequent* utterance, either to the prosecutor himself *or to other persons*, of other false documents or notes, or bad money, *though of a different description*, and though themselves *the subjects of separate indictments*, is admissible as material to the question of *guilty knowledge* or intent.—*Taylor, Evid.*, 1 *vol., par.* 322; *R.* v. *Aston*, 2 *Russ.* 841; *R.* v. *Lewis*, 2 *Russ.* 841; *R.* v. *Oddy*, 2 *Den.* 264. But in these cases, it is essential to prove distinctly that the instruments offered in evidence of guilty knowledge were themselves forged.—*Taylor, loc. cit.*

It seems also, that though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, he cannot proceed to show what the prisoner said or did at another time, with respect to such uttering; for these are collateral facts, too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict.—*Taylor, loc. cit.*; *R.* v. *Philipps*, 1 *Lewin*, 105; *R.* v. *Cooke*, 8 *C. & P.* 586. In *Philipps' case*, the judge said. "That the prosecutor could not give in evidence anything that was said by the prisoner at a time collateral to a former uttering in order to show that what he said at the time of such former

uttering was false, because the prisoner could not be prepared to answer or explain evidence of that description; that the prisoner is called upon to answer all the circumstances of a case under consideration, but not the circumstances of a case which is not under consideration; that the prosecutor is at liberty to show other cases of the prisoner having uttered forged notes, and likewise his conduct at the time of uttering them; but that what he said or did *at another time collateral to such other utterings*, could not be given in evidence, as it was impossible that the prisoner could be prepared to combat it." See *R.* v. *Browne*, 2 *F. & F.* 559, and Paterson's, J., remarks therein on *R.* v. *Cooke*, cited, *ante*, and *R.* v. *Forbes*, 7 *C. & P.* 224. The rule, in such cases, seems to be that you cannot bring collateral evidence of a collateral fact, or that you cannot bring evidence of a collateral circumstance of a collateral fact.

The prosecutor must also prove that the uttering was accompanied by an intent to defraud. As to which, see remarks, *ante*, on the necessity of this intent in forgery, generally. Baron Alderson told the jury, in *R.* v. *Hill*, 2 *Moo. C. C.* 30, that if they were satisfied that the prisoner uttered the bill as true, knowing at the time that it was forged, and meaning that the person to whom he offered it should believe it to be genuine, they were bound to infer that he intended to defraud this person, and this ruling was held right by all the judges. And in *R.* v. *Todd*, 1 *Cox*, 57, Coleridge, J., after consulting Cresswell, J., said: "If a person forge another person's name, and utter any bill, note, or other instrument with such signature, knowing it not to be the signature of the person whose signature he represents it to be, but intending it to be taken to be such by the party to whom it is given, the inference, as well in point of fact as of law, is strong

enough to establish the intent to defraud, and the party so acting becomes responsible for the legal consequences of his act, whatever may have been his motives. The natural, as well as the legal consequence, is that this money is obtained, for which the party obtaining it profess to give but cannot give a discharge to the party given up the money on the faith of it. Supposing a person in temporary distress puts another's name to a bill, intending to take it up when it becomes due, but cannot perform it, the consequence is that he has put another under the legal liability of his own act, supposing the signature to pass for genuine." See *R.* v. *Vaughan*, 8 *C. & P.* 276; *R.* v. *Cooke*, 8 *C. & P.* 582; *R.* v. *Geach*, 9 *C. & P.* 499.

A consequence of the judgment for forgery was an incapacity to be a witness until restored to competency by the king's pardon.—2 *Euss.* 844. But now by sect. 214 of the Procedure Act, it is enacted that "no person offered as a witness shall, by reason of any alleged incapacity from crime or interest, be excluded from giving evidence on the trial of any criminal case, or in any proceeding relating or incidental to each case." And sect. 215 of the same act enacts that every person shall be admitted and be compellable to give evidence, in criminal cases, notwithstanding that such person has been previously convicted of a crime or offence.

Indictment.—(General form, under statute.) The Jurors for Our Lady the Queen, upon their oath present, and J. S. on ..... feloniously did forge a certain *(here name the instrument)* which said forged is as follows: that is to say *(here set out the instrument verbatim)* (see *post* sections 114, 131, 132 of the Procedure Act) with intent thereby then to defraud; against the form of the statute in such case made and provided, and

against the peace of Our Lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, feloniously did forge a certain other *(state the instrument forged by any name or designation by which it is usually known)* with intent thereby then to defraud; against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged....which said last mentioned forged ..... is as follows: that is to say *(here set out the instrument verbatim)* with intent thereby then to defraud, he, the said J. S., at the time he so uttered, offered, disposed of and put off the said last mentioned forged ..... as aforesaid, well knowing the same to be forged; against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged *(as in the second count)* with intent thereby then to defraud, he, the said J. S., at the time he so uttered, offered, disposed of and put off the said last mentioned forged ..... as aforesaid, well knowing the same to be forged; against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

This indictment is not intended as a general precedent to serve in all cases of forgery; because the form in each particular case must depend upon the statute on which the indictment is framed. But, with the assistance of it, and upon an attentive consideration of the operative words in the statute creating the offence, the pleader can find no difficulty in framing an indictment in any case.—*Archbold*, 559.

Indictment for forgery at common law.—The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... unlawfully, knowingly and falsely did forge and counterfeit a certain writing purporting to be *(describe the instrument)* with intent thereby then to defraud: to the evil example of all others in like case offending, and against the peace of Our Lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, unlawfully, falsely and deceitfully did utter and publish as true a certain other false, forged and counterfeited writing, purporting to be *(describe the instrument)* with intent thereby then to defraud, he the said J. S., at the same time he so uttered and published the said last mentioned false, forged and counterfeited writing as aforesaid, well knowing the same to be false, forged and counterfeited, to the evil example of all others in the like case offending and against the peace of Our Lady the Queen, her crown and dignity. —*Archbold.*

At common law, forgery is a misdemeanor, punishable by fine or imprisonment, or both, at the discretion of the court.

The court of quarter sessions has no jurisdiction in

cases of forgery, 2 Russ 814, and never had: "why?" said Lord Kenyon, "I know not, but having been expressly so adjudged, I will not break through the rules of law.—*R.* v. *Higgins*, 2 *East* 18.—See also *R.* v. *Rigby*, 8 *C. & P.* 770, *and R.* v. *McDonald*, 31 *U. C. Q. B.* 337. See secs. 114, 130, 131 and 132 of Procedure Act as to indictments for forgery, and sec. 18 thereof as to venue.

A prisoner extradicted from the United States on a charge of forgery can, upon an indictment for forgery, be found guilty of a felonious uttering.—*R.* v. *Paxton*, 3 *L. C. L. J.* 117.

Making false entries in a book does not constitute the crime of forgery. *Ex parte Lamirande*, 10 *L. C. J.* 280. See *R.* v. *Blackstone*, *post*, *under sec.* 12, *and ex parte Eno*, 10 Q. L. R. 194.

Definition of the term forgery considered. *In re Smith*, 4 *P. R.* (*Ont.*) 215. *R.* v. *Gould*, 20 *U. C. C. P.* 154.

Where the prisoner was indicted for forging a note for $500, having changed a note of which he was the maker from $500 to $2,500. *Held*, a forgery of a note for $500, though the only fraud committed was on the endorser.—*R.* v. *McNevin*, 2 *R. L.* 711.

CHAPTER 165.

AN ACT RESPECTING FORGERY.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

INTERPRETATION.

1. In this Act, unless the context otherwise requires, the expression "Province of Canada" includes the late Province of Canada and the late Provinces of Upper Canada and Lower Canada, also the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and British Columbia, as they respectively existed before they became part of Canada, and also the several Provinces, Territories and Districts now or hereafter forming part of Canada.

2. When the having any matter or thing in the custody or possession of any person is, in this Act, expressed to be an offence, if any person has any such matter or thing in his personal custody and possession, or knowingly and wilfully has any such matter or thing in the actual custody and possession of any other person, or knowingly and wilfully has any such matter or thing in any dwelling-house or other building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter or thing is so had for his own use, or for the use or benefit of another, every such person shall be deemed and taken to have such matter or thing in his custody or possession within the meaning of this Act.—32-33 *V., c.* 19, *s.* 52. 24-25 *V., c.* 98, *s.* 45, *Imp.*

The words "or knowingly and wilfully has any such matter or thing in the actual custody of any other person" remove the doubts mentioned in *R.* v. *Rogers*, 2 *Moo. C. C.* 85. *R.* v. *Gerrish*, 2 *M. & Rob.* 219, and *R.* v. *Williams*, *C. & M.* 259.

3. The wilful alteration, for any purpose of fraud or deceit, of any document or thing written, printed or otherwise made capable of being read, or of any document or thing the forging of which is made punishable by this Act, shall be held to be a forging thereof.—32-33 *V., c.* 19, *s.* 45, *part.*

Not in the English Act.

An indictment under this clause should charge the alteration to have been done "wilfully and for a purpose of fraud," and in another count "wilfully and for the purpose of deceit."

In consideration of law, every *alteration* of an instrument amounts to a forgery of the whole, and an indictment for *forgery* will be supported by proof of a *fraudulent alteration*, though, in cases where a genuine instrument has been altered, it is perhaps better to allege the *alteration* in one count of the indictment.—1 *Starkie's Crim. pl.* 99.

THE GREAT SEAL, ETC.

4. Every one who forges or counterfeits, or utters, knowing the same to be forged or counterfeited, the Great Seal of the United Kingdom, or the Great Seal of Canada, of any Province of Canada, or of any one of Her Majesty's colonies or possessions, Her Majesty's Privy Seal, any Privy Signet of Her Majesty, Her Majesty's Royal sign manual, or any of Her Majesty's seals, appointed by the twenty-fourth article of the union between England and Scotland, to be kept, used and continued in Scotland, the Great Seal of Ireland, or the Privy Seal of Ireland, or the Privy Seal or Seal at Arms of the Governor General of Canada, or of the Lieutenant Governor of any Province of Canada, or of any person who administers or, at any time, administered the Government of any Province of Canada, or of the Governor or Lieutenant Governor of any one of Her Majesty's colonies or possessions, or forges or counterfeits the stamp or impression of any of the seals aforesaid, or utters any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or forges, or alters, or utters, knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon, or affixed thereto, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 19, *s.* 1. 24-25 *V.*, *c.* 98, *s.* 1, *Imp.*

5. Every one who forges or fraudulently alters any document bearing or purporting to bear the signature of the Governor General of Canada, or of any deputy of the Governor General, or of the Lieutenant Governor of any Province of Canada, or of any person who administers or, at any time, administered the Government of any Province of Canada, or offers, utters, disposes of or puts off any such forged or fraudulently altered document as aforesaid, knowing the same to be so forged or altered, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 19, *s.* 2.

LETTERS PATENT AND PUBLIC REGISTERS.

6. Every one who forges or alters, or in any way publishes, puts off, or utters as true, knowing the same to be forged or altered, any copy of letters patent, or of the enrolment or enregistration of letters patent, or of any certificate thereof, made or given or purporting to be made or given by virtue of any Act of Canada or of any Province of Canada, is guilty of felony, and liable to seven years' imprisonment. —32-33 *V.*, *c.* 19, *s.* 3.

7. Every one who forges or counterfeits or alters any public register or book appointed by law to be made or kept or any entry therein, or wilfully certifies or utters any writing as and for a true copy of such public register or book or of any entry therein, knowing such writing to be counterfeit or false, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 4.

Upon the trial of an indictment for any offence under these Sections, the jury may, if the evidence warrants it, under s. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.

Indictment.— .... under sec. 4 ..... that A. B., on ..... the Great Seal of the United Kingdon, falsely, deceitfully and feloniously did forge and counterfeit, against the form ..... And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. B. afterwards, to wit, on the day and year aforesaid, falsely, deceitfully and feloniously did utter a certain other false, forged and counterfeited Great Seal as aforesaid, then well knowing the same to be false, forged and counterfeited

against the form ..... *Add counts stating the instrument to which the counterfeit seal was appended, or which had thereon or affixed thereto the stamp or impression of such counterfeit, seal, etc.—Archbold*, 571.

Before the recent statutes, this offence was treason.—1 *Hale*, 183. See general remarks on forgery.

TRANSFER OF STOCK, ETC.

8. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity or other public fund which now is or here after may be transferable in any of the books of the Dominion of Canada, or of any Province of Canada or of any bank at which the same is transferable, or of or in the capital stock of any body corporate, company or society, which now is or hereafter may be established by charter, or by, under or by virtue of any Act of Parliament of the United Kingdom or of Canada, or by any Act of the Legislature of any Province of Canada, or forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund or capital stock, *or any claim for a grant of land from the Crown in Canada, or for any script or other payment or allowance in lieu of any such grant of land,* or to receive any dividend or money payable in respect of any such share or interest, or demands or endeavors to have any such share or interest transf[illegible]d, or to receive any dividend or money payable in respect thereof, or any such grant of land, or script or payment or allowance in lieu thereof as aforesaid, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 19, *s.* 5. 24-25 *V., c.* 98, *s.* 2, *Imp.*

The words in *italics* are not in the English Act.

See general remarks on fo·gery.

Indictment for forging and uttering a transfer of stock.— ..... that A. B., on ..... feleniously did forge a transfer of a certain share and interest in certain stock and annuities, to wit ..... which said stock and

annuities were then transferable at the bank of ..... and which said transfer then purported to be made by one J. N. with intent thereby then to defraud, against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

(2nd Count.)— ..... did offer, utter, dispose of, and put off, a certain other forged transfer of a certain share and interest of, and in certain other stock and annuities, to wit ..... which said last mentionned stock and annuities were then transferable at the bank of ....., and which said last mentionned transfer purported to be made by one J. N., with intent thereby then to defraud, he the said A. B., at the time he so uttered the said last mentioned forged transfer of the said share and annuity, well knowing the some to be forged, against the form .....—*Archbold*, 590.

Indictment for forging and uttering a power of attorney to sell out stock.— ..... that A. B., on ..... feloniously did forge a certain power of attorney to transfer a certain share and interest in certain stock and annuities which were then transferable at the bank of ....., which said forged power of attorney is as follows, that is to say (*here set it out*) with intent thereby then to defraud, against the form ..... (2nd Count.) ..... feloniously did offer, utter, dispose of and put off a certain other forged power of attorney, purporting to be a power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which were then transferable at the bank of ..... to wit, ... with intent thereby then to defraud, he the said A. B. then well knowing the said last mentioned power of attorney to be forged, against the form ..... (3rd Count.) ..... feloniously did demand and endeavour to have a certain share

and interest of the said J. N. in certain stock and annuities, which were then transferable at the bank of....., to wit, ... transfered, in the books of the said bank of ....., by virtue of a certain other forged power of attorney, purporting to be a power of attorney, to transfer the said share and interest of the said J. N. in the said stock and annuities so transferable as aforesaid, with intent thereby then to defraud, he the said A. B., at the time he so demanded and endeavoured to have the said share and interest transferred as aforesaid, well knowing the said last mentioned power of attorney to be forged, against the form ..... —*Archbold*, 590.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 865.

9. Every one who, falsely and deceitfully, personates any owner of any share, or interest of or in any stock, annuity or other public fund, which now is or hereafter may be transferable in any of the books of the Dominion of Canada, or of any Province of Canada, or of any bank at which the same is transferable, or any owner of any share or interest of or in the capital stock of any body corporate, company or society which now is or hereafter may be established by charter, or by, under or by virtue of any Act of Parliament of the United Kingdom or of Canada, or by any Act of the Legislature of any Province of Canada, *or of any claim for a grant of land from the Crown in Canada, or for any scrip or other payment or allowance in lieu of such grant of land,* or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and thereby transfers or endeavors to transfer any share or interest belonging to any such owner, or thereby receives or endeavors to receive any money due to any such owner, *or to obtain any such grant of land, or such scrip or allowance in lieu thereof as aforesaid,* as if such offender were the true and lawful owner, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 19, *s.* 6. 24-25 *V., c.* 98, *s.* 3, *Imp.*

The words in *italics* are not in the English Act.

Indictment.—..... feloniously did, falsely and deceitfully, personate one J. N., the said J. N. then being the owner of a certain share and interest in certain stock and annuities, which were then transferable at the bank of ....., to wit *(state the amount and nature of the stock;)* and that the the said A. B. thereby did then transfer the said share and interest of the said J. N. in the said stock annuities, as if he, the said A. B., were then the true and lawful owner thereof, against the form.....—*Archbold*, 614.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act convict the prisoner of an attempt to commit the same.—2 *Russ.* 865.

10. Every one who forges any name, handwriting or signature, purporting to be the name, handwriting or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund or capital stock, or grant of land or scrip or allowance in lieu thereof, as in either of the two sections next preceding mentioned, or to receive any dividend or money payable in respect of any such share or interest, or offers, utters, disposes of or puts off any such power of attorney or other authority, with any such forged name, handwriting or signature thereon, knowing the same to be forged, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 7. 24-25 *V.*, *c.* 98, *s.* 4, *Imp.*

11. Every one who, with intent to defraud, wilfully makes any false entry in, or wilfully alters any word or figure in any of the books of account kept by the Government of Canada, or of any Province of Canada, or of any bank at which any of the books of account of the Government of Canada or of any Province of Canada are kept, in which books the accounts of the owners of any stock, annuities or other public funds, which now are or hereafter may be transferable in such books, are entered and kept, or in any manner wilfully falsifies any of the accounts of any of such owners in any of the said books, or wilfully makes any transfer of any share or interest of or in any stock, annuity or other public fund which now is or hereafter may be trans-

femble as aforesaid, in the name of any person not being the true and lawful owner of such share or interest, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 19, *s.* 8. 24-25 *V.*, *c.* 98, *s.* 5, *Imp.*

12. Every one who, being a clerk, officer or servant of, or other person employed or intrusted by the Government of Canada or of any Province of Canada, or being a clerk or officer or servant of, or other person employed or intrusted by any bank in which any of such books and accounts as are mentioned in the next preceding section are kept, knowingly and with intent to defraud, makes out, or delivers any dividend warrant, or warrant for payment of any annuity, interest or money payable as aforesaid, for a greater or less amount than the person on whose behalf such warrant is made out is entitled to, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 9. 24-25 *V.*, *c.* 98, *s.* 6, *Imp.*

Indictment under sec. 10.—.....feloniously did forge a certain name, handwriting and signature, as and purporting to be the name, handwriting and signature of one ..... as and purporting to be a witness attesting the execution of a certain power of attorney to transfer a certain share and interest of one J. N. in certain stock and annuities which were then transferable at the bank of ....., to wit *(here state the amount and nature of the stock,)* against the form.....

(2nd Count.).....did utter, dispose of and put off a certain other forged power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which were then transferable at the bank of ....., to wit, with the name, handwriting and signature of the said ..... forged, on the said last mentioned power of attorney, as an attesting witness to the execution thereof, he the said *(defendant,)* at the time he so offered, uttered, disposed of and put off the same, well knowing the said name and handwriting, purporting to be the name and handwriting of the said ..... thereon, as attesting

witness thereof as aforesaid, to be forged, against the form .....—*Archbold.*

Indictment for making false entries of stock, under sec. 11 — ..... feloniously did wilfully alter certain words and figures, that is to say *(here set out the words and figures, as they were before the alteration)* in a certain book of account kept by ....., in which said book the accounts of the owners of certain stock, annuities and other public funds, to wit, the *(state the stock)* which were then transferable at ..... were then kept and entered, by *(set out the alteration and the state of the account or item when so altered)* with intent thereby then to defraud; against the form.....—*Archbold.*

Indictment for making a transfer of stock in the name of a person not the owner, under sec. 11.—.....feloniously did wilfully make a transfer of a certain share and interest of and in certain stock and annuities, which were then transferable at the bank of....., to wit, the share and interest of ....., in the ..... *(state the amount and nature of the stock),* in the name of one C. D., he the said C. D. not being then the true and lawful owner of the said share and interest of and in the said stock and annuities, or any part thereof, with intent thereby then to defraud, against the form.....—*Archbold.*

Indictment, under sec. 12..... then being a clerk of ..... and employed and entrusted by the said ..... feloniously did knowingly make out and deliver to one J. N. a certain dividend warrant for a greater amount than the said J. N. was then entitled to, to wit, for the sum of five hundred pounds; whereas, in truth and in fact, the said J. N. was then entitled to the sum of one hundred pounds only; with intent thereby then to defraud, against the form.....—*Archbold.*

Upon the trial of any indictment for any offence under these sections, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 865.

Where a bank clerk made certain false entries in the bank books under his control, for the purpose of enabling him to obtain the money of the bank improperly.

Held, that he was not guilty of forgery.—*The Queen* v. *Blackstone*, 4 *Man. L. R.* 296.

DEBENTURES, STOCK, EXCHEQUER BILLS, ETC.

13. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any debenture or other security, issued under the authority of any Act of the Parliament of Canada, or of the Legislature of any Province of Canada, or any exchequer bill or exchequer bond, or any Dominion or Provincial note, or any indorsement on or assignment of any such debenture, exchequer bill or exchequer bond or other security, issued under the authority of any Act of the Parliament of Canada, or of the Legislature of any Province of Canada, or any coupon, receipt or certificate for interest accruing thereon, or any scrip in lieu of land as aforesaid, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 19, s. 10. 24-25 *V.*, *c.* 98, *s.* 8, *Imp.*

14. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, makes or causes or procures to be made, or aids or assists in making, or knowingly has in his custody or possession, any frame, mould or instrument, having therein any words, letters, figures, marks, lines or devices, peculiar to or appearing in the substance of any paper provided or to be provided and used for any such debentures, exchequer bills or exchequer bonds, Dominion notes or Provincial notes or other securities as aforesaid, or any machinery for working any threads into the substance of any such paper, or any such thread, and intended to imitate such words, letters, figures, marks, lines, threads or devices,—or any plate peculiarly employed for printing such debentures, exchequer bills or exchequer bonds, or such notes or other securities, or any die or seal peculiarly used for preparing any such plate, or for sealing such debentures, exchequer bills or exchequer bonds, notes or other securities, or any plate, die or seal, intended to imitate any such plate, die or seal as aforesaid, is

guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 11. 24-25 *V.*, *c.* 98, *s.* 9, *Imp.*

15. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, makes, or causes, or procures to be made, or aids or assists in making any paper in the substance of which appear any words, letters, figures, marks, lines, threads or other devices peculiar to and appearing in the substance of any paper provided or to be provided or used for such debentures, exchequer bills or exchequer bonds, notes or other securities aforesaid, or any part of such words, letters, figures, marks, lines, threads or other devices, and intended to imitate the same, or knowingly has in his custody or possession any paper whatsoever, in the substance whereof appear any such words, letters, figures, marks, lines, threads or devices as aforesaid, or any parts of such words, letters, figures, marks, lines, threads or other devices, and intended to imitate the same, or causes or assists in causing any such words, letters, figures, marks, lines, threads or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads and other devices, and intended to imitate the same, to appear in the substance of any paper whatsoever, or takes, or assists in taking an impression of any such plate, die or seal, as in the next preceding section mentioned, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 12. 24-25 *V.*, *c.* 98, *s.* 10, *Imp.*

16. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, purchases or receives, or knowingly has in his custody or possession, any paper manufactured and provided by or under the direction of the Government of Canada or of any Province of Canada, for the purpose of being used as such debentures, exchequer bills or exchequer bonds, notes or other securities as aforesaid, before such paper has been duly stamped, signed and issued for public use, or any such plate, die or seal, as in the two sections next preceding mentioned, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 19, *s.* 13. 24-25 *V.*, *c.* 98, *s.* 11, *Imp.*

See, *ante*, sec. 2, as to what constitutes a criminal possession under this act.

Sec. 183 of the Procedure Act applies to trials under these sections.—2 *Russ.* 939.

STAMPS.

17. Every one who forges, counterfeits or imitates, or procures to be forged, counterfeited or imitated any stamp or stamped paper, issued or authorized to be used by any Act of the Parliament of Canada, or of the Legislature of any province of Canada, by means whereof any duty thereby imposed may be paid, or any part or portion of any such stamp,—or knowingly uses, offers, sells or exposes for sale any such forged, counterfeited or imitated stamp,—or engraves, cuts, sinks or makes any plate, die or other thing whereby to make or imitate such stamp or any part or portion thereof, except by permission of an officer or person who, being duly authorized in that behalf by the Government of Canada or of any Province of Canada, may lawfully grant such permission,—or has possession of any such plate, die or thing, without such permission, or, without such permission, uses or has possession of any such plate, die or thing lawfully engraved, cut or made,—or tears off or removes from any instrument, on which a duty is payable, any stamp by which such duty has been wholly or in part paid, or removes from any such stamp any writing or mark indicating that it has been used for or towards the payment of any such duty, is guilty of felony, and liable to twenty-one years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 14. 32-33 *V.*, *c.* 48, *s.* 8, *and* 33-34 *V.*, *c.* 98, *Imp.*

As to what constitutes a criminal possession under this act—see, *ante*, sec. 2.

See sec. 125 of the Procedure Act, as to indictment.

The Post Office Act, c. 35, Rev. Statutes, provides for the forgery of postage stamps, etc.

See *R.* v. *Collicott*, *R. & R.* 212, and *R.* v. *Field*, 1 *Leach*, 383.—And see general remarks on forgery. The words "with intent to defraud" are not necessary in the indictment, since the statute does not contain them.—See *R.* v. *Aspin*, 12 *Cox*, 391.

It was held, in *R.* v. *Ogden*, 6 *C. & P.* 631, under a similar statute, that a fraudulent intent was not necessary, but in a case of *R.* v. *Allday*, 8 *C. & P.* 136, Lord Abinger ruled the contrary: "The act of Parliament, he said, does not say that an intent to deceive or defraud

is essential to constitute this offence, but it is a serious question whether a person doing this thing innocently, and intending to pay the stamp duty, is liable to be transported. I am of opinion, and I hope I shall not be found to be wrong, that to constitute this offence, there must be a guilty mind. It is a maxim older than the law of England, that a man is not guilty unless his mind be guilty."

Lord Abinger, in *R.* v. *Page*, 8 *C. & P.* 122, held, upon the same principle, that giving counterfeit coin in charity, knowing it to be such, is not criminal, though in the statute there are no words with respect to defrauding. But this is overruled, as stated by Baron Alderson in *R.* v. *Ion*, 2 *Den.* 484; and Greaves well remarks *(on R.* v. *Page):* "As every person is taken to intend the probable consequence of his act, and as the probable consequence of giving a piece of bad money to a beggar is that that beggar will pass it to some one else, and thereby defraud that person, *quære*, whether this case rests upon satisfactory grounds? In any case a party *may* not be defrauded by taking base coin, as he *may* pass it again, but still the probability is that he will be defrauded, and that is sufficient."—1 *Russ.* 126, *note Z.*

And are there not cases, where a party, receiving a counterfeit coin or a false note, not only *may* not be defrauded, but will *certainly not* be defrauded. As for example, suppose that during an election any one buys an elector's vote, and pays it with a forged bill,—is the uttering of this bill, with guilty knowledge, not criminal? Yet, the whole bargain is a nullity; the seller has no right to sell; the buyer has no right to buy; if he buys, and does not pay, the seller has no legal or equitable claim against him, though *he* may have fulfilled his part

of the bargain. If the buyer does not pay, he *does not* defraud the seller; he *cannot* defraud him, since he does not owe him anything; it, then, cannot be said that he defrauds him in giving him, in payment, a forged note. Why see in this a fraud, and no fraud in giving a counterfeit note, in charity, to a beggar? Nothing is due to this beggar, and he is not defrauded of anything by receiving this forged bill, nor is this elector, who has sold his vote, defrauded of anything, since nothing was due to him; they are both *deceived* but not *defrauded*. In the general remarks on forgery, *ante*, an opinion was expressed that forgery would be better described as "a false making with the intent to defraud *or deceive*," and such cases as the above seem to demonstrate the necessity of a codification of our criminal laws. And, when the statute makes no mention of the intention, does it not make the act prohibited a crime in itself, apart from the intention? Of course, it is a maxim of our law that "*actus non facit reum nisi mens sit rea*" or, as said in other words, by Starkie, 1 *Cr. Pl.* 177, that, "to render a party criminally responsible, a vicious will must concur with a wrongful act." "But," continues Starkie, "though it be universally true, that a man cannot become a criminal unless his mind be in fault, it is not so general a rule that the guilty intention must be averred upon the face of the indictment." And then, for example, does not the man who forges a stamp, or, *scienter*, utters it, do wilfully an unlawful act? Does not the law say that this act, by itself, is criminal? Has Parliament not the right to say: "The forging, false-making a stamp, or knowingly uttering it, is a felony, by itself, whether the person who does it means wrong, or whether he means right, or whether he means nothing at all?" And this is exactly

what it has said with regard to stamps, the Great Seal, records of the courts of justice, etc. It has said of these: "they shall be sacred, inviolable: you shall not deface them, imitate them, falsify, or alter them in any way or manner whatsoever, and if you do, you will be a felon." And to show that, as regards these documents, the intent to defraud was not to be a material element of the offence, it has expressly, in all the other clauses of the statute, where it *did* require this intent to make the act criminal, inserted the words "with intent to defraud," and left them out in the clause concerning the said stamps, Great Seal, court records, etc. And no one would be prepared to say, that the maxim, "*la fin justifie les moyens*," has found its introduction into the English criminal law; and that, for instance, a clerk of a court of justice is not guilty of a criminal act, if he alters a record, provided that the alteration is done with a *good intent*, and to put the record, as *he* thinks, it ought to be, and should, in fact, be. Is it not better to say that, in such cases, the guilty mind, the evil intent, the *mens rea*, consist in the wilful disobedience to a positive law, in the rebellious infraction of the enactments of the legislative authority?

Against the preceding remarks, it must be noticed that Bishop, 1 *Cr. L.* 345, and 2 *Cr. L.* 607, cites these two cases, *R.* v. *Allday*, and *R.* v. *Page*, and apparently approves of them; but Baron Alderson's remarks on *R.* v. *Page*, in *R.* v. *Ion*, do not appear to have been noticed in Bishop's learned books. At the same time, it may be mentioned that in his 1 Cr. Procedure, after remarking, par. 521, that the adjudged law, on this question, seems to be not quite consistent with the general doctrine, and not quite clear and uniform in itself, this distinguished author says, in a foot note to par. 522: "Now, in this

complication of things, where also practice has run on without decision, and then decision has proceeded without much reference to the principles adhering in the law, it is not suprising that, on this question of alleging the intent, legal results have been reached, not altogether harmonious with one another, and not uniformly correct in principle. Still, as this is a practical question, the practical good sense of the judges has prevented any great inconvenience attending this condition of things."

See remarks by Greaves, on *R.* v. *Hodgson*, under general remarks on forgery, *ante*, and s. 114 Procedure Act.

BANK NOTES.

18. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any note or bill of exchange of any body corporate, company or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange or bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange or bank post bill, is guilty of felony, and liable to imprisonment for life. —32-33 *V., c.* 19, *s.* 15. 24-25 *V., c.* 98, *s.* 12, *Imp.*

Indictment.— ..... feloniously did forge a certain note of the bank of ..... commonly called a bank note, for the payment of ten dollars, with intent thereby then to defraud, against the form .....

(*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged note of the bank of ..... commonly called a bank-note, for the payment of ten dollars with intent thereby then to defraud,—he said J. S. at the time he so offered, uttered, disposed of and put off the said last mentioned forged note as aforesaid, then and there well knowing the same to be forged, against the form .....—*Archbold.*

It is unnecessary to set out the forged instrument: it is sufficient to describe it by any name or designation by which it is usually known, or by its purport.—Sections 130 and 131 of the Procedure Act.

An indictment need not state, in the counts for uttering, to whom the note was disposed of.—*R.* v. *Holden*, *R.* & *R.* 154. The intent to defraud any particular person need not be alleged or proved. Sect. 114 Procedure Act.

Under the counts for uttering, evidence may be given that the defendant offered or tendered the note in payment, or that he actually passed it, or otherwise disposed of it to another person. Where it appeared that the defendant sold a forged note to an agent employed by the bank to procure it from him, the judges held this to be within the act, although it was objected that the prisoner had been solicited to commit the act proved against him, by the bank themselves, by means of their agents.—*R.* v. *Holden*, *ubi supra*. So where A. gave B. a forged note to pass for him, and upon B.'s tendering it in payment of some goods, it was stopped; the majority of the judges held, that A., by giving the note to B., was guilty of disposing of and putting away the note, within the meaning of the act.—*R.* v. *Palmer*, *R.* & *R.* 72; *R.* v. *Soares*, *R.* & *R.* 25; *R.* v. *Stewart*, *R.* & *R.* 363; and *R.* v. *Giles*, 1 *Moo. C. C.* 166, where it was held, that giving a forged note to an innocent agent, or an accomplice, that he may pass it, is a disposing of, and putting it away, within the meaning of the statute.

See general remarks on forgery.

Upon the trial of any indictment for any offence against this section, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 874.

19. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, purchases or receives from any other person, or has in his custody or possession any forged bank note, bank bill of exchange or bank post bill, or blank bank note, blank bank bill of exchange or blank bank post bill, knowing the same to be forged, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 16. 24-25 *V.*, *c.* 98, *s.* 13, *Imp.*

As to what constitutes a criminal possession under this act, see sec. 2.

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that A. B. on ..... feloniously and without lawful authority or excuse, had in his custody and possession five forged bank notes for the payment of ten dollars each, the said A. B. then well knowing the said several bank notes and each and every of them respectively to be forged; against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—*Archbold*, 596; 2 *Burn*, 682.

In *R.* v. *Rowley, R. & R.* 110, it was held, that every uttering included having in custody and possession, and, by some of the judges, that, without actual possession, if the notes had been put in any place under the prisoner's control, and by his direction, it was a sufficient possession within the statute. See now sect. 2, *ante.*

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 182 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 874.

Held, that the alteration of a $2 Dominion note to one of the denomination of $20, such alteration consisting in the addition of a cypher after the figure 2, wherever that figure occurred in the margin of the note, was forgery, and the prisoner was rightly convicted therefor.—*The Queen* v. *Bail*, 7 *O. R.* 228.

See sec. 129, *Procedure Act.*

MAKING PAPER AND ENGRAVING PLATES FOR BANK NOTES, ETC.

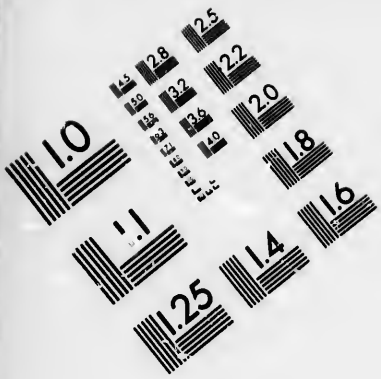
20. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, makes or uses, or knowingly has in his custody or possession any frame, mould or instrument for the making of paper used for Dominion or Provincial notes, or for bank notes, with any words used in such notes, or any part of such words, intended to resemble or pass for the same, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with laying wire lines thereof, in a waving or curved shape, or with any number, sum or amount, expressed in a word or words in letters, visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used for such notes, respectively,—or makes, uses, sells, exposes for sale, utters or disposes of, or knowingly has in his custody or possession any paper whatsoever with any words used in such notes, or any part of such words, intended to resemble and pass for the same visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum or amount expressed in a word or words in letters appearing visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used for any such notes, respectively,—or by any art or contrivance, causes any such words or any part of such words, intended to resemble and pass for the same, or any device or distinction peculiar to and appearing in the substance of the paper used for any such notes, respectively, to appear visible in the substance of any paper, or causes the numerical sum or amount of any such note, in a word or words in letters to appear visible in the substance of the paper, whereon the same is written or printed, is guilty of felony, and liable to fourteen years' imprisonment.—32 33 *V., c.* 19, *s.* 17. 24-25 *V., c.* 98, *s.* 14, *Imp.*

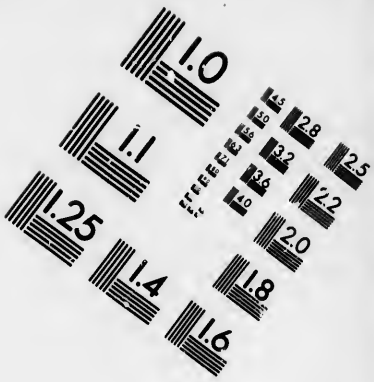
21. Nothing in the next preceding section contained shall prevent any person from issuing any bill of exchange or promissory note, having the amount thereof expressed in a numerical figure or figures denoting the amount thereof in pounds or dollars, appearing visible in the substance of the paper upon which the same is written or printed, or shall prevent any person from making, using or selling any paper having waving or curved lines, or any other devices in the nature of water marks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived

as to form the groundwork or texture of the paper, or to resemble the waving or curved, laying wire lines or bar lines, or the water-marks of the paper used for Dominion notes or Provincial notes or bank notes, as aforesaid.—32-33 *V.*, *c.* 19, *s.* 18. 24-25 *V.*, *c.* 98, *s.* 15, *Imp.*

22. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, engraves or in anywise makes upon any plate whatsoever, or upon any wood, stone or other material, any promissory note or part of a promissory note, purporting to be a Dominion or Provincial note, or bank note, or to be a blank Dominion or Provincial note, or bank note. or to be a part of any Dominion or Provincial note, or bank note, as aforesaid, as any name, word or character resembling, or apparently intended to resemble, any subscription to any such Dominion or Provincial note, or bank note, as aforesaid,—or uses any such plate, wood, stone or other material, or any other instrument or device for the making or printing of any such note, or part of such note,—or knowingly has in his custody or possession any such plate, wood, stone or other material, or any such instrument or device,—or knowingly offers, utters, disposes of or puts off, or has in his custody or possession any paper upon which any blank Dominion or Provincial note, or bank note, or part of any such note, or any name, word or character resembling, or apparently intended to resemble, any such subscription, is made or printed, is guilty of felony and liable to fourteen years' imprisonment.—31 *V.*, *c.* 46, *s.* 14. 32-33 *V.*, *c.* 19, *s.* 19. 24-25 *V.*, *c.* 98, *s.* 16, *Imp.*

23. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, engraves or in anywise makes upon any plate whatsoever, or upon any wood, stone or other material, any word, number, figure, device, character or ornament, the impression taken from which resembles, or is apparently intended to resemble any part of a Dominion or Provincial note, or bank note, or uses or knowingly has in his custody or possession any such plate, wood, stone or other material, or any other instrument or device for the impressing or making upon any paper or any other material, any word, number, figure, character or ornament, which resembles, or is apparently intended to resemble any part of any such note as aforesaid,—or knowingly offers, utters, disposes of or puts off, or has in his custody or possession any paper or other material upon which there is an impression of any such matter as aforesaid, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 20. 24-25 *V.*, *c.* 98, *s.* 17, *Imp.*





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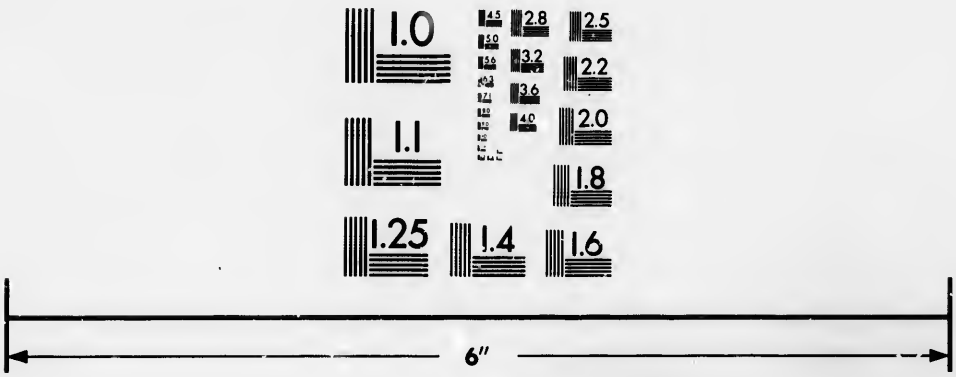

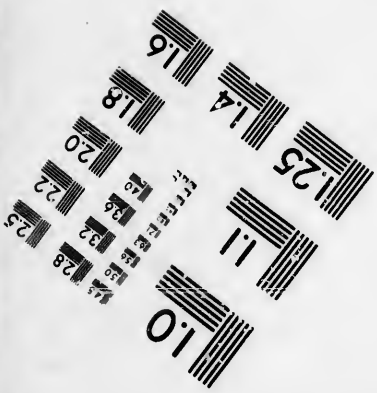

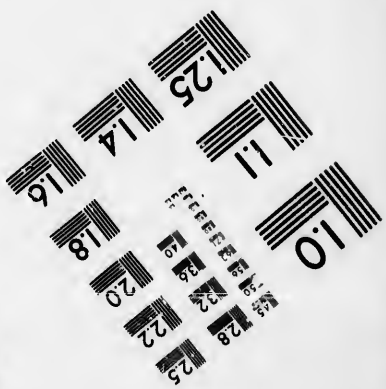

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24. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, makes or uses any frame, mould or instrument for the manufacture of paper, with the name or firm of any bank or body corporate, company or person carrying on the business of bankers, appearing visible in the substance of the paper, or knowingly has in his custody or possession any such frame, mould or instrument,—or makes, uses, sells, or exposes for sale, utters or disposes of, or knowingly has in his custody or possession any paper, in the substance of which the name or firm of any such bank, body corporate, company or person appears visible,—or, by any art or contrivance causes the name or firm of any such bank, body corporate company or other person to appear visible in the substance of the paper upon which the same is written or printed, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 21. 24-25 *V.*, c. 98, *s.* 18, *Imp.*

25. Every one who forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any bill of exchange, promissory note, undertaking or order for payment of money, in whatsoever language or languages the same is expressed, and whether the same is or is not under seal, purporting to be the bill, note, undertaking or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of Her Majesty, and every one who, without lawful authority or excuse, the proof whereof shall lie on him, engraves, or in anywise makes upon any plate whatsoever, or upon any wood, stone or other material, any bill of exchange, promissory note, undertaking or order for payment of money, or any part of any bill of exchange, promissory note, undertaking or order for payment of money, in whatsoever language the same is expressed, and whether the same is or is not, or is or is not intended to be under seal, purporting to be the bill, note, undertaking or order, or part of the bill, note, undertaking or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country not under the Dominion of Her Majesty, or uses or knowingly has in his custody or possession any plate, stone, wood or other material, upon which any such foreign bill, note, undertaking or order, or any part

thereof is engraved or made,--or knowingly offers, utters, disposes of or puts off, or has in his custody or possession any paper upon which any part of any such foreign bill, note, undertaking or order is made or printed, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 22. 24-25 *V.*, *c.* 98, *s.* 19, *Imp.*

The first part of this section is not in the English Act.

As to what is a criminal possession—see, *ante*, sec. 2.

Upon the trial of any indictment for any offence under these sections, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 874.

It was held in *R.* v. *Brackenridge*, 11 *Cox* 96, that it is an offence, under sect. 16 of the Imperial Act (sect. 22 of our act), feloniously, and without lawful excuse, to engrave upon a plate in England a note of a bank in Scotland, or in the colonies; but see 37 *L. J. M. C.* 88.

In *R.* v. *Keith*, *Dears* 486, a decision was given on what is a part of a bank note, but Greaves, *note a*, 2 *Russ.* 874, questions the legality of the decision.

R. v. *Warshaner*, 1 *Moo. C. C.* 466; *R.* v. *Harris*, and *R.* v. *Balls*, 1 *Moo. C. C.* 470, are cases under a clause similar to sect. 25, *ante*, as to foreign bills and notes.

In *R.* v. *Hannon*, 2 *Moo. C. C.* 77, the having, in England, in possession, a plate upon which was engraved a note of the Bank of Upper Canada, was declared to be within the then existing statute.

In *R.* v. *Rinaldi*, *L. and C.* 330, it was held, that the taking of a "positive" impression of a note on glass by means of the photographic process is a "making" of a note within 24-25 V., c. 98., s. 19 (sect. 25, *ante*, of our statute) although the impression so taken is evanescent, and although it cannot be printed or engraved from until it has been converted into a "negative." The report of this case gives at full length a copy of the indictment therein.

If several concur in employing another to make a forged instrument, knowing its nature, they are all guilty of the forgery.—*R.* v. *Mazeau*, 9 *C. and P.* 676.

See secs. 114, 131 and 132 of Procedure Act, as to indictment, and sec. 55 as to search warrants.

DEEDS, WILLS, BILLS OF EXCHANGE, ETC.

26. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any deed or any bond or writing obligatory, or any assignment at law or in equity of any such bound or writing obligatory, or forges any name, handwriting or signature purporting to be the name, handwriting or signature of a witness attesting the execution of any deed, bond or writing obligatory, or offers, utters, disposes of or puts off any deed, bond or writing obligatory, having thereon any such forged name, handwriting or signature, knowing the same to be forged, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 19, *s.* 23. 24-25 *V., c.* 98, *s.* 20, *Imp.*

Indictment ..... a certain bond and writing obligatory feloniously did forge, with intent thereby then to defraud, against the form.....

(2nd Count).....that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off, a certain other forged bond and writing obligatory, with intent thereby then to defraud, he the said J. S. at the time he so offered, uttered, disposed of and put off the said last-mentioned forged bond and writing obligatory as aforesaid, well knowing the same to be forged, against the form .....—*Archbold.*

A power of attorney is a deed within the meaning of 2 Geo. 2, c. 25, and forging a deed is within the statute, though there may have been subsequent directory provisions by statute, that instruments for the purpose of such forged deed shall be in a particular form, or shall comply with certain requisites, and the forged deed is not in that

form, or does not comply with those requisites.—*R.* v. *Lyon, R. & R.* 255. And a power of attorney to transfer government stock was holden to be a deed under the repealed statutes.—*R.* v. *Fauntleroy*, 1 *Moo. C. C.* 52; but the forging of such a power of attorney is now provided for by sect. 8, *ante*.

R. made an equitable deposit of title deeds with G. for £750, and afterwards assigned all his property to B. for the benefit of his creditors. R. and his assignee, B. then, for an additional advance, conveyed to G. the freehold of the property to which the deeds deposited related. After this, the prisoner R. executed a deed of assignment to the other prisoner of a large part of the land so conveyed to G. for a long term of years; but this deed was falsely antedated before the conveyance by R. and B. to G., and upon this deed, the prisoners resisted G.'s title to possession of this part of the land. *Held*, that this deed so antedated for the purpose of defrauding G. amounted to forgery, and that a man may be guilty of forgery by making a false deed in his own name.—*R.* v. *Ritson*, 11 *Cox*, 352.

Letters of orders issued by a bishop, certifying that so and so has been admitted into the holy orders, is not a deed within this section, and a forgery of such letters is not within the statute, but a misdemeanor at common law. —*R.* v. *Morton*, 12 *Cox*, 456.

Upon any indictment, for any offence under this section, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.

27. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 19, *s.* 24. 24-25 *V.*, *c.* 98, *s.* 21, *Imp.*

Indictment.—..... feloniously did forge a certain will and testament purporting to be the last will and testament of one ..... with intent thereby then to defraud, against the form .....

(2nd Count).....did offer, utter .....*(as in the last precedent)*.....—*Archbold*, 575.

The judges were equally divided upon the question whether in the absence of the existence of some person who could have been defrauded by the forged will, a count for forging it with intent to defraud a person or persons unknown could be supported.—*R.* v. *Tylney*, 1 *Den.* 319.

Forgery may be committed by the false making of the will of a living person; or of a non-existing person.—*R.* v. *Murphy*, 2 *East, P. C.* 949; *R.* v. *Sterling*, 1 *Leach*, 99; *R.* v. *Coogan*, 1 *Leach*, 449; *R.* v. *Avery*, 8 *C. & P.* 596. So, though it be signed by the wrong christian name of the person whose will it purports to be.—*R.* v. *Fitzgerald*, 1 *Leach*, 20.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sec. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.

28. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement or assignment of any bill of exchan or any promissory note for the payment of money, or any indorsement on or assignment of any such promissory note, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 19 *s.* 25. 24-25 *V., c.* 98, *s.* 22, *Imp.*

Indictment.— ..... a certain bill of exchange feloniously did forge, with intent thereby then to defraud; against the form .....

(2nd Count)..... did offer, utter ..... *as form under sec.* 23.

If the acceptance be also forged, add counts for it, as follows:

(3rd Count.) ..... that the said J. S. afterwards, to wit, on the day and year last aforesaid, having in his custody and possession a certain other bill of exchange, feloniously did forge on the said last mentioned bill of exchange an acceptance of the said last mentioned bill of exchange, which said forged acceptance is as follows, that is to say: *(set it out verbatim)* with intent thereby then to defraud, against the form .....

(4th Count.) ..... that the said J. S., afterwards, to wit, on the year and day last aforesaid, having in his custody and possession a certain other bill of exchange, on which said last mentioned bill of exchange was then written a certain forged acceptance of the said last mentioned bill of exchange, which said forged acceptance of the said last mentioned bill of exchange is as follows, that is to say: *(set it out verbatim)* he, the said J. S., on the day and year last aforesaid, feloniously did offer, utter, dispose of and put off the said forged acceptance of the said last mentioned bill of exchange, with intent thereby then to defraud, he the said J. S. at the time he so offered, uttered, disposed of and put off the said forged acceptance of the said last mentioned bill of exchange well knowing the said acceptance to be forged, against the form .....

If an indorsement be also forged, add counts for it as follows:

(5th Count.) ..... that the said J. S. afterwards, to wit, on the day and year last aforesaid, having in his custody and possession a certain other bill of exchange, feloniously did forge on the back of the said last mentioned bill of exchange, a certain indorsement of the said bill of exchange, which said forged indorsement is as

follows, that is to say: *(set it out verbatim)* with intent thereby then to defraud, against the form .....

(6th Count) ..... that the said J. S. afterwards, to wit, on the day and year last aforesaid, having in his custody and possession a certain other bill of exchange, on the back of which said last mentioned bill of exchange was then written a certain forged indorsement of the said last mentioned bill of exchange, which said last mentioned forged indorsement is as follows, that is to say: *(set it out verbatim)* he, the said J. S. on the day and year last aforesaid, feloniously did offer, utter, dispose of, and put off the said last mentioned forged indorsement of the said last mentioned bill of exchange, with intent thereby then to defraud,—he, the said J. S. at the time he so offered, uttered, disposed of and put off the said last mentioned forged indorsement of the said last mentioned bill of exchange, well knowing the said indorsement to be forged, against the form.....

From the above precedent, an indictment may readily be framed for forging and uttering a promissory note, merely substituting for the words "bill of exchange" the words "promissory note for the payment of money" and omitting, of course, the counts as to the acceptance.—*Archbold.*

A bill payable ten days after sight, purporting to have been drawn upon the Commissioners of the Navy, by a lieutenant, for the amount of certain pay due to him, has been holden to be a bill of exchange.—*R.* v. *Chisholm, R. & R.* 297. So a note promising to pay A. & B., "stewardesses" of a certain benefit society, or their "successors," a certain sum of money on demand, has been holden to be a promissory note within the meaning of the Act. It is not necessary that the note should be negotiable.—*R.* v. *Box, R. & R.* 300. An instrument drawn by A. on B., requiring him to

pay to the administrators of C a certain sum, at a certain time "without acceptance," is a bill of exchange.—*R.* v. *Kinnear*, 2 *M. & Rob.* 117. So, though there be no person named as drawee, the defendant may be indicted for uttering a forged acceptance on a bill of exchange.—*R.* v. *Hawkes*, 2 *Moo. C. C.* 60. For the act of putting the acceptance is a sort of estoppel to say it was not a bill of exchange, but, without acceptance, this instrument is not a bill of exchange.—*R.* v. *Curry*, 2 *Moo. C. C.* 218.

In *R.* v. *Mopsey*, 11 *Cox*, 143, the acceptance to what purported to be a bill of exchange was forged, but at the time it was so forged the document had not been signed by the drawer, and it was held that, in consequence, the document was not a bill of exchange. And a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to his own order, and purporting to be indorsed by the drawer, and accepted by the drawer, cannot, in an indictment for forgery or uttering, be treated as a bill of exchange.—*R.* v. *Bartlett*, 2 *M. & Rob.* 362. But an instrument payable to the order of A, and directed "*At* Messrs. P. & Co., bankers," was held to be properly described as a bill of exchange.—*R.* v. *Smith*, 2 *Moo. C. C.* 295. It is necessary that the promissory note should be *for the payment of money* only to be within the statute. In *R.* v. *Howie*, 11 *Cox*, 320, the prisoner had forged a seaman's advance note. He was indicted for forging or uttering a certain promissory note or order for the payment of money. *Held*, that a seaman's advance note was not a promissory note or order for the payment of money, and that the indictment was therefore bad as the advance note was conditional, and there must be no condition in a promissory note or order for payment of money. The adding of a false address to the name of the drawee

of a bill, while the bill is in the course of completion, in order to make the acceptance appear to be that of a different existing person, is a forgery.—*R.* v. *Blenkinsop*, 1 *Den.* 276. See *R.* v. *Mitchell*, 1 *Den.* 282 A nurseryman and seedsman got his foreman to accept two bills, the acceptance having no addition, description or address, and afterwards, without the acceptor's knowledge, he added to the direction a false address, but no description, and represented in one case that the acceptance was that of a customer, and in the other case that it was that of a seedsman, there being in fact no such person at the supposed false address: *Held*, that in the one case, the former, he was not guilty of forgery of the acceptance, but that, in the other case, he was.—*R.* v. *Epps*, 4 *F. & F.* 81. A bill of exchange was made payable to A, B, C, D, or other executrixes. The indictment charged that the prisoner forged on the back of the bill a certain forged indorsement, which indorsement was as follows (naming one of the executrixes); *Held*, a forged indorsement, and indictment sufficient.—*R.* v. *Winterbottom*, 1 *Den.* 41. Putting off a bill of exchange of A, an existing person, as the bill of exchange of A, a fictitious person, is a felonious uttering of the bill of a fictitious drawer.—*R.* v. *Nisbett*, 6 *Cox*, 320. If there are two persons of the same name, but of different discriptions or additions, and one signs his name with the description or addition of the other for the purpose of fraud, it is forgery.—*R.* v. *Webb, cited in Bayley on Bills*, 432.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.

There can be no conviction for forgery of an indorse-

ment of a bill of exchange under the above section, if the bill of exchange itself is not a complete instrument as such.—*R.* v. *Harper*, 14 *Cox*, 574.

W. a bailiff had an execution against prisoner and H. M. and to settle same it was arranged to give a note made by A. M. and indorsed by A. D. M. A note was drawn up payable to the order of A. D. M., and prisoner took it away and brought it back with the name A. D. M. indorsed. It was then signed by A. M. and given to the bailiff. The indorsement was a forgery, and prisoner was indicted for forging an indorsement on a promissory not, and convicted. *Held*, following *R.* v. *Butterwick*, 2 *M. & Rob.* 196; *R.* v. *Mopsey*, 11 *Cox*, 143; and *R.* v. *Hunter*, 7 *Q. B. D.* 78, that the conviction could not be sustained on the indictment as framed as the instrument, for want of the maker's name at the time of the forgery, was not a promissory note; nor could it stand on the count for uttering as after it was signed it was never in prisoner's possession.—*R.* v. *McFee*, 13 *O. R.* 8.

An indictment for forgery of a promissory note must allege that the promissory note was for the payment of money.—*Kelly* v. *R.*, 3 *Stephens' Dig. (Quebec,)* 222.

29. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any undertaking, warrant, order, authority or request for the payment of money or for the delivery or transfer of any goods or chattels, or of any note, bill or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority or request, or any accountable receipt, acquittance or receipt for money or for goods, or for any note, bill or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, or *any account, book or thing, written or printed, or otherwise made capable of being read,* is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 19, *s.* 26. 24-25 *V., c.* 98, *s.* 23, *Imp.*

The words in *italics* are not in the English Act; they constitute an important extension of the clause.

Greaves says: "This clause is new as far as it relates to any authority or request for the payment of money, or to any authority for the delivery or transfer of any goods, etc., or to any indorsement on or assignment of any such undertaking, warrant, order, authority, request or accountable receipt, as is mentioned in the clause.—*R.* v. *Arscott*, 6 *C. & P.* 408, is therefore no authority on this clause. The words 'authority, or request for the payment of money' are introduced to get rid of the question so commonly arising in cases of this kind, whether the forged instrument were either a warrant or order for the payment of money. Requests for the payment of money were not within these words."—*R.* v. *Thorn, C. & M.* 206; 2 *Moo. C. C.* 210.

It would be a waste of space, and of no practical use to refer to the cases that have occurred on these points; for, whenever there is any doubt as to the legal character of the instrument, different counts should be inserted describing it in each by one only of the terms *warrant, order, authority or request.* A forged indorsement on a warrant or order for the payment of money was not within the former enactments.—*R.* v. *Arscott*, 6 *C. & P.* 408. But this clause includes that and other forged indorsements.

Indictment.—..... feloniously did forge a certain warrant for the payment of money, with intent thereby then to defraud, against the form.....

(2nd Count.) ... . feloniously did offer, utter..... *(as, ante, form under sect.* 23.) *Add separate counts, as suggested by Greaves, supra.* See *R.* v. *Kay*, 11 *Cox*, 529, under next section. In *R.* v. *Goodwin*, March, 1876, *Q. B.*, Montreal, the above form was held good, on motion in arrest of judgment.

A draft upon a banker, although it be post-dated, is a warrant and order for the payment of money.—*R.* v. *Taylor*, 1 *C. & K.* 213; *R.* v. *Willoughby*, 2 *East, P. C.* 944. So is, even, a bill of exchange.—*R.* v. *Sheppard*, 1 *Leach*, 226; *R.* v. *Smith*, 1 *Den.* 79. An order need not specify any particular sum to fall under the statute.—*R.* v. *McIntosh*, 2 *East, P. C.* 942. A writing in the form of a bill of exchange, but without any drawee's name, cannot be charged as an order for the payment of money; at least, unless shown by averments to be such.—*R.* v. *Curry*, 2 *Moo. C. C.* 218. In *R.* v. *Howie*, 11 *Cox*, 320, it was held that a seaman's advance note was not an order for payment of money. It would seem, however, to be an *undertaking* for the payment of money within the statute.—*R.* v. *Bamfield*, 1 *Moo. C.C.* 416; *R.* v. *Anderson*, 2 *M. & Rob.* 469; *R.* v. *Reed*, 2 *Moo. C. C.* 62; *R.* v. *Joyce*, *L. & C.* 576. The statute applies as well to a written promise for the payment of money by a third person, as by the supposed party to the instrument.—*R.* v. *Stone*, 1 *Den.* 181. An instrument, professing to be a scrip certificate of a railway company, is not an undertaking within the statute.—*R.* v. *West*, 1 *Den.* 258. But perhaps the words *in italics* in the present section would cover this case.

In *R.* v. *Rogers*, 9 *C. & P.* 41, it was held, that a warrant for the payment of money need not be addressed to any particular person. See *R.* v. *Snelling*, *Dears.* 219.

As to what is a warrant or order for the delivery of goods, the following cases may be cited:—A pawnbroker's ticket is a warrant for the delivery of goods.—*R.* v. *Morrison*, *Bell, C. C.* 158. At the London docks, a person bringing a "tasting order" from a merchant having wine there, is not allowed to taste until the order

has across it the signature of a clerk of the company; the defendant uttered a tasting order with the merchant's name forged to it, by presenting it to the company's clerk for his signature across it, which the clerk refused; it was held to be, in this state, a forged order for the delivery of goods within the statute.—*R.* v. *Illidge*, 1 *Den.* 404. A request for the delivery of goods need not be addressed to any one.—*R.* v. *Carney*, 1 *Moo. C. C.* 351; *R.* v. *Cullen*, 1 *Moo. C. C.* 300; *R.* v. *Pulbroke*, 9 *C. & P.* 37. Nor need it be signed by a person who can compel a performance of it, or who has any authority over or interest in the goods.—*R.* v. *Thomas*, 2 *Moo. C. C.* 16; *R.* v. *Thorn*, 2 *Moo. C. C.* 210. Formerly, if upon an indictment for the misdemeanor of obtaining goods under false pretences, a felonious forgery were proved, the judge had to direct an acquittal.—*R.* v. *Evans*, 5 *C. & P.* 553; but now, see sect. 184 of the Procedure Act.

As to what is a receipt, under this section.—As remarked by Greaves, *supra*, the additions in the present clause render many of the cases on the subject of no practical importance. A turnpike toll-gate ticket is a receipt for money within this section.—*R.* v. *Fitch*, *R.* v. *Howley*, *L. & C.* 159. If a person, with intent to defraud, and to cause it to be supposed contrary to the fact, that he has paid a certain sum into a bank, make in a book, purporting to be a pass-book of the bank, a false entry, which denotes that the bank has received the sum, he is guilty of forging an accountable receipt for money.—*R.* v. *Moody*, *L. & C.* 173; *R.* v. *Smith*, *L. & C.* 168. A document called a "clearance" issued to members of the Ancient Order of Foresters' Friendly Society, certified that the member had paid all his dues and demands, and authorized any Court of the Order to accept the bearer as

a clearance member: *Held*, that this was not a receipt for money under this section.—*R.* v. *French*, 11 *Cox*, 472. An ordinary railway ticket is not an acquittance, or receipt, within this section, *R.* v. *Gooden*, 11 *Cox*, 672; but now, by sect. 33, *post*, forging a railway ticket is a felony. The prisoner being pressed by a creditor for the payment of £35 obtained further time by giving an I. O. U. for £35 signed by himself, and also purporting to be signed by W. W's name was a forgery; *held*, that the instrument was a security for the payment of money by W., and that the forgery of his name was a felony within this section.—*R.* v. *Chambers*, 12 *Cox*, 109.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.

An indictment for forging a receipt under this section must allege a receipt either for money or for goods.—*R.* v. *McCorkill*, 8 *L. C. J.* 283. But the intent to defraud any particular person need not be alleged.—*R.* v. *Hathaway*, 8 *L. C. J.* 235.

The evidence of the uttering of a forged *indorsement* of a negotiable check or order is insufficient to sustain a conviction for uttering *a forged order* or check, under sec. 29 of the Forgery Act.—*R.* v. *Cunningham, Cassel's Dig.* 107.

The prisoner was indicted for forging a request for the payment of money, the said request consisting in a forged telegram upon which he obtained $85. Held, a forgery as charged.—*R.* v. *Stewart*, 25 *U. C. C. P.* 440.

30. Every one who with intent to defraud draws, makes, signs, accepts or indorses any bill of exchange or promissory note, or any

undertaking, warrant, order, authority or request for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or offers, utters, disposes of or puts off any such bill, note, undertaking, warrant, order, authority or request, so drawn, made, signed, accepted or indorsed, by procuration or otherwise, without lawful authority or excuse, knowing the same to have been so drawn, made, signed, accepted or indorsed, as aforesaid, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 19, *s.* 27. 23-24 *V., c.* 98, *s.* 24, *Imp.*

Greaves says: "This clause is new, and was framed in order to make persons punishable, who, without authority, make, accept, or indorse bills or notes "per procuration," which was not forgery under the former enactments.—*Maddock's* case, 2 *Russ.* 947; *R.* v. *White*, 1 *Den.* 208."

Indictment, as under sect. 28. See general remarks on forgery.

A deposited with a building society £460, for two years, at interest, through the prisoner, who was an agent of the society. Having obtained the deposit note from A., who gave it up on receiving an accountable receipt for £500, being made up by the £460, and interest, the prisoner wrote, without authority, the following document: "Received of the S. L. Building Society the sum of £417 13s. 0d., on account of my share, No. 8071, *pp.*, Susey Ambler,—William Kay," and obtained £417 13s. 0d., by means thereof and giving up the deposit note. The jury having found that, by the custom of the society, such documents were treated as an "authority to pay," and as "a warrant to pay," and as "request to pay" money, the prisoner was convicted under 24-25 V., c. 98, s. 24 (sect. 30, *ante*, of our statute): *held*, that the conviction was right.—*R.* v. *Kay*, 11 *Cox*, 529.

Upon the trial of any indictment for any offence under

this section, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.

31. Whenever any cheque or draft on any banker is crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, every one who, with intent to defraud, obliterates, adds to or alters any such crossing, or offers, utters, disposes of or puts off any cheque or draft whereon any such obliteration, addition or alteration has been made, knowing the same to have been made, is guilty of felony, and liable to imprisonment life.—32-33 *V.*, *c.* 19, *s.* 28. 24-25 *V.*, *c.* 98, *s.* 25, *Imp.*

32. Every one who forges or fraudulently alters, or offers, utters, disposes of or puts off, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within Her Majesty's dominions or elsewhere, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 29. 24-25 *V.*, *c.* 98, *s.* 26, *Imp.*

On Sec. 31, Greave's says: "This clause is so framed as to meet the case of a draft in either issue with a crossing on it, or crossed after it was issued."

Under Sec. 32, no intent to defraud is necessary in the indictment.

PASSENGER TICKETS.

33. Every one who, with intent to defraud, forges, offers or utters disposes of or puts off, knowing the same to be forged, any ticket or order for a free or paid passage on any railway or any steam or other vessel, is guilty of felony, and liable to three years' imprisonment. —32-33 *V.*, *c.* 19, *s.* 32.

This clause is the 14th of c. 94, C. S. C. It will meet such cases as *R.* v. *Gooden*, 11 *Cox*, 672.

RECORDS, PROCESS, INSTRUMENTS OF EVIDENCE, ETC.

34. Every one who forges or fraudulently alters or offers, utters, disposes of or puts off, knowing the same to be forged, or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, *cognovit*

actionem, warrant of attorney, bill, petition, process, notice, rule, answer, pleading, interrogatory, report, order or decree, or any original document whatsoever of or belonging to any court of justice, or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any such court, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19 *s.* 33. 24-25 *V.*, *c.* 98, *s.* 27, *Imp.*

35. Every one who, being the clerk of any court or other officer, having the custody of the records of any court, or being the deputy of any such clerk or officer, utters any false copy or certificate of any record, knowing the same to be false; and every one, other than such clerk, officer or deputy, who signs or certifies any copy or certificate of any record as such clerk, officer or deputy, and every one who forges or fraudulently alters or offers, utters, disposes of or puts off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record, or offers, utters, disposes of or puts off any copy or certificate of any record having thereon any false or forged name, handwriting or signature, knowing the same to be false or forged and every one who forges the seal of any court of record, or forges or fraudulently alters any process of any court whatsoever, or serves or enforces any forged process of any court whatseover, knowing the same to be forged, or delivers or causes to be delivered to any person any paper, falsely purporting to be any such process or a copy thereof, or to be any judgment, decree or order of any court whatsoever, or a copy thereof, knowing the same to be false, or acts or prefesses to act under any such false process, knowing the same to be false, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 34. *C. S. U. C.*, *c.* 16, *s.* 16, *part.* 24-25 *V.*, *c.* 98, *s.* 28, *Imp.*

36. Every one who forges or fraudulently alters, or offers, utters, disposes of, puts off, tenders in evidence, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is made evidence by any Act of the Parliament of Canada or of the Legislature of any Province of Canada, and for which offence no other punishment is in this Act provided, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 35. 39 *V.*, *c.* 26, *s.* 14. *C. S. C.*, *c.* 80, *s.* 7, *part.* 24-25 *V.*, *c.* 98, *s.* 29, *Imp.*

37. Every one who,—

(*a*) Prints any proclamation, order, regulation or appointment, or notice thereof, and causes the same falsely to purport to have been printed by the Queen's Printer for Canada, or the Government Printer

for any Province of Canada, as the case may be, or tenders in evidence any copy of any proclamation, order, regulation or appointment, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or

(*b.*) Forges, or tenders in evidence, knowing the same to be forged, any certificate authorized to be made or given by any Act of the Parliament of Canada, or of the Legislature of any Province of Canada, for the purpose of certifying or verifying any copy or extract of any proclamation, order, regulation, appointment, paper, document or writing, of which a certified copy may lawfully be offered as *primâ facie* evidence.

Is guilty of felony, and liable to seven years' imprisonment.—44 *V., c.* 28, *s.* 4. 31-32 *V., c.* 37, *s.* 4, *Imp.*

In *R.* v. *Powner*, 12 *Cox* 235, it was held by Quain, J., that an indictment for forgery under sect. 28 of the English Act (sect. 35 of our Act, *suprâ)* must allege an intent to defraud; but that this averment was unnecessary in a count for *fraudulently* altering under the same section.—The "process" alleged to have been altered in that case was an order by two justices of the peace, under the poor laws, and was held to fall under the aforesaid section.

Upon the trial of any indictment for any offence under these sections, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 857.

NOTARIAL ACTS, REGISTERS OF DEEDS, ETC.

38. Every one who forges or fraudulently alters, or offers, utters, disposes of or puts off, knowing the same to be forged or fraudulently altered, *any notarial act or instrument or copy, purporting to be an authenticated copy thereof or any proces verbal of a surveyor, or like copy thereof, or forges or* fraudulently alters, or offers or utters, disposes of or puts off, knowing the same to be forged or fraudulently altered, *any duplicate of any instrument*, or any memorial, affidavit, affirmation, entry, certificate, indorsement, document or writing, made or issued under the provisions of any Act of the Parliament of Canada, or of the Legislature of any Province of Canada, for or relat-

ing to the registry of deeds *or other instruments or documents respecting or concerning the title to or claims upon any real or personal property whatsoever,* or forges, or counterfeits the seal of or belonging to any office for the registry of deeds or other instruments as aforesaid, or any stamp or impression of any such seal, or forges any name, handwriting or signature, purporting to be the name, handwriting or signature of any person to any such memorial, affidavit, affirmation, entry, certificate, indorsement, document or writing required or directed to be signed by or by virtue of any such Act, or offers, utters, disposes of or puts off any such memorial or other writing as in this section mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting or signature, knowing the same to be forged, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 19, *s.* 37. 24-25 *V., c.* 98, *s.* 31, *Imp.*

The words in *italics* are not in the Imperial Act. Sec. 183 of the Procedure Act applies.—2 *Russ.* 939.

ORDERS OF JUSTICES OF THE PEACE.

39. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any summons, conviction, order or warrant, of any justice of the peace, or any recognizance purporting to have been entered into before any justice of the peace, or other officer authorized to take the same, or any examination, deposition, affidavit, affirmation or solemn declaration, taken or made before any justice of the peace, is guilty of felony, and liable to three years' imprisonment.—32-33 *V., c.* 19, *s.* 38. 24-25 *V., c.* 98, *s.* 32, *Imp.*

R. v. *Powner*, 12 *Cox*, 235, is not very clear as to what is the difference between a "process" of a court under sections 34 and 35, and an "order" under the present section. The forgery of an affidavit taken before a Commissioner would not fall under this section.

40. Every one who, with intent to defraud, forges or alters any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing made or purporting or appearing to be made by any judge, commissioner, clerk or other officer of any court in Canada, or the name, handwriting or signature of any

such judge, commissioner, clerk, or other officer, as aforesaid, or offers, utters, disposes of or puts off any such certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing, knowing the same to be forged or altered, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 39. *C. S. U. C.*, *c.* 16, *s.* 16, *part.* 24-25 *V.*, *c.* 98, *s.* 33, *Imp.*

See general remarks on forgery.

41. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, in the name of any other person, acknowledges any recognizance of bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any court, judge, *notary*, or other person lawfully authorized in that behalf, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 40. 24-25 *V.*, *c.* 98, *s.* 34, *Imp.*

Indictment.— ..... on ..... feloniously did, without lawful authority or excuse, before ..... (the said ..... then being lawfully authorized in that behalf) acknowledge a certain recognizance of bail in the name of J. N. in a certain cause then pending in the said court *(or in the court of .....)* wherein A. B. was plaintiff, and C. D. defendant, against the form ..... —*Archbold*, 615; 2 *Russ.* 1016.

Upon the trial of any indictment, for any offence under this section, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.

MARRIAGE LICENSES.

42. Every one who forges or frudulently alters any license or certificate for marriage, or offers, utters, disposes of or puts off any such license or certificate, knowing the same to be forged or fraudulently altered, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 19, *s.* 41. 24-25 *V.*, *c.* 98, *s.* 35, *Imp.*

REGISTERS OF BIRTHS, MARRIAGES AND DEATHS.

43. Every one who unlawfully destroys, defaces or injures, or causes or permits to be destroyed, defaced or injured, any register of

births, baptisms, marriages, deaths or burials, authorized or required to be kept in Canada, or in any Province of Canada, or any part of any such register, or any certified copy of any such register, or of any part thereof, or forges or fraudulently alters in any such register any entry relating to any birth, baptism, marriage, death or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or knowingly and unlawfully inserts, or causes or permits to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death or burial, or knowingly and unlawfully gives any false certificate relating to any birth, baptism, marriage, death or burial, or certifies any writing to be a copy or extract from any such register, knowing such writing, or the part of such register whereof such copy or extract is so given, to be false in any material particular, or forges or counterfeits the seal of or belonging to any registry office or burial board, or offers, utters, disposes of or puts off any such register, entry, certified copy, certificate or seal, knowing the same to be false, forged or altered, or offers, utters, disposes of, or puts off any copy or any entry in any such register, knowing such entry to be false, forged or altered, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 19, *s.* 42. 24-25 *V., c.* 98, *s.* 36, *Imp.*

44. Every one who, knowingly and wilfully, inserts or causes, or permits to be inserted, in any copy of any register directed or required by law to be transmitted to any registrar or other officer, any false entry of any matter relating to any baptism, marriage or burial, or forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or knowingly or wilfully signs or verifies any copy of any register so directed or required to be transmitted as aforesaid, which copy is false in any part thereof, knowing the same to be false, or unlawfully destroys, defaces or injures, or for any fraudulent purpose, takes from its place of deposit, or conceals any such copy of any register, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 19, *s.* 43. 24-25 *V., c.* 98, *s.* 37, *Imp.*

Indictment under sect. 43 *for making a false entry in a marriage register.*—..... feloniously, knowingly and unlawfully did insert in a certain register of marriages, which was then by law authorized to be kept, a certain false entry of a matter relating to a supposed marriage, and

which said false entry is as follows: that is to say *(set it out verbatim with inuendoes if necessary to explain it;)* whereas in truth and in fact the said A. B. was not married to the said C. D., at the said church, on the said ..... day of ..... as in the said entry is falsely alleged and stated; and whereas, in truth and in fact, the said A. B. was not married to the said C. D. at the said church or elsewhere, at the time in the said entry mentioned, or at any other time whatsoever, against the form .....

(2nd Count.)..... feloniously did. knowingly and wilfully, offer, utter, dispose of and put off a copy of a certain other false entry relating to a certain supposed marriage, which said last mentioned false entry was before then inserted in a certain register of marriages, by law authorized to be kept, and which said last mentioned false entry is as follows: that is to say *(set it out)* whereas in truth and in fact ..... *(as above)*. And the jurors aforesaid, upon their oath aforesaid, do say that the said J. S. at the time he so offered, uttered, disposed of and put off the said copy of the said last mentioned false entry well knew the said last mentioned false entry to be false against the form..... —*Archbold. See R.* v. *Sharpe*, 8 *C. & P.* 436.

In *R.* v *Bowen*, 1 *Den.* 22, the indictment was under what is now the first part of sect. 43, and charged that..... "John Bowen ..... feloniously and *wilfuly (wilfully* must now be *unlawfully)* did destroy, deface and injure a certain register of ..... to wit, the register of ..... which said register was then and there kept *(and by law authorized to be kept)* as the register of the parish of..... and was then and there in the custody of ..... rector of the said parish of ..... against the form ..... It was objected that the indictment was bad for charging three offences, *destroying, defacing* "and" *injuring*, the

statute saying, *destroying, defacing* "or" *injuring.* A second objection was taken that no scienter was charged, and that the word "knowingly" was not in the indictment. The indictment was held good.

In *R.* v. *Asplin*, 12 *Cox* 391, it was held by Martin, B., that upon an indictment under sect. 36 (sect. 43 of our Act,) for making a false entry into a marriage register, it is not necessary that the entry should be made with intent to defraud, and that it is no defence that the marriage solemnized was null and void, being bigamous; also that, if a person knowing his name to be A., signs another name without authority, he is guilty, and it is immaterial that he is a third witness, the Marriage Act only requiring two.

Upon the trial of any indictment for any offence under these sections, the jury may, if the evidence warrants it, under sect. 183 of the Procedure Act, convict the prisoner of an attempt to commit the same.—2 *Russ.* 939.

DEMANDING PROPERTY UPON FORGED INSTRUMENTS.

45. Every one who, intent to defraud, demands, receives or obtains, or causes or procures to be delivered or pay to any person, or endeavors to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money or other property whatsoever, under, upon or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration were obtained, to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation or affidavit, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 19, *s.* 44. 24-25 *V., c.* 98, *s.* 38, *Imp.*

Greaves says: "This clause is new. It is intended to embrace every case of demanding, etc., any property whatsoever upon forged instruments; and it is intended to

include bringing an action on any forged bill of exchange, note, or other security for money. The words 'procure to be delivered or paid to any person were inserted to include cases where one person' by means of a forged instrument causes money to be paid to another person, and to avoid the difficulty which had arisen in the cases as to obtaining money by false pretences.—*R.* v. *Wavell*, 1 *Moo. C. C.* 224; *R.* v. *Garrett*, *Dears.* 232."

In *R.* v. *Adams*, 1 *Den.* 38, the prisoner had obtained goods at a store with a forged order; this was held not to be larceny; it would now fall under this clause.

The clause seems to cover the attempt to commit the offence, as well as the offence itself, and if, under sec. 183 of the Procedure Act, a verdict of guilty of the attempt to commit the offence could be given by the jury, the prisoner would stand convicted of a felony, and punishable under this clause, though see *R.* v. *Connell*, 6 *Cox*, 178.

CASES NOT OTHERWISE PROVIDED FOR.

46. Every one who, for any purpose of fraud or deceit, forges or fraudulently alters any document or thing written, printed or otherwise made capable of being read, or offers, utters, disposes of or puts off any such forged or altered document or thing, knowing the same to be forged or altered, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 19, *s.* 45, *part.*

See remarks under sec. 3, *ante.*

47. If by this or any other Act any person is liable to punishment for forging or altering, or for offering, uttering, disposing of or putting off, knowing the same to be forged or altered, any instrument or writing designated in such Act by any special name or description, and such instrument or writing, however designated, is in law a will, testament, codicil or testamentary writing, or a deed, bond or writing obligatory, or a bill of exchange, or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority or

request for the payment of money, or an indorsement on or assignment of an undertaking, warrant, order, authority or request for the payment of money, within the true intent and meaning of this Act, every one who forges or alters such instrument or writing, or offers, utters, disposes of or puts off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this Act, and punished accordingly.—32-33 *V.*, *c.* 19, *s.* 46. 24-25 *V.*, *c.* 98, *s* 39, *Imp.*

48. Every one who, in Canada, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any writing or matter of which the forging or altering, or the offering, uttering, disposing of or putting off, knowing the same to be forged or altered, is, in this Act, expressed to be an offence, in whatsoever country or place out of Canada, whether under the dominion of Her Majesty or not, such writing or matter purports to be made or has been made, and in whatsoever language the same or any part thereof is expressed, and every one who aids, abets or counsels the commission of any such offence, shall be deemed to be an offender within the meaning of this Act, and shall be punishable in the same manner as if the writing or matter purported to be made or was made in Canada.—32-33 *V.*, *c.* 19, *s.* 47, *part.* 24 25 *V.*, *c.* 98, *s.* 40, *Imp.*

49. Every one who, in Canada, forges or alters or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, authority or request for the payment of money, or for the delivery or transfer of any goods or security, or any deed, bond or writing obligatory for the payment of money (whether such deed, bond or writing obligatory is made only for the payment of money, or for the payment of money together with some other purpose), or any indorsement on or assignment of any such undertaking, warrant order, authority, request, deed, bond or writing obligatory, in whatsoever place or country out of Canada, whether under the dominion of Her Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, authority, request, deed, bond or writing obligatory is or purports to be payable, and in whatsoever language the same respectively or any part thereof is expressed, and whether such bill, note, undertaking, warrant, order, authority or request is or is not under seal, and every one who aids, abets or counsels the commission

of any such offence, shall be deemed to be an offender within the meaning of this Act, and shall be punishable in the same manner as if the money purported to be payable or was payable in Canada.—32-33 *V., c.* 19, *s.* 47, *part.* 24-25 *V., c.* 98, *s.* 40, *Imp.*

In *R.* v. *Lee*, 2 *M. & Rob.* 281, it was held that in an indictment under this last section for uttering a forged foreign bill or note, the bill or note need not be alleged to be payable out of England. Sec. 47 was at first enacted in England as 11 Geo. 4 and 1. Will 4. See 2 *Bishop*, 2 *Cr. Proc.* 446, as to this section.

Prisoner was indicted along with W. The first count charged W. with forging a circular note of the National Bank of Scotland, and the second with uttering it, knowing it to have been forged. Prisoner was charged as an accessory before the fact. Evidence was admitted showing that two persons, named F. and H., been tried and convicted in Montreal for uttering similar forged circular notes, printed from the same plate as those uttered by W.; that prisoner was in Montreal with F., they having arrived and registered their names together at the same hotel and occupied adjoining rooms; that after H. and F. had been convicted on one charge they admitted their guilt on several others: and that a number of these circular notes were found on F. and H., which were produced at the trial of the prisoner. Before the evidence was tendered it was proved that the prisoner was in company with W., who was proved to have uttered similar notes. Evidence was also admitted, showing that a large number of the notes were found concealed at a place near where the prisoner had been seen, and were concealed, as alleged, by him after W. had been arrested. *Held*, that the evidence was properly received in proof of the guilty knowledge of the prisoner.—*The Queen* v. *Bent*, 10 *O. R.* 559.

50. Whenever, by any Act, any person falsely making, forging, counterfeiting, erasing or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting off or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased or altered, or any person demanding or endeavoring to receive or have anything, or to do or to cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered,—or whenever, by any such Act, any person falsely personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real person to be such real person, or wilfully making a false entry in any book, account or document, or in any manner wilfully falsifying any part of any book, account or document, or wilfully making a transfer of any stock, annuity or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate was obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation,—or whenever, by any such Act, any person making or using, or knowingly having in his custody or possession any frame, mould or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such Act, be guilty of felony, and be liable to any greater punishment than is provided by this Act,—if any person is convicted of any such felony as is in this section mentioned, or of aiding, abetting, counselling or procuring the commission thereof, and the same is not punishable under any of the other provisions of this Act, every such person shall be liable to imprisonment for life.—32-33 *V.*, *c.* 19, *s.* 56. 24-25 *V.*, *c.* 98, *s.* 48, *Imp.*

CHAPTER 167.

AN ACT RESPECTING OFFENCES RELATING TO THE COIN.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. In this Act, unless the context otherwise requires,—

(*a*) The expression "current gold or silver coin" includes any gold or silver coined in any of Her Majesty's mints, or gold or silver coin of any foreign prince or state, or country, or other coin lawfully current, by virtue of any proclamation or otherwise, in Canada, or in any other part of Her Majesty's dominions ;

(*b.*) The expression "current copper coin" includes any copper coin and any coin of bronze or mixed metal coined in any of Her Majesty's mints or lawfully current, by virtue of any proclamation or otherwise, in Canada, or any other part of Her Majesty's dominions ;

(*c.*) The expression "copper or brass coin" includes coins and tokens of bronze, or of any other mixed metal, or other than gold or silver ;

(*d.*) The expression "false or counterfeit coin, resembling or apparently intended to resemble or pass for current gold or silver coin," or other similar expression, includes any of the current coin which has been gilt, silvered, washed, colored or cased over, or in any manner altered so as to resemble or be apparently intended to resemble or pass for any of the current coin of a higher denomination ;

(*e.*) The expression "current coin" includes any coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in Canada, or any other part of Her Majesty's dominions ; and whether made of gold, silver, copper, bronze or mixed metal.—31 *V.*, *c.* 47, *s.* 10. 32-33 *V.*, *c.* 18, *s.* 1, *part.* 24-25 *V.*, *c.* 99, *s.* 1, *Imp.*

As to apprehension of offenders against this Act, see sec. 29 Procedure Act.

By sec. 205 of the Procedure Act, it is enacted that:

"Upon the trial of any person accused of any offence respecting

the currency or coin, or against the provisions of the "*Act respecting offences relating to the Coin,*" no difference in the date or year, or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed, for the purpose of conterfeiting or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence; and it shall, in any case, be sufficient to prove such general resemblance to the lawful coin as will show an intention that the counterfeit should pass for it.

See also secs. 55, 56, 115, 209 and 229 of Procedure Act.

OFFENCES RELATING TO THE COIN.

The Imperial Act applies only to the "Queen's current, gold and silver coin," coined in any of Her Majesty's mints or lawfully current in any part or Her Majesty's dominions in or out of the United Kingdom. The Canadian Act includes gold or silver coin of any foreign prince, state or country current in Canada, or in any other part of Her Majesty's dominions. But the clause is so framed, in the English Act, as to include all such coin, though the words "of any foreign prince, state or country" are not inserted.

As to venue in certain cases, see sec. 23 of the Procedure Act.

2. Whenever the having any matter in the custody or possession of any person is mentioned in this Act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter is so had for his own use or benefit, or for that of any other person.—32-33 *V.*, *c.* 18, *s.* 1, *part.* 24-25 *V.*, *c.* 99, *s.* 1, *Imp.*

This clause is to cover questions which came up in *R.*

v. *Rogers*, 2 *Moo. C. C.* 45; *R.* v. *Gerrich*, 2 *M. & Rob*, 219, *and R.* v. *Williams*, 1 *C. & M.* 259.—*Greaves, Con. Acts*, 318.

3. Every one who falsely makes or counterfeits any coin resembling or apparently intended to resemble or pass for any current gold or silver coin, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 18, *s.* 2. 24-25 *V., c.* 99, *s.* 2, *Imp.*

Indictment.—The Jurors for Our Lady the Queen upon their oath present, that J. S., on ..... of ten pieces of false and counterfeit coin, each piece thereof resembling and apparently intended to resemble and pass for a piece of current gold coin, called a sovereign, falsely and feloniously did make and counterfeit, against the form ..... —*Archbold*, 744.

It is rarely the case that the counterfeiting can be proved directly by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited or caused to be counterfeited, or was present aiding and abetting in counterfeiting the coin in question. Before the modern statutes which reduced the offence of coining from treason to felony, if several conspired to counterfeit the Queen's coin, and one of them actually did so in pursuance of the conspirary, it was treason in all, and they might all have been indicted for counterfeiting the Queen's coin generally, 1 *Hale*, 214; but now only the party who actually counterfeits would be the principal felon, and the others, accessories before the fact, although triable as principals.

A variance between the indictment and the evidence in

the number of the pieces of coin, alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin, as guineas, sovereigns, shillings, would be fatal, unless amended. By the old law the counterfeit coin produced, in evidence must have appeared to have that degree of resemblance to the real coin that it would be likely to be received as the coin for which it was intended to pass by persons using the caution customary in taking money. In *R.* v. *Varley*, 1 *East, P. C.* 164, the defendant had counterfeited the semblance of a half-guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was, and the judges held that the offence was incomplete. So, in *R.* v. *Harris*, 1 *Leach*, 135, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were taken in an imperfect state, it being requisite that they should undergo another process, namely immersion in diluted *aqua fortis*, before they could pass as shillings, the judges held that the offence was incomplete; but now by sect. 27, *post*, of the Coin Act, the offence of counterfeiting shall be deemed complete although the coin made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

Any credible witness may prove the coin to be counterfeit, and it is not necessary for this purpose to produce any moneyer or other officer from the mint, sect. 229 Procedure Act. If it become a question whether the coin, which the counterfeit money was intended to imitate, be current coin, it is not necessary to produce the proclamation to prove its legitimation; it is a mere question of fact to be left to the jury upon evidence of usage, reputation, etc.—*Hale*, 196, 212, 213. It is not necessary to

prove that the counterfeit coin was utered or attempted to be uttered.—1 *East, P. C.* 165; *Archbold*, 744; *R.* v. *Robinson*, 10 *Cox*, 107; *R.* v. *Connell*, 1 *C. and K.* 190; *R.* v. *Byrne*, 6 *Cox*, 475.

By sect. 183 of the Procedure Act, if, upon the trial for any felony, it appears that the defendant did not complete the offence charged, but was only guilty of an attempt to commit the same, a verdict may be given of guilty of the attempt.

4. Every one who gilds or silvers, or with any wash or materials capable of producing the color or appearance of gold or of silver, or by any means whatsoever, washes, cases over or colors any coin whatsoever, resembling or apparently intended to resemble or pass for any current gold or silver coin,—or gilds or silvers, or with any wash or materials capable of producing the color or appearance of gold or silver, or by any means whatsoever, washes, cases over or colors any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being, of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any current gold or silver coin,—or gilds or, with any wash or materials capable of producing the color and appearance of gold, or by any means whatsoever, washes, cases over or colors any current silver coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold coin,—or gilds or silvers or with any wash or materials capable of producing the color or appearance of gold or silver, or by any means whatsoever washes, cases over or colors any current copper coin, or files or in any manner alters such coin with intent to make the same resemble or pass for any current gold or silver coin, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 18, *s.* 3. 24-25 *V.*, *c.* 99, *s.* 3, *Imp.*

Indictment for colouring coin.....falsely, deceitfully and feloniously did gild a certain false and counterfeit coin resembling a certain piece of current gold coin, called a sovereign, against the form.....—*Archbold.*

Prove the gilding, etc., or colouring as stated in the

indictment. Where the defendant was apprehended in the act of making counterfeit shillings, by steeping round blanks, composed of brass and silver in *aqua fortis*, none of which were finished, but exhibited the appearance of lead, though by rubbing they readily acquired the appearance of silver, and would pass current, it was doubted whether this was within the late Act, but the judges held the conviction to be right.—*R.* v. *Case*, 1 *Leach*, 145. In another case a doubt was expressed whether an immersion of a mixture, composed of silver and base metal, into *aqua fortis*, which draw the silver to the surface, was colouring within the repealed statutes, and whether they were not intended to apply only to a colouring produced by a superficial application. *R.* v. *Lavey*, 1 *Leach*, 153. But the words "capable of producing" seem to have been introduced into the recent statute for the purpose of obviating the doubt. Moreover the present statute adds the general words "or by any means whatsoever." Where a wash or material is alleged to have been used by the defendant, it must be shown either from the application by the defendant, or from an examination of their properties, that they are capable of producing the color of gold or silver. But an indictment charging the use of such material will be supported by proof of a colouring with gold itself.—*R.* v. *Turner*, 2 *Moo. C. C.* 41.—*Archbold*, 746. Where direct evidence of the act of colouring cannot be obtained, circumstances may be shown from which the act may be presumed, as that the prisoner was in possession of false coin, and that blanks coloured and materials for colouring were found in his house.—1 *Burn*, 806.

Indictment for colouring metal, etc ..... falsely, deceitand feloniously did gild ten pieces of silver, each piece thereof being respectively of a fit size and figure to be

coined, and with intent that each of the said pieces of silver respectively should be coined into false and counterfeit coin resembling a piece of current gold coin, called a sovereign, against the form ..... —*Archbold.*

An indictment charging the gilding of sixpences "with materials capable of producing the colour of gold" is good, and is supported by proof of colouring sixpences with gold.—*R.* v. *Turner*, 2 *Moo. C. C.* 41.

5. Every one who impairs, diminishes or lightens any current gold or silver coin, with intent that the coin so impaired, diminished, or lightened may pass for current gold or silver coin is guilty of felony, and liable to fourteen years' imprisonment.—32 33 *V.*, *c* 18, *s.* 4. 24-25 *V.*, *c.* 99, *s.* 4, *Imp.*

6. Every one who unlawfully has in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, which have been produced or obtained by impairing, diminishing or lightening any current gold or silver coin, knowing the same to have been so produced or obtained, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 18, *s.* 5. 24-25 *V.*, *c.* 99, *s.* 5, *Imp.*

Indictment.—.....ten pieces of current gold coin, called sovereigns, falsely, deceitfully and feloniously did impair, with intent that each of the ten pieces so impaired might pass for a piece of current gold coin, called a sovereign, against the form ..... —*Archbold.*

The act of impairing must be shown, either by direct evidence of persons who saw the prisoner engaged in it, or by presumptive evidence, such as the possession of filings and of impaired coin, or of instruments for filing, etc. The intent to pass off the impaired coin must then appear. This may be done by showing that the prisoner attempted to pass the coin so impaired, or that he carried it about his person, which would raise a presumption that he intended to pass it. And if the coin were not so defaced by the process

by impairing, as apparently to affect its currency, it would, under the circumstances, without further evidence, be a question for the jury, whether the diminished coin was intended to be passed.—*Roscoe on Coining*, 19. As to sect. 5, Greaves remarks: "This clause is new. It has frequently happened that filings and clippings, and gold dust have been found under such circumstances as to leave no doubt that they were produced by impairing coin, but there has been no evidence to prove that any particular coin had been impaired. This clause is intended to meet such cases."

7. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, buys, sells, receives, pays or puts off, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin, at or for a lower rate or value than the same imports, or was apparently intended to import, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 18, *s.* 6, *part.* 24-25 *V.*, *c.* 99. *s.* 6, *Imp.*

Indictment.—.....ten pieces of false and counterfeit coin, each piece thereof resembling a piece of the current gold coin, called a sovereign, falsely, deceitfully and feloniously, and without lawful authority or excuse did put off to one J. N. at and for a lower rate and value than the same did then import; against the..... *Archbold*, 750.

Prove that the defendant put off the counterfeit coin as mentioned in the indictment. In *R.* v. *Woolridge* 307, it was holden that the putting off must be co... and accepted. But the words offer to buy, sell, &c., in above clause would now make the acceptation immateria.

The last part of the clause refers to the indictment; by it, the cases of *R.* v. *Joyce*, and *R.* v. *Hedges*, 3 C. & P. 410, would not now apply.—*Archbold*, 751. If the names of the persons to whom the money was put off can be ascertained, they ought to be mentioned and laid severally in

the indictment; but if they cannot be ascertained the same rule will apply which prevails in the case of stealing the property of persons unknown.—1 *Russ.* 135.

8. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, imports or receives into Canada any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin, knowing the same to be false or counterfeit, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 18, *s.* 7. 24-25 *V.*, *c.* 99, *s.* 7, *Imp.*

Indictment.— ..... ten thousand pieces of false and counterfeit coin, each piece thereof resembling a piece of the current silver coin called a shilling, falsely, deceitfully and feloniously, and without lawful authority or excuse, did import into Canada,—he the said J. S. at the said time when he so imported the said pieces of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form ..... —*Archbold*, 751; 1 *Russ.* 108; 1 *Burn*, 867.

The guilty knowledge of the defendant must be averred in the indictment and proved.

9. Every one who, without lawful authority or excuse the proof whereof shall lie on him, exports or puts on board any ship, vessel or boat or *on any railway or carriage or vehicle of any description whatsoever*, for the purpose of being exported from Canada, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current coin, *or for any foreign coin of any prince, country or state*, knowing the sa meto be false or counterfeit, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 18, *s.* 8. 24-25 *V.*, *c.* 99, *s.* 8, *Imp.*

The words in *italics* are not in the Imperial Act.

The clause covers the attempt to export in certain cases.

Sec. 183 of the Procedure Act would cover other cases of attempts.

Indictment.— ..... One hundred pieces of false and

counterfeit coin, each piece thereof resembling a piece of the current coin called a sovereign, falsely, deceitfully and knowingly, and without lawful authority did export from Canada, he the said C. D. at the time when he so exported the said pieces of false and counterfeit coin, then well knowing the same to be false and counterfeit; against .....1 *Burn*, 825. See observations on last preceding clause.

10. Every one who tenders, utters or puts off, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin, knowing the same to be false or counterfeit, is guilty of a misdemeanor, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 18, *s.* 9. 24-25 *V.*, *c.* 99, *s.* 9, *Imp.*

11. Every one who tenders, utters or puts off as being current, any gold or silver coin of less than its lawful weight, knowing such coin to have been impaired, diminished or lightened, otherwise than by lawful wear, is guilty of a misdemeanor, and liable to one year's imprisonment.—32-33 *V.*, *c.* 18, *s.* 10.

12. Every one who has in his custody or possession any false or counterfeit coin, resembling or apparently intended to resemble or pass for any cuarent gold or silver coin, knowing the same to be false or counterfeit coin, and with intent to utter or put off any such false or counterfeit coin, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V.*, *c.* 18, *s.* 11. 24-25 *V.*, *c.* 99, *s.* 11, *Imp.*

Indictment for uttering counterfeit coin.— ..... One piece of false and counterfeit coin resembling a piece of the current gold coin, called a sovereign, unlawfully, falsely and deceitfully did utter to one J. N., he the said (defendant) at the time he so uttered the said piece of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form.....—*Archbold.*

Prove the tendering, uttering or putting off the sovereign in question, and prove it to be a base and counterfeit sovereign. Where a good shilling was given to a Jew boy

for fruit, and he put it into his mouth under pretence of trying whether it were good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor, saying that it was not good; this (which is called *ringing the changes)* was holden to be an uttering, indictable as such.—*R.* v. *Franks*, 2 *Leach*, 644; *Archbold*, 753. The giving of a piece of counterfeit money in charity is not an uttering, although the person may know it to be counterfeit; as in cases of this kind, there must be some intention to defraud.—*R.* v. *Page*, 8 *C. and P.* 122. But this case has been overruled.—*R.* v. *Ion*, 2 *Den.* 475; 1 *Russ.* 126.

A prisoner went into a shop, asked for some coffee and sugar, and in payment put down on the counter a counterfeit shilling: the prosecutor said that the shilling was a bad one; whereupon the prisoner quitted the shop, leaving the shilling and also the coffee and sugar: held that this was an uttering and putting off within the statute. —R. v. *Welch*, 2 *Den.* 78. The prisoner and J. were indicted for a misdemeanor in uttering counterfeit coin. The uttering was effected by J. in the absence of the prisoner, but the jury found that they were both engaged on the evening on which the uttering took place in the common purpose of uttering counterfeit shillings, and that in pursuance of that common purpose, J. uttered the coin in question: *Held*, that the prisoner was rightly convicted as a principal, there being no accessories in a misdemeanor.—*R.* v. *Greenwood*, 2 *Den.* 453. If two jointly prepare counterfeit coin, and utter it in different shops apart from each other but in concert, intending to share the proceeds, the utterings of each are the joint utterings of both, and they may be convicted jointly.—*R.* v. *Hurse*, 2 *M. and Rob.* 360.

R. v. *Else*, *R. & R.* 142; *R.* v. *Manners*, 7 *C. & P.* 801; *R.* v. *Page*, 9 *C. & P.* 756; 2 *Moo. C. C.* 219; are not law.—*Archbold*, 754. Husband and wife were jointly indicted for uttering counterfeit coin: held, that the wife was entitled to an acquittal, as it appeared that she uttered the money in the presence of her husband.—*R.* v. *Price*, 8 *C. & P.* 19. A wife went from house to house uttering base coin; her husband accompanied her but remained outside: *Held*, that the wife acted under her husband's compulsion.—*Conolley's case*, 2 *Lewin*, 229. Sarah McGinnes was indicted for uttering counterfeit coin. It appeared that at the time of the commission of the offence, she was in company with a man who went by the same name, and who was convicted of the offence at the last assizes. When the prisoners were taken into custody the police constable addressed the female prisoner as the male prisoner's wife. The male prisoner denied the fact (of her being his wife), in the hearing and presence of the woman. Sarah McGinnes since her committal had been confined of a child: *Held*, per Byles, J., that, under the circumstances, although the woman had not pleaded her coverture, and even although she had not asserted she was married to the male prisoner, when he stated she was not his wife, it was a question for the jury whether, taking the birth of the child and the whole circumstances, there was not evidence of the marriage, and the jury thought there was, and acquitted her, as being under the influence of her husband, when she uttered the coin.—*R.* v. *McGinnes*, 11 *Cox*, 391.

Proof of the guilty knowledge by the defendant must be given. This of course must be done by circumstantial evidence. If, for instance, it be proved that he uttered, either on the same day or at other times, whether before

or after the uttering charged, base money, either of the same or of a different denomination, to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question; this will be evidence from which the jury may presume a guilty knowledge.—*Archbold*, 754; 1 *Russ.* 127.

Indictment for having in possession counterfeit gold or silver coin with intent, etc., ...unlawfully, falsely and deceitfully had in his custody and possession *four* pieces of false and counterfeit coin, resembling the current *silver* coin called.....with intent to utter the said pieces of false and counterfeit coin, he the said J. S. then well knowing the said pieces of false and counterfeit coin to be false and counterfeit; against.....—*Archbold*, 757. As to what constitutes the having in possession, see sect.

See *R.* v. *Hermann*, 14 *Cox*, 279.

13. Every one who, having been convicted of any such misdemeanor as in any of the three sections next preceding mentioned, or of any misdemeanor or felony against this or any other Act relating to the coin, afterwards commits any of the misdemeanors in any of the said sections mentioned, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 18, *s.* 12. 24-25 *V.*, *c.* 99, *s.* 12, *Imp.*

The prisoner was indicted under this section. In the first instance, he was arraigned upon that part of the indictment relating to the subsequent offence and found guilty, and then upon the previous conviction and found not guilty. *Held*, that the conviction for a misdemeanor could be entered upon that verdict.—*R.* v. *Thomas*, 13 *Cox*, 52.

See sec. 139 and 207 of the Procedure Act, as to procedure when a previous offence is charged, corresponding to sect. 116 of the Imperial Larceny Act, and 37 of the Imperial Coin Act.—*R.* v. *Martin*, 11 *Cox*, 343.

14. Every one who, with intent to defraud, tenders, utters or puts off, as or for any current gold or silver coin, any coin not being such current gold or silver coin, or any medal, or piece of metal or mixed metals, resembling, in size, figure and color, the current coin as or for which the same is so tendered, uttered or put off, such coin, medal or piece of metal or mixed metals so tendered, uttered or put off, being of less value than the current coin as or for which the same is so tendered, uttered or put off, is guilty of a misdemeanor, and liable to one year's imprisonment.—32-33 *V.*, *c.* 18, *s.* 13. 24-25 *V.*, *c.* 99, *s.* 13, *Imp.*

A person was convicted, under the above section, of putting off, as and for a half sovereign, a medal of the same size and colour, which had on the obverse side a head similar to that of the Queen, but surrounded by the inscription "Victoria, Queen of Great Britain," instead of "Victoria Dei Gratiâ," and a round guerling and not square. And no evidence was given as to the appearance of the reverse side, nor was the coin produced to the jury; and it was held that there was sufficient evidence that the medal resembled, in figure, as well as size and colour, a half sovereign.—*R.* v. *Robinson, L. & C.* 604; the medal was produced, but, in the course of his evidence, one of the witnesses accidentally dropped it, and it rolled on the floor; strict search was made for it for more than half an hour, but it could not be found.

15. Every one who falsely makes or counterfeits any coin resembling or apparently intented to resemble or pass for any current copper coin, or without lawful authority or excuse, the proof of which shall lie on him, knowingly makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession, any instrument, tool or engine adapted and intended for the counterfeiting any current copper coin, or buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current copper coin, at or for a lower rate of value than the same imports or was apparently intended to import, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 18, *s.* 14. 24-25 *V.*, *c.* 99, *s.* 14, *Imp.*

16. Every one who tenders, utters or puts off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current copper coin, knowing the same to be false or counterfeit, or has in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any current copper coin, knowing the same to be false or counterfeit, with an intent to utter or put off the same, or any of them, is guilty of a misdemeanor, and liable to one year's imprisonment.—32-33 *V.*, *c.* 18, *s.* 15. 24-25 *V.*, *c.* 99, *s.* 15, *Imp.*

17. Every one defaces any current gold, silver or copper coin, by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened, and afterwards tenders the same, is guilty of a misdemeanor, and liable to one year's imprisonment.—32-33 *V.*, *c.* 18, *s.* 16. 24-25 *V.*, *c.* 99, *s.* 16, *Imp.*

18. Every one who tenders, utters or puts off any coin so defaced, shall, on summary conviction before two justices of the peace, be liable to a penalty not exceeding ten dollars; but no person shall proceed for any such last mentioned penalty without the consent of the Attorney General for the Province in which such offence is alleged to have been committed.—32-33 *V.*, *c.* 18, *s.* 17, *part.* 24-25 *V.*, *c.* 99, *s.* 17, *Imp.*

Indictment for defacing Coin.—..... one piece of the current silver coin, called a half crown, unlawfully and wilfully did deface, by then stamping thereon certain names and words..... against the form .....—*Archbold*, 748.

Prove that the defendant defaced the coin in question, by stamping on it any names or words, or both. It is not necessary to prove that the coin was thereby diminished or lightened. There must be defacing and tendering, to bring the offence within section 17.

19. Every one who makes or counterfeits any kind of coin not being current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state or country, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 18, *s.* 18. 24-25 *V.*, *c.* 99, *s.* 18, *Imp.*

20. Every one who, without lawful authority or excuse, the proof

whereof shall lie on him, brings or receives into Canada any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold of silver coin of any foreign prince, state or country, not being current coin, knowing the same to be false or counterfeit, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 18, *s.* 19. 24-25 *V.*, *c.* 99, *s.* 19, *Imp.*

21. Every one who tenders, utters or puts off any such false or counterfeit coin, resembling or apparently intended to resemble, or pass for any gold or silver coin of any foreign prince, state or country not being current coin, knowing the same to be false or counterfeit, is guilty of a misdemeanor, and liable to six months' imprisonment:

2. Every one who, having been convicted of any such offence, afterwards commits the like offence of tendering, uttering or putting off any such false or counterfeit coin, as aforesaid, knowing the same to be false or counterfeit, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years;

3. Every one who, having been twice convicted of any such offence, afterwards commits the like offence of tendering, uttering or putting off any such false or counterfeit coin, as aforesaid, knowing the same to be false or counterfeit, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, c. 18, *ss.* 20 *and* 21. 24-25 *V.*, *c.* 99, *ss.* 20-21, *Imp.*

See sec. 207 of Procedure Act.

22. Every one who, without lawful authority or excuse, the proof whereon shall lie on him, has in his possession or custody any forged, false or counterfeit piece or coin, counterfeited to resemble any foreign gold or silver coin described in the three sections next preceding, knowing the same to be false or counterfeit coin, is guilty of a misdemeanor, and liable to three years' imprisonment.—32-33 *V.*, *c.* 18, *s.* 22. 24-25 *V.*, *c.* 99, *s.* 23, *Imp.*

23. Every one who falsely makes or counterfeits any kind of coin, not being current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals, of less value than the silver coin of any foreign prince, state or country, is guilty of a misdemeanor, and liable, for the first offence, to one year's imprisonment; and for any subsequent offence, to seven years' imprisonment.—32-33 *V.*, *c.* 18, *s.* 23. 24-25 *V.*, *c.* 99, *s.* 22, *Imp.*

The remarks under the first part of the Act are all

applicable here, the enactments in those sections being the same, and repeated, to apply to foreign coin *not current here.*

See *R.* v. *Tierney*, 29 *U. C. Q. B.* 181.

24. Every one who, without lawful authority or excuse, the proof whereof shall lie on him,—

(*a.*) Knowingly makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession any puncheon, counter puncheon, matrix, stamp, die, pattern or mould, in or upon which there is made or impressed, or which will make or impress, or which is adapted and intended to make or impress the figure, stamp or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign prince, state or country, or any parts of both or either of such sides,—

(*b.*) Makes or mends, or begins or proceeds to make or mend or buys or sells, or has in his custody or possession any edger, edging or other tool, collars, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures, apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid, or—

(*c.*) Makes or mends or begins or proceeds to make or mend, or buys or sell, or has in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance, round blanks out of gold, silver or other metal or mixture of metals or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin as in this section aforesaid,—

is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 18, *s.* 24. 24-25 *V.*, *c.* 99, *s.* 24, *Imp.*

Indictment for making a puncheon for coining.—..... one puncheon, in and upon which there was then made and impressed the figure of one of the sides, that is to say, the head side of a piece of the current silver coin, commonly called a shilling, knowingly, falsely,

deceitfully and feloniously, and without lawful authority or excuse, did make, against the form .....—*Archbold.*

Prove that the defendant made a puncheon, as stated in the indictment; and prove that the instrument in question is a puncheon included in the statute. The words in the statute "upon which there shall be made or impressed" apply to the puncheon which being convex bears upon it the figure of the coin; and the words "which will make or impress" apply to the counter puncheon, which being concave will make and impress. However, although it is more accurate to describe the instruments according to their actual use, they may be described either way.—*R.* v. *Lennard*, 1 *Leach*, 90. It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin, for the words "or any part or parts" are introduced into this statute, and, consequently the difficulty in *R.* v. *Sutton*, 2 *Str.* 1074, where the instrument was capable of making the sceptre only cannot now occur.

And on an indictment for making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression.—*R.* v. *Foster*, 7 *C. & P.* 495. It is not necessary to prove under this branch of statute the *intent* of the defendant: the mere similitude is treated by the Legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question.—*R.* v. *Ridgely*, 1 *East, P. C.* 171. The proof of lawful authority or excuse, if any, lies on the defendant. Where the defendant employed a die-

sinker to make, for a pretended innocent purpose, a die calculated to make shillings; and the die-sinker, suspecting fraud, informed the authorities at the mint, and under their directions made the die for the purpose of detecting prisoner; it was held that the die-sinker was an innocent agent and the defendant was rightly convicted as a principal.—*R.* v. *Bannen*, 2 *Moo. C. C.* 309.

The *making* and *procuring* dies and other materials, with intent to use them in coining Peruvian half-dollars in England, not in order to utter them here, but by way of trying whether the apparatus would answer, before sending it out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held to be an indictable misdemeanor at common law.—*R.* v. *Roberts*, *Dears.* 539; *Archbold*, 760; 1 *Burn*, 814; 1 *Russ.* 100. A galvanic battery is a machine within this section.—*R.* v. *Grover*, 9 *Cox*, 282.

Indictment for having a puncheon in possession.—..... one puncheon in and upon which there was then made and impressed the figure of one of the sides, that is to say, the head side of a piece of the current silver coin commonly called a shilling, knowingly, falsely, deceitfully and feloniously, and without lawful authority or excuse, had in his custody and possession, against the form .....—*Archbold.*

An indictment which charged that the dofendant feloniously had in his possession a mould "upon which said mould was made and impressed the figure and apparent resemblance" of the observe side of a sixpence, was held bad on demurrer, as not sufficiently showing that the impression was on the mould at the time when he had it in his possession.—*R.* v. *Richmond*, 1 *C. & K.* 240.

As to evidence of possession, see sect. 2, *ante*.—*R.* v.

Rogers, 2 *Moo. C. C.* 85.—The prisoner had occupied a house for about a month before the police entered it, and found two men and two women there, one of whom was the wife of the prisoner. The men attacked the police, and the women threw something into the fire. The police succeeded, however, in preserving part of what the women threw away, which proved to be fragments of a plaster-of-Paris mould of a half crown. The prisoner came in shortly after the police, and, on searching the house, a quantity of plaster-of-Paris was found up-stairs. An iron ladle and some fragments of plaster-of-Paris moulds were also found. It was proved that the prisoner, thirteen days before the day in question, had passed a bad half-crown, but there was no evidence that it had been made in the mould found by the police. He was afterwards tried and convicted for uttering the base half-crown. It was held that there was sufficient evidence to justify the conviction, and that, on a trial for felony, other substantive felonies which have a tendency to establish the scienter of the defendant may be proved for that purpose.—*R.* v. *Weeks*, *L. & C.* 18. In *R.* v. *Harvey*, 11 *Cox*, 662, it was *held*: 1. That an indictment under this section is sufficient if it charges possession without lawful excuse, as excuse would include authority; 2. That the words "the proof whereof shall lie on the accused" only shift the burden of proof, and do not alter the character of the offence; 3. That the fact that the Mint authorities, upon information forwarded to them, gave authority to the die maker to make the die, and that the police gave permission to him to give the die to the prisoner, who ordered him to make it, did not constitute lawful authority or excuse for prisoner's possession of the die; 4. That, to complete the offence, a felonious intent is not necessary; and, upon a case reserved, the conviction was affirmed.

Indictment for making a collar.— ..... one collar adapted and intended for the marking of coin round the edges with grainings apparently resembling those on the edges of a piece of the current gold coin called a sovereign, falsely, deceitfully and feloniously, and without lawful authority or excuse, did make, he the said J. S. then well knowing the same to be so adapted and intended as aforesaid, against the form .....—*Archbold*, 761.

It must be proved, upon this indictment that the defendant knew the instrument to be adapted and intended for the marking of coin round the edges.

It must be remarked that the said clause expressly applies to tools for making foreign coin, as well as current coin.

25. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, knowingly conveys out of any of Her Majesty's mints into Canada, any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press or engine, used or employed in or about the coining of coin, or any useful part of any of the several articles aforesaid, or any coin, bullion, metal or mixture of metals, is guilty of felony and liable to imprisonment for life.—32-33 *V.*, *c.* 18, *s.* 25. 24-25 *V.*, *c.* 99, *s.* 25, *Imp.*

26. If any coin is tendered as current gold or silver coin to any person who suspects the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, such person may cut, break, bend or deface such coin, and if any coin so cut, broken, bent or defaced appears to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same is of due weight, and appears to be lawful coin, the person cutting, breaking, bending or defacing the same, shall be bound to receive the same at the rate for which it was coined:

2. If any dispute arises whether the coin so cut, broken, bent or defaced, is diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who may examine, upon oath, the parties as well as any

other person, for the purpose of deciding such dispute, *and if he entertains any doubt in that behalf, he may summon three persons, the decision of a majority of whom shall be final:*

3. Every officer employed in the collection of the revenue in Canada shall cut, break or deface, or cause to be cut, broken or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which is tendered to him in payment of any part of such revenue in Canada.—32-33 *V.*, *c.* 18, *s.* 26. 24-25 *V.*, *c.* 99 *s.* 26, *Imp.*

The words in *italics* are not in the Imperial Act.

27. Every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, tendering, uttering or putting off, or of offering to buy, sell, receive, pay, utter or put off, any false or counterfeit coin, against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, or bought sold, received, paid, tendered, uttered or put off, or offered to be bought, sold, received, paid, *tendered*, uttered or put off, was not in a fit state, to be uttered, or the counterfeiting thereof was not finished or perfected. 32-33 *V.*, *c.* 18, *s.* 32. 24-25 *V.*, *c.* 99, *s.* 30, *Imp.*

The word in *italics* is not in the Imperial Act.

MANUFACTURE AND IMPORTATION OF UNCURRENT COPPER COIN.

28. Every one who manufactures in Canada any copper or brass coin, or imports into Canada any copper or brass coin, other than current copper coin, with the intention of putting the same into circulation as current copper coin, shall, on summary conviction, be liable to a penalty not exceeding twenty dollars for every pound Troy of the weight thereof; and all such copper or brass coin so manufactured or imported shall be forfeited to Her Majesty, for the public uses of Canada.—31 *V.*, *c.* 47, *ss.* 1 *and* 2.

29. Any two or more justices of the peace, on the oath of a credible person, that any copper or brass coin has been unlawfully manufactured or imported, shall cause the same to be seized and detained, and shall summon the person in whose possession the same is found, to appear before them; and if it appears to their satisfaction, on the oath of a credible witness, other than the informer, that such copper or brass coin has been manufactured or imported in violation of this Act, such justices shall declare the same forfeited, and shall place the same in safe keeping to await the disposal of the Governor General, for the public uses of Canada.—31 *V.*, *c.* 47, *s.* 3.

30. If it appears, to the satisfaction of such justices, that the person in whose possession such copper or brass coin was found, knew the same to have been so unlawfully manufactured or imported, they may condemn him to pay the penalty aforesaid with costs, and may cause him to be imprisoned for a term not exceeding two months, if such penalty and costs are not forthwith paid.—31 *V.*, *c.* 47, *s.* 4.

31. If it appears, to the satisfaction of such justices, that the person in whose possession such copper or brass coin was found was not aware of it having been so unlawfully manufactured or imported, the penalty may, on the oath of any one credible witness, other than the plaintiff, be recovered, from the owner thereof, by any person who sues for the same in any court of competent jurisdiction.—31 *V.*, *c.* 47, *s.* 5.

32. Any officer of Her Majesty's customs may seize any copper or brass coin imported or attempted to be imported into Canada in violation of this Act, and may detain the same as forfeited, to await the disposal of the Governor General, for the public uses of Canada.—31 *V.*, *c.* 47, *s.* 6.

33. Every one who utters, tenders or offers in payment any copper or brass coin, other than current copper coin, shall forfeit double the nominal value thereof:

2. Such penalty may be recovered, with costs, in a summary manner, on the oath of one credible witness, other than the informer, before any justice of the peace, who, if such penalty and costs are not forthwith paid, may cause the offender to be imprisoned for a term not exceeding eight days.—31 *V.*, *c.* 47, *ss.* 7 *and* 8.

34. A moiety of any of the penalties imposed by any of the five sections next preceding, but not the copper or brass coin forfeited under the provisions thereof, shall belong to the informer or person who sues for the same, and the other moiety shall belong to Her Majesty, for the public uses of Canada.—31 *V.*, *c.* 47, *s.* 9.

CHAPTER 168.

AN ACT RESPECTING MALICIOUS INJURIES TO PROPERTY.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. In this Act, unless the context otherwise requires, the expression "cattle" includes any horse, mule, ass, swine, sheep, or goat, as well as any neat cattle or animal of the bovine species, and whatever is the age or sex of the animal, and whether castrated or not, and by whatever technical or trivial name it is known, and shall apply to one animal as well as to many.—32-33 *V.*, *c.* 22, *s.* 44. 40 *V.*, *c.* 29, *s.* 2.

This is the same definition of these words as is given in the Larceny Act, sec. 2.

INJURIES BY FIRE TO BUIDLINGS AND GOODS THEREIN.

2. Every one who unlawfully and maliciously sets fire to any church, chapel, meeting-house or other place of divine worship, is guilty of felony and liable to imprisonment for life—32-33 *V.*, *c.* 22, *s.* 1. 24-25 *V.*, *c.* 97, *s.* 1, *Imp.*

Indictment.—The Jurors for Our Lady the Queen, upon their oath present, that J. S. on the.....in the year.....feloniously, unlawfully and maliciously did set fire to a certain church, situate at ..... in the parish of ..... in the district of ..... against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

Local description necessary. *R.* v. *Woodward*, 1 *Moo. C. C.* 323.

Though it is not necessary to prove malice against the owner, yet the indictment must allege the act to have been done "unlawfully and maliciously." If a statute

makes it criminal to do an act unlawfully and maliciously, an indictment must state it to have been done so; stating that it was done feloniously, voluntarily and maliciously, is not enough.—*R.* v. *Turner*, 1 *Moo. C. C.* 239; *R.* v. *Lewis*, 2 *Russ.* 1067.

The definition of arson at common law is as follows: arson is the malicious and wilful burning the house of another, and to constitute the offence there must be an actual burning of some part of the house, though it is not necessary that any flames should appear.—3 *Burn*, 768. But now the words of the statute are *set fire to*, merely; and, therefore, it is not necessary in an indictment to aver that the house was burnt, nor need it be proved that the house was actually consumed. But under the statute, as well as at common law, there must be an actual burning of some part of the house; a bare intent or attempt to do it is not sufficient. But the burning or consuming of any part of the house, however trifling, is sufficient, although the fire be afterwards extinguished. Where on an indictment it was proved that the floor of a room was scorched; that it was charred in a trifling way; that it had been at a red heat but not in a blaze, this was held a sufficient burning to support the indictment. But where a small faggot having been set on fire on the boarded floor of a room, the boards were thereby scorched black but not burnt, and no part of the wood was consumed, this was held not sufficient.—*Archbold.*

The time stated in the indictment need not be proved as laid; if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment by the grand jury, it is sufficient. Where the indictment alleged the offence to have been committed in the night time and it was proved

to have been committed in the day time, the judges held the difference to be immaterial. The parish is material, for it is stated as part of the description of the house burnt. Wherefore, if the house be proved to be situate in another parish the defendant must be acquitted, unless the variance be amended. If a man intending to commit a felony, by accident set fire to another's house, this, it should seem, would be arson. If intending to set fire to the house of A. he accidentally set fire to that of B., it is felony. Even if a man by wilfully setting fire to his own house, burns also the house of one of his neighbors it will be felony; for the law in such a case implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighborhood. And generally if the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved.—*Archbold*; *R.* v. *Tivey*, 1 *C. & K.* 704; *R.* v. *Philp*, 1 *Moo. C. C.* 263.

It is seldom that the wilful burning by the defendant, can be made out by direct proof; the jury, in general, have to adjudicate on circumstantial evidence. Where a house was robbed and burnt, the defendant being found in possession of some of the goods which were in the house at the time it was burnt, was admitted as evidence tending to prove him guilty of the arson. So where the question is whether the burning was accidental or wilful, evidence is admissible to show that on another occasion, the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property. But on a charge of arson, where the question was as to the identity of the prisoner, evidence that a few days previous to the fire in

question, another building of the prosecutor's was on fire and that the prisoner was then standing by with a demeanor which showed indifference or gratification, was rejected.—*Archbold.*

Upon an indictment for any offence mentioned in this chapter (except the attempts specially enacted to be felonies) the jury may, under s. 183, Procedure Act, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted on an indictment for such attempt.—2 *Russ.* 1054.

SETTING FIRE TO A DWELLING-HOUSE, ANY PERSON BEING THEREIN.

3. Every one who unlawfully and maliciously sets fire to any dwelling-house, any person being therein, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 22, *s.* 2. 24-25 *V., c.* 97 *s.* 2, *Imp.*

This offence was formerly punishable with death.

As to verdict for an attempt to commit the offence charged upon an indictment for the offence, see Procedure Act, sect. 183.

Indictment.—.....feloniously, unlawfully and maliciously did set fire to a certain dwelling-house of J. N., situate in the parish of ..... in the district of ..... one J. L. and M. his wife then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house; against the form .....

Local description necessary as under sec. 2

In this section, no mention is made of the intent with which the act is done; and it seems it is not necessary to show that the prisoner knew that any person was in the house. It must be shown that some one was in the house at the time the house caught fire; and where a person was

in a house at the time the prisoner set fire to an outhouse, but left the house before the fire reached it, it was held that the offence was not proved within this section.—*R.* v. *Warren*, 1 *Cox*, 68; *R.* v. *Fletcher*, 2 *C. & K.* 215.

Under the repealed statute, a common gaol was held to be a dwelling-house; *Donnavan's Case*, 1 *Leach*, 69; but a mere lock-up where persons are never detained more than a night or two was held not to be a house.—*R.* v. *Connor*, 2 *Cox*, 65.

A building intended for a dwelling-house, but used as a place to deposit straw, etc., is neither a house, out-house nor barn.—*Elsemore* v. *St. Briavels*, 8 *B. & C.* 461. A dwelling-house must be one in which a person dwells; *R* v. *Allison*, 1 *Cox*, 24; but temporary absence is not sufficient to take the building out of the protection of the statute.—*R.* v. *Kimbrey*, 6 *Cox*, 464. A building not intended for a dwelling-house, but slept in by some one without the leave of the owner, and a cellar under a cottage separately occupied, were held not to be houses.—*R.* v. *England*, 1 *C. & K.* 533; *Anon.* 1 *Lewin* 8.

What is understood by the *house*. This extends at common law not only to the very dwelling-house, but to all out-houses which are parcel thereof, though not adjoining thereto, nor under the same roof.—2 *East, P. C.* 1020.

SETTING FIRE TO A HOUSE, OUT-HOUSE, MANUFACTORY, FARM BUILDING.

4. Every one who unlawfully and maliciously sets fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same is then in the possession of the offender, or in the possession of any other person, with the intent thereby to injure or defraud any person, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 22, *s.* 3. 35 *V., c.* 34, *s.* 1. 24-25 *V., c.* 97, *s.* 3, *Imp.*

See sect. 183, Procedure Act, as to verdict for an attempt to commit the offence charged, in certain cases, upon an indictment for the offence.

Indictment.—.....feloniously, unlawfully, and maliciously did set fire to a certain dwelling-house of J. N., situate ..... with intent thereby then to injure the said J. N., *(or to defraud a certain insurance company called)* ..... against the form .....

Local description necessary as under sec. 2.

.A was indicted for setting fire to an out-house. The building set on fire was a thatched pigsty, situate in a yard in the possession of the prosecutor, into which yard the back door of his house opened, and which yard was bounded by fences and by other buildings of the prosecutor, and by a cottage and barn which were lent to him by a tenant, but which did not open into this yard : *Held*, that this pigsty was an out-house within the repealed statute. —*R.* v. *Jones*, 2 *Moo. C. C.* 308.

A. was indicted for having set fire to a building twenty-four feet square, the sides of which were composed of wood with glass windows ; it was roofed and was used by a gentleman, who built houses on his own property, for the purpose of disposing of them, as a storehouse for seasoned timber, as a place of deposit for tools, and as a place where timber was prepared for use : *Held*, that this was a shed, and also an erection used in carrying on trade.—*R.* v. *Amos*, 2 *Den.* 65.

Burning a stable is not supported by proof of burning a shed, which has been built for and used as a stable originally, but has latterly been used as a lumber shed only.—*R.* v. *Colley*, 2 *M. & Rob.* 475.

An unfinished structure intended to be used as a house is not a house within the meaning of this section.—*R.* v. *Edgell*, 11 *Cox*, 132.

An indictment under this section, for setting fire to a house, shop, etc., need not allege the ownership of the house. The evidence in support of the intent to injure was that the prisoner N. was under notice to quit, and a week before the fire was asked to leave but did not. Of the intent to defraud, the evidence was that in 1867 he called on an agent about effecting an assurance, and that in 1871, he called on him again, and said he had come to *renew* his policy for £500, and paid ten shillings: *Held*, that the evidence was sufficient to prove the intent to injure the owner of the house, and the intent to defraud the insurance company; though the policy of insurance was not produced, there was sufficient evidence of it by the defendant's implied admission of its existence by saying he wished to *renew* his policy.—*R.* v. *Newboult*, 12 *Cox*, 148.

Malice against owner is unnecessary; see sect. 60, *post*; and intent to injure or defraud any particular person need not be stated in the indictment, nor proved on the trial.

In *Farrington's Case*, *R.* v. *R.* 207, no motive of ill-feeling whatsoever against the owner of the property burnt could be proved against the prisoner; he was proved to be a harmless, inoffensive man; but upon a case reserved it was held that an injury to the burnt building being the necessary consequence of setting fire to it, the *intent to injure* might be inferred, for a man is supposed to intend the necessary consequence of his own act.

Under the statute, it is immaterial whether the building, house, etc., be that of a third person or of the defendant himself; but in the latter case, the intent to, defraud cannot be inferred from the act itself, but it must be proved by other evidence. In *R.* v. *Kitson*, *Dears.* 187, the prisoner was indicted for arson, in setting fire to his

own house, with intent to defraud an insurance office. Notice to produce the policy was served too late on the defendant, and it was held that secondary evidence of the policy was not admissible. "But it must not, however be understood, said Jervis, C. J., that it is absolutely necessary in all cases to produce the policy, but the intent to defraud alleged in the indictment must be proved by proper evidence."

A married woman cannot be indicted for setting fire to the house of her husband with intent to injure him.—*R.* v. *March*, 1 *Moo. C. C.* 182.

See remarks under sects. 2 and 3, *ante.*

An indictment charging a prisoner with having feloniously and maliciously set fire to a barn containing hay, etc., according to the form contained in the schedule to the act 32-33 V., c. 29, is good, and it is not necessary to allege an intent to injure or defraud the prosecutor.

Sec. 32 of 32-33 V., c. 30 is directory, and a statement made by a prisoner as provided for by that act may be used in evidence against him although the justice has not complied with the provisions of that section, if it appeared that the prisoner was not induced to make the statement by any promise or threat.—*The Queen* v. *Soucie*, 1 *P. & B. (N. B.)* 611.

SETTING FIRE TO ANY RAILWAY STATION, ETC.

5. Every one who unlawfully and maliciously sets fire to any station, engine-house, warehouse or other building, belonging or appertaining to any railway, port, dock or harbor, or to any canal or other navigable water, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 22. *s.* 4. 24-25 *V.. c.* 97, *s.* 4, *Imp.*

The words "or other navigable water" replace the words "or other navigation." in the Imperial Act.

See remarks under secs. 2 and 3, *ante.*

Indictment—Berkshire (to wit). The Jurors for our Lady the Queen upon their oath present, that on the *first* day of *May*, in the year of our Lord 1852, at the parish of *Goring*, in the county of *Berks*, A. B. feloniously, unlawfully, and maliciously did set fire to a certain station *(any station, engine-house, warehouse, or other building)* the property of the Great Western Railway Company, there situate, then and there, belonging *(belonging or appertaining)* to a certain railway there, called "*The Great Western Railway.*"

SETTING FIRE TO THE QUEEN'S DOCK-YARDS, SHIPS, ETC.

6. Every one who unlawfully and maliciously sets on fire or burns, or otherwise destroys or causes to be set on fire or burnt, or otherwise destroyed, any of Her Majesty's ships or vessels of war, whether afloat or building, or begun to be built in any of Her Majesty's dock-yards, or building or repairing by contract in any private yard, for the use of Her Majesty's or any of Her Majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto, or any timber or material there placed for building, repairing or fitting out of ships or vessels, or any of Her Majesty's military, naval or victualling stores or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war, are kept, placed or deposited, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 5.

This clause is taken from 12 Geo. 3, c. 24. s. 1, Imp. See *ante*, remarks and form of indictment under secs. 2 and 3.

SETTING FIRE TO ANY PUBLIC BUILDING.

7. Every one who unlawfully and maliciously sets fire to any building, other than such as are in this Act before mentioned, belonging to Her Majesty or to any county, riding, division, city, town, village, parish or place, or belonging to any university or college, or hall of any university, or to any corporation, or to any unincorporated body or society of persons, associated together for any lawful purpose, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 6. 24-25 *V.*, *c.* 97, *s.* 5, *Imp.*

Greaves says: "This clause is new, and an extremely great amendment of the law. Before this act passed, there was no statute applicable to the burning of any public building, however important, unless it could be held to fall within the term "house." It would be easy to point out such buildings, the burning of which would have been looked upon as a national calamity. This section therefore has been introduced to protect all such buildings, as well as all the others specified in it."

See remarks under secs. 2 and 3, *ante*.

SETTING FIRE TO ANY OTHER BUILDING.

8. Every one who unlawfully and maliciously sets fire to any building, other than such as are in this Act before mentioned, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 22, *s.* 7. 24-25 *V., c.* 97, *s.* 6, *Imp.*

Greaves says: "This clause is new. It will include every building not falling within any of the previous sections of the act. It will include ornamental buildings in parks and pleasure grounds, hot houses, pineries, and all those buildings which not being within the curtilage of a dwelling-house, and not falling within any term previously mentioned, were unprotected before this act passed. The term 'building' is no doubt very indefinite ..... but it was thought much better to adopt this term, and leave it to be interpreted as each case might arise, than to attempt to define it, as any such attempt would probably have failed in producing any expression more certain than the term 'building' itself."

In *R.* v. *Edgell*, 11 *Cox*, 132, it was doubted whether an unfinished structure intended to be used as a house was a *building* within this section. The point was not determined.

But in *R.* v. *Manning*, 12 *Cox*, 106, upon a case reserved,

it was held that an unfinished dwelling-house of which the external and internal walls were built, and the roof covered in, and a considerable part of the flooring laid, and the walls and ceilings prepared for plastering, is a building, within this section. In this case, Lush, J., left it to the jury whether as a question of fact the erection was a building, and the Court of Crown cases reserved seemed to be of opinion that this had been correctly done. See remarks under secs. 2 and 3, *ante*. See *R.* v. *Labadie*, 32 *U. C. Q. B.* 429; *R.* v. *Greenwood*, 23 *U. C. Q. B.* 250.

Defendant was charged with having set fire to a building, the property of one J. H., "with intent to defraud." The case opened by the crown was that the prisoner intended to defraud several insurance companies, but the legal proof of the polices was wanting, and an amendment was allowed by striking out the words "with intent to defraud." The evidence showed that several persons were interested as mortgagees of the building, a large hotel, and J. H. as owner of the equity of redemption. It was left to the jury to say whether the prisoner intended to injure any of those interested. They found a verdict of guilty.

Held, that the amendment was authorised and proper, and the conviction was warranted by the evidence.

The indictment in such a case is sufficient without alleging any intent, there being no such averment in the statutory form; but an intent to injure or defraud must be shown on the trial.—*R.* v. *Cronin*, 36 *U. C. Q. B.* 342.

SETTING FIRE TO GOODS IN ANY BUILDING.

9. Every one who unlawfully and maliciously sets fire to any matter or thing, being in, against or under any building, under such circumstances that, if the building were thereby set fire to, the offence would amount to felony, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 8. 24-25 *V.*, *c.* 97, *s.* 7, *Imp.*

Greaves says: The terms "under such circumstances that if the building were thereby set fire to the offence would amount to felony" were advisably substituted instead of the terms used *(before)* in consequence of the case of *R.* v. *Lyons*, 1 *Bell, C. C.* 38. Some of the enactments as to setting fire to buildings, ships, etc., make an intent to injure or defraud necessary, but others do not, and the terms in question were adopted in order to include both categories; so that if goods are set fire to in a building where an intent to injure or defraud is necessary to constitute the offence of the setting fire to such building (as in the cases included in sect. 3), the case will fall within this clause; as well as where no intent is necessary to constitute the offence of setting fire to the building in which the goods are set fire to (as in the cases included in secs. 4, 5, 6, 7). In an indictment under this clause, where no intent is necessary to constitute the offence of setting fire to the building in which the goods are set fire to, it will be sufficient to allege the setting fire to the goods in that building; but where an intent to injure or defraud is necessary to constitute the offence of setting fire to the building it would seem necessary to allege in addition an intent to injure or defraud as the case may be; and the evidence in the former case will suffice, if it prove the setting fire to the goods in the building, but in the latter case, it must also be sufficient to satisfy the jury that the prisoner had the intent alleged in the indictment.

Indictment.— ..... feloniously, unlawfully and maliciously did set fire to a certain heap of straw in a certain building of J. N., situate at ..... in the district of..... against the form ..... 3 *Burn*, 799. According to Greaves, if the heap of straw was in a *house* (as under sect. 3), the intent to injure or defraud should be added. But see *R.* v. *Heseltine*, 12 *Cox*, 404, *post*.

Where the prisoners were indicted for setting fire to letters in a post-office, divers persons being in the house, it was held that there was no evidence of any intent, but it was what is vulgarly called a lark, and even if the house had been burned, they would not have been guilty.—*R.* v. *Batstone*, 10 *Cox*, 20.

A person maliciously sets fire to goods in a house with intent to injure the owner of the goods, but he had no malicious intention to burn the house, or to injure the owner of it. The house did not take fire, but would have done so if the fire had not been extinguished: *Held*, that if the house had thereby caught fire, the setting fire to it would not have been within this section, as, under the circumstances, it would not have amounted to felony.—*R.* v. *Child*, 12 *Cox*, 64; *R.* v. *Nattrass*, 15 *Cox*, 73; *R.* v. *Harris*, 15 *Cox*, 75.

It is not necessary in a count in an indictment laid under this section to allege an intent to defraud, and it is sufficient to follow the words of the section without substantively setting out the particular circumstances relied on as constituting the offence. Evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to.—*R.* v. *Heseltine*, 12 *Cox*, 404.

As to verdict for an attempt to commit the offence charged in certain cases, same as under sect. 2, *ante*.

See remarks under sects. 2 and 3, *ante*.

ATTEMPTING TO SET FIRE TO BUILDINGS.

10. Every one who, unlawfully and maliciously, by any overt act, attempts to set fire to any building, or any matter or thing in the next preceding section mentioned, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 22, *s.* 12. 24-25 *V., c.* 97, *s.* 8, *Imp.*

Indictment.— ..... feloniously, unlawfully and maliciously did attempt, by then *(state the overt act)* feloniously, unlawfully and maliciously to set fire to a certain dwelling-house *(building)* of J. N. situate at the parish of ..... in the ..... with intent thereby then to injure the said J. N. against the form ..... —*Archbold.*

The words "any building" are not to be read as connected with the words "in the next preceding section mentioned."—*Archbold*, 518.

Lighting a match by the side of a stack with intent to set fire to it is an attempt to set fire to it, because it is an act immediately and directly tending to the execution of the crime.—*R.* v. *Taylor*, 1 *F. & F.* 511. On an indictment against two prisoners for attempting to set fire, one prisoner had not assisted in the attempt, but had counselled and encouraged the other; both were convicted.—*R.* v. *Clayton*, 1 *C. & K.* 128.

See *R.* v. *Goodman*, 22 *U. C. C. P.* 338.

SETTING FIRE BY NEGLIGENCE TO ANY FOREST, TREE, ETC.

11. Every one who, by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a municipal law of the locality, sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide on the Crown domain, or land leased or lawfully held for the purpose of cutting timber, or on private property, on any creek or river, or rollway, beach or wharf, so that the same is injured or destroyed, is guilty of a misdemeanor, and liable to two years' imprisonment:

2. If, in the opinion of the magistrate investigating any charge under this section, the consequences have not been serious, he may, in his discretion, dispose of the matter summarily, without sending the offender for trial, by imposing a fine not exceeding fifty dollars, or in default of payment, by the committal of the offender to prison for any term not exceeding six months, with or without hard labor.—32-33 *V.*, *c.* 22, *ss.* 9 *and* 10.

12. Every one who, unlawfully and maliciously, sets fire to any

forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide, on the Crown domain, or on land leased or lawfully held for the purpose of cutting timber, or on private property, or on any creek, river, rollway, beach or wharf, so that the same is injured or destroyed, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 11.

See sect. 183 of the Procedure Act, as to a verdict for an attempt in certain cases.

These two clauses are not in the English statute. Both apply to forest, tree, lumber, etc.; but under the first, the act must have been done carelessly, or in contravention to a municipal law, whilst under the second, it must have been done *unlawfully and maliciously.*

Indictment under sect. 12 quashed, for want of the words "so as to injure or to destroy." *R.* v. *Berthe*, 16 *C. L. J.* 251. Such an indictment bad, even after verdict.—*R.* v. *Bleau*, 7 *R. L.* 571.

INJURIES BY EXPLOSIVE SUBSTANCES.

13. Every one who, unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroys, throws down or damages the whole or any part of any dwelling-house, any person being therein, or of any building, whereby the life of any person is endangered, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 13. 24-25 *V.*, *c.* 97, *s.* 9, *Imp.*

14. Every one who unlawfully and maliciously places or throws in, into, upon, under, against or near any building, any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods or chattels, whether or not any explosion takes place, and whether or not any damage is caused, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 14. 24-25 *V.*, *c.* 97, *s.* 10, *Imp.*

Indictment for destroying by explosion part of a dwelling-house, some person being therein.— ..... feloniously, unlawfully, and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder,

destroy a certain part of the dwelling-house of J. N., situate ..... one A. N. then being in the said dwelling-house, against the form ..... *(Add counts for throwing down and damaging part of the dwelling-house.)* See *R.* v. *McGrath*, 14 *Cox*, 598.

Prove that the defendant by himself or with others destroyed or was present aiding and abetting in the destruction of some part of the dwelling-house in question, by the explosion of gunpowder or other explosive substance mentioned in the indictment. It is apprehended that a destruction of some part of the *freehold* must be shown.—*R.* v. *Howell*, 9 *C. & P.* 437. It has been held that firing a gun loaded with powder through the keyhole of the door of a house, in which were several persons, and by which the lock of the door was blown to pieces, is not within this section. —*R.* v. *Brown*, 3 *F. & F.* 821. But Greaves is of opinion that this case would bear reconsideration.—2 *Russ.* 1045 *note*. Prove that it was the dwelling-house of J. N., and situate as described in the indictment. Prove that the act was done maliciously, that is, wilfully and not by accident. Prove also that N. was in the house at the time. No intent need be laid or proved.—*Archbold*. In *R.* v. *Sheppard*, 11 *Cox*, 302, it was held that, in order to support an indictment under this section, it is not enough to show simply that gunpowder or other explosive substance was thrown against the house, but it must also be shown that the substance was in a condition to explode at the time it was thrown, although no actual explosion did result.

Indictment for blowing up a house, whereby life was endangered.— ..... feloniously, unlawfully and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy the dwelling-

house of J. N., situate ..... whereby the life of one A. N. was then endangered, against the form ..... *(Add a count for damaging the house with a like consequence.) Archbold.*

Same proof as under last preceding indictment, and that the life of A. N. was endangered by the defendant's act.

Indictment for throwing gunpowder into a house with intent, etc.— ..... feloniously, unlawfully and maliciously did throw into the dwelling-house of J. N., situate ..... a large quantity, to wit, two pounds of a certain explosive substance, that is to say, gunpowder, with intent thereby then to destroy the said dwelling-house, against the form .....*(Add counts varying the statement of the act, and also stating the intent to be to damage the house.) —Archbold.* See *R.* v. *Sheppard*, 11 *Cox*, 302, *ante*. Prove as under sect. 13, and prove circumstances from which the jury may infer the intent as laid.

Local description necessary in the indictment.—*R.* v. *Woodward*, 1 *Moo. C. C.* 323.

INJURIES TO BUILDINGS BY TENANTS.

15. Every one who, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, unlawfully and maliciously pulls down or demolishes, or unlawfully and maliciously begins to pull down or demolish the same or any part thereof, or unlawfully and maliciously pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building, is guilty of a misdemeanor.—32-33 *V.*, *c.* 22, *s.* 17. 24-25 *V.*, *c.* 97, *s.* 13, *Imp.*

Indictment.— ..... that on ..... J. S. was possessed of a certain dwelling-house, situate ..... then held by him the said J. S. for a term of years then unexpired; and that the said J. S. being so possessed as aforesaid, on

the day and year aforesaid did unlawfully and maliciously pull down and demolish the said dwelling-house *(or begin to pull down or demolish the said dwelling-house or any part thereof)* against the form ..... — *Archbold.*

Greaves says : " This clause is a very important improvement in the law of England, as tenants have very frequently, especially when under notice to quit, wilfully injured houses and buildings to a great extent. " Mr. Cox says : " Malice is of the essence of this offence. It is not enough that it be unlawfully done, there must be a design to injure the owner. " This is clearly wrong by the express terms of sect. 58, *post*, (60 of our statute). Mr. Welsby perfectly correctly says " prove that the act was done maliciously, that is wilfully and without any claim or pretence of right to do it." No punishment for the offence created by this section was inserted, because it was thought that the common law punishment of fine or imprisonment, or both, was the proper punishment. " By the common law, when a fine is imposed, the offender may be imprisoned till the fine is paid.

This section only applies to any dwelling-house or building, but sect. 4, *ante*, provides for cases of setting fire to any of the things therein mentioned, whether in the offender's possession or not, and sect. 61, *post*, extends the provisions of the act generally to all offenders, whether in the possession of the property or not, if there be an intent to injure or defraud.—3 *Burn.* 775.

INJURIES TO MANUFACTURES, MACHINERY, ETC.

16. Every one who unlawfully and maliciously cuts, breaks or destroys, or damages, with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece,

stocking, hose or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process or progress of manufacture, or unlawfully and maliciously cuts, breaks, or destroys or damages with intent to destroy or render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or unlawfully and maliciously cuts, breaks or destroys or damages with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool or implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing or otherwise manufacturing or preparing any such goods or articles, or by force enters into any house, shop, building or place, with intent to commit any of the offences in this section mentioned, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 18. 24-25 *V.*, *c.* 97, *s.* 14, *Imp.*

17. Every one who unlawfully and maliciously cuts, breaks or destroys, or damages with intent to destroy or render useless, any machine or engine, whether fixed or movable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement whether fixed or movable, prepared for or employed in any manufacture whatsoever except the manufacture of silk, woollen, linen, cotton, hair, mohair or alpaca goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose or lace, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 19. 24-25 *V.*, *c.* 97, *s.* 15, *Imp.*

As to verdict for an attempt to commit the offence charged upon an indictment for the offence itself, in certain cases, see sect. 183 Procedure Act. It is not necessary to prove malice against owner; *post*, sect. 60. To prove that the act was done maliciously, it is sufficient to prove that it was done wilfully.

Taking away part of a frame and thereby rendering it useless, *R.* v. *Tacey*, *R.* & *R.* 452, and screwing up parts of an engine, and reversing the plug of the pump, thereby rendering it useless and liable to burst, *R.* v. *Fisher*, 10 *Cox*, 146, are damaging within the act, although no actual per-

manent injury be done.—If a thrashing machine be taken to pieces and separated by the owner, the destruction of any part of it is within the statute.—*R.* v. *Mackerell*, 4 *C. & P.* 448. So is the destruction of a water-wheel, by which a thrashing machine is worked.—*R.* v. *Fidler*, 4 *C. & P.* 449.—So though the side boards of the machine be wanting, without which it will act, but not perfectly, it is within the statute. But if the machine be taken to pieces, and in part destroyed by the owner from fear, the remaining parts do not constitute a machine within the statute.—*R.* v. *West*, 2 *Russ.* 1087. It is not necessary that any part of the machine should be broken; a dislocation or disarrangement is sufficient.—*R.* v. *Foster*, 6 *Cox*, 25. A table with a hole in it for water, used in the manufacture of bricks, was held not to be a machine "prepared for or employed in any manufacture" within the repealed statute; but it would no doubt now be held to be within the words *tool or implement* contained in the present section.—3 *Burn*, 776.

Indictment for cutting goods in the loom.—..... twenty-five yards of woollen cloth of the goods and chattels of J. N. in a certain loom then being, feloniously, unlawfully and maliciously did cut and destroy, against the form .....

Indictment for breaking warp of silk ..... a certain warp of silk, of the goods and chattels of J. N., feloniously, maliciously and unlawfully did cut and destroy, against the form .....

Indictment for entering by force into a house with intent to cut or destroy woollen goods..... into a certain house of J. N. situate ..... feloniously and by force did enter, with intent certain woollen goods of the said J. N. in a certain loom then and there being, feloniously,

unlawfully and maliciously to cut and destroy, against the form .....

Indictment for destroying a thrashing machine ..... a certain thrashing machine, the property of J. N., feloniously, unlawfully and maliciously did cut, break and destroy, against the form ..... —*Archbold.*

INJURY TO CORN, TREES AND VEGETABLE PRODUCTIONS.

18. Every one who unlawfully and maliciously sets fire to any crop of hay, grass, corn, grain or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice or plantation of trees, or to any heath, gorse furze or fern wheresoever the same is growing, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 20. 24-25 *V.*, *c.* 97, *s.* 16, *Imp.*

19. Every one who unlawfully and maliciously sets fire to any stack of corn, grain, pulse, tares, hay, straw, haulm or stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood or bark, or to any stere or pile of wood or bark, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 21. 24-25 *V.*, *c.* 97, *s.* 17, *Imp.*

20. Every one who unlawfully and maliciously, by any overt act, attempts to set fire to any matter or thing mentioned in either of the two sections next preceding, under such circumstances that if the same were thereby set fire to, the offender would be, under either of such sections, guilty of felony, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 22. 24-25 *V.*, *c.* 97, *s.* 18, *Imp.*

Indictment for setting fire to a stack of wheat ..... feloniously, unlawfully and maliciously did set fire to a certain stack of wheat, of J. N., aginst the form .....

Where the word *unlawfully* was omitted, the judges held the indictment to be bad.—*R.* v. *Turner*, 1 *Moo. C. C.* 239. No intent need be stated. *R.* v. *Newill*, 1 *Moo. C. C.* 458; *R.* v. *Woodward* 1 *Moo. C. C.* 323.

Prove that the defendant wilfully set fire to the stack of

wheat, as stated in the indictment, and prove the ownership of the property. An indictment for setting fire to a stack of beans, *R.* v. *Woodward*, 1 *Moo. C. C.* 323; or barley, *R.* v. *Swatkins*, 4 *C. & P.* 548, is good; for the court will take notice that beans are pulse, and barley, corn. A stack composed of the flax-plant with the seed or grain in it, the jury finding that the flax-seed is a grain, was held to be a stack of grain.—*R.* v. *Spencer*, *Dears. & B.* 131. The prisoner was indicted for setting fire to a stack of wood, and it appeared that the wood set fire to consisted of a score of faggots heaped on each other in a temporary loft over the gateway. *Held*, this not to be a stack of wood.—*R.* v. *Aris*, 6 *C. & P.* 348. Where the defendant set fire to a summer-house in a wood, and the fire was thence communicated to the wood, he was held to be properly convicted on an indictment charging him with setting fire to the wood.—*R.* v. *Price*, 9 *C. & P.* 729. An indictment for setting fire to a cock of hay cannot be sustained under a statute making it an offence to set fire to a stack of hay.—*R.* v. *McKeever*, 5 *Ir. R. C. L.* 86. A quantity of straw, packed on a lory, in course of transmission to market, and left for the night in the yard of an inn, is not a stack of straw within 24-25 Vict., c. 97, s. 17, Imp. (19 of our statute) and the setting fire thereto wilfully and maliciously is not felony.—*R.* v. *Satchwell*, 12 *Cox*, 449.

Sec. 19 does not apply to manufactured lumber.—*R.* v *Berthe*, 16 *C. L. J.* 251.

DESTROYING HOP-BINDS, ETC.

21. Every one who unlawfully and maliciously cuts or otherwise destroys any hop-binds growing on poles in any plantation of hops, *or any grape vines growing in any vineyard*, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V., c.* 22, *s.* 23. 24-25 *V., c.* 97, *s.* 19, *Imp.*

The words in *italics* are not in the English Act.

As to verdict for an attempt to commit the felony charged upon an indictment under this section, see sect. 183 of the Procedure Act.

Indictment.—..... one thousand hop-binds, the property of J. N., then growing on poles in a certain plantation of hops of the said J. N., situate ..... feloniously, unlawfully and maliciously did cut and destroy; against the form ..... —*Archbold.* See *R.* v. *Woodward*, 1 *Moo. C. C.* 323.

Prove that the defendant cut or otherwise destroyed the hop-binds, or some part of them, as alleged: that they were at the time growing in a plantation of hops, situate as described, belonging to J. N. Prove also that the act was done maliciously, that is to say, wilfully, and without the belief of a supposed right.—*Archbold.*

DESTROYING TREES, ETC.

22. Every one who unlawfully and maliciously cuts, breaks, barks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood growing in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, if the amount of the injury done exceeds the sum of five dollars, is guilty of felony, and liable to three years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 24. 24-25 *V.*, *c.* 97, *s.* 20, *Imp.*

23. Every one who unlawfully and maliciously cuts, breaks, barks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood growing in any public street or place or elsewhere than in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, if the amount of injury done exceeds the sum of twenty dollars, is guilty of felony, and liable to three years' imprisonment—32-33 *V.*, *c.* 22, *s.* 25. 24-25 *V.*, *c.* 97, *s.* 21, *Imp.*

Indictment under sect. 22 ..... two elm trees, the property of J. N.; then growing in a certain park, of the

said J. N., situate in ..... feloniously, unlawfully and maliciously did cut and damage, thereby then doing injury to the said J. N. to an amount exceeding the sum of five dollars, to wit, the amount of ten dollars, against the form ..... *(A count may be added for cutting with intent to steal the trees, under sect.* 18 *of the Larceny Act.)*—*Archbold.*

Indictment under sect. 23 ..... ten elm trees; the property of J. N., then growing in a certain close of the said J. N., situate ..... feloniously, unlawfully and maliciously did cut and damage, thereby then doing injury to the said J. N. to an amount exceding the sum of twenty dollars, to wit, the sum of twenty-five dollars, against the form ..... *(Add a count, under sect.* 18 *of the Larceny Act.)*

See sec. 183, Procedure Act, as to a verdict for an attempt to commit the offence charged upon an indictment for the offence, in certain cases.

A variance in the number of trees is not material. It must be proved, under sect. 22, that the tree was growing in a park, and that the damage done exceeds five dollars.

Under sect. 23, the damage must exceed twenty dollars, and the trees growing elsewhere than in a park. The amount of injury done means the actual injury done to the trees, by the defendant's act; it is not sufficient to bring the case within the statute, that, although the amount of such actual injury is less than twenty dollars, the amount of *consequential* damage would exceed twenty dollars.—*R.* v. *Whiteman, Dears.* 353. An indictment under these sections is defective, if it does not allege the act to have been done *unlawfully and maliciously,* and it is not sufficient to state that it was done *feloniously.*—*R.* v. *Lewis,* 2 *Russ.* 1067.

Two indictments were preferred against defendants for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. Defendants were put on trial on the charge of destroying the trees of M. and evidence relative to the offence charged in the other indictment was admitted as showing that the offences had been committed by the same persons.

Held, that such evidence was properly received.—*The Queen* v. *McDonald*, 10 *O. R.* 553.

DAMAGING TREES TO THE AMOUNT OF TWENTY-FIVE CENTS.

24. Every one who unlawfully and maliciously cuts, breaks, barks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is growing, the injury done being to the amount of twenty-five cents at the least, shall, on summary conviction, be liable to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment, with or without hard labor;

2. Every one who having been convicted of any such offence, either against this or any other Act or law, afterwards commits any of the offences in this section mentioned, shall, on summary conviction, be liable to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment with hard labor:

3. Every one who, having been twice convicted of any such offence, afterwards commits any of the offences in this section mentioned, is guilty, of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 22. *s.* 26. 24-25 *V.*, *c.* 97, *s.* 22, *Imp.*

If the injury done does not amount to twenty-five cents, the defendant may be punished under sect. 59, *post*.—*R.* v. *Dodson*, 9 *A. & E.* 704.

If a tree is cut or damaged, that is sufficient; it need not be totally destroyed.—*Taylor's Case*, *R. & R.* 373.

Indictment after two previous convictions for cutting or damaging trees to the value of twenty-five cents wheresoever growing.— ..... that J. S., on ..... one elm tree, the property of J. N., then growing on a certain land of the said J. N., in the ..... unlawfully and maliciously did cut and damage, thereby then doing injury to the said J. N., to the amount of forty cents, against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned (*stating the two previous convictions.*) See secs. 139 and 207 of the Procedure Act, as to indictments and procedure in indictable offences committed after previous convictions, and for which a greater punishment may be inflicted on that account.

If in answer to a charge under this section, the defendant sets up a bonâ fide claim of right, the justices of the peace have no jurisdiction.—*R.* v. *O'Brien*, 5 *Q. L. R.* 161.

DESTROYING PLANTS, ETC., IN A GARDEN.

25. Every one who unlawfully and maliciously destroys, or damages with intent to destroy, any plant, root, fruit or vegetable production, growing in any garden, orchard, nursery ground, house, hot-house green-house or conservatory, shall, on summary conviction, be liable to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment, with or without hard labor:

2. Every one who, having been convicted of any such offence, either against this or any other Act or law, afterwards commits any of the offences in this section mentioned, is guilty of felony, and liable to two years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 27. 24-25 *V.*, *c.* 97, *s.* 23, *Imp.*

Sects. 139 and 207 of the Procedure Act provide for the form of indictment and the procedure in cases of offences committed after a previous conviction, and for which, on

that account, a greater punishment may be inflicted.—*R.* v. *Martin*, 11 *Cox*, 343.

Indictment for destroying plants after a previous conviction. — ....., that J. S., on ..... one dozen heads of celery, the property of J. N., in a certain garden of the said J. N., situate ..... then growing, unlawfully and maliciously did destroy, against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence hereinbefore mentioned *(state the previous conviction.)* And so, the jurors aforesaid, upon their oath aforesaid, do say that the said J. S., on the day and year first aforesaid, one dozen heads of celery, the property of J. N. in a certain garden of the said J. N., situate ..... then growing, feloniously, unlawfully and maliciously did destroy, against the form .....

DESTROYING PLANTS, ETC., NOT IN A GARDEN.

26. Every one who unlawfully and maliciously destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard or nursery ground, shall, on summary conviction, be liable to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment, with or without hard labor, and in default of payment of such penalty and costs, if any, to imprisonment for any term not exceeding one month:

2. Every one who, having been convicted of any such offence, either against this or any other Act or law, afterwards commits any of the offences in this section mentioned, shall, on summary conviction, be liable to three months' imprisonment with hard labor.—32-23 *V.*, *c.* 22, *s.* 28. 24-25 *V.*, *c.* 97, *s.* 24, *Imp.*

See remarks under the last two preceding sections.

INJURIES TO FENCES.

27. Every one who, unlawfully and maliciously cuts, breaks,

throws down, or in anywise destroys any fence of any description whatsoever, or any wall, stile or gate, or any part thereof, respectively, shall, on summary conviction, be liable to a penalty not exceeding five dollars, over and above the amount of the injury done;

2. Every one who, having been convicted of any such offence, either against this or any other Act or law, afterwards commits any of the offences in this section mentioned, shall, on summary conviction, be liable to three months' imprisonment with hard labor.—32-33 *V.*, *c.* 22, *s.* 29. 24-25 *V.*, *c.* 97, *s.* 25, *Imp.*

The act must have been done *maliciously* to be punishable under this clause.—*R.* v. *Bradshaw*, 38 *U. C. Q. B.* 564.

INJURIES TO MINES.

28. Every one who unlawfully and maliciously sets fire to any mine of coal, cannel coal, anthracite or other mineral fuel, *or to any mine or well of oil or other combustible substance*, is guilty of felony and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 30. 24-25 *V.*, *c.* 97, *s.* 26, *Imp.*

29. Every one who unlawfully and maliciously, by any overt act attempts to set fire to any mine, *or to any such oil well*, under such circumstances that if the same were thereby set fire to, the offender would be guilty of felony, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 31. 24-25 *V.*, *c.* 97, *s.* 27, *Imp.*

The words in *italics* are not in the Imperial Act.

It is equally an offence within this section to set fire to a mine in the possession of the party himself, provided it is proved to be done with intent to injure or defraud any other person. The mine may be laid as the property of the person in possession of or working it, though only as agent.—*R.* v. *Jones*, 2 *Moo. C. C.* 293.

Indictment.— ..... feloniously, unlawfully and maliciously did set fire to a certain mine of coal of J. N., situate at ..... against the form .....

DROWNING MINES, ETC.

30. Every one who unlawfully and maliciously causes any water, earth, rubbish or other substance to be conveyed or to run or fall into any mine, *or into any oil well*, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine *or well*, or to hinder or delay the working thereof, or who, with the like intent, unlawfully and maliciously pulls down, fills up or obstructs or damages with intent to destroy, obstruct or render useless, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine *or well*, is guilty of felony, and liable to seven years' imprisonment:

2. This section shall not extend to any damage committed underground by any owner of any adjoining mine or well in working the same, or by any person duly employed in such working.—32-33 *V.*, *c.* 22, *s.* 32. 24-25 *V.*, *c.* 97, *s.* 28, *Imp.*

The words in *italics* are additions to the English statute, and intended, no doubt, as in the last two preceding sections, to protect petroleum wells.

See the remarks under these two sections.

Indictment for drowning a mine.—..... feloniously, unlawfully and maliciously did cause a quantity of water to be conveyed into a certain mine of J. N., situate ..... with intent thereby then feloniously to destroy the said mine, against the form of the statute .....

Acts causing the damages mentioned in this section done in the bonâ fide exercise of a supposed right and without a wicked mind are not indictable.—*R.* v. *Matthews*, 14 *Cox*, 5.

DESTROYING OR DAMAGING ENGINES, ETC., USED IN MINES.

31. Every one who unlawfully, and maliciously pulls down or destroys or damages with intent to destroy or render useless any steam engine or other engine for sinking, draining, ventilating or working, or for in anywise assisting in sinking, draining, ventilating or working any mine or oil well or any appliance or apparatus in connection with any such steam or other engine, or any staith, building or erection used in conducting the business of any mine or oil well, or any

bridge, waggon-way or track for conveying minerals or oil from any mine or well, whether such engine, staith, building, erection, bridge, waggon-way or track is completed or in an unfinished state, or unlawfully and maliciously stops, obstructs or hinders the working of any such steam or other engine, or of any such appliances or apparatus as aforesaid, with intent thereby to destroy or damage any mine or oil well, or to hinder, obstruct or delay the working thereof, or unlawfully and maliciously, wholly or partially, cuts through, severs, breaks or unfastens, or damages with intent to destroy or render useless any rope, chain or tackle, of whatsoever material the same is made, used in any mine or oil well, or in or upon any inclined plane, railway or other way or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine or oil well, or the working or business thereof, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 33. 24-25 *V.*, *c.* 97, *s.* 29, *Imp.*

See sect. 183 of the Procedure Act as to a verdict for an attempt to commit the offence charged in certain cases.

Prove that the defendant pulled down or destroyed the engine, as alleged. A scaffold erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold was holden to be an *erection* used in conducting the business of the mine, within the meaning of the statute.—*R.* v. *Whittingham*, 9 *C.* & *P.* 234.—Wrongfully setting a steam-engine in motion, without its proper machinery attached to it, and thereby damaging it and rendering it useless, is within the section.—*R.* v. *Norris*, 9 *C.* & *P.* 241. Damaging a drum moved by a steam-engine, but of which it forms no part, is not damaging a steam-engine.—*R.* v. *Whittingham*, *suprâ*. A trunk of wood used to convey water to wash the earth from the ore was held to be an erection used in conducting the business of a mine within the meaning of the statute.—*Barwell* v. *Winterstoke*, 14 *Q. B.* 704.

Indictment.— ..... a certain steam-engine, the property of J. N. for the draining and working of a certain

mine of the said J. N., situate ..... feloniously, unlawfully and maliciously did pull down and destroy, against the form.....

Acts causing the damages covered by this section must be done maliciously, and not in the bonâ fide exercise of a supposed right, to be punishable under its terms.—*R.* v. *Matthews*, 14 *Cox*, 5.

INJURIES TO SEA AND RIVER BANKS, AND TO WORKS ON RIVERS, CANALS, ETC.

32. Every one who unlawfully and maliciously breaks down or cuts down, or otherwise damages or destroys any sea bank, sea wall, dyke or aboiteau, or the bank, dam or wall of or belonging to any river, canal, drain, reservoir, pool or marsh, whereby any land or building is, or is in danger of being overflowed or damaged,—or unlawfully and maliciously throws, breaks or cuts down, levels, undermines or otherwise destroys any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, water-course or other work belonging to any port, harbor, dock or reservoir, or on or belonging to any navigable water or canal, or any dam or structure erected to create or utilize any hydraulic power, or any embankment for the support thereof, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 34. 24-25 *V.*, *c.* 97, *s.* 30, *Imp.*

33. Every one who unlawfully and maliciously cuts off, draws up or removes any piles, stone or other materials, fixed in the ground and used for securing any sea bank or sea wall, or the bank, dam or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbor, dock, quay, wharf, jetty or lock,—or unlawfully and maliciously opens or draws up any floodgate or sluice. or does any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 35. 24-25 *V.*, *c.* 97, *s.* 31, *Imp.*

Indictment under sect. 32—..... a certain part of the bank of a certain river called the river ..... situate..... feloniously, unlawfully and maliciously did cut down and

break down, by means whereof certain lands were then overflowed and damaged *(or were in danger .....)* against .....

Indictment under sect. 33—..... a certain pile, then fixed in the ground, and then used for securing the bank of a certain river called the river ..... situate ..... feloniously, unlawfully and maliciously did cut off, against the form .....

See R. v. *Woodward* 1 *Moo. C. C.* 323.

INJURIES TO FISH PONDS.

34. Every one who unlawfully and maliciously cuts through, breaks down or otherwise destroys the dam, floodgate or sluice of any fish-pond, or of any water which is private property, or in which there is any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish,—or unlawfully and maliciously puts any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish that are then or that may thereafter be put therein,—or unlawfully and maliciously cuts through, breaks down or otherwise destroys the dam or floodgate of any mill-pond, reservoir or pool, is guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 36. 24-25 *V.*, *c.* 97, *s.* 32, *Imp.*

Indictment for breaking down the dam of a fish-pond—..... the dam of a certain fish-pond of one J. N., situate ..... unlawfully and maliciously did break down and destroy with intent thereby then to take and destroy the fish in the said pond then being, against the form.....

Indictment for putting lime into a fish-pond.—..... unlawfully and maliciously did put a large quantity, to wit, ten bushels of lime, into a certain fish-pond of one J. N., situate ..... with intent thereby then to destroy the fish in the said pond then being, against the form.. .....

Indictment for breaking down a mill dam.—.....

the dam of a certain mill-pond of J. N., situate ..... unlawfully and maliciously did break down and destroy, against the .....

Maliciously in all cases under this act means a wrongful act done intentionally without just cause or excuse. *R.* v. *Matthews* 14 *Cox*, 5 ; 2 *Russ.* 1073, *note by Greaves.* —See Procedure Act sec. 183, as to a verdict for an attempt to commit the misdemeanor charged in certain cases, upon an indictment for the misdemeanor itself.

INJURIES TO BRIDGES, VIADUCTS AND TOLL-BARS.

35. Every one who unlawfully and maliciously pulls or throws down, or in anywise destroys any bridge, whether over any stream of water or not, or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal passes, or does any injury with intent and so as thereby to render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable, is guilty of felony, and liable to imprisonment for life.—32-33 *V., c.* 22, *s.* 37. 24-25 *V., c.* 97, *s.* 33, *Imp.*

This clause by the words *over any stream of water or not* does away with the difficulties raised in *R.* v. *Oxfordshire*, 1 *B. & A.* 289-297, and *R.* v. *Derbyshire*, 2 *Q. B.* 745.

The clause does not apply to private bridges, but any injury to a private bridge exceeding the sum of twenty dollars would bring the case within sect. 58, *post*, and if less than that sum within sect. 59, *post.*

Indictment for pulling down a bridge.—..... a certain bridge, situate ..... feloniously, unlawfully and maliciously did pull down and destroy, against the form .....

Indictment for injuring a bridge.—.....feloniously, unlawfully and maliciously did *(state the injury)* a certain bridge, situate ..... with intent thereby to render

the said bridge dangerous and impassable, against the form ..... —*Archbold.*

The intent, under this part of this section must be laid and proved, but if the bridge be proved to have been rendered dangerous or impassable, by the act of the defendant, it will be sufficient proof of the intent.—*Archbold.*

See sect. 183 Procedure Act, as to a verdict for an attempt to commit the offence charged in certain cases upon an indictment for the offence itself.

DESTROYING TURNPIKE GATES, TOLL-BARS, ETC.

36. Every one who unlawfully and maliciously throws down levels or otherwise destroys, in whole or in part, any turnpike gate or toll-bar, or any wall, chain, rail, post, bar or other fence belonging to any turnpike gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act or law relating thereto, or any house, building or weighing engine erected for the better collection, ascertainment or security of any such toll, is guilty of a misdemeanor, and liable to fine or imprisonment, or both, in the discretion of the court.—32-33 *V.*, *c.* 22, *s.* 38. 24-25 *V.*, *c.* 97, *s.* 34, *Imp.*

Indictment.— ..... a certain turnpike gate, situate ..... unlawfully and maliciously did throw down, level and destroy, against the form.....

See c. 181, *post*, secs. 24, 26 and 31, as to punishment.

INJURIES TO RAILWAYS AND TELEGRAPHS.

37. Every one who unlawfully and maliciously, and with intent to obstruct, endanger, upset, overthrow, injure or destroy any engine, tender, carriage, truck or vehicle, on any railway, or any property passing over or along any railway,

(*a.*) Puts, places, casts or throws any wood, stone or other matter or thing upon or across any railway,

(*b.*) Breaks, takes up, removes, displaces, injures or destroys any rail, railway switch, sleeper, bridge, fence or other matter or thing, or any portion thereof, belonging to any railway,

(*c.*) Turns, moves or diverts any point or other machinery belonging to any railway,

(*d.*) Makes or shows, hides or removes any signal or light upon or near any railway, or

(*e.*) Does or causes to be done, any other matter or thing,

Is guilty of a felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 39. 42 *V.*, *c.* 9, *s.* 88, *part*. 44 *V.*, *c.* 25, *s.* 116, *part*. 24-25 *V.*, *c.* 97, *s.* 35, *Imp*.

38. Every one who unlawfully and maliciously—

(*a.*) Breaks, throws down, injures or destroys, or does any other hurt or mischief to,

(*b.*) Obstructs or interrupts the free use of, or

(*c.*) Obstructs, hinders or prevents the carrying on, completing, supporting or maintaining of

Any railway or any part thereof, or any building, structure, station, depot, wharf, vessel, fixture, bridge, fence, engine, tender, carriage, truck, vehicle, machinery or other work, device, matter or thing of such railway, or appertaining thereto or connected therewith,

Is guilty of a misdemeanor, and liable to five years' imprisonment. —42 *V.*, *c.* 9, *ss.* 87 *and* 90. 44 *V.*, *c.* 25, *ss.* 115 *and* 118.

39. Every one who, by any means, or in any manner or way whatsoever, or by any wilful omission or neglect, obstructs or interrupts, or causes to be obstructed or interrupted, or aids or assists in obstructing or interrupting, the free use of any railway or any part thereof, or any building, structure, station, depot, wharf, vessel, fixture, bridge, fence, engine, tender, carriage, truck, vehicle, machinery or other work, device or thing of such railway, or appertaining thereto, or connected therewith, is guilty of a misdemeanor, and liable to two years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 40. 42 *V.* *c.* 9, *s.* 86. 44 *V.*, *c.* 25, *s.* 114. 24-25 *V.*, *c.* 97, *s.* 36, *Imp*.

40. Every one who unlawfully and maliciously cuts, breaks, throws down, destroys, injures or removes any battery, machinery, wire, cable, post or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes, or unlawfully and maliciously prevents or obstructs, in any manner whatsoever, the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire alarm, or the transmission of electricity for any such electric light or for any such

purpose as aforesaid, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 22, *s.* 41. 24-25 *V.*, *c.* 97, *s.* 37, *Imp.*

41. Every one who unlawfully and maliciously, by any overt act, attempts to commit any of the offences in the next preceding section mentioned, shall, on summary conviction, be liable to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labor.—32-33 *V.*, *c.* 22, *s.* 42. 24-25 *V.*, *c.* 97, *s.* 38, *Imp.*

See sec. 25 of c. 162, page 177, *ante* The extension of sec. 40 to *telephones, electric lights and fire alarms, or to the transmission of electricity for any such electric light, or for any such purpose as aforesaid,* is new law.

See sec. 183 of the Procedure Act as to a verdict of attempt to commit the offence charged in certain cases.

The words "endanger" and "or any property passing over and along any railway" in sec. 37, are not in the Imperial Act. Neither are the words, "breaks, injures or destroys," nor "railway switch, bridge, fence" in sub. sec. b.

The prisoners were indicted in several counts for wilfully and maliciously placing a stone upon the North Woolwich Railway, with intent to damage, injure, and obstruct the carriages travelling upon it.

It appeared that the prisoners, who were respectively aged thirteen and fourteen, had placed a stone on the railway in such a way as to interfere with the machinery of the points, and prevent them from acting properly, so that if a train had come up at the time the stone remained as placed by the prisoners it would have been passed off the line, and a serious accident must have been the consequence. Gutteridge held up the points whilst Upton dropped in the stone.

Wightman, J., told the jury that in order to convict the prisoners it was necessary, in the first place, to prove that they had wilfully placed the stone in the position stated

upon the railway ; and secondly, that it was done maliciously, and with the purpose of causing mischief. It was his duty to inform them that it was not necessary that the prisoners should have entertained any feeling of malice against the railway company, or against any person travelling upon it ; it was quite enough to support the charge if the act was done with a view to some mischievous consequence or other, and if that fact was made out the jury would be justified in finding the prisoners guilty, notwithstanding their youth. They were undoubtedly very young ; but persons of their age were just as well competent to form an opinion of the consequences of an act of this description as an adult person. *Verdict*, guilty upon the counts charging an intent to obstruct the engine.—*R.* v. *Upton (Greaves Lord Campbell's Acts, Appendix).*

Indictment under sect. 37.—.....feloniously, unlawfully and maliciously did put and place a piece of wood upon a certain railway called.....in ..... with intent thereby then to obstruct, upset, overthrow, and injure a certain engine and certain carriages using the said railway, against the form ..... —*Archbold. (The intent may be laid in different ways, in different counts, if necessary.)*

Prove that the defendant placed the piece of wood upon or across the railroad as described in the indictment, or was present aiding and assisting in doing so. The intent may be inferred from circumstances from which the jury may presume it. In general, the act being done wilfully, and its being likely to obstruct or upset the railway train, would be sufficient *primâ facie* evidence of an intent to do so. Where the engine or carriage is in fact obstructed, or the safety of the persons conveyed therein is in fact endangered by the defendant's act, but there is no evidence of any of the intents mentioned in sect. 37, the defendant

should be indicted for a misdemeanor under sect. 39—*R.* v. *Bradford, Bell C. C.* 268.—A line of railway constructed under an Act of Parliament, but not yet opened for public traffic, and used only for the carriage of materials and workmen, is within the statute.—*Idem.* A drunken man got upon the railway and altered the signals and thereby caused a luggage train to pull up and proceed at a very slow pace: *Held*, upon a case reserved, Martin, B. dissentient, that this was a causing of an engine and carriage using a railway to be obstructed within the meaning of sect. 36 (39 of our statute) of the act in question.—*R.* v. *Hadfield*, 11 *Cox*, 574. A person improperly went upon a line of railway and purposely attempted to stop a train approaching by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by inspectors of the line when desirous of stopping a train: *Held*, that this amounted to the offence of unlawfully obstructing an engine or carriage using a railway under sect. 36 (39 of our statute) of the statute in question.—*R.* v. *Hardy*, 11 *Cox*, 656.

Indictment under sec. 37 *b.*—.....*Berkshire* (to wit). The Jurors for Our Lady the Queen, upon their oath present, that on the *first* day of *May*, in the year of our Lord 1852, at the parish of *Goring*, in the county of *Berks*, A. B. did feloniously, unlawfully, and maliciously take up *(take up remove, or displace)* a certain rail *(any rail, sleeper, or other matter or thing)* then and there belonging to a certain railway there, called "*The Great Western Railway*," with intent, etc. *(Conclude as in last precedent. Vary counts and intent.)*

Indictment under sec. 37 *c.*—.....*Berkshire* (to wit). The Jurors for Our Lady the Queen upon their oath present, that on the *first* day of *May*, in the year of our Lord 1852,

at the parish of *Goring*, in the county of *Berks*, A. B. did feloniously, unlawfully, and maliciously turn [*turn, move, or divert*] certain points [*any points or other machinery*] then and there belonging to a certain railway there called "*The Great Western Railway*," with intent, etc. *(Conclude as in last precedent. Vary counts and intent.)*

Indictment under sec. 37 *d.*—.....*Berkshire* (to wit). The Jurors for Our Lady the Queen upon their oath present, that on the *first* day of *May*, in the year of our Lord 1852, at the parish of *Goring*, in the county of *Berks*, A. B. did feloniously, unlawfully, and maliciously make *(make or show, hide or remove)* a certain signal *(any signal or light)* upon *(upon or near to)* a certain railway there, called "*The Great Western Railway*," with intent, etc. *(Conclude as in the last precedent. Vary counts and intent.)*

Indictment under sec. 37 *e.*—.....*Berkshire* (to wit). The Jurors for Our Lady the Queen, upon their oath present, that on the *first* day of *May* in the year of our Lord 1852, at the parish of *Goring*, in the county of *Berks*, A. B. did feloniously, unlawfully, and maliciously set fire to *(do or cause to be done any other matter or thing)* a certain carriage, then and there using a certain railway there, called "*The Great Western Railway*," with intent thereby then and there to destroy [*obstruct, upset, overthrow, injure or destroy*] the said carriage [*any engine, carriage, or truck, using such railway*], so then and there using the said railway as aforesaid. *(Vary counts and intent.)*

INJURIES TO WORKS OF ART.

42. Every one who unlawfully and maliciously destroys or damages any book, manuscript, picture, print, statue, bust or vase, or any other article or thing kept for the purposes of art, science or literature, or as an object of curiosity in any museum, gallery, cabinet, library or other depository, which museum, gallery, cabinet, library, or other

depository is, either at all times or from time to time, open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument or other memorial of the dead, painted glass or other monument or work of art in any church, chapel, meeting-house or other place of divine worship, or in any building belonging to Her Majesty or to any county, riding, city, town, village, parish or place, or to any university, or college or hall of any university, or in any street, square, church-yard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing or fence surrounding such statue or monument, or any fountain, lamp, post, or other thing of metal, glass, wood or other material, in any street, square or other public place, is guilty of a misdemeanor, and liable to one year's imprisonment:

2. Nothing herein contained shall affect the right of any person to recover damages for the injury so committed.—32-33 *V.*, *c.* 22, *s.* 43. 24-25 *V.*, *c.* 97. *s.* 39, *Imp.*

INJURIES TO CATTLE AND OTHER ANIMALS.

43. Every one who unlawfully and maliciously kills, maims, wounds, *poison or injures* any cattle, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 45. 24-25 *V.*, *c.* 97, *s.* 40, *Imp.*

44. Every one who unlawfully and maliciously attempts to kill, maim, wound, poison or injure any cattle, or unlawfully and maliciously places poison in such a position as to be easily partaken of by any cattle, is guilty of a misdemeanor, and liable to fine or imprisonment, or both in the discretion of the court.—32-33 *V.*, *c.* 22, *s.* 46.

The words in *italics* in sec. 43 are not in the Imperial Act.

Sec. 44 is not in the Imperial Act.

As to the punishment under sec. 44, see, *post*, c. 181, secs. 24, 26, 31.

Indictment for killing a horse.—..... one horse of the goods and chattels of J. N. feloniously, unlawfully, and maliciously did kill, against the form .....

The particular species of cattle killed, maimed, wounded,

poisoned or injured, must be specified; an allegation that the prisoner maimed certain cattle is not sufficient.—*R.* v. *Chalkley*, *R. & R.* 258.

No malice against the owner is necessary; *post*, sect. 60. Other acts of administering poison to cattle are admissible in evidence to show the intent with which the drug is administered.—*R.* v. *Mogg*, 4 *C. & P.* 364. The word *wound* is contradistinguished from a permanent injury, such as maiming, and a *wounding* need not be of a permanent nature.—*R.* v. *Haywood*, 2 *East, P. C.* 1076; *R. & R.* 16.

In *R.* v. *Jeans*, 1 *C. & K.* 539, it was held that where part of the tongue of a horse was torn off, there was no offence against the statute, because no instrument was used. But, under the present statute, the same act was held to be a wounding within this section.—*R.* v. *Bullock*, 11 *Cox*, 125. Upon a case reserved, in *R.* v. *Owens*, 1 *Moo. C. C.* 205, it was held that pouring acid into the eye of a mare, and thereby blinding her, is a maiming.—Setting fire to a building with a cow in it, and thereby *burning the cow* to death, is a killing within the statute.—*R.* v. *Haughton*, 5 *C. & P.* 555.

The prisoner by a reckless and cruel act caused the death of a mare. The jury found that he did not intend to kill, maim or wound the mare, but that he knew that what he did would or might kill, maim or wound the mare, and that he nevertheless did the act recklessly, and not caring whether the mare was injured or not.

Held, that there was sufficient malice to support the conviction.—*R.* v. *Welch*, 13 *Cox*, 121.

In an indictment purporting to be under 32-33 V., c. 22, s. 45, for malicious injury to property the word "feloniously" was omitted.

Held, bad, and ordered to be quashed.—*The Queen* v. *Gough*, 3 *O. R.* 402.

KILLING OR MAIMING OTHER ANIMALS.

45. Every one who unlawfully and maliciously kills, maims, wounds, *poisons or injures* any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any domestic purpose, *or purpose of lawful profit or advantage or science*, shall, on summary conviction, be liable to a penalty not exceeding one hundred dollars, over and above the amount of injury done, or to three months' imprisonment with or without hard labor;

2. Every one who, having been convicted of any such offence, afterwards commits any of the offences in this section mentioned, is guilty of a misdemeanor, and liable to fine or imprisonment, or both, in the discretion of the court.—32-33 *V.*, *c.* 22, *s.* 47. 24-25 *V.*, *c.* 97, *s.* 41, *Imp.*

The words in *italics* are not in the Imperial Act.

As to the proceedings on a subsequent offence, see secs. 139 and 207 of the Procedure Act. As to the punishment under sub. sec 2, see secs. 24, 26 and 31 of c. 181, *post.*

As to a verdict of attempt to commit the offence charged in certain cases, see sec. 183 of the Procedure Act.

Greaves says: "This clause is new, and is a great improvement of the law, as it will protect domestic animals, from malicious injuries. It includes any beast or animal, not being cattle, which is the subject of larceny at common law. It also includes birds which are the subject of larceny at common law; such as all kinds of poultry, and, under certain circumstances, swans and pigeons. So also it includes any bird, beast or other animal ordinarily kept in a state of confinement, though not the subject of larceny, such as parrots and ferrets; and it is to be observed that the words *ordinarily kept in a state of confinement*, are a description of the mode in which the animals are usually

kept, and do not render it necessary to prove that the bird or animal was confined at the time when it was injured. Lastly the clause includes any bird or animal kept for any domestic purpose, which clearly embraces cats."

The words *or purpose of lawful profit* included in our statute cover all animals kept in a circus, menagerie, etc.

INJURIES TO SHIPS.

46. Every one who unlawfully and maliciously sets fire to, casts away or in anywise destroys any ship or vessel, whether the same is complete or in an unfinished state, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 48. 24-25 *V.*, *c.* 97, *s.* 42, *Imp.*

47. Every one who unlawfully and maliciously sets fire to or casts away or in anywise destroys any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person who has underwritten or who underwrites any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 49. 24-25 *V.*, *c.* 97, *s.* 43, *Imp.*

48. Every one who unlawfully and maliciously, by any overt act attempts to set fire to, cast away, or destroy any ship or vessel, under such circumstances that, if the ship or vessel were thereby set fire to, cast away or destroyed, the offender would be guilty of felony, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 50. 24-25 *V.*, *c.* 97, *s.* 44, *Imp.*

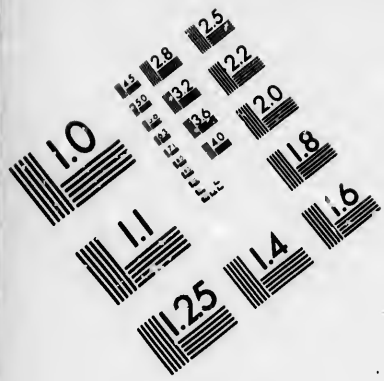
Indictment under sec. 46—.....that J. S., on..... feloniously, unlawfully and maliciously did set fire to a certain ship called "the Rattler," the property of J. N., against the form .....

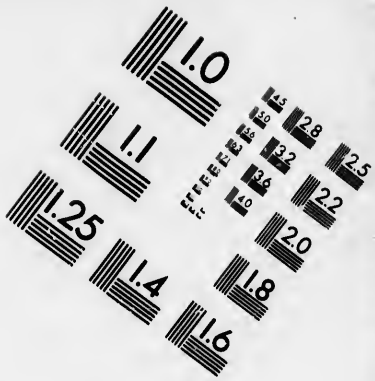
As to setting fire, etc., see notes under sections 2 and 3, *ante*.—A pleasure boat, eighteen feet long was set fire to, and Patteson, J., inclined to think that it was a vessel within the meaning of the act, but the prisoner was acquitted on the merits, and no decided opinion was given. —*R.* v. *Bowyer*, 4 *C. & P.* 559. Upon an indictment for

firing a barge, Alderson, J., seemed to doubt if a barge was within the meaning of the statute.—*R.* v. *Smith*, 4 *C. & P.* 569. The burning of a ship of which the defendant was a part owner is within the statute.—*R.* v. *Wallace*, 2 *Moo. C. C.* 200. See, *post*, sect. 61.

Indictment under sect. 47 ..... that J. S., on..... on board a certain ship called "the Rattler," the property of J. N., on a certain voyage upon the high seas, then being upon the high seas, feloniously, unlawfully and maliciously did set fire to the said ship, with intent thereby to prejudice the said J. N., the owner of the said ship, against the form ..... *(The intent may be stated in different ways, in different counts.)*

In *R.* v. *Philp*, 1 *Moo. C. C.* 263, there was no proof of malice against the owners, and the ship was insured for more than its value, but the court thought that the defendant must be taken to contemplate the consequences of his act, and held that, as to this point, the conviction was right.—See *R.* v. *Newill*, 1 *Moo. C. C.* 458. The destruction of a vessel by a part-owner shows an intent to prejudice the other part-owners, though he has insured the whole ship, and promised that the other part-owners should have the benefit thereof.—*Idem.* The underwriters on a policy of goods fraudulently made are within the statute, though no goods be put on board.—*Idem.* If the intent be laid to prejudice the underwriters, then prove the policy, and that the ship sailed on her voyage.—*R.* v. *Gilson*, *R. & R.* 138. It would seem, however, that the general provision of the 46th section of this statute renders unnecessary in any case the allegation or the proof of the intent mentioned in the 47th section. Proof that it was done wilfully is of itself evidence that it was done with intent to prejudice.





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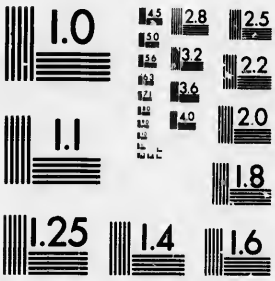

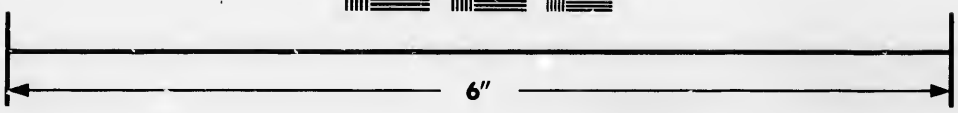

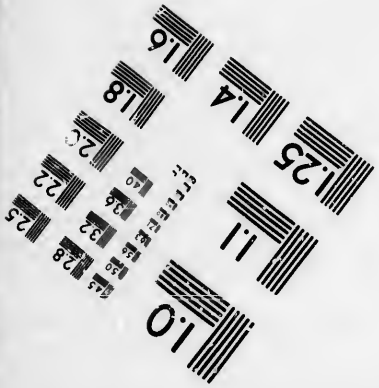

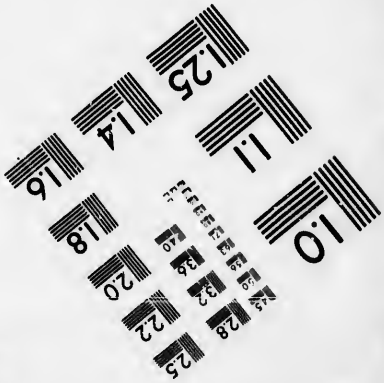

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A sailor goes on a ship to steal rum. While tapping the casks, a lighted match held by him set the rum on fire, and a conflagration ensued which destroyed the vessel.—*Held*, that a conviction for arson of the ship could not be upheld.—*R.* v. *Faulkner*, 13 *Cox*, 550.

Held, on the trial of the master of a vessel indicted for scuttling her (by Allen, C. J., and Fisher and Duff, J. J.), that s. 64 of the statute of Canada, 32-33 V., c. 29, allowing a witness to be cross-examined as to previous statements made by him in writing or reduced into writing, would not apply to protests made by the prisoner, or to policies of insurance issued to the witness, or to receipts which it did not appear the witness had either written, signed or even seen until they were shown to him in the witness box; but *held*, by Weldon, J., that it was competent, on the cross-examination of the witness, to put into his hands a policy of insurance not in evidence, and ask him if he did not see certain words in it; also, to read from a paper purporting to be a protest made by the prisoner and ask the witness if he did not write the protest and if certain words were not in it. *Held*, also, (by Allen, C. J., and Fisher and Duff, J. J.), that where the indictment in certain counts charged the destruction of the vessel with intent thereby to prejudice the underwriters, and in others simply charged the crime without alleging the intent, and the prisoner was found guilty on all the counts, that even if it was necessary to show that the prisoner had knowledge, as to which they expressed no opinion, the court could, if necessary, alter the verdict to a finding on the counts which did not allege the intent.

Per Weldon, J., that it was not necessary to show the prisoner's knowledge of the insurance, as he must be pre-

sumed to have intended the necessary consequence of his act, which was to prejudice the underwriters.

It appeared on the trial that the prisoner, with the greater portion of his crew including the mate, had gone before a naval court and given a false account of the loss of the vessel, also, that the prisoner had persuaded the mate to suppress the log book and swear that it was lost.

Held, Fisher, J., *dubitante*, that the log book was properly received in evidence.

Held, also, that proof of the receipt by the prisoner of drafts for large sums of money, drawn by parties in C., from which the vessel which the prisoner was charged with scuttling sailed, was properly received, and being unexplained by the prisoner they were properly left to the jury as evidence against him.

There is no positive rule of law that the testimony of an accomplice must receive direct corroboration, and the nature and extent of the corroboration required depend a great deal upon the character of the crime charged. Therefore, where the judge directed the jury "that it was not necessary that T. (the accomplice) should be corroborated as to the very act of boring the holes in the vessel; if the other evidence, and the circumstances of the case, satisfied them that he was telling the truth in the account which he gave of the destruction of the vessel that would be sufficient."

Held, a proper direction.

Held, also, that the words in a bill of lading "weight and contents unknown" would not prevent a jury from having the right to draw whatever inference of guilt they pleased against the prisoner, from his knowledge that the cargo was not what the bill of lading represented it to be. —*The Queen* v. *Tower*, 4 *P. & B. (N. B.)* 168.

PLACING GUNPOWDER NEAR A VESSEL WITH INTENT, ETC.

49. Every one who unlawfully and maliciously places or throws in, into, upon, against or near any ship or vessel, any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working-tools, goods or chattels, whether or not any explosion takes place, and whether or not any injury is effected, is guilty of felony, and liable to fourteen years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 51. 24-25 *V.*, *c.* 97, *s.* 45, *Imp.*

50. Every one who unlawfully and maliciously damages, otherwise than by fire, gunpowder or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 52. 24-25 *V.*, *c.* 97, *s.* 46, *Imp.*

See remarks under sects. 13, 14, 46, 47, 48, *ante.*

FALSE SIGNALS, ETC.

51. Every one who unlawfully masks, alters, removes or extinguishes any light or signal, or unlawfully exhibits any false light or signal, with intent to bring any ship, vessel or boat into danger, or unlawfully and maliciously does any thing tending to the immediate loss or destruction of any ship, vessel or boat, and for which no punishment is hereinbefore provided, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 53. 33 *V.*, *c.* 18, *s.* 4, *part.* 24-25 *V.*, *c.* 97, *s.* 47, *Imp.*

See sec. 183 of the Procedure Act for a verdict of attempt in certain cases.

It is to be remarked that the first part of the section says "*unlawfully*" only.

Indictment for exhibiting false signals.—The Jurors for Our Lady the Queen upon their oath present, that before and at the time of committing the felony hereinafter mentioned, a certain ship, the property of some person or persons to the jurors aforesaid unknown, was sailing on a certain river called ..... near unto ..... and that J. S. on ..... well knowing the premises, whilst the said

ship was so sailing on ..... near unto the said parish as aforesaid, feloniously and unlawfully did exhibit a false light, with intent thereby to bring the said ship into danger, against the form ..... *Archbold.*

Indictment for doing an act tending to the immediate danger of a ship.—.....near unto the parish of..... and that J. S. on ..... well knowing the premises, whilst the said ship was so sailing near the said parish as aforesaid, feloniously, unlawfully and maliciously did ..... *(state the act done,)* the said act so done by the said J. S. as aforesaid then tending to the immediate loss of the said ship, against the form .....—*Archbold.*

CUTTING AWAY, ETC., BUOYS.

52. Every one who, unlawfully and maliciously, cuts away, casts adrift, removes, alters, defaces, sinks or destroys, or unlawfully and maliciously does any act with intent to cut away, cast adrift, remove, alter, deface, sink or destroy, or in any other manner unlawfully and maliciously injures or conceals any lighthouse, light-ship, floating or other light, lantern or signal, or any boat, buoy, buoy-rope, beacon, anchor, perch or mark used or intended for the guidance of seamen, or for the purpose of navigation, is guilty of felony, and liable to seven years' imprisonment.—32-33 *V., c.* 22, *s.* 54. 33 *V., c.* 18, *s.* 4, *part.* 24-25 *V., c.* 97, *s.* 48, *Imp.*

Maliciously means wilfully. *See R.* v. *Faulkner,* 13 *Cox, ante,* under sec. 48, and cases there cited; also *R.* v. *Latimer,* 16 *Cox,* 70.

No intent need be charged in the indictment. This section includes the offence and the attempt to commit the offence.

Indictment.— ..... that J. S., on ..... upon the river called ..... feloniously, unlawfully and maliciously did cut away a certain buoy then used for the guidance of seamen and for the purpose of navigation, against the form.....

MAKING FAST TO BUOYS, ETC.

53. Every one who makes fast any vessel or boat to any such buoy, beacon or sea mark, shall, on summary conviction, be liable to a penalty not exceeding ten dollars, and in default of payment, to one month's imprisonment.—32-33 *V.*, *c.* 22, *s.* 55.

54. Every one who unlawfully and maliciously breaks, injures, cuts, loosens, removes or destroys, in whole or in part, any dam, pier, slide, boom or other such works, or any chain or other fastening attached thereto, or any raft, crib of timber or saw-logs, or unlawfully and maliciously impedes or blocks up any channel or passage intended for the transmission of timber, is guilty of a misdemeanor, and liable to a fine or to two years' imprisonment or to both.—32-33 *V.*, *c.* 22, *s.* 56; *C. S. C.*, *c.* 68, *s.* 67.

These clauses are not in the Imperial Act.

Malice against owner is unnecessary, and the clause applies to every person in possession of the property injured, if act done with intent to injure or defraud. But in such a case, it is not necessary to allege that the intent was to injure or defraud any particular person.—Sections 60, 61, *post.*

Indictment.— ..... that A. B. on ..... in ..... unlawfully and maliciously did cut a certain boom then and there lying on the river called ..... the said boom being then and there the property of J. S., of ..... against the form.....

INJURIES TO POLL BOOKS ETC.

55. Every one who unlawfully *or* maliciously destroys, injures or obliterates, or causes to be wilfully *or* maliciously destroyed, injured or obliterated, or makes or causes to be made any erasure, addition of names or interlineation of names in or upon, or aids, consents or assists in so destroying, injuring or obliterating, or in making any erasure, addition of names or interlineation of names in or upon any writ of election, or any return to a writ of election, or any indenture, poll book, voters' list, certificate, affidavit or report, or any document or paper made, prepared or drawn out according to any law in regard to provincial, municipal or civic elections, is guilty of

felony, and liable to a fine in the discretion of the court, or to seven years' imprisonment, or to both.—29-30 *V.* (*Can.*) *c.* 51, *s.* 188, *part.* *R. S. B. C., c.* 157, *ss.* 99 *and* 100, *part.*

This clause applies only to writs or documents for provincial, municipal, or civic elections.

INJURIES TO LAND MARKS.

56. Every one who knowingly and wilfully *pulls down*, defaces, alters or removes any mound, land mark, post or monument lawfully *erected*, *planted* or placed to mark or determine the boundaries of any Province, county, city, town, township, parish or other municipal division, is guilty of felony, and liable to seven years' imprisonment. —*C. S. C., c.* 77, *s.* 107, *part.* *C. S. U. C., c.* 93, *s.* 4, *part.*

57. Every one who knowingly and wilfully defaces, alters or removes any mound, land mark, post or monument lawfully placed *by any land surveyor* to mark any limit, boundary or angle of any concession, range, lot or parcel of land, is guilty of a misdemeanor, and liable to a fine not exceeding one hundred dollars, or to three months' imprisonment, or to both ;

2. Nothing herein shall prevent a land surveyor in his operation from taking up posts or other boundary marks when necessary, if he carefully replaces them as they were before.—*C. S. C., c.* 77, *s.* 107, *part.* *C. S. U. C., c.* 93, *s.* 4, *part.*

The words "*pulls down*" in sect. 56 are omitted from sec. 57. "So are the words *erected or planted.*"

The words "*by any land surveyors*" in sec. 57 are not in sec. 56.

The misdemeanor mentioned in sec. 57 can only be committed in relation to boundaries or land marks which have been *legally* placed by a land surveyor.—*R.* v. *Austin*, 11 *Q. L. R.* 76.

INJURIES NOT BEFORE PROVIDED FOR EXCEEDING TWENTY DOLLARS.

58. Every one who unlawfully and maliciously commits any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no

punishment is hereinbefore provided, the damage, injury or spoil being to an amount exceeding twenty dollars, is guilty of a misdemeanor, and liable to five years' imprisonment.—32-33 *V., c.* 22, *s.* 59. 24-25 *V., c.* 97, *s.* 51, *Imp.*

If an attempt to commit the offence only is proved, see sect. 183 of the Procedure Act. The English act has an additional enactment giving a greater punishment for offences committed in the night. Under this section, evidence of damage committed at several times, in the aggregate, but not at any one time, exceeding twenty dollars will not sustain an indictment.—*R.* v. *Williams*, 9 *Cox*, 338.

The injury must directly amount to twenty dollars; consequential damage cannot be taken into consideration, to make up that amount.—*R.* v. *Whiteman*, 6 *Cox*, 370; *Dears.* 353. In *R.* v. *Thoman*, 12 *Cox*, 54, the indictment was as follows ..... That Margaret Thoman, on the 30th of January, 1871, in and upon three frocks, six petticoats, one flannel petticoat, one flannel vest, one pinafore, one jacket, of the value of twenty pounds, of the property of ..... unlawfully and maliciously did commit certain damage, injury and spoil to an amount exceeding five pounds, by unlawfully cutting and destroying the same against the form of the statute in such case made and provided. At the trial, the prisoner's counsel objected that the indictment was bad, because the value of the articles damaged was ascribed to them collectively and not individually. But upon a case reserved, the indictment was held good, and Bovill, C. J., said: "We are all of opinion that it was not material to allege the value of the several articles in the indictment, but only that the amount of the damage exceeded five pounds."

Defendant was indicted for unlawfully and maliciously committing damage upon a window, in the house of the prosecutor, against this section. Defendant who had been fighting with other persons in the street after being turned out of a public house, went across the street, and picked up a stone, which he threw at them. The stone missed them, passed over their heads, and broke a window in the house. The jury found that he intended to hit one or more of the persons he had been fighting with, and did not intend to break the window: *Held*, that upon this finding the prisoner was not guilty of the charge within this section; to support a conviction of this nature, there must be a wilful and intentional doing of an unlawful act in relation to the property damaged.—*R.* v. *Pembliton*, 12 *Cox*, 607. See, on this last case, *R.* v. *Welch*, 13 *Cox*, 121; *R.* v. *Faulkner*, 13 *Cox*, 550, and *R.* v. *Latimer*, 16 *Cox*, 70.

The words "real or personal property" mean actual tangible property, not a mere legal right.—*Laws* v. *Eltringham*, 15 *Cox*, 22.

Upon an information laid before a magistrate under sec. 58 of c. 168, the magistrate cannot find prisoner guilty of the offence mentioned in next section. (Sec. 59.) *Ex parte Moffet*, 9 *L. N.* 403.

MALICIOUS INJURIES NOT BEFORE PROVIDED FOR.

59. Every one who unlawfully and maliciously commits any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on summary conviction, be liable to a penalty not exceeding twenty dollars, and such further sum, not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed, which last mentioned sum of money shall, in the case of private property, be paid to the person aggrieved; and if such sums

of money, together with the costs, if ordered, are not paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, the justice may cause the offender to be imprisoned for any term not exceeding two months, with or without hard labor:

2. Nothing herein contained shall extend to any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of, or to any trespass, not being wilful and malicious, committed in hunting or fishing, or in the pursuit of game; but every such trespass shall be punishable in the same manner as if this Act had not been passed:

3. The provisions of this section shall extend to any person who unlawfully and maliciously commits any injury to any tree, sapling, shrub or underwood, for which no punishment is hereinbefore provided.—32-33 *V.*, *c.* 22, *ss.* 60 *and* 61. 24-25 *V.*, *c.* 97, *s.* 52-53, *Imp.*

In the Imperial Act, the words "wilfully or maliciously" stand in lieu of "unlawfully and maliciously."

The application of the penalty, in case the property injured is of a public nature, has been expunged from this clause as it stood in the act of 1869.—Sub sect. 3 was introduced in the Imperial Act in consequence of *R.* v. *Dodson*, 9 *A. & E.* 704, and *Chanter* v. *Greame*, 13 *Q. B.* 216.

W. was summoned before the justices under this clause. He was in the employment of D., and by his order, he forcibly entered a garden belonging to and in the occupation of F., accompanied by thirteen other men, and cut a small ditch, from forty to fifty yards in length, through the soil. F. and his predecessors in title had occupied the garden for thirty-six years, and during the whole time, there had been no ditch upon the site of part of that cut by D. For the defence D. was called, who stated that, fifteen years before, there had been an open ditch in the land, which received the drainage from the highway, and that he gave directions for the ditch to

be cut by W. in the exercise of what he considered to be a public right. The justices found that W. had no fair and reasonable supposition that he had a right to do the act complained of, and accordingly convicted him: *Held*, that by the express words of the section and proviso, the jurisdiction of the justices was not ousted by the mere bonâ fide belief of W. that his act was legal, and that there was evidence on which they might properly find that he did not act under the fair and reasonable supposition required by the statute.—*White* v. *Feast*, *L. R.* 7 *Q. B.* 353.

A conviction by justices under sect. 52, c. 97, 24-25, V., (sect. 59 of our statute,) cannot be brought up by certiorari, on the ground that they had no jurisdiction inasmuch as the defendant had set up a bonâ fide claim of right, but the exemption is impliedly restricted to cases where the justices are reasonably satisfied of the fair and reasonable character of the claim.—*R.* v. *Essex*, *R.* v. *Musset*, 26 *L. T.* 429.

OTHER MATTERS.

60. Every punishment and penalty by this Act imposed on any person maliciously committing any offence, whether the same is punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence is committed from malice conceived against the owner of the property in respect of which it is committed, or otherwise.—32-33 *V., c.* 22, *s.* 66. 24-25 *V., c.* 97, *s.* 58, *Imp.*

61. Every provision of this Act, not hereinbefore so applied, shall apply to every person who with intent to injure or defraud any person, does any of the acts hereinbefore made punishable, although the offender is in possession of the property against or in respect of which such act is done.—32-33 *V., c.* 22, *s.* 67. 24-25 *V., c.* 97, *s.* 59, *Imp.*

Greaves says: "This clause is new and a very important amendment. It extends every clause of the act not

already so extended (see sect. 3) to persons in possession of the property injured, provided they intend to injure or defraud any other person. It therefore brings tenants within the provisions of the act, whenever they injure the demised premises, or anything growing on or annexed to them, with intent to injure their landlords."

By sec. 116, of the Procedure Act, in any indictment under this act, *where it is necessary* to allege an intent to injure or defraud, it is sufficient to allege that the person accused did the act with intent to injure or defraud, as the case may be, without alleging an intent to injure or defraud any particular person.

CHAPTER 173.

AN ACT RESPECTING THREATS, INTIMIDATION AND OTHER OFFENCES.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

THREATS.

1. Every one who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause any property, chattel, money, valuable security or other valuable thing, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 21, *s.* 43. 24-25 *V.*, *c.* 96, *s.* 44, *Imp.*

An indictment on this clause should always contain a count for uttering without stating the person to whom the letter or writing is uttered.—*Greaves, Cons. Acts*, 135.

Indictment for sending a letter, demanding money with menaces.—The Jurors for Our Lady the Queen, upon their oath present, that J. S., on ..... feloniously did send to one J. N. a certain letter, directed to the said J. N. by the name and description of Mr. J. N., of ..... demanding money from the said J. N. with menaces, and without reasonable or probable cause, he the said J. S. then well knowing the contents of the said letter; and which said letter is as follows, that is to say, *(here set out the letter verbatim)* against the form ..... And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. on the day and in the year aforesaid, feloniously did utter a certain writing demanding money from the said J. N. with menaces and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said writing and which said writing is as

follows, that is to say *(here set out the writing verbatim,)* against the form .....—*Archbold*, 422.

Where the letter contained a request only, but intimated, that, if it were not complied with, the writer would publish a certain libel then in his possession, accusing the prosecutor of murder, this was holden to amount to a demand.—*R.* v. *Robinson*, 2 *Leach*, 749. The demand must be with menaces, and without any reasonable or probable cause, and it will be for the jury to consider whether the letter does expressly or impliedly contain a demand of this description. The words "without any reasonable or probable cause" apply to the demand of money, and not to the accusation threatened by the defendant to be made against the prosecutor; and it is, therefore, immaterial in point of law, whether the accusation be true or not.—*R.* v. *Hamilton*, 1 *C. & K.* 212; *R.* v. *Gardner*, 1 *C. & P.* 479. A letter written to a banker, stating that it was intended by some one to burn his books and cause his bank to stop, and that if 250 pounds were put in a certain place, the writer of the letter would prevent the mischief, but if the money were not put there, it would happen, was held to be a letter demanding money with menaces.—*R.* v. *Smith*, 1 *Den.* 510. The judges seemed to think that this decision did not interfere with *R.* v. *Pickford*, 4 *C. & P.* 227. Nevertheless, it is said, in *Archbold*, 424, that it is difficult to admit that. In *R.* v. *Pickford*, the injury threatened was to be done by a third person. Sect. 6 would now cover that case; see *post*. It is immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation to be caused or made by the offender, or by any other person. See *R.* v. *Tranchant*, 9 *L. N.* 333.

32-33 V., c. 21, s. 43, makes it a felony to send "any

letter demanding of any person with menaces, and without any reasonable or probable cause, any money, etc."

Held, that the words "without reasonable or probable cause" apply to the money demanded, and not to the accusation threatened to be made.—*R.* v. *Mason*, 24 *U. C. C. P.* 58.

2. Every one who, with menaces or by force, demands any property, chattel, money, valuable security or other valuable thing of any person, with intent to steal the same, is guilty of felony, and liable to two years' imprisonment. 32-33 *V., c.* 21, *s.* 44. 24-25 *V., c.* 96, *s.* 45, *Imp.*

Indictment.— ..... feloniously with menaces did demand of J. N. the money of him the said J. N. with intent the said money from the said J. N. feloniously to steal, take and carry away, against ..... *Archbold*, 421.

The prosecutor must prove a demand by the defendant of the money or other thing stated in the indictment "by menaces or force" with intent to steal it. It is not necessary to prove an express demand in words; the statute says "whosoever with menaces or by force demands," and menaces are of two kinds, by words or by gestures; so that, if the words or gestures of the defendant at the time were plainly indicative of what he required, and tantamount in fact to a demand, it should seem to be sufficient proof of the allegation of demand in the indictment.—*R.* v. *Jackson*, 1 *Leach*, 269.—If a person, with menaces, demand money of another, who does not give it him, because he has it not with him, this is a felony within the statute; but if the party demanding the money knows that it is not then in the prosecutor's possession, and only intends to obtain an order for the payment of it, it is otherwise.—*R.* v. *Edwards*, 6 *C. & P.* 515.

The intent to steal must of course be presumed from

circumstances; it is a question entirely for the jury to determine, and which they will, in general, have to presume from the circumstances attending the demand, the expression or gestures of the prisoner, when he made it, and the like.—*Archbold.*

In order to bring a case within this section, the demand, if successful, must amount to stealing; and to constitute a menace within this section, it must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent; it must, therefore, be left to the jury to say whether the conduct of the prisoner is such as to have had that effect on the prosecutor; and in this case, the judge having directed the jury as a matter of law, that the conduct of the prisoner constituted a menace withing the statute, the conviction must be quashed.—*R.* v. *Walton, L. & C.* 288.

In *R.* v. *Robertson, L. & C.* 483; 10 *Cox*, 9, it was holden that a threat by a policeman to imprison a man upon a fictitious charge is a menace within this section, and though the money had in fact been obtained and the prisoner could, in consequence, also have been indicted for stealing the money, yet the conviction, under the present section, was right. On the ruling in *R.* v. *Walton, supra*, Greaves remarks: "This decision requires reconsideration, as it obviously proceeds upon the fallacy of supposing it necessary that the menaces should be such that if property were obtained by them, the offence would be larceny. Now the words of the clause warrant no such construction."

The words are "Whosoever shall with menaces or by force, demand any property with intent to steal the same." (*With menaces* not *by* menaces;) any menaces or any force there-

fore clearly satisfy the terms of the clause, provided there be an intent to steal. It might just as well be said that on an indictment for an assault with intent to rob or for wounding with intent to murder, it was necessary to prove such an assault in the one case, or such wounding in the other, as would be sufficient to effectuate the intent, and yet it has never been doubted that any assault, however slight, or any wound however trivial, was sufficient, provided the intent were proved. In truth, the criminality in these cases depends on the intent. The effect of this decision is to render the clause almost inoperative, for where the menaces have not obtained the money, it is plain the jury will be very reluctant to find that they were sufficient to obtain it. The whole offence consists in the acts and intent of the prisoner; and it is quite beside that to consider what the effect on the prosecutor might be.—3 *Russ.* 203, *note by Greaves.*

3. Every one who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing, accusing or threatening to accuse or cause to be accused any other person of any crime punishable by law with death, or imprisonment for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavor to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent, in any of such cases, to extort or gain, by means of such letter or writing, any property, chattel, money, valuable security or other valuable thing from any person, is guilty of felony, and liable to imprisonment for life:

2. The crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said crime, and every attempt or endeavor to commit the said crime, and every solicitation persuasion, promise or threat offered or made to any person whereby to move or induce such person to commit or permit the said crime, shall be deemed to be an infamous crime within the meaning of this Act:

3. Every species of parting with any such letter to the end that it

may come, or whereby it comes into the hands of the person for whom it is intended, shall be deemed a sending of such letter.—32-33 *V.*, *c.* 21, *s.* 45. 24-25 *V.*, *c.* 96, *s.* 46, *Imp.*

Sub. sect. 3 is not in the Imperial Act.

Indictment.—The Jurors for Our Lady the Queen, upon their oath present, that J. S., on ..... feloniously did send to one J. N., a certain letter, directed to the said J. N., by the name and description of Mr. J. N., threatening to accuse him the said J. N., of having attempted and endeavored to commit the abominable crime of buggery with him the said J. S., with a view and intent thereby then to extort and gain money from the said J. N., he the said J. S., then well knowing the contents of said letter, and which said letter is as follows, to wit *(here set out the letter verbatim)* against the form..... And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., on the day and in the year aforesaid feloniously did utter a certain writing threatening to accuse him the said J. N., of having attempted and endeavored to commit the abominable crime of buggery with him the said J. S., with a view and intent thereby then to extort and gain money from the said J. N., he the said J. S., then well knowing the contents of the said letter, and which said letter is as follows, to wit *(here set out the letter verbatim)* against the form.....—*Archbold.*

An indictment for sending a letter threatening to accuse a man of an infamous crime, need not specify such crime, for the specific crime the defendant threatened to charge might intentionally by him be left in doubt.—*R.* v. *Tucker*, 1 *Moo. C. C.* 134. The threat may be to accuse another person than the one to whom the letter was sent. —*Archbold, loc. cit.* It is immaterial whether the prosecutor be innocent or guilty of the offence threatened to be

imputed to him.—*R.* v. *Gardner*, 1 *C. & P.* 479; *R.* v. *Richards*, 11 *Cox*, 43.

Where it was doubtful from the letter what charge was intended, parol evidence was admitted to explain it, and the prosecutor proved that having asked the prisoner what he meant by certain expressions in the letter, the prisoner said that he meant that the prosecutor had taken indecent liberties with his person; the judges held the conviction to be right.—*R.* v. *Tucker*, 1 *Moo. C. C.* 134.

The court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer, in order that the prisoner's witnesses may inspect it.—*R.* v. *Harris*, 6 *C. & P.* 105.

In *R.* v. *Ward*, 10 *Cox*, 42, on an indictment containing three counts for sending three separate letters, evidence of the sending of one only was declared admissible.

4. Every one who accuses, or threatens to accuse, either the person to whom such accusation or threat is made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent, in any of the cases last aforesaid, to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security or other valuable thing, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 21, *s.* 46. 24-25 *V.*, *c.* 96, *s.* 47, *Imp.*

By sect. 6, *post*, it is enacted that "it shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation, to be caused or made by the offender or by any other person."

The words "crimes lastly before mentioned" in sect. 4, mean all those mentioned in sect. 3.—*Archbold.*

Indictment.—.....feloniously did threaten one J. N., to accuse him the said J. N., of having attempted and endeavored to commit the abominable crime of sodomy

with the said J. S., with a view and intent thereby then to extort and gain money from the said J. N., against the form.....—*Archbold.*

See the remarks under sections 1, 2, 3, *ante.* It must be a threat to accuse, or an accusation; if J. N. be indicted or in custody of an offence, and the defendant threatened to procure witnesses to prove the charge, this will not be a threat to accuse within the meaning of the statute.—*R.* v. *Gill, Archbold,* 425. But it need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient.—*R.* v. *Robinson,* 2 *M. & Rob.* 14. It is immaterial whether the prosecutor be innocent or guilty of the offence charged, and therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence will be allowed to be given, even in cross-examination by another witness, to prove that the prosecutor was guilty of such offence.—*R.* v. *Gardner,* 1 *C. & P.* 479; *R.* v. *Cracknell,* 10 *Cox,* 408. Whether the crime of which the prosecutor was accused by the prisoner was actually committed is not material in this, that the prisoner is equally guilty if he intended by such accusation to extort money; but it is material in considering the question, whether, under the circumstances of the case, the intention of the prisoner was to extort money or merely to compound a felony.—*R.* v. *Richards,* 11 *Cox,* 43. In *Archbold,* 425, this last decision seems not to be approved of.—A person threatening A's father that he would accuse A., of having committed an abominable offence upon a mare for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge to buy and pay for her at the prisoner's price, is guilty of threatening to accuse within

this section.—*R.* v. *Redman*, 10 *Cox*, 159. On the trial of an indictment for threatening to accuse a person of an abominable crime, with intent to extort money, and by intimidating the party by the threat, in fact obtaining the money, the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner when he was taken into custody.—*R.* v. *Kain*, 8 *C. & P.* 187.

5. Every one who, with intent to defraud or injure any other person, by any unlawful violence to or restraint of or threat of violence to or restraint of the person of another, or by accusing or threatening to accuse any person of any treason, felony or infamous crime, as hereinbefore defined, compels or induces any person to execute, make, accept, indorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix his name, or the name of any other person or of any company, firm or co-partnership, or the seal of any body corporate, company or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, is guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 21, *s.* 47. 24-25 *V.*, *c.* 96, *s.* 48, *Imp.*

On this clause, Greaves says: "This clause is new. It will meet all such cases as *R.* v. *Phipoe*, 2 *Leach*, 673, and *R.* v. *Edwards*, 6 *C. & P.* 521, where persons by violence to the person or by threats of accusation of crimes, induce others to execute deeds, bills of exchange or other securities.

The defendants, husband and wife, were indicted under this clause, for having by threats of violence and restraint induced the prosecutor to write and affix his name to the following document: "London, July 19th, 1875. I hereby agree to pay you £100 on the 27th inst, to prevent any action against me."

Held, that this document was not a promissory note, but was an agreement to pay money for a valid consideration which could be sued upon and was therefore a valuable security. To constitute a valuable security within the meaning of the statute an instrument need not be negotiable. A wife who takes an independent part in the commission of a crime when her husband is not present is not protected by her coverture.—*R.* v. *John*, 13 *Cox*, 100.

See that case as to form of indictment.

This clause, by the consolidation of the statutes, does not now form part of the *Larceny Act*, under which the words "*valuable security*" are defined.

6. It shall be immaterial whether the menaces or threats hereinbefore mentioned are of violence, injury or accusation, to be caused, or made by the offender or by any other person.—32-33 *V.*, *c.* 21, *s.* 48. 24-25 *V.*, *c.* 96, *s.* 49, *Imp.*

This clause is new, says Greaves; it is intended to meet cases where a letter may be sent by one person and may contain menaces of injury by another, and to remove the doubts occasioned by *R.* v. *Pickford*, 4 *C. & P.* 227. In *R.* v. *Smith*, 1 *Den.* 510, the threat by a person writing a letter of an injury to be made by a third person was held within the statute, before this clause. Of course, now, this is clear law, whatever doubts may have existed heretofore.

7. Every one who maliciously sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, is guilty of felony, and liable to ten years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 15. 24-25 *V.*, *c.* 100, *s.* 16, *Imp.*

Indictment.— ..... feloniously and maliciously did send *(send, deliver, utter, or directly or indirectly cause*

to be received) to one J. N. a certain letter *(letter or writing)* directed to the said J. N., by the name and description of Mr. J. N. threatening to kill and murder the said J. N., he the said ..... *(defendant)* then well knowing the contents of the said letter, which said letter is as follows, that is to say ..... Against the form ..... And the jurors aforesaid ..... that the said ..... on ..... feloniously and maliciously did utter a certain writing ..... *(as in the first count, substituting writing for letter.)*— *Archbold*, 853.

In *R.* v. *Hunter*, 2 *Leach*, 631, the court said: "In an indictment for sending a threatening letter, the letter must be set out in order that the court may judge from the face of the indictment whether it is or is not a threatening letter within the meaning of the statute on which the indictment is founded."

The same ruling had been held in *R.* v. *Lloyd*, 2 *East, P. C.* 1122.

Greaves, Crim. L. Cons. Acts, 50, says on this clause: "The words *directly or indirectly causes to be received*, are taken from the 9 Geo. 4, c. 55, s. 8, and introduced here in order to prevent any difficulty which might arise as to a case falling within the words *send, deliver or utter*. The words *to any other person* in the 10-11 V., c. 66, s. 1, were advisedly omitted, in order that ordering, sending, delivering, uttering, or causing to be received may be included. If, therefore, a person were to send a letter or writing without any address by a person with direction to drop it in the garden of a house in which several persons lived, or if a person were to drop such a letter or writing anywhere, these cases would be within this clause. In truth, this clause makes the offence to consist in sending, etc., any letter or writing which contains a threat to kill or murder

any person whatsoever, and it is wholly immaterial whether it be sent, etc., to the person threatened or to any other person. The cases, therefore, of *R.* v. *Paddle*, *R. & R.* 484; *R.* v. *Burridge*, 2 *M. & Rob.* 296; *R.* v. *Jones*, 2 *C. & K.* 398; 1 *Den.* 218; *and R.* v. *Grimwade*, 1 *Den.* 30, are not to be considered as authorities on this clause, so far as they decide that the letter must be sent, etc., to the party threatened. In every indictment on this and the similar clauses in the other acts, a count should be inserted alleging that the defendant uttered the writing without stating any person to whom it was uttered."

Where the threat charged is to kill or murder, it is for the jury to say whether the letter amounts to a threat to kill or murder.—*R.* v. *Girdwood*, 1 *Leach*, 142; *R.* v. *Tyler*, 1 *Moo. C. C.* 428.

The bare delivery of the letter, though sealed, is evidence of a knowledge of its contents by the prisoner, in certain cases.—*R.* v. *Girdwood*, 1 *Leach*, 142.

And in the same case, it was held that the offender may be tried in the county where the prosecutor received the letter, though he may also be tried in the county where the sending took place.

In *R.* v. *Boucher*, 4 *C. & P.* 562, the following letter was held to contain a threat to murder:—"You are a rogue, thief and vagabond, and if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it, my banker. Have a care old chap, or you shall disgorge some of your illgotten gains, watches and cash, that you have robbed the widows and fatherless of. Don't make light of this, or I'll make light of you and yours. Signed, *Cutthroat*."

Where an indictment contained three counts, each charging the sending of a different threatening letter, Byles,

J., held that the prosecutor must elect on which count he would proceed, though any letter leading up to or explaining the letter on which the trial proceeded would be admissible.—*R.* v. *Ward*, 10 *Cox*, 42.

8. Every one who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn or other building, or any rick or stack of grain, hay or straw or other agricultural produce, or any grain, hay or straw or other agricultural produce, in or under any building, or any ship or vessel, or to kill, maim, wound, *poison or injure* any cattle, is guilty of felony, and liable to ten years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 58. 24-25 *V.*, *c.* 97, *s.* 50, *Imp.*

The words "poison or injure" are not in the Imperial Act.

A threat to burn standing corn is not within the statute. —*R.* v. *Hill*, 5 *Cox*, 233.

It was held that a letter the necessary construction of which was not a threat to burn was not within the statute. —*R.* v. *Jepson*, 2 *East*, 1115, note *a*.

See, *ante*, for form of indictment, under preceding section.

9. Every one who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, *or in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with a view to hinder him from working or being employed at such trade, business or manufacture,* is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 42. 24-25 *V.*, *c.* 100, *s.* 41, *Imp.*, repealed by 34-35 *V.*, *c.* 32, *Imp.* which is repealed by 38-39 *V.*, *c.* 86, *Imp.*

The words in *italics* are not in the English act. They cover any violence or threat of violence with a view to hinder any person from working or being employed at a trade, business or manufacture, in pursuance of a com-

bination or conspiracy respecting such trade, business or manufacture.

Indictment for an assault in pursuance of a conspiracy to raise wages.—The Jurors for Our Lady the Queen upon their oath present, that J. S., J. W., and E. W., on ..... did amongst themselves conspire, combine, confederate, and agree together to raise the rate of wages then usually paid to workmen and laborers in the art, mystery and business of cotton spinners; and that the said ..... *(defendants)* in pursuance of the said conspiracy, on the day and year aforesaid, in and upon one J. N., unlawfully did make an assault, and him the said J. N., did then beat, wound and ill-treat, and other wrongs to the said J. N., did, to the great damage of the said J, N., against the form ..... *(Add a count stating that the defendants assaulted J. N., "in pursuance of a certain conspiracy before then entered into by the said ..... (defendants) to raise the rate of wages of workmen and laborers in the art, mystery and business of cotton-spinners;" also a count for a common assault.)*—*Archbold.*

For a number of workmen to combine to go in a body to a master and say that they will leave the works, if he does not discharge two fellow workmen in his employ, is an unlawful combination by threats to force the prosecutor to limit the description of his workmen.—*Walsby* v. *Auley*, 3 *E. & E.* 516. And a combination to endeavor to force workmen to depart from their work by such a threat as that they would be considered as blacks, and that other workmen would strike against them all over London, is unlawful.—*In re Perham*, 5 *H. & N.* 30. So also is a combination with a similar object to threaten a workman by saying to him that he must either leave his master's employ, or lose the benefit of belonging to a particular

club and have his name sent round all over the country.—*O'Neil* v. *Longman*, 4 *B. & S.* 376. An indictment or commitment alleging the offence to be a conspiracy to force workmen to depart from their work by threats need not set out the threats.—*In re Perham, supra.*

See *R.* v. *Rowlands*, 2 *Den.* 364.—Also, *Roscoe*, 390.

10. Every one who beats or uses any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes or other produce or goods, in any market or other place, or beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, whilst on the way to or from any city, market, town or other place, with intent to stop the conveyance of the same, shall, on summary conviction before two justices of the peace, be liable to imprisonment, with hard labor, for any term not exceeding three months. 32-33 *V., c.* 20, *s.* 40. 24-25 *V., c.* 100, *s.* 39 *Imp.*

"**11.** Every person who unlawfully and by force or threats of violence, hinders or prevents or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship laborer or other person employed to work at or on board any ship or vessel, or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed ; or beats or uses any violence to, or makes any threat of violence against any such person, with intent to hinder or prevent him from working at or exercising the same, or on account of his having worked at or exercised the same, shall, on summary conviction before two justices of the peace, be liable to imprisonment, with hard labor, for any term not exceeding three months."—as amended by 50-51 *V., c.* 47. 24-25 *V., c.* 100, *s.* 40, *Imp.*

12. Every one who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,

(*a.*) Uses violence to such other person, or his wife or children, or injures his property,

(*b.*) Intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property,

(*c.*) Persistently follows such other person about from place to place,

(*d.*) Hides any tools, clothes or other property owned or used by such other person, or deprives him or hinders him in the use thereof,

(*e.*) Follows such other person, with one or more other persons, in a disorderly manner, in or through any street or road, or,

(*f.*) Besets or watches the house or other place where such other person resides or works, or carries on business or happens to be,

Shall, on summary conviction before two justices of the peace, or on indictment, be liable to a fine not exceeding one hundred dollars, or to imprisonment for a term not exceeding three months.

2. Attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information shall not be deemed a watching or besetting within the meaning of this section;

3. Any person accused of any such offence may, on appearing before the justices, declare that he objects to being tried for such offence by such justices; and thereupon such justices shall not proceed with such trial, but may deal with the case in all respects as if the accused was charged with an indictable offence and not with an offence punishable on summary conviction, and the accused may be prosecuted on indictment accordingly;

4. It shall be sufficient to describe any such offence in the words of this section; and any exception, proviso, excuse or qualification, whether it does or does not accompany the description of the offence, may be proved by the defendant, but need not be specified in the information or complaint, and if so specified and negatived, no proof in relation to the matter so specified and negatived shall be required on the part of the informant or prosecutor;

5. No person who is a master, or the father, son or brother of a master in the particular manufacture, trade or business, in or in connection with which any offence under this section is charged to have been committed, shall act as a magistrate or justice, in any case of complaint or information under this section, or as a member of any court for hearing any appeal in any such case.—35 *V.*, *c.* 31, *s.* 2, *part, and s.* 4. 39 *V.*, *c.* 37, *ss.* 2 *and* 3. 38-39 *V.*, *c.* 86, *s.* 9, *part, Imp.*

13. In this section the expression "trade combination" means any combination between masters or workmen or other persons, for regu-

lating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman, in or in respect of his business or employment, or contract of employment or service; and the expression "act" includes a default, breach or omission;

2. No prosecution shall be maintainable against any person for conspiracy to do any act, or to cause any act to be done for the purposes of a trade combination, unless such act is an offence punishable by statute.—39 *V.*, *c.* 37, *s.* 4.

14. Every person who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any Province of Canada, by intimidation, combination or unfair management, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any lands so offered for sale, is guilty of a misdemeanor, and liable to a fine not exceeding four hundred dollars or to two years' imprisonment, or to both.—23 *V.* (*Can.*), *c.* 2, *s.* 33. 43 *V.*, *c.* 28, *s.* 55.

CRIMINAL BREACHES OF CONTRACT.

15. Every one who,—

(*a.*) Wilfully and maliciously breaks any contract made by him, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury,

(*b.*) Being under any contract made by him with any municipal corporation or authority, or with any company bound, agreeing or assuming to supply any city or any other place, or any part thereof, with gas or water, wilfully and maliciously breaks such contract, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city or place, or part thereof, wholly or to a great extent, of their supply of gas or water, or,

(*c.*) Being under any contract made by him with a railway company, bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight; or with Her Majesty, or any one on behalf of Her Majesty, in connection with a Government railway on which Her Majesty's mails, or passengers or freight are carried, wilfully and maliciously breaks such contract, knowing or having

reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway,

Shall, on summary conviction before two justices of the peace, or on indictment, be liable to a penalty not exceeding one hundred dollars, or to imprisonment for a term not exceeding three months, with or without hard labor.—40 *V.*, *c.* 35, *s.* 2. 38-39 *V.*, *c.* 86, *ss.* 4 *and* 5, *Imp.*

16. Every municipal corporation or authority or company which, being bound, agreeing or assuming to supply any city or any other place, or any part thereof, with gas or water, wilfully and maliciously breaks any contract made by such municipal corporation, authority, or company, knowing or having reason to believe that the probable consequences of its so doing will be to deprive the inhabitants of that city or place or part thereof, wholly, or to a great extent, of their supply of gas or water, is liable to a penalty not exceeding one hundred dollars.—40 *V.*, *c.* 35, *s.* 3, *part.*

17. Every railway company which, being bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, wilfully and maliciously breaks any contract made by such railway company, knowing or having reason to believe, that the probable consequences of its so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car, on the railway, is liable to a penalty not exceeding one hundred dollars.—40 *V.*, *c.* 35, *s.* 3 *part.*

18. Every punishment under the three sections next preceding imposed on any person maliciously committing any offence, shall equally apply and be enforced, whether the offence is committed from malice conceived against the person, corporation, authority or company with which the contract is made or otherwise.—40 *V.*, *c.* 35, *s.* 4.

19. Every such municipal corporation, authority or company, shall cause to be posted up at the gas works, or water works, or railway stations, as the case may be, belonging to such corporation, authority or company, a printed copy of this section and the four sections next preceding, in some conspicuous place, where the same may be conveniently read by the public; and as often as such copy becomes defaced, obliterated or destroyed, shall cause it to be renewed with all reasonable despatch;

2. Every such municipal corporation, authority or company which makes default in complying with the provisions of this section in relation to such copy as aforesaid, shall be liable to a penalty not exceeding twenty dollars for every day during which such default continues; and every person unlawfully injuring, defacing or covering up any such copy so posted up, shall be liable, on summary conviction, to a penalty not exceeding ten dollars.—40 *V.*, *c.* 35, *s.* 7. 38-39 *V.*, *c.* 86, *s.* 4, *Imp.*

FRAUDS WITH RESPECT TO CONTRACTS AND BUSINESS WITH THE GOVERNMENT.

20. Every one who makes any offer, proposal, gift, loan, promise, agreement, compensation or consideration, directly or indirectly, to any officer or person in the employment of the Government of Canada, or of any Province of Canada, with intent to secure the influence of such officer or person to promote either the obtaining or the execution of any contract with such government, or the payment of the consideration moneys therefor, and—

Every officer or person in the employment of such government, who accepts, or agrees to accept, any such offer, proposal, gift, loan, promise, agreement, compensation or consideration,

Is guilty of a misdemeanor and liable to a fine not exceeding one thousand dollars and not less than one hundred dollars, and to imprisonment for a term not exceeding one year and not less than one month, and in default of payment of such fine, to imprisonment for a further term not exceeding six months.—46 *V.*, *c.* 32, *s.* 1.

21. Every one who, in the case of tenders being called for by or on behalf of the Government of Canada, or of any Province of Canada, for any contract, directly or indirectly, by himself or by the agency of any other person on his behalf, with intent to obtain such contract, either for himself or for any other person, proposes or makes any gift, loan, offer, promise or agreement, or offers or gives any consideration or compensation whatsoever, to any person tendering for such contract, or to any officer or person in the employment of such government, and

Every person so tendering and every officer or person in the employment of the said government who accepts or agrees to accept any such gift, loan, offer, promise, agreement, consideration or compensation whatsoever,

Is guilty of a misdemeanor, and liable to a fine not exceeding one thousand dollars and not less than one hundred dollars, and to imprisonment for a term not exceeding one year and not less than one month, and, in default of payment of such fine, to imprisonment for a further term not exceeding six months.—46 *V.*, *c.* 32, *s.* 2.

22. Every one who, being a public officer or paid employee of the Government of Canada, or of any Province of Canada, receives, directly or indirectly, any promise, offer, gift, loan, compensation or consideration whatsoever, either in money or otherwise, from any person whomsoever, for fraudulently assisting or favoring any individual in the transaction of any business whatsoever connected with such government, or for doing so contrary to the duties of his special position as an officer or employee of the government, is guilty of a misdemeanor, and liable to a fine not exceeding two thousand dollars, and shall be incapable, for the term of five years, of holding any public office; and every one who makes such offer shall be liable to the same penalty.—46 *V.*, *c.* 32, *s.* 3.

23. Every person convicted of any offence under the provisions of the three sections next preceding shall be incapable of contracting with or holding any contract under any of the said governments.—46 *V.*, *c.* 32, *s.* 4.

24. No prosecution under the provisions of the four sections next preceding shall be commenced except within two years from the commission of the offence.—46 *V.*, *c.* 32, *s.* 5.

WILFUL VIOLATION OF STATUTES.

25. Every wilful violation of any Act of the Parliament of Canada, or of the Legislature of any Province of Canada, which is not made an offence of some other kind, shall be a misdemeanor, and punishable accordingly;

2. Whenever any wilful violation of any Act is made an offence of any particular kind or name, the person guilty of such violation shall, on conviction thereof, be punishable in the manner in which such offence is, by law, punishable.—31 *V.*, *c.* 1, *s.* 7, *paragraphs* 20 *and* 21. 31 *V.*, *c.* 71, *s.* 3.

See *R.* v. *Walker*, 13 *Cox*, 94.

CONSPIRACIES—FRAUDS.

26. Every one who is convicted of fraud, or of cheating, or of conspiracy, shall, in any case in which no special punishment is

provided by any statute, be liable to seven years' imprisonment.—32-33 *V., c.* 29, *s.* 86.

The Imperial Act, 14-15 V., c. 100, sec. 29 *(Lord Campbell's Act,)* also provides for the punishment of cheats, frauds and conspiracies, not otherwise specially provided for.

In *R.* v. *Roy*, 11 *L. C. J.* 89, Mr. Justice Drummond said: "The only cheats or frauds punishable at common law are the fraudulent obtaining of the property of another by any deceitful and illegal practice, or token, *which affects or may affect the public, or such frauds as are levelled against the public justice of the realm.*"

It is not every species of fraud or dishonesty in transactions between individuals which is the subject matter of a criminal charge at common law.—2 *East, P. C.* 816.

Fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy; per Lord Mansfield.—*R.* v. *Wheatly*, 2 *Burr.* 1125.

So cheats, by means of a bare lie, or false affirmation in a private transaction, as if a man selling a sack of corn falsely affirms it to be a bushel, where it is greatly deficient, has been holden not to be indictable.—*R.* v. *Pinkney*, 2 *East, P. C.* 818.

So, in *R.* v. *Channell*, 2 *East, P. C.* 818, it was held that a miller charged with illegally taking and keeping corn could not be criminally prosecuted.

And in *R.* v. *Lara*, cited in 2 *East, P. C.* 819, it was held that selling sixteen gallons of liquor for and as eighteen gallons, and getting paid for the eighteen gallons, was an unfair dealing and an imposition, but not an indictable offence.

The result of the cases appears to be, that if a man sell

by *false weights*, though only to one person, it is an indictable offence, but if, without false weights, he sell, even to many persons, a *less quantity* than he pretends to do, it is not indictable.—2 *Russ.* 610; *R.* v. *Eagleton, Dears.* 376, 515.

If a man, in the course of his trade, openly and publicly carried on, were to put a false mark or token upon an article, so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false token or mark, that would be a cheat at common law, but the indictment, in such a case, must show clearly that it was by means of such false token that the defendant obtained the money; by Chief Justice Cockburn, in *R.* v. *Closs, Dears. & B.* 460.

Offences of this kind would now generally fall under the "*Trade Marks Offences Act.*"

Frauds and cheats by forgeries or false pretences are also regulated by statute.

All frauds affecting the crown or the public at large are indictable, though arising out of a particular transaction or contract with a private party. So the giving to any person unwholesome victuals, not fit for man to eat, *lucri causâ*, or from malice and deceit is an indictable misdemeanor.—2 *East, P. C.* 821, 822. And if a baker sell bread containing alum in a shape which renders it noxious, although he gave directions to his servants to mix it up in a manner which would have rendered it harmless, he commits an indictable offence; he who deals in a perilous article must be wary how he deals; otherwise, if he observe not proper caution, he will be responsible. The intent to injure in such cases is presumed, upon the universal principle that when a man does an act of which the probable consequence may

be highly injurious, the intention is an inference of law resulting from doing the act.—*R.* v. *Dixon*, 3 *M. & S.* 11.

If a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being enlisted as a soldier, he may be indicted, and on conviction, punished under sect. 26, *ante*.—1 *Hawkins*, 108.

Cheating at games, cards, or in betting are provided for by sect. 80 of the *Larceny Act*, *p.* 442, *ante*.

In indictments for a cheat or fraud at common law, it is not sufficient to allege generally that the cheat or fraud was affected by means of certain false tokens or false pretences, but it is necessary to set forth what the false tokens or pretences were, so that the Court may see if the false tokens or pretences are such within the law. 2 *East*, *P. C.* 837. But the indictment will be sufficient if upon the whole it appears that the money has been obtained by means of the pretence set forth, and that such pretence was false.—2 *East*, *P. C.* 838.

It would seem that sec. 250 of the Procedure Act does not apply to cheats and frauds at common law, and that, therefore, the court has no power of awarding restitution of the property fraudulently obtained, upon convictions on indictments other than those brought under the Larceny Act.—2 *East*, *P. C.* 839.

Upon an indictment for any misdemeanor, if it appears to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, the jury may convict of the attempt; sec. 183, Procedure Act.

By sect. 184 of the Procedure Act, if upon the trial of any person for any misdemeanor, it appears that the facts given in evidence, *while they include such misdemeanor*, amount in law to a felony, such person shall not, by reason

thereof, be entitled to be acquitted of such misdemeanor, unless the court thinks fit to discharge the jury, and to direct such person to be indicted for felony.

The act now under consideration also provides for the punishment of conspiracy, when not otherwise specially provided for by any statute.

Conspiracies to murder are provided for by sec. 3 of c. 162, p. 141, *ante*, concerning offences against the person. Assaults arising from conspiracies are regulated by sec. 9, c. 173.

Conspiracy is a combination of two or more persons to accomplish some unlawful purpose, or a lawful purpose by unlawful means. This is the definition of conspiracy as given by Lord Denman in *R.* v. *Seward*, 1 *A. & E.* 706; and though questioned by the learned judge himself in *R.* v. *Peck*, 9 *A. & E.* 686, as an antithetical definition, and in *R.* v. *King*, 7 *Q. B.* 782, as not sufficiently comprehensive, it seems to be so far adopted as the most correct definition of this offence.—*R.* v. *Jones*, 4 *B. & A.* 345; 3 *Russ.* 116. *Bishop*, 2, *Cr. L.* 171, has in a clear and concise manner said "Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end." *See also R.* v. *Bunn*, 12 *Cox*, 316.

But the word "unlawful" used in these definitions of conspiracy, does not mean "indictable" or "criminal." The combining to injure another by fraud, or to do a civil wrong or injury to another is an indictable conspiracy. So in a case where the prisoner and L. were in partnership, and there being notice of dissolution, prisoner conspired with W. & P. in order to cheat L. on a division of assets at the dissolution, by making it appear by entries in the books that P. was a creditor of the firm, and by reason thereof,

partnership property was to be abstracted for the alleged object of satisfying P., it was held by the Court of Crown Cases Reserved that this was an indictable conspiracy.—*R.* v. *Warburton*, 11 *Cox*, 584. *See R.* v. *Aspinall*, 13 *Cox*, 231 and 563; *R.* v. *Orman*, 14 *Cox*, 381,

Mr. Justice Drummond, in *R.* v. *Roy*, 11 *L. C. J.* 89, has given the following definition of conspiracy: "A conspiracy is an agreement by two persons (not being husband and wife), or more, to do or cause to be done, an act, prohibited by penal law, or to prevent the doing of an act ordered under legal sanction by any means whatsoever, or to do or cause to be done an act whether lawful or not by means prohibited by penal law."—*R.* v. *Boulton*, 12 *Cox*, 87; *R.* v. *Parnell*. 14 *Cox*, 508; *R.* v. *Taylor*, 15 *Cox*, 625, 268.

No indictment for conspiracy can be preferred unless one or other of the preliminary steps required by sec. 140 of the Procedure Act has been taken. See 3 *Russ.* 116; *Archbold*, 936; *R.* v. *Levine*, 10 *Cox*, 374; *R.* v. *Lewis*, 11 *Cox*, 404; *R.* v. *Boulton*, 12 *Cox*, 87; 2 *Bishop, Cr. L.* 169.

On an indictment for conspiracy to defraud by obtaining goods on false pretences, the false pretences need not to set up.—*Thayer* v. *R.*, 5 *L. N.* 162.

An indictment for conspiracy with intent to defraud,—declared insufficient.—*R.* v. *Sternberg*, 8 *L. N.* 122.

What are the necessary allegation in an indictment for conspiracy.—*R.* v. *Downie*, 13 *R. L.* 429.—See also *Defoy* v *R.*, *Ramsay's App. Cas.* 193.

Acts done to coerce others to quit their employment in pursuance of a conspiracy are indictable.—*R.* v. *Hibbert*, 13 *Cox*, 82; *R.* v. *Bauld*, 13 *Cox*, 282.

Where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted.—*R.* v. *Manning*, 12 *Q. B. D.* 241.

27. Every one who destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, or any one or more of them, is guilty of a misdemeanor, and liable to six months' imprisonment.—*C. S. U. C.*, *c.* 26, *s.* 19.

28. Every one who makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of his lands, hereditaments, goods or chattels, or who removes, conceals or disposes of any of his goods, chattels, property or effects of any description, with intent to defraud his creditors or any of them, and every one who receives any such property, real or personal, with such intent, is guilty of a misdemeanor, and liable to a fine not exceeding eight hundred dollars, and to one year's imprisonment.—*C. S. U. C.*, *c.* 26, *s.* 20.

MISCONDUCT OF OFFICERS INTRUSTED WITH EXECUTION OF WRITS.

29. Every one who, being a sheriff, deputy sheriff, coroner, elisor, bailiff, constable or other officer intrusted with the execution of any writ, warrant or process, wilfully misconducts himself in the execution of the same, or wilfully and without the consent of the person in whose favor the writ, warrant or process was issued, makes any false return thereto, is guilty of a misdemeanor, and liable to a fine and imprisonment, in the discretion of the court.—27-28 *V.*, (*Can.*) *c.* 28, *s.* 31, *part.*

EMBRACERY.

30. Every one who is guilty of the offence of embracery, and every juror who wilfully and corruptly consents thereto, is liable, on indictment, to fine and imprisonment.—*C. S. U. C.*, *c.* 31, *s.* 166.

QUI TAM ACTIONS—QUEBEC.

31. Every private prosecutor in the Province of Quebec who, being a plaintiff in a *qui tam* action, discontinues or suspends such action without the permission or direction of the Crown, is guilty of a misdemeanor.—27-28 *V.* (*Can.*), *c.* 43, *s.* 2, *part.*

It is essential to the existence of this offence of embracery that there should be a judicial proceeding pending at the time the offence is alleged to have been committed; and the existence of such proceeding must be alleged in the indictment.—*R.* v. *Leblanc*, 8 *L. N.* 114.

What is embracery.—*R.* v. *Cornellier*, 29 *L. C. J.* 69.

CHAPTER 174.

AN ACT RESPECTING PROCEDURE IN CRIMINAL CASES.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

SHORT TITLE.

1. This Act may be cited as "*The Criminal Procedure Act.*"

INTERPRETATION.

2. In this and in any other Act of Parliament containing any provision relating to criminal law, unless the context otherwise requires,—

(*a.*) The expression "any Act," or, "any other Act," includes any Act passed or to be passed by the Parliament of Canada, or any Act passed by the legislature of the late Province of Canada, or passed or to be passed by the legislature of any Province of Canada, or passed by the legislature of any Province included in Canada, before it was included therein ;

(*b.*) The expression "justice" means a justice of the peace, and includes two or more justices, if two or more justices act or have jurisdiction, and also any person having the power or authority of two or more justices of the peace, and one justice may act, unless otherwise specially provided ;

(*c.*) The expression "indictment" includes information, inquisition and presentment as well as indictment, and also any plea, replication or other pleading, and any record ;

(*d.*) The expression "finding of the indictment" includes also the taking of an inquisition, the exhibiting an information and the making of a presentment ;

(*e.*) The expression "property" includes goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed ;

(*f.*) The expression "district, county or place" includes any divi-

sion of any Province of Canada, for purposes relative to the administration of justice in criminal cases;

(*g*) The expression "territorial division" means county, union of counties, township, city, town, parish or other judicial division or place to which the context applies;

(*h.*) The expression "the court for crown cases reserved" means and includes,—

(1.) In the Province of Ontario, any division of the High Court of Justice for Ontario;

(2.) In the Province of Quebec, the Court of Queen's Bench, on the appeal side thereof;

(3.) In the Provinces of Nova Scotia, New Brunswick and British Columbia, the Supreme Court in and for each of the said Provinces, respectively;

(4.) In the Province of Prince Edward Island, the Supreme Court of Judicature for that Province;

(5,) In the Province of Manitoba, Her Majesty's Court of Queen's Bench for Manitoba; and—

(6.) In the Northwest Territories, the Supreme Court of the Northwest Territories.—32-33 *V.*, *c.* 29, *s.* 1, *part and c.* 30, *s.* 65. 46 *V.*, *c.* 10, *s.* 5, *part.* 49 *V.*, *c.* 25, *s.* 14. *C.S.L.C.*, *c.* 77, *s.* 57, *part.* *R. S. N. S.* (*3rd S.*) *c.* 171, *s.* 99, *part.* 1 *R. S. N. B.*, *c.* 159, *s.* 22, *part.*

JURISDICTION.

3. Every superior court of criminal jurisdiction shall have power to try any treason, felony or other indictable offence.—34 *V.*, *c.* 14, *s.* 2. 37 *V.*, *c.* 42, *s.* 5. 40 *V.*, *c.* 4, *s.* 4, *part.*

4. No court of general or quarter sessions or recorder's court, nor any court but a superior court having criminal jurisdiction, shall have power to try any treason, or any felony punishable with death or any libel.—32-33 *V.*, *c.* 29, *s.* 12.

In Canada, the courts of general or quarter sessions have jurisdiction in all cases except treason, murder, rape, libel, offences under sects. 21, 22 and 23 of c. 162, (sec. 5 Procedure Act,) offences under sects. 60 to 76,

both inclusive, of c. 164 (sec. 6 Procedure Act,) perjury, subornation of perjury, and forgery, by common law; counterfeiting coin (probably) which was treason by different statutes (1 *East, P. C.* 158; 2 *Hale*, 44, 45; 25 Edw. III, *c.* 7, *s.* 7.), bribery, under influence, personation or other corrupt practices in elections for Parliament (sect. 116, c. 8, Rev. Stat.) offences against sects. 6, 7 and 8 of c. 146.

The following passage from *Archbold's Quarter Sessions*, p. 5, on the jurisdiction of the courts of quarter sessions, explains fully what our law is on the subject, independently of statutory enactments.

"Some doubts were formerly entertained as to the construction that ought to be give to the words '*Felonies*' and '*Trespasses*' in the above commission; some held that they included only such felonies and misdemeanors against the peace, of which cognizance was given to justices of the peace by the express words of a statute or statutes; others held that as the commission was created by statute, namely, in pursuance of stat. 34 Ed. III., c. 1, these words must be deemed to include only such offences as were felonies and trespasses at the time of the passing of the act, and that if justices have jurisdiction of any offence created since, it must be give to them by the express words of the statute creating the offence. But these constructions seem very unsatisfactory; if, according to the first of them, we are to hold that the courts of quarter sessions are to exercise jurisdiction only in those cases where cognizance of an offence is specially given them by some statute, the court will have cognizance of very few offences indeed, and no jurisdiction in most of the cases in which we see them continually exercise it; and if, according to the second construction, we confine their authority under the commission

to offences which were felonies and trespasses at the time of passing the statute 34 Ed. III., c. 1, then we shall have the absurdity of a commission being granted in the nineteenth century to justices giving them authority to hear and determine such offences only as were felonies and trespasses in the year 1360. There is nothing in the act itself or the commission, which at all obliges us to give them so narrow a construction; and in modern times the general opinion of the profession, sanctioned by cases which shall presently be mentioned, is, that with the exception of perjury at common law and forgery, the court of quarter sessions has jurisdiction by virtue of the commission of all felonies whatsoever, murder included, though not specially named, and of all indictable misdemeanors, whether created before or after the date of the commission. In fact, the only restriction upon their jurisdiction up to the time of the passing of the 5-6 V., c. 38 (30th June, 1842), hereafter mentioned, appears to have been the proviso contained in the commission of the peace; but if they thought fit, even in capital cases, to proceed to judgment, such judgment would have been valid until reversed for real error in the judgment, or for substantial defect appearing on the face of the record. As to the word 'trespasses,' the word used, when the commissions were in Latin, was '*transgressiones*,' which was a word of very general meaning, including all the inferior offences under felony, and also those injuries for which the modern action of trespass now lies; it was usually rendered into law French, by the word 'trespass,' and that is the word used in the original French of the above statute of Ed. III., and it is there rendered into English by the word 'trespasses.' In perjury at common law, it is indeed settled, that an indictment will not lie for it in a court of quarter sessions; but perjury under the statute 5 Eliz.,

c. 9, is within the jurisdiction of the sessions, by the express words of the act. Forgery at common law also is not cognizable by the sessions; nor is forgery by statute, as we shall see presently, when we come to consider the jurisdiction of the sessions by statute. Where an indictment for soliciting a servant to steal the goods of his master was removed into the Court of King's Bench by writ of error, it was argued that the facts charged in the indictment did not amount to an offence at common law, or if they did, still it was not an offence indictable at sessions, as it was no breach of the peace. As to the first point, the court held clearly that the facts stated did amount to an indictable offence; as to the second point, Lord Kenyon, C. J., said: "I am also clearly of opinion that it is indictable at the quarter sessions, as falling in with that class of offences, which being violations of the law of the land, have a tendency, as it is said, to a breach of the peace, and are, therefore, cognizable by that jurisdiction; to this rule there are, indeed, two exceptions, namely, forgery and perjury; why exceptions, I know not, but having been expressly so adjudged, I will not break through the rules of law; no other exceptions, however, have been allowed, and therefore this falls within the general rule." The other judges being of the same opinion, the judgment was accordingly affirmed. So where an indictment for a conspiracy to charge a man with taking hair out of a bag belonging to one A. R. was preferred and found at sessions, and the parties convicted upon it; and it was afterwards removed into the Court of King's Bench by certiorari, and a motion was then made in arrest of judgment, on the ground that the sessions had no jurisdiction of conspiracy, any more than of perjury and forgery, it not being specified in their commission, nor jurisdiction of it given to them by any special

statute; the court, however, held that the sessions had jurisdiction.

Lord Mansfield, C. J., said that as no case had been cited to show whether the sessions had or had not jurisdiction, the question must be decided upon general principles; that as to the cases of perjury and forgery, mentioned in argument, they stood upon their own special grounds, and it had been determined that justices had no jurisdiction of them; but as to conspiracy, "it is a trespass, and trespasses are indictable at sessions; though not committed *vi et armis*, they tend to a breach of the peace, as much as cheats, which are established to be within the jurisdiction of sessions." Where, however, a statute creates a new offence, and directs it to be prosecuted before a court of oyer and terminer, or gaol delivery, without mentioning the general or quarter sessions, that is deemed to be an implied exclusion of the jurisdiction of the sessions with respect to that particular offence. But where an indictment for lighting fires on the coast, contrary to 47 Geo. III., sec. 2, c. 66, was preferred at the sessions, removed by certiorari and tried at the assizes; and it was objected for the defendant that the sessions had no jurisdiction, as the statute required that the offenders should be carried before a justice of the peace, and by him committed to the county gaol, "there to remain until the next court of oyer and terminer, great session or gaol delivery," which amounted to an implied enactment that indictment should be prefered in those courts only; the court held that, as the offence was a misdemeanor only, and the defendant might be prosecuted for it without his being apprehended or in custody, the clause in the act referred to did not prevent the indictment from being preferred at the sessions; they held the indictment, therefore, to have been properly originated, and passed sentence on the defendant.

In England, now, there is a statute which takes away from the jurisdiction of the courts of sessions of the peace a large number of offences, which these courts could before try and determine. It is the 5-6 V., c. 58.

5. Neither the justices of the peace acting in and for any district, county, division, city or place, nor any judge of the sessions of the peace, nor the recorder of any city, shall, at any session of the peace, or at any adjournment thereof, try any person for any offence under sections twenty-one, twenty-two and twenty-three of the "*Act respecting offences against the person.*—32-33 *V., c.* 20, *s.* 48.

6. No court of general or quarter sessions of the peace shall have power to try any offence under any of the provisions of sections sixty to seventy-six, both inclusive, of "*The Larceny Act.*"—32-33 *V., c.* 21, *s.* 92.

7. The judge of the sessions of the peace for the city of Quebec, the judge of the sessions of the peace for the city of Montreal, and every police magistrate, district magistrate or stipendiary magistrate appointed for any territorial division, and every magistrate authorized by the law of the Province in which he acts, to perform acts usually required to be done by two or more justices of the peace, may do alone whatever is authorized by this Act to be done by any two or more justices of the peace, and the several forms in this Act contained may be varied so far as necessary to render them applicable to such case.—32-33 *V., c.* 30, *s.* 59, *and c.* 36, *s.* 8.

PLACE OF COMMISSION AND TRIAL OF OFFENCES.

8. When any offence punishable under the laws of Canada has been committed within the jurisdiction of the Admiralty of England, the same may be dealt with, inquired of and tried and determined in the same manner as any offence committed within the jurisdiction of any court before which the offender is brought for trial.—32-33 *V., c.* 29, *s.* 136.

9. When any person, being feloniously stricken, poisoned, or otherwise hurt, upon the sea, or at any place out of Canada, dies of such stroke, poisoning or hurt, in Canada, or, being feloniously stricken, poisoned or otherwise hurt at any place in Canada, dies of such stroke, poisoning or hurt, upon the sea, or at any place out of Canada, every offence committed in respect of any such case, whether the same amounts to murder or manslaughter, or of being accessory to murder

or manslaughter, may be dealt with, inquired of, tried, determined and punished in the district, county or place in Canada in which such death, stroke, poisoning or hurt happens, in the same manner, in all respects, as if such offence had been wholly committed in that district, county or place.—32-33 *V., c.* 20, *s.* 9. 24-25 *V., c.* 100, *s.* 10, *Imp.*

The 12-13 V., c. 96, s. 1, Imp., enacts that all offences committed upon the sea, or within the jurisdiction of the Admiralty shall, in any colony where the prisoner is charged with the offence or brought there for trial, be dealt with as if the offence had been committed upon any water situate within the limits of the colony and within the limits of the local jurisdiction of the courts of criminal jurisdiction of such colony.

And s. 2 of the same act enacts that: where any person shall die in any colony of any stroke, poisoning or hurt, such person having been feloniously striken, poisoned or hurt upon the sea or within the limits of the admiralty, or at any place out of the colony, every offence committed in respect of any such case may be dealt with, inquired of tried, determined and punished in such colony in the same manner in all respects as if such offence had been wholly committed in that colony, and if any person in any colony, shall be charged with any such offence as aforesaid in respect of the death of any person who having been feloniously stricken, poisoned or hurt, shall have died of such stroke, poisoning or hurt upon the sea, or any where within the limits of the Admiralty, such offence shall be held for the purposes of the act to have been wholly committed upon the sea.

The 17-18 V., c. 104, s. 267, Imp., enacts that all offences against property or person committed in, or at any place, either ashore or afloat, out of Her Majesty's dominions by any master, seaman, or apprentice who at the time

when the offence is committed is or within three months previously has been employed in any British ship are deemed to be offences of the same nature respectively, and are liable to the same punishments respectively, and may be inquired of, heard, tried, and determined and adjudged in the same manner, and by the same courts in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England.

The 18-19 V., c. [illegible]1, Imp., enacts that if any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbor, or, if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits. Then it is enacted that nothing contained in that section shall affect the 12-13 V., c. 96, (*ubi supra*).

By the Imperial *Merchant Shipping Amendment Act*, 30-31 V., c. 124, sect. 11, it is enacted that:

"If any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any court of justice in Her Majesty's Dominions, which would have had cognizance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such court shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid."

See *R.* v. *Armstrong*, 13 *Cox*, 184.

By 23-24 V., c. 122, Imp., legislatures in Her Majesty's possessions abroad are empowered to pass an enactment as the one contained in sect. 9 of the Procedure Act, *ante*.

By 28-29 V., c. 63, Imp., any colonial law repugnant to an Act of the Imperial Parliament is, to the extent of such repugnancy, void.

And by the *Courts (Colonial) Jurisdiction Act*, 1874, —37 V., c. 27, Imp.—it is enacted that:

"Whereas by certain Acts of Parliament jurisdiction is conferred on courts in Her Majesty's colonies to try persons charged with certain crimes or offences, and doubts have arisen as to the proper sentence to be imposed upon conviction of such persons ..... When, by virtue of any act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas, or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or, if committed within such local jurisdiction, made punishable by that act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any act to the contrary notwithstanding: Provided always that if the crime or offence is a crime or offence not punishable by the laws of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England."

The words "dealt with" apply to justices of the

peace; "inquired of" to the grand jury; "tried" to the petit jury and "determined and punished" to the court; by Lord Wensleydale in *R.* v. *Ruck, note Y.*, 1 *Russ.* 757.

In *R.* v. *Lewis, Dears. & B.* 182, a wound was inflicted by an alien on an alien in a foreign vessel, bound to England, of which wound the alien died in England, immedialety after landing. The offender was tried and convicted of manslaughter, but upon a case reserved, the court of criminal appeal held that the clause similar to the above section 9 of our statute did not apply to such a case, and quashed the conviction. The judges said that this section was not to be construed as making a homicide cognizable in England by reason only of the death occurring there, unless it would have been so cognizable in case the death had ensued at the place where the blow was given. In this case, the injury which caused the death was inflicted by one foreigner upon another on board a foreign vessel upon the high seas, and, consequently, if death had then and there followed, no offence cognizable by the law of this country had taken place; see 1 *Bishop's Cr. L.* 112; 1 *Cr. Proc.* 51, 53.

A prisoner is "found," within the meaning of s. 21, of 18-19 V., c. 91, *ubi supra*, wherever he is actually present, and the court, where he is present, under that act, has jurisdiction to try him, even if he has been brought there by force as a prisoner.—*R.* v. *Lopez*; *R.* v. *Sattler, Dears. & B.* 525.

On jurisdiction as to offences committed within the limits of the Admiralty, see *Archbold*, 29; 1 *Russ.* 762; 1 *Burn*, 42.

A German vessel carrying the German flag, on a voyage from Hamburg to the West Indies, commanded

by the prisoner, a German, and having a crew nearly all Germans, and a French pilot, whilst on her voyage in the British Channel, at a point within 2½ miles from Dover Beach, ran into and sank an English ship, and thereby occasioned the death of an English subject on board of her. The facts were such as to render the prisoner (if he had been an English subject) liable for manslaughter by the law of England.

Held (per Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush, J., Pollock, B., Field, J., and Sir R. Phillimore,) that there was no jurisdiction in the courts of this country to try the prisoner, a foreigner passing the English coast, on the high seas in a foreign vessel, though the occurence took place within three miles of the coast. *Held* (per Cockburn, C. J., Bramwell, J. A., Brett, J. A., Lush, J., Pollock, B., Field, J., and Sir R. Phillimore,) that the offence was not committed on board a British ship, though the person whose death was caused was in a British ship at the time of the collision and sinking of her.

Held, (per Lord Coleridge, C. J., Brett, J. A., Amphlett, J. A., Grove, J., Denman, J., and Lindley, J.,) that the courts of this country had jurisdiction, the offence being committed within three miles of the English coast.

Held (per Lord Coleridge, C. J., and Denman, J.,) that the offence was committed on board the British vessel.—*R.* v. *Keyn*, 13 *Cox*, 403. See *R.* v. *Carr*, 15 *Cox*, 129. —*R.* v. *Anderson*, 11 *Cox*, 198.

Now, by 41-42 V., c. 73, (Imp.), this decision in *R.* v. *Keyn, ubi supra*, is not to be followed. This Act applies to Canada.

The large inland lakes of Ontario are within the jurisdiction of the Admiralty.—*R.* v. *Sharp*, 5 *P. R. (Ont.)* 135.

Where a person dies in this Province from ill-treatment received on board a British ship at sea, the trial for manslaughter against the person who ill-treated him must take place in the district where the man died, not where he was apprehended.—*R.* v. *Moore*, 2 *Q. B. R.* 52.

On an indictment for an offence committed on board a British ship upon the high seas, it is not necessary in order to prove the nationality of the ship to produce its register, but the fact that she sailed under the British flag is sufficient.—*R.* v. *Moore*, 2 *Q. B. R.* 52. *See R.* v. *Von Seberg*, 11 *Cox*, 520, *and R.* v. *Bjornsen*, 10 *Cox*, 74.

In an indictment for a larceny committed on board a British vessel, it is sufficient to say *upon the sea*, without saying, *upon the high seas.*—*R.* v. *Sprungli*, 4 *Q. L. R* 110.

10. When any felony or misdemeanor is committed on the boundary of two or more districts, counties or places, or within the distance of one mile of any such boundary, or in any place with respect to which it is uncertain within which of two or more districts, counties or places it is situate, or when any felony or misdemeanor is begun in one district, county or place, and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished, in any one of the said districts, counties or places, in the same manner as if it had been actually and wholly committed therein.—32-33 *V.*, *c.* 29, *s.* 8.

This clause is taken from the 7 Geo. 4, c. 64, sec. 12 of the Imperial Acts.

The distance of one mile mentioned in the above clause is to be measured in a direct line from the border, and not by the nearest road; *R.* v. *Wood*, 5 *Jur.* 225.

This clause does not enable the prosecutor to *lay* the offence in one county and *try* it in the other, but only to lay *and* try it in either; *R.* v. *Mitchell*, 2 *Q. B.* 636. See also on this clause; *R.* v. *Jones*, 1 *Den.* 551; *R.* v. *Leech*, *Dears.* 642.

Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt at the common law, whether when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county; but by the 2-3 Edw. 6, c. 24, sec. 2, it was enacted that the trial should be in the county where the death happened.

Under the said section 10 of the Procedure Act, where the blow is given in one county, and the death takes place in another, the trial may be in either of these counties.—1 *Russ.* 753. This clause applies to coroners, when a felony has been committed, but not when the death is the result of an accident.—*R.* v. *Great Western Railway Company*, 3 *Q. B.* 333 and *note by Greaves*, 1 *Russ.* 754; *R.* v. *Grand Junction R. Co.* 11 *A. & E.* 128.

11. When any felony or misdemeanor is committed on any person or on or in respect of any property, in or upon any coach, wagon, cart or other carriage whatsoever, employed in any journey, or is committed on any person, or on or in respect of any property on board any vessel, boat or raft whatsoever, employed in any voyage or journey upon any navigable river, canal or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished, in any district, county or place, through any part whereof such coach, wagon, cart, carriage or vessel, boat or raft, passed in the course of the journey or voyage during which such felony or misdemeanor was committed, in the same manner as if it had been actually committed in such district, county or place,—32-33 *V.*, *c.* 29, *s.* 9.

12. Whenever the side, centre, bank or other part of any highway or of any river, canal or navigation, constitutes the boundary of any two districts, counties or places, any felony or misdemeanor mentioned in the two sections next preceding may be dealt with, inquired of, tried, determined and punished in either of such districts, counties or places, through or adjoining to, or by the boundary of any part

whereof such coach, wagon, cart, carriage or vessel, boat or raft, passed in the course of the journey or voyage during which such felony or misdemeanor was committed, in the same manner as if it had been actually committed in such district, county or place.—32-33 *V., c.* 29, *s.* 10.

These two clauses are taken from the 7 Geo. 4, c. 64, sec. 13, of the Imperial Statutes.

This enactment is not confined in its operation to the carriages of common carriers or to public conveyances, but if property is stolen from any carriage employed on any journey, the offender may, by virtue of the above section, be tried in any county through any part whereof such carriage shall have passed in the course of the journey during which such offence shall have been committed.—*R.* v. *Sharpe*, *Dears.* 415.

As to the effect of the words "in or upon" in this section, see *R.* v. *Sharpe*, 2 *Leuin*, 233.

Where the evidence is consistent with the fact of an article having been abstracted from a railway carriage, either in the course of the journey through the county of A., or after its arrival at its ultimate destination in the county of B., and the prisoner is indicted under the above section, the case must go to the jury, who are to say whether they are satisfied that the larceny was committed in the course of the journey or afterwards.—*R.* v. *Pierce*, 6 *Cox*, 117.

13. If, upon the dissolution of a union of counties, any information, indictment or other criminal proceeding, in which the venue is laid in a county of the union is pending, the court in which such information, indictment or proceeding is pending, or any judge who has authority to make orders therein, may, by consent of parties, or on hearing the parties upon affidavit, order the venue to be changed to the new county, and all records and papers to be transmitted to the proper officers of such county, and in the case of any such indictment found at any court of criminal jurisdiction, any judge of a superior court may make the order;

2. If no such change is directed, all such informations, indictments and other proceedings shall be carried on and tried in the senior county;

3. Any person charged with an indictable offence who, at the time of the disuniting of a junior from a senior county, is imprisoned on the charge in the gaol of the senior county, or is under bail or recognizance to appear for trial at any court in the senior county, and against whom no indictment has been found before the disunion takes place, shall be indicted, tried and sentenced in the senior county, unless a judge of a superior court orders the proceedings to be conducted in the junior county, in which event the prisoner or recognizance, as the case may be, shall be removed to the latter county, and the proceedings shall be had therein; and when, in any such case, the offence is charged to have been committed in a county other than that in which such proceedings are had, the venue may be laid in the proper county describing it as "formerly one of the united counties of ....."—29-30 *V.* (*Can.*), *c.* 51, *ss.* 52, 53 *and* 55.

14. All crimes and offences committed in any of the unorganized tracts of country in the Province of Ontario, including lakes, rivers, and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may be inquired of tried and punished within any county of such Province; and such crime or offence shall be within the jurisdiction of any court having jurisdiction over crimes or offences of the like nature committed within the limits of such county, before which court such crime or offence may be prosecuted; and such court shall proceed therein to trial, judgment and execution or other punishment for such crime or offence, in the same manner as if such crime or offence had been committed within the county where such trial is had;

2. When any provisional judicial district or new county is formed and established in any of such unorganized tracts, all crimes and offences committed within the limits of such provisional judicial district or new county, shall be inquired of, tried and punished within the same, in like manner as such crimes or offences would have been inquired of, tried and punished if this section had not been passed;

3. Any person accused or convicted of any offence in any such provisional district may be committed to any common gaol in the Province of Ontario; and the constable or other officer having charge of such person and intrusted with his conveyance to any such common

gaol, may pass through any county in such Province with such person in his custody; and the keeper of the common gaol of any county in such Province in which it is found necessary to lodge for safe keeping any such person so being conveyed through such county in custody, shall receive such person and safely keep and detain him in such common gaol for such period as is reasonable or necessary; and the keeper of any common gaol in such Province, to which any such person is committed as aforesaid, shall receive such person and safely keep and detain him in such common gaol under his custody until discharged in due course of law, or bailed in cases in which bail may by law be taken.—*C. S. U. C.*, *c.* 128, *ss.* 100, 101 *and* 105.

15. Whenever any offence is committed in the district of Gaspé, the offender, if committed to gaol before trial, may be committed to the common gaol of the county in which the offence was committed, or may in law be deemed to have been committed, and if tried before the Court of Queen's Bench, he shall be so tried at the sitting of such court held in the county to the gaol of which he has been committed, and if imprisoned in the common gaol after trial he shall be so imprisoned in the common gaol of the county in which he has been tried.—*C. S. L. C.*, *c.* 80, *s.* 6.

16. Every person accused of perjury, bigamy or any offence under the provisions of sections fifty-three, fifty-four and fifty-five of "*The Larceny Act*," may be dealt with, indicted, tried and punished in the district, county or place in which the offence is committed, or in which he is apprehended or is in custody.—32-33 *V.*, *c.* 20, *s.* 58, *part, and c.* 21, *s.* 72, *part, and c.* 23, *s.* 8. 33 *V.*, *c.* 26, *s.* 1, *part.* 24-25 *V.*, *c.* 96, *s.* 70; *c.* 100, *s.* 57, *Imp.*

Lynch was indicted in the district of Beauharnois for perjury committed in the district of Montreal; there was no averment in the indictment that the defendant had been apprehended, or in custody, or that he was in custody at the time of the finding of the indictment. The defendant neither demurred nor moved to quash, but after verdict moved in arrest of judgment on the ground that there was no averment in the indictment of his having been apprehended or in custody. The sitting judge dismissed the motion in arrest of judgment, but reserved the point so raised.

Held. That the indictment was defective, that the defect was one which could not be amended and, consequently, was not cured by verdict, and that the judgment must be arrested and the defendant discharged.—*R.* v. *Lynch*, 20 *L. C. J.* 187; 7 *R. L.* 553.—See note under sec. 18, *post*, and *R.* v. *Smith*, 1 *F. & F.* 36. Also note *c.* to 1 *Russ.* 274.

17. The offence of any person who is an accessory, either before or after the fact, to any felony, may be dealt with, inquired of, tried, determined and punished by any court which has jurisdiction to try the principal felony, or any felonies committed in any district, county or place in which the act, by reason whereof such person became such accessory, has been committed: Provided, that no person once duly tried, either as an accessory before or after the fact, or for a substantive felony, shall be liable to be afterwards prosecuted for the same offence.—31 *V.*, *c.* 72. *s.* 8. 32-33 *V.*, *c.* 17, *s.* 2. 24-25 *V.*, *c.* 94, *s.* 7, *Imp.*

There is a material difference between this clause and the corresponding clause of the Imperial Act. See Greaves, note, to sec. 7 of the Imperial Act, *page* 25 *of Greaves, Cons. Acts.*

18. Every one who commits any offence against the "*Act respecting Forgery*," or commits any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case is indictable at common law, or by virtue of any act, may be dealt with, indicted, tried and punished in any district, county or place in which he is apprehended or is in custody; in the same manner in all respects as if the offence had been actually committed in that district, county or place; and every accessory before or after the fact to any such offence, if the same is felony, and every person aiding, abetting or counselling the commission of any such offence, if the same is a misdemeanor, may be dealt with, indicted, tried and punished, in any district, county or place in which he is apprehended or is in custody, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such district, county or place.—32-33 *V.*, *c.* 19, *s.* 48. 24-25 *V.*, *c.* 98, *s.* 41, *Imp.*

It was held, under the corresponding section of the

English act, that where the prisoner is tried in the county where he is in custody, the forgery may be alleged to have been committed in that county, and there need not be any averment that the prisoner is in custody there.—*R.* v. *James*, 7 *C. & P.* 553. And in the case of *R.* v. *Smythies*, 1 *Den.* 498, it was held that, although the defendant is not shewn to have been in custody in the county where the bill is found, until the moment before his trial, when he surrenders in discharge of his bail, that is sufficient to make him triable there, and the judges said that the same ruling had been given in *R.* v. *Whiley*, 2 *Moo. C. C.* 186, though the report is to the contrary.

This last case is rightly reported in 1 *C. & K.* 150. See remarks under sec. 16, *ante*.

19. Every one accused of any offence against the provisions of section forty-six of the "*Act respecting Offences against the Person*" may be tried either in the district, county or place in which the same was committed, or in any district, county or place into or through which the person kidnapped or confined was carried or taken while under such confinement; but no person who has been once duly tried for any such offence shall be liable to be again indicted or tried for the same offence.—32-33 *V.*, *c.* 20, *s.* 71.

See note under preceding section.

20. Every one who receives any chattel, money, valuable security or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted or disposed of, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried and punished in any county, district or place in which he has or has had any such property in his possession, or in any county, district or place in which the person guilty of the principal felony or misdemeanor may, by law, be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county, district or place where he actually received such property. 32-33 *V.*, *c*, 21, *s.* 105.—24-25 *V.*, *c.* 96, *s.* 96, *Imp.*

See remarks under secs. 82, 83 and 84 of the *Larceny Act*.

A prisoner was tried at Amherst upon an indictment containing two counts, one for robbery and the other for receiving stolen goods. Both offences were proved to have been committed at Truro, and the jury found a general verdict of guilty on both counts.

Held, that the prisoner should have been proceeded against only on the count for receiving, and that, although he might have been guilty of both offences, as the robbery was committed in another county than that in which he was tried, he must be discharged.—*The Queen* v. *Russell*, 3 *R. & C.* (*N. S.*) 254.

21. Every one who brings into Canada, or has in his possession therein, any property stolen, embezzled, converted or obtained by fraud or false pretences in any other country; in such manner that the stealing; embezzling, converting or obtaining it in like manner in Canada, would, by the laws of Canada, be a felony or misdemeanor, may be tried and convicted in any district, county or place in Canada into or in which he brings such property, or has it in possession.—32-33 *V.*, *c.* 21, *s.* 112, *part.*

Sec. 88 of the *Larceny Act* (see, *ante*,) enacts that every one who brings into Canada any property so stolen, etc., in any other country is guilty of an offence of the same nature as if the stealing, etc., had taken place in Canada.

This clause is not to be found in the Imperial Acts. And in England, thefts committed out of the kingdom, and even in the Channel Islands are not indictable, though the stolen property is brought into England. The cases are clear on the question.

If a larceny be committed out of the kingdom, though within the crown's dominion, bringing the stolen money into this kingdom will not make it larceny here.—*R.* v. *Prowes*, 1 *Moo. C. C.* 349. And, if a larceny be committed in France, the party cannot be tried in England, though he brings the goods thereto.—*R.* v. *Madge*, 9 *C. & P.* 29.

The prisoner had stolen goods in Guernsey and brought them to England, where he was taken and committed for trial: *Held*, that Guernsey not being a part of the United Kingdom, the prisoner could not be convicted of larceny for having them in possession here, nor of receiving in England the goods so stolen in Guernsey.—*R.* v. *Debruiel*, 11 *Cox*, 207.

This sec. 88 of our *Larceny Act* is open to grave objections. Had Parliament the power to pass it? Is it not extra-territorial legislation? Of course, a conviction or an acquittal in the foreign country whence the goods have been brought would be no bar here to another prosecution. The rule that no man shall be put twice in jeopardy for the same offence "cannot span country and country in such a way as to cause a jeopardy in one country to free the party from trial in another."—1 *Bishop, Cr. L.* 983. See *Wheaton, International Law*, 184.

And *vice versâ*, a conviction or an acquittal in Canada would be no bar to a trial in the country where the offence was committed, upon the return thereto of the offender. So that a party from France, for instance, who has been tried and acquitted there may, on his arrival here with the property, be arrested, tried and convicted of larceny upon the same facts because, by the law of Canada, his act constitutes larceny, though, in France, it did not. So that, according to this interpretation of the clause, though this party committed no crime at the time, yet, the mere fact of his coming to Canada with the property will retroact on his act so as to make it a crime! And conversely, a Frenchman may be arrested, tried and convicted here for an act which, in France, was not a criminal offence; and, upon his return to France, put upon his trial and found never to have been guilty. The clause has no restriction. It

extends to foreigners as well as to British subjects, and it enacts virtually that an act done in a foreign country is a crime in Canada

Now in *R.* v. *Lewis, Dears. & B.* 182, under the clause of the Imperial Act corresponding to sec. 9 of our Procedure Act, it was held that this clause gives no jurisdiction to the English courts over offences committed by foreigners on foreign ships on the high seas. "How can we say," said Coleridge, J., "whether one foreigner wounding another on the high seas commits a felony? See, also, *R.* v. *Serva*, 1 *Den.* 104.

The law as to territorial limits of the jurisdiction of any country is well settled. The laws of no nation can extend beyond its territory, except as to its own subjects, and can have no force to control the rights of any other nation within its own jurisdiction. *The Apollon*, 9 *Wheat.* 370. "Now, no preposition of law can be more incontestable or more universally admitted, than that, according to the general law of nations, a foreigner cannot be held criminally responsible to the law of a nation not his own, for acts done beyond the limits of its territory." Per Cockburn, C. J.—*R.* v. *Keyn*, 13 *Cox*, 403.

This clause of our statute, it is true, does not in express terms profess to deal with crimes committed in foreign countries, but makes it a crime, in Canada, to bring into Canada property acquired by a crime in another country. *R.* v. *Hennessey, post.* But it requires obviously the trial by our courts of acts done abroad, even by foreigners, and, as previously remarked, authorizes our courts to stamp as a crime or declare it *to have been* a crime an act done in a foreign country and which at the time it was done may not have been a crime by the laws of that country. The contention that the bringing into

Canada of the property stolen is the offence to be tried here does not meet the objection. The first inquiry has to be whether the property was stolen or not, whether there was a crime or not in the foreign country.

The prisoner being the agent of the American Express Co. in the State of Illinois, received a sum of money which had been collected by them for a customer, and put it into their safe, but made no entry in their books of its receipt, as it was his duty to do, and afterwards absconded with it to this Province, where he was arrested: *Held*, that, according to Canadian and English law, he was guilty of larceny and was properly convicted here under the above section.—*R.* v. *Hennessey*, 35 *U. C. Q. B.* 603.

In this case, it must be noticed, the prisoner was not found guilty of bringing into Canada stolen property in the words of the act, but he was found guilty of larceny. The act does say that the bringing such a property into Canada is an offence of *the same nature* as if the stealing had taken place in Canada, But does that mean that he is guilty of the *same* offence? Does it not merely mean that the nature of the offence of bringing such property into Canada will be either felony or misdemeanor, according to what the act done in the foreign country would itself have been if done in Canada?

No objection appears to have been made to the judge's charge in that case, and this objection to the verdict was not taken or noticed.

The whole case itself does not seem to have been fully argued, and perhaps would bear reconsideration. It certainly does appear by the case as reported that Hennessey was, in Canada, found guilty of a larceny committed in the United States

22. If any person has in his possession in any one part of Canada,

any chattel, money, valuable security or other property whatsoever, which he has stolen or otherwise feloniously *or unlawfully taken or obtained by any offence against "The Larceny Act,"* in any other part of Canada, he may be dealt with, indicted, tried and punished for larceny or theft in that part of Canada where he so has such property, in the same manner as if he had actually stolen, or taken *or obtained it* in that part; and if any person in any one part of Canada receives or has any chattel, money, valuable security or other property whatsoever, which has been stolen or otherwise feloniously or *unlawfully* taken *or obtained* in any other part of Canada, such person knowing such property to have been stolen or otherwise feloniously or *unlawfully* taken *or obtained*, may be dealt with, indicted, tried and punished for such offence in that part of Canada where he so receives or has such property, in the same manner as if it had been originally stolen or taken *or obtained* in that part.—32-33 *V., c.* 21, *s.* 121. 24-25 *V., c.* 96, *s.* 114, *Imp.*

The words in *italics* are not in the English act.

A watch was stolen in Liverpool and sent with other things by railway to a receiver in Middlesex. *Held*, that the thief was triable in Middlesex, although there was no evidence that he had left Liverpool.—*R.* v. *Rogers*, 11 *Cox*, 38.

23. If any person tenders, utters, or puts off any false or counterfeit coin in any one Province of Canada, or in any one district, county or jurisdiction, therein, and also tenders, utters or puts off any other false or counterfeit coin, in any other Province, district, county or jurisdiction, either on the day of such first mentioned tendering, uttering or putting off, or within the space of ten days next ensuing, or if two or more persons, acting in concert in different Provinces, or in different districts, counties or jurisdictions therein, commit any offence against the *"Act respecting Offences relating to the Coin,"* every such offender may be dealt with, indicted, tried and punished, and the offence laid and charged to have been committed, in any one of the said provinces, or districts, counties or jurisdictions, in the same manner in all respects, as if the offence had been actually and wholly committed within one province, district, county or jurisdiction. —32-33 *V., c.* 18, *s.* 29. 24-25 *V., c.* 99, *ss.* 10 *and* 28, *Imp.*

Greaves says on this clause: "The first part is intro-

duced to remove a doubt which had arisen, whether a person tendering, etc., coin in one jurisdiction and afterwards tendering, etc., coin in another jurisdiction, within sect. 10 (of the Imperial Coin Act,) could be tried in either. As the offence created by that section is only a misdemeanor, probably there was no substantial ground for that doubt, but it was thought better to set the matter at rest."

APPREHENSION OF OFFENDERS.

24. Any person found committing an offence punishable either upon indictment or upon summary conviction, may be immediately apprehended without a warrant by any constable or peace officer, or by the owner of the property on or with respect to which the offence is being committed, or by his servant or any other person authorized by such owner, and shall be forthwith taken before some neighboring justice of the peace, to be dealt with according to law.—32-33 *V.*, *c.* 22, *s.* 69, *and c.* 29, *s.* 2. 24-25 *V.*, *c.* 97, *s.* 61, *Imp.*

25. Any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of "*The Larceny Act*" or the "*Act respecting the protection of the Property of Seamen in the Navy*," may be immediately apprehended without a warrant by any person, and forthwith taken, together with the property, if any, on or with respect to which the offence is committed, before some neighboring justice of the peace to be dealt with according to law.—32-33 *V.*, *c.* 21, *s.* 117, *part.* 33 *V.*, *c.* 31, *s.* 5, *part.* 24-25 *V.*, *c.* 96, *s.* 103, *Imp.*

26. If any person to whom any property is offered to be sold, pawned or delivered, has reasonable cause to suspect that any such offence has been committed on or with respect to such property, he may, and, if in his power, he shall apprehend and forthwith carry before a justice of the peace, the person offering the same, together with such property, to be dealt with according to law.—32-33 *V.*, *c.* 21, *s.* 117, *part, and c.* 29, *s.* 3. 33 *V.*, *c.* 31, *s.* 5, *part.* 24-25 *V.*, *c.* 96, *s.* 103, *Imp.*

27. Any person may apprehend any other person found committing any indictable offence in the night, and shall convey or deliver him to some constable or other person, so that he may be taken, as soon as conveniently may be, before a justice of the peace, to be dealt

with according to law.—32-33 *V.*, *c.* 29, *s.* 4. 14-15 *V.*, *c.* 19, *s.* 11, *Imp.*

28. Any constable or peace officer may, without a warrant, take into custody any person whom he finds lying or loitering in any highway, yard or other place, during the night, and whom he has good cause to suspect of having committed, or being about to commit, any felony, and may detain such person until he can be brought before a justice of the peace, to be dealt with according to law:

2. No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice of the peace.—32-33 *V.*, *c.* 29, *ss.* 5 *and* 6. 24-25 *V.*, *c.* 96, *s.* 104, *c.* 97, *s.* 57, *c.* 100, *s.* 66, *Imp.*

29. Any person may apprehend any other person who is found committing any indictable offence, against the "*Act respecting Offences relating to the Coin,*" and convey and deliver him to a peace officer, constable or officer of police, so that he may be conveyed, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.—32-33 *V.*, *c.* 18, *s.* 33. 24-25 *V.*, *c.* 96, *s.* 31. *Imp.*

Prisoner arrested and detained upon a telegram from persons in France and England. *Konigs, in re,* 6 *R. L.* 213. See *R.* v. *McHolme,* 8 *P. R.* (*Ont.*) 452.

At common law, if a constable or peace officer sees any person committing a felony, he not only *may,* but he *must* and is *bound* to apprehend the offender. And not only a constable or peace officer, but "*all persons* who are present when a felony is committed, or a dangerous wound given, are *bound* to apprehend the offender, on pain of being fined and imprisoned for their neglect, unless they were under age at the time; *(2 Hawkins,* 115*)*; and it is *the duty* of *all* persons to arrest without warrant any person *attempting* to commit a felony; *(R.* v. *Hunt,* 1 *Moo. C. C.* 93; R. v. *Howarth,* 1 *Moo. C. C.* 207*)*. So any person may arrest another for the purpose of putting a stop to a breach of the peace, committed in his presence (2 *Hawkins, P. C.* 115; 1 *Burn,* 295, 299.) A peace

officer may arrest any person without warrant, on a reasonable *suspicion of felony*, though that doctrine does not extend to misdemeanors. And even a private person has that right. But there is a distinction between a private person and a constable as to the power to arrest any one upon suspicion of having committed a felony, which is thus stated by Lord Tenterden, C. J., in *Beckwith* v. *Philby*, 6 *B. & C.* 35:

"In order to justify a private person in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has been actually committed; See *Ashley* v. *Dundas*, 5 *O. S. (Ont)*. 749; whereas a constable, having reasonable gronnd to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. See *McKenzie* v. *Gibson*, 8 *U. C. Q. B.* 100. This distinction is perfectly settled. The rule as to private persons was so stated by Genney, in the Year Book, 9 Edw. 4, already mentioned, and has been fully settled ever since the case of *Ledwith* v. *Catchpole (Cald.* 291, *A. D.* 1783); *Greaves*, on arrest without warrant." See *Murphy* v. *Eills*, 2 *Han. (N. B.)* 347.

Any private person may also arrest a person found committing a misdemeanor. This doctrine having been denied, in England, by a correspondent of the *Times*, Mr. Greaves, Q. C., the learned framer of the English Criminal Law Consolidation Acts, published, on the question, an article, *(Appendix to Greaves' Crim. Acts)* too long for insertion here, but from which the following extracts give fully the author's views on the question:—

"On these authorities it seems to be perfectly clear that any private person may lawfully apprehend any person whom he may catch in the attempt to commit any felony,

and take him before a justice to be dealt with according to law."

"I have now adduced abundantly sufficient authorities to prove that the general assertion in the paper (in the *Times*), that 'a private individual is not justified in arresting without a warrant a person found committing a misdemeanor, cannot be supported. On the contrary, those authorities very strongly tend to show that any private individual may arrest any person whom he catches committing any misdemeanor. It is quite true that I have been unable to find any express authority which goes to that extent; but it must be remembered that where the question turns on some common law rule, there never can have been any authority to lay down any general rule; each case must necessarily be a single instance of a particular class; and, as in larceny, notwithstanding the vast number of cases which have been decided, no complete definition of the offence has ever yet been given by any binding authority, so in the present case we must not be surprised if we find no general rule established."

"But when we find that all misdemeanors are of the same class; that it is impossible to distinguish in any satisfactory way between one and another, and that in the only case *(Fox* v. *Gaunt)* where such a distinction was attempted, the court at once repudiated it; and when, on the question whether a party indicted for a misdemeanor was entitled to be discharged on *habeas corpus*, Lord Tenterden, C. J., said, in delivering the judgment of the court, 'I do not know how for this purpose, to distinguish between one class of crimes and another. It has been urged that the same principle will warrant an arrest in the case of a common assault. That certainly will follow: *Ex parte Scott*, 9 *B. & C.* 446. And when, above all, the same broad prin-

ciple that it is for the common good that all offenders should be arrested, applies to every misdemeanor, and that principle has been the foundation of the decisions from the earliest times, and was the ground on which *Timothy* v. *Simpson* was decided; the only reasonable conclusion seems to be that the power to arrest applies to all misdemeanors alike, wherever the defendant is caught in the act."

It has been held that where a statute gives a power to arrest a person *found committing an offence*, he must be taken in the act, or in such continuous pursuit that from the finding until the apprehension, the circumstances constitute one transaction.—*Hanway* v. *Boultbee*, 4 *C. & P.* 350; *R.* v. *Curran*, 3 *C. & P.* 397; *R.* v. *Howart*, 1 *Moo. C. C.* 207; *Roberts* v. *Orchard*, 2 *H. & C.* 769; and therefore, if he was found in the next field with property in his possession suspected to be stolen out of the adjoining one, it is not sufficient; *R.* v. *Curran*, 3 *C. & P.* 397; but if seen committing the offence it is enough, if the apprehension is on quick pursuit. *Hanway* v. *Boultbee*, 4 *C. & P.* 350. The person must be immediately apprehended; therefore, probably, the next day would not be soon enough, though the lapse of time necessary to send for assistance would be allowable; *Morris* v. *Wise*, 2 *F. & F.* 51; but an interval of three hours between the commission of the offence and the discovery and commencement of pursuit is too long to justify an arrest without warrant under these statutes.—*Dowing* v. *Cassel*, 36 *L. J. M. C.* 97.

The person must be forthwith taken before a neighboring justice, and, therefore, it is not complying with the statute to take him to the prosecutor's house first, though only half a mile out of the way; *Morris* v. *Wise*, 2 *F. &*

F. 51; unless, indeed, it were in the night time, and then he might probably be kept in such a place until the morning.—*R.* v. *Hunt*, 1 *Moo. C. C.* 93.

But no person can, in general, be apprehended without warrant for a mere misdemeanor not attended with a breach of the peace, as perjury or libel; *King* v. *Poe*, 30 *J. P.* 178; and a private individual cannot arrest another, without warrant, on the ground of suspicion of his having been guilty of a misdemeanor; nor can, in this case, constables and peace officers.—*Matthews* v. *Biddulph*, 4 *Scott, N. R.* 54; *Fox.* v. *Gaunt*, 3 *B. & A.* 798; *Griffin* v. *Coleman*, 4 *H. & N.* 265. Neither can any person, not even a constable, arrest a person without a warrant on a charge of misdemeanor; *R.* v. *Curvan*, 1 *Moo. C. C.* 132; *R.* v. *Phelps*, *C. & M.* 180; *R.* v. *Chapman*, 12 *Cox*, 4; *Codd* v. *Cabe*, 13 *Cox*, 202; except when such person is *found* committing the offence by the person making the arrest, in the cases, as, *ante*, where the statute specially authorizes him to do so. And though *any* person can make an arrest to prevent a breach of the peace, or put down a riot or an affray, yet, after the offence is over, even a constable cannot apprehend any person guilty of it, unless there is danger of its renewal.—*Price* v. *Seeley*, 10 *C. & F.* 28; *Baynes* v. *Brewster*, 2 *Q. B.* 375; *Derecourt* v. *Corbishley*, 5 *E. & E.* 188; *Timothy* v. *Simpson*, 1 *C. M. & R.* 757; *R.* v. *Walker*, *Dears.* 358. In *R.* v. *Light*, *Dears. & B.* 332, it appeared that the constable, while standing outside the defendant's house, saw him take up a shovel and hold it in a threatening attitude over his wife's head, and heard him at the same time say. "If it was not for the policeman outside I would split your head open;" that in about twenty minutes afterwards the defendant left his house, after saying that he would leave

his wife altogether, and was taken into custody by the constable, who had no warrant, when he had proceeded a short distance in the direction of his father's residence; the prisoner resisted and assaulted the constable, for which he was tried and found guilty, and, upon a case reserved, the judges held that the conviction was right, and that the constable had the right to apprehend the defendant. "A constable, as conservator of the peace," said Williams, J., "has authority, equally with all the rest of Her Majesty's subjects, to apprehend a man where there is reasonable ground to believe that a breach of the peace will be committed; and it is quite settled that where he has witnessed an assault he may apprehend as soon after as he conveniently can. He had a right to apprehend the prisoner and detain him until he was taken before justices, to be dealt with according to law. He had a right to take him, not only to prevent a further breach of the peace, but also that he might be dealt with according to law in respect of the assault which he had so recently seen him commit."

Arrest, without warrant, for contempt of court.—Judges of courts of record have power to commit to the custody of their officer, *sedente curiâ*, by oral command, without any warrant made at the time.—*Kemp* v. *Neville*, 10 *C. B. N. S.* 523. This proceeds upon the ground that there is in contemplation of law a record of such commitment, which record may be drawn up when necessary; *Watson* v. *Bodell*, 14 *M. & W.* 37; 1 *Burn*, 293; for the like reason no warrant is required for the execution of sentence of death.—2 *Hale*, 408. If a contempt be committed in the face of a court, as by rude and contumelious behavior, by obstinacy, perverseness, or prevarication, by breach of the peace or any wilful disturbance whatever, the judge may order the offender to

be instantly, without any warrant, apprehended and imprisoned, at his, the judge's, discretion, without any further proof or examination; 2 *Hawkins*, 221; *Cropper* v. *Horton*, 8 *D. & R.* 166; *R.* v. *James*, 1 *D. & R.* 559; 5 B. & A.894; but the commitment must be for a time certain, and if by a justice of the peace, for a contempt of himself in his office, it must be by warrant in writing; *Mayhew* v. *Locke*, 2 *Marsh*, 377; 7 *Taun.* 63; and the jurisdiction with regard to contempt, which belongs to *inferior courts*, and in particular to the county court, is confined to contempts committed in the court itself.—*Ex parte Joliffe*, 42 *L. J. Q. B.* 121. This last case rests principally on the 9-10 V., c. 96 (Imp.), which gives to county courts power to commit for contempt committed in face of the court, but is silent as to contempt committed out of court; see 4 *Stephens' Com.* 341.—*R.* v. *Lefroy*, *L. R.* 8 *Q. B.* 134.

Time, place and manner of arrest.—A person charged on a criminal account may be apprehended at any time in the day or night. The 29 Car. 2, c. 7, sec. 6, prohibited arrests on Sundays, except in cases of treasons, felonies and breaches of the peace, but now, an arrest in any indictable offence may be executed on a Sunday. See 4 *Stephens' Com.* 347; 1 *Chitty*, 16; *Rawlins* v. *Ellis*, 10 *Jur.* 1039. No place affords protection to offenders against the criminal law, and they may be arrested any where, and wherever they may be.—*Bacon's Abr. Verb. Trespass.*

As to the manner of arresting without warrant by a private person, he is bound, previously to the arrest, to notify to the party the cause for which he arrests, and to require him to submit; but such notification is not necessary where the party is in the actual commission of the

offence, or where fresh pursuit is made after any such offender, who, being disturbed, makes his escape; so a constable arresting, without warrant, is bound to notify his authority for such arrest, unless the offender be otherwise acquainted with it, except, as in the case of private individuals, where the offender is arrested in the actual commission of the offence, or on fresh pursuit.—*R.* v. *Howarth*, 1 *Moo. C. C.* 207.

If a felony be committed, or a felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape, and if, in the pursuit, the felon be killed *where he cannot be otherwise overtaken*, the homicide is justifiable. This rule is not confined to those who are present so as to have ocular proof of the fact, or to those who first come to the knowledge of it, for if in these cases fresh pursuit be made, the persons who join in aid of those who began the pursuit are under the same protection of the law. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills, and the jury ought to enquire whether it were done of necessity or not; 1 *East, P. C.* 298; but this is not extended to cases of misdemeanor or arrests in civil proceedings, though in a case of riot or affray, if a person interposing to part the combatants, giving notice to them of his friendly intention, should be assaulted by them or either of them and in the struggle should happen to kill, this will be justifiable homicide. —*Fost.* 272. However, supposing a felony to have been actually committed, but not by the person suspected and pursued, the law does not afford the same indemnity to such as of their own accord, or upon mistaken information that a felony had been committed, engage in the pursuit, how probable soever the suspicion may be; but constables

acting on reasonable suspicion of felony are justified in proceeding to such extremities when a private person may not be; but the constable must know, or at least have reasonable ground for suspecting, that a felony has been committed; for a constable was convicted of shooting at a man, with intent to do him some grievous bodily harm, whom he saw carrying wood out of a copse which he had been employed to watch, and who, by running away, would have escaped if he had not fired, for unless the man had been previously summarily convicted for the same offence he had not committed a felony, and, though he had been so previously convicted, the constable was not aware of it. And the conviction was affirmed by the court of crown cases reserved. "We all think the conviction right," said Pollock, C. B., "the prisoner was not justified in firing at Waters, because the fact that Waters was committing a felony was not known to the prisoner at the time."—*R.* v. *Dadson*, 2 *Den.* 35.

What is an "immediate arrest" under secs. 24 and 25 is a question for the jury.—*Griffith* v. *Taylor*, 2 *C. P. D.* 194.

On the clause corresponding to sec. 26, *ante*, Greaves says:

"As to what constitutes a reasonable cause, in such cases, depends very much on the particular facts and circumstances in each instance; the general rule being that the grounds must be such that any reasonable person, acting without passion or prejudice, would fairly have suspected the party arrested of being the person who committed the offence, though the words of the statute seem to authorize the apprehension of the person offering, whether *he* be suspected or not.—*Allen* v. *Wright*, 8 *C. & P.* 522. A bare

surmise or suspicion is plainly insufficient. *Leete* v. *Hart*, 37 *L. J. C. P.* 157; *Davis* v. *Russell*, 5 *Bing.* 354."

If the conduct of the person arresting is impugned in an action of false imprisonment, a question arises as to whom does it belong to decide whether the defendant had reasonable cause of suspecting the plaintiff. The authorities conflict upon the point. In *Davis* v. *Russell*, 5 *Bing.* 354, and in *Stonehouse* v. *Elliott*, 6 *T. R.* 315, the Court of Common Pleas held it to be the judge's province to decide whether the facts alleged constituted such reasonable cause, and for the jury to say whether the facts stated really existed, and the defendant acted upon their existence. But in *Wedge* v. *Berkley*, 6 *A. & E.* 663, the court of Queen's Bench considered the question of reasonable and probable cause, a question purely for the jury. In the later case, however, of *Broughton* v. *Jackson*, 18 *Q. B.* 378, it was treated as a question of law; and in the case of *Hailes* v. *Marks*, 7 *H. & N.* 56; see also *Hogg* v. *Ward*, 3 *H. & N.* 417; the court of exchequer held the question of reasonable cause to be purely one of law for the judge. It is to be observed, however, that *Bramwell*, B., grounds his decision upon the case of *Panton* v. *Williams*, 2 *Q. B.* 169, without adverting to the fact that that was an action for malicious prosecution. It is submitted, however, that there is a clear distinction between the two cases, for whilst only judges or lawyers are competent to form an opinion upon what facts an action or an indictment would lie, and are thus the only persons competent to decide whether there was reasonable cause for instituting a prosecution, yet laymen are quite as competent as lawyers to say what affords a reasonable ground of suspicion against a particular person of having committed a crime. And thus it may well seem that in the one form of action the judge may direct the

jury as to the reasonableness of the cause for a prosecution, leaving the jury to ascertain the truth of the facts alleged; and in the other the jury may have the question of reasonable cause of suspicion entirely left to them. The varying circumstances of each case make it impossible to lay down any standard or fixed rule as to what is a reasonable ground of suspicion.—*Hogg* v. *Ward, ubi sup*; *Broughton* v. *Jackson, ubi sup.*

In *Lister* v. *Perryman, L. R.* 4, *H. L.* 521, it was held that it is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, but that the judge must then determine whether the facts found do constitute reasonable and probable cause, and that no definite rule can be laid down for the exercise of the judge's judgment. In an action for a malicious prosecution, although the question of reasonable and probable cause is an inference to be drawn by the judge from facts undisputed or found, yet the test is, not what impression the circumstances would make on the mind of a lawyer, but whether the circumstances warranted a discreet man in instituting and following up the proceedings. *Kelly* v. *Midland Great Western Railway of Ireland Company*, 7 *Ir. R., C. L.* 8.

As framed, this clause is open to this absurdity, that if any person offers to sell any property which is reasonably suspected to have been obtained by any offence, to another person, such person not only may, but is required to apprehend the person offering the property; but if a person has any quantity of property which is suspected to have been stolen, etc., in his possession, but does not offer it to any one, he cannot be apprehended under this clause; so that the right to apprehend under it depends on whether or not the offender offers the property to any person. It

is true that, by the common law, any peace officer may lawfully apprehend a person in such a case, if there be reasonable suspicion of a felony having been committed, but a private person must not only have reasonable suspicion of a felony having been committed, but must also be able to prove that one has actually been committed, in order to justify him in apprehending any person in such a case; *Beckwith* v. *Philby*, 6 *B. & C.* 35; and if the case were only a misdemeanor, no person is authorized by the common law to apprehend after the misdemeanor has been committed unless with a warrant. *Fox* v. *Gaunt*, 3 *B. & A.* 798. The consequence is that, for instance, any one who has obtained a drove of oxen by false pretences, may go quietly on his way, and no one not even a peace officer, can apprehend him without a warrant; but if a man offer a partridge, supposed to have been killed in the close season, he not only may but is required to be apprehended by that person, and, if the words of the clause are strictly interpreted, whether the person so offering the article is himself even suspected of guilt. See *Greaves' Cons. Acts*, 188.

On clause 27 Greaves says:

"As the law existed before this statute passed, there were sundry cases, in which persons committing indictable offences by night could only lawfully be apprehended by certain specified individuals, amongst whom peace officers and constables were sometimes omitted. The consequence was, as might naturally be expected, that resistance was frequently made by offenders, and grievous, if not mortal injuries inflicted upon persons endeavoring to apprehend such offenders; indeed many melancholy instances have occurred where death has been occasioned in nightly fray, and the party causing such death, though found commit-

ting an offence, for which he might have been lawfully apprehended by some one, has escaped the punishment he deserved for killing a person, who honestly believed he had not only a right, but was in duty bound to apprehend him, because it turned out, upon investigation on the trial, that such person was not lawfully entitled so to apprehend, through some cause or other, of which the party killing had no knowledge at the time. This clause, with a view to remedying all such cases, authorizes any person, be he who he may, to apprehend any person found committing any felony or indictable misdemeanor in the night; and it is conceived that it will prove highly beneficial, as nothing can more strongly tend to the repression of offences than the certain knowledge that, if the party is found committing them by any one, such person may at once apprehend him."

What is *night* under this clause? The Larceny Act defines it, but only for the purposes of that act. Night, therefore, in this section, is not defined at all, and the time in which it begins and ends, in each case with reference to this section, is regulated by the common law.

At common law, night is the time between sunset and sunrise. *Wharton, Law Lexicon, Verb. Night*; 3 *Chitty*, 1104.

Under sec. 29 of our statute, Greaves remarks: "this clause is new, and clearly unnecessary, as far as it relates to any felony or indictable misdemeanor, for there is no doubt whatever that any person in the act of committing any such offence is liable by the common law to be apprehended by any person, but it was introduced at the instigation of the solicitors of the Treasury, as it has been found that there was great unwillingness to apprehend in such cases, in consequence of doubts that prevailed among the public as to the right to do so."

ENFORCING APPEARANCE OF ACCUSED.

30. Whenever a charge or complaint (A) is made before any justice of the peace for any territorial division in Canada, that any person has committed, or is suspected to have committed any treason or felony, or any indictable misdemeanor or offence within the limits of the jurisdiction of such justice, or that any person guilty or suspected to be guilty of having committed any such crime or offence elsewhere out of the jurisdiction of such justice, is or resides or is suspected to be or reside within the limits of the jurisdiction of such justice, then, and in every such case, if the person so charged or complained against is not in custody, such justice may issue his warrant (B) to apprehend such person, and to cause him to be brought before him or any other justice for the same territorial division.—32-33 *V.*, *c.* 30, *s.* 1.

31. The justice to whom the charge or complaint is preferred instead of issuing, in the first instance, his warrant to apprehend the person charged or complained against, may, if he thinks fit, issue his summons (C) directed to such person, requiring him to appear before him at the time and place therein mentioned, or before such other justice of the same territorial division as shall then be there, and if after being served with the summons in manner hereinafter mentioned, he fails to appear at such time and place, in obedience to such summons, the justice or any other justice for the same territorial division may issue his warrant (D) to apprehend the person so charged or complained against, and cause such person to be brought before him, or before some other justice for the same territorial division, to answer to the charge or complaint, and to be further dealt with according to law; but any justice may, if he sees fit, issue the warrant hereinbefore first mentioned, at any time before or after the time mentioned in the summons for the appearance of the accused person —32-33 *V.*, *c.* 30, *s.* 2.

32. Whenever any indictable offence is committed on the high seas, or in any creek, harbor, haven or other place, in which the Admiralty of England have or claim to have jurisdiction, and whenever any offence is committed on land beyond the seas for which an indictment may be preferred or the offender may be arrested in Canada, any justice for any territorial division in which any person charged with having committed, or suspected of having committed any such offence, is or is suspected to be, may issue his warrant (D2) to apprehend such person, to be dealt with as therein and hereby directed.—32-33 *V.*, *c.* 30, *s.* 3.

33. If an indictment is found by the grand jury in any court of criminal jurisdiction, against any person then at large, and whether such person has been bound by any recognizance to appear to answer to any such charge or not, and if such person has not appeared and pleaded to the indictment, the person who acts as clerk of the Crown or chief clerk of such court shall, at any time, at the end of the term or sittings of the court at which the indictment has been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of twenty cents, grant to such prosecutor or person a certificate (E) of such indictment having been found; and upon production of such certificate to any justice for the territorial division in which the offence is alleged in the indictment to have been committed, or in which the person indicted resides, or is supposed or suspected to reside or to be, such justice shall issue his warrant (F) to apprehend the person so indicted, and to cause him to be brought before him or any other justice for the same territorial division, to be dealt with according to law.—32-33 *V.*, *c.* 30, *s.* 4.

34. If the person is thereupon apprehended and brought before any such justice, such justice, upon its being proved upon oath or affirmation before him that the person so apprehended is the person charged and named in the indictment, shall, without further inquiry or examination, commit (G) him for trial or admit him to bail as hereinafter mentioned.—32-33 *V.*, *c.* 30, *s.* 5.

35. If the person so indicted is confined in any gaol or prison for any other offence than that charged in the indictment at the time of such application and production of such certificate to the justice, such justice, upon its being proved before him, upon oath or affirmation, that the person so indicted and the person so confined in prison are one and the same person, shall issue his warrant (H) directed to the gaoler or keeper of the gaol or prison in which the person so indicted is then confined, commanding him to detain such person in his custody until he is removed therefrom by writ of *habeas corpus*, or by order of the proper court, for the purpose of being tried upon the said indictment, or until he is otherwise removed or discharged out of his custody by due course of law.—32-33 *V.*, *c.* 30, *s.* 6.

36. Nothing hereinbefore contained shall prevent the issuing or execution of bench warrants, whenever any court of competent jurisdiction thinks proper to order the issuing of any such warrant.—32-33 *V.*, *c.* 30, *s.* 7.

37. Any justice may grant or issue any warrant as aforesaid, or any search warrant, on a Sunday or other statutory holiday, as well as on any other day.—32-33 *V.*, *c.* 30, *s.* 8.

38. Whenever a charge or complaint for any indictable offence is made before any justice, if it is intended to issue a warrant in the first instance against the person charged, an information and complaint thereof (A) in writing, on the oath or affirmation of the informant, or of some witness or witnesses in that behalf, shall be laid before such justice.—32-33 *V.*, *c.* 30, *s.* 9.

39. When it is intended to issue a summons instead of a warrant in the first instance, the information and complaint shall also be in writing, and be sworn to or affirmed in manner aforesaid, except whenever, by some act or law, it is specially provided that the information and complaint may be by parol merely, and without any oath or affirmation to support or substantiate the same.—32-33 *V.*, *c.* 30, *s.* 10.

40. The justice receiving any information and complaint as aforesaid, if he thinks fit, may issue his summons or warrant as hereinbefore directed, to cause the person charged to be and appear as thereby directed; and every summons (C) shall be directed to the person so charged by the information and shall state shortly the matter of such information, and shall require the person to whom it is directed to be and appear at a certain time and place therein mentioned, before the justice who issues the summons, or before such other justice for the same territorial division as shall then be there, to answer to the charge and to be further dealt with according to law. —32-33 *V.*, *c.* 30 *s.* 13.

41. Every such summons shall be served by a constable or other peace officer, upon the person to whom it is directed, by delivering the same to such person, or if he cannot conveniently be so served, then by leaving the same for him with some person at his last or usual place of abode.—32-33 *V.*, *c.* 30, *s.* 14.

42. The constable or other peace officer who serves the same, shall attend at the time and place, and before the justice in the summons mentioned, to depose, if necessary, to the service of the summons.—32-32 *V.*, *c.* 30, *s.* 15.

43. If the person served does not appear before the justice at the time and place mentioned in the summons, in obedience to the same, the justice may issue his warrant (D) for apprehending the person so summoned, and bringing him before such justice, or before some other justice for the same territorial division, to answer the charge in the information and complaint mentioned, and to be further dealt with according to law.—32-33 *V.*, *c.* 30, *s.* 16.

44. Every warrant (B) issued by any justice to apprehend any person charged with any indictable offence shall be under the hand and seal of the justice issuing the same, and may be directed to all or any of the constables or other peace officers of the territorial division within which the same is to be executed, or to any such constable and all other constables or peace officers in the territorial division within which the justice issuing the same has jurisdiction, or generally to all the constables or peace officers within such last mentioned territorial division; and it shall state shortly the offence on which it is founded, and shall name or otherwise describe the offender; and it shall order the person or persons to whom it is directed to apprehend the offender, and bring him before the justice issuing the warrant, or before some other justice for the same territorial division, to answer the charge contained in the information and to be further dealt with according to law.—32-33 *V.*, *c.* 30, *s.* 17.

45. If, in any warrant or other instrument or document issued in any Province of Canada, at any time, by any justice, it is stated that the same is given under the hand and seal of any justice signing it, such seal shall be presumed to have been affixed by him, and its absence shall not invalidate the instrument, or such justice may, any time thereafter, affix such seal, with the same effect as if it had been affixed when such instrument was signed.—32-33 *V.*, *c.* 36, *s.* 4, *part.*

46. It shall not be necessary to make the warrant returnable at any particular time, but the same shall remain in force until executed.—32-33 *V.*, *c.* 30, *s.* 18.

47. Such warrant may be executed by apprehending the offender at any place in the territorial division within which the justice issuing the same has jurisdiction, or in case of fresh pursuit, at any place in the next adjoining territorial division, and within seven miles of the border of the first mentioned territorial division without having the warrant backed as hereinafter mentioned.—32-33 *V.*, *c.* 30, *s.* 19.

48. If any warrant is directed to all constables or other peace officers in the territorial division within which the justice has jurisdiction, any constable or other peace officer for any place within such territorial division may execute the warrant at any place within the jurisdiction for which the justice acted when he granted such warrant, in like manner as if the warrant had been directed specially to such constable by name, and notwithstanding the place within which such warrant is executed is not within the place for which he is constable or peace officer.—32-33 *V.*, *c.* 30, *s.* 20.

49. If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, or if he escapes into, or is supposed or is suspected to be, in any place within Canada, out of the jurisdiction of the justice issuing the warrant, any justice within the jurisdiction of whom the person so escapes, or in which he is or is suspected to be, upon proof alone being made on oath or affirmation of the handwriting of the justice who issued the same, without any security being given, shall make an indorsement (I) on the warrant, signed with his name, authorizing the execution of the warrant within the jurisdiction of the justice making the indorsement; and such indorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables and other peace officers of the territorial division where the warrant has been so indorsed, to execute the same in such other territorial division, and to carry the person against whom the warrant issued, when apprehended, before the justice who first issued the warrant, or before some other justice for the same territorial division, or before some justice of the territorial division in which the offence mentioned in the warrant appears therein to have been committed.—32-33 *V.*, *c.* 30, *s.* 23.

50. If the prosecutor or any of the witnesses for the prosecution are then in the territorial division where such person has been apprehended, the constable or other person or persons who have apprehended him may, if so directed by the justice backing the warrant, take him before the justice who backed the warrant, or before some other justice for the same territorial division or place; and the said justice may thereupon take the examination of such prosecutor or witnesses, and proceed in every respect in the manner hereinafter directed, with respect to persons charged before a justice with an offence alleged to have been committed in another territorial division than that in which such persons have been apprehended.—32-33 *V.*, *c.* 30, *s.* 24.

SEARCH WARRANTS AND SEARCHES.

See an article on search warrants in the Appendix to Greaves' Cons. Acts.

51. If a credible witness proves, upon oath (K) before a justice, that there is reasonable cause to suspect that any property whatsoever, on or with respect to which any larceny or felony has been committed, is in any dwelling-house, out-house, garden, yard, croft or other

place or places, the justice may grant a warrant (K 2), to search such dwelling-house, garden, yard, croft or other place or places for such property, and if the same, or any part thereof, is then found, to bring the same and the person or persons in whose possession such house or other place then is, before the justice granting the warrant, or some other justice for the same territorial division.—32-33 *V.*, *c.* 30, *s.* 12.

52. If any credible witness proves, upon oath before any justice, a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever, on or with respect to which any offence, punishable either upon indictment or upon summary conviction, by virtue of "*The Larceny Act*," or the "*Act respecting the protection of the Property of Seamen in the Navy*," has been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods.—32-33 *V.*, *c.* 21, *s.* 117, *part.* 33 *V.*, *c.* 31, *s.* 5, *part.*

53. On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, including any number of places or persons named in such complaint, and if, upon such search any such gold or gold-bearing quartz, or silver or silver ore is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right:

2. The decision of such justice shall be subject to appeal, as in ordinary cases on summary conviction; but before such appeal shall be allowed, the appellant shall enter into a recognizance in the manner provided by law in cases of appeal from summary convictions, to the value of the gold or other property in question, that he will prosecute his appeal at the next sittings of any court having jurisdiction in that behalf, and will pay the costs of the appeal in case of a decision against him, and, if the defendant appeals, that he will pay such fine, as the court may impose, with costs.—32-33 *V.*, *c.* 21, *ss.* 33 *and* 34.

54. If any constable or peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log or other description of lumber, belonging to any lumberman or owner of lumber, and bearing the registered trade mark of such lumberman or owner of lumber, is kept or detained in any saw-mill, mill-yard, boom or raft, without the knowledge or consent of the owner, such constable or peace officer may

enter into or upon the same, and search or examine, for the purpose of ascertaining whether such timber, mast, spar, saw-log or other description of lumber is detained therein without such knowledge and consent.—38 *V.*, *c.* 40, *s.* 1, *part*.

55. If it is made to appear, by information on oath or affirmation before a justice, that there is reasonable cause to believe that any person has in his custody or possession, without lawful authority or excuse, any Dominion or Provincial note, or any note or bill of any bank or body corporate, company or person carrying on the business of bankers, or any frame, mould, or implement for making paper in imitation of the paper used for such notes or bills, or any such paper, or any plate, wood, stone or other material, having thereon any words forms, devices or characters capable of producing or intended to produce the impression of any such note or bill or any part thereof, or any tool, implement or material used or employed, or intended to be used or employed, in or about any of the operations aforesaid, or any forged security, document or instrument whatsoever, or any machinery, frame, mould, plate, die, seal, paper or other matter or thing used or employed, or intended to be used or employed, in the forgery of any security, document or instrument whatsoever, such justice may, if he thinks fit, grant a warrant to search for the same; and if the same is found upon such search, it shall be lawful to seize and carry the same before some justice of the district, county or place, to be by him disposed of according to law; and all such matters and things so seized as aforesaid shall, by order of the court by which any such offender is tried, or if there is no such trial, then by order of some justice of the peace, be defaced and destroyed, or otherwise disposed of as such court or justice directs.—32-33 *V.*, *c.* 19, *s.* 53.

56. If any person finds or discovers, in any place whatsoever, or in the custody or possession of any person having the same without lawful authority or excuse, any false or counterfeit coin resembling or apparently intended to resemble or pass for any current gold, silver or copper coin, or any coin of any foreign prince, state or country, or any instrument, tool or engine whatsoever, adapted and intended for the counterfeiting of any such coin, or any filings or clippings, or any gold or silver bullion, or any gold or silver, in dust, solution or otherwise, which has been produced or obtained by diminishing or lightening any current gold or silver coin, the person so finding or discovering shall seize and carry the same forthwith before a justice:

2. If it is proved, on the oath of a credible witness, before any justice, that there is reasonable cause to suspect that any person has

been concerned in counterfeiting current gold, silver or copper coin, or any foreign or other coin mentioned in the "*Act respecting Offences relating to the Coin*," or has in his custody or possession any such false or counterfeit coin, or any instrument, tool or engine whatsoever, adapted and intended for the making or counterfeiting of any such coin, or any other machine used or intended to be used for making or counterfeiting any such coin, or any such filings, clippings or bullion, or any such gold or silver, in dust, solution or otherwise, as aforesaid, any justice may, by warrant under his hand, cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such false or counterfeit coin, or any such instrument, tool or engine, or any such machine, or any such filings, clippings or bullion, or any such gold or silver, in dust, solution or otherwise, as aforesaid, is found in any place so searched, to cause the same to be seized and carried forthwith before a justice:

3. Whenever any such false or counterfeit coin, or any such instrument, tool or engine, or any such machine, or any such filings, clippings or bullion, or any such gold or silver, in dust, solution or otherwise, as aforesaid, is in any case seized and carried before a justice, he shall, if necessary, cause the same to be secured, for the purpose of being produced in evidence against any person prosecuted for an offence against such act; and all such false and counterfeit coin, and all instruments, tools and engines adapted and intended for the making or counterfeiting of coin, and all such machines, and all such filings, clippings and bullion, and all such gold and silver, in dust, solution or otherwise, as aforesaid, after they have been produced in evidence, or when they have been seized and are not required to be produced in evidence, shall forthwith be defaced, by the order of the court, or otherwise disposed of as the court directs.—32-33 *V.*, *c.* 18, *s.* 27.

PROCEEDINGS ON APPEARANCE.

57. The room or building in which the justice takes the examination and statement shall not be deemed an open court; and the justice, in his discretion, may order that no person shall have access to or be or remain in such room or building without his consent or permission, if it appears to him that the ends of justice will be best answered by so doing.—32-33 *V.*, *c.* 30, *s.* 35.

58. No objection shall be taken or allowed to any information, complaint, summons or warrant, for any defect therein in substance

or in form, or for any variance between it and the evidence adduced on the part of the prosecution, before the justice who takes the examination of the witnesses in that behalf.—32-33 *V.*, *c.* 30, *ss.* 11 *and* 21.

59. If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, such justice, at the request of the person charged, may adjourn the hearing of the case to some future day, and in the meantime may remand such person, or admit him to bail, as hereinafter mentioned. —32-33 *V.*, *c.* 30, *s.* 22.

60. If it is made to appear to any justice, by the oath or affirmation of any credible person, that any person within Canada is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, such justice shall issue his summons (L) to such person, requiring him to be and appear before him at a time and place therein mentioned, or before such other justice for the same territorial division as shall then be there, to testify what he knows concerning the charge made against the accused person.—32-33 *V.*, *c.* 30, *s.* 25.

61. If any person so summoned neglects or refuses to appear at the time and place appointed bythe summons, and no just excuse is offered for such neglect or refusal (after proof upon oath or affirmation of the summons having been served upon such person, personally or by being left with some person for him at his last or usual place of abode), the justice before whom such person should have appeared may issue a warrant (L 2) to bring such person, at a time and place therein mentioned, before the justice who issued the summons, or before such other justice for the same territorial division as shall then be there, to testify as aforesaid, and, if necessary, the said warrant may be backed as hereinbefore mentioned, so that it may be executed out of the jurisdiction of the justice who issued the same.—32-33 *V.*, *c.* 30, *s.* 26.

62. If the justice is satisfied, by evidence upon oath or affirmation, that it is probable the person will not attend to give evidence unless compelled so to do, then, instead of issuing such summons, the justice may issue his warrant (L 3) in the first instance, and the warrant, if necessary, may be backed as aforesaid.—32-33 *V.*, *c.* 30, *s.* 27.

63. If, on the appearance of the person so summoned, either in

obedience to the summons or by virtue of the warrant, he refuses to be examined upon oath or affirmation concerning the premises, or refuses to take such oath or affirmation, or having taken such oath or affirmation, refuses to answer the questions then put to him concerning the premises, without giving any just excuse for such refusal, any justice then present and there having jurisdiction may, by warrant (L 4) commit the person so refusing to the common gaol or other place of confinement, for the territorial division where the person so refusing then is, there to remain and be imprisoned for any term not exceeding ten days, unless he in the meantime consents to be examined and to answer concerning the premises.—32-33 *V.*, *c.* 30, *s.* 28.

64. If, from the absence of witnesses or from any other reasonable cause, it becomes necessary or advisable to defer the examination or further examination of the witnesses for any time, the justice before whom the accused appears or has been brought may, by his warrant (M,) from time to time, remand the person accused to the common gaol in the territorial division for which such justice is then acting, for such time as he deems reasonable, not exceeding eight clear days at any one time.—32-33 *V.*, *c.* 30, *s.* 41.

65. If the remand is for a time not exceeding three clear days, the justice may verbally order the constable or other person in whose custody the accused person then is, or any other constable or person named by the justice in that behalf, to keep the accused person in his custody, and to bring him before the same or such other justice as shall be there acting, at the time appointed for continuing the examination.—32-33 *V.*, *c.* 30, *s.* 42.

66. Any such justice may order the accused person to be brought before him, or before any other justice for the same territorial division at any time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order.—32-33 *V.*, *c.* 30, *s.* 43.

67. Instead of detaining the accused person in custody during the period for which he has been so remanded, any one justice, before whom such person has appeared or been brought, may discharge him, upon his entering into a recognizance (M 2, 3), with or without sureties, in the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination. —32-33 *V.*, *c.* 30, *s.* 44.

68. If the accused person does not afterwards appear at the time

and place mentioned in the recognizance, the said justice, or any other justice who is then and there present, having certified (M 4) upon the back of the recognizance the non-appearance of such accused person, may transmit the recognizance to the clerk of the court where the accused person is to be tried, or other proper officer appointed by law, to be proceeded upon in like manner as other recognizances; and such certificate shall be *primâ facie* evidence of the non-appearance of the accused person.—32-33 *V.*, *c.* 30, *s.* 45.

69. Whenever any person appears or is brought before any justice charged with any indictable offence, whether committed in Canada, or upon the high seas, or on land beyond the sea, and whether such person appears voluntarily upon summons or has been apprehended, with or without warrant, or is in custody for the same or any other offence, such justice, before he commits such accused person to prison for trial or before he admits him to bail, shall, in the presence of the accused person (who shall be at liberty to put questions to any witness produced against him), take the statements (N) on oath or affirmation of those who know the facts and circumstances of the case, and shall reduce the same to writing; and such depositions shall be read over to and signed respectively by the witnesses so examined, and shall be signed also by the justice taking the same; and the justice shall, before any witness is examined, administer to such witness the usual oath or affirmation.—32-33 *V.*, *c.* 30, *ss.* 29 *and* 30, *part.*

70. After the examinations of all the witnesses for the prosecution have been completed, the justice or one of the justices, by or before whom the examinations have been completed, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused, the depositions taken against him, and shall say to him these words, or words to the like effect : " Having heard the evidence, do " you wish to say anything in answer to the charge? You are not " obliged to say anything unless you desire to do so, but whatever you " say will be taken down in writing, and may be given in evidence " against you at your trial; " and whatever the prisoner then says in answer thereto shall be taken down in writing (O) and read over to him, and shall be signed by the justice, and kept with the depositions of the witnesses, and shall be transmitted with them, as hereinafter mentioned.—32-33 *V.*, *c*, 30, *s.* 31.

71. The justice shall, before the accused makes any statement, state to him and give him clearly to understand that he has nothing to hope from any promise of favor, and nothing to fear from any

threat which may have been held out to him to induce him to make any admission or confession of his guilt, but that whatever he then says may be given in evidence against him upon his trial notwithstanding such promise or threat.—32-33 *V.*, *c.* 30, *s.* 32.

72. Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him,—32-33 *V.*, *c.* 30, *s.* 33.

73. When all the evidence offered upon the part of the prosecution against the accused has been heard, if the justice is of opinion that it is not sufficient to put the accused upon his trial for any indictable offence, such justice shall forthwith order the accused, if in custody, to be discharged as to the information then under inquiry; but if in the opinion of such justice the evidence is sufficient to put the accused upon his trial for an indictable offence, although it may not raise such a strong presumption of guilt as would induce him to commit the accused for trial without bail, or if the offence with which the person is accused is a misdemeanor, then the justice shall admit the accused to bail, as hereinafter provided; but if the offence is a felony, and the evidence given is such as to raise a strong presumption of guilt, then the justice shall, by his warrant (P), commit the accused to the common gaol for the territorial division to which, by law, he may be committed, or in the case of an indictable offence committed on the high seas or on land beyond the sea, to the common gaol of the territorial division within which such justice has jurisdiction, to be there safely kept until delivered in due course of law; Provided, that in cases of misdemeanor the justice who has committed the accused for trial may, at any time before the first day of the sitting of the court at which the accused is to be tried, admit him to bail in manner aforesaid, or may certify on the back of the warrant of committal the amount of bail to be required, in which case any justice for the same territorial division may admit such person to bail in such amount, at any time before such first day of the sitting of the court aforesaid.—32-33 *V.*, *c.* 30, *s.* 56.

74. At any time after all the examinations have been completed, and before the first sitting of the court at which any person so committed to prison or admitted to bail is to be tried, such person may require and shall be entitled to have from the officer or person having the custody of the same, copies of the depositions on which he has been committed or bailed, on payment of a reasonable sum for the same, not exceeding the rate of five cents for each folio of one hundred words.—32-33 *V.*, *c.* 30, *s.* 58.

RECOGNIZANCES TO PROSECUTE OR GIVE EVIDENCE.

75. Any justice before whom any witness is examined, may bind, by recognizance (Q), the prosecutor and every such witness (except married women and infants, who shall find security for their appearance, if the justice sees fit) to appear at the next court of competent criminal jurisdiction at which the accused is to be tried, then and there to prosecute, or prosecute and give evidence, or to give evidence as the case may be, against the person accused, which recognizance shall particularly specify the place of residence and the addition or occupation of each person entering into the same.—32-33 *V.*, *c.* 30, *s.* 36.

76. The recognizance, being duly acknowledged by the person entering into the same, shall be subscribed by the justice before whom the same is acknowledged, and a notice (Q 2) thereof, signed by the said justice, shall, at the same time, be given to the person bound thereby.—32-33 *V.*, *c.* 30, *s.* 37.

77. The several recognizances so taken, together with the written information, if any, the deposition, the statement of the accused, and the recognizance of bail, if any, shall be delivered by the justice, or he shall cause the same to be delivered to the proper officer of the court in which the trial is to be had, before or at the opening of the court on the first day of the sitting thereof, or at such other time as the judge, justice or person who is to preside at such court, or at the trial, orders and appoints.—32-33 *V.*, *c.* 30, *s.* 38.

78. If any witness refuses to enter into recognizance, the justice, by his warrant (R), may commit him to the common gaol for the territorial division in which the person accused is to be tried, there to be imprisoned and safely kept until after the trial of such accused person, unless in the meantime such witness duly enters into a recognizance before a justice for the territorial division in which such gaol is situate.—32-33 *V.*, *c.* 30, *s.* 39.

79. If afterwards, for want of sufficient evidence in that behalf, or other cause, the justice before whom the accused person has been brought does not commit him or hold him to bail for the offence charged, such justice, or any other justice for the same territorial division, by his order (R 2) in that behalf, may order and direct the keeper of the gaol where the witness is in custody to discharge him from the same and such keeper shall thereupon forthwith discharge him accordingly.—32-33 *V.*, *c.* 30 *s.* 40.

80. If any charge or complaint is made before any justice that any person has committed, within the jurisdiction of such justice, any of the offences following, that is to say: perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, forcible entry or detainer, nuisance, keeping a gambling house, keeping a disorderly house, or any indecent assault, and such justice refuses to commit or to bail the person charged with such offence, to be tried for the same, then, if the prosecutor desires to prefer an indictment respecting the said offence, the said justice shall take the recognizance of such prosecutor, to prosecute the said charge or complaint, and transmit the recognizance, information and depositions, if any, to the proper officer, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.—32-23 *V.*, *c.* 29, *s.* 29. 40 *V.*, *c.* 26, *s.* 2. 22-23 *V.*, *c.* 17, *s.* 2, *Imp.*

See *post*, remarks under sec. 140.

BAIL.

81. When any person appears before any justice charged with a felony, or suspicion of felony, other than treason or felony punishable with death, or felony under the "*Act respecting Treason and other Offences against the Queen's authority*," and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to insure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances (S and S 2) of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the court without leave; and when the offence committed or suspected to have been committed is a misdemeanor, any one justice before whom the accused appears may admit to bail, in manner aforesaid, and such justice may, in his discretion, require such bail to justify upon oath as to their sufficiency, which oath the said justice may administer, and in default of such person procuring sufficient bail, such justice may commit him to prison, there to be kept until delivered according to law.—32-33 *V.*, *c.* 30, *s.* 52.

82. In all cases of felony or suspicion of felony, other than treason or felony punishable with death, or felony under the "*Act respecting Treason and other Offences against the Queen's authority,*" and in all cases of misdemeanor, where the accused has been finally committed as herein provided, any judge of any superior or county court, having jurisdiction in the district or county within the limits of which the accused is confined, may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into recognizance with sufficient sureties before two justices, in such amount as the judge directs, and thereupon the justices shall issue a warrant of deliverance (S 3) as hereinafter provided, and shall attach thereto the order of the judge directing the admitting of the accused to bail.—32-33 *V.*, *c.* 30, *s.* 53.

83. No judge of a county court or justices shall admit any person to bail accused of treason or felony punishable with death, or felony under the "*Act respecting Treason and other Offences against the Queen's authority,*" nor shall any such person be admitted to bail, except by order of a superior court of criminal jurisdiction for the Province in which the accused stands committed, or of one of the judges thereof, or in the Province of Quebec, by order of a judge of the Court of Queen's Bench or Superior Court; and nothing herein contained shall prevent such courts or judges admitting any person accused of felony or misdemeanor to bail when they think it right so to do.—32-33 *V.*, *c.* 30, *s.* 54.

84. Whenever any justice or justices admit to bail any person who is then in any prison charged with the offence for which he is so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison, a warrant of deliverance (S 3) under his or their hands and seals, requiring the said keeper to discharge the person so admitted to bail if he is detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper, he shall forthwith obey the same.—32-33 *V.*, *c.* 30, *s.* 55.

DELIVERY OF ACCUSED TO PRISON.

85. The constable or any of the constables, or other person to whom any warrant of commitment authorized by this or any other act or law is directed, shall convey the accused person therein named or described to the goal or other prison mentioned in such warrant, and there deliver him, together with the warrant, to the keeper of such gaol or prison, who shall thereupon give the constable or other

person delivering the prisoner into his custody, a receipt (T) for the prisoner, setting forth the state and condition of the prisoner when delivered into his custody.—32-33 *V.*, *c.* 30, *s.* 57.

PROCEEDINGS WHERE OFFENDER IS APPREHENDED IN A DISTRICT IN WHICH THE OFFENCE WAS NOT COMMITTED.

86. Whenever a person appears or is brought before a justice in the territorial division, wherein such justice has jurisdiction, charged with an offence alleged to have been committed within any territorial division in Canada wherein such justice has not jurisdiction, such justice shall examine such witnesses and receive such evidence in proof of the charge as may be produced before him within his jurisdiction; and if, in his opinion, such testimony and evidence are sufficient proof of the charge made against the accused, the justice shall thereupon commit him to the common gaol for the territorial division where the offence is alleged to have been committed, or shall admit him to bail as hereinbefore mentioned, and shall bind over the prosecutor (if he has appeared before him) and the witnesses, by recognizance as hereinbefore mentioned.—32-33 *V.*, *c.* 30, *s.* 46.

87. If the testimony and evidence are not, in the opinion of the justice, sufficient to put the accused upon his trial for the offence with which he is charged, the justice shall, by recognizance bind over the witness or witnesses whom he has examined to give evidence as hereinbefore mentioned; and such justice shall, by warrant (U), order the accused to be taken before any justice in and for the territorial division where the offence is alleged to have been committed, and shall, at the same time, deliver up the information and complaint, and also the depositions and recognizances so taken by him to the constable who has the execution of the last mentioned warrant, to be by him delivered to the justice before whom he takes the accused, in obedience to the warrant; and the depositions and recognizances shall be deemed to be taken in the case, and shall be treated to all intents and purposes as if they had been taken by or before the last mentioned justice, and shall, together with the depositions and recognizances taken by the last mentioned justice in the matter of the charge against the accused be transmitted to the clerk of the court or other proper officer where the accused ought to be tried, in the manner and at the time herein mentioned, if the accused is committed for trial upon the charge, or is admitted to bail.—32-33 *V.*, *c.* 30, *s.* 47.

88. If the accused is taken before the justice last aforesaid, by virtue of the said last mentioned warrant, the constable or other per-

son or persons to whom the said warrant is directed, and who has conveyed the accused before such last mentioned justice, shall, upon producing the accused before such justice and delivering him into the custody of such person as the said justice directs or names in that behalf, be entitled to be paid his costs, and expenses of conveying the accused before such justice.—32-33 *V.*, *c.* 30, *s.* 48.

89. Upon the constable delivering to the justice the warrant, information, if any, depositions and recognizances, and proving on oath or affirmation, the handwriting of the justice who has subscribed the same, such justice, before whom the accused is produced, shall thereupon furnish such constable with a receipt or certificate (U 2) of his having received from him the body of the accused, together with the warrant, information, if any, depositions and recognizances, and of his having proved to him, upon oath or affirmation, the handwriting of the justice who issued the warrant.—32-33 *V.*, *c.* 30, *s.* 49.

90. The said constable, on producing such receipt or certificate to the proper officer for paying such charges, shall be entitled to be paid all his reasonable charges, costs and expenses of conveying the accused into such other territorial division, and returning from the same.—32-33 *V.*, *c.* 30, *s.* 50.

91. If such justice does not commit the accused for trial, or hold him to bail, the recognizances taken before the first mentioned justice shall be void.—32-33 *V.*, *c.* 30, *s.* 51.

DUTIES OF CORONERS AND JUSTICES.

92. Every coroner, upon any inquisition taken before him, whereby any person is indicted for manslaughter or murder, or as an accessory to murder before the fact, shall, in presence of the accused, if he can be apprehended, reduce to writing the evidence given to the jury before him, or as much thereof as is material, giving the accused full opportunity of cross-examination; and the coroner shall have authority to bind by recognizance all such persons as know or declare anything material touching the manslaughter or murder, or the offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or other court or term or sitting of a court at which the trial is to be, then and there to prosecute or give evidence against the person charged; and every such coroner shall certify and subscribe the evidence and all the recognizances, and also the inquisition taken before him, and shall deliver the same to the proper officer of the court at the time and in the manner specified in the seventy-seventh section of this Act.—32-33 *V.*, *c.* 30, *s.* 60.

93. When any person has been committed for trial by any justice coroner, the prisoner, his counsel, attorney or agent may notify the committing justice or coroner, that he will, as soon as counsel can be heard, move before a superior court of the Province in which such person stands committed, or one of the judges thereof, or the judge of the county court, if it is intended to apply to such judge, under the eighty-second section of this act, for an order to the justice or coroner for the territorial division where such prisoner is confined, to admit such prisoner to bail,—whereupon such committing justice or coroner shall, as soon as may be, transmit to the office of the clerk of the crown, or the chief clerk of the court, or the clerk of the county court or other proper officer, as the case may be, close under his hand and seal, a certified copy of all informations, examinations and other evidences, touching the offence wherewith the prisoner has been charged, together with a copy of the warrant of commitment and inquest, if any such there is; and the packet containing the same shall be handed to the person applying therefor, for transmission, and it shall be certified on the outside thereof to contain the information concerning the case in question.—32-33 *V.*, *c.* 30, *s.* 61.

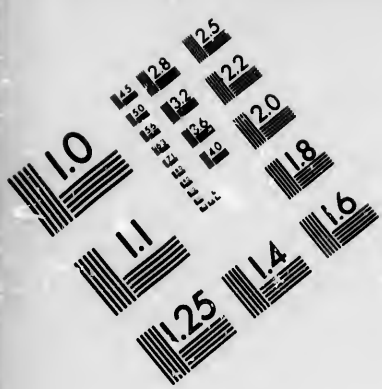
94. Upon such application to any such court or judge, as in the next preceding section mentioned, the same order concerning the prisoner being bailed or continued in custody shall be made as if the prisoner was brought up upon a *habeas corpus*.—32-33 *V.*, *c.* 30, *s.* 62.

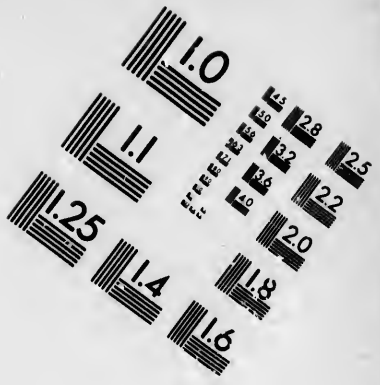
95. If any justice or coroner neglects or offends in anything contrary to the true intent and meaning of any of the provisions of the three sections next preceding, the court to whose officer any such examination, information, evidence, bailment, recognizance or inquisition ought to have been delivered, shall, upon examination and proof of the offence, in a summary manner, impose such fine upon every such justice or coroner as the court thinks fit.—32-33 *V.*, *c.* 30, *s.* 63.

96. The provisions of this act relating to justices and coroners, shall apply to the justices and coroners not only of districts and counties at large, but also of all other territorial divisions and jurisdictions.—32-33 *V.*, *c.* 30, *s.* 64.

REMOVAL OF PRISONERS.

97. The Governor in Council or the Lieutenant Governor in Council of any Province may, if, from the insecurity or unfitness of any gaol of any county or district for the safe custody of prisoners, or for any other cause, he deems it expedient so to do, order any person charged with treason or felony confined in such gaol or for whose





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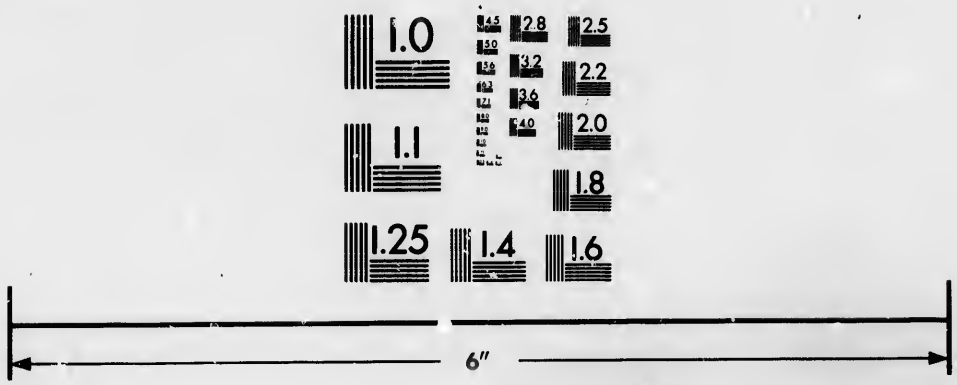

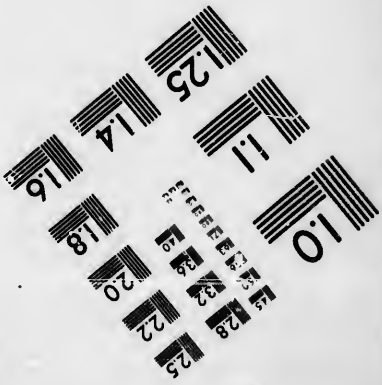

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arrest a warrant has been issued, to be removed to any other gaol of any other county or district in the same Province, to be named in such order, there to be detained until discharged in due course of law, or removed for the purpose of trial to the gaol of the county or district in which the trial is to take place; and a copy of such order, certified by the clerk of the Queen's Privy Council for Canada, or the clerk of the Executive Council, or by any person acting as such clerk of the Privy Council or Executive Council, shall be sufficient authority to the sheriffs and gaolers of the counties or districts respectively named in such order, to deliver over and to receive the body of any person named in such order.—31 *V.*, *c.* 74, *s.* 1. 47 *V.*, *c.* 44, *ss.* 1 *and* 2, *parts.*

98. The Governor in Council or a Lieutenant Governor in Council may, in any such order, direct the sheriff in whose custody the person to be removed then is, to convey the said person to the gaol of the county or district in which he is to be confined, and the sheriff or gaoler of such county or district to receive the said person, and to detain him until he is discharged in due course of law, or is removed for the purpose of trial to any other county or district.—31 *V.*, *c.* 74, *s.* 2. 47 *V.*, *c.* 44, *ss.* 1 *and* 2, *parts.*

99. If a true bill for treason or felony, is afterwards returned by any grand jury of the county or district from which any such person is removed, against any such person, the court into which such true bill is returned, may make an order for the removal of such person, from the gaol in which he is then confined, to the gaol of the county or district in which such court is sitting, for the purpose of his being tried in such county or district.—31 *V.*, *c.* 74, *s.* 3, 47 *V.*, *c.* 44, *s.* 2, *part.*

100. The Governor in Council or a Lieutenant Governor in Council may make an order as hereinbefore provided in respect of any person under sentence of imprisonment or under sentence or death, and, in the latter case, the sheriff to whose gaol the prisoner is removed shall obey any direction given by the said order or by any subsequent order in council, for the return of such prisoner to the custody of the sheriff by whom the sentence is to be executed.—47 *V.*, *c.* 44, *s.* 3.

101. When an indictment is found against any person and such person is confined in any penitentiary or gaol within the jurisdiction of such court, under warrant of commitment or under sentence for some other offence, the court may, by order in writing, direct the warden of the penitentiary or the keeper of such gaol, to bring up

such person to be arraigned on such indictment, without a writ of *habeas corpus*, and the warden or keeper shall obey such order.—32-33 *V.*, *c.* 29, *s.* 14.

CHANGE OF VENUE.

102. Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with felony or misdemeanor should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any judge who might hold or sit in such court may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same Province, named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused, as the court or judge thinks proper to prescribe:

2. Forthwith upon the order of removal being made by the court or judge, the indictment, if any has been found against the prisoner, and all inquisitions, informations, depositions, recognizances and other documents whatsoever, relating to the prosecution against him, shall be transmitted by the officer having the custody thereof to the proper officer of the court at the place where the trial is to be had, and all proceedings in the case shall be had, or, if previously commenced, shall be continued in such district, county or place, as if the case had arisen or the offence had been committed therein:

3. The order of the court, or of the judge, made under this section, shall be a sufficient warrant, justification and authority, to all sheriffs, gaolers and peace officers, for the removal, disposal and reception of the prisoner, in conformity with the terms of such order; and the sheriff may appoint and empower any constable to convey the prisoner to the gaol in the district, county or place in which the trial is ordered to be had:

4. Every recognizance entered into for the prosecution of any person, and every recognizance, as well of any witness to give evidence, as of any person for any offence, shall, in case any such order, as provided by this section, is made, be obligatory on each of the persons bound by such recognizance as to all things therein mentioned with reference to the said trial, at the place where such trial is so ordered to be had,

in like manner as if such recognizance had been originally entered into for the doing of such things at such last mentioned place; provided that notice in writing shall be given either personally or by leaving the same at the place of residence of the persons bound by such recognizance, as therein described, to appear before the court, at the place where such trial is ordered to be had.—32-33 *V., c.* 29, *s.* 11.

By this section the court or judge has a discretionary power of a wide extent: "*Whenever it appears to the satisfaction of the court or judge,*" says the statute, and when the court or judge declares that it so appears, the matter *quoad hoc* is at an end, the venue is changed and the trial must take place in the district, county or place designated in the order.

The words of the statute require that the court or judge be satisfied that the change of venue *is expedient to the ends of justice.* Mr. Justice Sanborn, *In ex parte Brydges,* 18 *L. C. J.* 141, said that "the common law discourages change of venue, and it is only to be granted with caution and upon strong grounds."

The following cases decided in England may be usefully noticed here;

Where there was a prospect of a fair trial the court refused to change the venue, though the witnesses resided in another county.—*R.* v. *Dunn,* 11 *Jur.* 287.

The court will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction.—*R.* v. *Patent Eureka and Sanitary Manure Company,* 13 *L. T., N. S.* 365.

The court has no power to change the venue in a criminal case, nor will they order a suggestion to be entered on the roll to change the place of trial in an information for libel, on the ground of inconvenience and difficulty in securing the attendance of the defendant's witnessses.—*R.* v. *Cavendish,* 2 *Cox,* 176.

The court will remove an indictment for a misdemeanor from one county to another, if there is reasonable cause to apprehend or suspect that justice will not be impartially administered in the former county.—*R.* v. *Hunt*, 3 *B. & A.* 444 ; 2 *Chit.* 130.

The court has a discretionary power of ordering a suggestion to be entered on the record of an indictment for felony, removed thither by certiorari, for the purpose of awarding the jury process into a foreign county ; but this power will not be exercised unless it is absolutely necessary for the purpose of securing an impartial trial.—*R.* v. *Holden*, 5 *B. & A.* 347.

In the case of *R.* v. *Harris et al.*, 3 *Burr.*, 1330, the private prosecutors, in their affidavit on an application made by them for a change of the venue, went no further than to swear generally " that they *verily believed* that there could not be a fair and impartial trial had by a jury of the City of Gloucester, " without giving any particular reasons or grounds for entertaining such a belief. The case to be tried was an information against the defendants, as aldermen of Gloucester, for a misdemeanor in refusing to admit several persons to their freedom of the city, who demanded their admission, and were entitled to it, and, in consequence, to vote at the then approaching election of members of Parliament for that city, and whom the defendants did admit after the election was over ; but would not admit them till after the election, and thereby deprived them of their right of voting at it. The prosecutors had moved for this rule, on a supposition " that the citizens of the city could not but be under an influence or prejudice in this matter." The application was refused.

" There must be a clear and solid foundation for it," said Lord Mansfield ; " now, in the present case, this gene-

ral swearing to apprehension and belief only is not a sufficient ground for entering such a suggestion, especially as it is sworn on the other side that there is a list returned up, consisting of above six hundred persons duly qualified to serve. Surely a person may espouse the interest of one or another candidate at an election, without thinking himself obliged to justify, or being even inclined to defend, the improper behavior of the friends or agents of such candidate."

"The place of trial," said Mr. Justice Denison, "ought not to be altered from that which is settled and established by the common law, unless there shall appear a clear and plain reason for it, which cannot be said to be the present case."

"Here is no fact suggested," said Mr. Justice Foster, "to warrant the conclusion that there cannot be a fair and impartial trial had by a jury of the City of Gloucester. It is a conclusion without premises. The reason given, or rather the *supposition*, would hold as well, in all cases of riots at elections. This is no question relating to the interest of the voters; it is only whether the defendants, the persons particularly charged with this misdemeanor, have personally acted corruptly or not."

"There was no rule better established," said Mr. Justice Wilmot, "than that all causes shall be tried in the county, and by the neighborbood of the place where the fact is committed; and, therefore, that rule ought never to be infringed, unless it plainly appears that a fair and impartial trial cannot be had in that county; ..... It does not follow that because a man voted on one side or on the other he would therefore perjure himself to favor that party when sworn upon a jury. God forbid! The freemen of this corporation are not at all interested in the personal

conduct of these men upon this occasion; the same reasoning would just as well include all cases of election riots."

It may be remarked on this case: (1.) That the application for a change of the venue was made by the prosecution; there is no doubt that much stronger reasons must then be given than if the application is made by the defendant: (2.) That the case dates from 1762, and that in some of the more recent cases on this point, the court seems to have granted such an application, *on the part of the defendant*, with less reluctance. This is easily explained; it must have been an unheard of thing, at first, to change the venue, at common law, at the time where the jurors themselves were the witnesses, and the only witnesses; where they were selected for each case because they were supposed to know the facts. Where no other witnesses, no evidence whatever was offered to them, it may well be presumed that a change in the venue was not allowable under any circumstances. The rule must then invariably, inflexibly, have been that the venue should always be laid in the county where the offence was committed. The strictness of the rule can have been relaxed only by degrees, and even when, for a long period, the strongest reason in support of it had ceased to exist, by the changes which have given us the present system of jury trial, it is not surprising to find the judges still adhering to it as much as possible. But, insensibly, a change is perceptible in the decisions, and now, under our statute, there is no doubt that every time, for any reason whatever, *it is expedient to the ends of justice* that a change in the venue, upon any criminal charge, should take place, it should be granted whether applied for by the prosecution or by the defence.

Another decision, in England, on the question may be noticed here:

The court removed an indictment from the Central Criminal Court, and changed the venue from London to Westminster, where it was a prosecution instituted by the Corporation of London for a conspiracy in procuring false votes to be given at an election to the office of bridge-master.—*R.* v. *Simpson*, 5 *Jur.* 462.

A case in the Province of Quebec, gave rise to a full discussion on this section of the Procedure Act.—*R.* v. *Brydges*, 18 *L. C. J.* 141.

In this case, a coroner's jury in the district of Quebec returned a verdict of manslaughter against the defendant, a resident of Montreal. The coroner issued his warrant, upon which the defendant was arrested; he gave bail, and then, in Montreal, before Mr. Justice Badgley, a judge of the Court of Queen's Bench, made application in chambers for a change in the venue; the only affidavit, in support of the application, was the defendant's, who swore that he could not have a fair trial in the district of Quebec. The crown was served with a notice of the application, and resisted it; Mr. Justice Badgley, however, granted it, and ordered that the trial should take place in Montreal, deciding (1) that, under the statute, a judge of the Court of Queen's Bench, in chambers in Montreal, may order the change of the venue from Quebec to Montreal, of the trial of a person charged with the commission of an offence in the Quebec district, and (2) that this order may be given immediately after the arrest of the prisoner.

On this last point, there is no room for doubt. By the statute, as soon as a person is *charged* with an offence, the application can be made, and there is no doubt, that in *Brydges'* case, such an application could even have been made before the issuing of the warrant of arrest against him. The finding by the coroner's inquisition of man-

slaughter against him was the *charge*. From the moment this finding was delivered by the jury, Brydges *stood charged* with manslaughter. In fact, this finding was equivalent to a true bill by a grand jury, and upon it, he had, if remaining intact, to stand his trial, whether or not a bill was later submitted to the grand jury, whether the grand jury found "a true bill," or a "no bill" in the case. See *R.* v. *Maynard, R. & R.* 240; *R.* v. *Cole*, 2 *Leach*, 1095; and the authorities cited in *R.* v. *Tremblay*, 18 *L. C. J.* 158.

Upon the other point decided, in this case, by Mr. Justice Badgley, as to the jurisdiction he had to grant the order required, there seemed at first to be more doubt. But the question was set at rest, by the judgment afterwards given in the case by Ramsay and Sanborn, J. J., who entirely concurred with Mr. Justice Badgley in his ruling on the question, as follows:

Ramsay, J.—"Before entering on the merits of these rules it becomes necessary to deal with a question of jurisdiction which has been raised on the part of the crown. It is urged that this case is not properly before us, and that if it is, that the law under which it is brought before the court, sitting in this district, is of so inconvenient and dangerous a character that it should be altered. With the inconvenience of the law we have nothing to do; neither ought we to express any opinion as to whether the grounds on which the learned judge who gave the order to change the venue were slight or not, provided he had jurisdiction. The whole question rests on the interpretation of section 11 of the Criminal Procedure Act of 1869. That section is in these words: (His Lordship read the section.)

"We have only to ask whether, at the time this order was given, Judge Badgley was a judge who might hold

or sit in the Court of Queen's Bench. If so, he had jurisdiction.

"But we are told that the statute evidently intended that the judge giving the order should be actually sitting in the district in which the offence is alleged to have taken place. There is no trace of any such intention in the statute and there is no rule of interpretation of statutes so well established as this, that where the words of a statute are clear and sufficient they must be taken as they stand. If courts take upon themselves, under the pretext of interpreting the law, to diminish or extend the clearly expressed scope of a statute, they are usurping the powers of the legislature, and assuming a responsibility which in no way devolves on them. In the particular case before us it does not appear clear to my mind that it was the intention of the legislature to limit the power to change the venue to a judge sitting in the district where the offence was said to be committed. In the first place, our statute goes far beyond the old law, which, I believe, is still unchanged in England. Not only is the power given here to a judge in chambers to change the venue, but he may do so before the bill of indictment is either laid or found. The object was to protect a man from being even put to trial by a prejudiced grand jury, and this could only be effectually done by giving the power to any judge who could hold or sit in the court to change the venue, for it will be observed that in 1869, when the act was passed, there were many districts in this Province in which there was no resident judge, and in Ontario the judges of the superior courts all live in Toronto, and, so far as I know, in each of the other Provinces, they live in the capital town. Unless, then, there was to be a particular provision for the Province of Quebec the law had to be drawn

as we find it. Besides this the Court of Queen's Bench is not for the district, but for the whole Province. The object of dividing the Province into districts is for convenience in bringing suits, but the jurisdiction of the court is general. This has never been doubted, and it has been the practice both in England and this country to bail in the place where the prisoner is arrested. In the case of *Blossom*, where the taking of bail was vigorously resisted by the crown, this court, sitting at Quebec, bailed the prisoner who was in jail here. This is going a great deal farther, but the power of the court to bail was not, and, I think, could not be questioned. We are told that great inconvenience might arise if this statute be not restrained. This is really no valid objection to the law. There are no facultative acts which may not be abused one way or another. A discretionary power involves the possibility of its indiscreet exercise, but that is not ground for us to annul the law creating it. In this case the inconveniences referred to are not specially apparent—the prisoner arrested in Montreal was bailed there, and made his application to have the venue changed to the district where he resided and where he actually was. The order made by Mr. Justice Badgley could hardly then be used as a precedent for an abusive use of the statute. It must be understood in saying this I do not refer to the sufficiency or insufficiency of the affidavit on which the order was given, which is not in any way before us, but solely to the circumstance of the accused being actually before the judge here. As the point is a new one, and as questions of jurisdiction are always delicate, we would willingly have reserved it for the decision of all the judges; but the act allowing us to reserve cases is unfortunately as much too narrow as the statute before us appears to Mr. Ritchie to

be too wide in its phraseology. We can only reserve after conviction, and irregular reservations for the opinion of the judges have no practically good results. We must, therefore, give the judgment to the best of our ability, and I must say for my own part that I cannot see any difficulty in the matter. The words of the statute are perfectly unambiguous, and there is no reason to say that they lead to any absurd conclusion."

Sanborn, J.—"First, as to the jurisdiction. It is objected that the venue was improperly changed, and that this inquisitson ought to be before the court at Quebec. If we are not 'legally' possessed of the inquisition, of course we cannot entertain these motions to quash. This has been fully and exhaustively treated by the President of the court. It is merely for us to enquire: Had Mr. Justice Badgley the power to order the trial to take place here instead of in the district of Quebec; where the accident occurred? The 11 section of the Criminal Procedure Act undoubtedly gives that power. He was a judge, entitled to sit at the court *where the party was sent for trial.* The jurisdiction of any of the judges of the Queen's Bench is not local for any district, but extends to all parts of the Province."

The words "he was a judge, entitled to sit at the court *where the party was sent for trial,*" in Mr. Justice Sanborn's remarks appear not supported by the statute. It is the court at which the party charged with a crime was at first liable to be indicted, or any judge who might hold or sit in *that court,* who have jurisdiction in the matter, *not the court where the party is sent for trial nor a judge who can hold and sit in such last mentioned court.* Of course, in *Brydges'* case this distinction could not be made, as Mr. Justice Badgley, who gave the order to change the

venue, could sit in the court at Quebec as well as in Montreal, and in Montreal as well as in Quebec. But suppose that such an application is made to a judge who can hold or sit in a court of quarter sessions, at which the party charged is *or is* liable to be indicted; and there are not many cases where a party accused is *not liable* to be indicted before the court of quarter sessions; the statute gives jurisdiction only to the court of quarter sessions of and for the locality where the trial should take place, in the ordinary course of law, or to a judge thereof, and not to a court or judge of another locality; and the judge of the quarter sessions for Montreal, for instance, could not, in a case from the district of Quebec, order the trial to take place in Montreal, though he would be a judge entitled to sit at the court *where the party was sent for trial.*

See in *re Sproule*, 12 *S. C. R.* 140, questions as to change of venue.

Change of venue allowed upon prisoner's solicitor's affidavit that from conversations he had had with the jurors, he was convinced of a strong prejudice against the prisoner. *R.* v. *McEneaney*, 14 *Cox*, 87.—See *R.* v. *Walter*, 14 *Cox*, 579.

Held, that 32–33 V., c. 29, s. 11, does not authorise any order for the change of the place of trial of a prisoner in any case where such change would not have been granted under the former practice, the statute only affecting procedure.—*R.* v. *McLeod*, 5 *P. R. (Ont.)* 181.

The power so granted is purely discretionary, but, where application in made on the part of the accused, it will be a sufficient ground that persons might be called on the jury whose opinions might be tainted with prejudice, and whom the prisoner could not challenge.—*R.* v. *Russell, Ramsay's App. Cas.* 199.—See *Ex parte Corwin*, 24 *L. C. J.* 104, 2 *L. N.* 364.

INDICTMENTS.

103. It shall not be be necessary that any indictment or any record or document relative to any criminal case be written on parchment. —32-33 *V., c.* 29, *s.* 13.

By the interpretation clause, *sec.* 2, *ante*, the word *indictment* includes *information*, *presentment*, and *inquisition*, as well as pleas, etc.

By the 4 Geo. 2, c. 26, and 6 Geo. 2, c. 14, "all indictments, informations, inquisitions and presentments shall be in English, and be written in a common legible hand, and not court hand, on pain of £50 to him that shall sue in three months."

They should be engrossed on plain parchment without a stamp. No part of the indictment must contain any abbreviation, or express any number or date by figures, but these as well as every other term used, must be expressed in words at length, except where a fac-simile of an instrument is set out.—3 *Burn* 35; 1 *Chitty*, 175.

Formerly, like all other proceedings, they were in Latin, and though Lord Hale, Vol. I. p. 168, thinks this language more appropriate, as not exposed to so many changes and alterations, in modern times, "it was thought to be of very greater use and importance," says his annotator *Emlyn*, "that they should be in a language capable of being known and understood by the parties concerned, whose lives and liberties were to be affected thereby."

Before confederation in Ontario and Quebec, the indictment in cases of high treason only had to be written on parchment.—*C. S. C., c.* 99, *s.* 20.

By section 133 of the *British North America Act*, the French language may be used in any of the courts of Quebec, and in any court established under that act.

104. It shall not be necessary to state any venue in the body of any indictment; and the district, county or place named in the

margin thereof, shall be the venue for all the facts stated in the body of the indictment; but if local description is required, such local description shall be given in the body thereof.—32-33 *V., c.* 29, *s.* 15.

This section is taken from sec. 23, 14-15 V., c. 100, of the Imperial statutes, upon which Greaves says: "This section was framed with the intention of placing the statement of venue upon the same footing in criminal cases upon which it was placed in civil proceedings by Reg. Gen., H. T., 4 Wm. IV. By this section, in all cases, except where some local description is necessary, no place need be stated in the body of the indictment; thus in larceny, robbery, forgery, false pretences, etc., no venue need be stated in the body of the indictment. In such cases, before the passing of this act, although it was considered necessary to state some parish or place, it was quite immaterial whether the offence was committed there or at any other parish in the county. On the other hand, in burglary, sacrilege, stealing in a dwelling house, etc., the place where the offence was committed must be stated in the indictment. It was necessary so to state it before the act, and to prove the statement as alleged, and so it is still, subject ever to the power of amendment given by the first section." (Sec. 143 post.)

"The *venue*, that is, the county in which the indictment is preferred, is stated in the margin thus "*Middlesex*," or "*Middlesex*, to-wit," but the latter method is the most usual. In the body of the indictment a special venue used to be laid, that is, the facts were in general stated to have arisen in the county in which the indictment was preferred." 3 *Burn*, 21.

"The place (or *special venue*, as it is technically termed) must be such as in strictness the jury who are to try the cause should come from. At common law, the jury, in strictness, should have come from the town, hamlet, or

parish, or from the manor, castle, or forest, or other known place out of a town, where the offence was committed, and for this reason, besides the county, or the city, borough, or other part of the county to which the jurisdiction of the court is limited, it was formerly necessary to allege that every material act mentioned in the indictment was committed in such a place ..... But now by stat. 14-15, V., c. 100 s. 23," it shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof, shall be taken to be venue for all the facts stated in the body of such indictment. Provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment." —*Archbold*, 49.

The cases in which a local description is still necessary in the body of the indictment, are:

Burglary; 2 *Russ*, 47.—House-breaking; *R.* v. *Bullock*, 1 *Moo. C. C.* 324, note *a*. Stealing in a dwelling-house, under sections 45 and 46 of the Larceny Act; *R.* v. *Napper*, 1 *Moo. C. C.* 44. Being found by night armed, with intent to break into a dwelling-house, under sec. 43 of the Larceny Act, and all the offences under sec. 35 to 43 of the Larceny Act; *R.* v. *Jarrald, L. & C.* 301. Riotously demolishing churches, houses, machinery, etc., or injuring them, under sections 9–10 of c. 147; *R.* v. *Richards*, 1 *M. & Rob.* 177. Maliciously firing a dwelling-house, perhaps an out-house, and probably all offences under sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 13 and 14 of the act as to malicious injuries to property, but not the offences under secs. 18, 19, 20, 21, of the same act; *R.* v. *Woodward*, 1 *Moo. C. C.* 323. Forcible entry; *Archbold*, 50. Nuisances to highways; *R.* v. *Steventon*, 1 *C. & K.* 55.

Malicious injuries to sea-banks, milldams, or other local property; *Taylor Ev.*, 1 *Vol.*, *par.* 227. Not repairing a highway; in which even a more accurate description is necessary, as the situation of the road within the parish, etc. Indecent exposure in a public place; *R.* v. *Harris*, 11 *Cox*, 659.

But in most cases of want of local description where necessary or of variance between the proof and the allegations in the indictment respecting the place, local description, etc., the courts would now allow an amendment.

It may well be said, with *Taylor, Ev., Vol.* 1, *par* 228.

"It would be extremely difficult to advance any sensible argument in favor of this distinction, which the law recognizes between local and transitory offences. On an indictment, indeed, against a parish for not repairing a highway, it may be convenient to allege, as it will be necessary to prove, that the spot out of repair is within the parish charged, ... but why a burglar should be entitled to more accurate information respecting the house he is charged with having entered, than the highway robber can claim as to the spot where his offence is stated to have been committed, it is impossible to say; either full information should be given in all cases or in none."

In offences not of local nature, it is clearly not now necessary to allege in the body of the indictment where the offence was committed, and it is the practice now, in England, not to do it. An indictment for larceny, for instance, runs thus:

Suffolk, to wit: The Jurors for Our Lady the Queen upon their oath present, that J. S., on the first day of June, in the year of our Lord one thousand eight hundred

and sixty, three pairs of shoes of the goods and chattels of J. N., feloniously did steal, take and carry away, against the peace of Our Lady the Queen, her crown and dignity: *Archbold*, 313. In 11 *Cox*, 101, 526, 593, *and* 12 *Cox*, 23, 393 *and* 456, may be seen indictments, so without a *special venue*.

The laying of the information and subsequent proceedings are the commencement of the prosecution. So, if a statute enacts that an offence must be prosecuted wthin a certain time, the information must be within that time, but not necessarily, the indictment.—*R.* v. *Austin*, 1 *C. & K.* 621; *R.* v. *Kerr*, 26 *U. C. C. P.* 214, and cases there cited.

105. The abolition of the benefit of clergy shall not prevent the joinder in any indictment of any counts which might have been joined but for such abolition.—32-33 *V.*, c. 29, *s.* 16.

This is the 7 & 8 Geo. IV., c. 28, s. 6, of the Imperial Statutes.

Lord Hale calls the benefit of clergy, "a kind of relaxation of the severity of the judgment of the law," and adds that "by the ancient privilege of the clergy and by the confirmation and special concession of the statute of 25 Edw. III., c. 4 (A. D. 1351), the benefit of clergy was to be allowed in all treasons and felonies touching other persons than the King himself and his royal Majesty".—1 *Hale*, 517.

The two following extracts will give, succinctly, what was the law of "benefit of clergy:"

"*Benefit of clergy (privilegium clericale)*, an arrest of judgment in criminal cases. The origin of it was this: Princes and States, anciently converted to christianity, granted to the clergy very bountiful privileges and exemptions, and particularly an immunity of their persons in criminal proceedings before secular judges. The clergy after-

wards increasing their wealth, number and power, claimed this benefit as an indefeasible right, which had been merely matter of royal favor, founding their principal argument upon this text of scripture, ' Touch not mine anointed, and do my prophets no harm. ' They obtained great enlargements of this privilege, extending it not only to persons in holy orders, but also to all who had any kind of subordinate ministration in the church, and even to laymen if they could read, applying it to civil as well as criminal causes. In criminal proceedings the prisoner was first arraigned, and then he might have claimed his benefit of clergy, by way of declinatory plea, or after conviction, by way of arrest of judgment. He was then, if a layman, burnt with a hot iron in the brawn of his left thumb, in order to show that he had been admitted to this privilege, which was not allowed twice to a layman. If a clerk he was handed over to the ecclesiastical court, and after the solemn farce of a mock trial, he was usually acquitted, and was made a new and an innocent man. These exemptions at length grew so burthensome and scandalous, that the legislature, from time to time, interfered, until the 7–8 Geo. IV., c. 58, s. 6, abolished benefit of clergy : " *Wharton, Law Lexicon. verb.* " *benefit of clergy.* "

" This has now become a title of curiosity only, the stat. 7–8 Geo. IV., c. 28, having enacted by sec. 6, that benefit of clergy with respect to persons convicted of felony shall be abolished ; and by sec. 7, that no person convicted of felony shall suffer death, unless for some felony which was excluded from the benefit of clergy before or on the first day of the then session of Parliament (Feb. 8, 1827), or which should be made punishable with death by some statute passed after that day."

This benefit of clergy constituted in former times so remarkable a feature in criminal law, and a general ac-

quaintance with its nature is still so important for the illustration of the books, that it may be desirable to subjoin further notice on the subject. It originally consisted in the privilege allowed to a clerk in orders, when prosecuted in the temporal court, of being discharged from thence and handed over to the court christian, in order to make a canonical purgation, that is to clear himself on his own oath, and that of other persons as his compurgators. *Vide Reeves's Hist. Eng. L. vol.* 2, *pp.* 114, 134 : 25 Edw. III. *st.* 3, 4 ; a privilege founded, as it is said, upon the text of scripture, " Touch not mine anointed, and do my prophets no harm. " In England this was extended by degrees to all who could read, and so were capable of becoming clerks : *Reeves* ubi supra *et* vol. 4, p. 156. But by 4 Hen. VII, c. 13, it was provided, that laymen allowed their clergy should be burned in the hand, and should claim it only once ; and as to the clergy, it became the practice in cases of heinous and notorious guilt, to hand them over to the ordinary, *absque purgatione facienda*, the effect of which was, that they were imprisoned for life : 4 *Blackstone*, 369. Afterwards, by 18 Eliz. c. 7, the delivering over to the ordinary was abolished altogether, but imprisonment was authorized in addition to burning in the hand. By 5 Anne, c. 6, the benefit of clergy was allowed to those entitled to ask it, without reference to their ability to read. By 4 Geo. I., c. 11 ; 6 Geo. I., c. 23, and 19 Geo. II., c. 74 the punishment of transportation was authorized in certain cases, in lieu of burning in the hand ; and by the act last mentioned the court might impose, instead of burning in the hand, a pecuniary fine, or (except in manslaughter) order the offender to be whipped. As to the nature of the offences to which the benefit of clergy applied, it had no application except in capital felonies, and from the more atrocious of

these it had been taken away by various statutes prior to its late abolition by 7–8 Geo. IV. c. 28, s. 6. As the law stood at the time of that abolition, clerks in orders, were, by force of the benefit of clergy, discharged in clergyable felonies without any corporal punishment whatever, and as often as they offended, and the only penalty being a forfeiture of their goods; and the case was the same with peers and peeresses, as to whom see. 4–5 V., c. 22; but they could claim it only for the first offence. As to commoners also, they could have benefit of clergy only for the first offence, and they were discharged by it from the capital punishment only, being subject on the other hand, not only to forfeiture of goods, but to burning in the hand, whipping, fine, imprisonment, or in certain cases transportation in lieu of capital sentence."—1 *Hale*, p. 517.

By the general repeal act of 1869, section 97 of chap. 99 of the Consolidated statutes of Canada remained in force. It is as follows:

"Benefit of clergy with respect to persons convicted of felony having been abolished in Upper Canada on the thirteenth day of February, 1833, and in Lower Canada from and after the first day of January, 1842, no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy by the law in force in that part of this province in which the trial is had when the benefit of clergy was abolished therein, or which has been made punishable with death by some act passed since that time."

It is now repealed by 49 V., c. 4, D.

JOINDER OF OFFENCES.

In *R.* v. *Jones*, 2 *Camp.* 131, Lord Ellenborough said: "In point of law, there is no objection to a man being

tried on one indictment for several offences of the same sort. It is usual, in felonies, for the judge, *in his discretion*, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanors."

In *R.* v. *Benfield*, 2 *Burr.* 980, an information against five for riot and libel had been filed, on which three of them were acquitted of the whole charge, and Benfield and Saunders found guilty of the libel. It was objected that several distinct defendants charged with several and distinct offences cannot be joined together in the same indictment or information, because the offence of one is not the offence of the other. But it was determined that several offences may be joined in one and the same indictment or information, if the offence wholly arise from such a joint act as is criminal in itself, without any regard to any particular default of the defendant which is peculiar to himself; as, for instance, it may be joint for keeping a gaming house, or for singing together a libellous song, but not for exercising a trade without having served an apprenticeship, because each trader's guilt must arise from a defect peculiar to himself, and 2 *Hawkins*, 140, was said to be clear and express in this distinction.

In *Young's case*, 1 *Leach*, 511, Buller, J., said: "In misdemeanors the case in Burrowes, *R.* v. *Benfield*, 2 *Burr.* 980, shews that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but even in such cases, it is no objection in this stage of the prosecution (writ of error.) On the face of an indictment every count imports to be for a different offence, and is charged as at different times; and it does not appear on the record whether the offences are or are not distinct. But, if it appear before the defen-

dant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in the challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last sessions at the Old Bailey, and hope that, in exercising that discretion, I did not infringe on any rule of law or justice. But, if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were it would overturn every indictment which contains several counts."

In the case of *R.* v. *Heywood, L. & C.* 451, this decision in *Young's case* was followed by the court of crown cases reserved, and it was held, that, although it is no objection in point of law to an indictment that it charges the prisoner with *several different* felonies in different counts, yet, as matter of practice, a prisoner ought not, in general, to be charged with different felonies in different counts of an indictment; as, for instance, a murder in one count, and a burglary in another, or a burglary in the house of A. in one count, and a "distinct" burglary in the house of B. in another, or a larceny of the goods of A. in one count, and a "distinct" larceny of the goods of B. at a different time in another, because such a course of proceeding is calculated to embarrass the prisoner in his defence. And where it has been done, and an objection is taken to the indictment on that ground before the prisoner has pleaded or the jury are charged, the judge *in his discretion may* quash

the indictment, or put the prosecutor to elect. But it is no objection in arrest of judgment, or on a writ of error. Thus, where an indictment charged the prisoner in three several counts with three several felonies in sending three separate threatening letters, Byles, J., compelled the prosecutor to elect upon which count he would proceed.—*R.* v. *Ward*, 10 *Cox*, 42. And since different judgments are required, it seems that the joinder of a count for a felony with another for a misdemeanor, would be holden to be bad upon demurrer, or after a *general* verdict, upon motion in arrest of judgment.—1 *Starkie, Cr. Pl.* 43. But now, see sec. 143 of the Procedure Act, *post*.

So in *R.* v. *Ferguson, Dears.* 427, where the prisoner, having been indicted for a felony and a misdemeanor in two different counts of one indictment, and found guilty, not *generally*, but of the felony only, the prisoner moved in arrest of judgment, against the misjoinder of counts, the judge reserved the decision, and Lord Campbell, C. J., delivering the judgment of the court of crown cases reserved, said: "There is really no difficulty in the world in this case, and I must say that I regret that the learned recorder, for whom I have a great respect, should have thought it necessary to reserve it. The question is, whether the indictment was bad on account of an alleged misjoinder of counts. The prisoner was convicted on the count for felony only, and it is the same thing as if he had been convicted upon an indictment containing that single count; and it is allowed that there was abundant evidence to warrant that conviction. There is not the smallest pretence for the objection, that the indictment also contained a count for misdemeanor, and it does not admit of any argument."

So in *R.* v. *Holman, L. & C.* 177, where the prisoner was charged in an indictment by one count for embezzle-

ment and the other for larceny as a bailee. *At the close of the case for the prosecution*, it was objected that the indictment was bad, for misjoinder of counts, and that the objection was fatal, although not taken till after plea pleaded and the jury had been charged; and, upon the court proposing to direct the counsel for the prosecution to elect on which count he would proceed, the prisoner's counsel further contended that the indictment was so absolutely bad that the election of counts was inadmissible.

The court directed the counsel for the prosecution to elect on which count he would proceed reserving, at the request of the prisoner's counsel, the points raised by him as above stated for the consideration of the court for crown cases reserved. The counsel for the prosecution elected to proceed on the second count, and upon that count the prisoner was convicted, and the conviction affirmed.

Where the defendant was indicted, in several counts, for stabbing with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was holden that the prosecutor was not bound to elect upon which count he would proceed, notwithstanding the judgment is by the statute different, being on the first count capital, and on the others transportation.—*R.* v. *Strange*, 8 *C. & P.* 172; *Archbold*, 70.

When the enactment contained in sec. 191 of our Procedure Act was in force in England, as 7 Will. IV and 1 Vic., c. 85, s. 11, a prisoner was charged in one indictment with feloniously stabbing with intent—first, to murder; second, to maim; third, to disfigure; fourth, to so some grievous bodily harm; to which was added a count for a common assault. The case was far advanced before the learned judge was aware of this, and at first he thought of stopping it; but as it was rather a serious one, he left the

case, without noticing the last count, to the jury, who (properly as the learned judge thought upon the facts) convicted the prisoner; and the counsel for the prosecution then, being aware of the objection of misjoinder, requested that the verdict might be taken on the last count for felony, which was done accordingly; and this was held right by all the judges.—*R.* v. *Jones*, 2 *Moo. C. C.* 94.

Here in Canada, now, there is no objection to a count for a common assault, in an indictment for any of the felonies, where, under sec. 191 of our Procedure Act, the jury may find a verdict for the assault. But, of course, such a count is not necessary, as the jury may, in that case, convict of the misdemeanor, without its being alleged in the indictment. See 1 *Bishop's Cr. Proc.* 446.

If in any case not falling under sec. 191 of the Procedure Act, a count for a felony is joined with a count for a misdemeanor, on motion to quash, or demurrer, it seems that the indictment should be quashed or the prosecutor ordered to proceed on one of the counts only. If the defendant does not take the objection and allows the trial to proceed, the conviction will be legal, if a verdict is taken *distinctly* on one of the counts. If a verdict is given of guilty generally, without specifying on which of the counts, the conviction will be held bad on motion in arrest of judgment, or in error, notwithstanding sec. 143 of the Procedure Act, though this clause is much more extensive than the corresponding English clause, 14-15 V., c. 100, s. 25. For how could the court know what sentence to give if it is not clear what offence the jury have found the prisoner guilty of. See 1 *Starkie, Cr. Pl.* 43; *R.* v. *Jones*, 2 *Moo. C. C.* 94; *R.* v. *Ferguson*, *Dears.* 427.

Though in law, the right to charge different felonies in one indictment cannot be denied, yet, in practice, the

court, in such a case, will always oblige the prosecutor to elect and proceed on one of the charges only.—*Dickinson's quarter sessions*, 190.

But the same offence may be charged in different ways, in different counts of the same indictment, to meet the several aspects which it is apprehended the case may assume in evidence, or in which it may be seen in point of law, and it is said in *Archbold*, p. 72: "Although a prosecutor is not, in general, permitted to charge a defendant, with different felonies in different counts, yet he may charge the same felony in different ways in several counts in order to meet the facts of the case; as, for instance, if there be a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, be the goods or house of A. or B., they may be stated in one count as the goods or house of A., and in another as the goods or house of B. See *R.* v. *Egginton*, 2 *B. & P.* 508; *R.* v. *Austin*, 7 *C. & P.* 796. And the verdict may be taken generally on the whole indictment.—*R.* v. *Downing*, 1 *Den.* 52. But, inasmuch as the word 'felony' is not *nomen collectivum* (as 'misdemeanor' is, see *Ryalls* v. *R.*, 11 *Q. B.* 781, 795), if the verdict and judgment, in such case, be against the defendant for 'the felony aforesaid,' it will be bad unless the verdict and judgment be warranted by each count of the indictment."—*Campbell* v. *R.*, 11 *Q. B.* 799, 814; see 1 *Bishop's Cr. Proc.* 449.

Indictments for misdemeanors may contain several counts for different offences, and, as it seems, though the judgments upon each be different.—*Young* v. *R.*, 3 *T. R.* 98, 105, 106; *R.* v. *Towle*, 2 *Marsh*, 466; *R.* v. *Johnson*, 3 *M. & S.* 539; *R.* v. *Kingston*, 8 *East*, 46; and see *R.* v. *Benfield*, 2 *Burr.* 980; *R.* v. *Jones*, 2 *Camp.* 131; *Dickinson's Q. S.* 190; *Starkie's Cr. Pl.* 43. Even where

several different persons were charged in different counts, with offences of the same nature, the court held that it was no ground for a demurrer, though it might be for an application to the discretion of the court to quash the indictment.—*R.* v. *Kingston*, 8 *East*, 41. Where two defendants were indicted for a conspiracy and a libel, and at the close of the case for the prosecution, there was evidence against both as to the conspiracy, but against one only as to the libel, the judge then put the prosecutor to elect which charge he would proceed upon.—*R.* v. *Murphy*, 8 *C. & P.* 297. On an indictment for conspiracy to defraud by making false lists of goods destroyed by fire, one set of counts related to a fire in June, 1864, and another to a fire in November, 1864. The prosecution was compelled to elect which charge of conspiracy should be first tried, and to confine the evidence wholly to that in the first instance.—*R.* v. *Barry*, 4 *F. & F.* 389. And on an indictment against the manager and secretary of a joint-stock bank, containing many counts, some charging that the defendants concurred in publishing false statements of the affairs of the bank, and others that they conspired together to do so, the prosecutors were put to elect on which set of counts they would rely.—*R.* v. *Burch*, 4 *F. & F.* 407. If, where there are several counts charging different offences in law, the judgment be entered up generally upon all, that the defendant '*for his said offences*' be adjudged, etc., and it appears that any count was bad in law, the judgment will be reversed in error.—*O'Connell* v. *R.*, 11 *C. & F.* 155. To prevent this it is now usual, in cases of misdemeanor, to pronounce and enter up the same judgment separately on each count of the indictment."—*Archbold*, 72.

Where a prisoner is indicted for a felony, it is not necessary to prefer a separate bill against him for an attempt to commit it; and where he is indicted for a misdemeanor, it is not necessary to add another count for an attempt to commit it; because upon an indictment for the felony or misdemeanor, if, upon the trial, it appear that the defendant merely attempted to commit the offence, but did not complete it, the jury may acquit him of the offence charged, and find him guilty of the attempt.—Procedure Act, sec. 183.

So, upon an indictment for robbery, the prisoner may now be found guilty of an assault with intent to rob.—S. 192 Procedure Act. So, upon an indictment for embezzlement, if the offence upon the evidence appear to be a larceny, the jury may acquit the prisoner of the embezzlement, and find him guilty of simple larceny, or of larceny as clerk or servant; or upon an indictment for larceny, if upon the evidence the offence appears to be embezzlement, the jury may acquit of the larceny and find the party guilty of embezzlement.—S. 195 Procedure Act. So, if upon an indictment for obtaining money or goods by false pretences, the offence upon the evidence turn out to be larceny, the defendant, notwithstanding, may be convicted of the false pretences.—S. 196 Procedure Act. So, if upon an indictment for larceny, the offence upon the evidence turn out to be an obtaining by false pretences, the jury may acquit of the larceny and find the defendant guilty of obtaining by false pretences.—S. 198 Procedure Act. So, upon an indictment for any misdemeanor, if the facts given in evidence amount to a felony, the defendant shall not on that account be acquitted of the misdemeanor, unless the court think fit to discharge the jury and order

the defendant to be indicted for the felony.—S. 184 Procedure Act. But this provision applies only where the facts given in evidence prove the *act charged* in the indictment; "while they include such misdemeanor," says the statute. And if a felony is proved, but no misdemeanor, the provision does not apply.

The commencement of a second or subsequent count is in form thus: "And the jurors aforesaid, upon their oath aforesaid, do further present that," etc., proceeding to state the offence. The absence of the words "upon their oath aforesaid" would be a fatal and not amendable defect, but as to the particular count only.—See *Archbold*, 73.

Counts for different misdemeanors on which the judgment is of the same nature may be joined in the same indictment, and, on such counts judgment may, and indeed ought to be, separately entered.—*R.* v. *Orton*, 14 *Cox*, 436 *and* 546; *R.* v. *Bradlaugh*. 15 *Cox*, 217.

Counts for different misdemeanors of the same class may be joined in the same indictment.—*R.* v. *Abrahams*, 24 *L. C. J.* 325.

Although, in general, it is not permitted to include two different felonies under different counts of an indictment, yet the same offence may be charged in different ways in different counts of the same indictment. Thus, in the first count, the accused may be charged with having stolen wood belonging to A., and in another with having stolen wood belonging to *B.*—*R.* v. *Falkner*, 7 *R. L.* 544.

JOINDER OF DEFENDANTS—SEPARATE TRIALS.

Two parties accused of the same offence on the same indictment are not entitled as of right to a separate defence

either in felonies or misdemeanors.—*R.* v. *McConohy*, 5 *R. L.* 746.

In *R.* v. *Littlechild*, *L. R.* 6 *Q. B.* 293, *Held*, that it is in the discretion of the court to grant a separate trial or not.

In *R.* v. *Gravel (Montreal, Q. B. March*, 1877,) for subornation of perjury separate trials refused, *Ramsay, J.* —In *R.* v. *Bradlaugh*, 15 *Cox*, 217, for libels, separate trial granted. Where several persons are jointly indicted the judge will not allow a separate trial on the ground that the depositions disclose statements and confessions made by one prisoner implicating another which are calculated to prejudice the jury, and that there is no legal evidence disclosed against the other prisoner.—*R.* v. *Blackburn*, 6 *Cox*, 333.

The prosecution has always a right to a separate trial. —1 *Bishop, Cr. Proc.* 1034; 2 *Hawkins, c.* 41, *par.* 8.

See on the question 1 *Chitty, C. L.* 535; 1 *Starkie, Cr. Pl.* 36; 1 *Bishop, Cr. Proc.* 463, 1018; 1 *Wharton*, 433. —*R.* v. *Payne*, 12 *Cox*, 118; *O'Connell.* v. *R.*, 11 *C. & F.* 115, *and* remarks under sec. 214, *post.*

For conspiracy and riot, there can be no severance of trial.—1 *Wharton*, 434; *Starkie's Cr. Pl.* 36, *et seq.*

106. Any number of the matters, acts or deeds by which any compassings, imaginations, inventions, devices or intentions, or any of them, have been expressed, uttered or declared, may be charged against the offender, for any felony, under the "*Act respecting Treason and other Offences against the Queen's authority.*"—31 *V., c.* 69, *s.* 7. 11. 12 *V., c.* 12, *s.* 5, *Imp.*

The Act respecting Treason is c. 146, p. 30, *ante.*

107. In any indictment for perjury, or for unlawfully, illegally, falsely, fraudulently, deceitfully, maliciously or corruptly taking, making, signing or subscribing any oath, affirmation, declaration,

affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient to set forth the substance of the offence charged against the accused, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing was taken, made, signed or subscribed, without setting forth the bill, answer, information, indictment, declaration or any part of any proceeding, either in law or equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.—32-33 *V.*, *c.* 23, *s.* 9. 14-15 *V.*, *c.* 100, *s.* 20, *Imp.*

See *R.* v. *Dunning*, 11 *Cox*, 651, *and R.* v. *Hare*, 13 *Cox*, 174.

108. In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing or procuring any person unlawfully, willully, falsely, fraudulently, deceitfully, maliciously or corruptly, to take, make, sign or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient, whenever such perjury or other offence aforesaid has been actually committed, to allege the offence of the person who actually committed such perjury or other offence, in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said person to do and commit the said offence in manner and form aforesaid; and whenever such perjury or other offence aforesaid has not actually been committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.—32-33 *V.*, *c.* 23, *s.* 10. 14-15 *V.*, *c.* 100, *s.* 21, *Imp.*

109. In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the accused did feloniously, wilfully, of his malice aforethought, kill and murder the deceased,—and it shall be sufficient in any indictment for manslaughter to charge that the accused did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or

manslaughter to charge the principal with the murder or manslaughter, as the case may be, in the manner hereinbefore specified, and then to charge the accused as an accessory, in the manner heretofore used and accustomed, or by law provided.—32-33 *V.*, *c.* 20, *s.* 6. 24-25 *V.*, *c.* 100, *s.* 6, *Imp.*

110. In any indictment for stealing, or, for any fraudulent purpose, destroying, cancelling, obliterating or concealing the whole or any part of any document of title to land, it shall be sufficient to allege such document to be or contain evidence of the title, or of part of the title, or of some matter affecting the title, of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real property to which the same relates, and to mention such real property or some part thereof.—32-33 *V.*, *c.* 21, *s.* 16, *part.* 24-25 *V.*, *c.* 96, *s.* 28, *Imp.*

111. Any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, committed by the offender, against Her Majesty, or against the same municipality, master or employer, within the space of six months from the first to the last of such acts, may be charged in any indictment,—and if the offence relates to any money or any valuable security, it shall be sufficient to allege the embezzlement or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender is proved to have embezzled or fraudulently applied or disposed of any amount, although the particular species of coin or valuable security of which such amount was composed is not proved, or if he is proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security was delivered to him in order that some part of the value thereof should be returned to the person delivering the same, or to some other person, and such part has been returned accordingly.—32-33 *V.*, *c.* 21, *s.* 73. 24-25 *V.*, *c.* 96, *s.* 71, *Imp.*

See, *ante*, p. 383, under sec. 52 of the Larceny Act, to which this clause applies.

112. In any indictment for obtaining or attempting to obtain any property by false pretences it shall be sufficient to allege that the person accused did the act with intent to defraud, and without

alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the person accused did the act charged with an intent to defraud.—32-33 *V.*, *c.* 21, *s.* 93, *part.* 24-25 *V.*, *c.* 96, *s.* 88, *Imp.*

Sill v. *R.*, *Dears.* 132, is not now law since this enactment.

See sec. 77, of c. 164, p. 420, *ante*, as to the offence of obtaining under false pretences. See Greaves' note under sec. 114, *post*.

113. It shall not be necessary to allege, in any indictment against any person for wrongfully and wilfully pretending or alleging that he inclosed and sent, or caused to be inclosed and sent, in any post letter, any money, valuable security or chattel, or to prove on the trial, that the act was done with intent to defraud.—32-33 *V.*, *c.* 21, *s.* 96, *part.*

This clause is not in the Imperial Acts. It has reference to sec. 79, p. 440, *ante*, of the Larceny Act.

114. In any indictment for forging, altering, uttering, offering, disposing of or putting off any instrument whatsoever, where it is necessary to allege an intent to defraud, it shall be sufficient to allege that the person accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the person accused did the act charged with an intent to defraud.—32-33 *V.*, *c.* 19, *s.* 51. 24-25 *V.*, *c.* 98, *s.* 44, *Imp.*

See, *ante*, c. 165, general remarks on forgery.

The words "where it is necessary to allege an intent to defraud" were inserted to prevent its being supposed that this clause made it necessary to allege an intent to defraud in cases where the clause creating the offence did not make such an intent an ingredient in the offence.—*Greaves' note.*

This section, and section 112, *ante*, apply to two matters the statement of the intent to defraud in indictments for forgery and false pretences, and the evidence in support of such intent.

Before this act passed, it was necessary in these cases to allege that the defendant did the act charged with intent to defraud some particular individual mentioned in the indictment, and to prove that in fact the defendant did such act with intent to defraud the person so specified. This in most instances led to the multiplication of counts, alleging an intent to defraud different persons, so as to meet any view that the jury might take of the evidence, and sometimes, upon the evidence, a difficulty occurred in ascertaining whether any person in particular could be said to be intended to be defrauded. (See *R.* v. *Marcus*, 2 *C & K.* 356; *R.* v. *Tuffs*, 1 *D. C. C.* 319). This clause is intended to obviate all such difficulties, and it renders it sufficient to allege in the indictment, that the forgery or uttering was committed, or the goods obtained, with intent to defraud, without specifying any particular person intended to be defrauded; and it likewise renders it unnecessary to prove that the defendant ntended to defraud any particular person, and makes it sufficient to prove that he did the act with intent to defraud.—*Greaves' note.*

115. In any indictment against any person for buying, selling, receiving, paying or putting off, or offering to buy, sell, receive, pay or put off, without lawful authority or excuse, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin, at or for a lower rate or value than the same imports or was apparently intended to import, it shall be sufficient to allege that the person accused did buy, sell, receive, pay or put off, or did offer to buy, sell, receive, pay or put off the false or counterfeit coin, at or for a lower rate of value than the same imports, or was apparently intended to import, without alleging at or

for what rate, price or value the same was bought, sold, received, paid or put off, or offered to be bought, sold, received, paid or put off.—32-33 *V.*, *c.* 18, *s.* 6, *part.* 24-25 *V.*, *c.* 99, *s.* 6, *Imp.*

See 1 *Russ.* 135.

"Under the former enactment it was necessary to allege in the indictment, and prove by evidence, the sum for which the coin was bought, etc.; *R.* v. *Joyce*, *Carr. Supp.* 184; *R.* v. *Hedges*, 3 *C. & P.* 410; the last part of this clause renders it unnecessary to allege the sum for which the coin was bought, etc., and consequently whatever the evidence on that point may be, there can be no variance between it and the allegation in the indictment, and all that need be proved is that the coin was bought, etc., at some lower rate or value than it imports.—*Greaves' note.*

116. It shall be sufficient in any indictment for any offence against the "*Act respecting Malicious Injuries to Property*," where it is necessary to allege an intent to injure or defraud, to allege that the person accused did the act with intent to injure or defraud, as the case may be, without alleging an intent to injure or defraud any particular person, and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the person accused did the act charged with an intent to injure or defraud as the case may be.—32-33 *V.*, *c.* 22, *s.* 68. 24-25 *V.*, *c.* 97, *s.* 60, *Imp.*

This clause places the law on these point[illegible]me position as in cases of forgery and false preten[illegible]s. 112 *and* 114, *ante.*

117. In any indictment for any offence committed in or upon or with respect to,—

(*a.*) Any church, chapel, or place of religious worship, or anything made of metal fixed in any square or street, or in any place dedicated to public use or ornament, or in any burial-ground,—

(*b.*) Any highway, bridge, court-house, gaol, house of correction, penitentiary, infirmary, asylum, or other public building,—

(*c.*) Any railway, canal, lock, dam, or other public work, erected or maintained in whole or in part at the expense of Canada, or of any of the Provinces of Canada, or of any municipallty, county, parish or township, or other sub-division thereof,—

(*d.*) Any materials, goods or chattels belonging to or provided for, or at the expense of Canada, or of any such Province, or of any municipality or other sub division thereof, to be used for making, altering or repairing any highway or bridge, or any court house or other such building, railway, canal, lock, dam or other public work as aforesaid, or to be used in or with any such work, or for any other purpose whatsoever,—

(*e.*) The whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill, petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever, of or belonging to any court of justice, or relating to any cause or matter, begun, depending or terminated in any such court, or of any original document in any wise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any Government or public office,—

(*f*) The whole or any part of any will, codicil or other testamentary instrument, or—

(*g.*) Any writ of election, return to a writ of election, indenture, poll-book, voters' list, certificate, affidavit, report, document or paper, made, prepared or drawn out according to any law respecting provincial, municipal or civic elections,—

It shall not be necessary to allege that any such property instrument or article is the property of any person.—32-33 *V.*, *c.* 21, *ss.* 17, *part*, 18, *part*, 20, *part, and c.* 29, *s.* 19. 29-30 *V.* (*Can.*), *c.* 51, *s.* 188, *part.* 24-25 *V.*, *c.* 96, *ss.* 29, 30, 31, *Imp.*

118. If in any indictment for any offence, it is requisite to state the ownership of any property, real or personal, which belongs to or is in possession of more than one person, whether such persons are partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state the property to belong to the person so named, and another or others, as the case may be.—32-33 *V.*, *c.* 29, *s.* 17.

119. If, in any indictment for any offence, it is necessary for any

purpose to mention any partners, joint tenants, parceners or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision and that of the next preceding section shall extend to all joint stock companies and trustees.—32-33 *V.*, *c.* 29, *s.* 18.

These two clauses are taken from the Imperial Act, 7 Geo. IV., c. 64, s. 14. Formerly, where goods stolen were the property of partners, or joint-owners, all the partners or joint-owners must have been correctly named in the indictment, otherwise the defendant would have been acquitted.

The word "*Parceners*" refers to a tenancy which arises when an inheritable estate descends from the ancestor to several persons possessing an equal title to it. —*Wharton, Law Lexicon.*

It must be remembered that the words of the statute, in sec. 118, are, "*another or others;*" and if an indictment allege property to belong to A. B. and *others*, and it appears that A. B. has only one partner, it is a variance.

The prisoner was indicted for stealing the property of G. Eyre "and *others*," and it was proved that G. Eyre had only one partner; it was held, per Denman, Com. Serj., that the prisoner must be acquitted.—*Hampton's Case*, 2 *Russ.* 303. So where a count for forgery laid the intent to be to defraud S. Jones "and *others*," and it appeared that Jones had only one partner, it was held that the count was not supported.—*R.* v. *Wright*, 1 *Lewin*, 268.

In *R.* v. *Kealey*, 2 *Den.* 68, the defendant was indicted for the common law misdemeanor of having attempted, by false pretences made to J. Baggally and others, to obtain from the said J. Baggally and others

one thousand yards of silk, the property of the said J. Baggally and others, with intent to cheat the said J. Baggally and others of the same. J. Baggally and others were partners in trade, and the pretences were made to J. Baggally; but none of the partners were present when the pretences were made, nor did the pretences ever reach the ear of any of them. It was objected that there was a variance, as the evidence did not show that the pretences where made to J. Baggally and others; but the objection was overruled by Russell Guerney, Esq., Q. C., and, upon a case reserved, the conviction was held right.

Greaves, in *note a*, 2 *Russ.* 304, says on this case: "It is clear that the 7 Geo. IV., c. 64, s. 14 (secs. 118 and 119, *ante*, of the Procedure Act) alone authorizes the use of the words 'and others;' for, except for that clause, the persons must have been named. There the question really was, whether that clause authorized the use of it in this allegation. The words are, 'whenever it shall be necessary to mention, *for any purpose whatsoever*, any partners, etc.' ('if it be necessary *for any purpose* to mention,' etc., sec. 119, *ante.)* Now it is plain that the prisoner had applied to Baggally to purchase the goods of the firm, and the inference from the statement in the indictment is that he had actually made a contract for their purchase, and, if that contract had been alleged, it must have been alleged as a contract with the firm, and it was clearly correct to allege an attempt to make a contract as made to the firm also."

Now, such a variance, as mentioned in *Hampton's* and *Wright's* cases, *ubi supra*, would not be fatal, if amended.—3 *Burn*, 25; see sec. 238 *post*; and *R.* v.

Pritchard, L. & C. 34; *R.* v. *Vincent*, 2 *Den.* 464; *R.* v. *Marks*, 10 *Cox*, 367.

It is not necessary that a strict legal partnership should exist. Where C. and D. carried on business in partnership, and the widow of C., upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but, before the division, part of the stock was stolen; it was holden that the goods were properly described as the goods of D. and the widow.—*R.* v. *Gaby, R. & R.* 178.

And where a father and son carried on business as farmers; the son died intestate, after which the father continued the business for the joint benefit of himself and the sons next of kin; some sheep were stolen, and were laid to be the property of the father and the sons next of kin, and all the judges held it right.—*R.* v. *Scott, R. & R.* 13.

In an indictment for stealing a Bible, a hymn-book, etc., from a Methodist chapel, the goods were laid as the property of John Bennett and others, and it appeared that Bennett was one of the Society, and a trustee of the chapel: Parke, J., held that the property was correctly laid in Bennett.—*R.* v. *Boulton*, 5 *C. & P.* 537.

In *R.* v. *Pritchard, L. & C.* 34, it was held that the property of a banking co-partnership may be described as the property of one of the partners specially named and others, under the clause in question; but see now sec. 122 of the Procedure Act, *post*, as to bodies corporate, and the property under their control.—*R.* v. *Beacall*, 1 *Moo. C. C.* 15.

120. In any indictment for any offence committed on or with res-

pect to any house, building, gate, machine, lamp, board, stone, post, fence or other thing erected or provided by any trustees or commissioners, in pursuance of any act in force in Canada, or in any Province thereof, for making any turnpike road, or to any conveniences or appurtenances thereunto respectively belonging, or to any materials, tools or implements provided for making, altering or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, without specifying the names of such trustees or commissioners.—32-33 *V.*, *c.* 29, *s.* 20. 7 *Geo.* 4, *c.* 64, *s.* 17, *Imp.*

121. In any indictment for any offence committed on or with respect to any buildings, or any goods or chattels, or any other property, real or personal, in the occupation or under the superintendence charge or management of any public officer or commissioner, or any, county, parish, township or municipal officer or commissioner, it shall be sufficient to state any such property to belong to the officer or commissioner in whose occupation or under whose superintendence, charge or management such property is, and it shall not be necessary to specify the names of any such officer or commissioner.—32-33 *V.*, *c.* 29, *s.* 21. 7 *Geo.* 4, *c.* 64, *s.* 16, *Imp.*

It has been held that if a person employed by a trustee of turnpike tolls to collect them, lives in the toll house rent free, the property in the house, in an indictment for burglary, may be laid in the person so employed by the lessee, he having the exclusive possession, and the toll house not being parcel of any premises occupied by his employer.—*R.* v. *Camfield*, 1 *Moo. C. C.* 42.

122. All property, real and personal, whereof any body corporate has, by law, the management, control or custody, shall, for the purpose of any indictment or proceeding against any other person for any offence committed on or in respect thereof, be deemed to be the property of such body corporate.—32-33 *V.*, *c.* 29, *s.* 22.

This clause is not in the English statutes. It is only declaratory of the common law, and it was held in England without this clause, that when goods of a corporation are stolen, they must be laid to be the property of the corpo-

ration in their corporate name and not in the names of the individuals who comprise it.—*R.* v. *Patrick and Pepper*, 1 *Leach.* 253. So in *R.* v. *Freeman*, 2 *Russ.* 301, the prisoner was indicted for stealing a parcel, the property of the London and North Western Railway Company. The parcel was stolen from the Lichfield Station, which had been in the possession of the company for three or four years, by means of their servants; but no statute was produced which authorized the company to purchase the Trent Valley Line; an Act incorporating the company was, however, produced. It was held that, as a corporation is liable in trover, trespass and ejectment, they might have an actual possession, though it might be wrongful, which would support the indictment.

In *R.* v. *Frankland, L. & C.* 276, it was held: 1st. That the incorporation of a private company must be proved by legal and documentary evidence: 2nd. That partners in a company not incorporated, might be proved to be such by parol evidence; 3rd. That Thomas Bolland and others, who were described in the indictment as the owners of the property embezzled, being partners in a company not incorporated, the indictment was supported by proof that the money was the property of the company.

123. In any indictment against any person for stealing any oysters or oyster brood from any oyster bed, laying or fishery, it shall be sufficient to describe, either by name or otherwise, the bed, laying or fishery in respect of which any of the said offences has been committed, without stating the same to be in any particular county, district or local division.—32-33 *V.*, *c.* 21, *s.* 14, *part.* 24-25 *V.*, *c.* 96, *s.* 26, *Imp.*

See sec. 11 of *The Larceny Act*, p. 294, *ante.*

124. In any indictment for any offence mentioned in sections twenty-five to twenty-nine, both inclusive, of "*The Larceny Act.*"

shall be sufficient to lay the property in Her Majesty, or in any person or corporation, in different counts in such indictment; and any variance in the latter case, between the statement in the indictment and the evidence adduced, may be amended at the trial; and if no owner is proved the indictment may be amended by laying the property in Her Majesty.—32-33 *V.*, *c.* 21, *s.* 36.

These sections of the *Larceny Act*, p. 312 *et seq.*, *ante*, apply to the stealing of ores and minerals, and the unlawfully selling or buying gold and silver from mines.

125. In any indictment for any offence committed in respect of any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, of the Legislature of any Province of Canada, for the payment of any fee, rate or duty whatsoever, the property therein may be laid in the person in whose possession, as the owner thereof, it was when the larceny or offence was committed, or in Her Majesty, if it was then unissued, or in the possession of any officer or agent of the Government of Canada or of the Province, by authority of the Legislature whereof it was issued or prepared for issue.—35 *V.*, *c.* 33, *s.* 1, *part.*

Sec. 2 of the *Larceny Act*, p. 278, *ante*, declares these stamps to be chattels, and included in the word property.

126. In every case of larceny, embezzlement or frandulent application or disposition of any chattel, money or valuable security, under sections fifty-three, fifty-four and fifty-five of "*The Larceny Act*," the property in any such chattel, money or valuable security may, in the warrant of commitment by the justice of the peace before whom the offender is charged, and in the indictment preferred against such offender, be laid in Her Majesty, or in the municipality, as the case may be.—32-33 *V.*, *c.* 21, *s.* 72, *part.* 24-25 *V.*, *c.* 96, *s.* 70, *Imp.*

See, *ante*, p. 401, under these clauses of the *Larceny Act*.

127. An indictment in the common form for larceny may be preferred against any person who steals any chattel let to be used by him in or with any house or lodging,—and in every case of stealing any fixture so let to be used, an indictment in the same form as if the

offender was not a tenant or lodger may be preferred,—and in either case the property may be laid in the owner or person letting to hire. 32-33 *V.*, *c.* 21, *s.* 75, *part.* 24-25 *V.*, *c.* 96, *s.* 94, *Imp.*

See, *ante*, p. 404 under sec. 57 of the Larceny Act.

128. No indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "*as appears upon the record*" or "as appears by the record," or of the words "with force and arms," or of the words "against the peace,"—or for the insertion of the words "against the form of the statute" instead of the words "against the form of the statutes," or *vice versâ*, *or for the omission of such words,—or for the want of an addition or for an imperfect addition of any person mentioned in the indictment*, or because any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name,—or for omitting to state the time at which the offence was committed in any case in which time is not of the essence of the offence, or for stating the time imperfectly, or for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, —or for want of a proper or perfect venue, or for want of a proper or formal conclusion, or for want of or imperfection in the addition of any defendant,—or for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil, in any case in which the value or price or amount of damage, injury or spoil is not of the essence of the offence.—32-33 *V.*, *c.* 29, *s.* 23.

The words 'against the form of the statute" are not necessary in any indictment.—*Castro* v. *R.*, 14 *Cox*, 546.

This clause is taken from the Imperial Act, 14-15 V., c. 100, s. 24. The words in *italics* are not in the Imperial Act.

By this enactment no objection can be taken against an indictment in the following cases:

1. The want of the averment of any matter unnecessary to be proved.

2. The omission of the words "as appears upon the record."

3. The omission of the words "as appears by the record."

4. The omission of the words "with force and arms."

5. The omission of the words "against the peace."

6. The insertion of the words "against the form of the statute" instead of "against the form of the statutes," and vice versâ.

7. The omission of such words.

8. Want of, or imperfection in the addition of any person mentioned in the indictment.

9. That any person is designated by a name of office, or other descriptive appellation instead of his proper name.

10. Omitting to state the time at which any offence was committed in any case where time is not of the essence of the offence.

11. Stating the time imperfectly.

12. Stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.

13. Want of a proper or perfect venue.

14. Want of a proper or formal conclusion.

15. Want of, or imperfection in the addition of any defendant.

16. Want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil, in any case where the value or price, or the amount of damage, injury or spoil is not of the essence of the offence.

On the first, second and third cases, no remarks are called for.

On the fourth, rendering unnecessary in any indictment the words "with force and arms," *Chitty* said, on these words, before this clause: "The words 'with force and

arms,' anciently *vi et armis*, were, by the common law, necessary in indictment for offences which amount to an actual disturbance of the peace, or consist, in any way, of acts of violence; but it seems to be the better opinion that they were never necessary where the offence consisted of a cheat or non-feasance, or a mere consequential injury ..... But the statute 37 Hen. VIII, c. 8, reciting that several indictments had been deemed void for want of these words, when in fact no such weapon had been employed, enacted that, 'that the words *vi et armis, videlicit, cum baculis, cultellis, arcubus et sagittis*,' shall not of necessity be put in any indictment or inquisition. Upon the construction of this statute, there seems to have been entertained very grave doubts whether the whole of the terms were intended to be abolished in all indictments, or whether the words following the *videlicet* were alone excluded. Many indictments for trespass, and other wrongs, accompanied with violence, have been deemed insufficient for want of the words 'with force and arms;' and, on the other hand, the court has frequently refused to quash the proceedings where they have been omitted, and the last seems the better opinion, for otherwise the terms of the statute appear to be destitute of meaning. It seems, to be generally agreed, that, where there are any other words imploying force, as, in an indictment for a rescue, the word 'rescued,' the omission of *vi et armis* is sufficiently supplied. But it is at all times safe and proper to insert them, whenever the offence is attended with an actual or constructive force, or affects the interest of the public."

The words "with force and arms," though not absolutely an essential allegation of the indictment, would, in certain

cases, not be easily replaced, as in indictments for forcible entry or forcible detainer. This clause would not apply, if a statute created an offence in the following words: "Whosoever, with force and arms, destroys, etc. Then the words *vi et armis* would be a necessary ingredient of the offence, and should be found in an indictment under such a clause.

As to the words "against the peace," at common law, they were necessary, where the offence charged was not one created by statute, and *contra pacem Domini Regis* were the words required; and this in the conclusion of each of the counts; *contra pacem* alone was insufficient, though *contra coronam et dignitatem ejus* was not necessary.—2 *Hale*, 188. So, formerly, great care was necessary in ascertaining whether the expression "against the form of the statute" or "against the form of the statutes" should be used; but one or the other was necessary when the indictment charged a statutory crime. In England, though a contrary opinion is given in *Archbold, p.* 67, it seems, according to *Broom's Comm. p.* 991, that, even now, the conclusion of the indictment must be *contra formam statuti*, where the offence charged is founded upon the statute law, as the 14-15 V., c. 100, s. 29, does not dispense with the conclusion; but whatever doubts may arise there are in Canada removed by the enactment stated as the seventh, *ante*, of our corresponding clause, as to the omission of these words.

It will be seen that another enactment in the Canadian clause, not to be found in the English act, is the eighth, *ante*, declaring immaterial the want of addition or imperfect addition of *any* person mentioned in the indictment. This covers all persons who are named as owners of the

property, regarding which the offence has been committed, and appears to be the rule even without this clause.—3 *Burn*, 23.

What is meant by the word "addition?" *Addition* is the title, or mystery (art, trade or occupation), and place of abode of a person besides his names.—*Wharton, Law Lexicon, verbo addition.*

By the ninth enactment of the clause in question, it is declared that no indictment shall be insufficient "for that any person mentioned in it is designated by a name of office or other descriptive appellation instead of his proper name."

This part of the clause applies only to the names of the prosecutor or of the party injured, or of any third parties mentioned in the indictment; it does not extend to the names of the defendant. Under it, an indictment alleging the goods stolen to be the property of the "Duke of Cambridge" without giving him any other names, would be held sufficient. *R.* v. *Frost, Dears.* 474. But it must be remembered that, if at the trial, it appear in evidence that the party injured is misnamed, or that the owner of the goods or house, etc., is another and different person from him named as such in the indictment, the variance, unless amended, is fatal, and the defendant must be acquitted.—2 *East, P. C.* 651, 781; *Archbold*, 46. But, now, under sec. 238 of the Procedure Act, see, *post*, such an amendment, asked for before verdict, would hardly ever be refused.

The enactments tenthly, eleventhly, and twelfthly, contained in the above sec. 128, refer to omitting in any indictment to state the time at which the offence was committed, in any case where time is not of the essence of the

offence, or to stating the time imperfectly, or to stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, the clause enacting in the same terms as the English act, that no objection to any indictment on these grounds will be available to the defendant.

At common law, where the date was not a necessary ingredient of the offence, a variance between the indictment and evidence in the time, when the offence was committed, was never considered material, and in *Sir Henry Vane's Case*, for high-treason, the jury, under instructions of the court, found the prisoner guilty, though the offence was proved to have been committed ten years anterior to the time laid in the indictment.—*Kelyng's C. C.* 19; *Stevens & Haynes* reprint. And the doctrine that the time laid in the indictment is not material, when not essential to the offence, was confirmed by all the judges in *Lord Balmerino's Case;* note in *Townley's Case, Fost.* 9.

So, Lord Hale, says: "But though the day or year be mistaken in the indictment of felony or treason, yet if the offence be committed in the same county at another time, the offender ought to be found guilty."—2 *Hale*, 179. But it was, nevertheless, necessary, though only a formal averment, except in particular cases, to state in the indictment the time at which the offence charged had been committed, that is to say the year and day, and any uncertainty or incongruity in the description of time was fatal to the indictment.—1 *Starkie, Cr. Pl.* 54, 60. The rule required a day to be specified, but did not require that day to be proved. *Lord Campbell, Lives of the Chief*

Justices, vol. 3, calls this a mystery of the English Procedure.

But, now, by the above enactment, time need not even be averred, and, if averred, it is no objection that the date stated is an impossible or an incongruous one. The averment is a surplusage, except when time is of the essence of the offence, as, for instance, in an indictment for a subsequent offence.

"Averments of time in criminal proceedings, says *Taylor, Ev.*, 229, are now even of less importance than those of place; for excepting in the very few cases where time is of the essence of the offence, the indictment need not contain any allegation respecting it. Indeed, independent of the new law, the date specified in the indictment has been so far disregarded that, where a court had no jurisdiction to try a criminal, except for an offence committed after a certain day, the judges held that no objection could be taken to the indictment in arrest of judgment, for alleging that the act was done before that day, the jury having expressly found that this was not correct.—*R.* v. *Treharne*, 1 *Moo. C. C.* 298."

It is said in *Archbold*, page 50: "There are, however, some exceptions to this rule: 1. The dates of bills of exchange, and other instruments must be truly stated, when *necessarily* set out; 2. Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered; 3. If any time stated in the indictment is to be proved by matter of record, it must be truly stated; 4. If the precise date of a fact be a necessary ingredient in the offence, it must be truly stated."

See, *post*, sec. 237, as to amendment of variances between the proof and the indictment, in documents in writing.

The *want of a proper or perfect venue* is the omission thirteenthly provided for by the above clause, as not affecting the validity of the indictment.

It seems that an entire omission of venue is not provided for by this clause, and that such an omission might still be taken advantage of; but no venue need now be stated in the body of the indictment, except where local description is required, but the name of the district, county, or place in the margin shall be taken to be the venue; sec. 104, *ante*. But an entire omission of venue in the cases where it is yet necessary, though it may be taken advantage of under sec. 143 of the Procedure Act, by way of demurrer or motion to quash the indictment, could probably be rectified by amendment under that section; and, if not taken advantage of by demurrer or motion to quash, the omission could not be taken advantage of by motion in arrest of judgment. See 3 *Burn*, 22.

The above clause declares, as its fourteenth enactment that no indictment shall be held insufficient *for want of a proper or formal conclusion.*

These words "were introduced to render any conclusion, perfectly unnecessary and immaterial."—2 *Russ.* 326, *note W. by Greaves.*

So that the words "to the great damage of the said ....." "to the evil example of all others," "to the great displeasure of Almighty God," etc., probably never necessary, are now not to be used. And an indictment for a public nuisance need not now conclude, "*ad commune nocumentum.*"—*R.* v. *Holmes, Dears.* 207.

And before these statutes, it was held that the conclusion "against the form of the statute" in an indictment for a common law offence, instead of "against the peace," did not invalidate the indictment; the conclusion may

then be treated as a surplusage.—*R.* v. *Mathews*, 2 *Leach*, 585.

The want of or imperfection in the addition of any defendant is the next defect declared immaterial by the above clause, or rather declared to be no defect at all.

See, *ante*, what has been said under the enactment in this same clause, concerning the want of addition or imperfect addition of *any person* mentioned in the indictment.

Sec. 142, *post*, enacts, *inter alia*, that no indictment shall be abated by reason of any want of addition of any party offering such plea.

Before these enactments, the 1 Hen. V., c. 5, required, in indictments, to be given to defendants the additions of "their estate, or degree, or mystery," and also the "towns, or hamlets, or places, and counties of which they were or be, or in which they be or were conversant."

Lastly, this clause enacts that no indictment shall be held insufficient for want of the statement of the value or price of any matter or thing, or the amount of damage injury or spoil in any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence.

The rule is, that if a statute makes, for instance, the stealing of a particular thing a felony, without reference to its value, then the value need not be alleged in the indictment. But wherever the value is an element to be considered by the court in determining the punishment, it must be alleged in the indictment and duly proved on the trial.—1 *Bishop, Cr. Proc.* 541. So suppose an indictment charges the defendant with the larceny of a diamond ring, without alleging the value of the ring, the defendant cannot be sentenced to more than seven years in the penitentiary, under sec. 5 of the Larceny Act, though, at the trial,

the ring was proved to be worth one thousand pounds; and the court cannot sentence him to the greater punishment allowed by sec. 86 of the said Larceny Act, because the value was not alleged in the indictment.

The value is of the essence of the offence, where, by the statute, it is said, for instance: "Whosoever steals in any dwelling-house any chattel, etc., to the value in the whole of *twenty-five dollars or more:*" sec. 45 of the Larceny Act. To bring an indictment under this section, the value of twenty-five dollars or more must necessarily be alleged in the indictment and proved. But suppose it is alleged to be of fifty dollars, and proved to be only of thirty, this will be sufficient, because the value proved constitutes the offence created by statute.

If there are more than one article mentioned in the indictment, it is better to state and prove the value of each, so as to form, in the whole, the amount necessary to bring the case under the statute.—*R.* v. *Forsyth, R. & R.* 274; 1 *Taylor, Ev. par.* 230. However, in *R.* v. *Thoman*, 12 *Cox*, 54, it has been held by the court of criminal appeal that in an indictment, under 24-25 V., c. 97, s. 51, Imp. (sec. 58, c. 168 of Canadian Acts,) for maliciously damaging personal property, the damage exceeding five pounds, it is not necessary to allege the value of each article injured, or the value of the damage done to each article, but only that the amount of damage done to the several articles exceeded five pounds in the aggregate.

129. Whenever, in any indictment, it is necessary to make an averment as to any money or to any note of any bank, or Dominion or Provincial note, it shall be sufficient to describe such money or note simply as money, without any allegation, so far as regards the description of the property, specifying any particular coin or note; and such averment shall be sustained by proof of any amount of coin or of any such note, although the particular species of coin of which

such amount was composed or the particular nature of the note is not proved.—32-33 *V.*, *c.* 29, *s.* 25.

130. Whenever it is necessary to make an averment in an indictment, as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same is usually known, or by the purport thereof, without setting out any copy or *fac simile* of the whole or of any part thereof.—32-33 *V.*, *c.* 29, *s.* 24.

The 130th sec. is taken from the 14-15 V., c. 100, s. 7, of the Imperial Statutes upon which *Greaves* remarks: "This section renders it sufficient to describe any instrument to which it applies by any name or designation by which it is usually known, or by its purport. It is to be observed also that this section applies not merely to instruments in respect of which any offence is alleged to have been committed, but to every instrument as to which any averment may be made in any indictment. —*Lord Campbell's Acts, by Greaves*, 12.

The 129th sec. is taken from the 14-15 V., c. 100, s. 18, of the Imperial Statutes, upon which *Greaves* says "This section was framed upon the 7-8 Geo. IV., c. 29, s. 48, and was intended to meet the case of *R.* v. *Bond*, 1 *Den.* 517. It originally applied to money and valuable securities, the same as the section from which it was taken; but it was thought better that it should only extend to coin and the notes of the Band of England and other banks. In these cases it is sufficient in any indictment whatever, where it is necessary to make any averment as to any coin or bank note, to describe such coin or note simply as money, without specifying any particular coin or note; and such an allegation will be supported by proof of any amount, although the species of coin or the nature of the note be not proved."

As to sec. 130 it is only necessary to remark that, at

common law, written instruments, wherever they formed a part of the gist of the offence charged must have been set out verbatim.—*Archbold*, 55. But even, before this statute, it was held that if the defendant is charged with fraudulently offering a spurious bank note, and obtaining goods by the false pretence that it is a good bank note it is not necessary to set out the bank note, because it is not in this case material for the court to see that the instrument falls within a particular description.—*R.* v. *Coulson*, 1 *Den.* 592.

As to sec. 129, it is said in *Archbold*, 59, that before this enactment, *money* was described in an indictment as so many "pieces of the current gold," or "silver," or "copper coin of the realm, called....," and the particular species of coin must have been specified; so, though *Lord Hale*, 1 *P. C.* 534, and *Starkie*, 1 *Cr. Pl.* 187, seem to be of a contrary opinion, an indictment charging the stealing of ten pounds in moneys numbered was held bad.—*R.* v. *Fry*, *R. & R.*, 482. And in *Bond's* case, cited, *supra*, by Greaves, it was held that an indictment charging a stealing of seventy pieces of the current coin of the realm called sovereigns, of the value of seventy pounds, 140 pieces, etc., called half-sovereigns, etc., 500 pieces, etc., called crowns, etc., is not supported by proof of a stealing of a sum of money consisting of some or other of the coins mentioned in the indictment, without proof of some one or more of the specific coins there charged to have been stolen. Of course these decisions could not now be followed.

On sec. 129, see *R.* v. *Pâquet*, 2 *L. N.* 140.

131. In any indictment for forging, altering, offering, uttering, disposing of or putting off any instrument, stamp, mark or thing, it shall be sufficient to describe the same by any name or designation by which the same is usually known, or by the purport thereof, without

setting out any copy or *fac simile* thereof, or otherwise describing the same or the value thereof.—32-33 *V.*, *c.* 19, *s.* 49. 24-25 *V.*, *c.* 98, *s.* 42, *Imp.*

132. In any indictment for engraving or making the whole or any part of any instrument, matter or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter or thing whatsoever has been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter or thing whatsoever has been made or printed it shall be sufficient to describe such instrument matter or thing by any name or designation by which the same is usually known, without setting out any copy or *fac simile* of the whole or any part of such instrument, matter or thing.—32-33 *V.*, *c.* 19, *s.* 50. 24-25 *V.*, *c.* 98, *s.* 43, *Imp.*

133. Any number of accessories at different times to any felony may be charged with substantive felonies, in the same indictment, *and may be tried together*, notwithstanding the principal felon is not included in the same indictment, or is not in custody or amenable to justice.—31 *V.*, *c.* 72, *s.* 7, *part.* 24-25 *V.*, *c.* 96, *s.* 6, *Imp.*

See, *ante*, under c. 145.

Greaves' note.—This clause is framed from the 14-15 V., c. 100, s. 15, and the words in *italics* inserted. The committee of the Commons who sat on the 14-15 V., c. 100, struck out those words, not perceiving that they were the only important words in the clause: for there never was any doubt that separate accessories and receivers might be included in the same indictment under the circumstances referred to in the clause; the doubt was, whether they could be *compelled* to be tried together in the absence of the principal where they separately became accessories, or separately received.

134. Several counts may be inserted in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, committed by him against the same person, within six months from the first to the last of such acts, and all or any of them may be proceeded upon.—32-33 *V.*, *c.* 21, *s.* 5. 24-25 *V.*, *c.* 96, *s.* 5.

See *R.* v. *Suprani*, 13 *R. L.* 577, *post*, under sec. 202.

Before the passing of the act, it was no objection in point of law that an indictment contained separate counts charging distinct felonies of the same degree, and committed by the same offender.—2 *Hale*, 173; 1 *Chit.* 253; *R.* v. *Heywood, L. & C.* 451. It was, in truth, a matter for the discretion of the court; and if the court thought the prisoners would be embarrassed by the counts, the court would either quash the indictment, or compel the counsel for the prosecution to elect.—*R.* v. *Young*, 2 *East, P. C.* 515. It seems that, where three acts of larceny are charged in separate counts there may also be three counts for receiving.—*R.* v. *Heywood, L. & C.* 451.

Greaves, on this clause, says: "It frequently happened before this statute passed, that a servant or clerk stole sundry articles of small value from his master at different times, and in such a case it was necessary to prefer separate indictments for each distinct act of stealing, and on the trial it not seldom happened that the jury, having their attention confined to the theft of a single article of small value, improperly acquitted the prisoner on one or more indictments. The present section remedies these inconveniences, and places several larcenies from the same person in the same position as several embezzlements of the property of the same person, so that the prosecutor may now include three larcenies of his property committed within the space of six calendar months in the same indictment."—*Lord Campbell's Acts, by Greaves*, 19.

See *R.* v. *Benfield*, 2 *Burr.* 980.—The indictment need not charge that the subsequent larcenies were committed within six months after the commission of the first.—*R.* v. *Heywood, L. & C.* 451.

135. In any indictment containing a charge of feloniously steal-

ing any property, a count, or several counts, for feloniously receiving the same or any part or parts thereof, knowing the same to have been stolen may be added, and in any indictment for feloniously receiving any property, knowing it to have been stolen, a count for feloniously stealing the same may be added.—32-33 *V.*, *c.* 21, *s.* 101, *part.* 24-25 *V.*, *c.* 96, *s.* 92, *Imp.*

See remarks under preceding section.

The words "containing a charge of" are substituted for the word "for" in the former act, in order that a count for receiving may be added in *any* indictment containing a charge of stealing any property. It will therefore apply to burglary with stealing, housebreaking, robbery, etc. It is also provided, by this clause, for cases which frequently occur, and were not within the former clause; where different prisoners may be proved to have had possession of different parts of the stolen property.—*Greaves' Cons. Acts*, 180.

136. Every one who receives any chattel, money, valuable security or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling and otherwise disposing whereof, amounts to a felony either at common law or by statute, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled or disposed of, may be indicted and convicted, either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon has or has not been previously convicted, or is or is not amenable to justice: Provided, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.—32-33 *V.*, *c.* 21, *s.* 100, *part.* 24-25 *V.*, *c.* 96, *s.* 91, *Imp.*

This clause applies to all cases where property has been feloniously extorted, obtained, embezzled, or otherwise disposed of, within the meaning of any section of this act.—*Greaves, Cons. Acts*, 179.

See remarks under secs. 82 and 83 of *The Larceny Act*, p. 443, *ante*.

137. Every such receiver may, if the offence is a misdemeanor

be indicted and tried for the misdemeanor, whether the person guilty of the principal misdemeanor has or has not been previously convicted thereof, or is or is not amenable to justice.—32-33 *V.*, *c.* 21, *s.* 104, *part.* 24-25 *V.*, *c.* 96, *s.* 95.

138. Any number of receivers at different times, of property, or any part or parts thereof, so stolen, taken, extorted, obtained, embezzled or otherwise disposed of at one time, may be charged with substantive felonies in the same indictment, and may be tried together notwithstanding that the principal felon is not included in the same indictment, or is not in custody or amenable to justice.—31 *V.*, *c.* 72, *s.* 7, *part.* 32-33 *V.*, *c.* 21, *s.* 102. 24-25 *V.*, *c.* 96, *s.* 93, *Imp.*

See sec. 40 of c. 145, p. 28, *ante.*

139. In any indictment for any indictable offence, committed after a previous conviction or convictions for any felony, misdemeanor or offence or offences punishable upon summary conviction (and for which a greater punishment may be inflicted on that account), it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place, or at certain times and places convicted of felony or of a misdemeanor, or of an offence or offences punishable on summary conviction, as the case may be, *and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence,* without otherwise describing the previous offence or offences.—32-33 *V.*, *c.* 29, *s.* 26, *part.*

See s.s. 207 and 230, *post.*

This clause is taken from section 116 of the English Larceny Act, 24-25 V., c. 96, and section 37 of the English Coin Act, 24-25 V., c. 99. The words in *italics* are not in section 116 of the English Larceny Act; but are in section 37 of the Coin Act. They clearly take away the necessity, before existing, of setting out at length the previous indictment, etc., and of giving in evidence a copy of that indictment.

The following remarks on section 116 of the English Larceny Act apply to section 139 of our Procedure Act, with the exception of the passage discussing whether this clause of the English act applies only to the Larceny Act,

or to any indictment for any offence. With us, sect. 139 of the Procedure Act clearly applies to all indictments for any subsequent offence whatever.

Greaves says: "The words 'after charging a subsequent offence' were inserted in order to render it absolutely necessary always to charge the subsequent offence or offences first in the indictment, and after so doing to allege the previous conviction or convictions. This was the invariable practice on the Oxford circuit, and the select committee of the Commons were clear that it ought to be universally followed, so that the previous conviction should not be mentioned, even by accident, before a verdict of guilty of the subsequent offence had been delivered.

Mr. Davis, Cr. L. 113, however, says: 'It seems to be immaterial whether the prior conviction be alleged before or after the substantive charge,' for which he cites *R.* v. *Hilton, Bell, C. C.* 20. Now, that case was decided on the 7-8 Geo. IV, c. 28, s. 11, which had not in it the words 'after charging the subsequent offence,' and is therefore, no authority on the present clause in which those words are inserted to render the course held sufficient in *R.* v. *Hilton* unlawful. Whenever a statute increases the punishment of an offender on a subsequent conviction, and gives no mode of stating the former conviction, the former indictment, etc., must be set out at length, as was the case in mint prosecutions before the present Coin Act; but when a statute gives a new form of stating the former conviction, that form must be strictly pursued; for no rule is more thoroughly settled than that in the execution of any power created by any act of Parliament, any circumstance required by the act, however unessential and unimportant otherwise, must be observed, and can only be satisfied by a strictly liberal and precise

performance, *R.* v. *Austrey*, 6 *M. & S.* 319; and to suppose that this clause, which makes it sufficient to allege the former conviction '*after* charging the subsequent offence' can be satisfied by alleging it *before* charging the subsequent offence, is manifestly erroneous.

"*Mr. Davis Cr. L.* 24, speaking of the similar clause in the Coin Act, says: 'There is a difficulty under this section in charging the subsequent offence as a *felony* without previously showing that which makes it a felony, namely, the previous conviction for misdemeanor. Moreover, arraigning the prisoner for the subsequent offence as for a felony, is equivalent to saying that the prisoner has been before convicted. The Legislature, perhaps, relies upon the ignorance of the jury as to this distinction.'

"It should seem that this difficulty may easily be surmounted. In the beginning of the indictment the subsequent offence may be alleged in exactly the same terms as if it were a first offence, omitting the word 'feloniously;' then the previous conviction may be stated in the ordinary way; and then the indictment may conclude, 'and so the jurors aforesaid, upon their oath aforesaid, do say that the defendant on, etc., in manner and form aforesaid, *feloniously* did' (stating the subsequent offence again). There not only appears to be no objection to such an indictment, but it would rather seem to be the more accurate form of pleading; for the clauses which make a subsequent offence after a conviction of a misdemeanor, or of an offence punishable on summary conviction, a felony, are in this form, 'whosoever, having been convicted of any such misdemeanor, shall afterwards commit any of the *misdemeanors* aforesaid, shall be guilty of felony;' or, 'whosoever having been convicted of any *such offence* (stealing fruit *for instance*) shall afterwards commit

any of *the offences* in this section mentioned, shall be guilty of felony.' An indictment, therefore, in the form suggested would be strictly in accordance with these clauses; and in principle it is supported by the forms of indictment for perjury, and for murder where several are charged as principals in the first and second degree, and *R.* v. *Crighton*, *R. & R.* 62, appears fully to warrant such an indictment; for there the indictment alleged that the prisoner received a sum of money on account of his masters, and 'did *fraudulently* embezzle' part of it, 'and *so* the jurors aforesaid, upon their oath aforesaid, do say 'that the prisoner on,' etc., 'in manner and form aforesaid the said sum' from his said masters '*feloniously* did steal,' etc. It was objected that the indictment did not charge that the prisoner '*feloniously* embezzled;' it was answered that this was unnecessary; as the indictment in charging the embezzlement pursued the words of the statute, and that it was sufficient in having drawn the conclusion that *so* the prisoner feloniously stole the money; and, on a case reserved, the conviction was held right. It is obvious that the clauses in these acts are precisely similar to the clause on which that case was decided.

"It must not be supposed that in what I have said I mean to raise a doubt as to the validity of an indictment which follows the ordinary form; all I suggest is, that an indictment in the form I have pointed out would be good.

"*Mr. Saunders, Cr. L.* 94, complains that this clause does not provide against the clerk of assize or the clerk of the peace announcing 'a true bill for felony after a previous conviction.' This practice was clearly irregular even before this act passed, and the reason why no provision was made against it was that no one on the select committee of the Commons had ever heard of such practice.

After the trouble the Legislature has taken to prevent the previous conviction being mentioned till after the prisoner has been convicted of the subsequent offence, it is to be hoped that any court where such a practice may have prevailed will forbid it in future.

"The proceedings on the arraignment and trial are now to be as follows:

"The defendant is first to be arraigned on that part only of the indictment which charges the subsequent offence; that is to say, he is to be asked whether he be guilty or not guilty of that offence. If he plead not guilty, or if the court order a plea of not guilty to be entered for him under the 7-8 Geo. IV., c. 28, s. 2, or 9 Geo. IV., c. 54, s. 8 (section 145 Procedure Act), where he stands mute or will not answer directly to the charge, then the jury are to be charged in the first instance to try the subsequent offence only. If they acquit of that offence, the case is at an end; but if they find him guilty of the subsequent offence, or if he plead guilty to it on arraignment, then the defendant is to be asked whether he has been previously convicted as alleged, and if he admit that he has, he may be sentenced accordingly; but if he deny it, or stand mute of malice, or will not answer directly to such question, then the jury are to be charged to try whether he has been so previously convicted, and this may be done without swearing them again, and then the previous conviction is to be proved in the same manner as before this act passed.

"The proviso as to giving evidence of the previous conviction, if the prisoner give evidence of his good character remains unaltered.

"In a case tried at Gloucester since this act came into operation, the proof of the identity of the prisoner failed,

and Willes, J., directed the jury to be discharged as to the previous conviction, entertaining a doubt whether, if the jury gave a verdict, it might not be pleaded to a future indictment which alleged that previous conviction, and therefore it may be well to say a few words on this point. There is no authority bearing directly on the question, and the pleas of *autrefois acquit* and *convict* afford no support to such a plea; for the former rests on the ground that no one ought to be put in peril a second time for the same offence, and the latter on the ground that no one ought to be punished twice for the same offence; now the clauses giving a higher punishment for having been previously convicted, clearly take away the grounds on which both these pleas rest; and all that a finding in favor of a prisoner on the allegation of a previous conviction necessarily amounts to is that the jury are not satisfied that he was previously convicted. It by no means amounts to a determination that he had not been previously convicted. It may, therefore, well be doubted whether any such plea would be good; but, supposing that this difficulty were surmounted, another obstacle presents itself. In order to plead such a plea, the prisoner must set out the indictment in the case where his identity was not proved and his conviction for the felony charged in it, and aver that he was the same person that was so convicted; for until he had been so convicted the jury could have no jurisdiction to inquire as to his previous conviction, and then it would appear, by his own showing, that he had been convicted of felony before the commission of the offence charged in the indictment to which that plea was pleaded, and thus the question would arise whether the court might not sentence him accordingly. The clauses which apply to subsequent offences merely state that if a person be convicted of any

such offence after a previous conviction he shall be more severely punished, but never say in what manner the former conviction *must* be shown. In some instances no form of indictment or proof is given; in others it is stated what form of indictment and what evidence *shall be sufficient*. But it is plain that such provisions are merely for the purpose of facilitating the statement in the indictment and the evidence in support of it, and they leave the question as to the sufficiency of any other statement or proof wholly unaffected; and, therefore, where a defendant has by his plea alleged that he has been previously convicted, it seems open to contend that judgment might well be given for a subsequent offence on such a record; for the judgment ought to be according to the merits as appearing on the whole record.

"But even if this were not held to be so, such a plea would disclose the previous conviction, and the court would, no doubt, consider it as far as it could in awarding the punishment for the subsequent offence; even if the court could not award any greater punishment than that which was assigned to the subsequent offence alone. It may, therefore, well be doubted whether any counsel would think it prudent to plead such a plea.

"It is obvious, also, that in any case the prosecutor may allege the previous conviction for felony in the case where the proof of the previous conviction failed, and then the prisoner can have no answer to it."

In *Archbold*, 363, are found the following remarks and form of conviction under sec. 33 of the English Larceny Act sec. 19 of our Larceny Act. As observed before, section 139 of our Procedure Act, is the reproduction of section 116 of the English Larceny Act, under which the said form of indictment and remarks, in *Archbold*, are

given so that these remarks may be usefully inserted here, as entirely applicable to our own law on the subject.

INDICTMENT.

....., to wit: The Jurors for our Lady the Queen, upon their oath present, that J. S., on the ..... day of ..... A. D. 1866, one oak sapling, of the value of two shillings, the property of J. N., then growing in certain land situate in the parish of ....., in the county of..... unlawfully did steal, take and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings, against the form of the statute in such case made and provided; and the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned, to wit, on the ..... day of ....., A. D. 1865, at ....., in the county of ....., the said J. S. was duly convicted before J. P., one of her said Majesty's justices of the peace for the said county of ..... for that he the said J. S., on *(etc., as in the first conviction to the words,)* against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged for his said offence to forfeit and pay, the sum of five pounds, over and above the value of the said tree so stolen as aforesaid, and the further sum of two shillings, being the value of the said tree, and also to pay the sum of ..... shillings for costs; and, in default of immediate payment of the said sums, to be imprisoned in the ....., and there kept to hard labor for the space of ..... calendar months, unless the said sums should be sooner paid; and the jurors aforesaid, upon their oath aforesaid, do further say, that heretofore and before the

committing of the offence first hereinbefore mentioned, to wit, on the ..... day of ..... A. D. 1866, at ....., in the county of ..... the said J. S., was duly convicted before L. S., one of Her Majesty's justices of the peace for the said county of ....., for that he *(etc., setting out the second conviction in the same manner as the first and proceed thus :)* and so the jurors aforesaid, upon their oath aforesaid, do say that the said J. S., on the day and year first aforesaid, the said oak sapling, of the value of two shillings, the property of the said J. N. then growing in the said land, situate in the parish of ....., in the said county of ....., feloniously did steal, take and carry away, etc., against the form of the statute in such a case made and provided.

"*2nd Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the ..... day of ..... A. D. 1866, one oak sapling of the value of two shillings, the property of the said J. N., then growing in certain land, situate in the said parish of ....., in the said county of ....., feloniously did steal, take and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings, against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence in this count hereinbefore mentioned, to wit, on the ..... day of ..... A. D. 1865 *(here set out the first conviction as in the first count :)* and the jurors aforesaid, upon their oath aforesaid, do further say that heretofore, and before the committing of the offence in this count first hereinbefore mentioned, to wit, on the ..... day of ..... A. D. 1866 *(here set out the second conviction as directed in the first count.)*

"A first and second offence against the 24 & 25 V., c. 96, s. 33 (sec. 19 of our Larceny Act), are both punishable on summary conviction, but a subsequent offence against that section is a felony. The 24-25 Vic., ch. 96, sec. 116 (sec. 139 of Procedure Act), enacts, that 'in any indictment for any offence punishable under this act, and committed after a previous conviction or convictions for any felony, misdemeanor, *or offence, or offences punishable under summary conviction*, it shall be sufficient, *after charging the subsequent offence*, to state that the offender was at a certain time and place, or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be) without otherwise describing the previous felony, misdemeanor, offence, or offences,' etc. It appears clear from this enactment that it was intended that the subsequent offence should first be charged, and in both counts of the above form of indictment that course has accordingly been adopted.

"It will be seen that the first count consists of three parts: 1. The charge of the subsequent offence which is charged as an offence, *not as a felony;* 2. The charge of the two previous summary convictions; 3. An averment, commencing, 'and so the jurors aforesaid,' etc. The reason for charging the subsequent offence first has been already given. The reason for charging it in the first instance as an offence only is as follows: sec. 116, above referred to, goes on to enact that 'the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a

plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only, and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted, as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last mentioned inquiry.'

"In pursuance of this enactment, therefore, the prisoner must be first arraigned for the subsequent offence, and if he plead not guilty, the jury must first inquire and give their verdict concerning that subsequent offence. They cannot find the prisoner guilty of *felonious* stealing at that stage of the proceedings, for they are then ignorant of the previous conviction, and, therefore, at that stage they can only find him guilty of the offence of unlawfully stealing. If they find him guilty of the unlawful stealing they are then to inquire of the previous convictions; if they find him guilty of the previous convictions, or if he pleads guilty to them, the ingredients are complete which make the felony, which, however, up to that time they have not expressly found. But then follows the third part of the indictment, 'and so the jurors aforesaid,' etc. This last part of the indictment, perhaps, need not be put to the jury in so many words, as the verdict of guilty of the subsequent offence, together with the verdict of guilty of the

previous convictions, amount to a verdict of guilty of the felony, and would, as it should seem, authorize the entry of such a verdict on the record.

"That the omission of the word 'feloniously' in the first part of the indictment does not vitiate it, see *R.* v. *Crighton, R. & R.* 62, in which case an indictment for embezzlement was held good, in which the word 'feloniously' was omitted before the word 'embezzled,' in the first part of the indictment, which, however, concluded, and so the jurors say that the prisoner did 'feloniously embezzle, steal, take and carry away,' etc.

"Sec. 116 of 24-25 V., c. 96, is analogous to sec. 37 of 24-25 V., c. 99 (The Coinage Act) *(these two clauses are combined in sec.* 139 *of our Procedure Act,)* and the mode of proceeding at the trial above suggested was approved by the court of criminal appeal in *R.* v. *Martin*, 11 *Cox*, 343, where the prisoner was indicted under sec. 12 of 24-25 V., c. 99, for being unlawfully in possession of counterfeit coin, after having been convicted of unlawfully uttering counterfeit coin. The court held that, as sec. 37 of 24-25 Vic., c. 99 (sec. 139 and sec. 207 of our Procedure Act) regulated the mode of proceeding at the trial, the prisoner must be first arraigned upon the subsequent offence and evidence respecting the subsequent offence must first be submitted to the jury, and the charge of the previous conviction must not be inquired into until after the verdict on the charge of the subsequent offence.

"The second count varies from the first in charging the subsequent offence in the first instance as a felony."—*Archbold.*

In the case hereinbefore cited of *R.* v. *Martin*, 11 *Cox*, 343, Lush, J., said that when he decided the unreported case mentioned in *Archbold* as a different ruling on the

question, (p. 757 of the 17th edit.) his attention had not been called to the clause under consideration, and he concurred with the court in the judgment. *R.* v. *Goodwin*, 10 *Cox*, 534, then stands overruled. Nor can *R.* v. *Hilton*, *Bell*, *C. C.* 20, be followed in Canada since the enactment of the said section of the Procedure Act.

In *R.* v. *Clark*, *Dears.* 198, it was held that any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner; by the aforesaid section this is undoubtedly also allowed.

In *R.* v. *Fox*, 10 *Cox*, 502, upon a writ of error by the crown to increase the sentence, the Irish court of criminal appeal perceived that it appeared from the record that the provisions of sec. 116 of the Larceny Act, under which the indictment had been tried, as to the arraigning of the prisoner, etc., had been neglected, and, thereupon, quashed the conviction.

In *R.* v. *Spencer*, 1 *C. & K.* 159, it was held that the indictment need not state the judgment, but the introduction of the words given in *italics*, *supra*, in clause 139 of the Procedure Act, seem to require with us the statement of the judgment. It will be, at all events, more prudent to allege it.

The certificate must state that judgment was given for the previous offence and not merely that the prisoner is convicted.—*R.* v. *Ackroyd*, 1 *C. & K.*, 158; *R.* v. *Stonnel*, 1 *Cox*, 142; for the judgment might have been arrested, and the statute says the certificate is to contain the substance and *effect* of the indictment and conviction for the previous offence; until the sentence, there is no perfect conviction.

See, *post*, sec. 25, c. 181, as to punishment in the case of a second conviction for felony.

At common law, a subsequent offence is not punishable more severely than a first offence; it is only when a statute declares that a punishment may be greater after a previous conviction that this clause 139 of the Procedure Act applies. So in an indictment for a misdemeanor, as for obtaining money by false pretences, a previous conviction for felony cannot be charged.—*R.* v. *Garland*, 11 *Cox*, 224. And then this clause does not prevent the prosecution from disregarding, if it chooses, the fact of a previous conviction and from proceeding as for a first offence. But the court cannot take any notice of a previous conviction, unless it were alleged in the indictment and duly proved on the trial, for giving a greater punishment than allowed by law for the first offence.—*R.* v. *Summers*, 11 *Cox*, 248; *R.* v. *Willis*, 12 *Cox*, 192.

To complete the proof required on a previous conviction charged in the indictment, when the prisoner does not admit it, it must be proved that he is the same person that is mentioned in the certificate produced, but it is not necessary for this to call any witness that was present at the former trial; it is sufficient to prove that the defendant is the person who underwent the sentence *mentioned in the certificate.*—*R.* v. *Crofts*, 9 *C. & P.* 219; 2 *Russ.* 352.

By section 207 of the Procedure Act, it is enacted that, if upon such a trial for a subsequent offence, the defendant gives evidence of his good character, it shall be lawful for the prosecutor to give in reply evidence of the previous conviction, before the verdict on the subsequent offence is returned, and then the previous conviction forms part of the case for the jury on the subsequent offence.

It has been held on this proviso, that if the prisoner cross-examines the prosecution's witnesses, to show that

he has a good character, the previous conviction may be proved in reply.—*R.* v. *Gadbury*, 8 *C. & P.* 676.

This doctrine was confirmed in *R.* v. *Shrimpton*, 2 *Den.* 319, where Lord Campbell, C. J., delivering the judgment of the court, said: "It seems to me to be the natural and necessary interpretation to be put upon the words of the proviso in the statute, that if, whether by himself or by his counsel, the prisoner *attempts* to prove a good character, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the crown, it is lawful for the prosecutor to give the previous conviction in evidence for the consideration of the jury." In the course of the argument Lord Campbell said that, however, he would not admit evidence of a previous conviction, if a witness for the prosecution, being asked by the prisoner's counsel some question which has no reference to character, should happen to say something favorable to the prisoner's character.

It is said in 2 *Russ.* 354: "It is obvious, that where the prisoner gives evidence of his good character, the proper course is for the prosecutor to require the officer of the court to charge the jury with the previous conviction, and then to put in the certificate and prove the identity of the prisoner in the usual way. If the prisoner gives such evidence during the course of the case for the prosecution, then this should be done before the case for the prosecution closes; but if the evidence of character is given after the case for the prosecution closes, then the previous conviction must be proved in reply."

See sec. 86, c. 178, *Summary Convictions Act* and sec. 230, *post*, as to what is sufficient proof of a conviction.

PRELIMINARY REQUIREMENTS AS TO CERTAIN INDICTMENTS.

140. No bill of indictment for any of the offences following, that is to say, perjury, subornation of perjury, conspiracy, obtaining

money or other property by false pretences, forcible entry or detainer, nuisance, keeping a gambling house, keeping a disorderly house, or any indecent assault, shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless the indictment for such offence is preferred by the direction of the attorney general or solicitor general for the province, or by the direction or with the consent of a court or judge having jurisdiction to give such direction or to try the offence;

2. Nothing herein shall prevent the presentment to or finding by a grand jury of any bill of indictment, containing a count or counts for any of such offences, if such count or counts are such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts are founded, in the opinion of the court in or before which the said bill of indictment is preferred, upon the facts or evidence disclosed in any examination or deposition taken before a justice in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law.—32-33 *V.*, *c.* 29, *s.* 28. 40 *V.*, *c.* 26, *ss.* 1 *and* 2.

Sec. 80, *ante*, applies to this sec. 140; and, *held*, that if the magistrate dismisses the charge and refuses to commit or bail the person accused, he is bound, if required to do so, to take the prosecutor's recognizance to prosecute the charge.—*R.* v. *Lord Mayor*, 16 *Cox*, 77. See *ex parte Wason*, 38 *L. J. Q. B.* 302.

This clause 140 forms in England the acts known as the "Vexatious Indictments Act."—22-23 V., c. 17 and 30-31 V., c. 35.

The following offences fall under this enactment:

Perjury,

Subornation of Perjury,

Conspiracy,

Obtaining money or other property by false pretences,

Keeping a gambling house,
Keeping a disorderly house,
Any indecent assault.
Nuisance, and forcible entry and detainer.

The reasons for this legislation are thus given in *Archbold*, page 5: "Formerly any person was at liberty to prefer a bill of indictment against any other before a grand jury for any crime, without any previous inquiry before a justice into the truth of accusation. This right was often much abused, because, as the grand jury only hear the evidence for the prosecution, and the accused is totally unrepresented before them, it frequently happened that a person wholly innocent of the charge made against him, and who had no notice that any proceedings were about to be instituted, found that a grand jury had been induced to find a true bill against him, and so to injure his character and put him to great expense and inconvenience in defending himself against a groundless accusation. The above provisions have been introduced, in order in some degree to remedy this state of the law."

The Imperial statute requires that the indictment, when authorized by a judge, or by the attorney general or solicitor general, should be preferred by the direction, *or with the consent in writing*, of such judge, or attorney general, or solicitor general. Though the words "in writing" are omitted in our statute, there is no doubt that no verbal proof of such a direction would be sufficient for the grand jury, and that this direction must be in writing. By the terms of the clause itself, any judge of any court having jurisdiction to try the offence may give this direction, as well as any judge authorized to direct that a person guilty of perjury before him be prosecuted, under sec. 4. of c. 154, p. 42, *ante*.

It is not necessary that the performance of any of the conditions mentioned in this statute should be averred in the indictment or proved before the petit jury.—*Knowlden* v. *R.* (in error), 5 *B. & S.* 532; 9 *Cox*, 483.

When the indictment is preferred by the direction in writing of a judge of one of the superior courts, it is for the judge to whom the application is made for such direction to decide what materials ought to be before him, and it is not necessary to summon the party accused or to bring him before the judge; the court will not interfere with the exercice of the discretion of the judge under this clause.—*R.* v. *Bray*, 3 *B. & S.* 255; 9 *Cox*, 215.

The provisions of the above statute must be complied with in respect to every count of an indictment to which they are applicable, and any count in which they have not been complied with must be quashed.—*R.* v. *Fuidge*, *L. & C.* 390; 9 *Cox*, 430; *R.* v. *Bradlaugh*, 15 *Cox*, 156. So if an indictment contains one count for obtaining money by false pretences on the 26th of September, 1873, and another count for obtaining money by false, pretences on the 29th of September, 1873, though the false pretences charged be the same in both cases, the second count must be quashed, if the defendant appears to have been committed only for the offence of the 26th September.

Where three persons were committed for conspiracy, and afterwards the solicitor general, acting under this clause, directed a bill to be preferred against a fourth person, who had not been committed, and all four were indicted together for the same conspiracy, such a course was held unobjectionable.—*Knowlden* v. *R.* (in error), 5 *B. & S.* 532; 9 *Cox*, 483.

Where it is made clear, either on the face of an indict-

ment or by affidavit, that it has been found without jurisdiction, the court will quash it on motion of the defendant, even after he has pleaded; but in a doubtful case, they will leave him to his writ of error.—*R.* v. *Heane*, 4 *B. & S.* 947; 9 *Cox*, 433.

A prosecutor who has required the magistrates to take his recognizances to prosecute under sec. 80 of the Procedure Act, when the magistrates have refused to commit or to bail for trial the person charged, must either go on with the prosecution or have his recognizances forfeited, as it would defeat the object of the statute if he was allowed to move to have his recognizances discharged.—*R.* v. *Hargreaves*, 2 *F. & F.* 790.

Held, that where one of the preliminary formalities mentioned in this section is required, the direction by a Queen's counsel, then acting as crown prosecutor, for and in the name of the attorney-general is not sufficient. The attorney-general or solicitor-general alone can give the direction.—*Abrahams* v. *The Queen*, 6 *S. C. R.* 10.

A person prosecuting under sec. 140 of the Procedure Act, has no right to be represented by any other counsel than the representative of the attorney general.—*R.* v. *St. Amour*, 5, *R. L.* 469.

Attempting to obtain money by false pretences does not come within this section.—*R.* v. *Burton*, 13 *Cox*, 71.

As to the interpretation of sub-sec. 2 of the said section, see *R.* v. *Bradlaugh*, 15 *Cox*, 156; also *R.* v. *Bell*, 12 *Cox*, 37.

PLEAS.

141. No person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any court, or to imparl, or to have time allowed him to plead or demur to any such indictment; provided always, that if the court, before which

any person is so indicted, upon the application of such person, or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such court may grant such further time to plead or demur, or may adjourn the receiving or taking of the plea or demurrer and the trial, or, as the case may be, the trial of such person, to a future time of the sittings of the court or to the next or any subsequent session or sittings of the court, and upon such terms, as to bail or otherwise, as the court seem meet, and may, in the case of adjournment to another session or sitting, respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings, without entering into any fresh recognizances for that purpose.—32-33 *V.*, *c.* 29, *s.* 30.

See secs. 273 and 274, *post*, as to special provisions for Ontario, in cases of misdemeanor.

Formerly, it was always the practice in felonies to try the defendant at the same assizes; 1 *Chitty, C. L.* 483; but it was not customary nor agreeable to the general course of proceedings, unless by consent of the parties, or where the defendant was in gaol, to try persons indicted for misdemeanors during the same term in which they had pleaded not guilty or traversed the indictment.—4 *Blackstone*, 351.

Traverse took its name from the French *de travers*, which is no other than *de transverso* in Latin, signifying *on the other side;* because as the indictment on the one side chargeth the party, so he, on the other side, cometh in to discharge himself. *Lambard*, 540.

The word *traverse* is only applied to an issue taken upon an indictment for a misdemeanor; and it should rather seem applicable to the fact of putting off the trial till a following sessions or assizes, then to the joining of the issue; and, therefore, perhaps, the derivation is from the meaning of the word *transverto*, which, in barbarous Latin, is to go over, *i.e.*, to go from one sessions, etc.,

to another, and thus it is that the officer of the court asks the party whether he be ready to try then, or will traverse over to the next sessions, etc., but the issue is joined immediately by pleading not guilty.—5 *Burn*, 1019.

To *traverse* properly signifies the general issue or plea of *not guilty*.—4 *Stephens' Comm.* 419.

To *imparl* is to have licence to settle a litigation amicably, to obtain delay for adjustment.— *Wharton's Law Lexicon, verbo "imparl."*

The above section of our Procedure Act is taken from the 60 Geo. III. and 1 Geo. IV., c. 4, ss. 1 and 2, and the 14-15 V., c. 100, s. 27, and abolishes all these distinctions between felonies and misdemeanors.

On the 14-15 V., c. 100, s. 27, *Greaves* says:—

"This section is intended wholly to do away with traverses, which were found to occasion much injustice. A malicious prosecutor could formerly get a bill for any frivolous assault found by the grand jury, and cause the defendant to be apprehended during the sitting of the court; and then he was obliged to traverse till the next session or assizes, as he could not compel the prosecutor to try the case at the sessions or assizes at which the bill was found. This led to the expense of the traverse-book and sundry fees, which operated as a great hardship on the defendant, not unfrequently an innocent person. Again, the defendant, in many instances, has been able to turn his right to traverse into a means of improperly putting the prosecutor to expense and inconvenience. The intention of the section is to abolish traverses altogether, and to put misdemeanors precisely on the same footing in this respect as felonies. In felonies, the prisoner has no *right* to postpone his trial, but the court, on proper grounds, will always postpone the

trial. Under this section, therefore, no defendant in a case of misdemeanor can insist on postponing his trial; but the court in any case, upon proper grounds being adduced, not only may, but ought to, order the trial to be postponed. If therefore, a witness be absent, or ill, or there has not been reasonably sufficient time for the defendant to prepare for his defence, or there exist any other ground for believing that the ends of justice will be better answered by the trial taking place at a future period, the court would exercise a very sound discretion in postponing the trial accordingly."

There are several cases in which, upon a proper application, the court will put off the trial. And it has been laid down that no crime is so great, and no proceedings so instantaneous, but that the trial may be put off, if sufficient reasons are adduced to support the application; but to grant a postponement of a trial on the ground of the absence of witnesses, three conditions are necessary: 1st, the court must be satisfied that the absent witnesses are material witnesses in the case; 2nd, it must be shown that the party applying has been guilty of no laches or neglect in omitting to endeavor to procure the attendance of these witnesses; and, 3rd, the court must be satisfied that there is a reasonable expectation that the attendance of the witnesses can be procured at the future time to which it is prayed to put off the trial.—*R.* v. *D'Eon*, 3 *Burr.* 1514.

But if an affidavit is given that, on cross-examination, one of the absent witnessses for the prosecution who has been bound over to appear, can give material evidence for the prisoner, this is sufficient ground for postponing the trial, without showing that the defence has made any endeavour to procure this witness, attendance as the prisoner was justified in believing that, being bound over, the witness would be present.—*R.* v. *McCarthy, C. & M.* 625.

In *R.* v. *Savage*, 1 *C. & K.* 75. the court required an affidavit stating what points the absent witness was expected to prove, so as to form an opinion as to the witness being material or not.

The party making an application to postpone a trial, on the ground of the absence of a witness, is not bound in his affidavit to disclose all that the absent witness can testify to, but he must show that the absent witness is likely to prove some fact which may be allowed to go to the jury; he must also show the probability of having the witness at a later term.—*R.* v. *Dougall*, 18 *L. C. J.* 85.

The court will postpone until the next assizes the trial of a prisoner charged with murder, on an affidavit by his mother that she would be enabled to prove by several witnesses that he was of unsound mind, and that she and her family were in extreme poverty, and had been unable to procure the means to produce such witnesses, and that she had reason to believe that if time were given to her, the requisite funds would be provided.—*R.* v. *Langhurst*, 10 *Cox*, 353.

But the affidavit of the prisoner's attorney, setting forth the information he had received from the mother, is insufficient.—*Idem.*

Upon an indictment for a murder recently committed, the court will postpone the trial, upon the affidavit of the prisoner's attorney that he had not had sufficient time to prepare for the defence, the affidavit suggesting the possibility of a good ground of defence.—*R.* v. *Taylor*, 11 *Cox*, 340.

If the application is made by the defendant, he shall be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor, it is in the discretion of the court either, on conside-

ration of the circumstances of each particular case, to detain the defendant in custody, or admit him to bail, or to discharge him on his own recognizance.—*R.* v. *Beardmore*, 7 *C. & P.* 497; *R.* v. *Parish*, 7 *C. & P.* 782; *R.* v. *Osborn*, 7 *C. & P.* 799; *R.* v. *Bridgman*, *C. & M.* 271. But, as a general rule, after a bill has been found, if the offence be of a serious nature, the court will not admit the prisoner to bail.—*R.* v. *Chapman*, 8 *C. & P.* 558; *R.* v. *Guttridge*, 9 *C. & P.* 228; *R.* v. *Owen*, 9 *C. & P.* 83; *R.* v. *Bowen*, 9 *C. & P.* 509; 5 *Burn*, 1032.

The production of fresh evidence on behalf of the prosecution (not known or forthcoming at the preliminary investigation, and not communicated to the defence a reasonable time before the trial) may be a ground for postponing the trial, on the request of the defence, if it appears necessary to justice.—*R.* v. *Flannagan*, 15 *Cox*, 403.

On the finding of an indictment for perjury, application was made for defendant to appear by counsel and plead:—

Held.—That he should submit to the jurisdiction of the court, and appear himself, before he can be allowed to take any proceedings therein.—*R.* v. *Maxwell*, 10 *L. C. R.* 45.

142. No indictment shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition, of any person offering such plea; but if the court is satisfied, by affidavit or otherwise, of the truth of such plea, the court shall forthwith cause the indictment to be amended according to the truth, and shall call upon such person to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.—32-33 *V.*, *c.* 29, *s.* 31.

This clause is taken from the 7th Geo. IV., c. 64, s. 19 of the Imperial Statutes.

See *post*, sec. 238, where, *inter alia*, a variance in names may be amended.

The name of the prisoner is not a matter of essential

description, because on this subject the prosecutor may have no means of obtaining correct information. If, therefore, the prisoner's name or addition be wrongly described, or if the addition be omitted, the court may correct the error, and call upon the prisoner to plead to the amended indictment.

And now, the total omission of any addition to the name of the defendant is of no consequence, as has been seen *ante*, under sec. 128.

In *R.* v. *Orchard*, 8 *C. & P.* 565, a woman charged with the murder of her husband, being described as "A., the wife of B. C.," the record was amended by inserting the word "widow" instead of "wife."

The plea in abatement is now very little used, as well in consequence of this section as of sec. 143, see *post*. However, if pleaded, it must be remembered that it is always required to be framed with the greatest accuracy and precision, and must point out the objection, so that it may be readily amended or avoided in another prosecution. —*O'Connell* v. *R.*, in error, 11 *C. & F.* 155; so in a plea of misnomer, the defendant must disclose his real name: By sec. 2 of the Procedure Act, see, *ante*, the word "indictment" includes "any plea," so that a plea in abatement may be amended in the same cases where an indictment would be amendable.

By the 4 Anne, c. 16, s. 17, it is enacted that no dilatory plea shall be received, unless the party offering such plea do by affidavit prove the truth thereof; so a plea in abatement to an indictment will be set aside, if not sworn to or accompanied by an affidavit.—*R.* v. *Grainger*, 3 *Burr.* 1617; *R.* v. *Duffy*, 9 *Ir. L. R.* 163.

If the name of the defendant be unknown, and he refuse to disclose it, an indictment against him as "a

person whose name is to the jurors unknown, but who was personally brought before the said jurors by ..... the keeper of ..... prison," will be sufficient.—*R.* v. ——, *R. & R.* 489.

Whatever mistake may exist in the indictment, in respect of the name of the defendant, if he appears and pleads not guilty, he cannot afterwards take advantage of the error.—1 *Chit.* 202 ; 1 *Bishop, Cr. Proc.* 677.

As a rule, the plea in abatement must be pleaded before any plea in bar when the prisoner is arraigned; 2 *Hale*, 175. But the court may, in its discretion, allow the withdrawal of the plea of not guilty, so as to allow the prisoner to plead in abatement or to the jurisdiction or to demur: *Kinlock's* case, *Fost.* 16; *R.* v. *Purchase, C. & M.* 617. And this is entirely in the discretion of the judge, who should allow it for the purpose of substantial justice, but not to enable the prisoner to take advantage of a mere technicality.—*R.* v. *Turner*, 2 *M. & Rob*, 214; *R.* v. *Brown*, 1 *Den.* 291; *R.* v. *Odgers*, 2 *M. & Rob.* 479.

Bishop, 1 Cr. Proc. 884, says, that by a plea in abatement, the defendant can avail himself of the objection that the grand jury finding the indictment consisted of more than twenty-three members.

143. Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterwards; and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.—32-33 *V.*, *c.* 29, *s.* 32.

The Imperial statute, from which this clause is taken, reads as follows :

"Every objection to any indictment for any *formal* defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment *before the jury shall be sworn*, and not afterwards; and every court before which any such objection shall be taken *for any formal defect* may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared." —14-15 *V.*, *c.* 100, *s.* 25.

Greaves says on this clause: "Under this section all formal objections *must* be taken before the jury are sworn. They are no longer open upon a motion in arrest of judgment or on error. By the common law, many formal defects were amendable; see 1 *Chit.* 297, and the cases there cited; and it has been the common practice for the grand jury to consent, at the time they were sworn, that the court should amend matters of form.—2 *Hawkins*, *c.* 25, *s.* 98. The power of amendment, therefore, given in express terms by this section, seems to be no additional power, but rather the revival of a power that had rarely, if ever, been exercised of late years."

A motion for arrest of judgment will always avail to the defendant for defects apparent on the face of the indictment, when these defects are such that thereby no offence in law appears charged against the defendant. Such an indictment cannot be aided by verdict, and such defects are not cured by verdict. As said in *R.* v. *Waters*, 1 *Den.* 356: "There is a difference between an indictment which is bad for charging an act which, as laid, is no crime, and an indictment which is bad for charging a crime defectively; the latter may be aided by verdict, the former cannot."

Defects in matters of substance are not amendable, so if a material averment is omitted the court cannot allow the amendment of the indictment by inserting it, for the very good reason that if there is an omission of a material averment, of an averment without which there is no offence known to the law charged against the defendant, then strictly speaking there is no indictment; there is nothing to amend by.

In a criminal charge *there is no latitude of intention* to include anything more than is charged; the charge must be explicit enough to support itself. Per Lord Mansfield, *R.* v. *Wheatly*, 2 *Burr.* 1127.

The court cannot look to what the prosecutor intended to charge the defendant with; it can only look to what he has charged him with. And this charge, fully and clearly defined, of a crime or offence known to the law, the indictment as returned by the grand jury must contain. If the indictment as found by the grand jury does not contain such a charge, the defect is fatal; if the grand jury has not charged the defendant with a crime, it will not be allowed, at a later period of the case, to amend the indictment so as to make it charge one.

It must not be forgotten that when the clerk of the court, on the grand jury returning the bill, asked them to agree that the court should amend matters of form in the indictment, the grand jury gave their assent, but on the express condition that no matter of substance should be altered. Who are the accusers on an indictment? The grand jury, and to their accusation only has the prisoner to answer. This accusation cannot be changed into another one, at any time, without the consent of the accuser.—1 *Chit.* 298, 324. And if they have brought against the prisoner an accusation of an offence not known in law, the

court cannot turn it into an offence known in law, by *adding* to the indictment.

This section, though the word "formal" is not in it as in the English Act, must be interpreted as obliging the defendant to demur or move to quash before joining issue, for defects apparent on the face of the indictment, *which the court has the power to amend.* In cases where the court has not the power to amend the defect or omission, the motion for arrest of judgment will avail to the defendant as heretofore. And this clause itself supposes cases where the court has not the power to amend, when it says that: "No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority *of this act,*" given certainly to understand that "a motion for arrest of judgment shall be allowed for any de ect in the indictment which could not have been taken advantage of by demurrer or amended under the authority *of this act,*" leaving the question reduced to: *What are the amendments allowed under the authority of this act?* Which can be, it seems, very easily answered. Of course this clause has no reference to the amendments allowed *on the trial,* by sections 237 and 238, see *post.* These do not relate to defects *apparent on the face of the indictment,* and cannot, in consequence, be the subject of a motion in arrest of judgment. Then the only other clause in the act relating to amendments is this section 143. And it does not authorize amendments in matters of substance or material to the issue. For instance, if the word "feloniously" in an indictment for felony has been omitted, the court cannot allow its insertion. This would be *adding* to the offence charged by the grand jury; it would be a change of its nature and gravity; note *a*, by *Greaves*, 1 *Russ.* 935; *R.* v. *Gray*, *L. & C.* 365.

And in an indictment intended to be for burglary, the word "burglariously," if omitted, cannot be inserted by amendment. It would be charging the defendant with burglary when the grand jury have not charged him with that offence. And in an indictment intended to be for murder, if it is barely alleged that the mortal stroke was given feloniously, or that the defendant *murdered*, etc., without adding *of malice aforethought*, or if it only charge that he *killed* or *slew* without averring that he *murdered* the deceased, the defendant can only be convicted of manslaughter. —1 *East, P. C.* 345; 1 *Chit.* 243; 3 *Chit.* 737, 751. And why? Because the offence charged is manslaughter, not murder. And the court has not the power by any amendment to try for *murder* a defendant whom the grand jury has charged with *manslaughter*.

And even, in the case of a misdemeanor, on an indictment for obtaining money by false pretences, if the words "*with intent to defraud*" are omitted in the indictment, there is no offence charged, and the court cannot allow their insertion by amendment; *R.* v. *James*, 12 *Cox*, 127, per Lush, J.; see *Archbold*, 60. So if a statute makes it an offence to do an act "wilfully" or "maliciously" the indictment is bad if it does not contain these words; *R.* v. *Bent*, 1 *Den.* 157; *R.* v. *Ryan*, 2 *Moo. C. C.* 15; *R.* v. *Turner*, 1 *Moo. C. C.* 239; it does not charge the defendant with a crime.

And whether the defendant takes advantage of an objection of this nature, or not, makes no difference. Nay, even after verdict, even without a motion in arrest of judgment, the court is obliged to arrest the judgment, if the indictment is insufficient.—*R.* v. *Wheatly*, 2 *Burr.* 1127; 1 *Chit.* 303; *R.* v. *Turner*, 1 *Moo. C. C.* 239; *R.* v. *Webb*, 1 *Den.* 338; see also *Sills' Case, Deurs.* 132.

These omissions are not *defects* in the sense of this word as used in this section; they make the indictment no indictment at all, or, at least, the indictment charges the defendant with no crime or offence.

On these principles, the Court of Queen's Bench, in Quebec, decided *R.* v. *Carr*, 26 *L. C. J.* 61. See, *post*, under sec. 246.

In this case the indictment was under sec. 10, of c. 20, 32-33 V., now sec. 8, c. 162, for an attempt to murder. A verdict of guilty was given, but the court being of opinion that the indictment was defective on its face, and that words material to the constitution of the offence charged were omitted therein, granted a motion to arrest the judgment and quash the indictment, though the prosecutor invoked section 32, now sec. 143 of the Procedure Act, and contended that the prisoner was too late to take the objection. Undoubtedly, if this indictment had been at first demurred to, the Court of Queen's Bench would have quashed it, and would not have allowed it to be amended. Sections 128 and 245 by enacting that, even after verdict an indictment shall not be held insufficient for want of the averment of *any matter not necessary to be proved*, cannot be made to say that an indictment not averring a matter *necessary to be proved* is sufficient, or that a verdict on such indictment will not be quashed.

Section 143 leaves the law of amendments what it is at common law. It leaves to the judge the discretion of allowing or refusing the amendment, and in matter of substance, no such amendment can be allowed. An irregularity may be amendable, but a nullity is incurable, and it has been held, that the court itself, *ex proprio motu*, will refuse to try an indictment on which plainly no good judgment can be rendered.—*R.* v. *Tremearne*, *R. & M.* 147; *R.* v. *Deacon*, *R. & M.* 27.

The ruling in the case of *R.* v. *Mason*, 22 *U. C. C. P.* 246, is not a contrary decision. The concluding remarks of Gwynne, J., show that the court in that case never went so far as to hold that no arrest of judgment or reversal on error should, *in any case*, be granted for *any* defect *whatever* in the indictment, apparent on the face thereof. What can be gathered from these remarks, taken together with those of Hagarty, C. J., is, that it was there held that the objections taken would even not have been good grounds of demurrer, or that if they had been raised by demurrer, the court would have had the power to amend the indictment in such particulars, and that, therefore, the defendant was too late to raise these objections after verdict. And this ruling is perfectly right.

As remarked, *ante*, if the defect is one which the court could amend, the objection must be taken *in limine litis;* a plea of not guilty may then be a waiver of the right to take advantage of such a defect. But if the indictment is defective in a matter of substance, a plea of not guilty is no waiver. Nay, more, a plea of guilty is no waiver, and does not prevent the defendant from taking exceptions in arrest of judgment to faults apparent on the record.—1 *Chit.* 431; 2 *Hawkins*, 466. The court, as said before, cannot allow an amendment adding, for instance, to the offence charged, or having the effect to make the indictment charge an offence where none, in law, was charged, or to change the nature of the offence charged by the grand jury, and the statute obliges to demur or move to quash before plea, only for objections based on *amendable* defects.

It is true, as remarked by the learned judge in *R.* v. *Mason*, that the last part of this clause of our statute, taking away, in express words, the motion in arrest of

judgment, is not in the Imperial statute; but it will be seen, *ante*, that Mr. Greaves, who framed the English clause, is of opinion that even without these words, it has the same effect; the words *and not afterwards*, in the English Act, cannot be interpreted otherwise.

Another difference between the two acts consists in the words *before the defendant has pleaded* in the Canadian Act, instead of *before the jury shall be sworn* in the English one. This is not an important change, however. In all cases, a demurrer must be pleaded before the plea of "not guilty," though the same may not strictly be said of the motion to quash.—*R.* v. *Heane*, 9 *Cox*, 433. And the judge may allow a plea of "not guilty" to be withdrawn in order to give the defendant his right to demur or move to quash for any substantial defect. See cases under next section.

Greaves' Note, MSS.—"I altogether concur in the remarks on the omission of 'formal' before 'defect' in the 14-15 V., c. 100, s. 25. If construed according to the terms under the new clause, a man might be hanged for what was really no crime, because he was too ignorant to perceive the defect in the *statement of the offence* in due time."

If the indictment does not charge any offence, the court cannot amend it so as to make it charge an offence. —*R.* v. *Norton*, 16 *Cox*, 59. See *R.* v. *Flynn*, under s. 13, c. 162, p. 163, *ante*.

Indictments may be signed by the clerk of the crown, or by a counsel, prosecuting for the crown "for and in the name of the attorney general of the Province."—*R.* v. *Grant*, 2 *L. C. L. J.* 276; *R.* v. *Downey*, 13 *L. C. J.* 193; *R.* v. *Ouellette*, 7. *R. L.* 222; *R.* v. *Regnier*, *Ramsay's App. Cas.* 188.

A defective indictment may be quashed on motion as well as on demurrer.—*R.* v. *Bathgate*, 13 *L. C. J.* 299.

Everything that is necessary to constitute the offence must be alleged in the indictment.—*R.* v. *Bourdon*, 2 *R. L.* 713.

On an indictment for defrauding a bank, the indictment was amended by adding the words "a body corporate."—*R.* v. *Paquet*, 2 *L. N.* 140.

Defendant was indicted as mistress of a certain girl called *Marie*. At the trial, the indictment was amended by striking out that she was such mistress, and inserting the girl's right name.—*R.* v. *Bissonette*, 23 *L. C. J.* 249. See also *R.* v. *Leonard*, 3 *L. N.* 138.

An indictment for perjury, based on an oath alleged to have been made before the "judge of the general sessions of the peace in and for the said district" instead of "before the judge of the sessions of the peace in and for the city of Montreal," may be amended after plea.—*R.* v. *Pelletier*, 15 *L. C. J.* 146.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanor, as counts, to a count for larceny; and the question, at all events, can only be raised by demurrer or motion to quash the indictment, under 32-33 V., c. 29, s. 32. And where there has been a demurrer to such allegations as insufficient in law, and judgment in favor of the prisoner, but he is convicted on the felony count, a court of error will not re-open the matter on the suggestion that there is a misjoinder of counts.

Where a prisoner arraigned on such an indictment pleads "not guilty" and is tried at a subsequent assize when the count for larceny only is read to the jury:

Held, no error, as the prisoner was given in charge on the larceny count only.—*R.* v. *Mason*, 22 *U. C. C. P.* 246.

Defendant was convicted on an indictment charging him with feloniously receiving goods of three different persons (naming them) knowing the same to have been feloniously stolen:

Held, that the defendant, having pleaded to the indictment could not, in arrest of judgment, object that it was bad as charging him with receiving goods not alleged to have been feloniously stolen, as the defect was aided by the verdict under the act of 1869, c. 29, s. 32, and the fact of three different offences being charged in the indictment, if objectionable at all, could not be taken advantage of after verdict.

An order for an extra jury panel under R. S. (N. S.) 3d Ser., c. 92, s. 37, is valid although not signed by a majority of the judges.—*The Queen* v. *Quinn*, 1 *R. & G. (N. S.)* 139.

An indictment charged that the prisoner did steal, take and carry away, etc., without charging that it was done feloniously. Before pleading the prisoner's counsel moved to quash the indictment. After argument the presiding judge allowed the indictment to be amended, under 32-33 V., c. 20, s. 32, by adding the word "feloniously." The prisoner was found guilty upon the amended indictment.

Held, on a case reserved, that the indictment without the word *feloniously* was bad and that it was not amendable under the said section.—*The Queen* v. *Morrison*, 2 *P. & B. (N. B.)* 682.

144. If any person, being arraigned upon any indictment for any indictable offence, pleads thereto a plea of "not guilty," he shall, by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court may, in the usual manner, order a jury for the trial of such person accordingly.—32-33 *V., c.* 29, *s.* 33.

This clause is taken from the Imperial Act, 7-8 Geo. IV., c. 28, s. 1.

Formerly, after the prisoner had pleaded "not guilty," he was asked by the clerk: "*How wilt thou be tried?*" To have his trial, he had to answer, if a commoner, "*By God and the country;*" if a peer, "*By God and my peers.*" If he refused to answer, the indictment was taken *pro confesso*, and he stood convicted.—4 *Blackstone*, 341.

Plea of guilty allowed to be withdrawn.—*R.* v. *Huddell*, 20 *L. C. J.* 301. *See R.* v. *Brown*, 1 *Den.* 291, and cases there cited; also, *Kinloch's case*, *Fost.* 16.

145. If any person, being arraigned upon any indictment for any indictable offence, stands mute of malice, or will not answer directly to the indictment, the court may order the proper officer to enter a plea of "not guilty," on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.—32-33 *V.*, *c.* 29, *s.* 34.

This clause is taken from the 7-8 Geo. IV, c. 28, sec. 2 of the Imperial statutes.

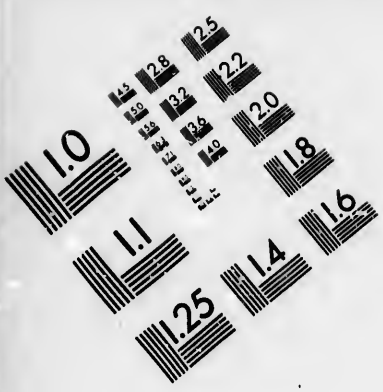
Formerly, to stand mute was to confess, and, if the defendant stood mute of malice, he was immediately sentenced.—4 *Blackstone*, 324, 329. In the case of *R.* v. *Mercier*, 1 *Leach*, 183, the prisoner being arraigned, stood mute. The court ordered the sheriff to return a jury *instanter*, to try whether the prisoner stood mute obstinately, or by the visitation of God. A jury being accordingly returned, the following oath was administered to them: "You shall diligently enquire and true presentment make for and on behalf of Our Sovereign Lord the King, whether Francis Mercier, the now prisoner at the bar, being now here indicted for the wilful murder of David Samuel Mondrey, stands mute fraudulently, wilfully and obstinately, or by the providence and act of God, according to your evidence and knowledge." The jury examined the witness in open court, and returned as their verdict that

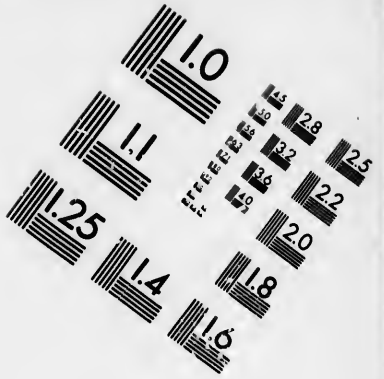
the prisoner stood mute of malice, and not by the visitation of God. Whereupon the court immediately passed sentence of death upon the prisoner, who was accordingly executed on the Monday following.

A prisoner who had been previously tried and convicted, but whose trial was deemed a nullity on account of some informality in swearing the witnesses, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had been already tried. Littledale, J., and Vaughan, B., ordered a plea of not guilty to be entered for him under this section.—*R.* v. *Bitton*, 6 *C. & P.* 92.

A person deaf and dumb was to be tried for a felony; the judge ordered a jury to be empannelled to try whether he was mute by the visitation of God; the jury found that he was so; they were then sworn to try whether he was able to plead, which they found in the affirmative, and the defendant by a sign pleaded not guilty; the judge then ordered the jury to be empannelled to try whether the defendant was now sane or not, and, on this question, directed them to say whether the defendant had sufficient intellect to understand the course of the proceedings to make a proper defence, to challenge the jurors and comprehend the details of the evidence, and that, if they thought he had not, they should find him of non-sane mind.—*R.* v. *Pritchard*, 7 *C. & P.* 303.

It seems that where a prisoner who is called on to plead remains mute, the court cannot hear evidence to prove that he does so through malice, and then enter a plea of not guilty under this section; but a jury must be empannelled to try the question of malice, and it is upon their finding that the court is authorized to enter the plea.—*R.* v. *Israel*, 2 *Cox*, 263.





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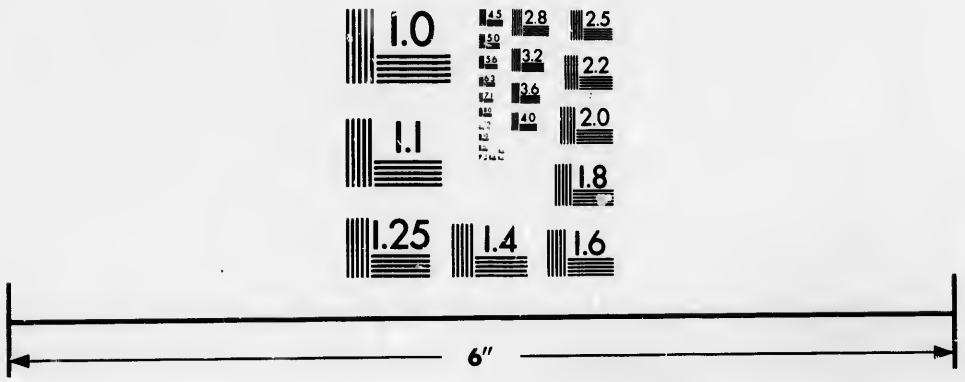

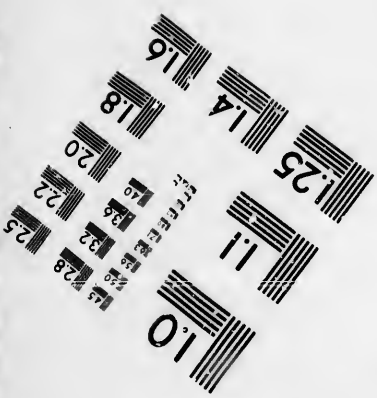

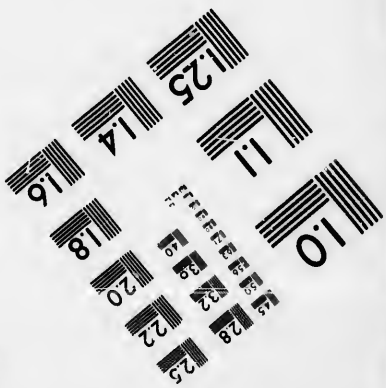

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A prisoner, when called upon to plead to an indictment, stood mute. A jury was empannelled and sworn to try whether he was mute of malice or by the visitation of God. A verdict of mute of malice having been returned, the court ordered a plea of not guilty to be entered on the record.—*R.* v. *Schleter*, 10 *Cox*, 409.

A collateral issue of this kind is always tried *instanter* by a jury empannelled for that purpose. In fact, there is properly speaking no issue upon it; it is an inquest of office. No peremptory challenges are allowed.—*R.* v. *Radcliffe*, *Fost.* 36, 40. The jury may be chosen amongst the jurors in attendance for the term of court, but must be returned by the sheriff, on the spot, as a special panel. —*Dickenson's Quarter Sessions*, 481. If the jury return a verdict of "mute by the visitation of God," as where the prisoner is deaf or dumb, or both, a plea of not guilty is to be entered, and the trial is to proceed in the usual way, but in so critical a case, great diligence and circumspection ought to be exercised by the court; all the proceedings against the prisoner must be examined with a critical eye, and every possible assistance consistent with the rules of law, given to him by the court.—*R.* v. *Steel*, 1 *Leach*, 451. In the case of *R.* v. *Jones*, *note*, 1 *Leach*, 452, the jury returned that the prisoner was "mute by the visitation of God." It appearing that the prisoner, who was deaf and dumb, could receive and communicate information by certain signs, a person skilled in those signs was sworn to act as interpreter and the trial then proceeded.

It would seem that now, as whether the prisoner stands mute of malice or by visitation of God, a plea of not guilty is to be entered, the only reason why a jury must be sworn to enquire whether the prisoner stands mute of

malice or not is to put the court in a position to know how to act during the trial, as above stated in *Steel's* and *Jones'* cases.—*R.* v. *Berry*, 13 *Cox*, 189.

By section 255 of the Procedure Act, see *post*, it is enacted that: "If any person indicted for any offence be insane, and upon arraignment be so found by a jury empannelled for that purpose, so that such person cannot be tried upon such indictment, or if, upon the trial of any person so indicted, such person appears to the jury charged with the indictment to be insane, the court before whom such person is brought to be arraigned, or is tried as aforesaid, may direct such finding to be recorded, and thereupon may order such person to be kept in strict custody until the pleasure of the Lieutenant Governor be known.

146. In any plea of *autrefois convict* or *autrefois acquit* it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment.—32-33 *V.*, *c.* 29, *s.* 35.

This clause is taken from the 14-15 V., c. 100, s. 28, of the Imperial Statutes.

It is a sacred maxim of law that "*nemo bis vexari debet pro eadem causâ*," no man ought to be twice tried, or brought into jeopardy of his life or liberty more than once, for the same offence.

"This section very properly," says Greaves, Lord Campbell's Acts, 31, "abbreviates the form of pleas of *autrefois acquit* and *autrefois convict*, and renders it unnecessary to set forth the previous indictment, and to make the many averments of identity, and so forth, which were requisite before the passing of this statute."

These pleas are of the class called special pleas in bar.

The following is the form of a plea of *autrefois acquit*, in answer to the whole of the indictment:—

And the said J. S., in his own proper person cometh into court here, and having heard the said indictment read, said, that our said Lady the Queen ought not further to prosecute the said indictment against the said J. S., because he saith that heretofore, to wit, at (describe the court correctly) he, the said J. S., was lawfully acquitted of the said offence charged in the said indictment and this, he, the said J. S., is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.—Archbold, 132.

It is not necessary that the plea should be written on parchment; sec. 103 of the Procedure Act, *ante.*

If there is more than one count in the indictment it is better to plead to each.—*R.* v. *Westley,* 11 *Cox,* 139. The defendant may, at the same time, plead over to the indictment, in felonies, by adding "*and as to the felony and larceny* (as the case may be) *of which the said J. S. now stands indicted, he, the said J. S., saith that he is not guilty thereof; and of this, he, the said J. S., puts himself upon the country.*" If, however, the defendant pleads *autrefois acquit,* without, at the same time, pleading over to the felony, after his special plea is found against him, he may still plead over to the felony.—*Archbold,* 133. But it seems that in misdemeanors, if the defendant pleads *autrefois acquit* or *autrefois convict,* and the jury find against him on this issue, the verdict operates as a conviction of the offence, and nothing remains to be done but to sentence the prisoner.—*Archbold,* 134; 1 *Chit.* 461, 463; 1 *Bishop, Cr. Proc.* 755, 809, 811, 812, *R.* v. *Bird,* 2 *Den.* 94. As a consequence of this, it has been held, in England, that, in misdemeanors, the defendant cannot, even by separate pleas, at the same

time plead *autrefois acquit* or *autrefois convict*, and *not guilty*.—*R.* v. *Charlesworth*, 9 *Cox*, 44; 1 *B. & S.* 460. See also *R.* v. *Taylor*, 3 *B. & C.* 502. Though in a later case of misdemeanor a plea of not guilty seems to have been put in with a plea of *autrefois acquit*.—*R.* v. *Westley*, 11 *Cox*, 139.

In felonies, the jury cannct be charged at the same time with both issues, but must first determine the plea of former acquittal.—1 *Chit.* 460; *R.* v. *Roche*, 1 *Leach*, 134. The prisoner has the right of challenge in the usual way; 2 *Hale*, *P. C.* 267*d*; *R.* v. *Scott*, 1 *Leach*, 401. See remarks, *post*, under sec. 163, as to challenges. If the verdict is in favor of the prisoner, and finds the plea proved, the prisoner is discharged, and the trial is at an end. If, on the contrary, the jury find the plea "not proved," they are charged again, this time to inquire of the second issue, *i.e.*, on the plea of not guilty, and the trial proceeds as if no plea in bar had been pleaded.—1 *Chit.* 461; 2 *Hale*, 255; *R.* v. *Knight*, *L. & C.* 378. They need not be sworn *de novo* to try the second issue.—*R.* v. *Key*, 2 *Den.* 347. Formerly when such pleas contained the first indictment, with the judgment, etc., detailed at full length, the prosecutor could demur to it, and then the court pronounced on that demurrer, without the intervention of a jury; but now, with the general form allowed by the statute, the prosecutor meets the plea with a general replication, entered only when the record is made up, after trial, though not necessarily actually pleaded, and the issue must be determined by a jury.—See, however, *R.* v. *Connell*, 6 *Cox*, 178; *Archbold*, 133; *Note by Greaves*, 2 *Russ.* 62. See form and proceedings, *R.* v. *Tancock*, 13 *Cox*, 217.

This replication, and the *similiter* (as to which see sec.

246, *post,)* when so entered upon the record, may be as follows:

And hereupon A. B., who prosecutes for our said Lady the Queen in this behalf, says that by reason of any thing in the said plea of the said J. S. above pleaded in bar to the present indictment, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S., because he says that the said J. S. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said J. S. hath above in his said plea alleged; and this he the said A. B. prays, may be inquired of by the country. And the said J. S. doth the like.

For a form of plea of *autrefois acquit* or *autrefois convict* to one count only of the indictment, see Lord Campbell's Acts, by Greaves, 88, and *R.* v. *Connell*, 6 *Cox*, 178.

When a man is indicted for an offence and acquitted he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and if he be thus indicted a second time, he may plead *autrefois acquit*, and it will be a good bar to the indictment. The true test by which the question whether such a plea is a sufficient bar in any particular case may be tried, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.—See *R.* v. *Bulmer*, *post*, under sec. 264; *R.* v. *Sheen*, 2 *C. & P.* 634; *R.* v. *Bird*, 2 *Den.* 94; *R.* v. *Drury*, 3 *C. & K.* 193. Thus an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods, because upon

the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny.—2 *Hale*, 245; *R.* v. *Vandercomb*, 2 *Leach*, 716; because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter, because the defendant could be convicted of the manslaughter on the first indictment. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder, for they differ only in degree.—2 *Hale*, 246; 1 *Chit.* 455. But see *R.* v. *Tancock*, 13 *Cox*, 217.

Now, also, no one can, after being acquitted on an indictment for felony or misdemeanor, be indicted for an attempt to commit it, for he might have been convicted of the attempt on the previous indictment; s. 183 post. But this applies only to the common law misdemeanor of attempting to commit a crime, for which section 183 allows a verdict, and not when the attempt to commit the offence charged is by a special statutory enactment made a felony. So, upon an indictment for the statutory felony of administering poison with intent to murder, a previous acquittal on an indictment for murder, founded on the same facts, cannot be pleaded in bar.—*R.* v. *Connell*, 6 *Cox*, 178. An acquittal for the murder of a child is a bar to an indictment for concealing the birth of the same child, because by sec. 188, *post*, the defendant upon the first indictment might have been found guilty of concealing the birth.—*R.* v. *Ryland*, note by *Greaves*, 2 *Russ.* 55.

So, a person acquitted of a felony including an assault, and for which assault the defendant might have been convicted upon the trial for the felony, under sec. 191 of the Procedure Act, cannot be subsequently indicted for this assault.—*R.* v. *Smith*, 34 *U. C. Q. B.* 552.

So, also, a person, indicted and acquitted on an indictment for a robbery, cannot afterwards be indicted for an assault with intent to commit it; s. 192, *post.* A person indicted and tried for a misdemeanor, which upon the trial appears to amount in law to a felony, cannot afterwards be indicted for the felony; the statute has the words "*if convicted*," but, by the common law, this rule would extend to a prisoner acquitted on trial, s. 184, *post.* A person indicted and acquitted for embezzlement cannot afterwards be indicted as for a larceny, or if tried and acquitted for a larceny cannot afterwards be indicted as for embezzlement upon evidence of the same facts, s. 195, *post.* A person indicted for larceny and duly acquitted cannot afterwards be indicted on the same facts for obtaining by false pretences, and a person indicted for obtaining by false pretences and acquitted cannot afterwards be prosecuted for larceny on the same facts. Secs. 196- 98, *post.*

And the ruling in *R.* v. *Henderson*, 2 *Moo. C. C.* 192, as cited in *Archbold, p.* 132, is not law here; but a reference to the report shows that there was no such ruling in that case, as given in *Archbold*, and even admitting there had been, it would not have been free from doubt, even in England, where they have not the enactment contained in sec. 198, *post.*—2 *Taylor, Ev. par.* 1516; though see *R.* v. *Adams*, 1 *Den.* 38.

If a man be indicted in any manner for receiving stolen goods, he cannot afterwards be prosecuted again on the

same facts; *secs.* 199, 200, *post.* This rule is equally applicable, though the first indictment be against the defendant jointly with others, and the second against him alone, and upon the first indictment the prisoner has been acquitted, and the others found guilty, because he might have been convicted on the first.—*R.* v. *Dann*, 1 *Moo. C. C.* 424. See *R.* v. *O'Brien*, 15 *Cox*, 29.

But the prisoner must have been put in jeopardy on the first indictment. If by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment for the offence charged against him in the first indictment, as it stood at the time of the verdict, he has not been in jeopardy, in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent indictment.—*R.* v. *Drury*, 3 *C. & K.* 190; *R.* v. *Green, Dears & B.* 113; *R.* v. *Gilmore*, 15 *Cox*, 85.

"In general," says *Starkie*, Cr. Pl. 320, "where the original indictment is insufficient, no acquittal founded upon that insufficiency can be available, because the defendant's life was never really placed in jeopardy, and therefore the reason for allowing the plea entirely fails."

And *Chit.* 1 *Cr. L.* 454, says: "And hence we may observe that the great general rule upon this part of the subject is, that the previous indictment must have been one upon which the defendant could legally have been convicted, upon which his life or liberty was not merely in imaginary but in actual danger, and consequently in which there was no material error ..... Upon the same principle, where the defendant was acquitted merely on some error of indictment, or variance in the recitals, he may be indicted again upon the same charge, for the first proceedings were merely nugatory. Thus, if an indictment for larceny lay

the property in the goods in the wrong person, the party may be acquitted, and afterwards tried on another, stating it to be the property of the legal owner."

And even now, that an amendment is allowed in such a case, and that the court, on the first indictment, might have substituted the name of the legal owner for the wrong one first alleged, if the indictment was not, in fact, so amended, the plea of *autrefois acquit* cannot be sustained; the indictment must be considered as it was, not as it might have been made; the court was not bound to amend, and the indictment to be considered is the indictment upon which the jury in the first case gave their verdict.—*R.* v. *Green, Dears. & B.* 113.

An abortive trial without verdict cannot be pleaded as an acquittal; the acquittal, in order to be a bar, must be by verdict on a trial. Thus, if after the jury are sworn, and the prisoner given in charge to them, the judge, in order to prevent a failure of justice by a refusal of a witness to give his evidence, or by reason of the non-agreement of the jury to a verdict, or by reason of the death or such illness of a juryman as to necessitate the discharge of the jury before verdict, does so discharge them without coming to a verdict, in all these and analogous cases the prisoner must be tried again.—*R.* v. *Winsor*, 10 *Cox*, 276; 7 *B. & S.* 490; *R.* v. *Charlesworth* 1 *B. & S.*, 460; 1 *Burn*, 348; 2 *Russ.* 62, *note by Greaves; R.* v. *Ward*, 10 *Cox*, 573.

A previous summary conviction for an assault is not a bar to an indictment for manslaughter of the party assaulted, dead since, founded upon the same facts.—*R.* v. *Morris*, 10 *Cox*, 480.

A person was acquitted of an assault with intent to murder, but was convicted of an assault with intent to do

grievous bodily harm, and the prosecutor, having subsequently died, he was indicted for murder, and it was held right.—*R.* v. *Salvi*, 10 *Cox*, 481, *note*.

And these two cases cannot be questioned. There can never be the crime of murder till the party assaulted dies: the crime has no existence, in fact or law, till the death of the party assaulted. Therefore, it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of the injured person's death is not merely a supervening aggravation, but it creates a new crime; per Lord Ardmillan, in *Stewart's Case* (Scotland), cited in 1 *Bishop, Cr. L.* 1059.

A man steals twenty pigs at the same time, can he be charged with twenty larcenies of one pig, in twenty different indictments? After verdict on the first indictment, can he maintain a plea of *autrefois acquit* or *autrefois convict* in answer to the subsequent indictments?

It may be said that, in principle, a man who steals twenty pigs, at the same time, commits but one larceny, but one criminal act. Suppose a man steals a bag containing three bushels of potatoes, could he be charged with three larcenies of one bushel each, in three different indictments, or with two larcenies in two indictments, one of the bag, and one of the potatoes? Or if a man steals ten pounds in ten one pound notes, can he be charged in ten different indictments with ten different larcenies of one pound?

Then A., at one shot, murders B. and C., though the shot was directed at B. only; has he committed one murder or two murders? If he is tried for the murder of B. and acquitted, can he plead *autrefois acquit* to an indictment

charging him with the murder of C.? Of course not. He is guilty of two murders.

In all these cases there has been only one criminal act, only one actual execution of a criminal design, only one guilty impulse of the mind; yet it appears to be settled that where *several chattels* are stolen at the same time, an acquittal on an indictment for stealing one of them is no bar to an indictment for stealing another of them, although it appear that both were taken by the same act.—*8th Rep. Cr. L. Comm., 5th July*, 1845.

"And thus it hath happened," says *Hale, V.* 2, p. 245, "that a man acquitted for stealing the horse hath yet been arraigned and convict for stealing the saddle, though both were done at the same time." And in *R.* v. *Brettel, C. & M.* 609; 2 *Russ.* 60, it was held that where the prisoner had been convicted of stealing one pig, he might be tried for stealing another pig at the same time and place; but as the prisoner was undergoing his sentence upon the conviction already given against him, the Judge (Cresswell, J.) thought that the second indictment should be abandoned, and this was done.

Erle, J., in *R.* v. *Bond*, 1 *Den.* 517, seemed to be of opinion that *one* act of taking could not be *two* distinct crimes. He said: "I do not think it necessary in a plea of *autrefois convict*, to allege the identity of the specific chattel charged to be taken (under the old form of such pleas). Suppose the first charge to be taking a coat; the second, to be taking a pocket-book; *autrefois convict* pleaded; parol evidence showing that the pocket-book was in the pocket of the coat. I think that I would support the plea because it would show a previous conviction for the *same act of taking.*"

But a note by *Greaves*, 2 *Russ.* 60, thinks this dictum erroneous, and the reporter, in Denison, in a foot note to the case, says: "*Quære*, whether a plea of *autrefois acquit* or *convict* would be supported by mere proof of the *same act of taking?* Suppose a purse stolen containing ten sovereigns, five belonging to A., five to B. Two indictments preferred one charging prisoner with a theft from A., the other with a theft from B.; a conviction of the theft from A. If the same act of taking were the gist of the crime, he could plead *autrefois convict* to the indictment of stealing from B. It seems that, to support a plea of *autrefois convict or acquit*, there must be proof of '*a taking of the same thing from the same party at the same time.*'"

If, according to this note, in the case where ten sovereigns are stolen at one and the same time, in the same purse, five belonging to A., five to B., two crimes have been committed by one act, it follows that in the case of the stealing of a bag containing potatoes, if the bag belongs to A., and the potatoes to B., two larcenies may be charged, one for the bag and one for the potatoes.

The proof, on a plea of this nature, lies on the defendant, and he is to begin.—*Archbold*, 133; 2 *Russ.* 62, *note* by *Greaves*.

In order to prove a former acquittal or conviction, if it took place at a previous assizes or in a different court, the prisoner must produce the record regularly drawn up.—*R.* v. *Bowman*, 6 *C. & P.* 101, 337. But if it took place at the same assizes, the original indictment, with the notes of the clerk of the court upon it, are sufficient evidence.—*R.* v. *Lea*, 2 *Moo. C. C.* 9 (called *R.* v. *Parry*, in 7 *C. & P.* 836).

But see secs. 230 and 244, *post*, as to proof of a conviction or acquittal.

When the verdict is quashed for informalities, or any other grounds than the real merits of the case, the entry on the record should state it in these words, "and because it appears that the said indictment is not sufficient *(or as the case may be)*, therefore it is considered and adjudged that the defendant go thereof without day," so as to prevent a plea of "*autrefois acquit.*"—1 *Chit.* 719.

Semble.—That a prisoner convicted for manslaughter might be tried again for murder upon the same facts. *R.* v. *Tancock*, 13 *Cox*, 217.

Greaves' MSS. note.—"The next question is, supposing the judges of C. C. R. were to hold that evidence had been improperly received or rejected, and simply determined to arrest or reverse the judgment, could the prisoner be indicted *de novo*, and tried and convicted for the same offence? And it is perfectly clear that he could. Nothing, except a verdict of guilty or not guilty on a valid indictment, and a lawful and still existing judgment on such verdict can afford a bar to another prosecution for the very same offence. See my note, 2 *Russ. C. & M.* 69 *et seq.* *R.* v. *Winsor*, 6 *B. & S.*, 143-7-490. 2 *Hale*, 246. *Vaux's Case*, 4 *Rep.* 44.

I have said on a *valid indictment.* Now an indictment may be either actually valid or valid as against the crown in some cases; for a very material distinction exists between an acquittal and conviction upon a bad indictment. If *autrefois acquit* be pleaded and the former indictment is bad upon the face of it, the plea fails, because the judgment may and is to be supposed to have been upon that defect, as it is simply *quod eat sine die* (3 *Inst.* 214, 2 *Hale*, 248, 394). But if a prisoner be convicted and sentenced on an insufficient indictment a plea of *autrefois convict* will be good unless the judgment has been reversed (2 *Hale*, 247), for the judgment could only be given on the verdict. So if a special verdict be found, and the court erroneously, adjudges it to be no felony, *autrefois acquit* is a good plea as long as that judgment is unreversed on error (2 *Hale*, 246). And in the case of an acquittal, if the judgment has been *quod eat inde quietus;* as the ancient form is in case of acquittal upon not guilty pleaded, that could never refer to the defect of the indictment, but to the very matter of the verdict, and the prisoner could not be indicted again until the judgment had been reversed on error (2 *Hale*, 394).

A strange misapprehension has prevailed in Ireland lately, that a writ of error in a criminal case could not be brought on the part of the crown. There really is not a doubt about it, as it is not only assumed that it may, but relied upon as a ground for decisions in 2 *Hale*, 246, 247, 248, 394, 395; 3 *Inst.* 214; where Lord Coke gives the reason why error must be brought by the crown where there is an erroneous judgment of condemnation; and *Vaux's Case*, 4 *Rep.* 45.

I entertain very considerable doubt whether all writs of error are not the writs of the crown, and that that is the true ground why the A. G's consent is necessary to obtain them for a prisoner. Where a judgment is arrested or reversed under the court of crown cases reserved act, it would appear on the face of the record that there was neither a judgment of acquittal nor of conviction.

Whenever a plea of *autrefois acquit* or *convict* in the short form allowed by the 14-15 *V.*, *c.* 100, *s.* 28, is pleaded, if the former indictment, or other part of the record be bad on the face of it, the question arises whether the replication should not set out the record and conclude with a demurrer. If the objection was the only answer to the plea, it would seem to be the better course. A jury might in such a case err, as they certainly did in *R.* v. *Lea*, 2 *Moo. C. C.* 9, where, against the direction of the judge, and without any reasonable evidence, they found for the prisoners, and it was held that the verdict could not be set aside. A judge might also decide erroneously against the crown; and, if a verdict passed for the prisoner, there would be great doubt whether any remedy existed. A case could not be reserved under the act, for there would not be any conviction, and error would not be available, for the former record could not appear on the subsequent record, and there is grave doubt as to a special verdict in such a case. But if judgment were given against the crown on such a replication as I have suggested, error might remedy the mischief."

147. No plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder is for the same offence as that charged in the indictment.—32-33 *V.*, *c.* 29, *s.* 36. 7-8 *Geo.* 4, *c.* 28, *s.* 4, *Imp.*

Attainder is the stain or corruption of the blood of a criminal capitally condemned; it is the immediate, inseparable consequence, by the common law, of the sentence of death, or of outlawry for a capital offence. Upon the sentence of death or the judgment of outlawry being

pronounced, the prisoner is attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court (but see now sec. 214 of the Procedure Act, *post*), neither is he capable of performing the functions of any other man, for, by anticipation of his punishment, he is already dead in law, *civiliter mortuus*. The consequences of attainder are forfeiture and corruption of blood, 4 *Blackstone*, 380. And at common law, if a man is *attainted*, he may plead such attainder in bar to any subsequent indictment for the same or any other felony. And this because such proceeding on a second indictment cannot be to any purpose, for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he has forfeited what he had; so that it is absurd and superfluous to endeavour to attaint him a second time.—4 *Blackstone*, 336. But now, by the above clause, attainder is no bar, unless for the same offence as that charged in the indictment, and in effect the plea of *autrefois attaint* is at an end.

See, *post*, secs. 36, 37, c. 181, limiting the effects of attainder.

In England, now, by the 33-34 V., c. 23, all attainders, corruption of blood, or forfeiture of property are abolished.

LIBEL.

For secs. 148, 149, 150, 151, 152, 153, 154, see *ante*, under c. 163. "*An act concerning Libel*," p. 227.

CORPORATIONS.

155. Every corporation against which a bill of indictment for a misdemeanor is found, at any court having criminal jurisdiction, shall appear by attorney in the court in which such indictment is found, and plead or demur thereto.—46 *V.*, *c.* 34, *s.* 1.

156. No writ of *certiorari* shall be necessary to remove any such indictment into any superior court with the view of compelling the defendant to plead thereto; nor shall it be necessary to issue any writ of *distringas*, or other process, to compel the defendant to appear and plead to such indictment.—46 *V.*, *c.* 34, *s.* 2.

157. The prosecutor, when any such indictment is found against any corporation, or the clerk of the court, when such indictment is founded on a presentment of the grand jury, may cause a notice thereof to be served on the mayor or chief officer of such corporation, or upon the clerk or secretary thereof, stating the nature and purport of such indictment, and that, unless such corporation appears and pleads thereto in two days after the service of such notice, a plea of not guilty will be entered thereto for the defendant by the court, and that the trial thereof will be proceeded with in like manner as if the said corporation had appeared and pleaded thereto.—46 *V.*, *c.* 34, *s.* 3.

158. If such corporation does not appear, in the court in which the indictment has been found, and plead or demur thereto within the time specified in the said notice, the judge presiding at such court may, on proof to him by affidavit of the due service of such notice, order the clerk or proper officer of the court to enter a plea of "not guilty" on behalf of such corporation; and such plea shall have the same force and effect as if such corporation had appeared by its attorney and pleaded such plea.—46 *V.*, *c.* 34, *s.* 4.

159. The court may, whether such corporation appears and pleads to the indictment, or whether a plea of "not guilty" is entered by order of the court, proceed with the trial of the indictment in the absence of the defendant, in the same manner as if the corporation had appeared at the trial and defended the same; and, in case of conviction, may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations.—46 *V.*, *c.* 34, *s.* 5.

JURIES AND CHALLENGES.

160. Every person qualified and summoned as a grand juror or as a petit juror, according to the laws in force for the time being in any province of Canada, shall be and shall be held to be duly qualified to serve as such grand or petit juror in criminal cases in that province, whether such laws were in force or were or are enacted by the Legislature of the Province before or after such province became a part of Canada, but subject always to any provision in any act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such act.—32-33 *V.*, *c.* 29, *s.* 44. 46 *V.*, *c.* 10, *s.* 3.

The Jurors and Juries acts of Ontario and Quebec, and sec. 160 of the Dominion Criminal Law Procedure act, are constitutional.—*R.* v. *Provost, M. L. R.*, 1 *Q. B.* 477; *R.* v. *Bradshaw*, 38 *U. C. Q. B.* 564; *R.* v. *O'Rourke*, 1 *O. R.* 464.

The defendant in a criminal case has no right to a communication of the petit jury list.—*R.* v. *Maguire*, 13 *Q. L. R.* 99.

161. No alien shall be entitled to be tried by a jury *de medietate linguæ*, but shall be tried as if he was a natural born subject.—32-33 *V.*, *c.* 29, *s.* 39. 44 *V.*, *c.* 13, *s.* 8.

Ever since the 28 Ed. III, c. 13, aliens, under our criminal law, have been entitled to be tried by a jury composed of one half of citizens and one-half of aliens or foreigners, if so many of these could be had. It seems to have been thought necessary, in *R.* v. *Vonhoff*, 10 *L. C. J.* 292, that these six aliens should be natives of the country to which the defendant alleged himself to belong, but the better opinion seemed to be that six aliens were required, without regard to what nationality they were of. Sec. 2 of 28 Ed. III, c. 13, says "the other half of aliens."

However, this is now of historical interest only, and by the above clause aliens, all through the Dominion when indicted before a criminal court are on the same footing as British subjects, as to the composition of the jury.

In England also now, an alien is not entitled to a jury *de medietate linguæ*.—33 *V.*, *c.* 14, *Imp.*

162. Any quaker or other person allowed by law to affirm instead of swearing in civil cases, or solemnly declaring that the taking of any oath is, according to his religious belief, unlawful, who is summoned as a grand or petit juror in any criminal case, shall, instead of being sworn in the usual form, be permitted to make a solemn affirmation beginning with the words following: "I, A. B., do solemnly, sincerely and truly affirm," and then may serve as a juror as if he had been

sworn, and his declaration or affirmation shall have the same effect as an oath to the like effect; and in any record or proceeding relating to the case, it may be stated that the jurors were sworn or affirmed; and in any indictment, the words "upon their oath present" shall be understood to include the affirmation of any juror affirming instead of swearing.—32-33 *V.*, *c.* 29, *s.* 43.

This clause extends to jurors the provisions of sec. 219 (see *post*), allowing to witnesses, in certain cases, to make an affirmation instead of an oath. In England, a similar enactment is contained in 30-31 V., c. 35, s. 8.

163. If any person arraigned for treason or felony challenges peremptorily a greater number of persons returned to be of the jury than twenty, in a case of indictment for treason or felony punishable with death, or twelve in a case of indictment for any other felony, or four, in a case of indictment for misdemeanor, every peremptory challenge beyond the number so allowed in the said cases respectively shall be void, and the trial of such person shall proceed as if no such challenge had been made; but nothing herein contained shall be construed to prevent the challenge of any number of jurors for cause.—32-33 *V.*, *c.* 29, *s.* 37.

The Imperial Act, 7-8 Geo. IV., c. 28, s. 3, also enacts that every peremptory challenge beyond the number allowed by law is void.

In England, thirty-five peremptory challenges are allowed in cases of high treason, twenty in all felonies, and none in misdemeanors. Sec. 163 of our Procedure Act, *ante*, applies only to treason felony not to high treason.

By the common law, if the prisoner challenged peremptorily more of the jury than he was allowed, this was deemed a refusal to be tried, and, therefore, the prisoner, if he would not retract his illegal challenge, stood convicted, as in cases where he refused to plead. And, even after the 22 Hen. VIII., c. 14, had enacted that "no person arraigned for felony can be admitted to make any more than twenty peremptory challenges," it was doubtful

whether, if the prisoner challenged twenty-one, he was to stand convicted without trial, or if the trial was to proceed the illegal challenge being disregarded and overruled. —4 *Blackstone*, 354. This explains the phraseology of the above clause, which, to remove all doubts, had to, and does provide for the consequences of a peremptory challenge over the number allowed, at the same time as it enacts what is the number allowed in all cases.

There are two kinds of challenges, the one to the array and the other to the polls.

A challenge to the array is an exception to the whole panel of jurors returned, and must be made before the swearing of any of the jury is commenced; a challenge to the array must be made in writing.

The ground of the challenge may be either that some fact exists inconsistent with the impartiality of the sheriff, or other officer returning the panel, or that some fact exists which makes it improbable that he should be impartial, or that some fact exists which does, in fact, interfere with his impartiality.

The challenge must be in writing, and must set forth the fact on which it is grounded. The court must decide whether the alleged fact is in itself a good cause of challenge, in which case it is called a principal challenge, or whether it is merely a fact from which partiality may or may not be inferred, in which case it is called a challenge to the favor, or that the sheriff has been guilty of some default in returning the panel.

If the court holds that the alleged fact is a good cause for a principal challenge, and the alleged fact is denied, or if the court holds that the alleged fact is good as a challenge to the favor, and either the fact or the partiality sought to be inferred from it, or both, are denied, two

triers must be appointed by the court to try the facts in dispute.

If the triers find in favor of the challenge, the panel is quashed, and a new one is ordered to be returned by the coroners or other officers. If they find against the challenge the panel is affirmed.—*Stephens' Cr. Proc. Art.* 280.

Held, in an indictment against R. M. that it was ground of principal challenge to the array that the prisoner's husband had an action pending against the sheriff for an assault committed on the prisoner.—*The Queen* v. *Rose Milne*, 4 *P. & B. (N. B.)* 394.

A challenge to the polls is an exception to some one or more individual juror or jurors. It may be made orally. After issue joined between the crown and the prisoner, when the jury is called and before they are sworn, is the only time when the right of challenge can be exercised.—*R.* v. *Key*, 2 *Den.* 347; *R.* v. *Shuttleworth*, 2 *Den.* 351. *In R.* v. *Giorgetti*, 4 *F. & F.* 546, it was held that the challenge must be made before the book is given into the hands of the juror, and before the officer has recited the oath, and it comes too late afterwards, though made before the juror has kissed the book. In *R.* v. *Frost*, 9 *C. & P.* 136, it was held that the challenge of a juror, either by the crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so. But if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. But a juror may be challenged even after being sworn if the prosecutor consents.—*Bacon's Abr. Verb. Juries*, 11; 1 *Chit.* 545; *R.* v. *Mellor*, *Dears. & B.* 494, per Wightman, J.

It is obvious that each juror must be sworn separately, in misdemeanors as well as in felonies, when peremptory challenges are allowed in misdemeanors.

The accused is to be informed before the swearing of the jurors, that if he will challenge them or any of them, he must challenge them as they come to the book to be sworn and before they are sworn; the following is the usual form: "Prisoner, these good men, whose names you shall now hear called, are the jurors who are to pass between our Sovereign Lady the Queen and you upon your trial *(in a capital case, upon your life and death)*; if, therefore, you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard." —1 *Chit.* 531.

The accused must make all his challenges in person, even in cases where he has counsel.—1 *Chit.* 546; 2 *Hawkins*, 570.

To enable the accused to make his challenges, he is entitled to have the whole panel read over, in order that he may see who they are that appear.—2 *Hawkins*, 570; *Townly's case, Fost.* 7.

A challenge to the polls is either peremptory or for cause; a peremptory challenge is such as is allowed to be made to a juror without assigning any cause; the number of these challenges allowed in each particular case is settled by secs. 163 and 164 of the Procedure Act.

Peremptory challenges are not allowed upon any collateral issue.—*R.* v. *Ratcliffe, Fost.* 40; *Barkstead's* case, *Kelyng's C. C., Stevens & Haynes* reprint, 16; *Johnsons'* case, *Fost.* 46; *R.* v. *Paxton*, 10 *L. C. J.* 213.

Hale, 2 *P. C.*, 267*d*, says that no peremptory challenges are allowed to the defendant "if he had pleaded any foreign

plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only." And it is added, in *Bacon's Arb. Verb. Juries*, 9, that "this peremptory challenge seems by the better opinion to be only allowable when the prisoner pleads the general issue." This would seem to take away the right of peremptorily challenging on the trial of pleas of "*autrefois acquit*," or "*autrefois convict*." But it is not so; the issue on a plea of this kind is not a collateral issue. And it is said in 2 *Hale, loc. cit.*, that if a man plead not guilty, or *plead any other matter of fact triable by the same jury*, and plead over to the felony, he has his peremptory challenges. By collateral issues, must be understood, for instance, where a criminal *convict* pleads any matter allowed by law in bar of execution, as pregnancy, pardon, an act of grace, or, as in *Ratcliffe's* case, above cited, when a person brought to the bar to receive his sentence says that he is not the same person that was convicted; the issues in these cases being always tried by a jury *instanter*.

Where several persons are tried by the same jury, each of such persons has a right to his full number of peremptory challenges in all cases where the right of peremptory challenge exists; and if twenty men were indicted for the same offence by one indictment, yet every prisoner should be allowed his full number of peremptory challenges. They may join in their challenges, if they wish to be tried together, and then they can only challenge amongst them to the number allowed to one. But if they refuse to do so, the crown has the right of trying each, or any number of them less than the whole, separately from the others, in order to prevent the delay which might arise from the whole panel being exhausted by the challenges.—1 *Chit.* 535.

So, in *Charnock's* case, 3 *Salk.* 80 (in many books

erroneously called *Charwick,)* three being indicted together, Holt, C. J., told them "that each of them had liberty to challenge thirty-five of those who were returned upon the panel to try them, without showing any cause; but that if they intended to take this liberty, then they must be tried separately and singly, as not joining in the challenges; but, if they intended to join in the challenges, then they could challenge but thirty-five in the whole, and might be tried jointly upon the same indictment;" accordingly, they all three joined in their challenges and were tried together and found guilty.

A challenge to the polls for cause is either *principal* or *for favor:* it is allowed to both the prosecutor and the defendant.—*Archbold,* 152.

It is said in *Archbold,* 156: "The defendant in treason or felony may, for cause shown, object to all or any of the jurors called, *after* exhausting his peremptory challenges of thirty-five or twenty." If this means that the prisoner must first exhaust all his peremptory challenges, before being allowed to challenge for cause, it is an error, and was so held by the Court of Queen's Bench, in Ontario, in *R.* v. *Whelan,* 28 *U. C. Q. B.* 2, confirmed by the Court of Appeal, 28 *U. C. Q. B.* 108; in which case, it was unanimously held that the prisoner is entitled to challenge for cause before exhausting his peremptory challenges, Richards, C. J., concurring, though he had at first at the trial, on *Archbold's* passage above cited, ruled that the prisoner, before being allowed to challenge for cause, must first have exhausted his peremptory challenges.

If the prosecutor or the defendant have several causes of challenge against a juror, he must take them all at the same time; *Bacon's Abr. Verb. juries,* 11; 1 *Chit.* 545.

If a juror be challenged for cause and found to be indif-

ferent he may afterwards be challenged peremptorily, if the number if his peremptory challenges is not exhausted. —1 *Chit.* 545; *R.* v. *Geach*, 9 *C. & P.* 499.

The most important causes of a *principal* challenge to the polls are: 1. *Propter defectum*, on account of some personal objection, as alienage, minority, old age, insanity, present state of drunkenness, deafness, or a want of the property qualifications required by law. 2. *Propter affectum*, on the ground of some presumed or actual partiality in the juror, who is objected to; as if he be of affinity to either party, or in his employment, or is interested in the event, or if he has eaten or drunk at the expense of one of the parties, if the juror has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant, also if he was one of the grand jurors who found the indictment upon which the prisoner is then arraigned, or any other indictment against him on the same facts. 3. *Propter delictum*, on the ground of infamy as where the juror has been convicted of treason, felony, perjury, conspiracy, or any other infamous offence.

A challenge to the polls for favor is founded on the allegation of facts not sufficient in themselves to warrant the court in inferring undue influence or prejudice, but sufficient to raise suspicion thereof, and to warrant inquiry whether such influence or prejudice in fact exists. The cases of such a challenge are manifestly numerous, and dependent on a variety of circumstances, for the question to be tried is whether the juryman is altogether indifferent as he stands unsworn. If a juror has been entertained in the party's house, or if they are fellow-servants, are cited as instances of facts upon which a challenge for favor may be taken.—1 *Chit.* 544.

In the case of a *principal* challenge to the polls the

court, without triers, examines either the juror challenged, or any witness or evidence then offered, to ascertain the truth of the fact alleged as a ground of challenge, if this fact is not admitted by the adverse party; and if the ground is made out to the satisfaction of the court, the challenge is at once allowed, and the juror set aside; *5th Cr. Law. Comm. Report*, 1849, *p.* 122. In these cases, the necessary conclusion in law of the fact alleged against the juror is that he is not indifferent, and this, as a matter of law, must be decided by the court.

But in the case of a challenge for favor, the matter of challenge is left to the discretion of triers. In this case, the grounds of such challenge are not such that the law necessarily infers partiality therefrom, as, for instance, relationship; but are reasonable grounds to suspect that the juror will act under some undue influence or prejudice.

The oath taken by the triers is as follows: "*You shall well and truly try whether A. B., one of the jurors, stands indifferent to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God.*"

No challenge of triers is admissible.—1 *Chit.* 549.

The oath to be administered to the witnesses brought before the triers is as follows:

"*The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth. So help you God.*"

If this challenge is made to the first juror, and, before any one has been sworn, then the court will direct two indifferent persons, not returned of the jury, to act as triers; if they find against the challenge, the juror will be sworn, and be joined with the triers in determining the next challenges.

But as soon as two jurors have been found indifferent and have been sworn, then the office of the first two triers

ceases, and every subsequent challenge is referred to the decision of the two first jurors sworn: 3 *Blackstone*, 363. If the first challenge is made after more than two of the jurors are sworn, then the court may assign any two of the jurors sworn to try the challenges. If the challenge is made when there is yet only one juror sworn, one trier is chosen by each party, and added to the juryman sworn, and the three, together, try the challenges, till a second juror is sworn.—1 *Chit.* 549; *Bacon's Abr. Verb, Juries, E.* 12; 2 *Hale*, 274.

The trial then proceeds by witnesses before the triers, in open court; the juror objected to may also be examined, having first been sworn as follows:

"*You shall true answer make to all such questions as the court shall demand of you. So help you God.*"

The challenging party first addresses the triers, and calls his witnesses; then the opposite party addresses them, and calls witnesses if he sees fit, in which case the challenger has a reply. But in practice there are no addresses in such cases. The judge sums up to the triers, who then say if the juror challenged stands indifferent or not: this verdict is final: *Roscoe*, 197, 198. But a juror challenged on one side and found to be indifferent may still be challenged by the other.—1 *Chit.* 545.

Bishop says, 1 *Cr. Proc.* 905: "It is plain that the line which separates the challenge for principal cause and the challenge to the favor must be either very artificial, or very uncertain."

And *Wharton*, 3 *Cr. L.* 3125, says: "The distinction, however, between challenges for favor and those for principal cause is so fine, that it is practically disregarded."

The following case was brought before the Court of

Criminal Appeal, in England, in 1858.—*R.* v. *Mellor*, *Dears. & B.* 468.—On a trial for murder, the panel of petit jurors returned by the sheriff contained the names of two persons,—*Joseph Henry Thorne* and *William Thorniley*. The name of *Joseph Henry Thorne* was called from the panel as one of the jury to try the case of Aaron Mellor; and *Joseph Henry Thorne*, as was supposed, went into the box and was duly sworn as *Joseph Henry Thorne* without challenge or objection. It was, however, discovered the next day, and after the prisoner had been convicted, that *William Thorniley* had, by mistake, answered to the name of *Joseph Henry Thorne*, when this one was called, and had gone into the box and been sworn as *Joseph Henry Thorne*, the prisoner having been offered his challenge when the person called *Joseph Henry Thorne*, but who was really *William Thorniley*, came to the book to be sworn. Upon being informed of these facts, the judge who had presided at the trial respited the execution of the sentence, and reserved the case for the consideration of the Court of Criminal Appeal. It was held in this court, by Lord Campbell, C. J., Cockburn, C. J., Coleridge, J., Wightman, J., Martin, B., and Watson, B. (six), that there had been a mis-trial; by Erle, Crompton, Crowder, Willes and Byles, J. J., and Channell, B. (six), that this was not a mis-trial, but only ground of challenge; and by Pollock, C. B., and Williams, J., that this was not a question of law arising at the trial, which could have been reserved for the Court of Criminal Appeal. The conviction was therefore affirmed by eight against six. But the report shows clearly that upon a writ of error the conviction would have been quashed. And it was undoubtedly illegal; the challenge is to the person called, not to the person who appears. When

addressed by the clerk of the court, as the jurors were to be called, the prisoner has been told, "These good men that *you shall now hear called* are the jurors who are to pass between our Sovereign Lady the Queen and you upon your trial; if, therefore, you would challenge *them*, or any of *them* (*i. e.*, that are called), you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard." Of course, this address supposes that the person who comes to be sworn is the person called. But that very supposition demonstrates clearly that if the contrary takes place it is a cause of absolute nullity. When *Joseph Henry Thorne* was called, the prisoner shut his eyes, and felt confident that *Joseph Henry Thorne* would be sworn as one of the jurors who were to try him. Why should he have challenged? He did not desire to challenge *Joseph Henry Thorne*. And supposing he desired to challenge him for cause, it is clear that it is cause of challenge against *Joseph Henry Thorne* that he would have brought forward, not those against *William Thorniley*. And then, suppose again, he had challenged when *Joseph Henry Thorne* was called, would not the entry on the record have been that *Joseph Henry Thorne* had been challenged? Who would think of an entry that "*Joseph Henry Thorne*, etc., *being called*, etc., *William Thorniley* was challenged?" Upon this challenge to *Joseph Henry Thorne's name*, *William Thorniley* would have withdrawn; then, if *William Thorniley's* name had been later called, would not the prisoner have had to challenge him, if he objected to him? Would he not then have had to challenge *twice* to get rid of *one* man? Would he not, then, have been deprived of one of the peremptory challenges he was entitled to?

On a trial for forgery, the panel of petit jurors contained the names of Robert Grant and Robert Crane. Robert Grant as was supposed was called and went into the box. After conviction, and before the jury left the box, it was discovered that Robert Crane had by mistake answered to the name of Robert Grant, and that Robert Crane was really the person who had served on the jury. *Held*, a mistrial.—*R.* v. *Feore*, 3 *Q. L. R.* 219.

The prisoner should challenge before the juror takes the book in his hand, but the judge, in his discretion, may allow the challenge afterwards before the oath is fully administered.—*R.* v. *Kerr*, 3 *L. N.* 299. (This decision is unsupported by authority.)

164. In all criminal trials, four jurors may be peremptorily challenged on the part of the crown; but this shall not be construed to affect the right of the crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause.—32-33 *V.*, *c.* 29, *s.* 38.

165. The right of the crown to cause any juror to stand aside until the panel has been gone through, shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel.—37 *V.*, *c.* 38, *s.* 11.

At common law, the crown might, it seems, have challenged peremptorily any number of jurors, without alleging any other reason than "*quod non boni sunt pro rege.*" But this power was taken away, in the year 1305, by 33 Ed. I. (re-enacted *for England*, by 6 Geo. IV., c. 50.) An abuse had arisen in the administration of justice by the crown assuming an unlimited right of challenging jurors without assigning cause, whereby "inquests remained untaken." In this way, the crown could in an arbitrary manner, on every criminal trial, challenge so many of the jurors returned on the panel by the sheriff that twelve did

not remain to form a jury, and the trial might be indefinitely postponed *pro defectu juratorum*. To prevent the trial going off for want of jurors by the peremptory challenges of the crown, this statute enacts that no peremptory challenge by the crown can be allowed, so that the "inquest remains untaken." The crown, however, is not bound to show any cause of challenge, or for the order to "stand aside," until the panel has been *gone through*, and it appears that there will not be jurors enough to try the defendant, if the peremptory challenges are allowed to prevail. And the panel is not to be considered as being gone through for this purpose, until it has been, not only once called over, but *exhausted (épuisée* is the word used in the French version of the Procedure Act, for *gone through;)* that is, until according to the usual practice of the court, and what may reasonably be expected, the fact is ascertained that there are no more jurors in the panel whose attendance may be procured, and so that unless the crown be put to show its cause of challenge, "the inquest would remain untaken." —*Mansell* v. *R.* (in error), *Dears. & B.* 375.

In that case, the panel contained fifty-four names: eighteen when called were peremptorily challenged by the prisoner; fifteen were, on the prayer of the counsel for the crown, the prisoner's counsel objecting and praying that cause of challenge should be shown, ordered to "stand by," and nine were elected and tried to be sworn. This left twelve other persons only on the panel, and they were at that time absent deliberating upon their verdict in another case. The name of William Ironmonger, the first person who, upon the prayer of the counsel from the crown, had been ordered to stand by, was then again called, and the counsel for the crown again prayed that he might be ordered to stand by, upon which the counsel for the prisoner

prayed that cause of challenge should be shown forthwith. At that moment, and before any judgment was given on this application, the twelve persons who sat as a jury in the other case came into court and gave their verdict; and the counsel for the crown then prayed that William Ironmonger should be ordered to stand by until such twelve persons should be called, but the counsel for the prisoner demanded that William Ironmonger should be sworn unless cause of challenge to him were shown. The court ordered that William Ironmonger should stand by, and three persons, the number required to complete the jury, were taken from the said twelve jurors, and elected and tried to be sworn, although the prisoner's counsel objected that such persons ought to be called in their proper order, with other persons on the panel, and that Jacob Jacobs, the person whose name stood in the panel immediately after that of William Ironmonger, ought to be next called. Upon a writ of error, it was held that, under the circumstances, the panel was not *gone through*, so as to put the crown to assign cause of challenge, until the twelve persons who came into court before the complete formation of the jury had been called, and that William Ironmonger was properly ordered to "stand by" the second time; also that the three persons required to complete the jury were properly called and taken from the said twelve, without again calling the whole panel through in its order; also, that "stand by" merely means that the juror being challenged by the crown, the consideration of the challenge shall be postponed till it be seen whether a full jury can be made without him.

The case of *R.* v. *Lacombe*, 13 *L. C. J.* 259, was decided on the same principles, in Montreal, in 1869, by the full Court of Queen's Bench upon a case reserved by Mr. Justice Mackay, as follows:

"The prisoner was tried before me on the 3rd July, 1869 ..... At the commencement of the trial, while the petit jury were being formed, and the jurors called for this trial, numbers of jurors were ordered to 'stand aside,' on the prayer of the crown prosecutor. So many jurors had been so made 'stand aside,' and so many had been challenged peremptorily by the prisoner, that before a complete jury was formed the whole list was gone through once; resort had then to be had to those who, just before, had been made 'stand aside.' I ordered them to be called in order. On the first of these, namely Adolphe Masson, being called, he answered, and was advancing to the jury box, when he was ordered to 'stand aside' by the crown prosecutor; the prisoner's counsel objected, insisting that Masson should be sworn, unless the crown had cause for challenging him, and did then state sufficient cause. This the crown refused to do. I ruled in favor of the crown, and Masson was ordered to 'stand aside,' and he was not sworn. Others were called afterwards, sworn, and the trial proceeded ....." The prisoner was convicted, and the Court of Queen's Bench maintained the conviction.

"However, it is held that the King need not assign his cause of challenge till all the panel is gone through, *and unless* there cannot be a full jury without the persons so challenged. And then, *and not sooner*, the King's counsel must shew his cause, otherwise the juror shall be sworn." —4 *Blackstone*, 353.

And it is said in 2 *Hawkins*, 569:

"However, if the King challenge a juror before a panel is perused, it is agreed that he need not show any cause of his challenge till the whole panel be gone through, *and* it appear that there will not be a full jury without the person so challenged." See also *Bacon's Abr. Verb.* "*Juries*," *E.* 10.

In 1 *Chit.*, 547, it is said: "The King need not show the cause until the whole panel in exhausted, and if one of the jurors was not present, but appear before his default is recorded, the King's counsel, if he has previously challenged another juror, need not assign his cause of challenge till after such defaulter has been sworn."

In the case of *R.* v. *Geach*, 9 *C. & P.* 499, Parke, B., is reported to have held that: "if on the trial of a case of felony, the prisoner peremptorily challenges some of the jurors, and the counsel for the prosecution also challenges so many that a full jury cannot be had, the proper course is to call over the whole of the panel in the same order as before, only omitting those who have been peremptorily challenged by the prisoner, and, as each juror then appears, for the counsel for the prosecution to state their cause of challenge; and if they have not sufficient cause, and the prisoner does not challenge, for such juror to challenge."

Upon this case, Lord Campbell, C. J., in *Mansell's* case, *supra*, remarks: "There can be no doubt that the course pointed out by the learned judge was, under the circumstances, the proper course; but is there any reason to suppose that if, after the panel had been once called over, and before any further step had been taken for the formation of the jury, jurors on the panel who had been called and did not at first answer had come into court in sufficient number to make a full jury, they would have been rejected, and the crown would have been put to assign cause for its challenges? ..... No doubt it may be assumed, *primâ facie*, that all the jurors on the panel are in court when the panel is called over, and if, when it has been once called over, there is not a full jury made, the usual course would be immediately to call the names over again, and to put the crown upon assigning cause of

challenge..... but there is no decision nor *dictum* to the effect that the panel may not be called over again, with a view to see whether there may not be some of the jurors in the panel who may have come into court, and who may make up a full jury, without putting the crown to assign cause of challenge."

On a public prosecution for libel by order of the attorney general, sec. 165 does not apply.—*R.* v. *Maguire*, 13 *Q. L. R.* 99. But in all trials for libels upon private individuals, this section applies, even when the prosecution is conducted by a counsel appointed by and representing the attorney general.—*R.* v. *Patteson*, 36 *U. C. Q. B.* 129.

166. In those districts in the Province of Quebec, in which the sheriff is required by law to return a panel of petit jurors, composed one half of persons speaking the English language, and one half of persons speaking the French language, he shall, in his return, specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists:

2. Whenever any person accused of treason or felony elects to be tried by a jury composed one half of persons skilled in the language of the defence, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one half of such number from among the English speaking jurors and one half from among the French speaking jurors:

3. This section applies only to the Province of Quebec.—32-33 *V., c.* 239, *s.* 40.

The right to a *medietate linguæ* jury exists in misdemeanors as in felonies.—*R.* v. *Maguire*, 13 *Q. L. R.* 96.

Sub-sec. 2 of sec. 7, 27-28 V., c. 41 (1864,) clearly gives that right to *any* prosecuted party. And though the Quebec legislature, by the 46th V., c. 16, s. 62 (1883,) has repealed the said act, this particular clause, giving the right to a mixed jury, must be considered as still in force, the Quebec legislature not having had the right to

repeal it. Otherwise, there is no statute in the Province giving the right to a mixed jury, in any case whatever, sec. 166 of the Procedure Act, merely taking it for granted that the right exists. If the Quebec legislature had the power to repeal that clause, the Dominion Parliament had not the right to enact for Manitoba section 167 of the Procedure Act.

By sub-sec. 2 of the aforesaid section 166 of the Procedure Act, the number of peremptory challenges to which the prisoner is entitled is divided equally between the jurors of the two languages; but, in misdemeanors, the defendant has the right to exercise all or any part of his peremptory challenges indifferently, and without regard to the language of the jurors.

Where in a case of felony, in which one half of the jury, on the application of the prisoner, were sworn as being skilled in the French language, it was discovered after verdict, that one of such French half was not so skilled in the French language. *Held*, that the trial and verdict were null and void.—*R.* v. *Chamaillard*, 18 *L. C. J.* 149.

The right to have a jury, composed of at least one half of persons skilled in the language of the defence, must, undoubtedly, both in Manitoba and Quebec, be exercised *upon arraignment.* Immediately after arraignment, the *venire* is presumed to have issued, and if it issues without this order, the jurors must be summoned in the usual manner, that it to say, without regard to language.

In *R.* v. *Dougall*, 18 *L. C. J.* 85, it was held by Mr. Justice Ramsay: 1st. That where the defendant has asked for a jury composed one half of the language of the defence, six jurors speaking that language *may* first be put into the box, before calling any juror of the other language; 2nd. That the right of the crown to tell jurors "to stand aside,"

exists for misdemeanors as well as for felonies; 3rd. That when to obtain six jurors speaking the language of the defence, all speaking that language have been called, the crown is still at liberty to challenge to stand aside, and is not held to show cause until the whole panel is exhausted. Mr. Justice Ramsay said that the calling the jurors' names alternately from the English and French lists, mentioned in section 40, now section 166 of the Procedure Act, is only directory, and applies only to the calling of the jury in ordinary cases, where no order has been given for a jury composed of one half English and one half French. The case was reserved, by the learned judge, for the consideration of the full court, but only on the one point thirdly above mentioned, given in the summary of the report of the decision of the court, at page 242, 18 L. C. J., as follows: "Where, to obtain six jurors speaking the language of the defence (English,) the list of jurors speaking that language was called, and several were ordered by the crown to stand aside; and the six English-speaking jurors being sworn, the clerk re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one of those (English) previously ordered to "stand aside" was again called: *Held*, that the previous "stand aside" stood good until the panel was exhausted by all the names on both lists being called."

This was the only point reserved and the only one decided, and that could be decided by the full court. As said by Mr. Justice Ramsay, "Be the question reserved difficult or not, the court has no authority to go beyond it, and any excursion into other matters is totally uncalled for and without jurisdiction." A reference to such "excursions" in *Dougall's* case would lead to the inference that the majority of the judges were of opinion that, in all such

cases, the jurors should be called alternately from the two lists, and that, if by consent of the parties, six jurors of one language have first been called and sworn from one of the lists, as in this case, then the calling from that list should go on from the sixth juror sworn, and not begin the said list over again. It does not appear by any of the remarks of the learned judges in this case why, when a jury composed of six English and six French has been ordered (the defence, say, being English,) the list of the English jurors is not first called till six English jurors are sworn, and why the list of the French jurors is not then called over till six French jurors are also sworn.

167. Whenever any person, who is arraigned before the Court of Queen's Bench for Manitoba, demands a jury composed for the one half at least of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury composed for the one half at least of the persons whose names stand first in succession upon the general panel, and who, on appearing, and not being lawfully challenged, are found in the judgment of the court to be skilled in the language of the defence:

2. Whenever, from the number of challenges, or any other cause, there is, in any such case, a deficiency of persons skilled in the language of the defence, the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors:

3. Whenever a person accused of treason or felony elects to be tried by a jury composed one half of persons skilled in the language of the defence, the number of peremptory challenges to which he is entitled shall be divided, so that he shall have the right to challenge one half of such number from among the English speaking jurors, and one half from among the French speaking jurors:

4. This section applies only to the Province of Manitoba.—34 *V., c.* 14, *ss.* 3, 4 *and* 5.

See remarks under preceding section.

168. Whenever, in any criminal case, the panel has been exhausted by challenge, or by default of jurors by non-attendance or not answer-

ing when called, or from any other cause, and a complete jury for the trial of such case cannot be had by reason thereof, then, upon request made on behalf of the Crown, the court may, in its discretion, order the sheriff or other proper officer forthwith to summon such number of good men of the district, county or place, whether on the roll of jurors or otherwise qualified as jurors or not, as the court deems necessary and directs, in order to make up a full jury:

2. Such sheriff or officer shall forthwith summon by word of mouth or in writing, the number of persons he is so required to summon, and add their names to the general panel of jurors returned to serve at that court, and, subject to the right of the Crown and of the accused respectively, as to challenge or direction to stand aside, the persons whose names are so added to the panel shall, whether otherwise qualified or not, be deemed duly qualified as jurors in the case, and so until a complete jury is obtained, and the trial shall then proceed as if such jurors were originally returned duly and regularly on the panel; and if, before such order, one or more persons have been sworn or admitted unchallenged on the jury, he or they may be retained on the jury, or the jury may be discharged, as the court directs:

3. Every person so summoned as a juror shall forthwith attend and act in obedience to the summons, and if he makes default shall be punishable in like manner as a juror summoned in the usual way; and such jurors so newly summoned shall be added to the panel for such case only.—32-33 *V.*, *c.* 29, *s.* 41. 6 *G.* 4, *c.* 50, *s.* 37, *Imp.*

It is only *upon request made on behalf of the Crown*, that the court is authorized to give the order mentioned in this section, and even then, whether this order will be given or not is left to the discretion of the court. This clause specially enacts that such jurors summoned as therein provided for shall be added to the panel only for the case in which such order has been given.

169. In all criminal cases, less than felony, the jury may, in the discretion of the court, and under its direction as to the conditions, mode and time, be allowed to separate during the progress of the trial. —32-33 *V.*, *c.* 29, *s.* 57.

On a trial for felony, the jury cannot be allowed to separate during the progress of the trial, and where such separation takes place, it is a mis-trial, and the court may direct

that the party convicted be tried again, as if no trial had been had in such case.—*R.* v. *Derrick*, 23 *L. C. J.* 239.

It is a general rule that upon a criminal trial there can be no separation of the jury after the prisoner is given in their charge, and before a verdict is given. The above enactment restricts the rule to felonies; in fact, it seems to have always been admitted that in misdemeanors the jury might be allowed to separate during the trial.— *R.* v. *Woolf*, 1 *Chitty's Rep.* 401; *R.* v. *Kinnear*, 2 *B. & Al.* 462.

But, even under the above clause, there is no doubt that, generally speaking, the judge ought not to allow the jury to separate after they have been addressed by the court and their deliberations have begun. In fact, some judges never allow the jury to separate, and if it can be done without too much inconvenience, this is, perhaps, the best practice. When, however, such separation is permitted, the judge ought to caution the jury against holding conversation with any person respecting the case, or suffering it in their presence, or reading newspaper reports or comments regarding it, or the like.—1 *Bishop, Cr. Proc.* 996.

The doctrine that "a jury sworn and charged in case of life or member cannot be discharged by the court, but they ought to give a verdict," is exploded, and it may now be considered as established law that a jury sworn and charged with a prisoner, even in a capital case, may be discharged by the judge at the trial without giving a verdict, if a necessity—that is a high degree of need—for such discharge is made evident to his mind. If after deliberating together the jury say that they have not agreed, and that they are not likely to agree, the judge may discharge them. It lies absolutely in his discretion

how long they should be kept together, and his determination on the subject cannot be reviewed in any way.—*R.* v. *Charlesworth*, 2 *F. & F.* 326; 1 *B. & S.* 460; *Winsor* v. *R.* (in error), 7 *B. & S.* 490; 10 *Cox*, 276.

In the course of the trial one of the jurors had, without leave, and without it being noticed by any one, left the jury box and also the court-house, whereupon the court discharged the jury without giving a verdict, and a fresh jury was empanelled. The prisoner was then tried anew, and convicted before the fresh jury: *Held*, by the Court of Criminal Appeal, that the course pursued was right.—*R.* v. *Ward*, 10 *Cox*, 573.

If a juryman is taken ill, so as to be incapable of attending throngh the trial, the jury may be discharged, and the trial and examination of witnesses begun over again, another juror being added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn *de novo*.—*R.* v. *Edwards*, *R. & R.* 224; see also *R.* v. *Scalbert*, 2 *Leach*, 620; *R.* v. *Beere*, 2 *M. & Rob*, 472; *R.* v. *Gould*, 3 *Burn*, 98.

In *R.* v. *Murphy*, 2 *Q. L. R.* 283, after the prisoner had been given in charge to the jury, the case was adjourned for one day, on account of his counsel's illness.

But when such a trial has to be begun over again, it is not regular, whether the prisoner assents to it or not, instead of having the witnesses examined anew *vivâ voce*, to simply call and swear them over again, and then read over the notes of their evidence taken by the judge on the first trial, even if, then, each witness is asked if what was read was true, and is submitted at the pleasure of the counsel on either side to fresh oral examination and cross-examination.—*By the Privy Council*, in *R.* v. *Bertrand*, 10 *Cox*, 618.

Although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict.—*R.* v. *Rosser*, 7 *C. & P.* 648; 2 *Taylor, Ev. par.* 1244; 3 *Burn*, 96.

A juror was summoned in error, but not returned in the panel, and in mistake was sworn to try a case, during the progress of which these facts were discovered. The jury were discharged, and a fresh jury constituted.—*R.* v. *Phillips*, 11 *Cox*, 142. It is not necessary when a jury are discharged without giving a verdict to state on the record the reason why they were so discharged.—*R.* v. *Davison*, 2 *F. & F.* 250; 8 *Cox*, 360.

The rule is that the right to discharge the jury without giving a verdict ought not to be exercised, except in some case of physical necessity, or where it is hopeless that the jury will agree, or where there have been some practices to defeat the ends of justice. If, after the prisoner is given in charge, though before any evidence is given, it is discovered that a material witness for the prosecution is not acquainted with the nature of an oath, it is not a sufficient ground for discharging the jury, so that the witness might be instructed before the next assizes upon that point, and a verdict of acquittal must be entered if the prosecution has no other sufficient evidence.—*R.* v. *Wade*, 1 *Moo. C. C.* 86.—*R.* v. *White*, 1 *Leach*, 430, seems a contrary decision, but is now overruled by the above last cited case. Where, during the trial of a felony, it was discovered that the prisoner had a relation on the jury, Erskine, J., after

consulting Tindal, C. J., held that he had no power to discharge the jury but that the trial must proceed.—*R.* v. *Wardle, C. & M.* 647.

If it appear, during a trial, that the prisoner, though he has pleaded not guilty, is mad, the judge may discharge the jury of him, that he may be tried after the recovery of his understanding.—1 *Hale*, 34; see *post*, sections 252 *et seq.* of the Procedure Act, and remarks thereunder.

In *Kinloch's* case, *Fost.* 16, 23 *et seq.*, it was held that a jury can be lawfully discharged in order to allow the defendant to withdraw his plea of "not guilty," and to plead in bar.

On a writ of error the record showed that, on the trial the judge discharged the jury after they were sworn, in consequence of the disappearance of a witness for the crown, and the prisoner was remanded. *Held*, that the judge had a discretion to discharge the jury which a court of error could not review; that the discharge of the jury without a verdict was not equivalent to an acquittal, and that the prisoner might be put on trial again.—*Jones* v. *R.*, 3 *L. N.* 309.

A jury had been sworn on the previous day, to try the prisoner on an indictment for murder. In the course of the trial, one of the jurors was discharged because he came from a house where there was small-pox. The case being resumed before a new jury, the prisoner contended that having been once put in jeopardy of his life, no new trial could be had. The court overruled the objection.—*R.* v. *Considine*, 8 *L. N.* 307.

170. Nothing in this act shall alter, abridge or affect any power or authority which any court or judge has when this act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority is expressly altered by or is inconsistent with the provisions of this act.—32-33 *V., c.* 29, *s.* 42.

A juror may be a witness. He is then sworn without leaving the jury box.—2 *Taylor, Ev., par.* 1244. See *R.* v. *Rosser*, under preceding section. Under this clause, it is probable that the whole of sect. 7 of the 27-28 V., c. 41 (1864), is still in force in the Province of Quebec (see remarks under sect. 166, *ante,)* except sub-secs. 8 and 9 thereof, which are repealed by 49 V., c. 4 (D.)

VIEW.

171. Whenever it appears to any court having criminal jurisdiction or to any judge thereof, that it will be proper and necessary that the jurors, or some of them, who are to try the issues in such case, should have a view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, whether such place is situate within the county or united counties in which the venue in any such case is laid, or without such county or united counties, in any other county, such court or judge may order a rule to be drawn up, containing the usual terms,—and, if such court or judge thinks fit, also requiring the person applying for the view to deposit in the hands of the sheriff of the county or united counties in which the venue in any such case is laid, a sum of money to be named in the rule, for payment of the expenses of the view.—29-30 *V.* (*Can.*), *c.* 46, *s.* 1.

172. All the duties and obligations now imposed by law on the several sheriffs and other persons when the place to be viewed is situate in the county or united counties in which the venue in any such case is laid, shall be imposed upon and attach to such sheriffs and other persons when the place to be viewed is situate out of the county or united counties in which the venue in any such case is laid.—29-30 *V.* (*Can.*), *c.* 46, *s.* 2. 6 *Geo.* 4, *c.* 50, *s.* 23, *Imp.*

The original statute, 1866, extended only to Upper Canada. It was passed to give the power of ordering a view *out of the* county in which the venue is laid. See *R.* v. *Whalley*, 2 *C. & K.* 376; *R.* v. *Martin*, 14 *Cox*, 633; and *R.* v. *Martin*, 12 *Cox*, 204.

SWEARING WITNESSES BEFORE GRAND JURY.

173. It shall not be necessary for any person to take an oath in

open court in order to qualify him to give evidence before any grand jury.—*C. S. U. C., c. 109, s. 1.*

174. The foreman of the grand jury and any member of the grand jury, who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who, under the circumstances hereinafter enacted, appears before such grand jury to give evidence in support of any bill of indictment; and every such person may be sworn and examined upon oath by such grand jury touching the matters in question.—*C. S. U. C., c. 109, ss. 2 and 6, part; C. S. L. C., c. 105, s. 2.*

175. The name of every witness examined, or intended to be so examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment.—*C. S. U. C., c. 109, s. 3.*

176. The name of every witness intended to be examined on any bill of indictment shall be submitted to the grand jury by the officer prosecuting on behalf of the crown, and no others shall be examined, by or before such grand jury, unless upon the written order of the presiding judge.—*C. S. U. C., c. 109, s. 4.*

177. Nothing in this act shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall be payable as if the witnesses had been sworn in open court.—*C. S. U. C., c. 109, s. 5.*

Secs. 173, 174 and 175 are re-enactments of the Imperial Act 19-20 V., c. 54. Sec. 176 would probably be held not to apply to private prosecutions, *sed quære?*

The omission by the foreman to write his initials against the name of each witness sworn *and* examined would give to the prisoner the right, before plea, to ask that the indictment be sent back to the grand jury with a direction to the foreman to so initial the names of the witnesses examined. In a case in Illinois, under a similar enactment, it was held that the statute requiring the foreman of the grand jury to note on the indictment the names of the witnesses upon whose evidence the same is found, is manda-

tory, and that a disregard of this requirement would, no doubt, be sufficient ground to authorize the court, upon a proper motion, to quash the indictment.—*Andrews* v. *The People*, 117 *Ill.* 195.

See *Thompson on Juries*, 724.

Under sec. 143 of the Procedure Act, a motion to quash the indictment upon such a ground must be made before plea, and upon such a motion the court would send the indictment back to the grand jury to remedy the defect. If the grand jury has been discharged, the indictment it seems, must be quashed. It is the practice, on many circuits in England, and a very proper one it is, not to formally discharge the grand jury till the end of the assizes, so that, if necessary, they may be called back, at any time, during the term.

With the grand jury's consent, the witnesses before them are examined by the crown prosecutor or clerk of the crown, or by the private prosecutor or his solicitor. But the grand jury must be alone during their deliberations.—1 *Chit.* 315; 3 *Burn*, 36; *charge to grand jury, Drummond, J.*, 4 *R. L.* 364. *Stephen's Cr. Proc. Art.* 190.

Not more than twenty-three grand jurors should be sworn in. But any number from twelve to twenty-three constitutes a legal grand jury. At least twelve of them must agree to find a true bill. If twelve do not so agree, they must return "not found," or "not a true bill," or "*ignoramus*"; this last form, however, is not now often used.—4 *Stephen's Bl.* 375 *(10th Edit.)*; 1 *Chit.* 322; 2 *Barr.* 1089; 3 *Burn*, 37; *R.* v. *Marsh*, 6 *A. & E.* 236; *Dickenson's Quarter Sess.* 183; *Stephen's Cr. Proc. Art.* 186; *Low's case*, 4 *Greenl. Rep. (Maine)* 439; 3 *Whart. Cr. L. pars.* 463, 497.

The court will not inquire whether the witnesses were

properly sworn before the grand jury. The grand jury are at liberty to find a bill upon their own knowledge only. —*R.* v. *Russell, C. & M.* 247; *Stephen's Cr. Proc. Art.* 185.

The court will not receive an affidavit of a grand juror as to what passed in the grand jury room upon the subject of the indictment.—*R.* v. *Marsh,* 6 *A. & E.* 236; nor allow one of them to be called as a witness to explain the finding.—*R.* v. *Cooke,* 8 *C. & P.* 582.

On the trial of Alexander Gillis for murder, his counsel called the foreman of the grand jury which found the bill against him to prove that a witness's evidence before the grand jury was different from that given by the witness on the trial. The counsel for the crown objected that a grand juror could not be allowed to give evidence of what took place in the grand jury room:

Held, that a grand juror's obligation to keep secret what transpired before the grand jury only applied to what took place among the grand jurors themselves, and did not prevent his being called to prove what a witness had said.—*R.* v. *Gillis,* 6 *C. L. T.* 203.

On this point, see *Taylor, Ev.*, par. 863. Also, *Stephen, Ev., art.* 114, where it is said: "It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury."

TRIAL.

178. Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law.—32-33 *V., c.* 29, *s.* 45, *part.*

179. Upon the trial the addresses to the jury shall be regulated as follows: the counsel for the prosecution, in the event of the defendant or his counsel not announcing, at the close of the case for the prosecution, his intention to adduce evidence, shall be allowed to

address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the accused, or his counsel, shall then be allowed to open his case and also to sum up the evidence, if any is adduced for the defence; and the right of reply shall be according to the practice of the courts in England: Provided always, that the right of reply shall be always allowed to the attorney general or solicitor general, or to any Queen's counsel acting on behalf of the crown.—32-33 *V.*, *c.* 29, *s.* 45, *part.*

The law as it stood formerly, did not allow a prisoner to be defended by counsel in any felony except high-treason. On this, *Blackstone* says (Vol. IV. 355):

"But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner, that is, shall see that the proceedings against him are legal and strictly regular,) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecution for every petty trespass?"

In England, the 6-7 William IV., c. 114, was the first statute passed to "enable persons indicted for felony to make their defence by counsel or attorney," and the addresses of counsel to the jury in felonies and misdemeanors are now regulated by the 28 V., c. 18, s. 2, as follows:

"If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they

intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants, and upon every trial for felony or misdemeanor, whether the prisoners, or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded, to sum up the evidence respectively; and the right of reply and practice and course of proceedings, save as hereby altered, shall be as at present." See *R.* v. *Kain*, 15 *Cox*, 388.

It will be seen that the only difference between the English and the Canadian clause is, that in the former, it is only *when the prisoner is defended by counsel* that the counsel for the prosecution is allowed to address the jury a second time, after his evidence is over, when the counsel for the defence does not declare that he intends to adduce any evidence, *which it is the duty of the presiding judge to ask him at the close of the case for the prosecution;* whilst in the Canadian clause this right is given, whether the defendant be assisted by counsel or not, and he or his counsel are required to announce at the close of the case for the prosecution their intention to adduce evidence or not, without the clause making it obligatory on the presiding judge to ask the question, though in practice it is obvious

that the judge will always ascertain the intention of the defence on that point, before allowing the prosecutor to sum up when he desires to do so.

The addresses of counsel, as regulated by this clause 179 of the Procedure Act, are therefore to take place as follows:—

First case: When no evidence for the defence.

Address of counsel for the crown, opening the case; crown's evidence; *defendant or his counsel declares that they have no evidence to adduce;* counsel for the crown sums up; defendant or his counsel addresses jury; reply of counsel for the crown, but only if attorney or solicitor-general, or Queen's counsel, acting on behalf of the crown.

Second case: Where the defence adduces evidence.

Crown prosecutor opens the case; evidence of the crown; defendant or his counsel addresses the jury; defendant's evidence; defendant or his counsel sums up; reply of prosecution in all cases.

In the first case supposed, the counsel for the prosecution never in practice exercises both the rights of summing up and replying; if the counsel is not the attorney-general or solicitor-general, or a Queen's counsel acting on behalf of the crown, he has to sum up the evidence, after it is over, as he is not allowed to reply; if he is the attorney-general or solicitor-general, or a Queen's counsel acting on behalf of the crown, he, in practice, does not sum up, as he is entitled to reply, whether the defendant adduces evidence or not, though in England this right is very seldom exercised, where no evidence, or evidence as to character only is offered; see *post.*

In the second case supposed, in practice the defence adresses the jury only after its evidence is over; two addresses would generally have no other result but to lengthen the trial, and fatigue court, counsel, and jury.

Opening of the counsel for the prosecution.—A prisoner charged with felony, whether he has been on bail or not, must be at the bar, viz., in the dock during his trial, and cannot take his trial at any other part of the court, even with the consent of the prosecutor.—*R.* v. *St. George*, 9 *C. & P.* 485. A merchant was indicted for an offence against the act of parliament prohibiting slave-trading (felony). His counsel applied to the court to allow him to sit by him, not on the ground of his position in society, but because he was a foreigner, and several of the documents in the case were in a foreign language, and it would, therefore, be convenient for his counsel to have him by his side, that he might consult him during his trial: *Held*, that the application was one which ought not to be granted.—*R.* v. *Zulueta*, 1 *C. & K.* 215; 1 *Cox*, 20. A similar application by a captain in the army was also refused in *R.* v. *Douglas*, *C. & M.* 193. But in misdemeanors, a defendant who is on bail and surrenders to take his trial need not stand at the bar to be tried.—*R.* v. *Lovett*, 9 *C. & P.* 462. A prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury as counsel; *R.* v. *Brice*, 2 *B. & A.* 606; *R.* v. *Stoddart*, *Dickinson's Quarter Sessions*, 152; *R.* v. *Gurney*, 11 *Cox*, 414, where a note by the reporter, supported by authorities, says that such is the law, whether the prosecutor is to be a witness or not.

Sergeant *Talfourd*, in *Dickinson's Quarter Sessions*, 495, on the duties of the counsel for the prosecution, says: —"When the counsel for the prosecution addresses the jury in a case of felony, he ought to confine himself to a simple statement of the facts which he expects to prove; but in cases where the prisoner has no counsel he should particularly refrain from stating any part of the facts, the

proof of which from his own brief appears doubtful, except with proper qualification; for he will either produce on the minds of the jurors an impression which the mere failure of the evidence may not remove in instances where the prisoner is unable to comment on it with effect; or may awaken a feeling against the case for the prosecution, which in other respects it may not deserve. The court, too, if watchful, cannot fail, in the summing up, to notice the discrepancy between the statement and the proof. But in all cases, as well of felony as misdemeanor, where a prisoner has counsel, not only may the facts on which the prosecution rests be stated, but they may be reasoned on, so as to anticipate any line of defence which may probably be adopted. For as counsel for parties charged with felony may now address the jury in their defence, as might always have been done in misdemeanor, the position of parties charged with either degree of offence is thus assimilated in cases where they have counsel, and it is no longer desirable for the prosecutor's counsel to abstain from observing generally on the case he opens, in such manner as to connect its parts in any way he may think advisable to demonstrate the probability of guilt and the difficulty of an opposite conclusion. But even here he should refrain from indulging in invective, and from appealing to the prejudices or passions of the jury; for it is neither in good taste nor right feeling to struggle for a conviction as an advocate in a civil cause contends for a verdict."

On the duties of counsel, in opening the case for the prosecution, it is said in *Archbold*, 159 :—"In doing so he ought to state *all* that it is proposed to prove, as well declarations of the prisoners as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in

support of them : per Parke, B., *R.* v. *Hartel*, 7 *C. & P.* 773 ; *R.* v. *Davis*, 7 *C. & P.* 783 ; unless such declarations should amount to a *confession*, where it would be improper for counsel to open them to the jury ; *R.* v. *Swatkins*, 4 *C. & P.* 548. *R.* v. *Davis*, 7 *C. & P.* 783. The reason for this rule is that the circumstances under which the confession was made may render it inadmissible in evidence. The general effect only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecutor's counsel."

Mr. Justice Blackburn, in *R.* v. *Berens*, 4 *F. & F.* 842, 853, said that the position of prosecuting counsel in a criminal case is not that of an ordinary counsel in a civil case, but that he is acting in a *quasi* judicial, capacity, and ought to regard himself as part of the court : that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury, and nothing more.

In *R.* v. *Puddick*, 4 *F. & F.* 497, per Crompton, J., the counsel for the prosecution "are to regard themselves as ministers of justice, and not to struggle for a conviction as in a case at *nisi prius ;* nor be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority, and a contest for skill and pre-eminence."

Summing up by counsel for the prosecution, where the defence brings no evidence.—It has already been remarked that in practice, if the counsel for the prosecution has the right of reply and intends to avail himself of it, it would be waste of time for him to sum up ; but if the counsel has not the right of reply (as to which see *post*, under heading

"*reply,*") he will perhaps find it useful to review the evidence as it has been adduced, and give some explanations to the jury. But it has been held in *R.* v. *Puddick*, 4 *F. & F.* 497, that the counsel for the prosecution ought not, in summing up the evidence, to make observations on the prisoner's not calling witnesses, unless at all events it has appeared that he might be fairly expected to be in a position to do so, and that neither ought counsel to press it upon the jury, that if they acquit the prisoner they may be considered to convict the prosecutor or prosecutrix of perjury. Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses. The statute gives him the right to do so, but that right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution is to state his case before he calls the witnesses, then, when the evidence has been given, either to say simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or in exceptional cases, as if something different is proved from what he expected, to address to the jury any suitable explanation which may be required.—*R.* v. *Berens*, 4 *F. & F.* 842, *reporter's note*. *R.* v. *Holchester*, 10 *Cox*, 226; *R.* v. *Webb*, 4 *F. & F.* 862.

The defence.—The defendant cannot have the assistance of counsel in examining and cross-examining witnesses, and reserve to himself the right of addressing the jury.—*R.* v. *White*, 3 *Camp.* 98; *R.* v. *Parkins*, 1 *C. & P.* 548. But see *post* as to statements by him to the jury. But if the defendant conducts his own case, counsel will be allowed to address the court for him on points of law arising in the

case.—*Idem.* Not more than two counsels are entitled to address the court for a prisoner during the trial upon a point of law.—*R.* v. *Bernard*, 1 *F. & F.* 240. The rule is that if the prisoner's counsel has addressed the jury, the prisoner himself will not be allowed to address the jury also.—*R.* v. *Boucher*, 8 *C. & P.* 141; *R.* v. *Burrows*, 2 *M. & Rob.* 124; *R.* v. *Rider*, 8 *C. & P.* 531. The counsel for the defendant may comment on the case for the prosecution. He may adduce evidence to any extent, and even introduce new facts, provided he can establish them by witnesses. He cannot, however, assume as proved that which is not proved. Nor will he be allowed to state anything which he is not in a situation to prove, or to state the prisoner's story as the prisoner himself might have done.—*R.* v. *Beard*, 8 *C. & P.* 142; *R.* v. *Butcher*, 2 *M. & Rob.* 228.

Bishop says, 1 Cr. Proc. 311: "No lawyer ought to undertake to be a witness for his client, except when he testifies under oath, and subjects himself to cross-examination, and speaks of what he personally knows. Therefore, the practice, which seems to be tolerated in many courts, of counsel for defendants protesting in their addresses to the jury that they believe their clients to be innocent, should be frowned down and put down, and never be permitted to show itself more. If a prisoner is guilty and he communicates the facts fully to counsel in order to enable the latter properly to conduct the defence, then, if the counsel is an honest man, he cannot say he believes the prisoner innocent; but, if he is a dishonest man, he will as soon say this as anything. Thus a premium is paid for professional lying. Again, if the counsel is a man of high reputation, a rogue will impose upon him by a false story, to make him an "innocent agent" in communicat-

ing a falsehood to the jury. Lastly, a decent regard for the orderly administration of justice requires that only legal evidence be produced to the jury, and the unsworn statement of the prisoner's counsel, that he believes the prisoner innocent, is not legal evidence. It is the author's cherished hope, that he may live to see the day when no judge, sitting where the common law prevails, will ever, in any circumstances, permit such a violation of fundamental law, of true decorum, and of high policy to take place in his presence, as is involved in the practice of which we are now speaking."

On the same subject, it is said in 3 *Wharton's Cr. L.*, 3010: "Nor is it proper for counsel in any stage of the case to state their personal conviction of their client's innocence. To do so is a breach of professional privilege, well deserving the rebuke of the court. The defendant is to be tried simply by the legal evidence adduced in the case; and to intrude on the jury statements not legal evidence is an interference with public justice of such a character that, if persisted in, it becomes the duty of the court, in all cases where this can be done constitutionally, to discharge the jury and continue the case. That which would be considered a high misdemeanor in third parties cannot be permitted to counsel. And where the extreme remedy of discharging the jury is not resorted to, any undue or irregular comment by counsel may be either stopped at the time by the court, or the mischief corrected by the judge when charging the jury."

Summing up by the defence.—The counsel for the prisoner or the prisoner himself is now entitled by sec. 179 of the Procedure Act at the close of the examination of his witnesses, to sum up the evidence.—*R.* v. *Wainwright.* 13 *Cox*, 171. In practice, it is the only time when the

counsel for the prisoner addresses the jury, and what has just been said on the defence generally applies to the address to the jury, whether made before or after the examination of witnesses.

A person on his trial defended by counsel is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury and make such statements subject to this, that what he says will be treated as additional facts laid before the court, and entitling the prosecution to the reply.—*R.* v. *Shimmin*, 15 *Cox*, 122. See reporter's note.

In *R.* v. *Weston*, 14 *Cox*, 346, the prisoner's counsel was allowed to make a statement on behalf of his client.

Per Stephen J.—A prisoner may make a statement to the jury, provided he does so before his counsel's address to the jury.—*R.* v. *Masters*, 50 *J. P.* 104.

A prisoner on his trial defended by counsel may, at the conclusion of his counsel's address, make a statement of facts to the jury, but the prosecution will be entitled to reply.—*The Queen* v. *Rogers*, 2 *B. C. L. R.* 119.

In *R.* v. *Taylor*, 15 *Cox*, 265, the prisoners were allowed to address the jury after their counsel. See *R.* v. *Millhouse*, 15 *Cox*, 622, where the judge said that could be allowed only where the prisoner called no witnesses.

The Reply.—If the defendant brings no evidence, the counsel for the prosecution is not allowed to reply, except if he be, according to sec. 179 of the Procedure Act, the attorney general or solicitor general, or a Queen's counsel acting on behalf of the crown. And in the interpretation of this clause, these words "acting on behalf of the crown" must be read as applying to the attorney-general or solicitor-general, as well as to a Queen's counsel, so that, if not act-

ing on behalf of the crown in a case, the attorney general or solicitor general would not be entitled to a reply, if no evidence is adduced by the defence.—3 *Russ.* 354, *note.*

On this privilege to reply, in cases instituted by the crown, it is said in 1 *Taylor, Ev., par.* 312: "But as this is a privilege, or rather a prerogative which stands opposed to the ordinary practice of the courts, the true friend of justice will do well to watch with jealousy the parties who are entitled to exercise it. Mr. Horne, so long back as the year 1777, very properly observed that the attorney-general would be grievously embarrassed to produce a single argument of reason or justice on behalf of his claim, and, as the rule which precludes the counsel for the prosecution from addressing the jury in reply, when the defendant has called no witnesses, has been very long thought to afford the best security against unfairness in ordinary trials, this fact raises a natural suspicion that a contrary rule may have been adopted, and may still be followed in State prosecutions, for a different and less legitimate purpose. It is to be hoped that ere long this question will receive the consideration which its importance demands, and that the Legislature, by an enlightened interference, will introduce one uniform practice in the trial of political and ordinary offenders."

If the defendant gives any evidence, whether written or parol, the counsel for the prosecution has a right to reply. If witnesses are called merely to give evidence to character, the counsel for the prosecution is strictly entitled to reply, though in England, in such cases, the practice is not to reply.

In *R.* v. *Bignold*, 4 *D. & R.* 70, Lord Tenderden revived an important rule, originally promulgated by Lord Kenyon, and by which a reply is allowed to the counsel

for the prosecution, if the counsel for the defendant, in his address to the jury, states any fact or any document which is not already in evidence, although he afterwards declines to prove the fact or put it in writing.—5 *Burn*, 357. *See R.* v. *Trevelli*, 15 *Cox*, 289; *R.* v. *Stephens*, 11 *Cox*, 669; *R.* v. *Burns*, 16 *Cox*, 195.

Evidence in reply.—Whenever the defendant gives evidence to prove new matter by way of defence, which the crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply to contradict it, but then he does not address the jury in reply before going into that evidence. The general rule is that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. This is the general rule, made for the purpose of preventing confusion, embarrassment and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted, as he may think best for the discovery of truth and the administration of justice.—2 *Phillips' Ev.* 408; *R.* v. *Briggs*, 2 *M. & Rob.* 199; *R.* v. *Frost*, 9 *C. & P.* 159. Where the counsel for the crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with if the evidence were not given, the court may permit the evidence to be given.—*R.* v. *White*, 2 *Cox*, 192. If evidence of his good character is given on behalf of a prisoner, evidence of his bad character may be given in reply: *R.* v. *Rowton, L. & C.* 520, overruling *R.* v. *Burt*, 5 *Cox*, 284.

Defendant's reply on evidence adduced in answer to his own.—When evidence is adduced for the prosecution in reply to the defendant's proof, the defendant's counsel

has a right to address the jury on it, confining himself to its bearings and relations, before the general replying address of the prosecution.—*Dickinson's Quart. Sess.* 565.

Witnesses may be recalled.—*R.* v. *Lamere*, 8 *L. C. J.* 380; *R.* v. *Jennings*, 20 *L. C. J.* 291. 2 *Taylor, Ev.* 1331.

Charge by the judge to the jury.—It is the duty of the president of the court, the case on both sides being closed, to sum up the evidence. His address ought to be free from all technical phraseology, the substance of the charge plainly stated; the attention of the jury directed to the precise issue to be tried, and the evidence applied to that issue. It may be necessary, in some cases, to read over the whole evidence, and, when requested by the jury, this will, of course, be done; but in general, it is better merely to state its substance.—5 *Burn*, 357; 1 *Chit.* 632.

In 12 Cox, 549, the editors reported a case from the United States, preceding it with the following remarks: "Although an American case, the principles of the criminal law being the same as in England, and the like duties and powers of the judge being recognized, a carefully prepared judgment on an important question that may arise here at some time has been deemed worthy of a place for any future reference."

The case is *Commonwealth* v. *Magee*, Philadelphia, December, 1873, decided by Pierce, J., who held that a judge may, where the evidence is clear and uncontradicted, and the character of the witnesses unimpeached and unshaken, tell the jury in a criminal case that it is their duty to convict.

For the same reason which induced the editors of Cox's Reports to insert this case in their columns, the full report thereof is given here.

"This was a motion for a new trial and in arrest of judgment on the ground of misdirection in the charge to the jury.

"Pierce, J., in his judgment, said: The evidence against the defendant was clear and explicit by two witnesses, who testified to having bought and drunk liquors at the defendant's place within this year. The defendant offered no testimony.

"There was nothing in the manner or matter of the witnesses to call in question their veracity, or in the slightest degree to impugn their evidence; the counsel for the defence did not in any manner question the truth of their evidence, but confined his address to the jury to an attack upon the law and the motives of the prosecutors. Were the jury, under these circumstances, at liberty to disregard their oaths and acquit the defendant? They had been solemnly sworn to try the case according to the evidence, and a regard to their oaths would lead them but to one conclusion, the guilt of the defendant. The counsel for the Commonwealth states the charge to have been: 'The judge declared that he had no hesitation in saying, that, under the evidence, it was the duty of the jury to render a verdict of guilty under the bill of indictment.' But no matter which form of expression was used, it was the evidence to which I had just called their attention that indicated their duty, and in view of which the remark was made. I perceive no error in this. It was not a direction to the jury to convict the defendant. It was simply pointing them to their duty. Jurors are bound to observe their oaths of office, whether it will work a conviction or acquittal of a defendant, and they are not at liberty to disregard uncontradicted and unquestioned testimony at their mere will and pleasure. Where, however, the testimony is contra-

dicted by testimony on the other side, or a witness is impeached in his general character, or by the improbability of his story, or his demeanor, it would be an unquestionable error in a judge to assume that the facts testified to by him had been proved.

In 3 *Wharton's Cr. L., par.* 3280, it is said: "Can a judge direct a jury peremptorily to acquit or convict if, in his opinion, this is required by the evidence? Unless there is a statutory provision to the contrary, this is within the province of the court, supposing that there is no disputed fact on which it is essential for the jury to pass." See, also, 1 *Wharton Cr. L., par.* 82*a*.

See Mr. Justice Ramsay's charge to the jury in *R.* v. *Dougall*, 18 *L. C. J.* 90.

In *R.* v. *Wadge (July 27th*, 1878*)*, for murder, Denman, J., remarked that "he had to take exception to the request made to the jury by the counsel for the defence, that, 'if they had any doubt about the case, they should give the prisoner the benefit of it.' That was an expression frequently employed by counsel in defending prisoners, but it was a fallacious and an artful one, and intended to deceive juries. The jury had no right to grant any benefit or boon to any one, but only to be just and do their duty."

In *R.* v. *Glass* (Montreal, Q. B., March, 1877*)*, the counsel for the defence after the judge's charge asked him to instruct the jury with regard to any doubt they might have in the case. Ramsay, J., answered, "No, I shall not, when there is no doubt."

When the judge has summed up the evidence he leaves it to the jury to consider of their verdict. If they cannot agree by consulting in their box they withdraw to a convenient place, appointed for the purpose, an officer being

sworn to keep them, as follows: "You shall well and truly keep this jury without meat, drink, or fire, candle light excepted; you shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them if they are agreed on their verdict. So help you God."—1 *Chit.* 632; 5 *Burn*, 357.

But this formality need not appear on the face of the record. The precautions taken for the safe keeping of the jury are noted by the clerk in the register, but they form no part of what is technically known as the record. Consequently the regularity or sufficiency of this part of the proceedings cannot be questioned upon a writ of error.—*Duval dit Barbinas* v. *R.*, 14 *L. C. R.* 52.

In *R.* v. *Winsor*, 10 *Cox*, 276, Chief Justice Cockburn said that there was no authority for allowing refreshments to the jury after they have retired to deliberate upon their verdict, and that he doubted exceedingly whether a judge would be justified in putting the rule aside by a simple act of his discretionary authority in ordering them refreshments during their deliberation.

In England a statute has been passed altering the common law rule on the subject, 33-34 V., c. 77, but in Canada, the law is yet as above stated in *R.* v. *Winsor*, except in New Brunswick, where it is provided by sec. 3 of 21 V., c. 22, that "when the judge deems it necessary that the jury shall be confined to the precincts of the court house during the progress or until the completion of any long trial for a criminal offence, the sheriff shall provide them necessary refreshment, the expense of which shall be paid by the county treasury out of the funds of the county, on the order of the presiding judge."

The jury coming back to the box, the prisoner is brought to the bar. The clerk then calls the jurors over by their

names, and asks them whether they agree on their verdict; if they reply in the affirmative, he then demands who shall say for them, to which they answer, their foreman. He then addresses them as follows: "Gentlemen, are you agreed on your verdict; how say you, is the prisoner at the bar *(or naming him if the trial is for a misdemeanor, and the defendant bailed)* guilty of the felony *(or as the case may be)* whereof he stands indicted, or not guilty?" If the foreman says guilty, the clerk of the court addresses them as follows: "Hearken to your verdict as the court recordeth it: you say that the prisoner at the bar *(or as the case may be)* is guilty *(or "not guilty," if such is the verdict received)* of the felony *(or as the case may be)* whereof he stands indicted; that is your verdict, and so you say all." The verdict is then recorded. The assent of all the jury to the verdict pronounced by their foreman in their presence is to be conclusively inferred. But the court may, before recording the verdict, either *proprio motu*, or, on demand of either party, poll the jury, that is to say, demand of each of them successively if they concur in the verdict given by their foreman.—2 *Hale*, 299; *Bacon's* Abr. *Verb.* juries, p. 768; 1 *Bishop, Cr. Proc.* 1003.

The mere entry, by the clerk, of the verdict, does not necessarily constitute a final recording of it. If it appear promptly, say after three or four minutes, that it is not recorded according to the intention of the jury, it may be vacated and set right.—*R.* v. *Parkin*, 1 *Moo. C. C.* 45; even if the prisoner has been discharged from the dock, he will be immediately brought back, on the jury which had not left the box saying that "not guilty" has been entered by mistake, and that "guilty" is their verdict.—*R.* v. *Vodden, Dears.* 229.

A judge is not bound to receive the first verdict which the jury gives, but may send them to reconsider it. Pollock, C. B., said, in *R.* v. *Meany, L. & C.* 213: "A judge has a right, and in some cases it is his bounden duty, whether in a civil or a criminal cause, to tell the jury to reconsider their verdict. He is not bound to receive their verdict unless they insist upon his doing so; and where they reconsider their verdict, and alter it, the second, and not the first, is really the verdict of the jury." See *R.* v. *Smith*, 1 *Russ.* 749; *Archbold*, 166; *Bacon's* Abr. *Verb.* "verdict;" 5 *Burn*, 358; 1 *Chit.* 647.

A recommendation to mercy by the jury is not part of their verdict.—*R.* v. *Trebilcock, Dears. & B.* 453; *R.* v. *Crawshaw, Bell, C. C.* 303.

The saying that "a judge is bound to be counsel for the prisoner" is erroneous.—Per Wills, J., in *R.* v. *Gibson*, 16 *Cox*, 181.

180. Every person under trial shall be entitled, at the time of his trial, to inspect, without fee or reward, all depositions, or copies thereof, taken against him, and returned into the court before which such trial is had.—32-33 *V.*, *c.* 29, *s.* 46.

This is the 6-7 Will. IV., c. 114, sec. 4 of the Imperial Statutes.

See the two next sections, and sec. 74, *ante.*

181. Every person indicted for any crime or offence shall, before being arraigned on the indictment, be entitled to a copy thereof, on paying the clerk ten cents per folio for the same, if the court is of opinion that the same can be made without delay to the trial, but not otherwise.—32-33 *V.*, *c.* 29, *s.* 47.

By usage, in Canada, one hundred words form a folio.

At common law, the prisoner was not entitled to a copy of the indictment in cases of treason or felony.—1 *Chit.* 403.

182. Every person indicted shall be entitled to a copy of the

depositions returned into court on payment of ten cents per folio for the same, provided, if the same are not demanded before the opening of the assizes, term, sittings or sessions, the court is of opinion that the same can be made without delay to the trial, but not otherwise, but the court may, if it sees fit, postpone the trial on account of such copy of the depositions not having been previously had by the person charged.—32-33 *V.*, *c.* 29, *s.* 48; 11-12 *V.*, *c.* 42, *s.* 27, *Imp.*

See sec. 74, *ante.*

VERDICT OF ATTEMPT, ETC.

183. If, on the trial of any person charged with any felony or misdemeanor, it appears to the jury, upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment; and no person tried as lastly mentioned shall be liable to be afterwards prosecuted for committing or attempting to commit the felony or misdemeanor for which he was so tried. —32-33 *V.*, *c.* 29, *s.* 49.

This clause is taken from sec. 9 of 14-15 V., c. 100, of the English statutes, upon which *Greaves* has the following remarks:

"As the law existed before the passing of this act (except in the case of the trial for murder of a child, and the offences falling within the 1 V., c. 85, s. 11,) (sec. 191 *post*), there was no power upon the trial of an indictment for any felony to find a verdict against a prisoner for anything less than a felony, or upon the trial of an indictment for a misdemeanor to find a verdict for an attempt to commit such misdemeanor.—(See *R.* v. *Catherall*, 13 *Cox*, 109; *R.* v. *Woodhall*, 12 *Cox*, 240; *R.* v. *Bird*, 2 *Den.* 94; 1 *Chit.* 251, 639). At the same time the general principle of the common law was, that upon a charge of

felony or misdemeanor composed of several ingredients, the jury might convict of so much of the charge as constituted a felony or misdemeanor.—*R.* v. *Hollingbury*, 4 *B. & C.* 329. The reason why, upon an indictment for felony, the jury could not convict of a misdemeanor, was said to be that thereby the defendant would be deprived of many advantages; for if he was indicted for the misdemeanor he might have counsel, a copy of his indictment, and a special jury.—*R.* v. *Westbeer*, 2 *Str.* 1133; 1 *Leach*, 12. The prisoner is now entitled, in cases of felony, to counsel, and to a copy of the depositions, and though not entitled to a copy of the indictment, yet as a matter of courtesy his counsel is always permitted to inspect it. With regard to a special jury, in the great majority of cases a prisoner would not desire it, and it can in no case be obtained unless the indictment has been removed by *certiorari*. Very little ground, therefore, remained for objecting to the jury being empowered to find a verdict of guilty of an attempt to commit a felony upon an indictment for such felony, and the prisoner obviously gains one advantage by it, as where he is charged with a felony, he may peremptorily challenge jurymen, which he could not do if indicted for a misdemeanor. No prejudice, therefore, being likely to arise to the prisoner, and considerable benefit in the administration of criminal justice being anticipated by the change, the jury are now empowered, upon the trial of any indictment for a felony to convict of an attempt to commit that particular felony, and upon the trial of any indictment for a misdemeanor to convict of an attempt to commit that particular misdemeanor."

In *R.* v. *McPherson, Dears. & B.* 197, the prisoner was indicted for breaking and entering a dwelling-house, and stealing therein certain goods specified in the indictment,

the property of the prosecutor. At the time of the breaking and entering the goods specified were not in the house, but there were other goods there the property of the prosecutor. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and *attempting to steal his goods therein: Held*, by the court of criminal appeal, that the conviction was wrong, as there was no attempt to commit the "*felony charged*" within the meaning of the aforesaid section.

Cockburn, C. J., said: "The effect of the statute is, that if you charge a man with stealing certain specified goods, he may be convicted of an attempt to commit 'the felony or misdemeanor charged,' but can you convict him of stealing other goods than those specified? If you indict a man for stealing your watch, you cannot convict him of attempting to steal your umbrella. I am of opinion that this conviction cannot be sustained. The prisoner was indicted for breaking and entering the dwelling-house of the prosecutor, and stealing therein certain specified chattels. The jury found specially that, although he broke and entered the house with the intention of stealing the goods of the prosecutor, before he did so, somebody else had taken away the chattels specified in the indictment; now, by the recent statute it is provided, that where the proof falls short of the principal offence *charged*, the party may be convicted of an attempt to commit the *same*. The word attempt clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed, and therefore the prisoner might have been convicted if the things mentioned in the indictment or any of them had been there; but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt

must be to do that which, if successful, would amount to the felony charged; but here the attempt never could have succeeded, as the things which the indictment charges the prisoner with stealing had been already removed, stolen by somebody else. The jury have found him guilty of attempting to steal the goods of the prosecutor, but not the goods specified in the indictment."

An attempt to commit a felony can only be made out where, if no interruption had taken place, the felony itself could have been committed. The prisoner was indicted for attempting to commit a felony by putting his hand into A's pocket, with intent to steal the property in the said pocket then being. The evidence was that he was seen to put his hand into a woman's pocket; but there was no proof that there was anything in the pocket: *Held*, that on the assumption that there was nothing in the pocket, the prisoner could not be convicted of the attempt charged; *R.* v. *Collins*, *L. & C.* 471; though he was guilty of an assault with intent to commit a felony.—*Stephen's Cr. L., p.* 39, *note. (4th Edit.)*

Greaves says, referring to these cases: "There can be no doubt that this and the preceding decision were right upon the grounds that the indictment in the former alleged the goods to be in the house, which was disproved, and in the latter to be in the pocket, which was not proved."—*Attempts to commit crimes, by Greaves, Cox & Saunders' Cons. Acts, cix.*

But the case of *R.* v. *Goodhall*, 1 *Den.* 187, where it was held that on an indictment for using an instrument with intent to procure the miscarriage of a woman, the fact of the woman not being pregnant is immaterial, Greaves admits, is a direct authority that a man may be convicted of an intent to do that which it was impossible to do.—

Idem, cxi. And if a person administers any quantity of poison, however small, however impossible that it could have caused death, yet if it were done with the intent to murder, the offence of administering poison with intent to murder is complete: *R.* v. *Cluderay* 1 Den. 514; 1 *Russ.* 901, *note by Greaves.* And this rests on a distinction between an *intent* and an *attempt* to commit a crime; it seems that a man may be convicted of doing an act with *intent* to commit a crime, although it be impossible to commit such crime, but that a man cannot be convicted of an *attempt* to commit a crime unless the attempt might have succeeded.—*Greaves,* "*Attempts,*" *Cox & Saunders' Cons. Acts, cxii.*

It was held in *R.* v. *Johnson, L. & C.* 489, that an indictment for an attempt to commit larceny, which charges the prisoner with attempting to steal the goods and chattels of A., without further specifying the goods intended to be stolen is sufficiently certain. And in *R.* v. *Collins, L. & C.* 471, above referred to, the indictment charged the defendant with attempting to steal "the property of the said woman in the said gown pocket then being," without further specifying the goods attempted to be stolen.

In *R.* v. *Cheeseman, L. & C.* 140, Blackburn, J., said: "If the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

In *R.* v. *Roebuck, Dears. & B.* 24, the prisoner was indicted for obtaining money by false pretences. It appeared that the prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver, but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding that it with-

stood the test, he, relying on his own examination and test of the chain, and not placing any reliance upon the prisoner's statement, lent the prisoner ten shillings, the sum he asked, and took the chain as a pledge; the jury found the prisoner guilty of the attempt to commit the misdemeanor charged against him. *Held*, that the conviction was right.

It is said in 2 *Russ.* 599, on this right given to convict the defendant of the attempt to commit the offence charged: "There are some offences which may be attempted to be committed, whilst there are others which cannot be so attempted. It is obvious that where an offence consists in an act that is done, there may be an attempt to do that act which will be an attempt to commit that offence. But where an offence consists in an omission to do a thing, or in such a state of things as may exist without anything being done, it should seem that there can be no attempt to commit such offence. Thus if an offence consists in omitting or neglecting to turn the points of a railway, it may well be doubted whether there could be an attempt to commit that offence. And a very nice question might perhaps be raised on an indictment on the 9-10 Will. III., c. 41, s. 2, for *having possession* of marked stores, where the evidence failed to prove that the stores actually came into the prisoner's possession though an attempt to get them into his possession, as in *R.* v. *Cohen*, 8 *Cox*, 41, and knowledge of their being marked, might be proved; for in order to constitute the offence of having possession of anything, it is not necessary to prove any act done, and, therefore, it would be open to contend that there could not be an attempt to commit such an offence."

It is to be observed, however, that the 50-51 V., c. 45, s. 6, of our statutes corresponding to the 9-10 W. III, c. 41, s. 2, (Imp.), has the words "receives, possesses;" and on

a count charging the receiving of stores, there seems no reason to doubt that there might be a conviction of an attempt to receive; for receiving clearly includes an act done. Thus in *R.* v. *Wiley*, 2 *Den.* 37, where a prisoner went into a coach office and endeavoured to get possession of stolen fowls which had come by a coach, there seems no reason why she might not have been convicted of an attempt to receive the fowls.

Can there be an attempt to commit an assault? Greaves says: "In principle there seems no satisfactory ground for doubting that there may be such an attempt. Although an assault may be an attempt to inflict a battery on another, as where A. strikes at B. but misses him, yet it may not amount to such an attempt, as where A. holds up his hand in a threatening attitude at B., within reach of him, or points a gun at him without more. Is not the true view this—that every offence must have its beginning and completion, and is not whatever is done which falls short of the completion an attempt, provided it be sufficiently proximate to the intended offence? Pointing a loaded gun is an assault. Is not raising the gun in order to point it an attempt to assault?

In *R.* v. *Ryland*, 11 *Cox*, 101, it was held that under an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt to commit that offence, though the child was not unwilling that the attempt should be made.

In *R.* v. *Hapgood*, 11 *Cox*, 471, H. was indicted for rape, and W. for aiding and abetting. Both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt, The conviction was affirmed both as to W. and H. See *R.* v. *Bain, L. & C.* 129, *and note a thereto.*

It was held in *R.* v. *Connell*, 6 *Cox*, 178, that upon a trial for felony the jury under the above clause can only convict of an attempt which is a misdemeanor, and not of an attempt which is made felony by statute. Thus, on an indictment for murder with poison, the prisoner cannot be convicted of feloniously administering poison to the deceased with intent to murder him. But it is doubtful if, in Canada, this ruling would be followed in view of the enactment contained in section 185, *post*.

The attempt to commit a felony or a misdemeanor is, at common law, a misdemeanor, punishable by fine or imprisonment, or both. See *post*, s. 31, c. 181.

But many cases of attempts to commit indictable offences must fall under s. 34, c. 162, p. 184, *ante*, which provides for the punishment of the common law misdemeanor of any one who assaults any person with intent to commit any indictable offence.

An assault with intent to commit a crime is an attempt to commit that crime; though see reporter's note in *R.* v. *Dungey*, 4 *F. & F.* 99.

An attempt to commit a crime is an intent to commit such crime by some overt act, and in cases of rape, etc., necessarily includes an assault.—*Stephen's Cr. L. art.*, 49.

Upon an indictment for rape or for assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt.—*R.* v. *Ryland*, 11 *Cox*, 101. Also, *R.* v. *Hapgood*, *ubi supra*; *R.* v. *Mayers*, 12 *Cox*, 311; *R.* v. *Barratt*, 12 *Cox*, 498; *R.* v. *Dungey*, 4 *F. & F.*, 99.

The prisoner wrote a letter to a boy of fourteen, inciting him to commit an unnatural offence: *Held*, that this was an attempt to incite to commit a crime, and a misdemeanor. An attempt to commit a misdemeanor is a misdemeanor. To incite, solicit or do any act with intent to induce

another person to commit a felony is a misdemeanor.—*R.* v. *Ransford*, 13 *Cox*, 9. See *R.* v. *Gregory*, 10 *Cox*, 459, and 1 *Burn*, 342.

184. If, upon the trial of any person for any misdemeanor, it appears that the facts given in evidence, *while they include such misdemeanor*, amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor, unless the court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony,—in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor; and the person tried for such misdemeanor, *if convicted*, shall not be liable to be afterwards prosecuted for felony on the same facts.—32-33 *V.*, *c.* 29, *s.* 50.

The above clause is taken from the 14-15 V., c. 100, s. 12 of the Imperial Acts. The words in *italics* are not in the English Act, but the clause has always been interpreted, in England, as if these words were actually in it.

Greaves says on this clause: "This section was introduced to put an end to all questions as to whether on an indictment for a misdemeanor, in case upon the evidence it appeared that a felony had been committed, the defendant was entitled to be acquitted, on the ground that the misdemeanor merged in the felony.—*R.* v. *Neale*, 1 *C. & K.* 591; 1 *Den.* 36; *R.* v. *Button*, 11 *Q. B.* 929. The discretionary power to discharge the jury is given in order to prevent indictments being collusively or improperly preferred for misdemeanors where they ought to be preferred for felonies, and also to meet those cases where the felony is liable to so much more severe a punishment than the misdemeanor, that it is fitting that the prisoner should be tried and punished for the felony. For instance, if on an indictment for attempting to commit a rape, it clearly appeared that the crime of rape was committed, it would be right to discharge the jury."

Formerly, where upon a indictment for an assault with

intent to commit a rape, a rape was actually proved, an acquittal would have been directed, on the ground that the misdemeanor was merged in the felony.—*R.* v. *Harmwood*, 1 *East, P. C.* 430; *R.* v. *Nicholls*, 2 *Cox*, 182; though in *R.* v. *Neale*, 1 *Den.* 36, cited, *ante*, by Greaves, it was held before this enactment that where a prisoner was indicted for carnally knowing a girl between ten and twelve years of age, and it was proved that he had committed a rape upon her, he was not thereby entitled to be acquitted. The above section removes all doubt on the matter, but it must not be lost sight of, that by its express terms the facts proved, though amounting in law to a felony, *must also, include the misdemeanor charged.* For instance, if upon an indictment for having carnal knowledge of a girl above the age of ten years and under the age of twelve years, it appears that in fact the girl was under the age of ten years, this section does not apply, and the prisoner must be acquitted; the offence charged against him is not proved; quite another and totally different offence is proved, and this offence as proved does not include the misdemeanor charged.—*R.* v. *Shott*, 3 *C. & K.* 206, is a ruling to this effect, in England, though there the words "while they include such misdemeanor" are not in the corresponding clause.

But the clause fully applies where, upon an indictment for false pretences, the facts prove that the false pretences have been affected by a forgery; in such a case, though a forgery be proved, the prisoner may nevertheless be convicted of the misdemeanor charged, if such is also proved.

185. No person shall be tried or prosecuted for an attempt to commit any felony or misdemeanor, who has been previously tried for committing the same offence.—32-33 *V., c.* 29, *s.* 52.

There is no principle so well established in the English criminal law, and in fact, in every system of jurisprudence,

that "no man is to be brought into jeopardy of his life more than once for the same offence:" 4 *Blackstone*, 335; or as expressed by Lord Campbell, in *R.* v. *Bird*, 2 *Den.* 216, in other terms: "No one ought to be twice tried for the same cause," a rule, in the civil law, contained in the words, "*nemo bis vexari debet pro eadem causâ.*"

It was laid down by Mr. Justice Buller, in *R.* v. *Vandercomb*, 2 *Leach*, 708, and has never been since doubted, that the true criterion to ascertain whether an indictment "puts any one twice in jeopardy for the same offence," is whether the facts charged in the second indictment would have been sufficient to support a conviction upon the first indictment; and by the words *a conviction upon the first indictment*, is not meant only *a conviction of the crime expressly charged in the first indictment* but *any conviction allowed by law upon the first indictment.*

The above clause is not in the Imperial Acts. The last part of sec. 183, *ante*, seems to cover it, and if *R.* v. *Connell*, 6 *Cox*, 178, *ubi supra*, under sec. 184, is to be followed, this clause 185 should be repealed.

186. If the facts or matters alleged in an indictment for any felony under the "*Act respecting Treason and other Offences against the Queen's authority,*" amount in law to treason, such indictment shall not, by reason thereof, be deemed void, erroneous or defective; and if the facts or matters proved on the trial of any person indicted for felony under the said Act amount in law to treason, such person shall not, by reason thereof, be entitled to be acquitted of such felony; but no person tried for such felony shall be liable to be afterwards prosecuted for treason upon the same facts.—31 *V.*, *c.* 69, *s.* 8. 11-12 *V.*, *c.* 12, *s.* 7, *Imp.*

See *c.* 146, p. 30, *ante.*

187. The jury empanelled to try any person for treason or felony shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony.—32-33 *V.*, *c.* 29, *s.* 53.

This is the 7-8 Geo. IV., c. 28, s. 5 of the Imperial Statutes.

By the old English law, flight by any one accused of a crime was an offence, and in treason and felony, if the jury found that the prisoner "had fled for it," this finding carried the forfeiture of his goods and chattels, whether found guilty or acquitted of the crime charged. Long before being specially abolished by Parliament, the question "did he fly for it" had become a mere form of no consequence, as the jury always found against the flight.—4 *Blackstone*, 387; 1 *Chit.* 731.

188. If any person tried for the murder of any child is acquitted thereof, the jury by whose verdict such person is acquitted may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition of such child or of the dead body of such child, endeavor to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth.—32-33 *V.*, *c.* 20, *s.* 61, *part.* 24-25 *V.*, *c.* 100, *s.* 60, *Imp.*

See p. 221, *ante*, under s. 49 of c. 162.

Cases have not unfrequently occurred where endeavors have been made to conceal the birth of children, and there has been no evidence to prove that the mother participated in those endeavors, though there has been sufficient evidence that others did so, and under the former enactments, under such circumstances, all must have been acquitted. The present clause is so framed as to include every person who uses any such endeavor, and it is quite immaterial under it whether there be any evidence against the mother or not.

Under the former enactments a person assisting the mother in concealing a birth would only have been indictable as an aider or abettor; but a person so assisting would come within the terms of this clause as a principal.

The terms of the former enactments were "by secret

burying or otherwise disposing of the dead body," and on these terms many questions had arisen. See *R.* v. *Snell*, 2 *M. & Rob.* 44; *R.* v. *Watkins*, 1 *Russ.* 777; *R.* v. *Ash*, 2 *M. & Rob.* 294; *R.* v. *Bell*, ib.; *R.* v. *Halton*, ib.; *R.* v. *Jones*, ib.; *R.* v. *Goldthorpe*, 2 *Moo. C. C.* 240; *R.* v. *Perry*, *Dears.* 471. Under this clause "any secret disposition" is sufficient.

Under the former enactments the mother alone could be convicted of this offence where she was tried for the murder of her child. Under this clause any person tried for the murder of a child may be convicted of this offence, whether the mother be convicted or not.—*Greaves' note to this section and to s.* 49 *of c.* 162, p. 221, *ante.*

189. If, upon the trial of any indictment for any felony, except in cases of murder or manslaughter, the indictment alleges that the accused did wound *or inflict grievous bodily harm* on any person with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with the intent to resist or prevent the lawful apprehension or detainer of any person, and the jury is satisfied that the accused is guilty of the wounding, or inflicting grievous bodily harm, charged in the indictment, but is not satisfied that the accused is guilty of the felony charged in such indictment, the jury may acquit of the felony, and find the accused guilty of unlawfully and maliciously wounding, *or inflicting grievous bodily harm;* and such accused shall be liable to three years' imprisonment.—32-33 *V. c.* 20, *s.* 19, *part.* 14-15 *V., c.* 19, *s.* 5, *Imp.*

The words in *italics* are not in the Imperial Act.

In *R.* v. *Ward*, 12 *Cox*, 123, the indictment charged a felonious wounding with intent to do grievous bodily harm. The jury returned a verdict of unlawful wounding, under 14-15 V., c. 19, s. 5 (s. 189, *supra*). Upon a case reserved, it was held that the words "*maliciously and*" must be understood to precede the word unlawfully in this section, and that to support the verdict the act must have been done maliciously as well as unlawfully.

Greaves, in an article on this case, 1 *Law Magazine* 379, censures severely this ruling. According to him, a new offence, that of unlawful wounding, was created by that clause, and the word *maliciously* has been purposely omitted from it. In a preceding number of the same magazine, p. 269, an anonymous writer attacks the decision in *Ward's Case* from another point of view. The shooting was certainly proved not to have been intended to strike the prosecutor, but the court, by twelve judges against three, found that there was proof of malice sufficient to support the conviction. On this appreciation of the facts of the case, this anonymous writer censures the judgment, at the same time admitting its correctness, so far as the court held the *maliciously* as necessary as the *unlawfully* under this clause, though the word *maliciously* had been dropped in the statute. It thus appears that the question is not very well settled in England, so far.

This enactment applies to a robbery with wounding under s. 34 of the Larceny Act, p. 331, *ante*.—*R.* v. *Miller*, 14 *Cox*, 356, has no application in Canada.

The defendant may also be found guilty of a common assault or of attempting to commit the offence charged.—See remarks under s. 14, c. 162, p. 163, *ante*.

On motion to discharge a prisoner convicted before a Police Magistrate, on habeas corpus, where the conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grevious bodily harm."

Held, that the addition of the words "with intent to do grevious bodily harm" did not vitiate the conviction, and that the prisoner might be lawfully convicted of the statutory misdemeanor of malicious wounding.

Held, also, that imprisonment at hard labor for a year

was properly awarded under 38 V., c. 47.—*The Queen* v. *Boucher*, 8 *P. R.* (*Ont.*) 20. *Affirmed on appeal*, 4 *Ont. App. R.* 191.

190. If, upon the trial of any person for unlawfully and maliciously administering to or causing to be administered to or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, the jury is not satisfied that such person is guilty of such felony, but is satisfied that he is guilty of the misdemeanor of unlawfully and maliciously administering to, or causing to be administered to or taken by such person, any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, the jury may acquit the accused of such felony, and find him guilty of such misdemeanor; and thereupon he shall be punished in the same manner as if convicted upon an indictment for such misdemeanor.—32-33 *V., c.* 20, *s.* 24. 24-25 *V., c.* 100, *ss.* 23, 24, 25, *Imp.*

See p. 167, *ante*, remarks under secs. 17, 18, c. 162.

191. If, upon the trial of any person for any felony whatsoever, the crime charged includes an assault against the person, although an assault is not charged in terms, the jury may acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding, and the person so convicted shall be liable to five years' imprisonment.—32-33 *V., c.* 29, *s.* 51.

See sec. 248, *post*.

From 1837 to 1851, the statute book in England contained an enactment similar to this one, the 7 Will. IV. and 1 V., c. 85, s. 11; but it was found there, that such great difficulties had arisen in its construction, that it was repealed by the 14-15 V., c. 100, s. 10.

On this repealing clause, Greaves says:—

"This section repeals the 11th sec. of the 1 V., c. 85, which had not only led to difficulties in determining to what cases it applied, but had been applied to cases to which it is extremely questionable whether it was ever intended to apply. The power to convict of an attempt to commit

a felony given by the last section (sec. 183 of our Procedure Act), and the power to convict of unlawfully cutting, stabbing, or wounding, given by the 14-15 V., c. 19, s. 5 (section 189, *ante*), are much better calculated to prove beneficial than the repealed section."

In the case of *R.* v. *Bird*, 2 *Den.* 94, on the interpretation of the repealed clause, fourteen judges of the court of Exchequer were divided eight to six, and the Chief Justice of England, Lord Campbell, who was one of the minority, closed his remarks on the case by saying: "I hope I may, without impropriety, express a wish that the Legislature will speedily repeal or explain the enactment which has caused such confusion. Of course, I am ready to abandon the construction of it for which I have been contending, and most respectfully and submissively to be governed by the opinion of my learned brethren who differ from me; but I have not been able to gather from them any clear and certain rule for my future guidance, and I am afraid that without the interference of Parliament, notwithstanding our best efforts to be unanimous, we ourselves, as well as others, may again find it difficult to anticipate the result of our deliberations."

This was on the 12th February, 1851, and on the 7th August of the same year, Parliament repealed the objectionable clause. In Ontario, it has been held that under this clause a verdict of assault upon an indictment for murder or manslaughter is not legal: *R.* v. *Ganes*, 22 *U. C. C. P.* 185; *R.* v. *Smith*, 34 *U. C. Q. B.* 552, whilst in Quebec, in *R.* v. *Carr*, 1872, a verdict of assault in a case of manslaughter has been given, and received by Chief Justice Duval.

The following are the most important decisions in England on the interpretation of this clause.

In a joint indictment for felony, one may be found guilty of the felony, and the other of assault under this clause.—*R.* v. *Archer*, 2 *Moo. C. C.* 283. In an indictment for felony, a conviction cannot be given under this clause of an assault completely independent and distinct, but only of such an assault as was connected with the felony charged. —*R.* v. *Gutteridge*, 9 *C. & P.* 471 ; and this interpretation was admitted as undoubtedly right in *R.* v. *Phelps*, 2 *Moo. C. C.* 240 (see *post*), and by the fourteen judges in *R.* v. *Bird*. The case of *R.* v. *Pool*, 9 *C. & P.* 728, where Baron Gurney held that if a felony was charged and a misdemeanor of an assault proved, the defendant might be convicted of the assault, although that assault should not be connected with the felony, stands, therefore, overruled. In *R.* v. *Boden*, 1 *C. & K.* 395, it was held that on an indictment for assaulting with intent to rob, if that intent is negatived by the jury, the prisoner may be convicted of assault under this enactment. In *R.* v. *Birch*, 1 *Den.* 185, upon a case reserved, it was held that upon an indictment for robbery, the defendant, under this clause, may be found guilty of a common assault. The judges thought, upon consulting all the authorities, that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. See also *R.* v. *Ellis*, 8 *C. & P.* 654. But they were of opinion that, in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the crown prosecutes as a felony by the indictment. And it was suggested that it would be prudent that all indictments for felony includ-

ing an assault, should state the assault in the indictment. Our clause, however, has the words "although an assault be not charged in terms" which were not in the English act.

In *R.* v. *Greenwood*, 2 *C. & K.* 339, it was held by Wightman, J., that if on an indictment for robbery with violence the robbery was not proved, the prisoner could not be found guilty of the assault only, under this clause, unless it appeared that such assault was committed, in the progress of something which, when completed, would be, and with intent to commit, a felony.

In *R.* v. *Reid*, 2 *Den.* 88, it was held by five judges that the verdict of assault allowed by this clause must be for an assault as a misdemeanor, and not for a felonious assault, and this has never since been doubted.

In *R.* v. *St. George*, 9 *C. & P.* 491, the prisoner was charged with attempting to fire a pistol with intent, etc. The question was whether the prisoner could be convicted of an assault committed with his hand prior to having drawn out the pistol. Baron Parke held that the prisoner could only be found guilty of that assault which was involved in and connected with firing the pistol.

In *R.* v. *Phelps*, 2 *Moo. C. C.* 240, the prisoner with others was indicted for murder. It was proved that Phelps, in a scuffle, struck the deceased once or twice and knocked him down; that after this, Phelps went away to his own home and took no further part in the affray: that, about a quarter of an hour afterwards, the deceased, on the same spot, was again assaulted by other parties, and received then an injury of which he died on the spot. On these facts the jury acquitted Phelps of the felony, and found him guilty of the assault. But the judges were unanimously of opinion that the conviction was wrong, as for a

verdict of assault under the clause mentioned, the assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault as this was.

In *R.* v. *Crumpton, C. & M.* 597, Patteson, J., held that, in manslaughter, a jury should not convict a prisoner of an assault unless it conduced to the death of the deceased, even though the death itself was not manslaughter. See also *R.* v. *Connor*, 2 *C. & K.* 518.

In the case of *R.* v. *Bird*, 2 *Den.* 94, already cited, as the final blow to the enactment in question, in England, the court, on the following division, decided that on an indictment for murder or manslaughter, the prisoner, under the said clause, cannot be convicted of an assault:

Against the conviction.	*For the conviction.*
Pollock, C. B.	Lord Campbell, C. J.
Patteson, J.	Jervis, C. J.
Coleridge, J.	Parke, B.
Wightman, J.	Alderson, B.
Cresswell, J.	Maule, J.
Erle, J.	Martin, B.
V. Williams, J.	
Talfourd, J.	

In the case of *R.* v. *Ganes*, 22 *U. C. C. P.* 185, already cited, the court followed the rule laid down by the majority in *R.* v. *Bird*, and decided that, under the said section (191) of our Procedure Act, a verdict of assault cannot be given upon an indictment for murder or manslaughter. It may be remarked that, in this case, Chief Justice Hagarty distinctly said that his own individual opinion was wholly with that of the minority in *R.* v. *Bird*, viz. that, in such cases, a verdict of assault is legal. See also *R.* v. *Smith*, 34 *U. C. Q. B.* 552.

In Quebec, in the cases of *R.* v. *Carr* (2nd case,) *R.* v. *Wright*, *R.* v. *Taylor*, and upon indictments charging either murder or manslaughter, verdicts of "guilty of assault" have been given, and received, unquestioned.

In *R.* v. *Walker (Salacia case,)* Quebec, 1875, for manslaughter, Dorion, C. J., charged the jury that they were at liberty to return a verdict of common assault.

Upon an indictment for rape or for an assault with intent to commit rape, under secs. 37, 38, of c. 162, see p. 197, *ante*, a boy under the age of fourteen years may be convicted of an assault under the said section 191 of the Procedure Act.—*R.* v. *Brimilow*, 2 *Moo. C. C.* 122.

Upon an indictment, under sec. 8, c. 162, p. 147, *ante*, for feloniously assaulting with intent to murder, a verdict of common assault may be given under the said section of the Procedure Act.—*R.* v. *Cruse*, 2 *Moo. C. C.* 53; *R.* v. *Archer*, 2 *Moo. C. C.* 283. If a man has carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, upon an indictment for rape, he must be acquitted of the felony, but may, under the said section of the Procedure Act, be convicted of an assault.—*R.* v. *Saunders*, 8 *C. & P.* 265; *R.* v. *Williams*, 8 *C. & P.* 287. (This is rape now in England by statute of of 1885.)

But to authorize such a verdict, the felony *charged* must necessarily include an assault on the person, and, for instance, on an indictment for administering poison with intent to murder, a verdict of assault cannot be given under this clause. Nor can it be given on an indictment for burglary with intent to ravish.—*R.* v. *Watkins*, 2 *Moo. C. C.* 217; *R.* v. *Dilworth*, 2 *M. & Rob.* 531; *R.* v. *Draper*, 1 *C. & K.* 176; but such a verdict may be given, if the indictment charges an assault, and the wilfully administering of deleterious drugs.—*R.* v. *Button*, 8 *C. & P.* 660.

The authorities on the question are sufficiently clear as to one point, viz., that, under this section of the Procedure Act, in *all* cases of felonies, which include an assault against the person, although an assault be not charged in terms, the jury may acquit of the felony, if such is not proved, and find a verdict of assault against the defendant, if the evidence warrants it; that is to say, if an assault forming part of the very act or transaction which the crown prosecutes as a felony by the indictment has been proved.

It is true that as to indictments for murder or manslaughter, *R.* v. *Phelps* and *R.* v. *Bird*, in England, and *R.* v. *Ganes*, in Ontario, are given by the reporters as ruling, as an abstract principle, that in *no case* of murder or manslaughter a verdict of assault can be given under this section; but a careful consideration of these cases will show that they do not bear such an interpretation.

In the first of these cases, *R.* v. *Phelps*, as already stated, it was decided that, upon an indictment for murder, the defendant cannot, under this clause, be convicted of an assault entirely separate and distinct from the felony charged; it was there proved that when the deceased was killed, when the murder was committed, the defendant was away from the spot and had been gone for a quarter of an hour; the judges decided that, upon this evidence, the defendant could not be convicted of an assault, though an assault had been proved to have been committed by him on the deceased a quarter of an hour before the murder took place. And this ruling has never since been questioned; it is not because a felony involves an assault that the defendant can be convicted of any assault whatever, committed on the same person; if in the course of the evidence, the witnesses happen to disclose crimes

entirely distinct and disconnected from the offence charged, the jury are not thereby authorized to adjudge on anything else but the facts forming part of the crime laid in the indictment. The assault which can be found cannot be any other assault than the one necessarily accompanying the crime charged, and forming an integral part of it, as in *R.* v. *Brimilow; R.* v. *Cruse; R.* v. *Birch, etc., ante.* So much for *R.* v. *Phelps,* which is clearly far from supporting the proposition that a verdict for assault cannot, under any circumstances, be found in cases of murder or manslaughter.

Then comes *R.* v. *Bird.* It is an error to cite this case as deciding anything else than the case of *R.* v. *Phelps.* It is based on the following facts: The prisoners were indicted for the murder of Mary Ann Parsons, by striking and beating her. It was proved on the trial that Mary Ann Parsons' death, on the 4th of January, 1850, was caused *exclusively* by one particular blow on the head, inflicted shortly before her death, but there being no evidence that the fatal blow had been struck by either of the prisoners, they were acquitted; during the course of the trial, it had been proved that the prisoners had committed different assaults on the deceased in the two months preceding her death, but that none of these assaults were connected with her death. The majority of the court held, that on these facts, a verdict of assault could not be given against the prisoners. And why? Because the assaults committed by them on Mary Ann Parsons during the two months preceding her death were not included in the crime charged in the indictment, but were totally different and distinct offences; because the only assault included in the indictment was the particular blow which had caused her death, and as they were found not guilty of having

given that particular blow, they were entitled to a full acquittal, and the jury had not the right to say: "It is true that the assault which caused Mary Ann Parsons' death has not been proved to have been committed by the prisoners, but other assaults previously committed by them on the deceased have been proved, and we will take this occasion to find the defendants guilty of these, though they were only accused, in this case, of the particular blow which caused the death."

It is obvious that this would be trying a man for one offence, and finding him guilty of another. That is what the court refused to do in that case of *R.* v. *Bird*, and a reference, as *infra*, to the remarks of the following judges who form part of the majority will show that they followed *Phelps'* case, without going an inch further:

Talfourd,	2 Den.	pp.	147, 148
Williams,	"	"	157, 158
Cresswell,	"	"	164, 165
Wightman,	"	"	168, 169
Coleridge,	"	"	180, 181
Patteson,	"	"	183, 187

None of these learned judges said that a verdict for assault can never be given on an indictment for murder or manslaughter. Indeed, it will be found that they all appear to think such a result possible.

Wightman, J., distinctly says: "If in the present case, it had appeared that, at the time the mortal injury was received, the prisoners were with the deceased, and had assaulted and beaten her immediately before, but that the evidence raised a doubt whether the mortal injury was occasioned by blows, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the

prisoners of felony, I should think that they might be convicted of assault under the statute, for in that case, the assault proved would have been involved in, and formed part of the act or transaction charged as a felony in the indictment, and prosecuted as such."

And Jervis, C. J. *(one of the minority,)* says: "If it had been proved that the child had not died, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder. If the death resulted from natural causes, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder."

In the Ontario case of *R.* v. *Ganes*, see *ante*, the facts were almost similar to those in *R.* v. *Bird*, and the only ruling in the case is that where upon an indictment for murder, the prisoners are proved to have, at different times *before* the death of the deceased, committed on him various assaults, yet they cannot be found guilty of *these* assaults, and must be acquitted, altogether, if it is proved that these assaults were not connected with the death of the deceased; but, on the contrary, that the deceased died from a burning, with which the prisoners were not connected. Here, as in *Phelps'* and *Bird's* cases, the only question decided is that upon an indictment for murder or manslaughter, the defendant cannot be found guilty of any offence not included in the crime charged, viz., of an assault committed *at another time* than the offence charged, of any other assault than the one which the prosecution *charged as a felony*.

And the judges, who formed the minority in *Bird's* case, did not intend to overrule *R.* v. *Phelps*, but thought one case distinguishable from the other.

But it is said, and this reasoning is adopted by Mr.

Justice Gwynne, in *R.* v. *Ganes*, that, as in murder or manslaughter, the only assault charged in the indictment is the one which conduced to the death of the deceased, if the prisoner is guilty of an assault, he is guilty of the felony, and cannot, in respect of that assault, be convicted of assault merely; and that if the assault proved does not conduce to the death, it is distinct from and independent thereof, and is, therefore, not included in the crime charged; and, therefore, that no verdict of assault can be rendered upon an indictment for homicide, in respect of such an assault.

When different assaults are brought out by the prosecution, in the course of the evidence, as supposed by Erle, J., in his remarks in Bird's case, and as was the case in *R.* v. *Phelps*, *R.* v. *Bird*, and *R.* v. *Ganes*, this opinion seems to be unassailable. But when the defendant is accused of having, on a certain occasion, killed a person, by, for instance, striking him in the chest, cannot the jury say: "We find that, on the occasion specified, the defendant did strike the deceased, but we do not think it proved by the prosecution that the deceased died of this blow." How can it be said that the *crime charged* is the assault connected with the death, and that of the assault connected with the death only the prisoner can be found guilty, or else be acquitted altogether? This reasoning would render the clause wholly inoperative in cases of homicide. And when the clause says "for *any* felony *whatever*," it expressly includes murder or manslaughter. Moreover this interpretation would make the clause say that when a felony is proved, a verdict of assault *can* be returned. This would be absurd, and the law does not say it; quite the contrary, such a finding is allowed only, *if the evidence warrants it.* The clause must be read, in

cases of homicide, as if it said: "On the trial of any person for murder or manslaughter, where the homicide charged includes an assault against the person, although an assault be not charged in terms (and no assault is now, in such cases, charged in terms), the jury may acquit of the felony, and find a verdict of guilty of assault against the defendant, if the defendant's act which the prosecution called a felony has been proved to be only an assault." The clause, indeed, says, in express terms, that in such a case, there must be an acquittal for a part, *i.e.*, "may acquit of the felony," and a conviction for another part, *i.e.*, "may find a verdict of assault," showing the operation it authorizes, of first divesting the act charged against the defendant of the felonious character which the prosecution endeavoured to put upon it, if the evidence warrants it, and secondly, of finding the same act to be an assault, if the evidence warrants it.

Any other interpretation gives to the clause an absurd sense, and the rule is that of two possible interpretations of a statute, the one which gives it a reasonable and practicable sense is to be preferred to any other, which would make it absurd and inoperative.

In a case of *R.* v. *Dingman*, 22 *U. C. Q. B.* 283, it was held that, under s. 66, c. 99, of the Consolidated Statutes of Canada, there could be no conviction for an assault, unless the indictment charged an assault in terms, or a felony necessarily implying an assault; but the insertion of the words "*although an assault be not charged in terms*," in sec. 191 of the Procedure Act, renders this ruling now inapplicable, if it was ever correct.

In New Brunswick, the repealed statute, 1 Rev. Stat., c. 149, s. 20, enacted that: "Whoever, on a trial for murder or manslaughter, or any other felony which shall

include an assault, shall be convicted of an assault only, shall be imprisoned for any term not exceeding three years, or fined at the discretion of the court."

In *R.* v. *Cregan*, 1 *Hannay*, 36, on an indictment for murder, the jury found the prisoner guilty of an assault only, but that such assault did not conduce to the death of the deceased. The court held this conviction illegal, and not sustained by the above statute.

In *R.* v. *Cronan*, 24 *U. C. C. P.*, 106, the Ontario Court of Common Pleas held that upon an indictment for shooting with a felonious intent, the prisoner, if acquitted of the felony, may be convicted of a common assault, and that to discharge a pistol loaded with powder and wadding, at a person, within such a distance that he might have been hit, is an assault.

In *R.* v. *Goadby*, 2 *C. & K.* 782, it appears to have been held that a verdict of assault cannot be received on an indictment for feloniously stabbing with intent to do grievous bodily harm, but this case seems very questionable, says *Greaves, note d*, 2 *Russ.* 63.

The case of *R.* v. *Dungey*, 4 *F. & F.* 99, where it was held that after an acquittal upon an indictment for rape, the prisoner may be indicted for a common assault, is not law in Canada, under sec. 191 of the Procedure Act.

Held, by Weldon, Wetmore and King, J. J., (Allen, C. J., and Duff, J., dis.), that on an indictment for murder in the short form given in schedule A. to c. 29 of 32-33 V., a prisoner cannot be convicted of an assault under s. 51 of that chapter.

Held, also, by all the judges, that the fact of the prisoner's counsel having, at the trial, consented that he could be convicted, and requested the judge so to direct the jury, did not preclude him from afterwards objecting to the

validity of the conviction on this ground.—*The Queen* v. *Mulholland*, 4 *P. & B. (N. B.)* 512.

Greaves' note to R. v. *Phillips*, 3 *Cox*, 226.

"It may admit of some doubt whether the construction of s. 11 of the 1 V., c. 85, is finally settled. The framer of the clause probably intended that the clause should apply to those cases where, upon an indictment for a felony, including an assault, the jury should acquit on the ground that the felony, although attempted, was not completed. But if such were the intention, the words do not so clearly express it as they ought, as they authorize the jury to convict 'of assault' on any indictment for felony 'where the crime charged shall include an assault.' These words are so general that they might include any assault, whether at the time of the felony charged or not; and the learned judges have therefore been obliged to put some limitation upon them, and the proper limitation seems to be that which has been put upon them by the very learned Baron in *R.* v. *St. George*, namely that the assault must be an assault involved in and connected with the felony charged; and it is submitted that it must be such an assault as is essential to constitute part of the crime charged. A felony including an assault may be said to consist of the assault, the intent to commit the felony, and the actual felony. Thus in robbery there is the assault, the intent to rob, and the actual robbery; and in such a case it is submitted the assault, of which the prisoner may be convicted, must be such an assault as constitutes one step towards the proof of the robbery. Upon this the question arises whether an assault, where the jury negative any intention to commit a felony, is within the section, and it is submitted that it is not, as such an assault cannot be said to be involved in or connected with the felony charged in any manner what-

soever. It is true that an assault is included in the felony but it is an assault coupled with an intent, and if the jury negative the intent, such an intent in no way tends to prove the felony; and it certainly would be a great anomaly if the prisoner were indicted for a felony, and the jury found he had no intention of committing a felony, that he might be sentenced to three years imprisonment and hard labor, while if he had been indicted for the offence of which he was really guilty, he could only be sentenced to three years imprisonment without hard labor *R.* v. *Ellis* (8 *C. & P.* 654), therefore seems deserving of reconsideration, and the more so as it was decided before *R.* v. *Guttridge* (9 *C. & P.* 471), *R.* v. *St. George*, (9 *C. & P.* 483), *R.* v. *Phelps (Gloucester Sum. Ass. M. S. cited* 1 *Russ.* 781). The intention, no doubt, was to punish attempts to commit felonies, including assaults, and it is to be regretted that the provision, instead of being what it is, was not that upon any indictment for felony, if the jury should think that the felony was not completed, they might find the prisoner guilty of an attempt to commit the felony charged in the indictment."

In that case of *R.* v. *Phillips*, four persons were indicted for a felony. Three were found guilty of the felony, and one of common assault.

Under s. 36, c. 162, p. 184, *ante*, common assault is punishable with one year's imprisonment. Under the above sec. 191 of the Procedure Act, an assault found upon an indictment for felony is punishable with five years' imprisonment.

192. If, upon the trial of any person upon an indictment for robbery, it appears to the jury, upon the evidence, that the accused did not commit the crime of robbery, but that he did commit an assault with intent to rob, the accused shall not, by reason thereof, be entitled to be acquitted, but the jury may find him guilty of an assault

with intent to rob; and thereupon he shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried, as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.—32-33 *V., c.* 21, *s.* 40. 24-25 *V., c.* 96, *s.* 41, *Imp.*

See secs. 32-33 of *Larceny Act*, p. 315 *ante*. Under such a verdict, the punishment is as provided for in sec. 33 of the *Larceny Act*, or sec. 34, thereof, if the indictment is under the said clause. See page 331, *ante*.

This clause was introduced in consequence of the case of *R.* v. *Reid*, 2 *Den.* 88. There seems no doubt that on an indictment properly framed, that is to say, charging an assault with intent to rob and a robbery, that the defendant might have been convicted of the assault with intent to rob, just in the same way as upon an indictment for burglary charging a breaking with intent to steal and stealing the defendant may be convicted of breaking with intent to steal. But it was thought better to provide for this case by express enactment, in order to prevent any doubt on the matter.—*Greaves' note.*

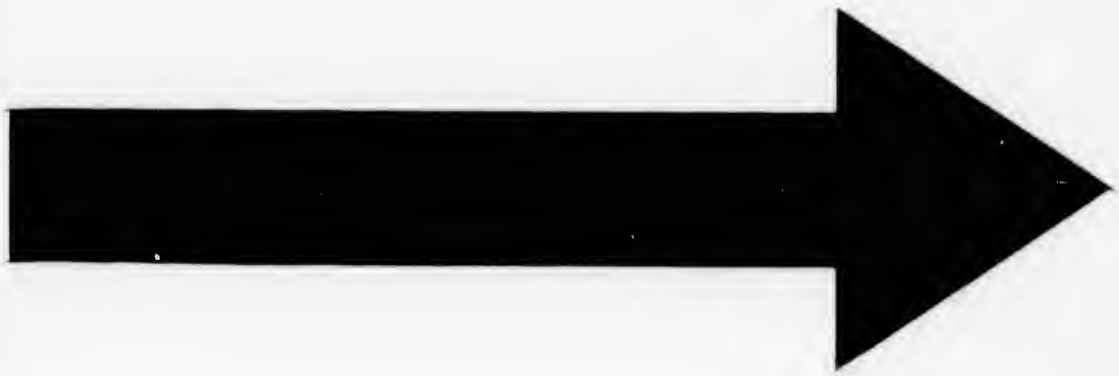
See *R.* v. *Mitchell*, 2 *Den.* 468; *Dears.* 19.

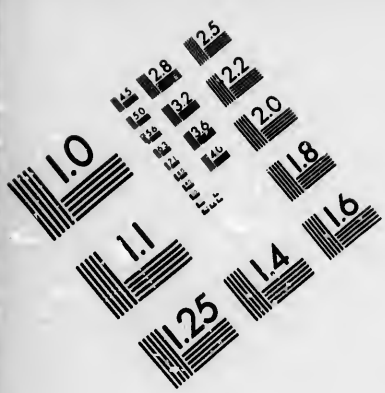
193. Every one who is indicted for any burglary, where the breaking and entering are proved at the trial to have been made in the day-time, and no breaking out appears to have been made in the night-time, or where it is left doubtful whether such breaking and entering or breaking out took place in the day or night-time, shall be acquitted of the burglary, but may be convicted of the offence of breaking and entering the dwelling-house with intent to commit a felony therein.—32-33 *V., c.* 21, *s.* 57.

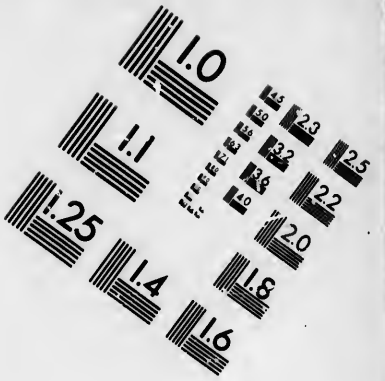
This clause is not in the English Act.

See sec. 42, *Larceny Act*, *p.* 365, *ante*.

194. It shall not be available, by way of defence, to a person charged with the offence of breaking and entering any dwelling-house, church, chapel, meeting-house or other place of divine worship, or







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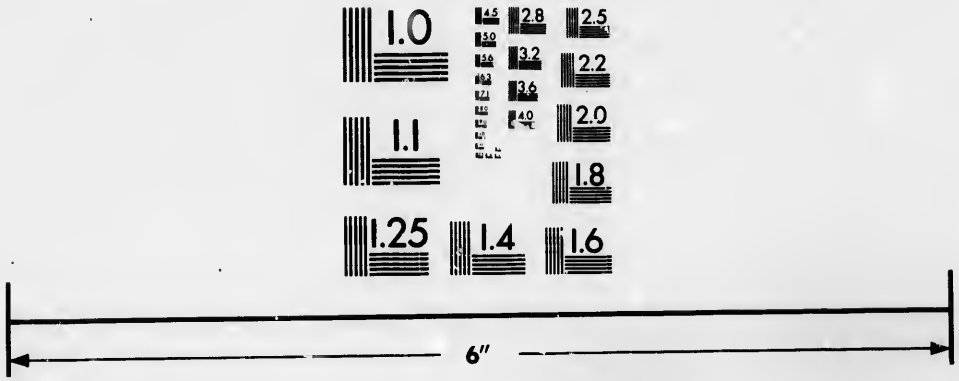

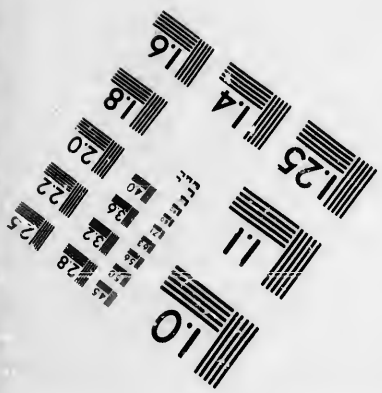

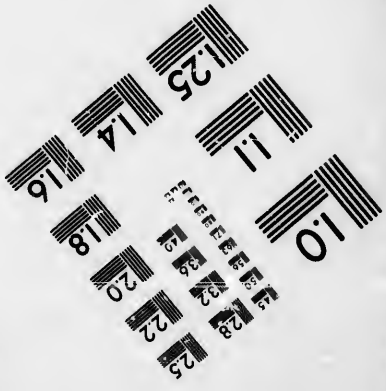

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any building within the curtilage, school-house, shop, warehouse or counting-house, with intent to commit any felony therein, to show that the breaking and entering were such as to amount in law to burglary: Provided, that the offender shall not be afterwards prosecuted for burglary upon the same facts; but it shall be opened to the court before which the trial for such offence takes place, upon the application of the person conducting the prosecution, to allow an acquittal on the ground that the offence, as proved, amounts to burglary; and if an acquittal takes place on such ground, and is so returned by the jury in delivering its verdict, the same shall be recorded together with the verdict, and such acquittal shall not then avail as a bar or defence upon an indictment for such burglary. —32-33 *V.*, *c.* 21, *s.* 58.

This clause is not in the Imperial Act.

See sec. 42 of *Larceny Act*, *p.* 365, *ante*.

195. If, upon the trial of any person indicted for embezzlement or fraudulent application or disposition of any chattel, money or valuable security, it is proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury may acquit the accused of embezzlement or fraudulent application or disposition, and find him guilty of simple larceny or larceny as a clerk, servant or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, as the case may be, and thereupon the accused shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if, upon the trial of any person indicted for larceny, it is proved that he took the property in question in any such manner as to amount in law to embezzlement or fraudulent application or disposition as aforesaid, he shall not, by reason thereof, be entitled to be acquitted, but the jury may acquit the accused of larceny, and find him guilty of embezzlement or fraudulent application or disposition, as the case may be, and thereupon the accused shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement upon the same facts.—32-33 *V.*, *c.* 21, *s.* 74. 24-25 *V.*, *c.* 96, *s.* 72, *Imp.*

See remarks under sec. 52 of *Larceny Act*, *p.* 383, *ante*.

Also *Stephens' Cr. L., XXXIX*, and *R.* v. *Rudge*, 13 *Cox*, 17.

The distinction between embezzlement and larceny by a servant is so fine that it was thought proper by this section to prevent an acquittal in case upon the trial of an indictment for the one if it should turn out that the offence amounted in point of law to the other. The distinction between the two offences is this, if the servant received the property and converted it to his own use before it came to the possession of the master, the offence is embezzlement. If the property had come to the possession of the master, and the servant afterwards converted it to his own use, it is larceny. Thus, if a shopman received money and converted it to his own use immediately, this was embezzlement; but if he put it in the till or other depository, and afterwards abstracted it, this was larceny. *R.* v. *Grove*, 1 *Moo. C. C.* 447. It is somewhat singular that it should never have been decided whether, upon an indictment for larceny, the defendant might not be convicted of embezzlement; inasmuch as the 7-8 Geo. 4, c. 29, s. 47, enacts, that every person guilty of embezzling any property "shall be deemed to have feloniously stolen the same:" which would seem well to have warranted a conviction for embezzlement upon a count for larceny as a servant.—*Greaves' Note.*

196. If, upon the trial of any person indicted for obtaining from any other person, by any false pretence, any chattel, money or valuable security, with intent to defraud, it is proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts. —32-33 *V., c.* 21, *s.* 93, *part.* 24-25 *V., c.* 96, *s.* 88, *Imp.*

See remarks under sec. 77 of Larceny Act, p. 420, *ante.*

197. If, upon the trial of any person for any misdemeanor, under any of the provisions of sections sixty to seventy-six both inclusive, of "*The Larceny Act*," it appears that the offence proved amounts to larceny, he shall not by reason thereof be entitled to be acquitted of the misdemeanor.—32-33 *V.*, *c.* 21, *s.* 92, *part.* 20-21 *V.*, *c.* 54, *s.* 14, *Imp.* (repealed).

This clause is not in the Imperial Act.

See sect. 184 of this act, *ante*, which covers this same enactment.

198. If, upon the trial of any person for larceny, it appears that the property taken was obtained by such person by fraud, under circumstances which do not amount to such taking as constitutes larceny, such person shall not by reason thereof be entitled to be acquitted, but the jury may acquit the accused of larceny, and find him guilty of obtaining such property by false pretences, with intent to defraud, if the evidence proves such to have been the case, and thereupon the accused shall be punished in the same manner as if he had been convicted upon an indictment for obtaining property by false pretences, and no person so tried for larceny as aforesaid shall be afterwards prosecuted for obtaining property by false pretences upon the same facts.—32-33 *V.*, *c.* 21, *s.* 99.

See remarks under sec. 77 of *Larceny Act*, p. 420, *ante*.

Sec. 196, *ante*, is the converse of this Sec. 198.

This very important clause is not in the English Act. It was in the 14-15 V., c. 100, as the bill was introduced, but was struck out. In *R.* v. *Adams*, 1 *Den.* 38, the judges held the conviction wrong, because the indictment was for larceny, and the facts established an obtaining by false pretences; now, under the above clause, the jury, in such a case, may find the defendant guilty of the obtaining by false pretences.

See *Stephens' Cr. L.*, *XXXIX.*

199. If any indictment containing counts for feloniously stealing any property, and for feloniously receving the same, or any part or parts thereof, knowing the same to have been stolen, has been prefer-

red and found against any person, the prosecutor shall not be put to his election, but the jury may find a verdict of guilty, either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment has been preferred and found against two or more persons, the jury may find all or any of the said persons guilty either of stealing the property or receiving the same, or any part or parts thereof, knowing the same to have been stolen, or may find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen.—32-33 *V.*, *c.* 21, *s.* 101, *part.* 24-25 *V.*, *c.* 96, *s.* 92, *Imp.*

See sec. 82, *et seq.* of Larceny Act, p. 443, *ante.*

The prisoner was convicted of receiving stolen goods on an indictment containing two counts, one for stealing the goods and the other for receiving them knowing them to have been stolen. He had, on a former day in the same circuit, been indicted for stealing the same goods as those which he was charged with stealing by the first count of the present indictment. A jury was impannelled and the trial of the prisoner begun, but in consequence of it appearing by the testimony that the prisoner could not be convicted for larceny, the clerk of the crown, who was conducting the prosecution by direction of the attorney general, entered a *nolle pros.*, and then sent another bill before the grand jury containing a count for receiving, being the indictment on which the conviction took place, and on the second trial he consented that the prisoner should be acquitted of the charge of stealing alleged in the first count, and he was acquitted accordingly,—

Held, on a case reserved.

1. That the clerk of the crown had authority to enter a *nolle pros.*

2. That a *nolle pros.* being entered prisoner could be again indicted for the same offence.

3. Even admitting that the clerk of the crown had no authority to enter a *nolle pros.*, a conviction upon the count for receiving would be good, each count being a separate indictment by itself.—The *Queen* v. *Thornton*, 2 *P. & B. (N. B.)* 140.

200. If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, the jury may convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property.—32-33 *V.*, *c.* 21, *s.* 103. 24-25 *V.*, *c.* 96, *s.* 94, *Imp.*

See sec. 82 *et seq.* of Larceny Act, p. 443, *ante.*

201. See under sec. 85, of Larceny Act, p. 452, *ante.*

202. If, upon the trial of any indictment for larceny, it appears that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor or counsel for the prosecution shall not, by reason thereof, be required to elect upon which taking he will proceed, unless it appears that there were more than three takings, or that more than six months elapsed between the first and the last of such takings; and in either of such last mentioned cases the prosecutor or counsel for the prosecution shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings.—32-33 *V.*, *c.* 21, *s.* 6. 24-25 *V.*, *c.* 96, *s.* 6, *Imp.*

The word "month" in this clause means a calendar month. Interpretation Act, c. 1, Rev. Stat.

The effect of the above and the preceding section is to restrain the power of the court with respect to the doctrine of election. The court cannot now put the prosecutor to his election where the indictment charges three acts of larceny within six months, or where the evidence shows that the property was not stolen at more than three different times, and that no more than six months had elapsed between the first and last of such times. But, on the other

hand, the court is not bound by the above section to put the prosecutor to his election in other cases, but is left to its discretion, according to the old practice at common law. —*R.* v. *Jones*, 2 *Camp.* 131; *R.* v. *Heywood*, *L. & C.* 451.

By means of a secret junction pipe with the main of a gas company, a mill was supplied with gas, which did not pass through the gas meter, and which was consumed without being paid for. This continued to be done for some years. *Held*, on an indictment for stealing 1000 cubic feet of gas on a particular day, the entire evidence might be given, as there was one continuous act of stealing all the time, and that section 6 of the Larceny Act, section 202, *supra*, as to the prosecutor's electing on three separate takings within six months, did not apply.—*R.* v. *Firth*, 11 *Cox* 234.

An indictment charged an assistant to a photographer with stealing on a certain day divers articles belonging to his employer. It did not appear when the articles were taken, whether at one or more times, but only that they were found in the prisoner's possession on the 17th of January, 1870, and that one particular article could not have been taken before March, 1868; but the prosecution abandoned the case as to this article: *Held*, that this was not a case in which the prosecutor should be put to elect upon which articles to proceed, under this section.—*R.* v. *Henwood*, 11 *Cox*, 526.

On this clause, Greaves remarks:

"Formerly it very often happened on the trial of an indictment alleging the stealing of a number of articles at the same time, that it turned out that they had been taken at different times, in which case the prosecutor was usually compelled to elect some single taking; such election being required to be made on the spur of the moment sometimes

led to improper acquittals. The present section is intended to afford a remedy for such cases, and to place such cases in the same position as the cases provided for by the previous section. When, therefore, it appears on the trial of an indictment for stealing a number of goods at the same time, that the goods were taken at different times, the prosecutor is not to be put to elect to proceed on any particular taking, unless it appear that there were more than three takings, or that more than six calendar months intervened between the first and last of such takings, in which case he is to elect such takings, not exceeding three, within the period of six calendar months from the first to the last of such takings. A suggestion has been made, that in some extraordinary cases this may unduly limit the evidence on the part of the prosecution, as it is said that evidence of only three takings will be admissible. This is a fallacy; the clause confines the prosecutor to *proceeding to obtain a conviction* for three takings, but it does not at all interfere with the admissibility of any evidence that may in the opinion of the court tend to explain the nature and character of any of the takings. If, therefore, a case should occur where a doubt arose whether the evidence as to one or more takings shewed that it was felonious, there can be no doubt that evidence of other takings would be admissible for the purpose of removing such doubt precisely in the same way as heretofore, but not otherwise. *See R.* v. *Bleasdale*, 2 *C. & K.* 765. In fact the clause empowers the prosecutor to proceed for three takings instead of one, without in any respect otherwise altering the evidence that may be admissible."

When it appears by the evidence that the felonious receiving was one continuous act during a certain period of time, extending over two years, the court will not com-

pel the prosecutor to elect, even if it be proved that some of the articles received by the accused were so received at divers fixed dates extending over more than six months, and on more than three occasions.—*R.* v. *Suprani*, 13 *R. L.* 577, 6 *L. N.* 269.

203. When proceedings are taken against any person for having received goods, knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice in writing has been given to the person accused, that proof is intended to be given of such other property stolen within the preceding period of twelve months, having been found in his possession: and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen.—40 *V.*, *c.* 26, *s.* 3. 34-35 *V.*, *c.* 112, *s.* 19, *Imp.*

See remarks under secs. 82, 83, 84 of *Larceny Act*, p. 443, *ante*.

The cases of *R.* v. *Oddy*, 2 *Den.* 264; *R.* v. *Dunn*, 1 *Moo. C. C.* 146; *and R.* v. *Davis*, 6 *C. & P.* 177, are not now law since the above enactment.

Upon an indictment for receiving stolen goods, evidence may be given under this section that there was found in the possession of the prisoner other property stolen within the preceding twelve months, although such other property is the subject of another indictment against him.—*R.* v. *Jones*, 14 *Cox*, 3.

In order to show guilty knowledge, under this section, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner but it must be proved that such "other property"

was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject of the indictment.—*R.* v. *Drage*, 14 *Cox*, 85; *R.* v. *Carter*, 15 *Cox*, 448.

204. When proceedings are taken against any person for having received goods, knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession,—then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: Provided, that not less than three days' notice in writing has been given to the person accused, that proof is intended to be given of such previous conviction; and it shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused.—49 *V.*, *c.* 26, *s.* 4. 34-35 *V.*, *c.* 112, *s.* 19, *Imp.*

See *Larceny Act*, secs. 82, 83, 84, *p.* 443, *ante*, and remarks under preceding section.

205. See p. 535, *ante*, under c. 167, "*offences relating to the coin.*"

206. See p. 37, *ante*, c. 147, "*An act respecting riots, etc.*

PROCEEDINGS WHEN PREVIOUS OFFENCE CHARGED.

207. The proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows, that is to say: the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, or if the court orders a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if the jury finds him guilty, or if, on arraignment, he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the indictment, and if he answers that he was so previously convicted, the court may proceed to sentence him accordingly, but if he denies that he was so previously convicted, or stands mute of malice, or will not answer directly to such question, the jury

shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall, for all purposes be deemed to extend to such last mentioned inquiry: Provided, that if upon the trial of any person for any such subsequent offence, such person gives evidence of his good character, the prosecutor may, in answer thereto, give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty is returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.—32-33 *V.*, *c.* 29, *s.* 26, *part.*

See R. v. *Harley*, 8 *L. C. J.* 280.
Also R. v. *Martin*, 11 *Cox*, 343.
R. v. *Thomas*, 13 *Cox*, 52, and remarks under s. 139, *ante*, also, s. 230, *post.*

IMPOUNDING DOCUMENTS.

208. Whenever any instrument which has been forged or fraudulently altered is admitted in evidence, the court or the judge or person who admits the same may, at the request of any person against whom the same is admitted in evidence, direct that the same shall be impounded and be kept in custody of some officer of the court or other proper person, for such period, and subject to such conditions, as to the court, judge or person admitting the same, seems meet.—32-33 *V.*, *c.* 19, *s.* 36.

This clause is not in the Imperial Act. It was taken from the Consolidated Statutes for Upper Canada, *c.* 101, *s.* 2.

DESTROYING COUNTERFEIT COIN.

209. If any false or counterfeit coin is produced in any court, the court shall order the same to be cut in pieces in open court, or in the presence of a justice of the peace, and then delivered to or for the lawful owner thereof, if such owner claims the same.—32-33 *V.*, *c.* 18, *s.* 28.

Not in the Imperial Act.
It applies to all courts, civil and criminal.

WITNESSES AND EVIDENCE.

210. Every witness duly subpœnaed to attend and give evidence at any criminal trial before any court of criminal jurisdiction shall be bound to attend and remain in attendance throughout the trial.—39 *V.*, *c.* 36, *s.* 1.

211. Upon proof to the satisfaction of the judge, of the service of the subpœna upon any witness who fails to attend or remain in attendance, and that the presence of such witness is material to the ends of justice, he may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpœna; and such witness may be detained on such warrant before the judge or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a recognizance with or without sureties, conditioned for his appearance to give evidence and to answer for his default in not attending or not remaining in attendance; and the judge may, in a summary manner, examine into and dispose of the charge against such witness, who, if he is found guilty thereof, shall be liable to a fine not exceeding one hundred dollars, or to imprisonment, with or without hard labor, for a term not exceeding ninety days, or to both.—39 *V.*, *c.* 36, *s.* 2.

As to re-calling witnesses, see *R.* v. *Lamère*, 8 *L. C. J.* 181; *R.* v. *Jennings*, 20 *L. C. J.* 291; 2 *Taylor*, *Ev.*, *par.* 1331.

212. If any witness in any criminal case, cognizable by indictment in any court of criminal jurisdiction at any term, sessions or sittings of any such court in any part of Canada, resides in any part thereof, not within the ordinary jurisdiction of the court before which such criminal case is cognizable, such court may issue a writ of subpœna, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court; and if such witness does not obey such writ of subpœna, the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and time as are necessary, and upon default being made in such appearance, may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court.—32-33 *V.*, *c.* 29, *s.* 59.

213. When the attendance of any person confined in any penitentiary or in any prison or gaol in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend may, or any judge of such court, or of any superior court or county court, may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden of the penitentiary, or upon the sheriff, gaoler or other person having the custody of such prisoner, to deliver such prisoner to the person named in such order to receive him; and such person shall, at the time prescribed in such order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said court seems meet.—32-33 *V.*, *c.* 29, *s.* 60.

At common law, writs of subpoena have no force beyond the jurisdictional limits of the court fron which they issue, but, by the above clause, any court of criminal jurisdiction in Canada may summon a witness from any other part of Canada, for instance, a criminal court in Quebec can summon a witness in Nova Scotia, or *vice versâ*, and if the subpœna is not obeyed, the court may proceed against the witness in like manner as if such witness were resident within the jurisdiction of the court. In England, the 46 Geo. III, c. 92, contains a provision of the same nature. In criminal cases the witness is bound to attend, even if he has not been tendered his expenses.—3 *Russ.* 575; *Roscoe*, *Ev.*, 104.

Sec. 213 renders unnecessary, in criminal matters, the writ of *habeas corpus ad testificandum*. It seems to go very far, and might lead to serious consequences; it, for instance, authorizes a judge of the court of quarter sessions, or of the county court in any part of the Dominion, to order the removal of a prisoner from any other part of the Dominion. Moreover, this removal is not, as in England, to be made under the same care and custody as if the prisoner was brought under a writ of *habeas corpus*, and

by the officer under whose custody the witness is, but by any other person named by the judge in his order, thereby, against all notions on the subject, releasing for a while a prisoner from the custody of his gaoler, who, of course, ceases, *pro tempore*, to be responsible for his safe keeping. The Imperial act on the subject is the 16-17 V., c. 30, s. 9. Though our statute does not expressly require it, an affidavit stating the place and cause of confinement of the witness, and further that his evidence is material, and that the party cannot, in his absence, safely proceed to trial, should be given in support of the application. And if the prisoner be confined at a great distance from the place of trial, the judge will, perhaps, require that the affidavit should point out in what manner his testimony is material. —2 *Taylor, Ev., par.* 1149.

214. No person offered as a witness shall, by reason of any alleged incapacity from crime or interest, be excluded from giving evidence on the trial of any criminal case, or in any proceeding relating or incidental to such case.—32-33 *V., c.* 29, *s.* 62, *and c.* 19, *s.* 54, *par.* 1

215. Every person so offered shall be admitted and be compellable to give evidence on oath, or solemn affirmation, where an affirmation is receivable, notwithstanding that such person has or may have an interest in the matter in question, or in the event of the trial in which he is offered as a witness, or of any proceeding relating or incidental to such case, and notwithstanding that such person so offered as a witness has been previously convicted of a crime or offence.—32-33 *V., c.* 29, *s.* 63.

These two clauses are taken from the 6-7 V., c. 85, s. 1, of the Imperial statutes.

At common law, persons convicted of treason, felony, piracy, perjury, forgery, etc., were not admitted as witnesses. It was also a general rule of evidence not to admit the testimony of a witness who was interested, either directly or indirectly, in the event of the trial. These incapacities are now removed by the above enactments.

In *R.* v. *Clements* *Toronto*, 1876) for murder, the crown called as a witness a man who had been sentenced to death, but whose sentence had been commuted to one for Penitentiary for life, which he was then serving. Galt, J., (after consulting Hagarty, J.,) admitted his evidence, saying that he would reserve the objection to it, but the prisoner was acquitted.

In the case of *R.* v. *Webb*, 11 *Cox*, 133, Lush, J., *held*, that, notwithstanding the last part of section 215, *ante*, a person under sentence of death is incapable of being a witness. The evidence of such a witness cannot in any case be of much weight, since he is not liable to the temporal punishments attached to perjury. See 2, *Taylor Ev.*, *par.* 1169, *note*.

Where several prisoners are jointly indicted, and one of them is convicted, either on his own confession or by verdict, and sentenced before the trial of the other is concluded, the prisoner so sentenced is rendered competent for or against the other.—*R.* v. *Jackson*, 6 *Cox*, 525; *R.* v. *Gallagher*, 13 *Cox*, 61.

In *R.* v. *Winsor*, 10 *Cox*, 276, it was held that where two persons are jointly indicted, but separately tried, one of them may be called as a witness against the other, although the one so called as a witness has not been tried, nor acquitted, nor pleaded guilty to the indictment, nor discharged on a *nolle prosequi*. So in *R.* v. *Payne*, 12 *Cox*, 121, Chief Justice Cockburn said that if prisoners jointly indicted are tried separately, there can be no objection to calling one prisoner as witness for another. See *R.* v. *Jerrett*, 22 *U. C. Q. B.* 499.

In *R.* v. *Deeley*, 11 *Cox*, 607, Mellor, J., allowed two of the prisoners to be called as witnesses on behalf of the third, though they were jointly indicted and tried together.

But this case is overruled, and in *R.* v. *Payne*, 12 *Cox*, 118, it was held, by sixteen judges, that after several prisoners, jointly indicted and tried, are given in charge to the jury, one, whilst in such charge, cannot be called as a witness for another. And in *R.* v. *Thompson*, 12 *Cox*, 202, upon the same principle, it was held that the wife of a prisoner, jointly indicted and given in charge to the jury with other prisoners, cannot be called as a witness by one of the other prisoners whilst the husband is so in charge with them.—*See R.* v. *Boulton*, 12 *Cox*, 87; *R.* v. *Bradlaugh*, 15 *Cox*, 217.

Whenever, therefore, the crown or the defendant intend to call as a witness one of the co-defendants they should ask for a separate trial: if it is only after the defendants have jointly been given in charge to the jury that the evidence of one of the defendants is discovered to be necessary, then, if for the crown, a *nolle prosequi* may be entered, or a verdict of acquittal may be taken, in the discretion of the court, if no evidence has been given against the party who is sought to be made a witness. Then the discharged prisoner becomes competent to testify either for the crown, or for his former co-defendants.—2 *Taylor, Ev., par.* 1223.—*R.* v. *Hambly*, 16 *U. C. Q. B.* 617.

If, on a first trial of two prisoners jointly indicted and tried together, the jury are discharged without giving a verdict, there is nothing to prevent the prosecution from trying only one of the prisoners on the *venire de novo*, and then, on this second trial, to call as a witness, on this issue, the other prisoner.—*R.* v. *Winsor*, 10 *Cox*, 276. See 1 *Starkie, Ev.*, 143, *and* 2 *Starkie*, 797.

As to necessity for evidence of an accomplice to be corroborated.—*R.* v. *Andrews*, 12 *O. R.* 184; following *R.* v. *Stubbs*, 7 *Cox*, 48; *Dears.* 555, and *R.* v. *Beckwith*, 8 *U. C. C. P.* 274.

On a trial for murder the widow of the deceased was the principal witness for the crown, and she testified that prisoner had told her he was planning the murder. There was other evidence of her improper intimacy with the prisoner. The prisoner having been convicted:

Held, that whether she was an accomplice or not the verdict should not be disturbed.—*R.* v. *Smith*, 38 *U. C. Q. B.* 218.

A. and B. were tried together on a joint indictment for assault on a peace officer, and the wife of A. was offered as a witness to disprove the charge against B.:

Held, that her evidence was properly rejected, but had the husband not been on his trial she would have been a competent witness.—*The Queen* v. *Thompson*, 2 *Han.* (*N. B.*) 71.

216. On the summary or other trial of any person upon any complaint, information or indictment, for common assault, or for assault and battery, the defendant shall be a competent witness for the prosecution or on his own behalf:

2. On any such trial the wife or husband of the defendant shall be a competent witness on behalf of the defendant:

3. If another crime is charged, and the court having power to try the same is of opinion, at the close of the evidence for the prosecution, that the only case apparently made out is one of common assault, or of assault and battery, the defendant shall be a competent witness for the prosecution or on his own behalf, and his wife or her husband, if the defendant is a woman, shall be a competent witness on behalf of the defendant, in respect of the charge of common assault, or assault and battery:

4. Except as in the next preceding sub-section mentioned, this section shall not apply to any prosecution in which any other crime than common assault, or assault and battery, is charged in the information or indictment.—43 *V.*, *c.* 37, *s.* 2.

217. Nothing herein contained shall, except as provided in the next preceding section, render any person who is charged, in any criminal proceeding, with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compel-

lable to give evidence for or against himself, or shall render any person compellable to answer any question tending to criminate himself; and nothing herein contained shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding.—*C. S. U. C.*, *c.* 32, *s.* 18. *R. S. N. S.* (3rd *S.*), *c.* 135, *s.* 44, *part.* 19 *V.* (N. B.), *c.* 41, *s.* 2, *part.* 16 *V.* (*P. E. I.*), *c.* 12, *s.* 13, *part.*

On an indictment for assault and battery occasioning actual bodily harm, the defendant is not a competent witness on his own behalf under sec. 216 of the Procedure Act.—*R.* v. *Richardson*, 46 *U. C. Q. B.* 375. *See R.* v. *Bonter*, 30 *U. C. C. P.* 19, *R.* v. *McDonald*, 30 *U. C. C. P.* 21, *note.*

The fraudulent removal of goods under 11 G. 2, c. 19, s. 4, is a crime, and a conviction therefor was quashed with costs against the landlord, because the defendant had been compelled to testify on the prosecution.—*The Queen* v. *Lackie*, 7 *O. R.* 431.

By the Interpretation Act, the word "herein" in sec. 217 means "in this act." So that the last part of the section seems rather a contradiction of parts of sec. 216.

218. The evidence of any person interested or supposed to be nterested in respect of any deed, writing, instrument or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the "*Act respecting Forgery*," shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution.—32-33 *V.*, *c.* 19, *s.* 54, *part.*

See *R.* v. *Hughes*, 2 *East P. C.* 1002. *R.* v. *Maguire*, *Ibid.* *The Bank prosecutions*, *R. & R.* 378.

There is no such enactment in England. The act 9 Geo. 4, c. 32, s. 2, was the first enactment enabling the party whose name is forged to be a witness for the prosecution.

219. Any quaker or other person allowed by law to affirm instead of swearing in civil cases, or who solemnly declares that the taking of any oath is, according to his religious belief, unlawful, who is required to give evidence in any criminal case shall, instead of taking an oath in the usual form, be permitted to make his solemn affirmation or declaration, beginning with the words following, that is to say: "I, A. B., do solemnly, sincerely and truly declare and affirm;" which said affirmation or declaration shall be of the same force and effect as if such quaker or other person as aforesaid had taken an oath in the usual form.—32-33 *V.*, *c.* 29, *s.* 61.

This enactment corresponds with the 24-25 V., c. 66, 32-33 V., c. 68, and 33-34 V., c. 49, of the Imperial Statutes. The declaration required may be given with the affirmation as follows: "I, A. B., do solemnly, sincerely and truly declare and affirm that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely and truly declare and affirm."—2 *Taylor, Ev., pars.* 1253 *and* 1254.

220. Whenever it is made to appear at the instance of the Crown or of the prisoner or defendant, to the satisfaction of a judge of a superior court, or a judge of a county court having criminal jurisdiction, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, such judge may, by order under his hand, appoint a commissioner to take in writing the statement on oath or affirmation of such person:

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same, with the said addition, to the proper officer of the court for trial at which such accused person has been so committed or bailed; and in every other case he shall transmit the same to the clerk of the peace of the county, division or city in which he has taken the same, and such clerk of the peace shall preserve the same and file it of record, and, upon order of the court or of a judge, transmit the same to the proper officer of the court where the same shall be required to be used as evidence:

3. If afterwards, upon the trial of any offender or offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend at the trial to give evidence, such statement may, upon the production of the judge's order appointing such commissioner, be read in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and if it is proved to the satisfaction of the court that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed, to be read in evidence, and that such person or his counsel or attorney had, or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same.—43 *V.*, *c.* 35 *ss.* 1 *and* 3, *part.* 30-31 *V.*, *c.* 35, *s.* 6, *Imp.*

The notice required by this section is a written notice. Whether it has been a reasonable notice, and whether the opportunity for cross-examination was sufficient or not, are questions for the judge at the trial.—*R.* v. *Shurmer*, 16 *Cox*, 94.

221. Whenever a prisoner in actual custody is served or receives notice of an intention to take such statement as hereinbefore mentioned, the judge who has appointed the commissioner may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice, for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed.—43 *V.*, *c.* 35, *ss.* 2 *and* 3, *part.* 30-31 *V.*, *c.* 35, *s.* 7, *Imp.*

222. If, upon the trial of any accused person, it is proved upon the oath or affirmation of any credible witness, that any person whose deposition has been taken by a justice in the preliminary or other investigation of any charge, is dead, or is so ill as not to be able to travel, or is absent from Canada, and if it is also proved that such deposition was taken in the presence of the person accused, and that he, his counsel or attorney, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or before whom the same purports to have been taken, it shall be

read as evidence in the prosecution, without further proof thereof, unless it is proved that such deposition was not in fact signed by the justice purporting to have signed the same.—32-33 *V.*, *c.* 30, *s.* 30, *part* 11-12 *V.*, *c.* 42, *s.* 17, *Imp.*

Doubts have arisen in England whether, under this last cited clause of the Imperial act, the prosecution must have been identically for the same offence as charged against the prisoner, by the depositions against him as taken by the magistrate, and it has even been held that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding.—*R.* v. *Ledbetter*, 3 *C. & K.* 108. Though in the subsequent case of *R.* v. *Beeston*, *Dears.* 405, it was held by the court of criminal appeal that a deposition taken on a charge, either of assault and robbery, of doing grievous bodily harm, or of feloniously wounding with intent to do grievous bodily harm, can, after the death of the witness, be read upon a trial for murder or manslaughter, where the two charges relate to the same transaction, yet it seems by the report of the case that if the charges on the two occasions had been substantially different, the deposition would not have been admissible: see *R.* v. *Lee*, 4 *F. & F.* 63; *R.* v. *Radbourne*, 1 *Leach*, 457; *R.* v. *Smith*, *R. & R.* 339; *R.* v. *Dilmore*, 6 *Cox*, 52. But now, in Canada, by sec. 224 of the Procedure Act, all doubts on the question are removed, and a deposition taken on "*any*" charge against a person may be read as evidence in the prosecution of such person for "*any other offence whatsoever*," when the deposition is otherwise admissible.

Prisoner's deposition.—The depositions on oath of a witness legally taken are admissible evidence against him, if he is subsequently tried on a criminal charge. The only exception is in the case of answers to questions, which he

objected to, when his evidence was taken as tending to criminate him, but which he has been improperly compelled to answer.—*R.* v. *Coote, L. R.* 4 *P. C.* 599; 12 *Cox*, 557; *R.* v. *Garbett*, 1 *Den.* 236. Where a witness claims protection on the ground that an answer may criminate him, and he is compelled to answer, the answer is inadmissible whether he claim the protection in the first instance or after having given some answers tending to criminate himself.—*R.* v. *Garbett, ubi supra.* But it seems that the part of the deposition given before such witness has so claimed the protection of the court is admissible.—*R.* v. *Coote, ubi supra.* And the witness need not have been cautioned or put upon his guard as to the tendency of the question, in order to render his answer admissible. Secs. 70 and 71 of the Procedure Act, are applicable to accused persons only and not to witnesses; and sec. 72 of the same Act enacts specially that "nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement made at any time by the person accused or charged, which by law would be admissible as evidence against him." See 3 *Russ.* 418, and *R.* v. *Coote, ubi supra.*

Also, *R.* v. *Wellings*, 14 *Cox*, 105, and *R.* v. *Beriau, Ramsay's App. Cases*, 185.

The fact alone of the witness residing abroad at the time of the trial is not sufficient to admit his deposition.—*R.* v. *Austin, Dears.* 312.

On a trial for murder, the examination of the deceased cannot be put in evidence, if the prisoner had not the opportunity to cross-examine him, he having knowledge that it was his interest to do so.—*R.* v. *Milloy*, 6 *L. N.* 95.

Depositions not taken in presence of the accused cannot be submitted to the grand jury under sec. 222, Procedure Act.—*R.* v. *Carbray*, 13 *Q. L. R.* 100.

The deposition, regularly taken by the committing magistrate, of a witness, was allowed to be read at the trial, for the reason that a medical man proved that the witness was old, and that he thought, under her state of nervousness, that she would faint at the idea of coming into court, though he was of opinion that she could go to London to see a doctor without difficulty or danger. *Held*, that her deposition ought not to have been received.—*R.* v. *Farrell*, 12 *Cox*, 605; *R.* v. *Thompson*, 13 *Cox*, 181.

The deposition of a witness who has travelled to the assize town, but is too ill to attend court, may be read before the grand jury.—*R.* v. *Wilson*, 12 *Cox*, 622; *R.* v. *Gerrans*, 13 *Cox*, 158; *R.* v. *Goodfellow*, 14 *Cox*, 326.

Depositions taken abroad under the Merchant Shipping Act may be received in evidence, if the witness cannot be had.—*R.* v. *Stewart*, 13 *Cox*, 296.

Too much importance ought not to be attached to the variations between what a witness says at the trial and what his deposition before the magistrate makes him say, if there is a substantial concordance between both.—*R.* v. *Wainwright*, 13 *Cox*, 171.

On a charge of murder, to prove malice or motive against the prisoner, the deposition of the deceased against him, taken before the magistrates on another charge, was held admissible.—*R.* v. *Buckley*, 13 *Cox*, 293; *R.* v. *Williams*, 12 *Cox*, 101.

Upon a prosecution for uttering forged notes, the deposition of one S., taken before the Police Magistrate on the preliminary investigation, was read upon the following proof that S. was absent from Canada. R. swore that S. had, a few months before, left his (R.'s) house where she (S.) had, for a time, lodged; that she had since twice heard from her in the U. S. but not for six months. The chief

constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S., by means of personal inquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner as his wife:

Held, upon a case reserved, Cameron, J., dis., that the admissibility of the deposition was in the discretion of the judge at the trial, and that it could not be said that he had wrongfully admitted it.—*The Queen* v. *Nelson*, 1 *O. R.* 500.

223. The statement made by the accused person before the justice may, if necessary, upon the trial of such person, be given in evidence against him without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same.—32-33 *V.*, *c.* 30, *s.* 34. 11-12 *V.*, *c.* 42, *s.* 18, *Imp.*

See *The Queen* v. *Soucie*, under sec. 4 of c. 168, p. 565, *ante*. This section must be read in connection with secs. 70 and 71 of the Procedure Act, p. 688, *ante*.

224. Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence whatsoever, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken.—32-33 *V.*, *c.* 29, *s.* 58.

The deposition on oath of a witness is evidence against him on his trial if he is subsequently charged with a crime.—*R.* v. *Coote*, 12 *Cox*, 557; *L. R.* 4 *P. C.* 599. See *R.* v. *Buckley*, *ante*, under sec. 222, and remarks under that section.

225. A certificate, containing the substance and effect only, omitting the formal part, of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of

an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.—32-33 *V.*, *c.* 23, *s.* 11. 14-15 *V.*, *c.* 100, *s.* 22, *Imp.*

It is to be observed that this section is merely remedial, and will not prevent a regular record from being still admissible in evidence, and care must be taken to have such record drawn up in any case where the particular averments in the former indictment may be essential.—*Lord Campbell's Acts, by Greaves*, 27.

Before the same court, though not during the same term, the production by the officer of the court of the indictment with the entries thereon and the docket entries is sufficient. —*R.* v. *Newman*, 2 *Den.* 390. But the record or a certificate under the above section are necessary when before another court.—*R.* v. *Coles*, 16 *Cox*, 165.

226. Whenever, upon the trial of any offence, it is necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete on proof of any degree of penetration only.—32-33 *V.*, *c.* 20, *s.* 65.

See sec. 37 of c. 162, p. 197, *ante*.

227. The trial of any woman charged with the murder of any issue of her body, male or female, which, being born alive, would, by law, be bastard, shall proceed and be governed by such and like rules of evidence and presumption as are by law used and allowed to take place in respect to other trials for murder.—32-33 *V.*, *c.* 20, *s.* 62.

This section repeals 21 Jac. 1, c. 27, repealed in England by 43 Geo. 3, c. 58. By the repealed act, if the mother of an illegitimate child endeavored privately to conceal his birth and death, she was presumed to have murdered it, unless she could prove that the child was born dead. Taylor, *on Evidence, Note* 7, *p.* 128, justly says that this rule was barbarous and unreasonable.

228. In any prosecution, proceeding or trial for any offence under the eighty-seventh section of "*The Larceny Act*," a timber mark, duly registered under the provisions of the "*Act respecting the Marking of Timber*," on any timber, mast, spar, saw-log, or other description of lumber, shall be *primâ facie* evidence that the same is the property of the registered owner of such timber mark; and possession by any offender, or by others in his employ, or on his behalf, of any such timber, mast, spar, saw-log or other description of lumber so marked, shall, in all cases, throw upon the person charged with any such offence the burden of proving that such timber, mast, spar, saw-log or other description of lumber, came lawfully into his possession, or the possession of such others in his employ or on his behalf as aforesaid.—38 *V.*, *c.* 40, *s.* 1, *part.*

See sec. 87 of *The Larceny Act*, *p.* 457, *ante.*

The act respecting the marking of timber is c. 64 of *R. S. C.*

229. When, upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of Her Majesty's mint, or other person employed in producing the lawful coin in Her Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.—32-33 *V.*, *c.* 18, *s.* 30. 24-25 *V.*, *c.* 99, *s.* 29, *Imp.*

The usual practice is to call as a witness a silversmith of the town where the trial takes place, who examines the coin in court, in the presence of the jury.—*Davis's Cr. L.* 235.

230. A certificate, containing the substance and effect only, omitting the formal part, of any previous indictment and conviction for any felony or misdemeanor, or a copy of any summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court before which the offender was first convicted, or to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of such

conviction, without proof of the signature or official character of the person appearing to have signed the same.—32-33 *V., c.* 29, *s.* 26, *part.*

See secs. 139 and 207, *ante*, of which, in the corresponding English sections, this section 230 forms part.

The Act 34-35 V., c. 112, s. 18, Imp., also contains an enactment as to proof of a previous conviction.

231. A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate, as provided in the next preceding section, shall, upon proof of the identity of the witness, as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate.—32-33 *V., c.* 29, *s.* 65.

This enactment is taken from the 28 V., c. 18, s. 6, of the Imperial statutes, *An Act for amending the law of evidence and practice on criminal trials.*

Questions tending to expose the witness to criminal accusation, punishment or penalty need not be answered; no one can be forced to criminate himself. But this privilege can be invoked only by the witness himself. Nor is the judge bound to warn the witness of his right, though he may deem it proper to do so.—2 *Taylor, Ev., par.* 1319; *R.* v. *Coote, L. R.* 4 *P. C.* 599; 12 *Cox*, 557. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, is a point which the court will determine, under all the circumstances of the case, as soon as the protection is claimed, but without requiring the witness fully to explain how the effect would be produced; for, if this were necessary, the protection which the rule is designed to afford to the witness would at once be annihilated.

It is now decided, contrary to an opinion formerly

entertained by several of the judges, that the mere declaration of a witness on oath, that he believes that the answer will tend to criminate him, will not suffice to protect him from answering, when the other circumstances of the case are such as to induce the judge to believe that the answer would not really have that tendency. In all cases of this kind the court must see from the surrounding circumstances, and the nature of the evidence which the witness is called to give, that reasonable ground exists for apprehending danger to the witness from his being compelled to answer. When, however, the fact of such danger is once made to appear, considerable latitude should be allowed to the witness in judging for himself of the effect of a particular question; for it is obvious that a question, though at first sight apparently innocent, may, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. On the whole, as Lord Hardwicke once observed, "these objections to answering should be held to very strict rules," and, in some way or other, the court should have the sanction of an oath for the facts on which the objection is founded.—2 *Taylor, Ev., par.* 1311.

If the prosecution to which the witness might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time, the privilege has ceased and the witness must answer.—2 *Taylor, Ev., par.* 1312.

Whether a witness is bound to answer any question, the direct and immediate effect of answering which might be to degrade his character, seems doubtful, although where the transaction as to which the witness is interrogated forms any material part of the issue, he will be obliged to answer, however strongly his evidence may reflect on his character.

Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the character and consequent credit of the witness, there is much more room for doubt. Several of the older *dicta* and authorities tend to show that in such case the witness is not bound to answer; but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times. Even Lord Ellenborough, who is reported to have held on one occasion that a witness was not bound to state whether he had not been sentenced to imprisonment in a house of correction, and on another, that the question could not so much as be put to him, seems in a later case to have disregarded the rules thus enunciated by himself; for, on a witness declining to say whether or not he had been confined for theft in gaol, his Lordship harshly observed: "If you do not answer the question, I will send you there."

No doubt cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended; for if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for

veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause.—2 *Taylor, Ev., pars.* 1313, 1314, 1315; 3 *Russ.* 543, 547.

By the words "*or refuses to answer*" in the said section (and these words are also in the Imperial statute), it would, at first sight, seem that the witness questioned as to a previous conviction is not bound to answer; but it is obvious that this is not so; and the above quotation from *Taylor* goes to show clearly that the question, if insisted upon by the court, must be answered. Indeed, in a great many cases, the party putting the question could not be expected to be ready, on the spot, to prove the conviction of the witness, otherwise than by himself.

232. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.—32-33 *V., c.* 29, *s.* 66.

This is, *verbatim*, sec. 7 of 28 V., c. 18, of the Imperial statutes. Formerly the rule was that if an instrument, on being produced, appeared to be signed by subscribing witnesses, one of them, at least, should be called to prove its execution. The above clause abrogates this rule. It applies only to instruments to the validity of which attestation is not requisite. In 2 *Taylor, Ev., pars.*

1637, *et seq.*, will be found a list of the principal documents requiring attestation in England.

233. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury, as evidence of the genuineness or otherwise of the writing in dispute.—32-33 *V., c.* 29, *s.* 67.

As the preceding clauses, this enactment is taken from the 28 V., c. 18 of the Imperial statutes, and is *verbatim* section 8 thereof. Before this enactment, it was an established rule that, in a criminal case, handwriting could not be proved by comparing a paper with any other papers acknowledged to be genuine: 3 *Russ.*, 361; neither the witness nor the jury were allowed to compare two writings with each other, in order to ascertain whether both were written by the same person.—2 *Taylor. Ev., par.* 1667.

234. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.—32-33 *V., c.* 29, *s.* 68.

This is sec. 3 of the 28-29 V., c. 18, of the Imperial Statutes, *an Act for amending the law of evidence and practice on criminal trials.*

In the Province of Quebec a similar enactment is contained in article 269 of the Code of Civil Procedure.

The word *adverse* in the above clause does not mean merely *unfavorable*, but *hostile*; 2 *Taylor, Ev., par.* 1282. However, in *Dear* v. *Knight*, 1 *F. & F.* 433, Erle,

J., appears to have regarded a witness as "adverse," simply because he made a statement contrary to what he was called to prove.

The first part of the clause seems to have always been the law. It was decided in *Ewer* v. *Ambrose*, 3 *B. & C.* 746, that if a witness called to prove a fact prove the contrary, his credit could not be impeached by general evidence, but, in *R.* v. *Ball*, 8 *C. & P.* 745, that the party is at liberty to make out his case by other and contradictory evidence. The portion of the clause allowing a party to prove that his witness made at any time a different account of the same transaction seems to be new law, by the said case of *R.* v. *Ball*, *ubi supra*. See *R.* v. *Little*, 15 *Cox*, 319.

235. Upon any trial, a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject matter of the case, without such writing being shown to him; but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the judge at any time during the trial may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit: Provided, that a deposition of the witness, purporting to have been taken before a justice on the investigation of the charge, and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *primâ facie* to have been signed by the witness.—32-33 *V.*, *c.* 29, *s.* 64, 40 *V.*, *c.* 26, *s.* 5.

The words "upon any trial" mean "upon any trial *in any criminal case.*" This enactment is sec. 5 of 28 V., c. 18, of the Imperial statutes, *an Act for amending the law of evidence and practice on criminal trials*: upon which see 2 *Taylor, Ev., pars.* 1301, 1302, 1303; 3 *Russ.* 550. The general rule was that, when a contradictory statement alleged to have been made by the witness was

contained in a letter or other writing, the cross-examining party should produce the document as his evidence, and have it read, in order to base any questions to the witness upon it. The above clause abrogates this rule, under which was excluded one of the best tests by which the memory and integrity of a witness can be tried, 2 *Taylor, Ev., par.* 1301. Before the abrogation of the rule, the witness could not be asked whether he did or did not state a particular fact before the magistrate, without first allowing him to read, or have read to him, his deposition.—*R.* v. *Edwards*, 8 *C. & P.* 26. And it was irregular to question a witness as to the contents of a former declaration, affidavit, letter or any writing made or written by him, or taken in writing as his declaration or deposition, without first having the said writing read.—*The Queen's case*, 2 *Brod. & B.* 288. The prosecution cannot use or refer to the depositions without putting them in.—*R.* v. *Muller*, 10 *Cox*, 43.

But if the former declarations of the witness were not in writing, but merely by parol, he may be cross-examined on the subject of it, and if he deny it, another witness may be called to prove it, if it be a matter relevant to the issue; if not relevant to the issue, the witness's answer is conclusive.—2 *Taylor Ev., par.* 1295.

236. If a witness, upon cross-examination as to a former statement made by him, relative to the subject matter of the case, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.—32-33 *V., c.* 29, *s.* 69.

This enactment is taken from s. 4 of the 28 V., c. 18 of the Imperial statutes.

Formerly there was some difference of opinion as to whether in such a case, proof might be given that the

witness had made the statement denied by him. It must be observed that the clause applies only to a statement *relative to the subject matter of the case.* If it is not *relative to the subject matter of the case,* the answer given by the witness must be taken as conclusive. It seems that questions respecting the motives, interest or conduct of the witness, as connected with the cause or with either of the parties, are relevant *quoad* this enactment, though Coleridge, J., in *R.* v. *Lee,* 2 *Lewin,* 154, held that if a witness denies that he has tampered with the other witnesses, evidence to contradict him cannot be received. This case was before the statute, and does not specially apply to a *former statement* made by a witness. As to the last part of the clause, it is based on a principle always received under the rules of evidence. It was held in *The Queen's case,* 2 Brod. & B. 311, that where a witness for a prosecution has been examined in chief, the defendant cannot afterwards give evidence of any declaration by such witness, or of acts done by him, to procure persons corruptly to give evidence in support of the prosecution, unless he has previously cross-examined such witness as to such declarations or acts.

VARIANCES—RECORDS.

237. Whenever, in the indictment whereon a trial is pending before any court of criminal jurisdiction in Canada, any variance appears between any matter in writing or in print produced in evidence, and the recital or setting forth thereof, such court may cause the indictment to be forthwith amended in such particular or particulars, by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared.—32-33 *V., c.* 29, *s.* 70.

This enactment is taken from the 11-12 V., c. 46, s. 4 of the Imperial statutes.

At common law, any variance between an instrument as alleged in the indictment and the instrument itself as produced in evidence was fatal.—*R.* v. *Powell*, 2 *East, P. C.* 976; *see post*, remarks under the next section.

In a case of libel, there was no allegation in the indictment, that the article complained of had been circulated in the district of Montreal, where the offence was laid: *Held*, that an amendment to cure that defect could not be allowed.—*R.* v. *Hickson*, 3 *L. N.* 139.

238. Whenever, on the trial of an indictment for any felony or misdemeanor, any variance appears between the statement in such indictment and the evidence offered in proof thereof, in names, dates, places or other matters or circumstances therein mentioned, not material to the merits of the case, and by the mis-statement whereof the person on trial cannot be prejudiced in his defence on such merits, the court before which the trial is pending may order such indictment to be amended according to the proof, by some officer of the court or other person—both in that part of the indictment where the variance occurs, and in every other part of the indictment which it may become necessary to amend on such terms as to postponing the trial to be had before the same or another jury as such court thinks reasonable; and if the trial is postponed the court may respite the recognizances of the prosecutor and witnesses, and of the defendant and his sureties, if any, in which case they shall respectively be bound to attend at the time and place to which the trial is postponed, without entering into new recognizances, and as if such time and place had been mentioned in the recognizances respited, as those at which they were respectively bound to appear.—32-33 *V.*, *c.* 29, *s.* 71.

239. After any such amendment the trial shall proceed, whenever the same is proceeded with, in the same manner and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and in all other respects, as if no such variance had occurred.—32-33 *V.*, *c.* 29, *s.* 72.

240. In such case the order for the amendment shall be indorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment, among the proper records of the court.—32-33 *V.*, *c.* 29, *s.* 73.

241. When any such trial is had before a second jury, the Crown and the defendant respectively shall be entitled to the same challenges as they were entitled to with respect to the first jury.—32-33 *V.*, *c.* 29, *s.* 74.

242. Every verdict and judgment given after the making of any such amendment shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it is after such amendment has been made.—32-33 *V.*, *c.* 29, *s.* 75.

243. If it becomes necessary to draw up a formal record in any case in which an amendment has been made as aforesaid, such record shall be drawn up in the form in which the indictment remained after the amendment was made, without taking any notice of the fact of such amendment having been made.—32-33 *V.*, *c.* 29, *s.* 76.

These clauses are taken from the 14-15 V., c. 100, of the Imperial statutes (Lord Campbell's act), in relation to which *Greaves* remarks :—

"This is one of the most important sections in the act, and, if the power given by it be properly exercised, will tend very materially to the better administration of criminal justice. Formerly, if any variance occurred between any allegation in an indictment, and the evidence adduced in support of it, the prisoner was entitled to be acquitted. This led to much inconvenience. It caused the multiplication of counts, varying the statement in as many ways as it was possible to conceive the evidence could support, and thereby greatly increased the expense of the prosecution. It sometimes led to the entire escape of heinous [illegible]or it happened in some cases that the grand jury were [illegible]ed before the acquittal took place; and though such acquittal in many cases would not have operated as a bar to another indictment, yet the prosecutor chose rather to submit to the first defeat, than to prefer another indictment at a subsequent assizes; and even in some cases an acquittal took place under such circumstances that the prisoner was enabled successfully to plead it in bar to another indict-

ment. Thus in *Sheen's case*, 2 C. & P. 634, where the prisoner had been indicted for the murder of Charles William Beadle, and acquitted on the ground that the name of the deceased could not be proved, to a subsequent indictment, which charged him with the murder of Charles William, he pleaded the former acquittal, and that the deceased was as well known by the name mentioned in the one indictment as by the name mentioned in the other, and so the jury found. This case clearly shows that the preferring a new bill was not in all cases sufficient to prevent a failure of justice in consequence of a variance; and many like cases have occurred.

"The provisions as to the amendment of variances in criminal cases have been gradually extended. The first statute, which introduced the power of amendment, was the 9 Geo. IV., c. 15, which empowered any judge at *nisi prius*, or any court of oyer and terminer and general gaol, delivery to amend any variance, in cases of misdemeanor, between any matter *in writing or in print*, and the recital thereof on the record. After this statute had been in operation for the full period of twenty years, and no injurious consequences had been found to arise from it, the 11-12 V., c. 46, s. 4, empowered any court of oyer and terminer and general gaol delivery to amend any variance, *in any offence whatever, between any matter in writing or in print*, and the recital thereof on the record. And the provisions of this act were extended to the sessions, as far as they are applicable to offences within their jurisdiction, by the 12-13 V., c. 45, s. 10.

"As these enactments only applied to variances between matters in writing and the record, a very numerous class of variances was left unprovided for, and the first clause in this act was intended to apply to all such variances. As

this section originally stood, immediately after the words 'persons whatsoever therein named or described,' followed the general words 'or any variance between such statement and the evidence offered in proof in any other matter or thing whatsoever.' These words were objected to as being too general, and struck out on that ground in the House of Lords. The words 'or in the name or description of any matter or thing therein named or described' were then inserted in the Lords. A doubt subsequently arose whether, in case any property were described as belonging to certain persons, and it turned out to belong to more or less in number than the persons named, an amendment could be made as the clause then stood; in other words, whether the clause warranted an amendment in the *number* of owners of property; and to avoid this difficulty, the words 'or in the ownership of any property therein named or described' were inserted. The striking out of the general words is much to be regretted, as cases precisely within the same mischief as those provided for will very probably occur.

"As the clause now stands, it is limited to the particular variances therein enumerated, and, not only so, but it is so cautiously framed, that whilst on the one hand it is so worded as to prevent the escape of offenders by reason of variances not material to the merits of the case, so on the other it does not permit any amendment to be made whereby the defendant may be prejudiced in his defence *upon such merits.* In every case, therefore, where a variance occurs, the court will have to consider the following questions: 1st, whether the variance be in one of the matters specified in the section; 2ndly, whether it be 'not material to the merits of the case;' and lastly, if it appear not material to the merits of the case, whether the defendant

may be prejudiced by the amendment 'in his defence on such merits.'

"The terms 'merits of the case,' as applied to all ordinary criminal cases, obviously mean the substantial truth and justice of the case with reference to the guilt or innocence of the prisoner. When we say that a prisoner has been acquitted upon the merits, we mean that the jury have heard and considered all the evidence with reference to the question of the guilt or innocence of the prisoner of the crime charged, and have acquitted him on the ground that the charge was not proved. It would be a perversion of language to apply such an expression to a case where the prisoner was acquitted on the ground of a trifling variance or a technical quibble.

"It may be well to observe that a matter may well constitute some part of the merits of a case, and yet a variance as to the name or description of such matter may not be material to the merits of the case. Thus, upon the trial of an indictment for stealing an animal, the proof of the animal stolen constitutes a part of the merits of the case, and yet the description of it, as a ewe instead of a lamb, may not be in the least degree material to the merits of the case as above explained.

"It is to be carefully noticed, also, that an amendment is *only* prohibited where the defendant may be prejudiced in his defence *upon the merits*, not in his defence simply. Indeed, wherever any variance occurs which makes an amendment necessary, it may be truly said that the defendant may be prejudiced in his defence by making it, for if the amendment be not made the defendant would be entitled to be acquitted. The prejudice, therefore, to the defendant, which is to prevent an amendment, is properly confined to a prejudice in his defence *upon the merits*,

which plainly means a substantial, and not a formal or technical defence to the charge made against him.

"The clause applies in terms to six classes:

"I. The name of any county, riding, division, city, borough, town corporate, parish, township, or place, mentioned or described in the indictment.

"II. The name or description of any person or persons, or body politic or corporate, stated to be the owner or owners of any property which forms the subject of any offence charged in the indictment.

"III. The name or description of any person or persons, body politic or corporate, alleged to be injured or damaged, or intended to be injured or damaged, by the commission of the offence charged in the indictment.

"IV. The christian name or surname, or both christian name and surname, or other description of any person or persons named or described in the indictment."

"V. The name or description of any matter or thing whatsoever, named or described in the indictment."

(By the interpretation clause of the Procedure Act, the term 'indictment' includes inquisition, information, presentment, plea, replication, and other pleading, as well as a *nisi prius* record, consequently the power of amendment extends to all.)

"With regard to the cases in which an amendment ought to be made or refused, as the questions whether the variance be material to the merits of the case, and whether the defendant may be prejudiced in his defence on the merits by making an amendment, are questions which must necessarily depend on the particular charge and particular circumstances of each case, it is impossible to lay down any general rule by which the court may be guided in all

cases; indeed it is very possible that the very same identical variance, which ought unquestionably to be amended in one case, ought just as clearly not to be amended in another, as it may so happen that the amendment in the one case could not possibly prejudice the prisoner in his defence on the merits, but in the other might materially prejudice the prisoner in such defence.

"Cases may easily be put where no doubt can exist that the variance is not material to the merits, and that the defendant cannot be prejudiced by an amendment in his defence on the merits. For instance, a man steals a sheep in the night out of a field, being ignorant at the time of the name of the owner of the sheep; in such a case it is very difficult to conceive that the name of the owner can be material to the merits, or that the defendant can be prejudiced in his defence by the name of the owner being amended according to the proof. So also if a man were to shoot into a crowd and wound or kill an individual, the name of such individual could hardly by possibility be material. In each case, however, the court must form its own judgment upon a consideration of the whole facts of the case, and the manner in which the variance is brought under its notice; and it may not unfrequently be material to see whether any such question has been raised before the committing magistrate; for if the case has proceeded before the sitting magistrate without any such question being raised, that may afford some ground at least for concluding that the defendant did not consider the point material to his defence, and that it is not entitled to be so considered upon the trial.

"Before determining upon making an amendment, the court should receive all the evidence applicable to the particular point, otherwise it might happen that that which

appeared to be a variance upon the evidence at one stage of the trial, might afterwards be shown to be no variance by the evidence at a later period of the trial; and if the court were to amend on the evidence at the earlier period, it would be obliged to direct an acquittal upon the evidence at the subsequent period, for *the clause gives no power to amend the same identical particular more than once.*

"Again, in order to ascertain whether the prisoner may be prejudiced in his defence by the amendment, the court ought to look, not only to the facts in evidence on the part of the prosecution at the time when the amendment is applied for, but also to the defence already set up, or intended to be set up; for which purpose it may, perhaps, in some cases be necessary to examine a witness or two on behalf of the defendant. It must be remembered that the question is one entirely for the court, and that the court must decide it itself; and, generally speaking, where this is the case, the court will not determine the question before it on the evidence on one side, but will permit the other side immediately to introduce any evidence that may bear upon the question, so that the whole facts relating to the particular question may be before the court at once.

"Thus—to mention an analogous case—where the plaintiff proposed to put in evidence an account signed by the defendant, and the defendant proposed to exclude the account, on the ground that it had been delivered to the plaintiff, an attorney, in his character of attorney for the defendant, Erle, J., held that the defendant was entitled immediately to put in a letter, and call a witness to prove that the account was so delivered, though the plaintiff's case was not closed.—*Cleave* v. *Jones, Hereford Summer Assizes*, 1851. It must be noticed, also, that the power to amend clearly does not extend to altering the charge in

the indictment from one offence to another offence. For instance, an indictment for 'forging' could not be altered into an indictment for 'uttering,' nor an indictment for 'stealing' into an indictment for 'obtaining by false pretences.'

"Equally clear is it that the amendment ought not to be made so as to apply to a different transaction. Every offence, however simple it may be, consists of a number of particulars; it must have time, and place, and its component parts, all of which together constitute one individual transaction. Now the real meaning of the clause is that, provided you keep to the same identical transaction, you may amend any such error as is mentioned in the clause as to one or more of the particulars included in such transaction. For instance, a burglary is charged in the house of James Jones, in the parish of Winkill, and stealing the goods of *John* Jeffs. The evidence shows that a burglary was committed in every respect as alleged, except that the goods were the property of *James* Jeffs. There an amendment would clearly be right. But suppose, instead of such a case, it was proposed to prove a burglary at another time, at another place in another man's house, and the stealing of other goods; this clearly would not be a case for amendment. The proper mode to consider the question is this: the grand jury have had evidence of one transaction, upon which they found the bill; the case before the petty jury ought to be confined to the same transaction, but if it is, it may turn out that, either through insufficient investigation or otherwise, the grand jury have been in error as to some particular or other, and upon the trial the error is discovered. Now this is just the case to which the clause applies. A civil case may afford an apt illustration. The plaintiffs declared on a promissory note for £250, made

by *the defendant*, dated the 9th of November, 1838, payable to the plaintiffs, or their order, *on demand;* the defendant pleaded that he did not make the note; the plaintiffs proved on the trial a *joint and several* promissory note for £250, made by the defendant *and his wife*, dated the 6th of November, payable *twelve months after date*, with interest. There was no proof of the existence of any other note. Although it was objected that there was a material variance in the substantial parts of the note, the date, the parties, and the period of its duration, it was held that the declaration was properly amended, so as to make it correspond with the note produced; for it was a mere misdescription, and it was just the case in which the Legislature intended that the discretionary power of amendment should be exercised.—*Beckett* v. *Dutton*, 7 *M. & W.* 157. The amendment was made under the 3 & 4 Wm. IV., c. 42, sec. 23.

"The following appear to be the sort of variances which are amendable. In an indictment for bigamy, a woman described as a 'widow' who is proved to be unmarried.—*R.* v. *Deeley*, 1 *Moo. C. C.* 303; or as 'Ann Gooding,' where the register described her as 'Sarah Ann Gooding:' *R.* v. *Gooding*, *C. & M.* 297. In an indictment for night poaching describing a wood as 'The Old Walk,' its real name being 'The Long Walk.'—*R.* v. *Owen*, 1 *Moo. C. C.* 118. In an indictment for stealing 'a cow,' which was 'a heifer;' *Cooke's* case, 1 *Leach*, 105; 'a sheep,' which turned out to be 'a lamb.'—*R.* v. *Loom*, 1 *Moo. C. C.* 160; or 'ewe.'—*R.* v. *Puddifoot*, 1 *Moo. C. C.* 247; 'a filly,' which was a 'mare:' *R.* v. *Jones*, 2 *Russ.* 364; 'a spade,' which turned out to be the iron part, without any handle.—*R.* v. *Stiles*, 2 *Russ.* 316. So in an indictment for a nuisance,

by not repairing, or by obstructing a highway the termini of the highway, might be amended. So where an indictment alleges a burglary, or house-breaking, in the parish of St. Peter, in the county of W., and it appears that only part of the parish is situated in such county, the indictment may be amended.—*R.* v. *Brookes*, *C. & M.* 543; *R.* v. *Jackson*, 2 *Russ.* 49, 76.

"Such are some of the instances in which amendments would clearly be right, but it is easy to suggest other cases in which an amendment ought not to be made. Suppose, on the trial of an indictment for stealing a sheep, evidence were given of stealing a cow, or *vice versâ*, or on an indictment for stealing geese, it were proposed to prove stealing fowls; these are cases in which no amendment ought to be made; it is impossible to conceive that the grand jury can have made such a mistake, and the offence, though in law the same, and liable to the same punishment, is obviously as different as if it were different in law, and liable to a different punishment.

"Many decisions have been rendered by the courts in civil cases as to the instances in which amendments ought to be made, and some of the principles laid down in those decisions may form a useful guide in questions arising under this clause, and they are, therefore, here introduced.

"It has been well laid down by a great judge, that the fairest test of whether a defendant can be prejudiced by an amendment is this: 'Supposing the defendant comes with evidence that would enable him to meet the case as it stands on the record unamended, would the same enable him to meet it as amended:' per Rolfe, B., *Cooke* v. *Stratford*, 13 *M. & W.* 379. If, whatever would be available as a defence under the indictment, as it originally

stood, would be equally so after the alteration was made, and any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other, the amendment would not be one by which the defendant could be prejudiced in his defence, or in a matter material to the merits.—*Gurford* v. *Bailey*, 3 *M. & G.* 781. If the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed.—*Cooke* v. *Stratford*, 13 *M. & W.* 379. But if the amendment would substitute a different transaction from that alleged, it ought not to be made: *Perry* v. *Watts*, 3 *M. & G.* 775; *Brashier* v. *Jackson*, 6 *M. & W.* 549; and the court will look at all the circumstances of the case to ascertain whether the transaction would be changed by the amendment. If the amendment would render it necessary to plead a different plea, the amendment ought not to be made.—*Perry* v. *Watts*, 3 *M. & G.* 775; *Brashier* v. *Jackson*, 6 *M. & W.* 549.

"It was laid down in two cases of perjury, which were tried some years ago, that amendments in criminal cases ought to be made sparingly under the 9 Geo. IV. c. 15; *R.* v. *Cooke*, 7 *C. & P.* 559; *R.* v. *Hewins*, 9. *C. & P.* 786. These cases occurred at a time when amendments in criminal cases were looked upon with great disfavor; but the opinion of the Legislature, evidenced by the 11-12 V., c. 46, s. 4, the 12-13 V., c. 45, sec. 10, and the present statute, clearly is in favor of amendments being made in all cases where the amendment is not material to the merits, and the prisoner is not prejudiced by it. In civil suits, the 9 Geo. IV. c. 15, and the 3 4 Wm. IV. c. 42, sec. 23, *being remedial acts*, have always received a liberal construction; *Smith* v. *Brandram*, 2 *M. & G.* 244;

Smith v. *Knoweldon*, 2 *M. & G.* 561; *Sainsbury* v. *Matthews*, 4 *M. & W.* 343; and it has been held, that the fact of an action being a harsh and oppressive proceeding on the part of a landlord, who was taking advantage of a forfeiture in order to get possession of property on which the defendant had laid out a large sum of money, was not a consideration which ought to influence a judge against allowing an amendment; for if the amendment did not prejudice the defendant in his defence it ought to be allowed.—*Doe d. Marriott* v. *Edwards*, 5 *B. & A.* 1065.

"In fact the Legislature has carefully specified the questions to be considered previous to making an amendment; these are, 1st, whether the variance be material to the merits of the case; and, 2ndly, whether the defendant may be prejudiced by the amendment in his defence on such merits. These are plain and simple questions, and form a certain guide for the determination of each case; and if the courts, as they certainly ought, will only determine each case with reference to these questions alone, there can be little doubt that there will be an uniformity in the decisions upon this clause. But if, contrary to the plain intention of the Legislature, any court shall, on the ground of any supposed hardship or otherwise, refuse to make an amendment of a variance not material to the merits, and whereby the defence will not be prejudiced in his defence on the merits, uncertainty of decisions will necessarily arise, and the beneficial effect of this clause be much diminished. The courts, in considering the propriety of making an amendment, should ever remember that the great object of the statute is to cause *every case to be determined according to the very right and justice of the case upon the merits.*

"The amendment must be made in the course of the trial,

and certainly before the jury give their verdict, because the trial is to proceed and the jury are to give their opinion upon the amended record: per Alderson, B., *Brashier* v. *Jackson*, 6 *M. & W.* 549. It would be better, indeed, in all cases to make it immediately before any further evidence is given, and where the amendment is ordered in the course of the case for the prosecution, it certainly should be made before the defence begins, for it is to the amended record that the defence is to be made.

"It may be observed, that as the power to amend is vested entirely in the *discretion* of the courts, a case cannot be reserved under the 11–12 V., c. 78 (establishing the court of crown cases reserved), as to the propriety of making an amendment, as that statute only authorizes the reservation of 'a question of law.' If, however, a case should arise in which the question was, whether the court had *jurisdiction* to make a particular amendment—in other words, whether a particular amendment fell within the term of the statute, there the court might reserve a case for the opinion of the judges as to that point, as that would clearly be a mere question of law.'—*Lord Campbell's Acts, by Greaves, p.* 2.

The English statute is not exactly in the same terms as ours; it reads thus;

"From and after the coming of this act into operation, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, *in the name of any county, riding, division, city, borough, town, corporate parish, township or place mentioned or described in any such indictment. or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be*

the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby on his defence on such merits, to order such indictment to be amended according to the proof by some officer of the court or other person."

It will be seen that all the words above cited in *italics* are replaced in our statute by the words, "*in names, dates, places, or other matters or circumstances therein mentioned*," which cover all the subjects mentioned in the English statute, and have, besides, a more extensive meaning.

In the English statute, the words "if it shall consider such variance not material to the merits of the case" show clearly that there it is the *variance* which must be not material, whilst in our statute it is the names, dates, places, or other matters or circumstances which must be not material to the merits of the case.

Another difference between the two statutes consists in that, in the Imperial Act, as interpreted by *Greaves*, and it must be remembered that he framed it, it is the *amend-*

ment by which the defendant must not be prejudiced, whilst, in our statute, it is the *misstatement* which must not prejudice the defendant in his defence on the merits. This certainly seems an error in our statute. The misstatement, as long as it remains, can prejudice the prosecutor, not the defendant, whilst the amending of that misstatement is what the legislator did not intend to allow, when the defendant could suffer from such an amendment in his defence on the merits.—See 3 *Russ.* 321; and *Greaves'* remarks, *ante*, on the English Statute.

Greaves' MSS note.—"In my Preface to Lord Campbell's Acts, I adverted to the great discussion and great difficulty encountered in obtaining the limited power of amendment there mentioned; it was this that led to the specification of the particulars in which amendments might be made, and to the rejection of general words at the end, by which it was intended that every other variance should be amendable if the defendant could not be prejudiced thereby in his defence *on the merits*. The alteration in the Canada Act, from particulars to generalities, is perfectly right. But the other alterations are much to be regretted. In the original clause it is the *variance* which must be not material; as I read the new clauses it is the matter or circumstance that must be not material. It seems that the words "not material" must refer to the immediately preceding words, and cannot refer to "variance," by correct grammatical construction, and the subsequent words "the misstatement of which" make this perfectly clear; for there cannot be a misstatement (in the indictment) of a variance. Fatal variances only occur where the *matter*, which the evidence negatives or fails to prove, is material, and therefore very serious questions may arise as to the power to amend.

"The words "the defendant cannot be prejudiced thereby (by the amendment) in his defence on such merits" are the very pith of the clause in the original. But, as is extremely well pointed out at p. 332 (Vol. 2, of 1st edition of Taschereau's Crim. Acts,) it is not the defendant, but the prosecutor, who is prejudiced by a misstatement, *ubi supra*.

Another objection to the new clause is that by the original act, the court may amend "*if it shall consider* such variance not material," etc.; whereas the new clause omits this altogether, and makes the question turn upon the very words of the clause; and the insertion of "may" afterwards before "order" is by no means equivalent or a substitution for the omitted words; but is only a change of the word, from before to after "not material," etc.

Section 242 is an enactment *ex majori cautelâ*, and section 243 is intended to prevent any question being raised by writ of error as to any amendment that might be made; *Lord Campbell's acts, by Greaves, page* 10; 1 *Taylor, Ev., par.* 205; but, whilst in England, the provision re-enacted in our section 243 applies to all amendments made under the act, including those made in virtue of the enactment reproduced in section 143 of our Procedure Act (see *ante*,) it is clear that the substitution of the words "as aforesaid" in the said section 243 of our act for the words "under the provisions of this act" in the English corresponding clause, has the effect to render the enactment not applicable to amendments made under the said section 143 of our Procedure Act, and that in the case of such an amendment having been made, it must so appear, if a formal record has to be drawn up. The same may, perhaps, be said of any amendment under section 237.

Greaves, in 3 *Russ.* 324, has the following remarks on the English statute:—

"It has been well laid down by a very learned judge (Byles, J., in *R.* v. *Welton*, 9 *Cox*, 297,) that a statute like the 14-15 V., c. 100, should have a wide construction, and should not be interpreted in favor of technical strictness, and there are very strong reasons why a liberal construction should be made on such a statute. If a prisoner is acquitted on the ground of a variance, he may be again more correctly indicted, and wherever this course is adopted, the effect of an acquittal on such a variance is to put both the prosecutor and prisoner to additional trouble and expense. And in case where no fresh indictment is preferred, the result is that the costs of the prosecution are thrown away, and an offender, possibly a very notorious one, escapes the punishment he deserves. In every case where an acquittal takes place in consequence of a variance, the court may order a fresh indictment to be preferred, and the prisoner to be detained in prison or admitted to bail till it is tried, and it may be well for the court, where a variance occurs, to consider whether the prisoner might not fairly be presented with the option either of having the amendment made or of being indicted anew in a better form."

WHEN THE AMENDMENT MUST BE MADE.

It had been laid down in *R.* v. *Rymes*, 3 *C. & K.* 326, that an amendment should not be allowed after the counsel for the defence has addressed the jury, but this case is now no authority, and an amendment may be allowed after the prisoner's counsel has addressed the jury.—*R.* v. *Fullarton*, 6 *Cox*, 194.

But it must be made before verdict.—*R.* v. *Frost, Dears.* 474; *R.* v. *Larkin, Dears.* 365; *R.* v. *Oliver,* 13 *Cox,* 588.

"Upon full consideration," says *Greaves,* 3 *Russ.* 329, "it seems that the verdict is the dividing line. Any one familiar with criminal trials must have met with cases where variances have not been discovered until just before the verdict is given, and the only limit to the time for amendment is in the words 'on the trial,' and the trial is clearly continuing until the verdict, as the power to amend is given '*whenever* on the trial' there shall appear to be any variance.

"Before making an amendment the court should receive all the evidence bearing upon the point; and as this is a question to be determined by the court, but is not to be left to the jury, the evidence bearing upon it which may be in the possession of the prisoner, may be interposed when the point arises in the course of the case for the prosecution, and this is much the best course, as the court is thereby enabled to dispose of the point at once; indeed, it is now settled that in all cases, whether civil or criminal, where a question is to be decided by the court, the proper course is for the judge to receive the evidence on both sides at once, and then to determine the question."

DECISIONS ON THE STATUTE.

The clause gives no power to amend the same identical particular more than once, and the court will not amend an amendment.—*R.* v. *Barnes, L. R.* 1 *C. C.* 45.

And when an indictment is amended at the trial, the court of crown cases reserved cannot consider it as it originally stood, but only in its amended form.—*R.* v. *Pritchard, L. & C.* 34; *R.* v. *Webster, L. & C.* 77.

Under this statute, an amendment in the name of the

owner of stolen property, by substituting a different owner than the one alleged, may be made at the trial.—*R.* v. *Vincent*, 2 *Den.* 464; *R.* v. *Senecal*, 8 *L. C. J.* 287. See *Cornwall* v. *R.* 33 *U. C. Q. B.* 106, *and R.* v. *Jackson*, 19 *U. C. C. P.* 280.

In *R.* v. *Welton*, 9 *Cox*, 297, the prisoner was charged with throwing Annie Welton into the water with intent to murder her; there being no proof of the name of the child, it was held, by Byles, J., that the indictment might be amended by striking out "Annie Welton" and inserting 'a certain female child whose name is to the jurors unknown."

An indictment alleged that a footway led from a turnpike-road into the town of Gravesend, but the highway was a carriage way from the turnpike-road to the top of Orme House Hill, and from thence to Gravesend it was a footway, and the nuisance alleged was between the top of Orme House Hill and Gravesend; it was held that the indictment might be amended by substituting a description of a footway running from Orme House Hill to Gravesend as this appeared to be the very sort of case for which the statute provides.—*R.* v. *Sturge*, 3 *E. & B.* 734.

Where an indictment for perjury alleged that the crime was committed on a trial for burning a *barn*, and it was proved that the actual charge was one of firing a *stack of barley*, it was held that the words *stack of barley* might be inserted instead of *barn*.—*R.* v. *Neville*, 6 *Cox*, 69.

Where the indictment stated that the prisoner had committed perjury, at the hearing of a summons before the magistrates, charging a woman with being "drunk" whereas the summons was really for being "drunk and disorderly," the court held that it had power, under this statute, to amend the indictment by adding the words "and disorderly."—*R.* v. *Tymms*, 11 *Cox*, 645.

In an indictment for perjury, perjury was alleged to have been committed at a petty sessions of the peace, at Tiverton, in the county of Devon, before John Lane and Samuel Garth, then respectively being justices of the peace assigned to keep the peace in and for *the said county*, and acting in and for the borough of Tiverton, in the said county. It appeared by the proof that these gentlemen were justices for the borough of Tiverton only, and were not justices for the county. Blackburn, J., allowed to amend the indictment by striking out the words, *the said county*, so as to make the averment be, "justices assigned to keep the peace in and for, and acting in and for the borough of Tiverton, in the said county." The court of criminal appeal held that the judge had power so to amend.—*R.* v. *Western*, 11 *Cox*, 93.

The secretary of a friendly society, of which A. B. and others were the trustees, was charged with embezzling money belonging to the society. In the indictment, the property was laid as of "A. B. and others," without alleging that they were trustees of the society: *Held*, that the indictment might be amended by adding the words, "trustees of."—*R.* v. *Marks*, 10 *Cox*, 367; see *R.* v. *Sénécal*, 8 *L. C. J.* 287.

The description of an act of parliament, in an indictment may be amended by the court of criminal appeal.—*R.* v. *Westley*, *Bell*, *C. C.* 193.

In an indictment for larceny of property belonging to a banking company, the property was laid to be in the manager of the bank; the banking business was carried on by a joint-stock banking company, and there were more than twenty partners or shareholders. The judge amended the indictment by stating the property to be in "W. (one of the partners) and others:" *Held*, that this amend-

ment was right.—*R.* v. *Pritchard, L. & C.* 34, 8 *Cox*, 461.

But an amendment changing the offence charged to another offence should not be allowed. Where the prisoner was indicted for a statutable felonious forgery, but the evidence only sustained a forgery at common law, the prosecutor was not allowed to amend the indictment by striking out the word "feloniously," and thus convert a charge of felony into one of misdemeanor.—*R.* v. *Wright*, 2 *F. & F.* 320.

So upon an indictment for having carnal knowledge of a girl between ten and twelve years of age, it appearing by the proof that she was under ten, Maule, J., held that the indictment could not be amended: *R.* v. *Shott*, 3 *C. & K.* 206. The offence as charged in this case was a misdemeanor; the offence as proved, and as desired to be substituted by amendment, was a felony, and a felony cannot, by amendment, be substituted for a misdemeanor; or *vice versâ*.—See *R.* v. *Wright*, 2 *F. & F.* 320.

The words "felonious" or "feloniously," if omitted, can never be allowed to be inserted: 1 *Russ.* 935, *note a* by *Greaves*. An amendment altering the nature or quality of the offence charged cannot be allowed.

When an indictment against two bankrupts alleged that they embezzled a part of their personal estate to the value of £10—to wit, certain bank-notes and certain moneys, and it rather seemed that the money converted was foreign money, it was held that "moneys" meant English moneys, and the court refused to amend the indictment.—*R.* v. *Davison*, 7 *Cox*, 158. But Greaves is of opinion that the case seems to be one in which an amendment clearly might have been made.—3 *Russ.* 327.

An indictment alleged that the prisoner pretended that

he had served a certain order of affiliation on J. Bell; but the evidence was, that the prisoner had said that he had left the order with the landlady at the Chesterfield Arms, where Bell lodged, he being out; it was held that this variance was not amendable under the English statute, as it was not a variance in the name or description of any matter or thing named or described in the indictment.—*R.* v. *Bailey*, 6 *Cox*, 29. But in Canada it seems that such a variance would be amendable, being covered by the more general terms of the statute.

A woman charged with the murder of her husband was described as "A., wife of J. O., late of....," the judge ordered this to be amended by stricking out the word "wife," and inserting the word "widow."—*R.* v. *Orchard*, 8 *C. & P.* 565.

Where in an indictment for false pretences, the words "with intent to defraud" are omitted, the indictment is bad, and cannot be amended under this statute: per Lush, J., *R.* v. *James*, 12 *Cox*, 127.

An indictment charged the prisoner with stealing nineteen shillings and sixpence. At the trial, it was objected by the prisoner's counsel that there was no case, for the evidence showed that if the prisoner was guilty of stealing anything, it was of stealing a sovereign. Thereupon the court amended the indictment by striking out the words nineteen shillings and sixpence," and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of stealing a sovereign. *Held*, by the court of criminal appeal, that the court had power to amend under the 14–15 V., c. 100, sec. 1.—*R.* v. *Gumble*, 12 *Cox*, 248.

The words "with intent to defraud" allowed to be struck out of an indictment. The "merits of the case" in the above sec. 238 means the justice of the case as regards

the guilt or innocence of the prisoner, and "his defence on the merits" means a substantial, and not a formal or technical defect.—*R.* v. *Cronin*, 36 *U. C. Q. B.* 342.

If an indictment for libel contains merely a general allegation that the newspaper in which it appeared circulated in the district of Montreal, an amendment for the purpose of alleging publication in that District of the special article complained of is not allowable.—*R.* v. *Hickson*, 3 *L. N.* 139.

244. In making up the record of any conviction or acquittal on any indictment, it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading; and the statement of the arraignment and the proceedings subsequent thereto shall be entered of record in the same manner as before the passing of this Act, subject to any such alterations in the forms of such entry as are, from time to time, prescribed by any rule or rules of the superior courts of criminal jurisdiction respectively, which rules shall also apply to such inferior courts of criminal jurisdiction as are therein designated.—32-33 *V.*, *c.* 29, *s.* 77.

There is no statutory enactment, in England, corresponding to this one, and there the caption has, yet, to be entered of record immediately before the indictment, when the record has to be made up in form.

The record of judicial proceedings in criminal cases is always, in the first instance, taken down by the clerk of the court in the way of short entries made upon his docket, or of indorsements upon papers filed and the like. When he has to make the extended record, or record proper, resort is had to these docket entries, to the documents filed, and to the several indorsements upon them, which serve as *memoranda* for him. The record, formally made up, is the history or narration of the proceedings in the case, stating:

1st. The court before which the indictment was found, and where and when holden.

2ndly. The grand jurors by whom it was found.

3rdly. The time and place where it was found, and that the indictment was found under oath.

(These three particulars form the caption.)

4thly. The indictment.

5thly. The appearance or bringing in of the defendant into court.

6thly. The arraignment.

7thly. The plea.

8thly. The joinder in issue, or *similiter*.

9thly. The award of the jury process.

10thly. The verdict.

11thly. The *allocutus*, or asking of the defendant why sentence should not be passed on him.

12thly. The sentence.

It is probably now only when a writ of error is issued or to prove *autrefois acquit or autrefois convict* (section 146, *ante*,) that it will be necessary to draw up a formal record, as sections 230 and 231 (see *ante*) of the Procedure Act take away the necessity of so doing in the other cases where it could have been wanted.

The necessity of a formal caption or heading to a made-up record is taken away by section 244.

The caption of the indictment is no part of the indictment itself, but only the style or preamble thereto, the formal history of the proceedings before the grand jury.—2 *Hale*, 165; 1 *Starkie, Cr. Pl.* 233; 2 *Hawkins*, 349; 1 *Chit.* 325; *Archbold*, 37; 1 *Bishop, Cr. Proc.* 655.

The form of the caption is as follows:

Dominion of Canada, } In the Court of Queen's Bench,
Province of Quebec, } Crown Side.

District of Quebec.—Be it remembered, that at a term of the Court of Queen's Bench, crown side, holden at the

city of Quebec, in and for the said district of Quebec, on the ..... day of ..... *(the first day of the term,)* in the year of our Lord ..... upon the oath of *(insert the names of the grand jurors)* good and lawful men of the said district, now here sworn and charged to inquire for our Sovereign Lady the Queen, and for the body of the said district, it is presented in the manner following, that is to say: *(this ends the caption.)*

Then the record continues to recite the indictment, etc., as follows, and by sec. 244 of the Procedure Act, may commence here:

District of Quebec.—(The Jurors for our Lady the Queen, upon their oath present,) that John Jones, on the fifth day of June, in the year of our Lord one thousand eight hundred and seventy, feloniously, wilfully and of his malice aforethought, did kill and murder one Patrick Ray, against the peace of our Lady the Queen, her crown and dignity; whereupon the sheriff of the aforesaid district is commanded, that he omit not for any liberty in his bailiwick, but that he take the said John Jones, if he may be found in his bailiwick, and him safely keep to answer to the felony and murder whereof he stands indicted. And afterwards, to wit, at the same term of the said Court of Queen's Bench, before the said Court of Queen's Bench, on the said ..... day of ....., in the said year of our Lord .....: here cometh the said John Jones under the custody of William Brown, Esquire, sheriff of the district aforesaid (in whose custody in the gaol of the district aforesaid, for the cause aforesaid, he had been before committed), being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed. And he, the said John Jones, forthwith being demanded concerning the premises in the said indictment above specified and charged

upon him, how he will acquit himself thereof, saith that he is not guilty thereof, and therefore he puts himself upon the country. And the honorable George Irvine, attorney general of our said Lady the Queen, who prosecutes for our said Lady the Queen in this behalf, doth the like. Therefore let a jury thereupon immediately come before the said court of free and lawful men of the said district of Quebec, by whom the truth of the matter may be the better known, and who are not of kin to the said John Jones, to recognize upon their oath whether the said John Jones be guilty of the felony in the indictment above specified or not guilty; because, as well, the said George Irvine, who prosecutes for our said Lady the Queen in this behalf, as the said John Jones have put themselves upon the said jury. And the jurors of the said jury, by the sheriff for this purpose impannelled and returned—to wit *(naming the twelve)*—being called, come, who to speak the truth of and concerning the premises being chosen, tried and sworn, upon their oath, say that the said John Jones is guilty of the felony aforesaid, on him above charged, in manner and form aforesaid as by the said indictment is above supposed against him. And thereupon it is forthwith demanded of the said John Jones, if he hath or knoweth anything to say why the said court here ought not, upon the premises and verdict aforesaid to proceed to judgment against him; who nothing further saith, unless as he has before said. Whereupon, all and singular the premises being seen and fully understood by the said court here, it is considered and adjudged by the said court here that the said John Jones be taken to the common gaol of the said district of Quebec, from whence he came, and that he be taken from thence to the place of execution, on Friday, the..... day of.....next ensuing, and there be hanged by the neck until he be dead;

and the court orders and directs the said execution to be done on the said John Jones in the manner provided by law.

If the defendant against whom an indictment has been found, happen to be present in court, or in the custody of the court, he may at once be arraigned upon the indictment without previous process.—1 *Chit.* 338; *Archbold*, 78.

Then the record, when made up, instead of the words "whereupon the sheriff of the aforesaid district is commanded," etc., as in the above form, must read "Whereupon, to wit, on the said ..... day of ..... at the same term of the said Court of Queen's Bench, before the said Court of Queen's Bench here cometh the said John Jones under the custody of William Brown, Esquire, sheriff of the district aforesaid (in whose custody, in the gaol of the district aforesaid, he stood before committed)," etc.

In the report of the case of *Mansell* v. *R.*, *Dears. & B.* 375, may be seen a lengthy form of a record with all the proceedings on the challenges of jurors; also in *R.* v. *Fox*, 10 *Cox*, 502; *Whelan* v. *R.*, 28 *U. C. Q. B.* 2; *Holloway* v. *R.*, 2 *Den.* 287; and 4 *Blackstone*, *Appendix*.

Two important and essential formalities must be remembered in making up a record. 1st. Every adjournment of the court must appear; and, 2nd, at each sitting of the court so adjourned, a special entry must appear of the presence of the defendant.

In the case of *Whelan* v. *R.*, cited *supra*, it was held in Upper Canada, that if, notwithstanding sec. 244 of the Procedure Act (sec. 52, ch. 99, Con. Stat. Can.), a formal caption is prefixed to the indictment, this caption may be rejected, if it proves defective.

In *R.* v. *Aylett*, 6 *A. & E.* 247, and *R.* v. *Marsh*, 6 *A. & E.* 236, it was held that it is not necessary to name the grand jurors in the caption.

FORMAL DEFECTS CURED AFTER VERDICT.

245. No judgment upon any indictment for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved,—nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or *vice versâ, or the omission of such words or words of like import,*—nor because any person mentioned in the indictment is designated by a name of office or other descriptive appellation, instead of his proper name, *nor for want of or any imperfection in the addition of any defendant or other person,*—nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened —*nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil, in any case where such value, price, damage, injury or spoil, is not of the essence of the offence,*—nor for the want of a proper or perfect venue, where the court appears by the indictment to have had jurisdiction over the offence.—32-33 *V., c.* 29, *s.* 78.

This clause is taken from the 7 Geo. IV. c. 64, s. 20 of the Imperial Statutes; the words given in *italics* are not in the Imperial Act.

See *Heymann* v. *R.*, 12 *Cox*, 383 and *R.* v. *Knight*, 14 *Cox*, 31 as to aider by verdict and what defects are cured by verdict.

Verdict will only cure defective statements. An absolute and total omission in the indictment is not cured by verdict.—*R.* v. *Bradlaugh*, 14 *Cox*, 68.

No amendment allowed after verdict.—*R.* v. *Oliver*, 13 *Cox*, 588.

In an indictment for perjury, alleged to have been committed in a certain cause, "wherein one Adrien Girardin,

" of the Township of Kingsey, in the district of Arthabaska, " trader, and Thomas Ling, of the same place, farmer, *was* " *defendant.*" The omission of the words *was plaintiff* in the description of the plaintiff held fatal, and conviction quashed.—*R.* v. *Ling*, 5 *Q. L. R.* 359; 2 *L. N.* 410.

In an indictment for obstructing an officer of excise under 27-38 V., c. 3; *Held*—that the omission in the indictment of the averment that at the time of the obstruction the officer was acting in the discharge of his duty under the authority of the said statute was not a defect of substance, but a formal error, which was cured by the verdict.—*Spelman* v. *R.*, 13 *L. C. J.* 154.

The defendant was indicted in the District of Beauharnois for perjury committed in the District of Montreal, but there was no averment in the indictment that he had been apprehended or that he was in custody in the District of Beauharnois at the time of finding the indictment.—*Held* bad, even after verdict.—*R.* v. *Lynch*, 20 *L. C. J.* 187; 7 *R. L.* 553.

A defect such as the omission of the word " company " in an indictment for embezzling money from the Grand Trunk Railway Company of Canada, is cured by verdict. —*R.* v. *Foreman*, 1 *L. C. L. J.* 70.

Defect in an indictment cured after verdict.—*R.* v. *Stansfield*, 8 *L. N.* 123; also in *R.* v. *Stroulger*, 16 *Cox*, 85.

An indictment too vague and too general in its language is not cured by verdict.—*White* v. *R.*, 13 *Cox* 318.

246. Judgment, after verdict upon an indictment for any felony or misdemeanor, shall not be stayed or reversed for want of a *similiter*, —nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion,—nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors,—nor because any person has served upon the jury who was

not returned as a juror by the sheriff or other officer; and where the offence charged is an offence created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, *although they are disjunctively stated or appear to include more than one offence, or otherwise.*—32-33 *V., c.* 29, *s.* 79.

This clause is taken from 7 Geo. IV. c. 64, sec. 21 of the Imperial Statutes, except the words given in *italics.*

Under it, the first defect cured by verdict is the want of a similiter. The similiter is the joinder in issue, contained, in the record (see, *ante*, under section 244 for form of a record) in these words: "And ..... who prosecutes for our said Lady the Queen in this behalf, doth the like."

The second defect cured by verdict under this clause is the wrongful award of the jury process upon an insufficient suggestion. The jury process is usually directed to the sheriff, but if one of the parties represent that the sheriff is interested, or of kin to one of the parties, or in any way disqualified to act in the case (see *Archbold*, 153, for grounds, against sheriff, of challenge to the array), an entry of this suggestion is made on the back of the indictment first, and then on the record, when it is made up formally; and then the jury process is awarded to the coroner, if not disqualified, and if disqualified, then to two elisors named by the court, and sworn, in which last case the return is final, and no challenge to the array is allowed; *Jervis, coroners*, 54; 1 *Chit.* 514; *Wharton, Law Lexicon, Verbo* "elisors;" *Archbold*, 154. By the above clause, these formalities cannot be questioned or investigated after verdict, and no misnomer or misdescription of the officer returning the process or of any of the jurors can invalidate the verdict.—See s. 247, *post.*

This clause says thirdly that no motion in arrest of

judgment or writ of error will avail on the ground that any person has served upon the jury who was not returned as a jur or by the sheriff or other officer.—See *Dovey* v. *Hobson*, 2 *Marsh.* 154.

The fourth and most important part of this section of the Procedure Act consists in the words: "And where the offence charged is an offence *created by any statute*, or subjected to a *greater* degree of punishment by any statute, the indictment shall, *after verdict*, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they be disjunctively stated or appear to include more than one offence, *or otherwise.*"

What is the meaning of these two last words "*or otherwise*," is not clear. "Although *they* be disjunctively stated" means "although *the words* be disjunctively stated" "as unlawfully or maliciously" instead of "unlawfully and maliciously."

The words "or appear to include more than one offence" are not new law: see *R.* v. *Ferguson*, 1 *Dears.* 427; *R.* v. *Heywood, L. & C.* 451; *Archbold*, 69; and, remarks under section 105, p. 715, *ante*; also *R.* v. *Davies*, 5 *Cox*, 328.

The words "subjected to a greater degree of punishment" mean greater than it was at common law, as for instance, in s. 38 of c. 162, p. 197, *ante.*

The following decisions on the interpretation of the part of this clause rendering valid, after verdict, indictments describing the offence in the words of the statute creating it, or subjecting it to a greater degree of punishment, may be usefully inserted here.

In *R.* v. *Larkin*, *Dears.* 365, it was held that if an indictment charging a felonious receiving of stolen goods, does not aver that the prisoner knew the goods to have

been so stolen, it is defective, and the defect is not cured by verdict.

An indictment under 14-15 V., c. 100, s. 49, for procuring the defilement of a girl by false pretences, false representations or other fraudulent means, did not set out or allege what were the false pretences, false representations or other fraudulent mea[illegible] The defendant having been found guilty, brought a writ of error on this ground, and the conviction was quashed.—*Howard* v. *R.*, 10 *Cox*, 54.

In *R.* v. *Warshaner*, 1 *Moo. C. C.* 466, an indictment for having unlawfully in possession *five florins*, was held sufficient after verdict, though not showing what *florins* were, and their value, it being a foreign coin, as the indictment described the offence in the words of the statute creating it.

After verdict, defective averments in the second count of an indictment are cured by reference to sufficient averments in the first count.—*R.* v. *Waverton*, 2 *Den.* 340.

If, before s. 112 of the Procedure Act, in an indictment for obtaining property by false pretences, it did not appear who was the owner of the property so alleged to have been unlawfully obtained, the defect was not cured by verdict, and notwithstanding the above clause 246 of the Procedure Act, in such a case, a conviction, upon a writ of error, would have been quashed.—*R.* v. *Bullock*, *Dears.* 653; *Sill* v. *R. Dears.* 132; *R.* v. *Martin*, 8 *A. & E.* 481.

In *R.* v. *Bowen*, 13 *Q. B.* 790, the indictment was for obtaining by false pretences, and did not contain the word "knowingly" with "unlawfully" but the court held the conviction good after verdict, as the indictment was in the words of the statute.—See *Hamilton* v. *R.*, 9 *Q. B.* 271.

But an indictment for felony must always allege that the act which forms the subject matter of the indictment was done feloniously; if an indictment for felony does not contain the word "feloniously," it is bad, though in the words of the statute creating the offence, and is not cured by verdict.—*R.* v. *Gray*, *L. & C.* 365.

If an indictment under sec. 83 of *the Larceny Act*, *c.* 164, p. 444, *ante*, alleges the goods to have been "unlawfully obtained, taken, and carried away, and that the receiver knew them to have been unlawfully obtained" instead of "unlawfully obtained *by false pretences*" the indictment is bad and not cured by verdict. See *R.* v. *Wilson*, 2 *Moo. C. C.* 52.

An indictment under the same section charged that defendant "unlawfully did receive goods which had been unlawfully, and knowingly, and fraudulently obtained by false pretences with intent to defraud, as in this count before mentioned," but omitting to set out what the particular false pretences were. *Held*, that the objection, if at any time valid, was cured by the verdict of guilty.—*R.* v. *Goldsmith*, 12 *Cox*, 479.

Would an indictment for obtaining property by false pretences, not setting out the false pretences, be good after verdict?

In *R.* v. *Goldsmith*, 12 *Cox*, 483, Chief Justice Bovill said: "I am not aware whether the question has been raised after verdict since the passing of the Statute of 7-8 Geo. IV., c. 64." (sec. 246 of our Procedure Act.)

Section 278, *post*, enacts that the forms given will be sufficient, and the form given for obtaining by false pretences does not state what are the false pretences. It is, however, doubtful notwithstanding the form given with the Procedure Act, if, before verdict, such an indictment would be sufficient, if not alleging what are the false pretences.

But, *after verdict*, it would seem to be sufficient, both at common law, and under section 246 of the Procedure Act, by the remarks of the judges in *R.* v. *Goldsmith*, 12 *Cox*, 482; *R.* v. *Watkinson*, 12 *Cox*, 271; *and Heymann* v. *R.*, 12 *Cox*, 383. *Howard* v. *R.*, 10 *Cox*, 54, cited *ante*, is on another statute.

In *R.* v. *Carr*, 26 L. C. J. 61, the court quashed the indictment on the ground of the omission therein of the words "feloniously, wilfully, and of his malice aforethought," though the form given in the schedule of the Procedure Act for the offence created by the clause under which the prisoner was indicted has not these words.

In *R.* v. *Deery*, 26 *L. C. J.* 129, the jury found the prisoner guilty on the following count of the indictment, under sec. 10, c. 20, 32-33 Vic. (s. 8, c. 162, p. 147, *ante*). "And the jurors aforesaid, on their oath aforesaid, do further present that the said Cornelius Deery, on the day and year aforesaid, one Alfred Baignet feloniously and unlawfully did wound, with intent thereby then to commit murder."

The prisoner moved to stay the judgment, "because the said second count of the said indictment is illegal, null and void, and does not disclose any offence, inasmuch as the crime therein charged is not alleged to have been committed with the *malice aforethought* of the said Cornelius Deery." Upon a reserved case, the Court of Queen's Bench held that, under sec. 246 of the Procedure Act, the count of the indictment objected to was sufficient after verdict.

There seems to be another possible objection to the said indictment. Is it sufficient in an indictment, under the said section 10, of c. 20, 32-33 V., (s. 8. c. 162 p. 147, *ante*,) for wounding with intent to murder, to aver simply "with intent to commit murder" generally without naming the

person intended by the prisoner, or if his name is not known, alleging "a person to the jurors unknown?"

Chief Justice Jervis, in *R.* v. *Lallement*, 6 *Cox* 204, said that, *after* verdict, he had no doubt that "with intent to commit murder" would be sufficient, being the words of the statute, but doubted if such an indictment could not be successfully demurred to.

And *Greaves*, 1 *Russ.* 1003, *note g*, and 1004, *note h*, says that it is questionable whether such an indictment is sufficient, even after verdict, relying on *R.* v. *Martin*, 8 *A. & E.* 481, to say that in many cases it is not sufficient, even after verdict, to follow the words of the statute. Against this opinion, the case of *R.* v. *Ryan*, 2 *M. & Rob.* 213, can be cited, where an indictment alleging "with intent to commit murder" generally was prepared, under the express direction of the court, and the prisoner tried and convicted.

Then, the forms of indictment given in *Archbold*, under sec. 11, 24-25 V., c. 100, and the following sections, all contain a count, averring "with intent to commit murder." The question seems unsettled so far, and it will be prudent, in all such indictments, to avoid such a count as much as possible.

In *R.* v. *Carr*, 26 *L. C. J.* 61, the indictment was in the following terms:

"The jurors for our Lady the Queen, upon their oath, present that John Carr, on the twentieth day of June, in the year of our Lord one thousand eight hundred and seventy-one, in the parish of St. Colomb de Sillery, in the district of Quebec, did feloniously wound Lawrence Byrne, with intent then and there to murder the said Lawrence Byrne, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

The prisoner, having been found guilty, moved in arrest of judgment, "for that it is not alleged and charged against the said John Carr, in and by the said indictment, that he the said John Carr did wound the said Lawrence Byrne, of the malice aforethought of him the said John Carr."

The presiding judge having reserved the case, the Court of Queen's Bench held that the indictment was defective, on the ground taken by the prisoner, and that the defect was not cured by verdict.

There is this difference between this last case and *R.* v. *Deery*, cited *ante*. In *R.* v. *Deery*, the indictment averred "with intent to commit murder" generally, and was in the express words of the statute, whilst in *R.* v. *Carr* the averment of the intent was not "to commit murder," in the words of the statute, but "with intent to murder the said Lawrence Byrne." To "commit murder" means to commit the crime known in law as "of malice aforethought to kill and murder," whilst on an indictment charging that the defendant murdered, without saying "of malice aforethought," the defendant can only be convicted of manslaughter.—1 *East, P. C.* 345, 346. So in an indictment for burglary, if the indictment avers that the defendant did feloniously and burglariously break and enter ..... with intent to commit murder, it is sufficient; whilst if the averment as to the intent refers to any person in particular, it must state "with intent feloniously, and of his malice aforethought, to kill and murder the said J. N." See 2 *Bishop, Cr. Proc.* 82, 145.

It is true that in these two cases of *Deery* and *Carr*, the objection was that the indictment did not charge "feloniously and of his malice aforethought did wound;" but if the indictment in Carr's case had averred "feloniously did

wound with intent then and there feloniously and of his malice aforethought to murder," it would certainly not have been open to the objection taken; and the forms given in *Archbold* are "feloniously and unlawfully did wound with intent to commit murder," whilst if the person the prisoner intended to murder is known, the form is "feloniously and unlawfully did wound with intent, thereby then feloniously, wilfully and of his malice aforethought, the said J. N. to kill and murder."

There is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively. The latter may be aided by verdict, the former cannot.—*R.* v. *Waters*, 1 *Den.*, 356. See also, *ante*, remarks under section 143 of the Procedure Act.

When an indictment is quashed or judgment upon it arrested for insufficiency or illegality thereof, the court will order that a new indictment be preferred against the prisoner, and may detain the prisoner in custody therefor.—1 *Bishop, Cr. Proced.* 739; 2 *Hale*, 237; 2 *Hawkins*, 514; *R.* v. *Turner*, 1 *Moo. C. C.* 239.—See Greaves' note in 3 *Russ*, 321; *ante*, under sec. 238–243.

In *R.* v. *Vandercomb*, 2 *Leach* 708, the jury, by the direction of the court, acquitted the prisoners, as the charge as laid against them had not been proved; but as it resulted from the evidence adduced that another offence had been committed by the prisoners, and as the grand jury were not discharged, the prisoners were detained in custody, in order to have another indictment preferred against them.

In *R.* v. *Semple*, 1 *Leach*, 420, the court quashed the indictment, upon motion of the prisoner, upon the ground of informality, but ordered the prisoner to be detained till the next session. See, also, 1 *Chit.* 304.

So, upon a demurrer, if the defendant succeeds, he only obtains a little delay, for the judgment is that the indictment be quashed, and the defendant will be detained in custody until another accusation has been preferred against him, except, of course, where the demurrer has established that the defendant has not committed any legal offence whatsoever, in which case he will be altogether discharged from custody.—1 *Chit.* 442.

In *R.* v. *Gilchrist*, 2 *Leach*, 657, the prisoner was found guilty of forgery, but, upon motion in arrest of judgment, the court held that the indictment, being repugnant and defective, the prisoner should be discharged from it; but that as the objection went only to the form of the indictment, and not to the merits of the case, the prisoner should be remanded to prison until the end of the session, to afford the prosecutor an opportunity, if he thought fit, of preferring another and better indictment against him. See, also, *R.* v. *Pelfryman*, 2 *Leach*, 563.

In *Archbold*, page 166, it is said: Upon the delivery of the verdict, if the defendant be thereby acquitted on the merits, he is forever free and discharged from that accusation, and is entitled to be immediately set at liberty, unless there be some other legal ground for his detention. If he be acquitted from some defect in the proceedings, so that the acquittal could not be pleaded in bar of another indictment for the same offence, *he may be detained to be indicted afresh.* So in 1 *Chit.* 649, *and R.* v. *Knewland*, 2 *Leach*, 721.

An indictment having been held bad on demurrer, it was quashed so that another indictment might be preferred, not that defendants be discharged.—*R.* v. *Tierney*, 29 *U. C. Q. B.* 181.

In *R.* v. *Bulmer, Montreal, Nov.*, 1881, though the

indictment had been quashed on demurrer, the court refused to liberate the prisoner, and ordered his detention till the following term.

In *R.* v. *Woodhall*, 12 *Cox*, 240, the verdict was held to be illegal, but the prisoners were bound over to appear at a future session.

247. No omission to observe the directions contained in any Act as respects the qualification, selection, ballotting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, the drafting panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon any writ of error or appeal to be brought upon any judgment rendered in any criminal case.—*C. S. U. C.*, *c.* 31, *s.* 139.

This is a statute of Upper Canada extended to all the Dominion. This clause does not take away the right of challenging the array.

A conviction, not by a special jury, in cases where the statute enacts that an offence shall be tried by a special jury, is a nullity.—*R.* v. *Kerr*, 26 *U. C. C. P.* 214.

COSTS.

248. When any person is convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court thinks fit, in addition to any sentence which the court deems proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for loss of time as the court, by affidavit or other inquiry and examination, ascertains to be reasonable; and unless the sums so awarded are sooner paid, the offender shall be liable to imprisonment for any term not exceeding three months, in addition to the term of imprisonment, if any, to which the offender is sentenced for the offence.—32-33 *V.*, *c.* 20, *s.* 78. 24-25 *V.*, *c.* 100, *s.* 74.

Greaves' Note.—This and the following clause are new in England; they are taken from the 10 Geo. 4, c. 34, ss. 33, 34 (I.). It had long been the practice in England in

such cases for the courts, after a conviction for an assault, to allow compromises to be made between the parties, and such compromises were legal.—*Beeley* v. *Wingfield*, 11 *East*, 46; *Kerr* v. *Leeman*, 6 *Q. B.* 308; 9 *Q. B.* 371. Such compromises were usually made by the defendant paying a sum of money to the prosecutor to idemnify him for his expenses; but where there was an obstinate defendant, it frequently happened that no compromise could be effected, and the court was sometimes placed in an invidious position. These clauses place it in the power of the court to do full justice, without regard to the wishes or consent of either party.

See next section.

249. The court may, by warrant in writing, order such sum as is so awarded, to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner; and if such sum is so levied, the offender shall be released from such imprisonment.—32-33 *V.*, *c.* 20, *s.* 79. 24-25 *V.*, *c.* 100, *s.* 75, *Imp.*

See remarks under preceding section. These two sections apply, it seems, to convictions under sections 14, 35, 36 of c. 162, *offences against the person*, and generally to any conviction for assault, including those *under sec.* 191 *of the Procedure Act.*

RESTITUTION OF STOLEN PROPERTY.

250. If any person who is guilty of any felony or misdemeanor, in stealing, taking, obtaining, extorting, embezzling, appropriating, converting or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, the property shall be restored to the owner or his representative:

2. In every such case, the court before whom such person is tried for any such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property, or to order the

restitution thereof in a summary manner; *and the court may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such felony or misdemeanor, although the person indicted is not convicted thereof, if the jury declares, as it may do, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such felony or misdemeanor*:

3. If it appears before any award or order is made, that any valuable security has been *bonâ fide* paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been *bonâ fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, extorted, embezzled, converted or disposed of, the court shall not award or order the restitution of such security:

4. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanor under "*The Larceny Act.*"—32-33 *V.*, *c.* 21, *s.* 113. 24-25 *V.*, *c.* 96, *s.* 100, *Imp.*

"It is to be observed that the proviso as to trustees, bankers, &c., only excepts cases of misdemeanors from the operation of this section, and leaves all cases of felony within it."—2 *Russ.* 355, note. The words in *italics* are not in the English Act; they were in the bill as passed in the House of Lords, but were struck out by the select committee of the Commons.—*Greaves' Cons. Acts.*

The prisoners were convicted of feloniously stealing certain property. The judge who presided at the trial made an order, directing that property found in the possession of one of the prisoners, not part of the property stolen, should be disposed of in a particular manner. *Held*, that the order was illegal, and that a judge has no power, either by common law or by statute, to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor.—*R.* v. *Pierce*, *Bell C. C.* 235. *R.* v. *Corpor. of London*, *E. B. & E.* 509.

The case of *Walker* v. *Mayor of London*, 11 *Cox*, 280, has no application in Canada. In *R.* v. *Stancliffe*, 11 *Cox*, 318, it was held that the present section applies to cases of false pretences as well as felony, and that the fact that the prisoner parted with the goods to a *bonâ fide* pawnee did not disentitle the original owner to the restitution of the goods.—See 2 *Russ.* 355.

The court is bound by the statute to order restitution of property obtained by false pretences and the subject of the prosecution, in whose hands soever it is found; and so likewise of property received by a person knowing it to have been stolen or obtained by false pretences; but the order is strictly limited to property identified at the trial as being the subject of the charge, therefore it does not extend to property in the possession of innocent third persons which was not produced and identified at the trial as being the subject of the indictment.—*R.* v. *Goldsmith*, 12 *Cox*, 594.

An order of restitution of property stolen will extend only to such property as is produced and identified in the course of the trial, and not to all the articles named in the indictment, unless so produced and identified and in the possession of the court.—*R.* v. *Smith*, 12 *Cox*, 597.

It was held, on this clause, (*R.* v. *Atkin*, 18 *L. C. J.* 23,) that the court will not give an order for the restitution of stolen goods, where the ownership is the subject of a dispute in the civil courts. See *R.* v. *Macklin*, 5 *Cox*, 216.

Restitution can be ordered to the owner only.—*R.* v. *Jones*, 14 *Cox*, 528.

See 1 *Hale*, 543, 4 *Blackstone*, 363.

A. Blenkarn took premises at 37 Wood street, and wrote to the plaintiffs at Belfast ordering goods of them. The

letters were dated 37 Wood street, and signed A. Blenkarn & Co. in such a way as to look like "A. Blenkiron & Co." there being an old established firm of Blenkiron & Sons, at 123 Wood street. One of the plaintiffs knew something of that firm, and the plaintiffs entered into a correspondence with Blenkarn, and ultimately supplied the goods ordered, addressing them to "A. Blenkiron & Co., 37 Wood street."

The fraud having been discovered, Blenkarn was indicted and convicted for obtaining goods by falsely pretending that he was Blenkiron & Sons.

Before the conviction the defendant had purchased some of the goods bonâ fide of Blenkarn without notice of the fraud, and resold them to other persons. The plaintiffs having brought an action for the conversion of the goods: *Held*, that the plaintiffs intended to deal with Blenkiron & Sons, and therefore there was no contract with Blenkarn: that the property of the goods never passed from the plaintiffs; and that they were accordingly entitled to recover in the action.—*Lindsay* v. *Cundy*, 2 *Q. B. D.* 976; 13 *Cox*, 583.

The plaintiff had stolen money of the defendant, and had been prosecuted for it, but acquitted on a technical ground. The plaintiff had, previously to the prosecution, converted the money into goods, which were now in the possession of the defendant as being the proceeds of the money stolen from him by the plaintiff. The plaintiff brought an action to claim the said goods. Held, that he had no right of action.—*Cattley* v. *Loundes*, 34 *W. R.* 139.

A thief's money in the hands of the police after his conviction is not a debt of the police to the thief, and cannot be attached under garnishee proceedings.—*Bice* v. *Jarvis*, 49 *J. P.* 264.

Under this section the court can order the restitution

of the proceeds of the goods, as well as of the goods themselves, if such proceeds are in the hands of the criminal or of an agent who holds them for him.—*R.* v. *The Justices*, 16 *Cox*, 143, 196. (Quœre? by the interpretation clause of the Procedure Act, the word "property" has not the extensive meaning given by the interpretation clause of the *Larceny Act.)*

A man was convicted of stealing cattle, which he had sold since in market overt, and had been resold immediately also in market overt, the purchasers being in good faith. Restitution ordered to the person from whom they had been stolen.—*R.* v. *Horan*, 6 *Ir. R. C. L.* 293.

M. was indicted for stealing $95 in bank notes, and acquitted. He applied to have $37 in notes, found on his person when arrested, returned to him, which the prosecutor resisted. The statute of P. E. I., 6 W. 4, c. 22, s. 38, enacts that "when a prisoner is not convicted, the court may, if it sees fit, order restitution of the property where it clearly appears to have been stolen from the owner. When arrested prisoner had the money sewed up in his trousers, and among the notes was a $5 note, bank of N. B., $5 note, bank of Halifax, and a $5 note, bank of Montreal. Prisoner said he put the money there to hide it from the police. Prosecutor had sworn that he had carefully counted the money before the robbery, and that it included a $5 bank of N. B. note, and a $5 bank of Halifax note.

Held, that the evidence was not sufficient to identify the notes as the prosecutor's, and the application must be granted.—*The Queen* v. *McIntyre*, 2 *P. E. I. Rep.* 154.

251. When any prisoner has been convicted, either summarily or otherwise, of any larceny or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained,

and that money has been taken from the prisoner on his apprehension, the court may, on the application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner, a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser.—32-33 *V.*, *c.* 21, *s.* 114. 30-31 *V.*, *c.* 35, *s.* 9, *Imp.*

The English Act does not, expressly, provide by the corresponding clause, for cases of obtaining by false pretences.

The section provides for the *sale* only of the stolen property. *R.* v. *Stancliffe*, 11 *Cox*, 318, *supra*, would not be affected by it.

See *R.* v. *Roberts*, 12 *Cox*, 574.

INSANE PRISONERS.

252. Whenever it is given in evidence upon the trial of any person charged with any offence, whether the same is treason, felony or misdemeanor, that such person was insane at the time of the commission of such offence, and such person is acquitted, the jury shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity; and if it finds that such person was insane at the time of committing such offence, the court before which such trial is had shall order such person to be kept in strict custody in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant Governor is known.—32-33 *V.*, *c.* 29, *s.* 99.

253. The Lieutenant Governor of the Province in which the case arises may, thereupon, make such order for the safe custody of such person during his pleasure, in such place and in such manner as to him seems fit.—32-33 *V.*, *c.* 29, *s.* 100.

254. If any person, before the passing of this Act, whether before or after the first day of July, one thousand eight hundred and sixty-seven, was acquitted of any such offence on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person by order of the court before which such person was tried, and still remains in custody, the Lieutenant Governor may make a like order for the safe custody of such person during pleasure. —32-33 *V.*, *c.* 29, *s.* 101. 40 *V.*, *c.* 26, *s.* 7.

255. If any person indicted for any offence is insane, and upon arraignment is so found by a jury empanelled for that purpose, so

that such person cannot be tried upon such indictment, or if, upon the trial of any person so indicted, such person appears to the jury charged with the indictment to be insane, the court, before which such person is brought to be arraigned, or is tried as aforesaid, may direct such finding to be recorded, and thereupon may order such person to be kept in strict custody until the pleasure of the Lieutenant Governor is known.—32-33 *V.*, *c.* 29, *s.* 102.

256. If any person charged with an offence is brought before any court to be discharged for want of prosecution, and such person appears to be insane, the court shall order a jury to be empanelled to try the sanity of such person; and if the jury so empanelled finds him insane, the court shall order such person to be kept in strict custody, in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant Governor is known.—32-33 *V.*, *c.* 29, *s.* 103.

257. In all cases of insanity so found, the Lieutenant Governor may make such order for the safe custody, during pleasure, of the person so found to be insane, in such place and in such manner as to him seems fit.—32-33 *V.*, *c.* 29, *s.* 104.

258. The Lieutenant Governor, upon such evidence of the insanity of any person imprisoned for an offence, or imprisoned for safe custody charged with an offence, or imprisoned for not finding bail for good behavior or to keep the peace, as the Lieutenant Governor considers sufficient, may order the removal of such insane person to a place of safe keeping; and such person shall remain there, or in such other place of safe keeping, as the Lieutenant Governor from time to time orders, until his complete or partial recovery is certified to the satisfaction of the Lieutenant Governor, who may then order such insane person back to imprisonment, if then liable thereto, or otherwise to be discharged.—36 *V.*, *c.* 51, *s.* 1.

It is said in 1 *Russ.*, 29: "If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner become mad, he shall not be tried, as he cannot make his defence. If, after he is tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if after judgment, he becomes of nonsane

memory, 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 or execution. And, by the common law, if it be doubtful, whether a criminal who at his trial is, in appearance, a lunatic, be such in truth or not, the fact shall be investigated. And it appears that it may be tried by the jury, who are charged to try the indictment, or by an inquest of office to be returned by the sheriff of the county wherein the court sits, or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *venire* awarded returnable *instanter*, in the nature of an inquest of office. And if it be found that the party only feigns himself mad, and he refuses to answer or plead, he would formerly have been dealt with as one who stood mute, but now a plea of not guilty may be entered under the 7-8 Geo. IV., c. 28, sec. 2;" sec. 145 of the Procedure Act.

The above sections of the Procedure Act, on the procedure in the case of insane prisoners, are taken from the 39-40 Geo. III., c. 94, and the 3-4 V., c. 54.

Where, on a prisoner being brought up to plead, his counsel states that he is insane, and a jury is sworn to try whether he is so or not, the proper course is for the prisoner's counsel to begin the evidence on this issue, and prove the insanity, as the sanity is always presumed.—*R.* v. *Turton*, 6 *Cox*, 385.

It has been seen, *ante*, under sec. 163, that no peremptory challenges are allowed on collateral issues.

The jury may judge of the sanity or insanity of the prisoner from his demeanor in their presence without any evidence.—*R.* v. *Goode*, 7 *A. & E.*, 536.

The jury are sworn as follows:—"You shall diligently inquire and true presentment make for and on behalf of

our Sovereign Lady the Queen, whether A. B., the prisoner, be insane or not, and a true verdict give according to the best of your understanding; so help you God."

If a prisoner has not, at the time of his trial, from the defect of his faculties, sufficient intelligence to understand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding, he may be ordered to be kept in custody.—*R.* v. *Dyson*, 7 *C. & P.* 305.

A grand jury have no right to ignore a bill against any person on account of his insanity, either when the offence was committed or at the time of preferring the bill, however clearly shown.—*R.* v. *Hodges*, 8 *C. & P.* 195; 1 *Russ.* 32; *Dickinson's Quarter Sessions*, 476.

If at any stage of the trial it is found that the prisoner has not sufficient intelligence to understand the nature of the proceedings, the jury should be discharged and the prisoner detained under the above section 255.—*R.* v. *Berry*, 13 *Cox*, 189.

CROWN CASES RESERVED.

259. Every court before which any person is convicted on indictment of any treason, felony or misdemeanor, and every judge within the meaning of "*The Speedy Trials Act*," trying any person under such Act, may, in its or his discretion, reserve any question of law which arises on the trial, for the consideration of the justices of the court for crown cases reserved, and thereupon may respite execution of the judgment on such conviction, or postpone the judgment, until such question has been considered and decided; and in either case the court before which the person is convicted may, in its discretion, commit the person convicted to prison, or take a recognizance of bail, with one or two sufficient sureties, in such sum as such court thinks fit, conditioned for his appearance at such time as such court directs, to receive judgment or to render himself in execution, as the case may be.—38 *V.*, *c.* 45, *s.* 1. 46 *V.*, *c.* 10, *s.* 5, *part.* 49 *V.*, *c.* 47, *s.* 1. *C. S. U. C.*, *c.* 112, *s.* 1. *C. S. L. C.*, *c.* 77, *s.* 57. *R. S. N. S.* 3rd. S, *c.* 171, *s.* 99, *part.* 1 *R. S. N. B.*, *c.* 159, *s.* 22, *part.*

260. The judge or other person presiding at the court, before which the person is convicted, shall thereupon state in a case, to be signed by such judge or other person, any question of law so reserved, with the special circumstances upon which the same arose; and such case shall be transmitted by such judge, or other person, to the court for Crown cases reserved, on or before the last day of the first week of the term of such court next after the time when such trial was had. —*C. S. U. C.*, *c.* 112, *s.* 2. *C. S. L. C.*, *c.* 77, *s.* 58, *part. R. S. N. S.* (3rd S.), *c.* 171, *s.* 100. 1 *R. S. N. B.*, *c.* 159, *s.* 23, *part.*

261. The justices of the court for Crown cases reserved, to which the case is transmitted, shall hear and finally determine such question, and reverse, affirm or amend any judgment given on the trial wherein such question arose, or shall avoid such judgment or order an entry to be made on the record, that in the judgment of such justices the person convicted ought not to have been convicted, or shall arrest the judgment, or if no judgment has been given, shall order judgment to be given thereon at some future session of the court before which the person was convicted, or shall make such other order as justice requires —*C. S. U. C.*, *c.* 112, *s.* 3. *C. S. L. C.*, *c.* 77, *s.* 58, *part. R. S. N. S.* (3rd *S.*), *c.* 171, *s.* 101. 1 *R. S. N. B.*, *c.* 159, *s.* 23, *part.*

262. The judgment and order of such justices shall be certified under the hand of the chief justice, president or senior judge of the court for Crown cases reserved, to the clerk of the court before which the person was convicted, who shall enter the same on the original record in proper form, and a certificate of such entry, under the hand of such clerk, in the form as near as may be, or to the effect mentioned in the third schedule to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted is; and the said certificate shall be sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as so certified to have been affirmed or amended, and execution shall thereupon be carried out on such judgment, or if the judgment has been reversed, avoided or arrested, the person convicted shall be discharged from further imprisonment, and the court before which the person was convicted shall, at its next session, vacate the recognizance of bail, if any; or if the court before which the person was convicted is directed to give judgment, such court shall proceed to give judgment at the next session thereof.—46 *V.*, *c.* 10, *s.* 5, *part. C. S. U. C.*, *c.* 112, *s.* 4. *C. S. L. C.*, *c.* 77, *s.* 59. *R. S. N. S.* (3rd *S.* *c.* 171, *s.* 102. 1 *R. S. N. B.*, *c.* 159, *s.* 23, *part.*

263. The judgment of the justices of the court for Crown cases reserved shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or person convicted thinks it fit that the case should be argued, in like manner as other judgments of such court are delivered, but no notice, appearance or other form of procedure, except such only as such justices in such case see fit to direct, shall be requisite.—*C. S. U. C.*, *c.* 112, *s.* 5; *C. S. L. C.*, *c.* 77, *s.* 60; *R. S. N. S.* (3*rd S.*), *c.*171, *s.* 103.

264. The justices of the court for Crown cases reserved, when any question has been so reserved for their consideration, may cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment may be delivered after it has been amended. *C. S. U. C.*, *c.* 112, *s.* 6; *C. S. L. C.*, *c.* 77, *s.* 61; 1 *R. S. N. B.*, *c.* 159, *s.* 24.

See, s. 2, interpretation clause, p. 640, *ante*, for meaning of the words *Court of Crown cases reserved.*

The Imperial corresponding statute is 11-12 V., c. 78.

The statute gives no jurisdiction to the court of crown cases reserved to hear a case reserved on a judgment on a demurrer. There must have been a trial and a conviction to give jurisdiction to this court.—*R.* v. *Faderman Den.* 565; *R.* v. *Paxton*, 2 *L. C. L. J.* 162.

If a prisoner pleads guilty to the charge alleged in the indictment, no question of law can be reserved, as none can be said to have arisen on the trial.—*R.* v. *Clark*, 10 *Cox*, 338.

In *R.* v. *Daoust*, 9 *L. C. J.* 85, the defendant having been found guilty of felony, a motion for a new trial had been granted by Mr. Justice Mondelet. At the next term of the court, the prosecutor moved to fix a day for this new trial before Mr. Justice Aylwin, who then reserved for the court of crown cases reserved the question whether a second trial could be had in a case of felony. The Court of Queen's Bench held that the question was properly reserved, and that the statute gave them jurisdiction to

decide it.—10 *L. C. J.* 221. It may be doubted whether in this case they had jurisdiction *before* the second trial and conviction, if a second conviction there had been.

A question raised in the court below by a motion in arrest of judgment is a question arising on the trial, and properly reserved.—*R.* v. *Martin*, 1 *Den.* 398; 3 *Cox*, 447; *R.* v. *Carr*, 26 *L. C. J.* 61; *R.* v. *Deery*, 26 *L. C J.* 129; *R.* v. *Corcoran*, 26 *U. C. C. P.* 134.

The statute gives jurisdiction to the court of crown cases reserved to take cognizance of defects apparent on the face of the record, when questions upon them have been reserved at the trial.—*R.* v. *Webb*, 1 *Den.* 338.

What a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be reserved. When the jury say guilty, there is an end to the matter; that is the verdict, and a recommendation to mercy is no part of the verdict.—*R.* v. *Trebilcock*, *Dears. & B.* 453.

On a trial for murder, the name of A. a juror on the panel was called; B. another juror on the same panel appeared by mistake, answered to the name of A. and was sworn as a juror. The prisoner was convicted and sentenced to death. The next day, this irregularity in the jury was discovered, when the judge, being informed of it, reserved the question as to the effect of the mistake on the trial. *Held*, by eight judges, against six, that the conviction must stand.—*R.* v. *Mellor*, *Dears. & B.* 468. The judges were divided on the question whether the court of crown cases reserved had jurisdiction over the case.

The court expects cases reserved to be submitted in a complete form, and will ordinarily refuse to send back a case for amendment.—*R.* v. *Holloway*, 1 *Den.* 370.

If a counsel should think that any material point raised at the trial has been omitted in the case, it would be proper for him to communicate with the judge who reserved the case, and suggest any amendment that in his judgment may be necessary.—*R.* v. *Smith, Temple & Mews' Crim. App. Cases*, 214. Where a case reserved does not, in the opinion of the counsel, fairly raise all the points that were in issue, the proper course is to apply to the judge reserving to amend it.—*R.* v. *Smith*, 1 *Den.* 510. See *R.* v. *Winsor*, 10 *Cox*, 276.

The court will not send a case back for amendment on the mere application of counsel, but will do so if on the argument it appears that it is imperfectly stated.—*R.* v. *Hilton, Bell, C. C.* 20. Where a case reserved has been re-stated by order of the court, an application, supported by affidavit, to have it again re-stated will be refused. This court has no jurisdiction to interfere compulsorily with the judge's exercise of his discretion.—*R.* v. *Studd*, 10 *Cox*, 258.

The court must deal with the case as it is stated, and upon the evidence returned by the judge.—*R.* v. *Brummitt, L. & C.* 9.

By the express words of the statute, the court of crown cases reserved has its jurisdiction limited to the question of law reserved, and mentioned in the case sent up; it has no right to adjudicate on any other question.—*R.* v. *Tyree, L. R.*, 1 *C. C.* 177; *R.* v. *Blakemore*, 2 *Den.* 410; *R.* v. *Smith, Temple and Mews' Cr. App. Cases* 214.

So, in *R.* v. *Overton, C. & M.* 655, on a crown case reserved, it was held that the judges will not allow the prisoner's counsel to argue objections that are apparent on the face of the indictment, unless they were reserved by the judge, but will leave the prisoner to his writ of error.

The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, and not a rule of law, and questions of law only can be reserved.—*R.* v. *Stubbs, Dears.* 555. Contra, *R.* v. *Smith,* 38 *U. C. Q. B.* 218. But see later case of *R.* v. *Andrews,* 12 *O. R.* 184.

The court of crown cases reserved cannot amend the indictment.—*R.* v. *Garland,* 11 *Cox,* 224. Where an amendment, without which the indictment was bad, had been improperly made at the trial, after verdict, this court ordered the record to be restored to its original state, and a verdict of not guilty to be entered.—*R.* v. *Larkin, Dears.* 365.

On the argument of a case reserved, the counsel for the defendant must begin.—*R.* v. *Gate Fulford, Dears. & B.* 74.

Post, under the sub-title *venire de novo,* s. 268, will be found the cases where the court of crown cases reserved, ordered or refused a *venire de novo.*

Sec. 266, *post,* enacts that no writ of error shall be allowed, unless it is founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve. So that where any party wishes to save his recourse to a writ of error on a question that can be reserved, the proper course is to put in writing his demand to have it reserved, so that the judge's refusal, when it occurs, should appear on the record.

On a motion for a new trial from a conviction for perjury: *Held,* that the trial (under sec. 259 of the Procedure Act) is not terminated until sentence is rendered, and a "question which has arisen on the trial" (which arises on the trial) does not necessarily mean a question that was raised at the trial, but extends to one that took its rise at

the trial, and therefore a point not raised by the defence may be reserved by the court.—*R.* v. *Bain*, 23 *L. C. J.* 327.

Where no new trial is asked for in a reserved case, the court will not order a new trial.—*R.* v. *Hincks*, 24 *L. C. J.* 116. *(Quære ?)*

No reserved case can be had, where no conviction.—*R.* v. *Lalanne*, 3 *L. N.* 16.

It is not necessary that the prisoner be present at the hearing of a reserved case.—*R.* v. *Glass*, 21 *L. C. J.* 245. *See re Sproule*, 12 *S. C. R.* 140.

Where the prisoner has been put on his trial on an indictment containing six counts, charging him with shooting with intent to murder, and was found guilty on the first count, which verdict was afterwards set aside on a reserved case for insufficiency of that first count: *Held*, that he could not be tried again on the other counts, as they all referred to the same act of shooting; prisoner discharged on plea of *autrefois acquit*.—*R.* v. *Bulmer*, 5 *L. N.* 92.

Held, that when a case reserved for the consideration of the full court does not contain a question which, in the opinion of the full court, it is essential to decide in connection with such case, it may be sent back for amendment.—*R.* v. *Provost*, 1 *M. L. R. Q. B.* 473.

A reserved case may be amended at the request of the defendant during the argument thereon before the full court, by adding the evidence taken at the trial.—*R.* v. *Ross*, 1 *M. L. R. Q. B.* 227.

If illegal evidence has been allowed to go to the jury, though without objection from the prisoner, the verdict must be quashed, if that evidence *might* have affected the verdict, though apart from it, there is sufficient evidence

to support the verdict. The law on this in criminal cases is what it was in civil cases before the Judicature Act. The case of *R.* v. *Ball, R. & R.* 132, reviewed. *R.* v. *Gibson,* 16 *Cox,* 181.

Challenging the array of the jury panel is not a matter which can be reserved under C. S. U. C., c. 112.—*R.* v. *O'Rourke,* 32 *U. C. C. P.* 388.

But otherwise, if the question is one relating to the proper constitution of the petit jury.—*R.* v. *Kerr,* 26 *U. C. C. P.* 214.

Quære, whether, when such a question has been reserved by a judge at the trial, it can afterwards be made the subject of a writ of error.—*R.* v. *O'Rourke,* 32 *U. C. C. P.* 388.

The decision of the judge in directing certain jurors to stand aside is a question of law arising at the trial which he can reserve.—*R.* v. *Patteson,* 36 *U. C. Q. B.* 129. But see *R.* v. *Smith,* 38 *U. C. Q. B.* 218. See *R.* v. *Mellor, Dears. & B.* 468, *cited ante.*

A police magistrate cannot reserve a case for the opinion of a superior court, under C. S. U. C., c. 112, as he is not within the terms of that act.—*R.* v. *Richardson,* 8 *O. R.* 651.

Now, under sec. 259 of the Procedure Act, every judge acting under the *Speedy Trials Act* can reserve a case.

WRITS OF ERROR.

265. Writs of error shall run in the name of the Queen, and shall be tested and returnable according to the practice of the court granting such writ, and shall operate a stay of execution of the judgment of the court below.—*C. S. U. C., c.* 113, *s.* 16, *part. C. S. L. C., c.* 77, *s.* 56, *part.*

As amended by c. 50, 50-51 *V.*

266. No writ of error shall be allowed in any criminal case, unless

it is founded on some question of law which could not have bee reserved, or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases.—32-33 *V., c.* 29, *s.* 80, *part.*

267. Whenever in a criminal case any writ of error has been brought upon any judgment or any indictment, information, presentment or inquisition, and the court of error reverses the judgment, the court of error may either pronounce the proper judgment, or remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment or inquisition.—*C. S. U. C., c.* 113, *s.* 17. *C. S. L. C., c.* 77, *s.* 62. 1 *R. S. N. B., c.* 160, *s.* 1. 11-12 *V. c.*78, *s.*5, *Imp.*

Writ of error.—When once judgment is given, the writ of error is the only remedy for any defect in the proceedings; 1 *Chit.* 747; if the judge presiding at the trial has not reserved a case, as shown under the last sub-title. By the statute, the judgment on a crown case reserved is final, and no error lies from that judgment, or on the same grounds, and by sec. 266 of the Procedure Act, "no writ of error shall be allowed in any criminal case, unless it be founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases." See *R.* v. *Faderman*, 1 *Den.* 565.

The "questions of law which could not have been reserved by the judge presiding at the trial" in that clause have no meaning, for *all* questions of law can be reserved.

In *R.* v. *Mason*, 22 *U. C. C. P.* 246, Gwynne, J., said, citing sects. 32 and 80 of the Procedure Act then in force "Our law as to what may or may not be objected on error essentially differs from that of England."

A writ of error in England in the proper remedy after judgment for every defect in substance in an indictment, where a question of law has not been reserved, for irregu-

larity in awarding the jury process, for irregularity in the verdict or judgment, for any manifest error on the face of the record, for a challenge wrongly disallowed, or for an error in the sentence, if the sentence is not authorized by law; also, in capital cases, if the *allocutus*, or demand on the defendant why the court should not proceed to judgment against him, has been omitted.—*Archbold*, 173; *Chit.* 699, 747; *Whelan* v. *R.*, 28 *U. C. Q. B.* 2; *8th Cr. L. Com. Rep.* 170; 3 *Burn*, 60; 5 *Burn*, 359; 4 *Blackstone*, 375.

The criminal law commissioners, *loc. cit.*, say that the matters apparent upon the face of the record, which are sufficient to falsify or reverse a judgment upon a writ of error, are the same as are sufficient to arrest or bar a judgment, and also any material defect in the judgment itself, as a judgment which sentences a party to suffer a punishment not warranted by law. In this last case the writ of error may issue at the instance of the crown. But although it is issued at the instance of the crown, the court is not limited to the errors assigned; but the whole record is before the court, and the prisoner has the right to the benefit of all substantial defects in it, and the conviction will be quashed, if such a defect exists.—*R.* v. *Fox*, 10 *Cox*, 502.

No writ of error, either in felony or misdemeanor, can issue without the fiat of the attorney general, or solicitor general. This *fiat* cannot be signed by the crown prosecutor acting for the attorney general. The court cannot control the exercise of the discretion left to the attorney general on this subject.—*Archbold*, 188; *Dunlop* v. *R.*, 11 *L. C. J.* 186, 271; *Notman* v. *R.*, 13 *L. C. J.* 255.

By section 103, p. 708, of the Procedure Act, *ante*, the writ of error need not be on parchment. The original writ

itself is served and delivered to the clerk of the court, who has the custody of the indictment, and who then makes up the record and makes the return to the court. This return must be signed by the judge. See *Archbold* for forms of fiat, præcipe, writ, return, assignment of error, etc.

If the whole record be not certified, or not truly certified, the plaintiff in error may allege a diminution of the record, showing by affidavits that part of the record has been omitted, and a *certiorari* will be awarded.—*Archbold*, 192; *Duval* v. *R.*, 14 *L. C. R.* 52.

On a charge of felony, the party suing out the writ must appear in person to assign errors; if he is in custody, he must be brought up by *habeas corpus*, obtained on affidavit. The expenses of the writ and the gaoler's travelling charges are borne by him. In misdemeanors, it is not necessary that the plaintiff in error should assign error in person, or be present when the case is heard or judgment given.—*8th Crim. L. Com. Rep.* 172; *Archbold*, 192.

In *Murray* v. *R.*, 3 *D. & L.* 100, the court, on special reasons, did not insist, in a case of felony, on the presence of the plaintiff in error.

No fact can be assigned for error which contradicts the record.—*R.* v. *Carlile*, 2 *B. & A.* 362.

Formerly, if the court below had pronounced an erroneous judgment, the court of error had no power at common law to pronounce the proper judgment, or remit the record to the court below, but were bound to reverse the judgment and discharge the defendant.—*Bourne* v. *R.*, 7 *A. & E.* 58. But now, by sec. 267, *ante*, the court of error is authorized to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment.

A judgment reversed on a writ of error for a technical

error in the proceedings is no bar to a second indictment.—*R.* v. *Drury*, 3 *C & K.* 193; 1 *Chit.* 756 4 *Blackstone*, 393.

In *Ramsay* v. *R.*, 11 *L. C. J.* 158, the Court of Queen's bench, held that no writ of error lay on a judgment of a criminal court on a rule for a contempt of court.

In capital felonies the prisoner is remanded and kept in custody during the pendency of a writ of error.—*Whelan* v. *R.*, 28 *U. C. Q. B.* 2.

In *Spelman* v. *R.*, 13 *L. C. J.* 154, *and* 14 *L. C. J.* 281, the prisoner was admitted to bail on *habeas corpus*, during the pendency of a writ of error

But at common law this is not allowed, and in *R.* v. *Wilkes*, 4 *Burr.* 2543, Lord Mansfield said that he knew of no case where a person convicted of misdemeanor had been bailed without the consent of the prosecutor. Now, in England, by statute, upon the issue of a writ of error, a defendant, in misdemeanors, can be bailed; 8-9 V., c. 68, and 16-17 V., c. 32. But, without any statute law to that effect, in no case can a prisoner in custody, in execution of a judgment, be admitted to bail, even when a writ of error has issued. Before the above statutes, in England, it was said (Appendix to 8th Rep. Cr. L. Com): "In the present state of the law, a writ of error in a criminal case does not suspend judgment, and the party convicted is subject to receive sentence, and to be consigned to punishment." Though see art. 32, p. 173, 8th Cr. L. Com. Rep. as to the case where the judgment has not been wholly or *partially* carried into effect.

See, *ante*, under s. 146, *Greaves' MSS. note.*

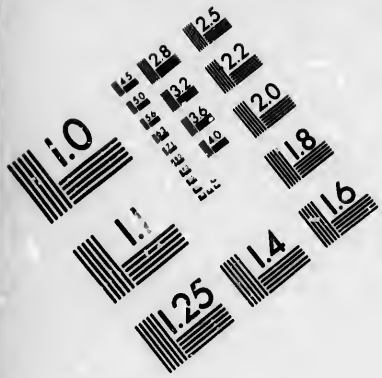
On the hearing of a writ of error, the plaintiff in error must be personally before the court, and, if he is confined, should be brought up on *habeas corpus.*—*Laurent* v. *R.*, 1 *Q. B. R.* 302.

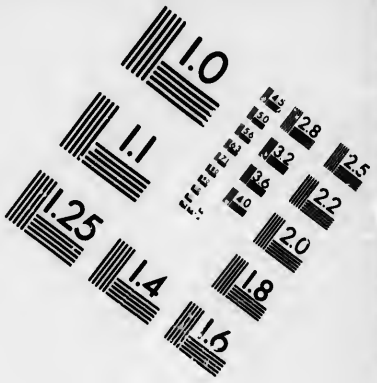
On a writ of error being maintained and a conviction set aside for irregularities in the indictment, the court held that whether they would remand or liberate the prisoner was discretionary.—*Kelly* v. *R.*, 3 *Stephens' Dig., Quebec*, 218.

The court cannot look beyond the record for what took place at the trial, and affidavits purporting to contradict the record are inadmissible. The notes taken by the judge at the trial do not form part of the record.—*Dougall* v. *R.* 22 *L. C. J.* 133; *in re Sproule*, 12 *S. C. R.* 140; *R.* v. *Winsor*, 10 *Cox*, 276; *R.* v. *Carlile*, *ubi supra*.

Where it was alleged on a writ of error that, in the course of the trial, which was for murder, and in which the prisoner was found guilty, a medical witness was ordered to make an analysis for the information of the jury, and that he had done so and made a report, but that the report so made was not placed before the jury, as it ought to have been, and that thereby the prisoner was deprived of the advantage of important evidence in her favor: *Held*, that as the report could not have been submitted to the jury except as part of the evidence, and as neither the evidence nor the ruling of the judge in relation to it could be brought under the consideration of the court of error by means of a writ of error, that the plaintiff in error had no right to have the record amended so as to place before the court the said report; nor could the plaintiff cause the said record to be amended so as to show whether the judge who presided at the trial wrote the notes of evidence himself or caused them to be written by a clerk; nor as to show what precautions were taken for the safe keeping of the jury while deliberating upon their verdict.—*Duval* v. *R.*, 14 *L. C. R.* 52.

Whether the police court is a court of justice within 32-33 V., c. 21, s. 18, or not, is a question of law which may





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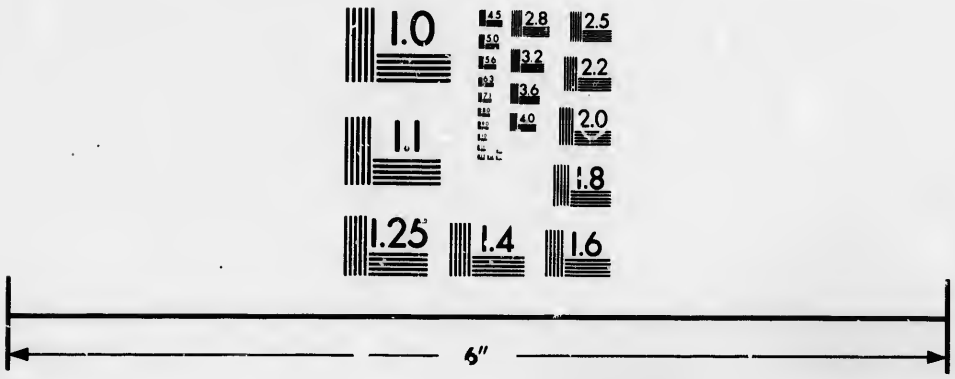

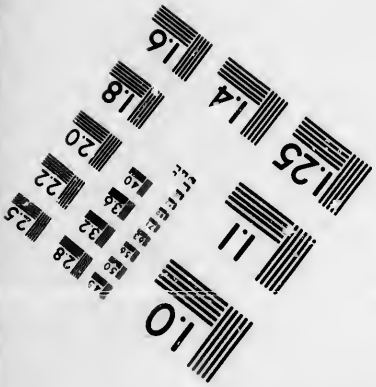

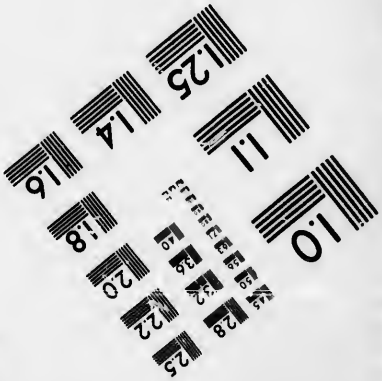

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be reserved by the judge at the trial under C. S. U. C., c. 112, s. 1; and where it does not appear by the record in error that the judge refused to reserve such question it cannot be considered upon a writ of error.—*R.* v. *Mason* 22 *U. C. C. P.* 246.

The judge may discharge the jury, after they are sworn, in consequence of the disappearance of a witness for the crown. The prisoner may then be tried again, and a court of error cannot review the judge's decision.—*Jones* v. *R.* 3 *L. N.* 309.

Error only lies for matter of record. The charge of the judge is not matter of record.—*Defoy* v. *R.*, *Ramsay's App. Cas.* 200.

In Quebec, the judge who presided at the trial cannot sit in the court of error.—*R.* v. *Dougall*, *Ramsay's App. Cas.* 200.

The judgment of a court of record cannot be inquired of on *habeas corpus*, *Exp. O'Kane*, *Ramsay's App. Cas.* 188.

And the judgment of a superior court of law cannot be interfered with on *habeas corpus*, even if the sentence is illegal. *Exp. McGrath*, *Ramsay's App. Cas.* 188. The writ of error is the only remedy, but otherwise, if it is the sentence of an inferior tribunal. *Exp. Burns*, *Ramsay's App. Cas.* 188.

See in re *Sproule*, 12 *S. C. R.* 140, and cases there cited. —Also *R.* v. *Mount*, *L. R.* 6 *P. C.* 283.

APPEALS AND NEW TRIALS.

1. Section two hundred and sixty-eight of "*The Criminal Procedure Act*" is hereby repealed, and the following substituted therefor.—50-51 *V.*, *c.* 50.

268. "Any person convicted of any indictable offence, or whose conviction has been affirmed before any court of oyer and terminer or gaol delivery or before the Court of Queen's Bench in the Province

of Quebec, on its crown side, or before any other superior court having criminal jurisdiction, whose conviction has been affirmed by any court of last resort, or, in the Province of Quebec, by the Court of Queen's Bench on its appeal side, may appeal to the supreme court against the affirmance of such conviction; and the supreme court shall make such rule or order therein, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect: Provided that no such appeal shall be allowed if the court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney General for the proper Province, within fifteen days after such affirmance:

"2. Unless such appeal is brought on for hearing by the appellant at the session of the supreme court during which such affirmance takes place, or the session next thereafter, if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the supreme court:

"3. The judgment of the supreme court shall, in all cases, be final and conclusive:

"4. Except as hereinbefore provided, a new trial shall not be granted in any criminal case, unless the conviction is declared bad for a cause which makes the former trial a nullity, so that there was no lawful trial in the case; but a new trial may be granted in cases of misdemeanor in which, by law, new trials may now be granted:

"5. Notwithstanding any royal prerogative, or anything contained in "*The Interpretation Act*" or in "*The Supreme and Exchequer Courts Act*," no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard."

2. Sections sixty-eight and sixty-nine of "*The Supreme and Exchequer Courts Act*" are hereby repealed.

3. The foregoing provisions of this Act shall not come into force until a day to be named by the Governor General, by his proclamation to that effect.

Per Ritchie, C. J.—Only the grounds upon which the court of crown cases reserved are not unanimous are

open to the appellant on a criminal case before the supreme court.—*R.* v. *Cunningham, Cassels' Dig.* 107.

Since the passing of 32-33 V., c. 29, s. 80, repealing so much of c. 77 of Cons. Stat. L. C., as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32-33 V., c. 36, repealing s. 63 of c. 77, Cons. Stat. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial.—*Laliberté* v. *R.*, 1 *S. C. R.* 117.

But a *venire de novo* could always be granted.

A new trial will not be granted to the crown in a criminal case; neither has the crown an appeal to the supreme court of Canada from a judgment quashing a conviction. —*The Queen* v. *Tower*, 4 *P. & B. (N.* B.*)* 168.

A new trial may be ordered on a reserved case, in misdemeanors, where it appears to the court on the evidence that an injustice may have been done to the defendant.—*R.* v. *Ross*, 1 *M. L. R. Q. B.* 227, *following R.* v. *Bain*, 23 *L. C. J.* 327.

In misdemeanors there is no doubt that the superior courts may grant a new trial, in order to fill the purpose of substantial justice.—1 *Chit.* 654. A new trial may be allowed on the application of a defendant, after conviction on the ground that the prosecutor has omitted to give notice of trial in the cases where it ought to have been given, or that the verdict is contrary to evidence or the directions of the judge, or for the improper reception or rejection of evidence, or other mistake or misdirection on the part of the judge, or misconduct on the part of the jury, or where for any other cause it shall appear to the court that a new trial is essential to justice.—8*th Cr L. Com. Report*, p. 159. If the defendant has been acquitted, the prosecutor is, in general, not entitled to a new trial.—*R.*

v. *Silvester*, 1 *Wils.* 298; *R.* v. *Reynett*, 6 *East*, 315; *R.* v. *Wandsworth*, 1 *B.* v. *Ald.* 63; *R.* v. *Duncan*, 14 *Cox*, 571, though it seems admitted that where the defendant shall have kept back any of the prosecutor's witnesses, or obtained an acquittal by fraudulent means or practice, a new trial may be granted in the case of an acquittal.—*8th Cr. L. Com. Report*, 161, and authorities there cited. A motion for a new trial is generally not received after the expiration of the first four days of the term next after trial or after sentence. The offender, or if more than one, all the offenders who have been convicted, must be present in court, when the motion is made for a new trial.—*R.* v. *Caudwell*, *Note a*, 2 *Den.* 372, 1 *Chit.* 658; unless some special ground be laid for dispensing with the rule.—*R.* v. *Parkinson*, 2 *Den.* 459. See *R.* v. *Fraser*, 14 *L. C. J.* 252. Where one or more of several defendants have been convicted, and another or others acquitted, a new trial may be granted as to the former only.—1 *Chit.* 659; *R.* v. *Teal*, 11 *East*, 307. As a general rule, no motion for a new trial is received after a motion in arrest of judgment; though the court may, in its discretion, receive it.—1 *Chit.* 658; *R.* v. *Rowlands*, 2 *Den.* 364.

Mr. Justice Aylwin, in *R.* v. *Bruce*, 10 *L. C. R.* 117, held that in Lower Canada, where the court is held before one judge and never before more than two, the motion for a new trial in cases of supposed misdirection becomes impracticable. And in *R.* v. *Dougall* (indictment for libel, Queen's Bench, Montreal, September, 1874), Mr. Justice Ramsay seemed to be of opinion that he had no jurisdiction to hear and determine a motion for a new trial; but these cases are not now law.

It has been said that no new trial can be granted in a case of felony. In *R.* v. *Scaife, et al.*, 2 *Den.* 281, how-

ever, a new trial was granted, in such a case, but it was since said by Sir J. T. Coleridge, in *R.* v. *Bertrand*, 10 *Cox*, 618, that the attention of the court, in *R.* v. *Scaife*, had not been directed to this question, and that the decision therein, so far, has taken no root in our law and borne no fruit in our practice. In this case of *R.* v. *Bertrand*, the prisoner, in New South Wales, having been found guilty of murder and sentenced to death, moved for a new trial before the supreme court, on the ground of alleged irregularities on his trial. The supreme court granted this application, and setting aside the verdict, granted a new trial. The privy council reversed this judgment, and ordered that the verdict and sentence against the prisoner, should stand, on the express ground that a new trial cannot be granted in a case of felony. See *R.* v. *Duncan*, 14 *Cox*, 571.

The same doctrine was upheld by the privy council, upon another appeal from New South Wales in *R.* v. *Murphy*, 11 *Cox*, 372. In delivering the judgment in this case, Sir William Erle said that the cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire facias de novo* awarded, have been cases of defect of jurisdiction in respect of time, place or person, or cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon, but that there is no valid authority for holding a verdict, of conviction or acquittal in a case of felony, delivered before a competent tribunal in due form, to be a nullity by reason of some conduct on the part of the jury considered unsatisfactory by the court, and if irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests

the discretion either of executing the law or commuting the sentence. But see Greaves' remarks, *post*, on these cases.

Venire facias de novo.—The "material difference" says *Chitty*, Cr. L. 654, "between a new trial and a *venire facias de novo*, is that the latter is only grantable where some mistake is apparent on the record, but the former may be granted on the ground of improper direction, false evidence, misconduct of jurors, and a variety of other causes which never appear on the face of the proceedings."

Manning, Serjt., in a note to *Gould* v. *Oliver*, 2 *M. & G.*, 238, says: "The distinction between an award of a *venire de novo* and a rule for a new trial appears to be that the former is always founded upon some irregularity or miscarriage apparent upon the face of the record, whilst the latter is an interference by the court in the discretionary exercise of a species of equitable jurisdiction, for the purpose of relieving a party against a latent grievance. After a rule for a new trial and a new trial had thereon the record is in the same state as if no trial, except the last, had taken place, whereas, upon a *venire de novo*, the fact of the first trial, and the circumstances under which that trial became nugatory or abortive, and which rendered a second trial a matter not of discretion, but of right, necessarily appear on the record."

As to when a writ of *venire facias de novo* may issue the Cr. Law Com. in their eighth report, p. 160, say: "A writ of *venire facias de novo* may be awarded by the Court of Queen's Bench, where the jury have been improperly chosen, or irregularly returned, or a challenge has been improperly disallowed, or where, by reason of misconduct on the part of the jury, or some uncertainty or ambiguity or other imperfection in their verdict, or of any other irregularity

or defect in the proceedings or trial, appearing on the record, the proper effect of the first *venire* has been frustrated or the verdict become void in law."

The record at the quarter sessions, after stating that the defendants were indicted for stealing oats, to which they pleaded not guilty, and a verdict of guilty thereon was given, added, "that because it appeared to the justices, that, after the jury had retired, one of them had separated from the other jurors, and conversed respecting his verdict with a stranger, it was considered that the verdict was bad, and it was therefore quashed, and a *venire de novo* awarded to the next sessions;" and it then proceeded to set out the appearance of the parties at such sessions, and the trial and conviction by the second jury, "whereupon, all and singular the premises being seen and considered, judgment was given." *Held*, on a writ of error, that such judgment was right.—*R.* v. *Fowler*, 4 *B. & Ald.* 273.

In *Campbell* v. *R.*, 2 *Cox*, 463; *Gray* v. *R.*, 11 *C. & Fin.* 427; *R.* v. *Yeadon*, *L. & C.* 81; and *R.* v. *Winsor*, 10 *Cox*, 276, the award of a *venire de novo*, in felony as well as in misdemeanor, was held legal and right, in all cases where, from any reason, the first trial has proved abortive.

In the case of *R.* v. *Murphy*, 11 *Cox*, 372, cited, *ante*, the judgment reversed by the privy council was a judgment granting a *venire de novo* in a case of felony, but their lordships considered the application was, in substance, for a new trial, and an attempt, by the exercise of a discretion, to grant a new trial in a case of felony, on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the trial. The privy council, in *Levinger* v. *R.*, 11 *Cox*, 613, quashed a conviction in a case of felony, and awarded a *venire de novo*, on the

ground that the prisoner had been improperly refused the challenge of a juror. See also *R.* v. *Martin*, 12 *Cox*, 204.

If the conviction is set aside from some cause not depending upon the merits of the case, and in any case where the former trial has been a nullity or a mis-trial, a *venire de novo* ought to be awarded. If the circumstances of the case are such that the prisoner could not plead *autrefois convict* to a second indictment for the same offence, there is no reason why a *venire de novo* should not be awarded on the first indictment, provided, of course, that it has not been quashed, or the conviction set aside on the ground of irregularities or illegality in the said first indictment. In *R.* v. *Yeadon, L. & C.* 81, the court of crown cases reserved, holding that there had been a mis-trial, awarded a *venire de novo*. See also *Levinger* v. *R.*, cited *supra*.

In *R.* v. *Mellor, Dears. & B.* 468, a juror by mistake answered to the name of another, and was sworn. The fact was discovered after the trial was over, the prisoner having been found guilty and sentenced to death. Upon a case reserved, Crowder, Willes and Byles, J. J., were of opinion that there had been no mistrial; Pollock, Erle, Williams, Crompton and Channell, J. J., were of opinion that, as the court of crown cases reserved, they had not the right to award a *venire de novo;* Campbell, C. J., Cockburn, C. J., Wightman and Watson, J. J., were of opinion that there had been a mis-trial, and that, as the court of crown cases reserved, they had the power, under the statute, to order a *venire de novo;* Coleridge and Martin, J. J., were also of opinion that the first trial was a nullity, and that the entry on the record should be that there had been a mis-trial, that the conviction was wrong and null, and that the prisoner must be again tried for the same

offence. The majority of the judges, in this case, was then of opinion that a *venire de novo* may be ordered by the court of crown cases reserved in a case of felony.

In that *Mellor's* case, it seems by the remarks of Pollock, C. B., *Dears & B.* 487, that all the judges were of opinion that a *venire de novo* cannot be granted where improper evidence has been received. See *R.* v. *Gibson*, 16 *Cox*, 181.

The Court of Queen's Bench, in the Province of Quebec, in two instances, on setting aside the convictions, has awarded a *venire de novo*, for admission of illegal evidence.

The first case is *R.* v. *Pelletier*, 15 *L. C. J.* 146.

The second case is *R.* v. *Coote*, 12 *Cox*, 557; *L. R.* 4 *P. C.* 599. This last case was brought in appeal before the privy council, and the judgment was reversed, on the ground that the first trial and conviction were valid, so that the question of the power of the court to award a *venire de novo*, when the verdict is vacated on the admission of illegal evidence, was not determined.

In *R.* v. *Guay*, 18 *L. C. J.*, 306, the Court of Queen's Bench, upon a case reserved for its consideration on the legality of certain evidence received at the trial, held that the evidence had been improperly admitted, and quashed the verdict, but the report does not show whether the court ordered either the discharge of the prisoner or a *venire de novo*. In *R.* v. *Chamaillard*, 18 *L. C. J.* 149, upon a case reserved, the Court of Queen's Bench vacated the judgment, on the ground that the first trial was null and void, but gave no order, either as to the discharge or the trial *de novo* of the prisoner. In this case, the prosecutor subsequently moved for a *venire de novo* before the original court, upon which the judge reserved a second case for the consideration of the full court on the

question whether he had the right to order a *venire de novo*; but the Court of Queen's Bench refused to decide the point, on the ground that they had not jurisdiction to do so, evidently overruling *R.* v. *Daoust*, 10 *L. C. J.* 221, though the report does not show that the court's attention was called to this last case. See note to 1 *Bishop, Crim. Proc.* 1047, on the subject.

In *R.* v. *Feore*, 3 *Q. L. R.* 219, the first trial being declared null the prisoner was ordered to be re-tried.

The cases of *R.* v. *Yeadon*, *R.* v. *Mellor*, and *Levinger* v. *R.*, cited *supra*, seem to leave no doubt on this question. If the judgment or sentence has been passed by the court, where the trial was held, the court of crown cases reserved can either reverse, affirm, or amend the *judgment* or avoid such judgment, *and* order an entry to be made on the record that the party convicted ought not to have been convicted. If the sentence or judgment has not been passed by the court whence the case comes, then the court of crown cases reserved can arrest the judgment, or order that such judgment be given by the court whence the case comes at a subsequent session thereof. In both cases, the court of crown cases reserved has the power to make *such other order as justice requires.*

But, as said by Channell, B., in *R.* v. *Yeadon*, *ubi supra*, the court of crown cases reserved cannot reverse, affirm or amend the *verdict.* It can affirm, reverse or amend the *judgment*, if there is one; if there is none yet it may arrest it, or order it to be pronounced. Then it may order anything else which justice requires. If the first trial is a mis-trial, for any reason appearing on the face of the record, then, as in *R.* v. *Yeadon*, the court declares it to have so been, and orders a *venire de novo*, or such other order as justice requires.

The enactment contained in the aforesaid section of the Procedure Act certainly implies that in any case where the former trial has been adjudged to be a nullity, the offender may be subsequently tried for the same offence. If there has been a mis-trial, the defendant has not been put in jeopardy. If it appears by the record that no legal judgment can be given on the first verdict, it is, as it has been seen, one of the cases specially mentioned, where a *venire de novo* not only may, but must, issue. This is not an application left to the discretion of the judge, as in the case of a motion for a new trial by the defendant. A *venire de novo* cannot be refused any more than the first *venire* could have been. In the eyes of the law there can, it is true, be had only one *legal* trial for the same offence; but it is that *legal* trial which is ordered on a *venire de novo*. The proceedings held in the case so far are declared not to be in law a trial; see *R.* v. *Fowler*, 4 *B. & Ald.* 273. If the indictment has not been quashed, the offender stands charged of an offence for which he has not yet been punished though not acquitted of the charge. The former conviction against him does not any longer exist. He could not plead it in bar to a second indictment, because it was not a lawful conviction, 1 *Chit.* 461, and he was not lawfully liable to suffer judgment for the offence charged against him.—*R.* v. *Drury*, 3 *C. & K.* 190. If he may be tried again on a new indictment, why not try him on the same indictment, if it stands, and avoid delays, costs and annoyances to the prisoner as well as to the prosecutor.

In *R.* v. *Kerr*, 26 *U. C. C. P.* 214, the court held that the first trial being a nullity, the defendant could be tried again without the necessity of ordering a *venire de novo*.

There is no doubt that on a writ of error, a *venire de novo* could be awarded, if the first trial is a nullity. "A

mis-trial vitiates and annuls the verdict in *toto*, and the only judgment is a *venire de novo*, because the prisoner was never, in contemplation of law, in any jeopardy on his first trial."— *Whelan* v. *R.*, 28, *U. C. Q. B.* 2 and 137. It is not law that this can be done only on a writ of error, and every time that the first verdict is set aside, on account of a mis-trial, such a *venire de novo* should issue.

In *R.* v. *Winsor*, 10 *Cox*, 276, Chief Justice Cockburn said:

"No man ought to be put in peril twice on the same charge. I entirely agree with that maxim. But we must take that fundamental maxim of the criminal law according to what is really meant by it. It means this, that a man shall not twice be put in peril. After a verdict has been once pronounced, that verdict being one which it was competent for the jury to pronounce, you shall not harass a man a second time if he has been once convicted *and sentenced*. Still less shall you harass a man a second time if he has been pronounced not guilty by a jury of his country. It does not follow because from any particular circumstance or reason a trial has proved abortive, that then the question involved in the case shall not be again submitted to the consideration of a jury, and determined as right and justice may require" ..... And Blackburn, J., said: "For the reasons given by Crampton, J., in *Conway and Lynch* v. *the Queen*, which I will not repeat, I quite concur in his conclusion that the principle is this; that where, upon the jury process going, there has not been a verdict *decisive of either guilt or innocence*, whether it be from error in the judge or the fault of the jury, or inevitable accident, or the judge improperly discharging the jury, and the indictment has not been disposed of, in all such cases there ought to be a *venire de novo*."

Motion in arrest of judgment.—The defendant, after conviction, may move at any time in arrest of judgment, before the sentence is actually pronounced upon him. This motion can be grounded only on some objection arising on the face of the record itself, and no defect in the evidence, or irregularity at the trial, can be urged at this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which has not been amended during the trial, and is not aided by the verdict, will be a ground for arresting the judgment.

The court will *ex proprio motu*, arrest the judgment, even if the defendant omits to move for it, when it is satisfied that the defendant has not been found guilty of any offence in law. If a substantial ingredient of the offence does not appear on the face of the indictment, the court will arrest the judgment.—*R.* v. *Carr*, 26 *L. C. J.*, 61. Judgment will also be arrested if the court does not appear by the indictment to have had jurisdiction over the offence charged.—*8th Crim. L. Com. Report*, 162; *R.* v. *Fraser*, 1 *Moo. C. C.* 407.

A party convicted of felony must be present in court, in order to move in arrest of judgment; so a party convicted of a misdemeanor, unless his presence be dispensed with at the discretion of the court.—1 *Chit.* 663; *Cr. L. Com. Rep. loc. cit.*

If the judgment be arrested, the indictment and all the proceedings thereupon are set aside, and judgment of acquittal is given by the court, but such acquittal is no bar to a fresh indictment.—*Archbold*, 170; *8th Cr. L. Com. Rep.* 163; 3 *Burn*, 58.

Greaves' MSS. note on new trials and venire de novo.

Greaves' MSS. note.—The question put to me by Mr. Justice Taschereau is:

In cases where the court of crown cases reserved quashes the conviction because illegal evidence has been received against the prisoner, or because legal evidence offered by the prisoner has been refused, say *Holt's case*, for instance, *Bell, C. C.* 280, can the court order a *venire de novo?*

"The statute authorizes the court of crown cases reserved:

I.—To reverse, affirm or amend any judgment.

II.—To avoid such judgment and to order an entry to be made on the record "that the defendant" ought not to have been convicted.

III.—"To arrest the judgment."

IV.—"To order judgment to be given thereon at some other session," "if no judgment shall have been before that time given, as they shall be advised."

V.—"Or to make such other order as justice may require."

Nos. I & II relate to cases where a judgment has been given; Nos. III and IV to cases where no judgment has been given; and V to all cases where justice requires something to be done, either in addition to, or wholly independent of, any of the things that are previously specified.

The act creates an entirely new court, and runs wholly in the affirmative. Every question of law may be reserved; and, if reserved, must be finally determined; and when so determined, the subsequent proceedings are to be in accordance with that determination. The act leaves it quite open as to their form, and does not require them to be in any existing form. It introduces new forms, e. g.,

the avoiding judgments and ordering entries on the record and adds general words, which clearly proves that the forms might be varied to meet the particular case. In some cases it is clear the judgment must be complete, e. g., where the judgment is affirmed, and it cannot be doubted that it was intended to be so in all cases; otherwise a judgment on error would be complete, whilst a judgment under this remedial act would not be so, e. g., a *venire de novo* on error; a mere reversal under this act.

Although the section is very badly worded, it is, perfectly clear that the court not only may, but ought to award any and everything that justice requires to carry out to the fullest extent their decision. The clause not only applies to judgments, but also to a judgment *and* order to make an entry on the record; and to an order to give judgment, and to such other orders as justice may require; and then "such judgment and order, if any," are to be certified in the manner pointed out.

It is quite clear, therefore, that there may be an order in addition to a judgment; and as the record of the indictment is not before the judges, and the decision must in all cases be certified to the officer, who has the custody of the indictment, and who is to enter it on the record, and send a certificate to the sheriff or gaoler, it is difficult to see how any case can arise where the judges must not give some order in addition to their judgment.

In order to determine whether a *venire de novo* can be granted, it is best to point out what that proceeding really is, and we can have no better form than that in *Campbell* v. *R.*, 11 *Q. B.* 814, the year before the act passed. It ran thus: "It is considered by the court here that the verdict and judgment upon the said indictment be, for

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the errors aforesaid, set aside and annulled; and that the Recorder, etc., in and for, etc., do award a writ of *venire facias de novo* upon the said indictment; and that the keeper of Millbank do deliver the prisoner to the gaoler of the City of Chester." Now, it appears to me that the whole of this or, at all events, all down to and including the words "the said indictment" where lastly mentioned, is comprised in the judgment. It is all governed by the formal words of the judgment, "it is considered by the court." The English form simply is that "you cause to come anew;" the last word being the only difference from the *venire facias.—Chit. forms, p.* 73. Then, assuming that all I have pointed out is the judgment, can the court so reverse the judgment and award such a *venire de novo?* And I think it clear that they can, and, when the case shows that justice requires it, they ought. The case of *Davies* v. *Pierce,* 2 *T. R.* 53, is an express authority for the latter proposition.

As to the objection that the act gives no authority to set a verdict aside, the answer is clear. The judgment on the question reserved will show that the verdict is a nullity, and this must appear on the face of the proceedings, and a nullity in law is exactly the same as if it did not in fact exist.

Before this act, when the Court of Queen's Bench had an erroneous judgment before them on a writ of error, and the indictment was good, they could only reverse the judgment, and neither pass the proper sentence, nor send the record back to the court below, in order that the proper sentence might be passed,—*R.* v. *Bourne,* 7 *A. & E.* 58. But sec. 5, which was passed to remedy this, provides that whenever a "court of error shall reverse the judgment," it may either pronounce the proper judgment, or remit the record to the

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court below, in order that it may pronounce the proper judgment. Now a case might occur where this clause would, enable the court of error to grant a *venire de novo;* if that be so, the act would be inconsistent in the most material parts, unless the judges could do the same under sec. 2. But supposing the sentence set out consists of a judgment of reversal *and* an order for a *venire de novo*, it can admit of no doubt that it is *ejusdem generis* with an avoidance of a judgment and an order of an entry that the prisoner ought not to have been convicted. Indeed, it is quite clear that whether the sentence be a judgment alone, or a judgment and order, it is *ejusdem generis* with the things especially named. It cannot be anything other than a judgment or a judgment and order. Again, if under this act no *venire de novo* can be awarded, the anomaly will arise that whether a *venire de novo* can issue will depend on whether the question be raised under the act or upon a writ of error; and the act will have provided a worse instead of "a better mode of deciding difficult questions," if under it a *venire de novo* cannot issue.

Where the judges affirm or amend any judgment, or direct a judgment to be given, they order the conviction to be carried out to its full extent. So, if they avoid a judgment because the facts do not prove the alleged offence they direct the prisoner to be discharged. In these instances the whole case comes to its legitimate conclusion. But, if they cannot award a *venire de novo*, the ends of justice will be retarded, and may be defeated. There may occur a case of as brutal a murder as can be, where judgment must be arrested for some formal defect, and if the judge ordered the prisoner to be discharged, he might at once be arrested, indicted and tried again; for the former record

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would not support a plea either of *autrefois acquit* or *convict*. In such a case the effect of not granting a *venire de novo* would be to make it necessary to institute a new prosecution, and to give the criminal another chance of escape.

It is immaterial that the words of the clause are in the alternative. Two or more alternatives may clearly be joined in a judgment, if necessary.

I will now turn to the cases, and first to those independent of the act.

It is clearly settled that a *venire de novo* can be awarded in a criminal case upon a writ of error.—*Gray* v. *R.*, 11 *C. & F.* 427. *Campbell* v. *R.*, 11 *Q. B.* 838. *Levinger* v. *R.*, 11 *Cox*, 613. *Winsor* v. *R.*, 6 *B. & S.* 143; 7 *B. & S.* 490. In *Campbell* v. *R.*, the Queen's Bench ordered the Recorder of Chester to issue a *venire de novo*, and the Exchequer Chamber affirmed this judgment. *R.* v. *Fowler*, 4 *B. & Ald.* 273 shows that a court of quarter sessions can grant a new trial, and this case was approved and acted upon in *Campbell* v. *R.*, (11 *Q. B.* 814) on the ground that that court is not a court of inferior jurisdiction. See also *R.* v. *Smith*, 8 *B. & C.* 342.

I now come to the cases on this act.

In *R.* v. *Mellor, Dears. & B.* 468, there was a great difference of opinion whether a *venire de novo* could be awarded under the act. The question was only started by Lord Campbell, C. J., after the argument was over; and, as far as I can discover, from the judgments, Lord Campbell, C. J. Cockburn, C. J., Wightman, J. and Watson, B., held that a *venire de novo* might be awarded; and Coleridge, J. and Martin, B., thought that a new trial might be directed, but that a *venire de novo* was not the proper form. Pollock, C.

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B., Erle, J., Crompton, J., Willes, J. and Channell, B., held that a *venire de novo* could not be granted. Crowder, J. and Byles, J. doubted; Williams, J., thought the case was reserved too late. The majority, therefore, thought that a new trial could be granted; and it seems not to be very material whether the new trial be granted by the usual form of a *venire de novo*, or by some other; for in substance both would be the same; and a simpler form could hardly be invented than the old form. It seems to me that the reasons in favor of a new trial are simply overwhelming, especially those of Wightman, J. and Martin, B.

In the subsequent case of *R.* v. *Yeadon, L. & C.* 81, the indictment charged the prisoners in different counts with inflicting grievous bodily harm, wounding, and an assault occasioning bodily harm. The jury found them guilty of a common assault. The chairman held that they could not find them guilty of that, on that indictment; and directed them to reconsider their verdict; and they then found them guilty. It was held that the first verdict was perfectly legal, and ought to have been received; that there had been a mistrial, and there must accordingly be a *venire de novo*. Now this judgment was delivered, after time taken to consider, by Pollock, C. B., and Wightman, J., Williams, J., Martin, B., and Channell, B. concurred in it. Either, therefore, they considered *R.* v. *Mellor* to have settled the question, or they were satisfied now that a *venire de novo* was right; and in this latter view Pollock, C. B. and Channell, B. must have changed their opinions and Williams, J., must have held that, where a case was properly reserved, a *venire de novo* might issue. The case is a *very strong* authority; as the offence was so trifling, and so much deliberation was devoted to it; and the more

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so, as it placed the prisoners in jeopardy of being convicted of the aggravated offence, after having been lawfully acquitted of the aggravation. It, perhaps, deserved consideration whether the sessions might not have been ordered to enter a verdict of guilty of a common assault, which was held to be the lawful finding. It is obvious that that would have been the course exactly in accordance with justice. *R.* v. *Virrier*, 12 *A. & E.* 317, shows that a verdict in a case of misdemeanor may be amended by a judge's notes; and the case reserved is even more legal evidence to amend by. My opinion is that the order just suggested might properly be made.

However, there can be no doubt that this case is a *conclusive authority* that the judges have power to issue a *venire de novo* under the act.

The next question is, can a *venire de novo* issue, because it appears on the case that illegal evidence has been admitted or lawful evidence excluded; and I am very clear that it can. The question seems to arise in consequence of *R.* v. *Oldroyd*, *R. & R.* 88; *R.* v. *Ball*, *R. & R.* 132; *R.* v. *Treble*, *R. & R.* 164; *Tinckler's Case*, 1 *East P. C.* 354, which seem to prove that if there be ample evidence to support an indictment after rejecting the improper evidence, the conviction will not be set aside. But much doubt is thrown on this doctrine, as stated in *R.* v. *Ball*, by Lord Denman's note in 1 *Den.* p. V. preface, as to the real facts of *Tinckler's Case*, on which *R.* v. *Ball* was founded, and *R.* v. *Harling*, 1 *Moo. C. C.* 39, is *contra*. And it seems to me perfectly unconstitutional for judges to take upon themselves to decide, in a criminal case, upon the effect of the admission or rejection of any evidence on the mind of a jury; and the later cases of *Crease* v. *Barrett*, 5 *Tyr.*

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458, *Wright* v. *Doe d. Tatham*, 7 *A. & E.* 313, *De Rutzen* v. *Farr*, 4 *A. & E.* 53, *and Bessey* v. *Windham*, 6 *Q. B.* 166, show that where inadmissible evidence is received in a *civil* suit a new trial is a *matter of right;* as it is impossible to say what weight it may have had on a jury; and no doubt they would be followed in any criminal case, where the question could arise on a record in the Queen's Bench. And under this act, if the question be whether any evidence has been improperly received or rejected, the judges can *only* decide that question; and if they decide in favor of the prisoner, they *must* adjudge accordingly. They cannot decide that any of the evidence was inadmissible, and affirm the conviction. Formerly, in civil cases, the courts exercised a *discretion* whether a new trial should be granted for the erroneous admission or rejection of evidence, and that accounts for *R.* v. *Ball*, etc. But, under the act, a question of law *only* is to be decided, and, when that has been done, the further proceedings *must* follow the result.

In *Davies* v. *Pierce*, 2 *T. R.* 53, the declarations of occupiers of lands, that they rented the lands and paid rent to Mr. Evans, being rejected, a bill of exceptions was tendered, and the record removed into the King's Bench, who held that the evidence ought to have been received; and, after time to consider what was next to be done, the court granted a *venire de novo*, and Buller, J., said "unless some extraordinary reasons be urged to the contrary, I have not the least doubt but that a *venire de novo must* be granted." As no distinction can be drawn between the admission and rejection of evidence, and as this case has never been questioned, it is a conclusive authority on both points, and, equally so, in criminal as in civil cases.

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I do not enter into the cases as to where a *venire de novo* can or cannot be granted according to the decisions independent of this act; the act creates an entirely new mode of procedure; and I am clear that the only true test of whether or not a *venire de novo* ought to issue under it is, whether justice requires it or not; or, more widely, whether the case ought to be submitted to another jury.

In all other cases, it is clear to me that, whether the question be decided for or against a prisoner, the court ought to carry out the decision either exactly as it would have been, if the question had been decided in the same way on the trial, or as near thereto as may be practicable.

I will next proceed to consider *R.* v. *Scaife*, 2 *Den.* 281, *and* 17 *Q. B.* 238; *R.* v. *Bertrand*, 10 *Cox*, 618, and *A. G.* v. *Murphy*, 11 *Cox*, 372, and it will be clearly shown, unless I am much in error, that *R.* v. *Scaife* was well decided, and that the other cases are altogether erroneous.

In order to a correct understanding of these cases, the procedure in our courts in criminal cases should be clearly known. The Court of Queen's Bench has two different criminal jurisdictions; it may deal with all cases where an information is filed or an indictment is found, in that court, and it may also deal with all indictments that are removed before trial by certiorari into that court from the courts of oyer and terminer or gaol delivery (which I will call the assizes hereafter), or quarter sessions. It seems that, originally, the trial in all these cases was before all the judges of this court, and that trials at bar, such as *R.* v. *Orton*, in the *Tichborne case*, are the original mode of trial. It is obvious that such a proceeding must have been extremely inconvenient, and by the 27 Edw. 1, St., 1, s. c. 4., intitled "nisi prius shall be granted before one of the

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justices of the court where the suit is commenced," it is enacted that inquests "shall be taken in the time of vacation before any of the justices before whom the plea is brought;" but it adds "unless it be an inquest that requires great examination;" which supports the opinion that trials at bar were the mode of trial originally. This act only authorized nisi prius before a judge of the same court, in which the suit began. But by the 14 Edw. 111, St. 1, c. 16, nisi prius may be granted before a judge of another court, and the verdict is to be returned into the court where the record is, and there judgment is to be given. The effect of these statutes is to make the judge, whether he be a judge of the court where the record is or not, a representative of the other judges of that court, and to make the trial exactly the same as if it had taken place before the full court, and hence it is that the report of the judge who tried the case, whether written or verbal, is always acted upon by the court. The following is a striking case. In *R.* v. *Wooler*, 6 *M. & S.* 367, an information was filed by the attorney general for a blasphemous libel, and the defendant was found guilty before Abbott, J., at the London sittings, and the next day he reported verbally to the full court that the jury retired to consider their verdict, and on their return into court the foreman gave a verdict of guilty and said they all agreed, and the verdict was recorded; Abbott, J., then summed up the course he had taken when the jury retired, and said that then a barrister informed him that some of the jury had not agreed in *Wooler's case;* and it appearing to him, Abbott, J., to be doubtful whether from the particular situation of some of the jury, they might not exactly hear what had passed, he made this statement to the court; and a new

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trial was ordered at the suggestion ofthe court itself. This is a very important case on several grounds. It was an information filed by the attorney general and tried at nisi prius in London. The court acted on the verbal report of Abbott, J., exactly as if they had all been present at the trial. It shows that the court will grant a new trial in a criminal case when there is *any reason to doubt* the correctness of the verdict.

The jurisdiction of the Court of Queen's Bench in criminal cases arises from its being the Sovereign court of oyer and terminer and gaol delivery. The Privy Council in the first case *ubi supra* took no notice of the nature of the court; but in the second, they say "the supreme court sitting in banco in term, could (not) take cognizance as a court of appeal of the judgment pronounced by Fawcett, J., at the session of oyer and terminer, which had come to an end before the session in banco began." This is altogether erroneous; the trial was at nisi prius *in* the supreme court, and just was exactly like *R.* v. *Wooler*, the only difference is that prosecutions for felony in that court are by information at the suit of the attorney general. The court in banco was neither a court of appeal, nor was the session of oyer and terminer ended. It was the same supreme court, and the trial was in contemplation of law exactly as if it had taken place before all the judges, and the new trial had been granted by them. A graver mistake could not have been made, for there is no doubt that our Queen's Bench cannot grant a new trial, where the case has been tried at the assizes or the crown side; for it cannot have the facts before it; and it is because the facts are before it when a case is tried on a record of the Queen's Bench that that court can grant a new trial in any case. This mistake com-

pletely destroys the authority of both *R.* v. *Bertrand* and *A. G.* v. *Murphy;* for in neither, was the true nature of the case seen, and all that these decisions amount to is simply this, that the supreme court cannot grant a new trial in felony, where the case has not been tried before it, but under a commission of oyer and terminer or gaol delivery.

And here, I cannot help questioning the decision in *R.* v. *Bertrand* that the Privy Council could hear the case. In *R.* v. *Wooler* the court acted on the verbal statement of the judge; how could an appellate court deal with such a case? Although there are written notes of what may have occurred at a trial, it is difficult to see how they could be dealt with in an appellate court; and in such cases, it is clear in England that no appellate court can notice them. Yet no notice seems to have been taken of these points.—In that case of *R.* v. *Bertrand*, an information for murder filed by the attorney general in the supreme court of N. S. Wales was tried before the Chief Justice, but the jury could not agree and were discharged; and the prisoner was afterwards tried by another jury, and a verdict of guilty given, and a new trial granted by the supreme court, on the ground that the judge's notes of the evidence of witnesses on the previous trial had been improperly admitted in evidence. On appeal to the Privy Council, this decision was reversed. The grounds of the reversal are open to much observation. The first was that no new trial could be granted in any case of felony. This position is clearly erroneous in many cases as will be shown. The second was that *R.* v. *Scaife* was the only case where an application for a new trial in felony had ever been made. It will hereafter be shown that *R.* v. *Ellis*, 6 *B. & C.* 145, completely refutes this statement. *R.* v. *Scaife* was misunderstood. The court said that,

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in that case, Cresswell, J., "admitted a deposition subject to the objection; the meaning of which probably was that he might upon consideration have referred his ruling to the court of criminal appeal." This is a strange mistake; a judge at nisi prius has no power so to do; and that great judge knew the right course perfectly well. He "thought that as the record came from the Queen's Bench, that was the proper tribunal to deal with the case," and he informed the prisoner's counsel that "he thought the admissibility of the deposition should be raised in that court."—2 *Den.* 286. And it was so raised accordingly.

The court relied very much on there having been no application for a new trial before that case, and that since that decision no attempt had been made to press that, case as an authority. If it had been considered how extremely rarely indictments for felony are tried in the Queen's Bench or on Queen's Bench records, it would have been seen how extremely weak such a point is. In my long experience on the Oxford Circuit I only remember one; and I never heard of another; and I much doubt whether any except the cases reported have come before the court *after verdict.* The reasons are clear; it requires *special grounds* to remove a case into the Queen's Bench; and where removal takes place, the same proportional number of acquittals and convictions will occur as in cases tried at the assizes; and in acquittals, there can be no new trials, and in convictions, it is not in one case in twenty that there can be any ground for a new trial. It was anything rather than reasonable to rely on the absence of such cases. (Since the preceding was written careful search has been made in the crown office, and in the last 33 years there

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have been only 55 cases of felony and only about 11 convictions, which may be reduced to about six actually *separate* cases; and *R.* v. *Scaife* seems to be one of them. Nothing could more strongly confirm my views; and I have no doubt now that the reason why other cases of applications for new trials have not been found is that there have been no cases in which there was any ground for making them, even if there were any cases where an application was capable of being made.)

Again, no mention is ever made on the record of the application for or of the grant of a new trial. And in *Bright* v. *Eynon*, 1 *Burr.* 394, Lord Mansfield, C. J., said "the reason why this matter cannot be traced further back is that the old report books do not give any accounts of the determinations made by the court upon motions." Neither this case nor *R.* v. *Mawbey*, 6 *T. R.* 619, were cited. In the latter, the court held, for the first time, that a new trial in a criminal case might be granted as to the defendants that had been found guilty only, on the ground that justice required that should be done; although no precedent could be found.

The evidence of some of the witnesses on the former trial, in this Bertrand case, was read from the judge's notes, at the instance of the prisoner personally and on the application of his counsel; and this course was disapproved by the Privy Council, who said: "It is a mistake to consider the question only with reference to the prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be, not the interests of either party." This remark very much lessens the importance of a prisoner's consent even when he is advised by

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counsel, and substantially, not of course literally, affirms the wisdom of the common understanding in the profession that a prisoner can consent to nothing. This supposed common understanding seems to be as unfounded in law as it is in reason. A man may plead guilty, if he likes, though the court advises him not to do so. What is that but consenting to a verdict against himself? The very question "are you guilty or not guilty" assumes that he may so consent. It is every day's practice for it to be openly stated in court that a prisoner pleads guilty by the advice of his counsel; and it would be difficult to suggest a reason why he should not do so. Can anything be more absurd than to hold that this prisoner could not consent to the evidence being read, and yet that he might plead guilty, and thereby consent to be hung? Our ancient lawyers were more sensible men. In *Mansel's Case*, 1 *And.* 104, after stating an imperfect verdict, the record alleges that he was asked whether he wished to be freed from that verdict, and he answered that he did, and so he, of his own consent, was freed from the verdict; all the judges at Serjeant's Inn held that this course was right. It is true that in this case there was no verdict in point of law; as Foster, J., pointed out in *Kinloch's Case, Fost.* 31; but that does not invalidate the ruling of all the judges that a prisoner may consent even in a case of murder. So in *Kinloch's Case, Fost.* 16, after the jury had been charged, they were discharged "at the request and by the consent" of the prisoners, and this was held right. In this case Foster, J., said "in capital cases I think the court is so far of counsel with the prisoner that it should not suffer him to consent to anything manifestly wrong and to his own prejudice." Even this great criminal lawyer omitted to perceive that

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the judge cannot prevent a prisoner from stating in court what he may think fit. All that the judge can, or ought to do, is to explain to the prisoner the position in which he is, and the consequences of what he is going to do, and then the prisoner is clearly entitled to act as he likes. In *R.* v. *Edward, R. & R.* 224, where a juror was taken ill and another sworn in his place, the judge said the witness must be examined over again; but the counsel said if the judge read his notes over that would be sufficient; accordingly he read his notes over to the witness, asking him at the end of every sentence if it was right, to which he answered in the affirmative, and was then cross-examined; and the conviction was affirmed. This case was not cited in *R.* v. *Bertrand.*

In *A. G.* v. *Murphy,* 11 *Cox,* 373, an information for murder filed by the attorney general in the supreme court of N. S. Wales was tried at a "session of the said supreme court as a court of oyer and terminer and general gaol delivery" before one of the judges of the same court, and the prisoner was convicted, and a rule was granted by the said supreme court why a *venire de novo* should not issue on the ground that, during adjournments of the trial, the jurors were permitted to see newspapers containing reports of the trial as far as it had gone. One report was headed "The South Creek Murder Case," and another stated that a "witness was cross-examined, but was not shaken in his evidence." That rule was made absolute; but on appeal to the Privy Council that judgment was reversed. The first ground stated for the reversal was that "the law is clear that the discretional power vested in certain courts and cases to grant new trials does not extend to cases of felony." Now in this case the

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question was altogether different from that in *R.* v. *Bertrand*. There the question was whether a new trial could be granted *on the merits;* here it was whether a new trial could be granted for misconduct, bias, and want of impartiality of the jury, or (as the court put it) by reason of some irregularity in the trial." Yet the court held that the rule so laid down in *R.* v. *Bertrand* governed the case.

The court next say that "each of these cases falls within the rule that no person ought to be put in peril twice on the same charge." A stranger misapplication of a rule was never made. The rule was made for a prisoner's benefit; and here it is used to prevent him obtaining a fair trial, and a chance of saving his life. It is almost needless to say that the rule only applies where there has been a lawful conviction or acquittal, and not where the question is whether it be lawful or not.

The court then rely upon the *dictum* of Blackburn, J., in *R.* v. *Winsor*, 14 *L. T.* 195; 10 *Cox*, 276 that "where the jury have once found a verdict of conviction or acquittal, the matter has become *res-judicata*, and after that there can be no further trial." Whether that *dictum*, when strictly tied down to the question on which it was uttered, was correct or not, need not be discussed. It is immeasurably too wide as a general proposition; for it would preclude new trials in all misdemeanors, all reversals on error, and all arrests of judgment; and it is plainly no authority, where the question is whether the verdict is right.

Then the court seems to have become at last aware that, in some cases, there might be a new trial in felony, though this was unknown to them in *R.* v. *Bertrand*, and is inconsistent with the general proposition at the beginning of this

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judgment. They say "the cases, in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded, have not been classified in the digests; there are cases of defect of jurisdiction, in respect of time, place or person—cases of verdicts so insufficiently expressed, or so ambiguous that a judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict, of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal, in due form of law, to be a nullity by reason of some conduct on the part of the jury which the court considers unsatisfactory." We think the search must have been very superficial, or (we much regret to add) the cases very little understood. At all events it would have been very much more satisfactory, if the court, instead of looking merely for cases in point, had taken pains to ascertain the principles upon which verdicts had been set aside, and then considered whether this case was not within those principles. The right under Magna Charta is that every prisoner shall be tried *per legale judicium parium suorum;* (see the remarkable record in 1 *Hale,* 345); and, in our humble judgment it needed no case to prove that no jury that is improperly biassed or prejudiced can be a *lawful* jury, and consequently if *that be shown, or even if a real* doubt be raised as to that being the case, the verdict cannot stand.

Again the court say "none of the authorities cited for the defendant appear to us to sanction the notion that a verdict, even in a civil case, could be set aside upon an imagination of some wrong without any *proof of reality.* The suggestions, upon which verdicts have been so set aside in civil cases have alleged traversable facts, material and relevant, to show that *the verdict had actually*

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resulted from improper influence; and we refer to the *special verdict* reported in 11 *H.* 4 *f.* 17, as affording an example of such facts as would, if stated in a suggestion on the record, have had the effect of setting aside the verdict."

Now no case was ever more thoroughly misunderstood, or more completely perverted into the very opposite of what it decided, than this case.

In order properly to understand the case, it is better to state what the practice was under similar circumstances at the time when it occurred. In ancient times, when any charge of misconduct, partiality, etc., was made against a jury, the practice was for the judge to examine the jurors as to it, and if they admitted it, their admission was entered on the record. Thus where a charge was made that some of a jury had separated, drunk, and been biassed by a stranger, the judges at nisi prius examined the jurors, who confessed it, and their confession was entered as parcel of the record, and nevertheless the judges took their verdict, 14 *H. VII;* 29, 15 *H. VII,* 1. So, where a witness was examined by a jury after they had retired to consider their verdict, and complaint was made to the judge, he examined the inquest, who confessed all the matter, and it was entered on the postea.—*Metcalfe* v. *Deane, Cro. El.* 189. And see *Vicary* v. *Farthing, Cro. El.* 411; *Graves* v. *Short, Cro. El.* 616.

The case in 11 *H. IV.* 17, is this: "The plaintiff in an assize had delivered a scroll in writing to a juryman on the panel for evidence of his matter, and after the same juror, with others, was sworn, and put in a house to agree on their verdict, he showed the same writing to his companions; and the officer, who kept the inquest, showed this matter to the court; wherefor the justices took the writing

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from the jurors, and took their verdict, and by the examination of the jurors, the time of the delivery of the writing was inquired into, and it was found *(i.e.* by the judges, and not "by the jurors" as the Privy Council supposed) *ut supra*; and because the verdict had passed for the plaintiff, he now prayed his judgment. *Gascoigne and Hulls*, judges of the K. B., said that the jury after they were sworn ought not to see or carry with them any other evidence except that which was delivered to them by the court, and by the party put in court upon the evidence shown; and because they did the contrary, this was suspicious *(which words are omitted by the Privy Council.)* Wherefore he ought not to have judgment. (And afterwards the plaintiff said that the writing proved the same evidence as he himself gave to them at the bar; wherefore it was not so bad as if it had not been read in evidence, but it was not allowed.) *The Privy Council omitted this last passage between brackets.*

Now it is quite clear that the same course of examining the jury, etc., was followed here as in the cases above referred to. Yet the P. C. call this "a special verdict;" and say "the result of the examination, viz., that the verdict was not according to the evidence, but upon evidence taken out of court, without the assent of the other party, appeared by the *finding of the jury*;" and, again, that the court "ascertained the fact of the misconduct of the plaintiff by examination of the jurors, while acting as jurors, and *by their verdict.*"

Whereas nothing is clearer than that the only verdict the jury gave was for the plaintiff upon the issue joined; and it is very difficult to understand how the Privy Council could imagine that a jury could find any verdict as to

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anything else; and still more so, a verdict that would have convicted themselves of irregularity, if not more. But it is still more surprising that the Privy Council whilst professing to translate the case should have omitted all version of *ceo fuit suspicious;* for that is the very ground of the judgment; for what was said by the judges was the judgment of the court. *Rolle* (trial verdict, D. pl. 9., p. 714) well puts this case on the ground that the delivery of a writing to the jury will avoid a verdict for the party who delivered it, although he give the same evidence to the jury at the bar; and neither in this nor in any other case did the court enter into any inquiry whether *in fact* the jury was biassed. This case is a distinct authority that if a party give a paper to a jury, which may possibly bias them, and they find a verdict for him, this makes the *verdict so suspicious* that it can not stand; and this case has always been followed in later cases.

In a trial between the Bishop of R. and the Earl of Kent, during a tempest some of the jurors separated themselves, and some person said to one of them, "Beware how you act; for the matter of the Earl is better than the matter of the Bishop," and induced him to drink; and afterwards the jury found a verdict for the Bishop. It was held that the verdict was good; for it was contrary to the inducement which was made for the defendant; but, if the verdict had been the other way, it would not have stood; for it would be suspicious. *(car il est suspeceoneux.) Y. B.* 14 *H. VII,* 29 and 15 *H. VII,* 1. This case was repeatedly argued before all the judges of both benches; and it was held that the distinction between a verdict for the party, in whose favor the influence

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was used, and a verdict against him, was that the verdict for him showed that there was a bias in his favor; but the verdict against him showed that there was no favor towards him; and it was said to have been held that, if a man gave money to a juror, who found a verdict against him, the verdict was good; but it would have been otherwise if the verdict had been for him. Lord Hale infers from this case that if the jury eat and drink "at the charge of the prisoner, and the verdict find him guilty, the verdict is good; but if they find him not guilty, and this appears by examination, the judge before whom the verdict is given, may record the special matter, and thereupon the verdict shall be set aside, and a new trial awarded."—2 *Hale*, 306. See also *Graves* v. *Short*, *Cro. El.* 616.

The jury having heard all the evidence in a case of murder, withdrew to consider their verdict, and being returned, delivered their verdict into court in writing; and being examined by the court how they came by that writing, confessed it was delivered into their hands by the prisoner as they passed him. The court thereupon discharged the jury of the prisoner and a new venire was awarded. 1 *Hon. Fost.* 27. This record was produced in court.

In *Metcalfe* v. *Deane*, *Cro. El.* 189, a witness for defendant was called by the jury after they had retired, and they caused him to repeat his evidence, which was the same in effect that was given before in court, and not different, and they found a verdict for the defendant, and the court held that the verdict was not good, because (according to Rolle) "it is *not certainly known* to the court whether this was the same evidence as was given at bar."—2 *Rolle Abr.* 715, *pl.* 13, who says he had seen this record.

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Now these cases clearly show that if there be any reasonable ground to suppose that the jury may have been improperly influenced, the verdict will be set aside; and the influence need not be created by the party in whose favor the verdict is given; for where handbills reflecting on the plaintiff's character had been distributed in court and shown to the jury on the day of the trial, a new trial was granted against the defendant, though he denied all knowledge of the handbills.—*Coster* v. *Merest*, 3 *B. & B.* 272. *R.* v. *Wooler* also is a distinct authority that a reasonable doubt of the correctness of a verdict is a sufficient ground for a new trial in a criminal case.

Now let us see what the *Murphy* case is. It is distinctly stated that the jurors were allowed the use of newspapers containing the heading "The South Creek murder" and stating that a witness was cross-examined and not shaken. This clearly was matter that ought not to have been seen by the jury; as its tendency was against the prisoner; and the verdict was against him. It is impossible to conceive that any judge would have allowed the jury to see these papers. The case clearly comes directly within the principle established by all the authorities. The decision on this point, therefore, was undoubtedly, erroneous.

The supreme court had ordered a proper entry on the record (in accordance with the authorities) that the jury were improperly allowed the use of the newspapers. Yet the Privy Council entered into a consideration of the documents, on which the supreme court acted. This is directly contrary to *Graves* v. *Short*, and in subversion of the rule that nothing but the record itself can be considered. The ground on which the Privy Council considered these docu-

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ments was that they were referred to them with the case by the crown; but it can hardly be maintained that that could make that lawful to be acted upon, which would otherwise be unlawful.

Then the court proceeded to show that the sheriff and his bailiffs are not like a party in a cause; but that really was not the point. The true question was, had the jury access to papers which might improperly bias their minds.

I now pass from *A. G.* v. *Murphy*. It is well next to consider the supposed authorities for saying that there can be no new trial in felony.—In *R.* v. *Mawbey*, 6 *T. R.* 619, four defendants were indicted for a conspiracy, and two of them acquitted and two convicted; and one question was whether a new trial could be granted as to the two that were convicted without the others; and it was contended for these defendants that a new trial ought to be granted wherever there would be a palpable defect of justice if it were not granted. On the part of the crown, cases were put to show that a new trial could not be granted in many cases, in which there might be a palpable failure of justice. Thus if a defendant, unquestionably guilty, were acquitted, the court could not grant a new trial. So also if a defendant be convicted of treason or felony, though against the weight of evidence, there is no instance of a motion for a new trial in such a case; but the judge passses sentence and respites execution till application can be made to the mercy of the crown. It is clear that this passage refers to cases of conviction on the crown side at the assizes, and not to cases tried at nisi prius on King's Bench records; for until the 11 G. 4 & 1 Wm. 4, c. 70, s. 9, sentence could not be passed on a conviction at nisi prius; and the hardship in so large a number of such cases was quite sufficient

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for the argument on the part of the crown. Again the *dictum* merely asserts that no case of a new trial had been found where it had been moved for on the ground of the verdict being against the weight of evidence; which is a far narrower assertion than that no new trial could be granted in any case of felony; and very nearly amounts to an admission that, in some cases of felony, a new trial might he granted. Then Lord Kenyon, C. J., plainly referring to this *dictum*, said "in one class of offences indeed, those greater than misdemeanors, no new trial can be granted at all." This *dictum* must in all fairness be limited to the point put by the counsel for the crown; otherwise it is clearly too wide. This *dictum*, entirely separated from the context, has been cited in *Corner's C. P.* 161, and elsewhere as warranting the general proposition; and I will apply the *dictum* of Cockburn, C. J., in *Winsor* v. *R.*, 14 *L. T.* 189, 10 Cox, 276, to it. "This loose *dictum* has been copied servilely by text writers into their books until it has come to be regarded as an authority." The only other case cited by Corner is *Bright* v. *Eynon*, 1 *Burr.* 390; but there is not a word as to a new trial in felony in that case. But this case and *R.* v. *Mawbey* are as strong authorities as possible that the court will not yield to the mere absence of precedent in opposition to the claims of justice; but will grant a new trial where the ends of justice cannot be attained without it. In a note, 13 *East*, 416, it is said "in capital cases at the assizes if a conviction take place upon insufficient evidence, the common course is to apply to the crown for a pardon"; but "I am not aware of any instance of a new trial granted in a capital case." The context shows that this means a case tried at the assizes.

In the same note, it is said that in *Tinckler's Case*, 1 *East*

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P. C. 354, it seemed to be the opinion of the judges that a new trial could not be granted in felony. Neither in *East* nor in 1 *Den.* p. *V.* (preface) is anything of the sort mentioned; and it is difficult to see how such a point could have arisen. The prisoner was tried at Durham for murder; and a case was reserved as to the admissibility of certain dying declarations, and the judges held the conviction right. It is clear the judges could not grant a new trial; and, if any thing as to a new trial was mentioned, it was wholly extra-judicial, and all it could amount to was that where a case was tried on the crown side at the assizes, no new trial could be granted by any other court. The truth is that all that has been said on this subject refers to cases tried at the assizes or quarter sessions; and, as there are no means of bringing the facts before the Queen's Bench on error or by certiorari, of course that court cannot grant a new trial. The supposed general rule doubtless, originated with these ordinary cases at assizes and sessions; but, like other general rules, it is subject to the exception of the very rare cases in the Queen's Bench. The following cases of misdemeanor well illustrate the matter. In *R.* v. *Oxfordshire*, 13 *East* 411, the defendants were found guilty of the non-repair of a bridge at the assizes, and a motion was made for a certiorari to remove the indictment into the Queen's Bench in order to move for a new trial; but it was held that it could not be done, as the court could have no information as to the merits. *R.* v. *Nichols*, *Ibid*, *note p.* 412. So where the defendants were convicted at the quarter sessions for the non-repair of a bridge, the court at once refused to notice a case which had been reserved for their opinion. *R.* v. *Salop*, 13 *East* 95. Again, in *R.* v. *Winsor*, 14 *L. T.* 201, 10 *Cox*, 276, Blackburn, J.,

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said "a verdict may have been founded on circumstances against evidence; but that cannot be reviewed in a court of error, because the evidence upon which the jury decided the question of fact cannot be brought up to a court of error."

This remark was made with reference to a case of felony, and it is quite inconsistent with the supposition that there can be no new trial in any case of felony; for it was useless to draw such a distinction as to the facts being or not being before the court, if in no case could the court decide upon them.

But where a case is tried on a Queen's Bench record, the evidence is brought before the court in banco, and it can deal with it as it can in other cases tried on records of that court. The distinction, therefore, is that the Court of Queen's Bench cannot grant a new trial either in misdemeanor or felony where the case has been tried on the crown side at the assizes or quarter sessions, because it cannot have the facts before it. But that it can grant a new trial in all cases of misdemeanor (whether on the merits or otherwise) where the trial is on a record of that court; and also, in all cases of felony so tried, for any formal defects; and it is maintained that it can do so also on the merits.

I now turn to a case which excited considerable notice at the time. The prisoner was charged with stealing the money of his mistress at Exeter, convicted and sentenced to 14 years' transportation; but this judgment was reversed on error. *R.* v. *Ellis*, 5 *B. & C.* 395. He was again indicted, and in consequence of the prejudice that existed against him, the indictment was removed into the King's Bench, and he was tried at nisi prius by a jury of the County of Devon, and again convicted; and within the

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four first days of the next term a rule was applied for on the ground that evidence of other stealings besides those charged in the indictment had been improperly admitted; but the reports differ as to what the rule was. In 6 *B. & C.* 145, it is said to have been a "rule for staying the judgment." In 9 *D. & R.* 176, it is said to have been "a rule for a new trial;" and this is right; for I have ascertained, from the crown office, that that is the entry in the master's book. Lord Tenterden was present when the application was made, and heard the grounds of it stated, for he remarked upon them; but as no motion can be made in felony, unless the prisoner be present, the application was postponed until he was brought up for judgment on a subsequent day, when it was renewed and fully argued before Bayley, J. and Holroyd, J.,on the part of the prisoner, but the counsel for the crown was not heard. Here then we have a case of felony, in which a rule for a new trial was applied for, argued, and decided on the merits, and not a doubt suggested as to a new trial being grantable in felony; and it is clear that all these three great judges had no doubt on the subject, otherwise they never would have listened to the application or heard it solemnly argued; but would have instantly stopped the motion, as was done at once in *R.* v. *Oxfordshire* and *R.* v. *Salop.* This case occurred in 1826, when Lord Campbell and Cresswell, J., very probably were in court; the one then being in great business in that court, and the other, being joint reporter with Barnwall. This case clearly was a good precedent for *R.* v. *Scaife,* and it proves how unfounded is the statement in the judgment in *R.* v. *Bertrand* that no such application had ever been made before that case; and, as that erroneous supposition was the foundation of that

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judgment, it shakes that decision to the greatest extent. It equally negatives the doctrine that no new trial can be granted in felony; for the more that doctrine is supposed to have prevailed, the more unaccountable is it that the application should have been entertained, unless all the judges were clear that the doctrine was erroneous.

In *R.* v. *Scaife*, the indictment had been removed into the Queen's Bench and was tried by Cresswell, J., at York, when two of the prisoners were convicted, and one acquitted. Cresswell, J., had admitted the deposition of an absent witness, subject to the objection that it could not be evidence against two of the prisoners, and he pointed out that the question ought to be raised in the Queen's Bench, as the record came from that court.—(2 *Den.* 286.) Now it is quite impossible to suppose that Cresswell, J., would have taken this course, unless he was of opinion that that court could set the matter right, and the only way in which it could do so was by granting a new trial; and the only reasonable inference is that that great judge had no doubt that a new trial might be granted in felony, and I have little doubt that the similar course in *R.* v. *Ellis*, as to the admissibility of evidence, was in the mind of Cresswell, J., when he reserved the question.

Accordingly, a rule nisi for a new trial was obtained, argued on both sides, and the rule made absolute by Lord Campbell, C. J., Patteson, J., Erle, J., and Coleridge J. Not a doubt was suggested as to a new trial being grantable in felony. But after the judgment had been delivered it was suggested (according to the Queen's Bench report) that there was a difficulty as to what rule should be drawn up, no precedent for a new trial in felony having been found, on which Lord Campbell said "that

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might have been an argument against our hearing the motion." The court, after conferring with the master, made the rule absolute. So that, having the question directly brought to their notice, the court clearly thought there was nothing in it. Probably the report is inaccurate as to the difficulty about the rule. There could be no difficulty in an ordinary rule absolute, as it would follow the regular course; but here, there was the difficulty of making the rule absolute as to those prisoners only who had been convicted, which was so much discussed in *R.* v. *Mawbey*, in which it was decided that it might be done, but no rule drawn up; and probably this was the difficulty. See the rule in 2 *Den.* 287. The result of the examination of these cases is that Lord Tenderden, C. J., Bayley, J., Holroyd, J., Lord Campbell, C. J., Coleridge, J., Patteson, J., Erle, J., and Cresswell, J., must have been of opinion that a new trial in felony might be granted at the time, when these cases were before them, and the fact that neither in the one case nor in the other did the counsel for the crown venture to raise the question, strongly tends to show that, on all hands, it was considered perfectly clear at that time that a new trial might be granted in felony.

It may be well also to consider the cases as to a *venire de novo* after a special verdict in felony, as the only material difference between it and a new trial seems to be that a *venire de novo* is only grantable for something that appears on the face of the record, but a new trial may be granted for a variety of causes in addition, which never appear on the record. — 1 *Chit.* 654. It is clearly settled that a *venire de novo* may be granted for error in the proceedings, which is not upon the merits. As to a *venire de novo* on the merits, in *Trafford* v. *R.*, 8.

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Bing. 204, a *venire de novo* was granted, because the special verdict did not contain a sufficient finding of facts to warrant the application of the rule that, at common law, the land holders would have the right to raise the banks of a river, from time to time, so as to confine the flood-water within the banks. The court, therefore, must have considered the facts, and decided upon them. In *R.* v. *Keite*, 1 *L. Raym.* 138, the question was whether a special verdict showed that the prisoner was guilty of murder or manslaughter. On the first argument Holt, C. J., said, "if the verdict is imperfect, no judgment can be given, but a *venire de novo* ought to issue"; and Eyre, J., and Rokeby, J., held the same. At the end of the second argument, no judgment was given on the matter of law raised on the special verdict; but Holt, C. J., took several exceptions to the indictments, and they were quashed. In *R.* v. *Burridge*, 3 *P. Wm.* 499, Lord Hardwicke, C. J., said that "a doubt seems to have arisen whether a *venire de novo* could be awarded in a capital case; to avoid this question, Lord Holt took exceptions to the indictments." This seems to be a misapprehension both as to their having been any such doubt, and as to Lord Holt having tried to avoid it; there is not a word in the report to lead to either supposition, and it should be remembered that, in former times, the judges quashed indictments for any objection apparent to themselves; and hence it was that any barrister, as *amicus curiæ*, had a right to point out any defect, "to inform the justices, that they do not err."—14 *H. VII.* 29. The *dicta*, therefore, of Lord Holt, C. J., and the other two justices are unshaken; and *Trafford* v. *R.*, is in accordance with them; so also in *Campbell* v. *R.* "there is a solemn decision of the Court of Queen's Bench, not reversed or

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questioned, that a *venire de novo* will lie upon an imperfect verdict" in felony: per Blackburn, J., *R.* v. *Winsor*, 14 *L. T.* 203; 10 *Cox*, 276. It is clear that in every case of a special verdict, the merits of the case are considered, and if they are sufficiently stated, judgment on the one side or the other is given, but if they are insufficiently stated, a *venire de novo* must issue. In *R.* v. *Sykes*, *T. Raym.* 202, in an information for perjury the record of the trial, on which the perjury was committed, varied from the statement of it in the information, and at the assizes, it was found specially. It was held that the judges at the trial ought to have determined it, and that a *venire de novo* ought to issue. This case is a clear decision that a *venire de novo* ought to issue upon the merits. It is just like the case of admitting or rejecting evidence improperly, which in civil cases is a ground for a *venire de novo: Davies* v. *Pierce*, 2 *T. R.* 125. And in *Campbell* v. *R.*, 11 *Q. B.* 824, it was asserted that there is no distinction on this point between criminal and civil cases. If then a *venire de novo* can be granted on the merits in felony, it strongly supports the powers of granting a new trial on the merits, for the difference between the two really consists merely in the form in which the question is brought before the court.

A sort of vague notion seems to have existed that there was some distinction between felony and misdemeanor on these questions; and the *dictum* of Lord Kenyon, C. J., in *R.* v. *Mawbey*, referring to "a class of offences" "greater than misdemeanors" may have given countenance to this supposition. But any such distinction is clearly unfounded, for there is no doubt, whatsoever, that in every case of felony where there is any fatal formal defect, a new

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trial or a *venire de novo* (as the case may be) may be granted exactly in the same way as in misdemeanors, and it was well observed by Cockburn, C. J., in *R.* v. *Winsor* with reference to *R.* v. *Davison*, 2 *F. & F.* 250, that "it is very true that that was a case of misdemeanor, and this is a case of felony; but I can see no real distinction whatever between the two classes of cases. The trial by jury is the same, and the principles on which it is to be administered are the same, whether the case is one of felony or misdemeanor; and I am utterly at a loss to see any distinction that can exist in point of principle between the two cases."

There is, however, one very important distinction in favor of a prisoner charged with felony—the right to challenge jurymen peremptorily—which does not exist in misdemeanor, and this affords a strong argument for there being at least as large a power to correct the errors of jurors, on the merits, in cases of felony as in misdemeanors.

I have dealt thus fully with this question, because it does seem to me most unreasonable that there should be power to grant a new trial in misdemeanors, both on the merits and for matters of form, and in felony also, for matters of form, but not on the merits; in other words that there should be no such power on the most momentous questions on which the guilt or innocence of the prisoner may turn, although it exists in the less important matters, which in no way whatever bear on his guilt or innocence."

SPECIAL PROVISIONS.

269. Any judge, retired judge, or Queen's counsel, presiding at any sittings of the High Court of Justice of Ontario, may reserve the giving of his final decision on questions raised at the trial; and his decision, whenever given, shall be considered as if given at the time of the trial.—46 *V.*, *c.* 10, *s.* 1.

270. The practice and procedure in all criminal cases and matters whatsoever in the said High Court of Justice shall be the same as the practice and procedure in similar cases and matters, before the establishment of the said High Court.— 46 *V., c.* 10, *s.* 2.

271. If any general commission for the holding of a court of assize and nisi prius, oyer and terminer or general gaol delivery, is issued by the Governor General for any county or district in the Province of Ontario, such commission shall contain the names of the justices of the supreme court of judicature for Ontario, and may also contain the names of the judges of any of the county courts in Ontario, and of any of Her Majesty's counsel learned in the law, appointed for the Province of Upper Canada, or for the Province of Ontario, and if any any such commission is for a provisional judicial district such commission may contain the name of the judge of the district court of the said district:

2. The said courts shall be presided over by one of the justices of the said supreme court, or in their absence by one of such county court judges or by one of such counsel, or in the case of the said district by the judge of the said district court.—46 *V., c.* 10, *s.* 4.

272. It shall not be necessary for any court of General Sessions in the Province of Ontario to deliver the gaol of all prisoners who are confined upon charges of simple larceny, but the court may leave any such cases to be tried at the next court of oyer and terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do.—*C. S. U. C., c.* 17, *s.* 8.

273. If any person is prosecuted in either division of the high Court of Justice for Ontario, for any misdemeanor, by information there filed or by indictment there found, or removed into such court and appears therein in term time, in person, or in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged therewith, shall not imparl to a following term, but shall plead or demur thereto, within four days from the time of his appearance; and in default of his pleading or demurring within four days as aforesaid, judgment may be entered against such defendant for want of a plea.—*C. S. U. C., c.*108, *s.* 1.

274. If such defendant appears to such information or indictment by attorney, such defendant shall not imparl to a following term; but a rule, requiring him to plead, may forthwith be given and served, and a plea to such information or indictment may be enforced, or

judgment in default may be entered, in the same manner as might have been done formerly in cases in which the defendant had appeared to such information or indictment by attorney in a previous term; but the court, or any judge thereof, upon sufficient cause shown for that purpose, may allow further time for such defendant to plead or demur to such information or indictment.—*C. S. U. C.*, *c.* 108, *s.* 2.

275. If any prosecution for misdemeanor instituted by the Attorney General for Ontario in the said court, is not brought to trial within twelve months next after the plea of not guilty has been pleaded thereto, the court in which such prosecution is depending, upon application made on behalf of any defendant in such prosecution, of which application twenty days previous notice shall be given to such Attorney General, may make an order, authorizing such defendant to bring on the trial of such prosecution; and thereupon such defendant may bring on such trial accordingly, unless a *nolle prosequi* is entered to such prosecution.—*C. S. U. C.*, *c.* 108, *s.* 4.

276. In the Province of Nova Scotia a calendar of the criminal cases shall be sent by the clerk of the Crown to the grand jury in each term, together with the depositions taken in each case and the names of the different witnesses, and the indictments shall not be made out, except in Halifax, until the grand jury so directs.—*R. S. N. S.* (3rd S.), *c.* 123, *s.* 17.

277. A judge of the supreme court of Nova Scotia may sentence convicted criminals on any day of the sittings at Halifax, as well as in term time.—*R. S. N. S.* (3rd S.), *c.* 171, *s.* 75.

GENERAL PROVISIONS.

278. The several forms in the schedules to this Act, or forms to the like effect, shall be good, valid and sufficient in law, and the forms of indictment contained in the second schedule to this Act may be used, and shall be sufficient as respects the several offences to which they respectively relate; and as respects offences not mentioned in such second schedule, the said forms shall serve as a guide to show the manner in which offences are to be charged, so as to avoid surplusage and verbiage, and the averment of matters not necessary to be proved, and the indictment shall be good if, in the opinion of the court, the prisoner will sustain no injury from its being held to be so,

and the offence or offences intended to be charged by it can be understood from it.—32-33 *V.*, *c.* 29, *s.* 27; *and c.* 30, *s.* 66.

279. Nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.—32-33 *V.*, *c.* 29, *s.* 137.

The enactment in section 278, so far as it relates to the forms contained in the first schedule, is taken from the 11-12 V., c. 42, s. 28, *Imp.* The cases of *Barnes* v. *White*, 1 *C. B.* 192, in *re Allison*, 10 *Ex.* 561, *R.* v. *Johnson*, 8 *Q. B.* 102, and *R.* v. *Sansome*, 1 *Den.* 545, seem to support the contention that where a statute gives a form it is sufficient to follow it. In *R* v. *Johnson*, *ubi supra*, however, it was said, by the judges, that a statutory form is insufficient, if it does not give a complete description of the offence.

In *R.* v. *Kimber*, 3 *Cox*, 223, the judges doubted if a certain document under the Jervis act was sufficient though it had been drawn exactly in the form given by the statute. In *Egginton's Case*, 5 *E. & B.* 100, it was held that if a form is given by a statute, it can be followed.—So, in *R.* v. *Bain*, *Ramsay's App. Cases* 191, for perjury; and *R.* v. *Davis*, 18 *U. C. Q. B.* 180, for false pretences.

REMARKS ON FORMS IN THE SECOND SCHEDULE.

Murder and Manslaughter.—Venue in the body of the indictment unnecessary. S. 104, Procedure Act.

Bodily harm.—Venue unnecessary.—Indictment under sec. 8, c. 162 need not aver "and did thereby cause bodily harm."—But if it does "*grievous* bodily harm" are the words of the section.—Then "with intent to *commit* murder," or "with intent feloniously, wilfully and of his malice aforethought to kill and murder" are necessary.

See *R.* v. *Carr*, 26 *L. C. J.* 61.

Rape.—Venue unnecessary.—Allegation that the woman ravished was above twelve years of age, unnecessary.

Robbery.—This is a form under sec. 34 of the *Larceny Act*, page 331, *ante*. It is entirely defective, even after verdict.

Burglary.—Word "*burglariously*" omitted.—The particular felony intended must also be specified. This form bad, even after verdict. See remarks under sec. 38 of *the Larceny Act*, p. 353, *ante*.

Stealing money.—Stealing money is simple larceny under sec. 5 of the *Larceny Act*, p. 290, *ante*, and the form given for simple larceny in this schedule covers it. Stealing from the person is covered by sec. 32 of the *Larceny Act*, p. 315, *ante*, and this form does not cover it. Stealing any property or any money the value of which is over $200 is covered by sec. 86 of the *Larceny Act*, p. 457, *ante*, and this form, if intended to fall under that section, should allege that the sum of money stolen was of more than $200.

Embezzlement.—See proper form, p. 386, *ante*, under sec. 52 of the *Larceny Act*.

False pretences.—What are the false pretences should be set at full length.

See, p. 420, *ante*, remarks under sec. 77 of the *Larceny Act*.

After verdict, an indictment was quashed for not stating what the false pretences were. *R.* v. *Mason*, 2 *T. R.* 581. This decision was before the statute which enacts that, *after verdict*, an indictment in the words of the statute is sufficient.

In *R.* v. *Goldsmith*, 12 *Cox*, 479, it is said that the question whether such an indictment, not stating what are the false pretences, would be sufficient now, after verdict, has not been raised. See *R.* v. *Kelleher*, 14 *Cox*, 48.

In Ontario and Quebec, before the Consolidation Acts of 1869, sec. 35 of ch. 99, C. S. C. expressly dispensed with the necessity of setting out the false pretences in all indictments for obtaining by false pretences; but this clause has been repealed by the General Repeal Act of 1869.

Offences against the habitation.—See proper form under sec. 2 of c. 168, p. 558, *ante*.—The word "unlawfully" is wanting. The statutory offence is therefore not covered by this form.

In *R.* v. *Davis*, 1 *Leach*, 493, the indictment averred that the defendent *unlawfully, maliciously* and *feloniously* did shoot, etc. The words of the statute creating the offence charged were. "That if any person shall *wilfully* and *maliciously* shoot ..... he shall be guilty of felony." As the word "wilfully" was not in the indictment, it was held bad.

So in *R.* v. *Cox*, 1 *Leach*, 71, it was held that the term "wilful" in a statute is a material description of the offence, and that an indictment for such an offence must necessarily aver that the act was "wilful" or done "wilfully." "*Quod voluit dixit*, said Patteson, J., in *R.* v. *Bent*, 1 *Den.* 157; if the Legislature has said that the doing such an act *wilfully* shall be an offence, the indictment must charge the defendant to have done it *wilfully*. That the words of the statute must be pursued is a safe and certain rule; an inquiry whether other words have the same meaning, must be precarious and uncertain."

So in *R.* v. *Turner*, 1 *Moo. C. C.* 239, it was held that if a statute makes it criminal to do an act *unlawfully* and *maliciously*, an indictment must state that it was done unlawfully; stating that it was done feloniously, voluntarily and maliciously is not enough. So an indictment charging the prisoner with "feloniously, wilfully and

maliciously" cutting, is defective, and judgment will be arrested upon a verdict thereon, if the statute creating the offence uses the word "unlawfully."—*R.* v. *Ryan*, 2 *Moo. C. C.* 15; *R.* v. *Lewis*, 2 *Russ.* 1067.

Malicious injuries to property.—This form is under sec. 4. of ch. 168 p. 562, *ante*.—The word "unlawfully" is wanting. Also the words "with intent to defraud" or "injure."—Bad, even after verdict.

Forgery.—See general form, *ante*, p. 484, *ante*, for forgery under statute, and p. 486, *ante*, for forgery at common law, and under sec. 28 of Forgery Act, p. 512, *ante*, for forgery of a promissory note.

Coining.—The words "intent to defraud" are a surplusage in the count for counterfeiting under sec. 3. c. 167, p. 537, *ante*.—The last part of this form is for a misdemeanor under sec. 12 of c. 167, p. 544, *ante*, and is not in the words of the statute.

Subornation of perjury.—The words "aforesaid upon their oath aforesaid" should be inserted after the words "and the jurors." Each count is a separate presentment, and every presentment must appear to be upon oath.—1 *Chit.* 249; *Archbold*, 73.

Offences against the publicpeace.—This form is entirely defective. It is under sec. 9 of c. 147, p. 35, *ante*, and the words *unlawfully* and *feloniously* are omitted. See proper form with that act, p. 36, *ante*.

Offences against the administration of justice.—This form is presumed to cover the offence created by sec. 89 of the *Larceny Act*, under which, p. 459, *ante*, see a proper form.

The present one has not the word "feloniously." Then it does not allege that the defendant has not used all due diligence to cause the offender to be brought to trial.

This is an exception, and a well established rule of pleading directs that if there be an exception contained in the same clause of an act creating an offence, the indictment must show, negatively, that the defendant does not come within the exception.—*Archbold*, 62.

Bigamy.—See form, p. 76, *ante*, under c. 161.

The two last counts in this form of the second schedule are for offences under secs. 1 and 3 of that act.

Offences relating to the army.—This form is to cover the offence created by sec. 1 of c. 169.—It is entirely defective.—It should allege that the accused was not an enlisted soldier in Her Majesty's service or a seaman in Her Majesty's naval service. Then procuring *a soldier* to desert is too general. His name must be given, if known, or if unknown covered by the usual allegation in such instances.

Offences against public morals.—Defective.—Under c. 157, s. 8, p. 71, *ante.*—See *form* in *Archbold*, 935. Sec. 140, Procedure Act, applies.

FIRST SCHEDULE.

(Not printed. The forms it contains apply to ss. 30 to 96 of the Procedure Act, relating to the procedure before the magistrates.)

SECOND SCHEDULE.

FORMS OF INDICTMENT.

Murder.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of in the year , at in the county (*or* district) of , did feloniously, wilfully, and of his malice aforethought, kill and murder one C. D.

Manslaughter.

County (*or* district) of , to wit: } *Same as last form, omitting* "wilfully and of malice aforethought," *and substituting the word* "slay" *for the word* "murder."

Bodily Harm.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen upon their oath, present that J. B., on the , day of , at , did feloniously administer to (*or* cause to be taken by) one A. B., poison (*or* other destructive thing) and did thereby cause bodily harm to the said A. B., with intent to kill the said A. B. (*or C. D.*)

Rape.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , by force and against her will, feloniously ravished and carnally knew C. D., a woman above the age of *twelve* years.

Simple Larceny.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did feloniously steal a *gold watch*, the property of C. D.

Robbery.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did feloniously rob C. D (and at the time of, or immediately before or after such robbery (*if the case is so*), did cause grievous bodily harm to the said C. D.), (*or to any person, naming him.*)

Burglary.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did feloniously break into and enter the dwelling-house of C. D., in the night-time, with intent to commit a felony therein (*or as the case may be.*)

Stealing Money.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did feloniously steal a certain sum of money, to wit, to the amount of dollars, the property of one C. D. (*or as the case may be.*)

Embezzlement.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , being a servant (*or* clerk) then employed in that capacity by one C. D., did then and there, in virtue thereof, receive a certain sum of money, to wit, the amount of , for and on account of the said C. D., and the said money did feloniously embezzle.

False Pretences.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , unlawfully, fraudulently and knowingly, by false pretences, did obtain from one C. D., *six yards of muslin*, of the goods and chattels of the said C. D., with intent to defraud.

Offences against the Habitation.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did feloniously and maliciously set fire to the dwelling-house of C. D., the said C. D. (*or some other person by name, or if the name is unknown*), some person being therein.

Malicious Injuries to Property.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did feloniously and maliciously set fire, or attempt to set fire, to a certain building or erection, that is to say (a house *or* barn *or* bridge, *or as the case may be,*) the property of one C. D. (*or as the case may be*).

Forgery.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the , day of , at , did feloniously forge (*or* utter, knowing the same to be forged) a certain *promissory note, &c.* (*or* clandestinely and without the consent of the owner, did make an *alteration* in a certain written instrument with intent to defraud, *or as the case may be*).

Coining,

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did feloniously counterfeit a gold coin of the United Kingdom, called a *sovereign*, current by law in Canada, with intent to defraud, (*or* had in his possession a counterfeit of a gold coin of the United Kingdom, called a *sovereign*, current by law in Canada, knowing the same to be counterfeit, and with intent to defraud by uttering the same.)

Perjury.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that heretofore,

to wit, at the (*assizes*) holden for the county (*or* district) of , on the day of , before (*one of the judges of our Lady the Queen*), a certain issue between one E. F. and one J. H., in a certain action of *covenant*, was tried, upon which trial A. B. appeared as a witness for and on behalf of the said E. F., and was then and there duly *sworn* before the said and did then and there, upon his *oath*, aforesaid, falsely, wilfully and corruptly depose and *swear* in substance and to the effect following, "*that he saw the said G. H. duly execute the deed on which the said action was brought*," whereas, in truth, the said A. B. did not see the said G. H. execute the said deed, and the said deed was not executed by the said G. H., and the said A. B. did thereby commit wilful and corrupt perjury.

Subornation of Perjury.

County (*or* district) of , to wit: } *Same as last form to the end, and then proceed:*—And the jurors further present, that before the committing of the said offence by the said A. B., to wit, on the day of , at , C. D., unlawfully, wilfully and corruptly did cause and procure the said A. B. to do and commit the said offence in manner and form aforesaid.

Offences against the Public Peace.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , with *two* or more persons, did riotously and tumultuously assemble together to the disturbance of the public peace, and with force did demolish, pull down or destroy (*or* attempt or begin to demolish, *&c.*), a certain building or erection of C. D.

Offences against the Administration of Justice.

County (*or* district) of , to wit:— } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the , day of , at , did corruptly take or receive money under pretence of helping C. D. to a chattel (*or* money, *&c.*), that is to say, a horse (*or* five dollars, *or* a note, *or* a carriage), which had been stolen (*or as the case may be*).

Bigamy or offences against the Law for the Solemnization of Marriage.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , being then married, did feloniously marry C. D. during the lifetime of the wife of the said A. B.—(*or* not being duly authorized, did solemnize *or* assist in the solemnization of) a marriage between C. D. and E. F., *or* being duly authorized to marry, did solemnize marriage between C. D. and E. F. before proclamation of banns according to law, or without a license for such marriage under the hand and seal of the Governor.)

Offences relating to the Army.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did solicit (*or* procure a soldier to desert the Queen's service (*or as the case may be*).

Offences against Public Morals and Decency.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did keep a common gaming, bawdy or disorderly house (*or* rooms).

General Form.

County (*or* district) of , to wit: } The Jurors for our Lady the Queen, upon their oath, present that A. B., on the day of , at , did (*here describe the offence in the terms in which it is described in the law, or state such facts as constitute the offence intended to be charged, and if the offence is felony, state the act to have been done feloniously.*)

THIRD SCHEDULE.

Whereas at (*stating the session of the court before which the person was convicted,*) held for the county (*or* united counties) of , on before A. B., late of , having been found guilty of felony, and judgment thereon given, that (*state the substance,*) the court before whom he was tried reserved a certain question of law for the consideration of the justices of (*name of court*), and execution was thereupon respited in the meantime (*as the case may be*): This is to certify that the justices of (*name of court*) having met at in term (*or as the case may be*), it was considered by the said justices there, that the judgment aforesaid should be annulled, and an entry made on the record, that the said A. B. ought not, in the judgment of the said justices, to have been convicted of the felony aforesaid; and you are therefore, hereby required forthwith to discharge the said A. B. from your custody.

(Signed), E. F.
Clerk of (*as the case may be.*)

To the sheriff of , and
the gaoler of , and } all
others whom it may concern.

32-33 *V.*, *c.* 29, *sch. A, and c.* 30, *sch.*;—*C. S. U. C.*, *c.* 112, *sch.*; —*C. S. L. C.*, *c.* 77, *sch. A.*; —*R. S. N. S.* (3*rd S.*), *c.* 171, *sch.*;—1 *R. S. N. B.*, *Title XL, and sch., Form* (*U.*)

CHAPTER 179.

AN ACT RESPECTING RECOGNIZANCES.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. Any surety for any person charged with any indictable offence may, upon affidavit showing the grounds therefor, with a certified copy of the recognizance, obtain from a judge of a superior court or from a judge of a county court having criminal jurisdiction, an order in writing under his hand, to render such person to the common gaol of the county where the offence is to be tried.—1 *R. S. N. B., c.* 157, *s.* 1.

2. The sureties, under such order, may arrest such person, and deliver him, with the order, to the gaoler named therein, who shall receive and imprison him in the said gaol, and shall be charged with the keeping of such person until he is discharged by due course of law.—1 *R. S. N. B., c.* 157, *s.* 2.

3. The person rendered may apply to a judge of a superior court, or in cases in which a judge of a county court may admit to bail, to a judge of a county court, to be again admitted to bail, who may on examination allow or refuse the same, and make such order as to the number of the sureties and the amount of recognizance as he deems meet,—which order shall be dealt with in the same manner as the first order for bail, and so on, as often as the case requires.—1 *R. S. N. B., c.* 157, *s.* 3.

4. On due proof of such render, and certificate of the sheriff, proved by the affidavit of a subscribing witness, that such person has been so rendered, a judge of the superior or county court, as the case may be, shall order an entry of such render to be made on the recognizance by the officer in charge thereof, which shall vacate the recognizance, and may be pleaded or alleged in discharge thereof.—1 *R. S. N. B., c.* 157, *s.* 4.

5. The sureties may bring the person charged as aforesaid into the court at which he is bound to appear, during the sitting thereof, and then, by leave of the court, render him in discharge of such recognizance at any time before trial, and such person shall be committed to

gaol, there to remain until discharged by due course of law; but such court may admit such person to bail for his appearance at any time it deems meet.—1 *R. S. N. B., c.* 157, *s.* 5.

6. The arraignment or conviction of any person charged and bound as aforesaid shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence, as the case may be; and the court may commit such person to gaol upon his arraignment or trial, or may require new or additional sureties for his appearance for trial or sentence, as the case may be, notwithstanding such recognizance; and such commitment shall be a discharge of the sureties.—1 *R. S. N. B., c.* 157, *s.* 6.

7. Nothing in the foregoing provisions shall limit or restrict any right which a surety now has of taking and rendering to custody any person charged with any such offence, and for whom he is such surety,

8. Unless otherwise provided, all fines, issues, amercements and forfeited recognizances, the disposal of which is within the legislative authority of the Parliament of Canada, set, imposed, lost or forfeited before any court of criminal jurisdiction, shall, within twenty-one days after the adjournment of such court be fairly entered and extracted of a roll by the clerk of the court, or in case of his death or absence by any other person, under the direction of the judge who presided at such court, which roll shall be made in duplicate and signed by the clerk of the court, or in case of his death or absence, by such judge:

2. If such court is a superior court of criminal jurisdiction, one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer,—

(*a.*) In the Province of Ontario, of a division of the high court of justice,—

(*b.*) In the Provinces of Nova Scotia, New Brunswick and British Columbia, of the supreme court of the Province,—

(*c.*) In the Province of Prince Edward Island, of the supreme court of judicature of that Province,—

(*d.*) In the Province of Manitoba, of the Court of Queen's Bench of that Province and,—

(*e.*) In the North-West Territories, of the supreme court of the said Territories,—

On or before the first day of the term next succeeding the court by or before which such fines or forfeitures were imposed or forfeited:

3. If such court is a court of General Sessions of the Peace, or a county court, one of such rolls shall remain deposited in the office of the clerk of such court.—*C. S. U. C., c.* 117, *ss.* 1 *and* 2, *part,* 3 *and* 4, *part.* 49 *V., c.* 25, *s.* 14. 3 *Geo.* 4, *c.* 46, *s.* 2, *Imp.*

9. The other of such rolls shall, as soon as the same is prepared, be sent by the clerk of the court making the same, or in case of his death or absence, by such judge as aforesaid with a writ of *fieri facias* and *capias*, according to the form in the schedule to this Act, to the sheriff of the county in and for which such court was holden; and such writ shall be authority to the sheriff for proceeding to the immediate levying and recovering of such fines, issues, amercements and forfeited recognizances, on the goods and chattels, lands and tenements of the several persons named therein, or for taking into custody the bodies of such persons respectively, in case sufficient goods and chattels, lands or tenements cannot be found, whereof the sums required can be made; and every person so taken shall be lodged in the common gaol of the county, until satisfaction is made, or until the court into which such writ is returnable, upon cause shown by the party, as hereinafter mentioned, makes an order in the case, and until such order has been fully complied with.—*C. S. U. C., c.* 117, *ss.* 2, *part*, 4 *part, and* 5. 3 *Geo.* 4, *c.* 46, *s.* 2, *Imp.*

10. If any person bound by recognizance for his appearance (or for whose appearance any other person has become so bound) to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, makes default, the officer of the court by whom the estreats are made out shall prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which such person, or his surety, was so bound, together with the residence, trade, profession or calling of every such person and surety, and shall, in such list, distinguish the principals from the sureties, and shall state the cause, if known, why each such person did not appear, and whether, by reason of the non-appearance of such person, the ends of justice have been defeated or delayed.—*C. S. C., c.* 99, *s.* 120. 7 *Geo.* 4, *c.* 64, *s.* 31, *Imp.*

11. Every such officer shall, before any such recognizance is estreated, lay such list before the judge or one of the judges who presided at the court, or if such court was not presided over by a judge, before two justices of the peace who attended at such court, and such judge or justice shall examine such list, and make such order touching the estreating or putting in process any such recognizance as appears just, subject, in the Province of Quebec, to the provisions hereinafter contained; and no officer of any such court shall estreat or put in process any such recognizance without the written order of the judge

or justices of the peace before whom respectively such list has been laid.—*C. S. C., c.* 99, *s.* 121. 7 *Geo.* 4, *c.* 64, *s.* 31, *Imp.*

12. Except in the cases of persons bound by recognizance for their appearance, or for whose appearance any other person has become bound to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, in every case of default whereby a recognizance becomes forfeited, if the cause of absence is made known to the court in which the person was bound to appear, the court, on consideration of such cause, and considering also, whether, by the non-appearance of such person the ends of justice have been defeated or delayed, may forbear to order the recognizance to be estreated; and, with respect to all recognizances estreated, if it appears to the satisfaction of the judge who presided at such court that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied.—*C. S. U. C., c.* 117, *s.* 6, *part.*

13. The clerk of the court shall, for such purpose, before sending to the sheriff any roll, with a writ of *fieri facias* and *capias*, as directed by this act, submit the same to the judge who presided at the court, and such judge may make a minute on the said roll and writ of any such forfeited recognizances and fines as he thinks fit to direct not to be levied; and the sheriff shall observe the direction in such minute written upon such roll and writ, or indorsed thereon, and shall forbear accordingly to levy any such forfeited recognizance or fine.—*C. S. U. C., c.* 117, *s.* 7.

14. If upon any writ issued under this act, the sheriff takes lands or tenements in execution, he shall advertise the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve months from the time the writ came to the hands of the sheriff.—*C. S. U. C., c.* 117, *s.* 8.

15. The clerk of the court shall, at the foot of each roll made out as herein directed, make and take an affidavit in the following form, that is to say:—

"I. A. B. (*describing his office*), make oath that this roll is truly "and carefully made up and examined, and that all fines, issues, "amercements, recognizances and forfeitures which were set, lost, "imposed or forfeited, at or by the court therein mentioned, and which,

"in right and due course of law, ought to be levied and paid, are, to "the best of my knowledge and understanding, inserted in the said "roll; and that in the said roll are also contained and expressed all "such fines as have been paid to or received by me, either in court or "otherwise, without any wilful discharge, omission, misnomer or defect "whatsoever So help me God;"

Which oath any justice of the peace for the county is hereby authorized to administer.—*C. S. U. C.*, *c.* 117, *s.* 9. 3 *Geo.* 4, *c.* 46, *s.* 3, *Imp.*

16. If any person on whose goods and chattels a sheriff, bailiff or other officer is authorized to levy any such forfeited recognizance, gives security to the said sheriff or other officer for his appearance at the return day mentioned in the writ, in the court into which such writ is returnable, then and there to abide the decision of such court and also to pay such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as are adjudged and ordered by the court, such sheriff or officer shall discharge such person out of custody; and if such person does not appear in pursuance of his undertaking, the court may forthwith issue a writ of *fieri facias* and *capias* against the surety or sureties of the person so bound as aforesaid.—*C. S. U. C.*, *c.* 117, *s.* 10; 3 *Geo.* 4, *c.* 46, *s.* 5, *Imp.*

17. The court into which any writ of *fieri facias* and *capias*, issued under this act, is returnable, may inquire into the circumstances of the case, and may, in its discretion, order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, and make such order thereon as to such court appears just; and such order shall accordingly be a discharge to the sheriff, or to the party, according to the circumstances of the case. —*C. S. U. C.*, *c.* 117, *s.* 11; 3 *Geo.* 4, *c.* 46, 6, *Imp.*

18. The sheriff, to whom any writ is directed under this act, shall return the same on the day on which the same is made returnable and shall state, on the back of the roll attached to such writ, what has been done in the execution thereof; and such return shall be filed in the court into which such return is made.—*C. S. U. C.*, *c.* 117, *s.* 12; 3 *Geo.* 4, *c.* 46, *s.* 8, *Imp.*

19. A copy of such roll and return, certified by the clerk of the court into which such return is made, shall be forthwith transmitted to the Minister of Finance and Receiver General, with a minute thereon

of any of the sums therein mentioned, which have been remitted by order of the court, in whole or in part, or directed to be forborne, under the authority of this act.—*C. S. U. C.*, *c.* 117, *s.* 13.

20. The sheriff or other officer shall, without delay, pay over all moneys collected under this act by him to the Minister of Finance and Receiver General, or other person entitled to receive the same. —*C. S. U. C.*, *c.* 117, *s.* 14.

QUEBEC.

21. The provisions of sections eight and nine and of twelve to nineteen, both inclusive, shall not apply to the Province of Quebec, and the following provisions shall apply to that Province only.

22. Whenever default is made in the condition of any recognizance lawfully entered into or taken in any criminal case, proceeding or matter, in the Province of Quebec, within the legislative authority of the Parliament of Canada, so that the penal sum therein mentioned becomes forfeited and due to the Crown, such recognizance shall thereupon be estreated or withdrawn from any record or proceeding in which it then is or a certificate or minute of such recognizance, under the seal of the court, shall be made from the records of such court where the recognizance has been entered into orally in open court:

2. Such recognizance, certificate or minute, as the case may be, shall be transmitted by the court, recorder, justice of the peace, magistrate or other functionary before whom the cognizor, or the principal cognizor, where there is a surety or sureties, was bound to appear, or to do that, by his default to do which the condition of the recognizance is broken, to the superior court in the district in which the place where such default was made is included for civil purposes, with the certificate of the court, recorder, justice of the peace, magistrate or other functionary as aforesaid, of the breach of the condition of such recognizance, of which and of the forfeiture to the crown of the penal sum therein mentioned, such certificate shall be conclusive evidence:

3. The date of the receipt of such recognizance or minute and certificate by the prothonotary of the said court shall be indorsed thereon by him, and he shall enter judgment in favor of the crown against the cognizor for the penal sum mentioned in such recognizance, and execution may issue therefor after the same delay as in other cases, which shall be reckoned from the time when the judgment is entered by the prothonotary of the said court:

4. Such execution shall issue upon fiat or *præcipe* of the Attorney General, or of any person thereunto authorized in writing by him; and the crown shall be entitled to the costs of execution and to costs on all proceedings in the case subsequent to execution, and to such costs for the entry of the judgment, as are fixed by any tariff:

5. Nothing in this section contained shall prevent the recovery of the sum forfeited by the breach of any recognizance from being recovered by suit in the manner provided by law, whenever the same cannot, for any reason, be recovered in the manner provided in this section:

6. In such case, the sum forfeited by the non-performance of the conditions of such recognizance shall be recoverable, with costs, by action in any court having jurisdiction in civil cases to the amount, at the suit of the Attorney General of Canada or of Quebec, or other person or officer authorized to sue for the crown; and in any such action it shall be held that the person suing for the crown is duly empowered so to do, and that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the crown, unless the defendant proves the contrary:

7. In this section, unless the context otherwise requires, the expression "cognizor" includes any number of cognizors in the same recognizance, whether as principals or sureties.—*C. S. L. C., c.* 106, *s.* 2.

23. When a person has been arrested in any district for a crime or offence committed within the limits of the Province of Quebec, and a justice of the peace has taken recognizances from the witnesses heard before him or another justice of the peace, for their appearance at the next session or term of the court of competent criminal jurisdiction, before which such person is to undergo his trial, there to testify and give evidence on such trial, and such recognizances have been transmitted to the office of the clerk of such court, the said court may proceed on the said recognizances in the same manner as if they had been taken in the district in which such court is held.—*C. S. L. C., c.* 106, *s.* 1.

SCHEDULE.

FORM.

Victoria, by the Grace of God, etc.

To the sheriff of , Greeting:

You are hereby commanded to levy of the goods and chattels, lands and tenements, of all and singular, the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason that no goods or chattels, lands or tenements can be found belonging to the said persons, respectively, then, and in all such cases, that you take the bodies of such persons, and keep them safely in the gaol of your county, there to abide the judgment of our court (*as the case may be*), upon any matter to be shown by them, respectively, or otherwise to remain in your custody as aforesaid, until such debt is satisfied, unless any of such persons respectively gives sufficient security for his appearance at the said court, on the return day hereof, for which you will be held answerable, and what you do in the premises make appear before us in our court (*as the case may be*), on the day of term next, and have then and there this writ. Witness, etc., A. B., clerk (*as the case may be*). —*C. S. U. C.*, *c.* 117, *sch.*

The mere failure of the party to answer, when called, in the term subsequent to that in which he was arraigned could not operate as a forfeiture of his bail. *The Atty. General* v. *Beaulieu*, 3 *L. C. J.* 17.

On an information against the bail or surety of a person charged with subornation of perjury, *held*, that after the accused has pleaded guilty to an indictment, no default can be entered against him, except on a day fixed for his

appearance, and that it is the duty of the court to estreat the recognizances in cases like the present.—*R.* v. *Croteau*, 9 *L. C. R.* 67.

A recognizance taken before a police magistrate under 32-33 V., c. 30, s. 44, D., omitted the words "to owe:" *Held*, fatal, and that an action would not lie upon the instrument as a recognizance.—*R.* v. *Hoodless*, 45 *U. C. Q. B.* 556.

Held, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtor's Act, and that such writ may be granted at the suit of the crown, where the defendant absconds to avoid being arrested for a felony.—*R.* v. *Stewart*, 8 *P. R. Ont.* 297.

A recognizance of bail put in on behalf of a prisoner, recited that he had been indicted at the court of general sessions of the peace for two separate offences, and the condition was, that he should appear at the next sitting of said court, and plead to such indictment as might be found against him by the grand jury; at the next of said sittings, the accused did not appear, and no new indictment was found against him:—*Held*, that the recitals sufficiently showed the intention to be that the accused should appear and answer the indictments already found, and that an order estreating the recognizance was properly made.—*Re Gauthreaux's Bail*, 9 *P. R. Ont.* 31.

Held, that on the return of a writ of certiorari a recognizance is unnecessary.—*R.* v. *Nunn*, 10 *P. R. Ont.* 395.

Held, that since the passing of the Dominion statute, 49 V., c. 49, s. 8, there is no longer necessity for a defendant on removal by certiorari of a conviction against him to enter into recognizances as to costs as formerly required.—*R.* v. *Swalwell*, 12 *O. R.* 391.

CHAPTER 180.

AN ACT RESPECTING FINES AND FORFEITURES.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any act, and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, by civil action or proceeding at the suit of Her Majesty only, or of any private party suing as well for Her Majesty as for himself—in any form allowed in such case by the law of that Province in which it is brought—before any court having jurisdiction to the amount of the penalty in cases of simple contract—upon the evidence of any one credible witness other than the plaintiff or party interested; and if no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to Her Majesty; and the other moiety shall belong to the private party suing for the same, if any, and if there is none, the whole shall belong to Her Majesty.—31 *V.*, *c.* 1, *s.* 7, *part.*

2. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law, the same shall belong to the Crown for the public uses of Canada.—49 *V.*, *c.* 48, *s.* 1.

3. The Governor in Council may, from time to time, direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration.—49 *V.*, *c.* 48, *s.* 2.

4. Any duty, penalty or sum of money, or the proceeds of any forfeiture, which is, by any act, given to the crown, shall, if no other provision is made respecting it, from part of the Consolidated Revenue Fund of Canada, and shall be accounted for and otherwise dealt with accordingly.—31 *V.*, *c.* 1, *s.* 7, *part.*

5. No action, suit or information shall be brought or laid for any penalty or forfeiture under any act, except within two years after the cause of action arises, or after the offence is committed, unless the time is otherwise limited by such act.—*C. S. U. C., c.* 78, *s.* 7, *part*, *C. S. L. C., c.* 108, *s.* 1, *part, and s.* 2. 29 *V.* (*N. S.*) *c.* 12, *s.* 15, *part.* 1 *R. S. N. B, c.* 140, *s.* 2.

CHAPTER 181.

AN ACT RESPECTING PUNISHMENTS, PARDONS AND THE COMMUTATION OF SENTENCES.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

PUNISHMENTS.

1. Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act.—32-33 *V.*, *c.* 29, *s.* 1, *part.*

2. Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitation contained in the enactment, be in the discretion of the court or tribunal before which the conviction takes place.—32-33 *V.*, *c.* 29, *s.* 1, *part.*

3. Whenever any offender is punishable under two or more acts or two or more sections of the same act, he may be tried and punished under any of such acts or sections; but no person shall be twice punished for the same offence.—32-33 *V.*, *c.* 20, *ss.* 40, *part and* 41, *part, and c.* 21, *s.* 90, *part.* 36 *V.*, *c.* 55, *s.* 33. 40 *V.*, *c.* 35, *s.* 6.

CAPITAL PUNISHMENT.

4. Every one who is indicted as principal or accessory for any offence made capital by any statute, shall be liable to the same punishment, whether he is convicted by verdict or on confession.—32-33 *V.*, *c.* 29, *s.* 82.

5. In all cases of treason, the sentence or judgment to be pronounced against any person convicted and adjudged guilty thereof shall be, that he be hanged by the neck until he is dead.—31 *V.*, *c.* 69, *s.* 4. 54 *Geo.* 3., *c.* 46, *s.* 1, *Imp.*

6. Upon every conviction for murder, the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be

had and taken in the same manner, and the court before which the conviction takes place shall have the same powers in all respects as after a conviction for any other felony for which a prisoner may be sentenced to suffer death as a felon.—32-33 *V.*, *c.* 20, *s.* 2. 24-25 *V.*, *c.* 100, *s.* 2, *Imp.*

7. Whenever any offender has been convicted before any court of criminal jurisdiction, of an offence for which such offender is liable to and receives sentence of death, the court shall order and direct execution to be done on the offender in the manner provided by law.—32-33 *V.*, *c.* 29, *s.* 106.

8. In the case of any prisoner sentenced to the punishment of death, the judge before whom such prisoner has been convicted shall forthwith make a report of the case to the Secretary of State, for the information of the Governor General; and the day to be appointed for carrying the sentence into execution shall be such as, in the opinion of the judge, will allow sufficient time for the signification of the Governor's pleasure before such day; and if the judge thinks such prisoner ought to be recommended for the exercise of the Royal mercy, or if, from the non-decision of any point of law reserved in the case, or from any other cause, it becomes necessary to delay the execution, he, or any other judge of the same court, or who might have held or sat in such court, may, from time to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as are necessary for the consideration of the case by the crown.—32-33 *V.*, *c.* 29, *s.* 107. 36 *V.*, *c.* 3, *s.* 1.

A judgment may be altered at any time during the assizes; and a reprieve may be granted or taken off by a judge, although the session be adjourned or finished, and this, by reason of common usage.—2 *Hale*, 412; *Dyer*, 205.

9. Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the medical officer or surgeon of the prison, a chaplain or a minister of religion, shall have access to any such convict, without the permission, in writing, of the court or judge before whom such convict has been tried, or of the sheriff.—32-33 *V.*, *c.* 29, *s.* 108.

10. Judgment of death to be executed on any prisoner shall be

carried into effect within the walls of the prison in which the offender is confined at the time of execution.—32-33 *V.*, *c.* 29, *s.* 109.

11. The sheriff charged with the execution, and the gaoler and medical officer or surgeon of the prison, and such other officers of the prison and such persons as the sheriff requires, shall be present at the execution.—32-33 *V.*, *c.* 29, *s.* 110.

12. Any justice of the peace for the district, county or place to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the sheriff proper to admit within the prison for the purpose, and any minister of religion who desires to attend, may also be present at the execution.—32-33 *V.*, *c.* 29, *s.* 111.

13. As soon as may be after judgment of death has been executed on the offender, the medical officer or surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, and deliver the same to the sheriff.—32-33 *V.*, *c.* 29, *s.* 112.

14. The sheriff and the gaoler of the prison, and such justices and other persons present, if any, as the sheriff requires or allows, shall also sign a declaration to the effect that judgment of death has been executed on the offender.—32-33 *V.*, *c.* 29, *s.* 113.

15. The duties imposed upon the sheriff, gaoler, medical officer or surgeon by the four sections next preceding, may and shall, in his absence, be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, in the performance of his duties.—32-33 *V.*, *c.* 29, *s.* 114.

16. A coroner of the district, county or place to which the prison belongs, wherein judgment of death is executed on any offender, shall within twenty-four hours after the execution, hold an inquest on the body of the offender; and the jury at the inquest shall inquire into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender; and the inquisition shall be in duplicate, and one of the originals shall be delivered to the sheriff.—32-33 *V.*, *c.* 29, *s.* 115.

17. No officer of the prison or prisoner confined therein shall, in any case, be a juror on the inquest.—32-33 *V.*, *c.* 29, *s.* 116.

18. The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, unless the Lieutenant Governor in Council, being satisfied that

there is not, within the walls of any prison, sufficient space for the convenient burial of offenders executed therein, permits some other place to be used for the purpose.—32-33 *V.*, *c.* 29, *s.* 117.

19. Every one who knowingly and wilfully signs any false certificate or declaration required with respect to any execution, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 29, *s.* 120.

20. Every certificate and declaration, and a duplicate of the inquest required by this act, shall, in every case, be sent with all convenient speed by the sheriff to the Secretary of State, or to such other officer as is, from time to time appointed for the purpose by the Governor in Council; and printed copies of such several instruments shall, as soon as possible, be exhibited, and shall, for twenty-four hours at least, be kept exhibited on or near the principal entrance of the prison within which judgment of death is executed.—32-33 *V.*, *c.* 29, *s.* 121.

21. The omission to comply with any provision of the preceeding sections of this act shall not make the execution of judgment of death illegal in any case in which such execution would otherwise have been legal.—32-33 *V.*, *c.* 29, *s.* 123.

22. Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if this act had not been passed.—32-33 *V.*, *c.* 29, *s.* 124.

The Imperial Act on capital executions is 31 V., c. 24.

Of course, when possible, it seems better that the sentence of death, and, in fact, any sentence, be passed by the judge who held the trial; but it is not an absolute necessity, and any judge of the same court may pronounce the sentence.—2 *Hale*, 405; 1 *Chit.* 697; *R.* v. *Camplin*, 1 *Den.* 89, *as cited* in *R.* v. *Fletcher*, *Bell*, *C. C.* 65.

If a case reserved is undecided, or if a writ of error is still pending, or if the Governor has not yet given his decision upon the case, or if a woman sentenced to death is pregnant, or if the prisoner becomes insane after the sentence, a reprieve may be granted either by the Governor, or any judge of the court where the trial was held, in term or in vacation.—1 *Chit.* 758; 2 *Hale*, 412.

It is clear that if from any mistake or collusion, the criminal is cut down before he is really dead, and afterwards revives, he ought to be hanged again, for the judgment being "to be hanged by the neck till he be dead," is satisfied only by the death of the criminal.—1 *Chit.* 788; 2 *Hale*, 412.

The nick-name of *Jack Ketch* is generally given to the common hangman in the city of London, which name is from *John Ketch*, a noted hangman in 1682, of whom his wife said that any bungler might put a man to death, but only her husband knew how to make a gentleman die sweetly.

IMPRISONMENT.

23. Every one who is convicted of any offence not punishable with death shall be punished in the manner, if any, prescribed by the statute especially relating to such offence.—32-33 *V.*, *c.* 29, *s.* 88, *part*.

24. Every person convicted of any felony for which no punishment is specially provided, shall be liable to imprisonment for life:

2. Every one who is convicted on indictment of any misdemeanor for which no punishment is specially provided, shall be liable to five years' imprisonment:

3. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding twenty dollars, or to imprisonment, with or without hard labor, for a term not exceeding three months, or to both.—32-33 *V.*, *c.* 29, *s.* 88, *part*.

25. Every one who is convicted of felony, not punishable with death, committed after a previous conviction for felony, is liable to imprisonment for life, unless some other punishment is directed by any statute for the particular offence,—in which case the offender shall be liable to the punishment thereby awarded, and not to any other.—32-33 *V.*, *c.* 29, *s.* 88.

26. Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided, that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, pres-

cribed for the offence of which he is convicted.—32-33 *V.*, *c.* 29, *ss.* 89 *and* 90, *part*.

27. When an offender is convicted of more offences than one, before the same court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another. 32-33 *V.*, *c.* 29, *s.* 92.

See *R.* v. *Wilkes, Burr.* 2577; *R.* v. *Williams*, 1 *Leach* 536; *R.* v. *Orton*, 14 *Cox*, 436 *and* 546.

28. Every one who is sentenced to imprisonment for life, or for a term of years not less than two, shall be sentenced to imprisonment in the penitentiary for the Province in which the conviction takes place:

2. Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed:

3. Provided, that any prisoner sentenced for any term by any military, naval or militia court martial, or by any military or naval authority under any Mutiny Act, may be sentenced to imprisonment in a penitentiary:

4. Imprisonment in a penitentiary, in the Central Prison for the Province of Ontario, in the Andrew Mercer Ontario Reformatory for females, and in any reformatory prison for females in the Province of Quebec, shall be with hard labor, whether so directed in the sentence or not:

5. Imprisonment in a common gaol, or a public prison, other than those last mentioned, shall be with or without hard labor, in the discretion of the court or person passing sentence, if the offender is convicted on indictment, or under "*The Speedy Trials Act*,"—and, if convicted summarily, may be with hard labor if hard labor is part of the punishment for the offence of which such offender is convicted,

—and if such imprisonment is to be with hard labor, the sentence shall so direct:

6. The term of imprisonment, in pursuance of any sentence, shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced:

7. Every one who is sentenced to imprisonment in any penitentiary, gaol, or other public or reformatory prison, shall be subject to the provisions of the statute relating to such penitentiary, gaol or prison and to all rules and regulations lawfully made with respect thereto. —32-33 *V.*, *c.* 29, *ss.* 1, *part*, 91, 93, 94, *part*, 96, *part, and* 97. 34 *V.*, *c.* 30, *s.* 3, *part.* 43 *V.*, *c.* 39, *s.* 14, *part.* 43 *V.*, *c.* 40, *s.* 9, *part.* 44 *V.*, *c.* 32, *s.* 4. 46 *V.*, *c.* 37 *s.* 4.

Imprisonment for one calendar month, how computed. —*Nigotti* v. *Colville*, 14 *Cox*, 263, 305.

REFORMATORIES.

29. The court or person before whom any offender whose age at the time of his trial does not, in the opinion of the court, exceed sixteen years, is convicted, whether summarily or otherwise, of any offence punishable by imprisonment, may sentence such offender to imprisonment in any reformatory prison in the Province in which such conviction takes place, subject to the provisions of any act respecting imprisonment in such reformatory; and such imprisonment shall be substituted, in such case, for the imprisonment in the penitentiary or other place of confinement by which the offender would otherwise be punishable under any Act or law relating thereto: Provided, that in no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison; and in every case where the term of imprisonment is fixed by law to be more than five years, then such imprisonment shall be in the penitentiary:

2. Every person imprisoned in a reformatory shall be liable to perform such labor as is required of such person. 38 *V.*, *c.* 43. 43 *V.*, *c.* 39, *ss.* 1, *part, and* 14, *part, and c.* 40, *ss.* 1, *part, and* 9, *part.*

WHIPPING.

30. Whenever whipping may be awarded for any offence, the

court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison; and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence; and, whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence:

2. Whipping shall not be inflicted on any female.—32-33 *V.*, *c.* 20, *ss.* 20, 21, *parts, and c.* 29, *s.* 95. 40 *V.*, *c.* 26, *s.* 6.

SURETIES FOR KEEPING THE PEACE, AND FINES.

31. Every one who is convicted of felony may be required to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment otherwise authorized:

2. Every one who is convicted of any misdemeanor may, in addition to or in lieu of any punishment otherwise authorized, be fined, and required to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behavior:

3. No person shall be imprisoned for not finding sureties under this section, for any term exceeding one year.—31 *V.*, *c.* 72, *s.* 5, *part.* 32-33 *V.*, *c.* 18, *s.* 34, *and c.* 19, *s.* 58, *and c.* 20, *s.* 77, *and c.* 21, *s.* 122, *and c.* 22, *s.* 74.

32. Whenever any person who has been required to enter into a recognizance with sureties to keep the peace and be of good behavior has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts to a judge of a superior court, or to a judge of the county court of the county or district in which such gaol or prison is situate, or, in the North-West Territories, to a stipendiary magistrate,—and such judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order, as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound.—41 *V.*, *c.* 19, *s.* 1.

33. Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such

limits, if any, as are prescribed in that behalf, be in the discretion of the court or person passing sentence or convicting, as the case may be.—32-33 *V.*, *c.* 29, *s.* 90, *part.*

Several articles censuring the legislation contained in the Imperial Acts similar to the above three last sections having been published in England, when it was enacted there as part of the Consolidated Criminal Acts, Greaves, Q.C., the learned framer of these acts, answered these criticisms by the following remarks:—

"This is a new enactment.—A fine is, at common law, one of the punishments for a misdemeanor, and by this clause, the court may, in addition to, or in lieu of, any of the punishments assigned to any misdemeanor by these acts, fine the offender. (Sec. 31, sub-sec. 2, *ante.*) It may be as well to observe that a fine ought not to be imposed on a married woman, because in presumption of law she has no property wherewith to pay it.—*R.* v. *Thomas, Rep. T. Hard.* 278." 1 *Russ.* 92.

"In all cases of misdemeanor the court might, by the common law, add to the sentence of imprisonment, by ordering the defendant to find security for his good behavior and for keeping the peace, and might order him to be imprisoned until such security were found; *R.* v. *Dunn*, 12 *Q. B.* 1026; but as this power was not generally known, it was thought better to insert it in this clause."

"As it sometimes happens in cases of felony, that it may be expedient to require sureties for keeping the peace after the expiration of any imprisonment awarded, this clause empowers the court to require such sureties. It is easy to see that it may frequently be highly advisable to pass a very short sentence of imprisonment on a youth, and to direct him to be delivered to his friends on their entering into the proper recognizances. And it may be well

worth making the experiment whether requiring adults to find such sureties may not prove beneficial. The great difficulty with which convicts have to contend immediately after their discharge, is the want of some check that may tend to prevent them from relapsing into their former habits; and the knowledge that their sureties would be liable to forfeit their recognizances might, and probably would, in some cases at least, operate as a check upon their conduct. In cases of assault and other breaches of the peace, it has been found highly beneficial to require the parties to find sureties for their future good behavior; and this leads to the hope that, even in cases of felony, a similar result may follow from requiring sureties for keeping the peace, especially where the felony has been accompanied by any personal violence."

"As an attack was made by Mr. Saunders, in the *Law Times* of the 21st of September last, on these clauses, which might, peradventure, cause some magistrates, who have not had a professional education, to doubt, we answered that attack in the *addenda* to the first edition, and, as a reply to that answer was made by Mr. Saunders in the *Law Times* of the 30th November last, we shall answer that reply here. In order to render the matters plain, we will first state the objections raised, then our answers, then the reply, if any, to them; and, lastly, our answers to that reply."

"1. Mr. Saunders asserted that the difficulties of these clauses were 'of so formidable a character as to render it exceedingly dangerous for any magistrate to encounter them.' Now, the power conferred by these clauses is only conferred on courts which try criminals by indictment; and if there be any point of law peculiarly clear, it is that no action will lie against any of the members of such a court for any error in any judgment pronounced by that

court. The courts of quarter sessions, therefore, may act on these clauses with the most perfect safety. To this answer no reply has been given, and no doubt for the best possible reason, viz., that it admitted of none."

"2. Mr. Saunders said, 'it is difficult to understand why the infliction of a fine should be inflexibly associated with the entering into recognizances to keep the peace,' and *vice versâ*. As the clause was originally framed, the court might either impose a fine on the offender, or require him to find sureties; but the select committee of the Commons altered the clause in that respect. Nor is there the slightest difficulty occasioned by the alteration. The fine may be as low; and the recognizances for as short a time, and in as small an amount as the court thinks fit; and, consequently, the court may, in any case, if it think fit, impose a nominal fine on the offender, and require him to find sureties in a large amount; or the court may, if it think fit, impose a heavy fine on the offender, and take his own recognizances alone in a small sum and for a short time. So that the alteration made by the select committee of the Commons can cause no practical difficulty whatever. To this answer Mr. Saunders replied, that the objection taken was that 'the hands of the court were fettered for no practical advantage.' It is sufficient to rejoin that, *practically*, the hands of the court were not fettered at all; for the court may impose a nominal fine, or require recognizances for a nominal term."

"3. M. Saunders said, 'as regards the fine itself, the section makes no provision in the event of its not being paid. Suppose the fine is not paid, what is to be done with the offender? Is he to be committed to gaol in default? What authority is there for this? And, if committed, for how long? and, if for a time certain, is it to be with

or without hard labor? These are difficulties which the framers of the section have evidently not foreseen, and most certainly have not provided for.' The answer is, all these supposed difficulties have no existence whatever. When an offender is convicted and receives judgment, he is in the custody of the sheriff, and the question is not whether he is to be committed to prison, for he is actually in prison, but how he is to get out of prison; and the only means by which he can lawfully get out of prison, is by doing and suffering whatever the court may lawfully adjudge him to do or to suffer."

"It is a general rule, also, that when a statute creates a new felony or misdemeanor, all the common law incidents are impliedly attached to it. Where, therefore, a statute creates a misdemeanor, it at once is liable to the common law punishments for misdemeanor, of which fine and suretics of the peace, and imprisonment in default of paying the one or finding the other are part. So where a statute creates an offence and specifies its punishment, that punishment is to be carried into execution according to the course of the common law. Thus wherever a statute creates a capital felony the offender may be sentenced and executed according to the course of the common law.. So, where a statute authorizes the court to impose a fine, the offender may be imprisoned according to the course of the common law till the fine is paid. For, as Lord Coke says, "a fine signifieth a pecuniary punishment for an offence, and regularly to it imprisonment appertaineth."—1 *Inst.* 126 *b.* And hence it is that the statutes simply authorize the courts to impose the fine, and its payment is enforced according to the course of the common law. The framers of the 9 Geo. 4, c. 31, were well aware that this was the law, and by s. 9, in the case of manslaughter, by s. 20, in

the case of taking away girls under sixteen years of age, and by s. 23, in the case of assault upon clergymen, the court was empowered to adjudge the offender to pay a fine; but no provision was made in any of these cases as to what was to be done in default of payment. No one will doubt that Lord Campbell knew the law in this respect; and it is well known that he drew his Libel Act, 5-6 V., c. 96, with his own hand; and by ss. 4 and 5 of that act the court may impose a fine, and there is no provision in default of payment. It would be waste of time to refer to other like enactments on a point so perfectly clear. All the preceding observations, except those founded on the 9 Geo. 4, c. 31, and 5-6 V., c. 96, apply equally to detaining an offender in prison till he finds sureties. But one precedent in point may be added. The 37 Geo. 3, c. 126, s. 4, makes every person uttering coins liable to six months' imprisonment and to find sureties for good behavior for six months after the end of such imprisonment, and in case of a second conviction, sureties are required for two years; but no power of commitment is given in either case. Again, both the 1-2 Phil. and Mary, c. 13, s. 5 and the 2-3 Phil. and Mary, c. 10, s. 2, gave justices who examined persons charged with felony, 'authority to bind all such by recognizances as do declare anything material to prove' the felony, and contained no provision as to what was to be done if the witness refused to be bound. Now, in *Bennett* v. *Watson*, 3 *M. & S.* 1, it was held that under those statutes a justice might lawfully commit a person who was a material witness upon a charge of felony brought before him, and who refused to appear at the sessions to give evidence, in order that her evidence might be secured at the trial, and Dampier, J., said 'the power of commitment is absolutely

necessary to the existence of the statute of Phil. and Mary; for unless there were such a power, every person would of course refuse to enter into a recognizance, and the magistrate could not compel him; and then, if he could further avoid being served with a subpœna, the delinquent might escape unpunished.' This is a very much stronger case than the case of a convict required to find sureties, for he is already in prison, whereas the witness is at liberty, and, therefore in his case, the power both to apprehend and commit has to be implied."

"It is perfectly clear, then, that the courts have power under these clauses to order an offender to be detained in prison until he pay the fine and find sureties. But supposing a provision had been introduced expressly empowering the court to award imprisonment until the fine was paid and the sureties found, it would have made these clauses inconsistent with s. 5 of the offences against the Person Act, which follows s. 9 of the 9 Geo. 4, c. 31; and if that had been altered likewise, both would have been made inconsistent with Lord Campbell's Libel Act, and the other acts containing similar clauses. To this answer Mr. Saunders replied, 'Taking Mr. Greaves' exposition to be correct that the common law incident of imprisonment attaches upon non-payment of the fine, the objection that the imprisonment is indefinite still remains in force. If the fine is not paid, is imprisonment in default to be everlasting?' We rejoin that imprisonment for non-payment of a fine under this clause, is and was intended to be exactly the same as for non-payment of a fine upon a conviction for any common law misdemeanor; that the object of this clause in this respect was to place all misdemeanors against these acts precisely on the same footing as common law misdemeanors; that no complaint had ever been made of

the common law on this subject, and, therefore, there was not only no reason for any alteration in it, but its long use without objection afforded a very good ground for extending it to all similar cases, and that any alteration in these acts would have rendered the law on the subject inconsistent; for it would have rendered the law different in misdemeanors under these acts from what it was with like offences at common law."

"4. But, Mr. Saunders asked, is the offender to be committed to hard labor, and for a time certain? Undoubtedly neither the one nor the other. The imprisonment for non-payment of a fine or not finding sureties is not by way of punishment, but in order to compel the payment of the one and the finding of the other, and therefore it is merely imprisonment until he pay the fine or find the sureties, exactly the same as it is in cases of common law misdemeanors. To this Mr. Saunders replied that 'it was further objected that upon imprisonment in default of paying the fine, the court has no power to impose hard labor. This Mr. Greaves admits.' Now, this is a misrepresentation. Mr. Saunders originally merely asked, 'Is it (the imprisonment) to be with or without hard labor?' and we, having answered that question conclusively, Mr. Saunders puts this new objection, and adds, 'surely the power of imposing hard labor would be in many cases an active stimulant towards accomplishing the end desired.' It might just as well be said that the court ought to have been empowered to order the defendant to be whipped every day until he paid the fine, which would, we conceive, have been a more active stimulant than hard labor. The question is not, however, what is the best stimulant to make the offender pay the fine; but what is the proper substitute for non-payment of the fine. ? By the common

law, simple imprisonment has always been that substitute. We have shown that in summary cases, however, wherever justices have authority either to fine, or imprison, whether with or without hard labor, they never ought to have power to award imprisonment with hard labor for non-payment of a fine, *Introduction to 1st Ed., P. xxxiii.*, and our reasoning is completely supported by the high authority of Chief Justice Cockburn, in *R.* v. *Willmott*, 1 *B. & S.* 27. We will now apply the same reasoning to imprisonment for non-payment of a fine on conviction for a misdemeanor against these acts, and we cannot do better than take the example of dog-stealing under the 24-25 Vict., c. 96, s. 18; by which any person who steals a dog may either be imprisoned with or without hard labor for not exceeding six months, or shall forfeit over the value of the dog not exceeding 20l., and by sec. 107, in default of payment he may be imprisoned either with or without hard labor. For a second offence of dog-stealing, the defendant is to be guilty of a misdemeanor, and liable to imprisonment for not exceeding eighteen months, with or without hard labor, and by the general clause in question the court may impose a fine either in addition to or in lieu of these punishments. Now, if the court under this clause adjuges imprisonment without hard labor, it is tantamount to adjudging that the offence does not deserve even imprisonment, and to give the court power to imprison with hard labor for non-payment of the fine would be almost equivalent to giving it power, *uno flatu*, to adjudge the offender not deserving and deserving of hard labor. Nay, more, it would be giving the court power, after adjudging that the defendant merely deserved to be fined for an indictable offence, to adjudge him to be imprisoned with hard labor for mere non-payment of money, no criminal

offence at all. Mr. Saunders, however, says that 'such an anomaly' as not giving the court power to award hard labor for non-payment of a fine imposed for a second offence of dog-stealing, 'clearly shows the defectiveness of the section;' and he arrives at this conclusion thus: After stating the punishment for the first offence, he proceeds: 'then in default of payment he may, under Jervis's Act, 11-12 V., c. 43, s. 19, be committed to prison with or without hard labor.' In which short passage there are two mis-statements. That section only applies where, by the statute in that behalf, no mode of enforcing the payment of the penalty is provided. Now sec. 107 of the Larceny Act does provide for enforcing the payment of the penalty for dog-stealing; and consequently Jervis's Act has nothing to do with the case. But even if it did apply, a distress warrant must be issued in the first instance, unless its issuing would be ruinous to the defendant, or it appeared that he had no goods. It is therefore incorrect to state generally that the defendant may under that section be committed at all. So that we have both a wrong statute cited, and that statute wrongly stated. It is true that a similar argument might have been founded on sec. 107 of the Larceny Act, but it would be completely answered by that we have said here and in the Introduction."

"5. Next, Mr. Saunders said that 'the court will have no authority to take the recognizance of one surety only since the statute speaks only of sureties.' Now the Court of Queen's Bench never takes less than two sureties in any case, and generally four in cases of felony, and with very good reason, for one surety may die, become insolvent, or quit the country; but it is much less likely that two or more sureties should do so. Therefore, there was an

excellent precedent founded on good reason for requiring more than one surety. The select committee of the Commons introduced the power to take the offender's own recognizances. Mr. Saunders in reply admits 'that the Queen's Bench usually requires two sureties,' 'but thinks that circumstances may occur, particularly in the case of a young person, where one surety (the parent) need alone be required.' We reply that the admitted practice, invariably followed from time immemorial by the Court of Queen's Bench, was an infinitely better guide to follow than any other."

"Lastly, Mr. Saunders said that the proviso, which was introduced by the committee of the Commons 'means that if any person is required to find sureties for more than a year, he shall not be imprisoned for not doing it.' According to this reading, every person required to find sureties for a less term than a year would be liable to be imprisoned for life unless he found them; whilst a person required to find them for more than a year would not be liable to be imprisoned at all. The objector, therefore, may well admit that cannot be the intention of the section. The committee of the Commons thought that the clause clearly meant that no one was to be imprisoned for more than a year for not finding sureties. They framed it, and they are at least as competent as the objector to understand its meaning. In reply Mr. Saunders says, that Mr. Greaves admits that the meaning of the Legislature was 'that no person shall be imprisoned under this clause for any period exceeding one year for not finding sureties. That being so, we will only add, that it is very much to be regretted that the British Legislature has not said what it meant, instead of saying what it did not mean.' But has it done so? The words are, 'No person shall be imprisoned under this

clause for not finding sureties for any period exceeding one year, and the objection rests on reading 'sureties' together with 'for any period exceeding one year.' Now, 'sureties to keep the peace or to be of good behavior for any term,' is a perfectly well-known expression; but 'sureties for any period' is a very unusual, if not an altogether unknown expression, and it therefore ought not to be supposed to be used in any case, especially where it makes nonsense of a sentence. Again, in pronouncing sentence nothing is more common than to insert the cause of imprisonment between the word 'imprisoned,' and the term of imprisonment awarded, e.g., 'The sentence of the court, is that you be imprisoned for this your offence for the term of one year,' and if the clause be so read it is perfectly free from objection. If the clause had run 'imprisoned for not paying a fine for any period exceeding one year,' no doubt would have existed as to its meaning, and there is equally little as to the meaning of the clause as it stands; for where a clause is capable of being read in two ways, one of which leads to a manifest absurdity, and the other makes perfectly good sense, it is obvious that the latter is the right reading."

"We said and repeat, that there was nothing whatever in any one of the numerous objections, and unquestionably nothing to justify a writer in saying that the clause was 'so slovenly drawn;' 'it is astonishing that a section so loose as this one should have been permitted to have found its way into this act;' 'taken altogether this section is a most unfavorable specimen of legal workmanship, and will cause very great embarrassments to those whose duty it will be to carry it into effect.'"

"Not satisfied, however, with 'attacking' this clause in the *Law Times*, Mr. Saunders returns to the charge in his

and Mr. Cox's Edition of the statutes, p. 97, where he starts the additional objection, that 'the section contains new and very extensive powers.' Surely Mr. Saunders cannot but know that the power to fine and require sureties for keeping the peace and being of good behavior on a conviction for misdemeanor is one of the oldest powers known to the common law. Then Mr. Saunders says, 'it may well be questioned whether when a criminal has suffered his appointed punishment, it is judicious to impose upon him the further inconvenience of providing bondsmen for his future good behavior.' It would be enough to answer that such has been the case in common law misdemeanors from time immemorial, and no one ever heard a complaint against it; but it may be well to add, that neither fines nor sureties are ever awarded 'when a criminal has suffered his appointed punishment;' on the contrary, the court always considers them as part of the punishment, and this power is always used in mercy towards the criminal, and a less term of imprisonment awarded, where it is exercised. In fact, instead of the clause being open to this objection, it is a most humane and merciful provision founded on that 'nursing mother,' the common law."

"Mr. Saunders again returns to the charge, p. 244, with the further objection that this clause 'in effect amounts to a bestowal of unlimited powers of mitigation of punishment, and when we find that unlawfully and maliciously wounding, etc., are all misdemeanors, the powers thus given to impose a fine in lieu of any other punishment, looks very like jesting with criminal punishment.'—Had Mr. Saunders forgotten that by sec. 5 of the same act any person convicted of manslaughter (a crime infinitely greater in many cases than misdemeanor) may be sentenced to pay a fine either in addition to or without any other punish-

ment? So under the 9 Geo. 4, c. 31, s. 9, the court might have awarded a fine on a conviction for manslaughter, without any other punishment."—*Greaves' Cr. Acts*, 6.

34. The punishment of solitary confinement or of the pillory shall not be awarded by any court.—32-33 *V.*, *c.* 29, *s.* 81.

The pillory was a frame erected in a public place on a pillar, and made with holes and moveable boards, through which the heads and hands of criminals were put. The punishment of the pillory, which had been abolished, in England, in all other cases, by 56 Geo. III., c. 138, was retained for the punishment of perjury and subornation of perjury, but it is now altogether abolished by 7 Wm. IV., and 1 V., c. 23 :—1 *Chit.* 797; *Wharton, Law Lexicon, Verb. Pillory.*

DEODAND.

35. There shall be no forfeiture of any chattels which have moved to or caused the death of any human being, in respect of such death. —32-33 *V.*, *c.* 29, *s.* 54.

By the common law, *omnia quæ movent ad mortem sunt Deo danda.* Hence the word "deodand," which signified a personal chattel which had been the immediate occasion of the death of any reasonable creature, and which, in consequence, was forfeited to the crown, to be applied, to pious uses, and distributed in alms by the High Almoner. Whether the death were accidental or intended, whether the person whose chattel had caused the death participated in the act or not, was immaterial. The cart, the horse, the sword, or anything which had occasioned the death of a human being, or the value thereof, was forfeited, if the party died within a year and a day from the wound received. And for this object, the coroner's jury had to inquire what instrument caused the death, and to establish

the value of it. But the jury used to find a nominal value only, and confine the deodand to the very thing or part of the thing itself which caused the death, as, if a waggon, to one of the wheels only.—*R.* v. *Rolfe, Fost.* 266; 1 *Hawkins*, 74; 1 *Blackstone*, 300. This forfeiture, "which seemeth to have been originally founded rather in the superstition of an age of extreme ignorance than in the principles of sound reason and true policy," *Fost.* 266, was abolished in England on the 1st day of September, 1846, by the 9-10 V., c. 62.

ATTAINDER.

36. Except in cases of treason, or of abetting, procuring or counselling the same, no attainder shall extend to the disinheriting of any heir, or to the prejudice of the right or title of any person, other than the right or title of the offender during his natural life only.—32-33 *V., c.* 29, *s.* 55.

37. Every one to whom, after the death of any such offender, the right or interest to or in any lands, tenements or hereditaments, should or would have appertained, if no such attainder had taken place, may, after the death of such offender, enter into the same.—32-33 *V., c.* 19, *s.* 56.

By the common law, a man convicted of treason or felony stands *attaint*. By this attainder, he loses his civil rights and capacities, and becomes dead in law, *civiliter mortuus*.—1 *Stephens' Comm.* 141. He forfeits to the Crown all his lands and tenements, as well as his personal estate, his blood is corrupted, so that nothing can pass by inheritance to, from or through him.—4 *Blackstone*, 380, 387; 2 *Hawkins*, 637. But the lands or tenements are not vested in the crown during the life of the offender, *without office*, or *office-found* which is finding by a jury of a fact which entitles the crown to the possession of such lands or tenements.—*Wharton's* Law Lexicon,

verb. "*Inquest of office,*" "*office-found.*"—3 *Stephens' Comm.* 661; though this formality is not necessary in cases of treason, where, by 33 Hen. VIII. ch. 20, sec. 2, goods and chattels become the property of the crown without office.

The aforesaid sections of the Procedure Act are taken from the 54 Geo. III., c. 145, of the Imperial Statutes; they have the effect to abolish the corruption of blood in felonies. They seem to exclude cases of treason, or rather to assume that corruption of blood exists in treason; but, in these cases, corruption of blood never existed in this country, not being part of the criminal law of England, as introduced here, it having been abolished in England, by 7 Anne, c. 21, sec. 10, suspended by the 17 Geo. II., c. 39, sec. 3, till not only the Pretender, but also his eldest, and all and every his son and sons, should be dead, an event long ago accomplished.

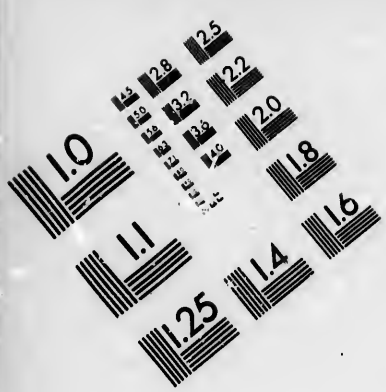
The 39 Geo. III., c. 93 (Imperial), repealed these last mentioned statutes, but it is not law for us.—1 *Chitty*, 734, 741; 4 *Stephens' Comm.* 455.

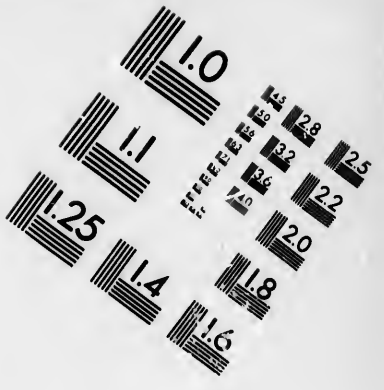
This view, on this part of the law, seemed to bear such incongruous consequences, that we thought it better to have upon it the opinion of the learned Mr. *Wicksteed*, law clerk of the House of Commons, the framer of the above clauses.

Mr. *Wicksteed* had the kindness to write as follows:

"Sections 55 and 56 of the 32-33 V., c. 29, are taken from the statute of U. C., 3 Wm. IV., c. 4, and, I think, should be read, and should have been printed as one section, as they are in the U. C. statute. Why the U. C. Legislature supposed that it was desirable to pass that act, I do not exactly know, but suppose that, after the passing of the Imperial Act, 54 Geo. III., c. 145, 'An Act

to take away the corruption of blood save in certain cases,' which does not in any way refer to the prior acts of William III., Anne, or 39-40 Geo. III, but simply enacts that, 'no attainder for felony which shall take place after the passing of the act, save in the cases of high treason, petty-treason or murder, or abetting or procuring or counselling the same, shall extend to disinheriting any heir,' &c., they thought that the operation of the acts of Wm. III., and Anne was at any rate doubtful as to high-treason, and not at all doubtful as to petty-treason and murder, and they, therefore, passed an act identical with that of the Imperial Parliament, as to high-treason, but extending the exemption to all other cases of felony, except high treason. And it is well to observe that the act 39-40 Geo. III., c. 93, which is supposed to have repealed the acts of Wm. III. and Anne, does nothing of the kind, but merely regulates the mode of indictment and trial in cases where the overt act of treason consists in a direct attempt on the life of or bodily harm to the Sovereign, and provides that, after conviction in such cases, judgment shall be nevertheless given and execution done as in other cases of high-treason; nothing is said of the consequences of the attainder, and the act is entitled 'An act for regulating trials of high-treason and misprison of treason in certain cases.' I do not see that this act repeals the two foregoing statutes, (William and Ann) or restores the old law if it was repealed by them, and the Imperial act 54 Geo. III., c. 145, seems to assume that the old law existed, notwithstanding the three former acts, or it ought to have repealed them. It goes to work in a better way, for they, if in force, would have abolished corruption of blood in high-treason, and left it in other felonies of minor degree. And the U. C. Stat. and our present one go still further and





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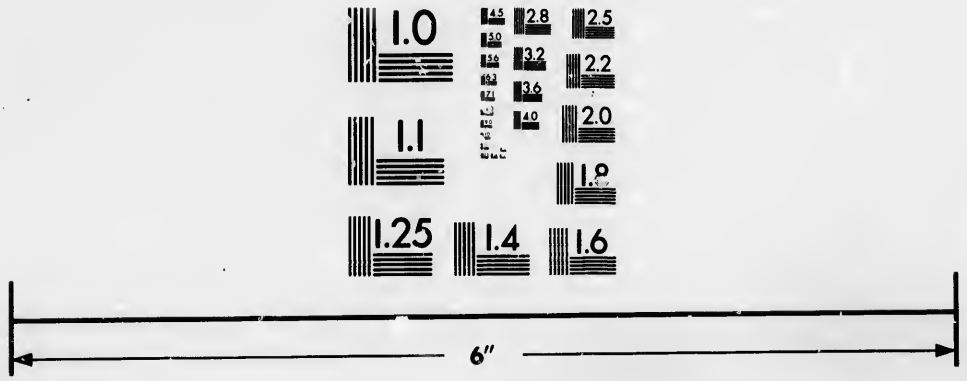

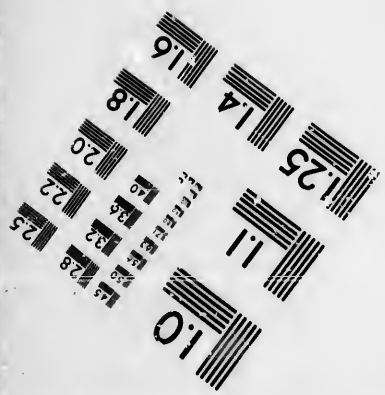

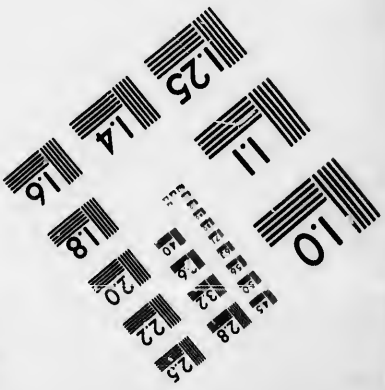

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abolish it in all cases *but* high treason, thus very properly reversing the operation of the statutes William III, and Anne. I am not aware that any statute of the Imperial Parliament or of any of the Provinces of Canada has re-enacted corruption of blood for high treason. It would seem then that the acts of William and Anne, and 17 Geo. II., c. 39 (which I could not look at as it is absent from the library,) were intended to abolish corruption of blood for treason after the death of the sons of the Pretender, the last of whom, Cardinal York, died at Rome in 1807, and, therefore, before the passing of the Imperial Act, 54 Geo. III., c. 145, and still longer before the passing of the U. C. act, 3 Wm. IV., c. 4. But though the said acts would appear to have abolished corruption of blood for treason from 1807, yet, both the Imperial Parliament and the U. C. Legislature seem to have thought that the said acts had not that effect, for neither the Imperial nor the U. C. act re-enact the corruption of blood for treason, but assume that it existed, and abolish it in certain other cases. If so, then, in Lower Canada, it does not seem to have been abolished in treason or felony, until the passing of our act of 1869. There is a little mystery about this, but fortunately, it does not matter now, except as a curiosity of legislative history. The Imperial Parliament passed an act, in 1870, 33-34 V., c. 23, abolishing forfeitures in all cases—a very sensible thing. But the act is necessarily long and special, as it had to provide for the management of a felon's property while undergoing sentence of imprisonment. In *Chitty's* Cr. L., vol. 1, p. 741, there is something on this matter, and he calls the 7 Anne *an ineffectual attempt to remove the corruption of blood from high treason.* But I doubt whether *Chitty* had the statutes before him, for the effect of 39-40 Geo. III., c. 93, and of 54 Geo. III., c. 145, seem both to be incorrectly stated."

These valuable notes go strongly to confirm the view of the law as expressed on the subject, *ante*; neither the U. C. Act (C. S. U. C., c. 116) nor section 55 of the Procedure Act of 1869 can be taken as reenacting the corruption of blood in cases of high-treason: they both, assuming that it exists, pretend to leave it in force. But it appears that it does not exist. When the criminal laws of England were introduced either in Upper or in Lower Canada, there were in force, in England, as stated, *ante*, two statutes abolishing such corruption of blood in high treason, virtually from 1807 (see *Hawkins'* P. C., by *Curwood*, Vol. II., p. 649 note): these statutes, were transmitted to us as part of our laws: they have never been repealed in Canada; so, it would seem that, in the present state of our law, there is no corruption of blood either in cases of high treason or any other felony, and that on attainder of all felonies, the criminal forfeits only his goods and chattels, and the profits of lands during life, while his real estate comes, in the ordinary channel of descent, to his heir who is thus also restored to a full capacity to inherit. See for Ontario, C. S. U. C., c. 82, sec. 7.

In the Province of Quebec, by articles 32 and 33 of the civil code, civil death results from a condemnation to death or penitentiary for life: by art. 35, all the property of the *civiliter mortuus* is confiscated to the Crown: by art. 36, the *civiliter mortuus* cannot take or transmit by succession. Is there not a contradiction between these articles, and more particularly the last one and sections 36 and 37 of the above act, on punishments. Parliament has undoubtedly exclusive jurisdiction on the judgment and all the parts of the judgment in criminal cases. But are the attainder, forfeiture, etc., a part of the judgment, or only a consequence of it? See 4 *Blackstn.* 386. If only a con-

sequence of the judgment, do they fall within the Criminal Law or the Civil Law?

The attainder can be reversed by Act of Parliament only: the royal pardon has not that effect.—*Rochon* v. *Leduc*. 1 *L. C. J.* 252; 2 *Hawkins*, 49.

The goods of an adjudged felon belong to the Queen, without office found, though they are allowed to remain in the possession of his wife, or any other party. So if a larceny is committed of such goods, they must be laid in the indictment as belonging to the Queen, even if the felon is only sentenced to a short period of imprisonment; but a house or land continues to be the felon's property, as long as no office is found.—*R.* v. *Whitehead*, 2 *Moo. C. C.* 181.

As remarked by Mr. Wicksteed (see *ante*), forfeitures, confiscations and attainders are now abolished in England since 1870.

It may be useful to remark that though the rebels of 1837-38, sentenced by the Courts-Martial then established, were declared *attaint*, and their property confiscated, this was in virtue of a special statute specially passed for that purpose,—the 2 V., c. 7, of the Lower Canada Statutes.

As to the validity of assignment by felons, see *Chowne* v. *Baylis*, 31 *Beav.* 351; *Perkins* v. *Bradley*, 1 *Hare*, 219; *Saunders, in re*, 9 *Cox*, 279; *Whitaker* v. *Wisbey*, 12 *C. B.* 44.

PARDONS.

38. The Crown may extend the Royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some person other than the Crown.—32-33 *V.*, *c.* 29, *s.* 125.

39. Whenever the Crown is pleased to extend the Royal mercy to any offender convicted of a felony punishable with death or otherwise, and grants to such offender either a free or a conditional pardon, by

warrant under the Royal Sign Manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon of such offender, under the Great Seal, as to the felony for which such pardon has been granted; but no free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any felony or offence other than that for which the pardon was granted. —32-33 *V.*, *c.* 29, *s.* 126.

COMMUTATION OF SENTENCE.

40. The Crown may commute the sentence of death passed upon any person convicted of a capital crime, to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any other gaol or place of confinement for any period less than two years, with or without hard labor; and an instrument under the hand and seal-at-arms of the Governor General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of State or of the Under Secretary of State, shall be sufficient authority to any judge or justice, having jurisdiction in such case, or to any sheriff or officer to whom such letter or instrument is addressed, to give effect to such commutation, and to do all such things and to make such orders, and to give such directions, as are requisite for the change of custody of such convict, and for his conduct to and delivery at such gaol or place of confinement or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted.—32-33 *V.*, *c.* 29, *s.* 127.

UNDERGOING SENTENCE, EQUIVALENT TO A PARDON.

41. When any offender has been convicted of an offence not punishable with death, and has endured the punishment to which such offender was adjudged,—or if such offence is punishable with death and the sentence has been commuted, then if such offender has endured the punishment to which his sentence was commuted, the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the Great Seal; but nothing herein contained, nor the enduring of

such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other offence.—32-33 *V.*, *c.* 29, *s.* 128. 9 *Geo.* 4, *c.* 32, *s.* 3, *Imp.*

See *Leyman* v. *Latimer*, 14 *Cox*, 51.

42. When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice of the peace in any case in which such justice of the peace may discharge such person, he shall be released from all further or other proceedings for the same cause.—32-33 *V.*, *c.* 21, *s.* 120, *and c.* 22, *s.* 73.

43. Nothing in this act shall, in any manner, limit or affect Her Majesty's Royal prerogative of mercy.—32-33 *V.*, *c.* 29, *s.* 121.

GENERAL PROVISIONS.

44. The Governor in Council may, from time to time, make such rules and regulations to be observed on the execution of judgment of death in every prison, as he, from time to time, deems expedient for the purpose, as well of guarding against any abuse in such execution as also of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place. —32-33 *V.*, *c.* 29, *s.* 118.

45. All such rules and regulations shall be laid upon the tables of both Houses of Parliament within six weeks after the making thereof, or, if Parliament is not then sitting, within fourteen days after the next meeting thereof.—32-33 *V.*, c. 29, *s.* 119.

46. The forms set forth in the schedule of this Act, with such variations or additions as circumstances require, shall be used for the respective purposes indicated in the said schedule, and according to the directions contained therein.—32-33 *V.*, *c.* 29, *s.* 122.

47. Nothing in this act shall alter or affect any laws relating to the government of Her Majesty's land or naval forces.—32-33 *V.*, *c.* 29, *s.* 137.

SCHEDULE.

CERTIFICATE OF SURGEON.

I, A. B., surgeon (*or as the case may be*) of the (*describe the prison,*) hereby certify that I, this day, examined the body of C. D., on whom judgment of death was this day executed in the said prison; and that on such examination I found that the said C. D. was dead.

(Signed,) A. B.

Dated this day of , 18 .

DECLARATION OF SHERIFF AND OTHERS.

We, the undersigned, hereby declare that judgment of death was this day executed on C. D., in the (*describe the prison*), in our presence.

Dated this day of , 18 .

E. F., Sheriff of
L. M., Justice of the Peace for
G. H., Gaoler of
etc., etc.

SURETIES.

COMPLAINT BY THE PARTY THREATENED, FOR SURETIES FOR THE PEACE.

Province of Canada, , district (*or* county, united counties, *or as the case may be,*) of .

The information (*or* complaint) of C. D., of the township of , in the said district (*or* county, united counties, *or as the case may be,*) of , (*laborer*). (*If preferred by an attorney or agent, say*—by D. E., his duly authorized agent (*or* attorney,) in this behalf), taken upon oath, before me, the under-

signed, a justice of the peace, in and for the said district (*or* county, united counties, *or as the case may be*) of , at N., in the said district, (county, *or as the case may be*) of , this day of , in the year one thousand eight hundred and , who says that A. B., of the (*township*) of , in the district (county, *or as the case may be*,) of , did, on the day of (instant *or* last past, *as the case may be*,) threaten the said C. D. in the words or to the effect following, that is to say, (*set them out, with the circumstances under which they were used*:) and that from the above and other threats used by the said A. B. towards the said C. D., he, the said C. D. is afraid that the said A. B. will do him some bodily injury, and therefore prays that the said A. B. may be required to find sufficient sureties to keep the peace and be of good behavior towards him, the said C. D.; and the said C. D. also says that he does not make this complaint against nor require such sureties from the said A. B. from any malice or ill-will, but merely for the preservation of his person from injury.

FORM OF RECOGNIZANCE FOR THE SESSIONS.

Be it remembered that on the day of , in the year , A. B. of (*laborer,*) L. M. of (*grocer,*) and N. O. of (*butcher,*) personally came before (*us*) the undersigned, (*two*) justices of the peace for the district (*or* county, united counties, *or as the case may be,*) of , and severally acknowledged themselves to owe to our Lady the Queen the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each of good and lawful money of Canada, to be made and levied, of their goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition indorsed (*or* hereunder written.)

Taken and acknowledged the day and year first above mentioned, at before us.

J. S.
J. T.

The condition of the within (*or* above) written recognizance is such that if the within bound A. B. (of, etc.) appears at the next court of general sessions of the peace (*or other court discharging the functions of the court of general sessions, or as the case may be*), to be holden in and for the said district (*or* county, united counties, *or as the case may be,*) of to do and receive what is then and there enjoined him by the court, and in the meantime keeps the peace and is of good behavior towards Her Majesty and her liege people, and specially towards C. D. (of, etc.), for the term of now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

FORM OF COMMITMENT IN DEFAULT OF SURETIES.

Province of Canada, , district (*or* county, united counties, *or as the case may be,*) of

To all or any of the constables or other peace officers in the district (*or* county, united counties, *or as the case may be,*) of , and to the keeper of the common gaol of the said district (*or* county, united counties, *or as the case may be,*) at , in the said district (*or* county, etc.)

Whereas on the day of instant, complaint on oath was made before the undersigned (*or* J. L., Esquire,) a justice of the peace in and for the said district (*or* county, united counties, *or as the case may be,*) of , by C. D., of the township of , in the said district (*or* county, *or as the case may be*) (*laborer*), that A. B., of (etc.,) on the day of , at the township of , aforesaid, did threaten (*etc., follow to end of complaint, as in form above, in the past tense, then*): And whereas the said A. B. was this day brought and appeared before the said justice (*or* J. L., Esquire,) a justice of the peace in and for the said district (*or* county, united counties, *or as the case may be,*) of , to answer unto the said complaint: and having been required by me to enter into his own

recognizance in the sum of , with two sufficient sureties in the sum of each, as well for his appearance at the next general sessions of the peace (*or other court discharging the functions of the court of general sessions, or as the case may be,*) to be held in and for the said district (*or* county, united counties, *or as the case may be,*) of , to do what shall be then and there enjoined him by the court, as also in the meantime to keep the peace and be of good behavior towards Her Majesty and her liege people, and especially towards the said C. D., has refused and neglected, and still refuses and neglects, to find such sureties: These are therefore to command you, and each of you, to take the said A. B., and him safely to convey to the (common gaol) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the (common gaol,) to receive the said A. B. into your custody in the said (common gaol,) there to imprison him until the said next general sessions of the peace (*or the next term of sitting of the said court discharging the functions of the court of general sessions, or as the case may be,*) unless he, in the meantime, finds sufficient sureties as well for his appearance at the said sessions (*or* court) as in the meantime to keep the peace as aforesaid.

Given under my hand and seal, this day of , in the year , at in the district (*or* county, *or as the case may be,*) aforesaid.

J. S. [L.S.]

APPENDIX.

MSS. NOTE BY C. S. GREAVES, ESQ., Q.C., ON RAPE.

For the purpose of the better consideration of the statutes relating to rape, it will be best to place them together.

Among the Laws of William the Conqueror, at the end of Kelham's Norman Dictionary, p. 36, we have "*De muliere vi compressâ et, pudicitiâ luctamine tentatâ, qui fœminam vi compresserit forisfacit membra sua. Qui prostravit fœminam ad terram et* (Quœre ? ut,) *vi vim inferat, mulcta ejus Domino est X solidi. Si vero eam compresserit, forisfacit membra.*

By the 3 Edw. 1, c. 13, "the King prohibiteth that none do ravish, or take away *by force* any maiden within age (neither by her own consent nor without,) nor any wife or maiden of full age, nor any other woman *against her will;* and if any do, at his suit that will sue within 40 days, the King shall do common right;" (and if none sue the King shall, and,on conviction, imprisonment and fine shall follow.) By the 13 Edw. 1. st. 1. c. 34, "if a man from henceforth do *ravish* a woman married, maid, or other, *where she did not consent neither before nor after*, be shall have judgment of life and member. And likewise where a man *ravisheth* a woman married, lady, damosel or other, *with force, although she consent after*, he shall have such judgment as before is said, *if he be attainted at the King's suit*, and there the King shall have his suit." By the C. R. II, st. 1, c. 6, whensoever, ladies and the daughters of noblemen and other women "be ravished, and after such rape do consent to such ravishers, that as well the ravishers as they that be ravished and every of them be from thenceforth disabled" to take any inheritance, etc., The 18 Eliz., c. 7, took away benefit of clergy in all cases of rape.

The statute of William the Conqueror was repealed by the 3 Edw. 1, c. 13, and it and the other statutes continued in force until the 9 G. 4, c. 31, which repealed them.

The crime of rape was felony at common law, and the offender was to suffer death (2 Inst. 180); and it is thus defined by Lord Coke, "rape is when a man hath carnal knowledge of a woman *by*

force and against her will;" (*Co. Litt* 123, *b*) and commenting upon *what this word (rape) doth signify in the* 3 *Edw.* 1, *c.* 13, *and other statutes*, Lord Coke says, "it is well described by the mirror '*rape solonque le volunt del estatute est prise pour un proper mots done pur chescun afforcement de fem*' (forcing of a woman, Kelham, W. D.) *But better in another place*," rape is when a man hath carnal knowledge of a woman *by force and against her will*," (2 *Inst.* 180, 3 *Inst.* 60), and this definition has been followed in too numerous books to warrant a reference to them.

Then rape, like murder, has a fixed meaning, which nothing else can express. In the Year Book, 9 Ed. 4. f. 26 pl. 35, a man was indicted for that he *Aliciam felonice cepit et eum tunc et ibidem carnaliter cognovit contra voluntatem suam.* Per Lakin (Judge of K.B.); The statute (13 Ed. 1, c. 34,) says that if a man ravish a Dame or Damosel; so the indictment ought to state according to the statute that he committed the felony, *scilicet quod ipsam rapuit*, etc., for it cannot be taken by the indictment for a case of felony. If a special act be made that if one ravish such a woman, that this shall be felony, and he be indicted *quod eam felonice cepit et eam carnaliter cognovit*, this avails not; but she ought to state according to the statute that she was ravished." Per Yelverton (Judge of K B.:) "If a woman bring an appeal of rape, she ought to say *rapuit*, or otherwise it availeth not." Hele (counsel): "writs ought to follow the form, and this is the form of an appeal, as you say; but an indictment holds no form, but only (states) the truth of the fact, and this matter in itself proves that he ravished her; wherefore it is sufficiently good, for it is the same in effect as if it had said *rapuit*. Billing (C.J.K.B.:) "Where a man is indicted of murder, if he buy a charter of pardon, he ought to make mention expressly of murder, or otherwise it shall not be allowed; therefore, if a man be indicted that he of malice prepense assaulted and killed a man, and says not *murdravit*, notwithstanding that this matter proves that he murdered him, yet the indictment is bad, because he is not indicted *quod murdravit*, etc. So here it ought to have the word that makes the felony,—scilicet *rapuit*." Lord Coke thus applies this case "this word rape is so appropriated by law to this case, as without this word (*rapuit*) it cannot be expressed by any periphrasis or circumlocution; for *carnaliter cognovit eam*, or the like, will not serve." (Co Litt. 123b.) Accordingly every indictment for rape has always used the word.

No rule is better settled than that where a word has had a definite

meaning attached to it at common law, and that word is used in any statute it will have the very same meaning in the statute as it had at common law, and that is more especially the case when the word imports an offence; and consequently the common law meaning of rape must be given to that word wherever it is used in any statute, and so the meaning affixed to any term in a statute is the meaning of the same term in any subsequent statute.

The punishment of rape was changed from death to loss of members by the statute of William the Conqueror, and thereby the crime ceased to be felony (2 *Inst.* 180;) and so continued until the 13 Edw. 1, s. 1, c. 34. During all the time previous to this statute if the woman demanded the man for her husband, it saved him from punishment (2 *Inst.* 180), and Lord Coke says that at common law this election was confined to the woman (2 *Inst.* 181.) But on the same page he says "it is not credible what ill success this act (3 Edw. 1, c. 13) had," and cites the case of *Warren de Henwick (Hil. 6, Edw. 1,)* who publicly ravished the daughter of S. de Warton, and "came and desired to have her as his wife, which was granted by the Justices, and he was affianced to her in open court."

This state of things led to the 13 Edw. 1, st. 1, c. 34, which amended but did not repeal, the 3 Edw. 1, c. 13. Therefore they must be construed together.

The 3 Edw. 1, c. 13, contained two distinct clauses. The first applied to girls, who were within age. The second to all other women. The first applied to cases whether by consent or without; and this shows that girls within age were capable of consenting, and that it was not rape where they did; but this clause rendered their consent of no avail. Whilst in the latter case the words are "against her will;" as in such cases, the woman was capable of consenting. And thus it is shown that each of the clauses was accurately framed to meet the cases at which each was directed. It is also perfectly clear that *each clause only applied to the time at which the offence was committed;* and did not affect anything that occurred either before or after that time.

The evil consequences of this statute (as we have pointed out) led to the passing of the 13 Ed. 1, st. 1, c. 34, which does not repeal the previous statute. It also contains two clauses; the first applies where a man "do ravish a woman married, maid, or other, where she did not consent neither before nor after." The second where a man "ravisheth a woman, although she consent after." The first applies

where there never is any consent at all; the second where there is consent after the rape. It is clear that *the words "did not consent neither before nor after" do not apply to the time of the rape itself*, but actually exclude it. Lord Coke (2 *Inst.* 433) says "this clause is intended of an appeal to be brought by the party ravished; for, *if she consent either before or after*, she shall have no appeal; but, *if she consented neither before nor after*, then she shall have an appeal, and there is no law that gives a woman an appeal of rape but this." (Lord Coke refers to "13 Edw. 3, Coron. 122," which is not in the Year Books; as they skip from 10th to 17th Edw. 111.) Lord Coke adds "Hereby the ancient law concerning the election given to her that is ravished is taken away." This explains the origin of the clause, and shows that the words do not apply to the act itself, and were not introduced in order to define the offence in any respect. The reasons why the clause does not in terms refer at all to consent at the time of the rape are that the word "ravish" at common law imported that the act was against the will; and the 3 Edw. 1, c. 13, contained the very words "against her will," and that statute and this *must* be read together. *It was absolutely necessary to use the word "consent," as applicable to the time before and after the act;* for it was impossible to apply the words "against the will" to either of those times: they could only be applied to the time of the act itself. It is manifest that the later statute was very carefully framed upon the former. The words "a woman married, maid or other" are plainly substituted for "any wife or maiden of full age, nor any other woman" in the former statute. And this leads to the inference that the first clause in that statute, relating to "any maiden within age," is not affected in any way by the later statute. So too the words in the second clause, "if he be attainted at the King's suit," plainly refer to the previous statute, and limit a prosecution by the crown to cases where there is no suit by any private individual; and the 6 R. II st. 1, c. 6, plainly shows that the suit by a private person continued after the 13 Edw. 1, st. 1, c. 34; and that where the woman consented after the rape, it saved the man. Cases like that of Warren de Henwick were completely met by the first clause, which obviously prevented the man from claiming and obtaining the woman against her consent.

Lord Coke in his chapter on Rape (3 *Inst.* 60) clearly considered the former statutes of the 3 Edw. 1, c. 13, the 13 Edw. 1, statute 1, c. 34, the 6 R. 2, c. 6, and the 18 El., c. 7, as all existing together; and,

with his usual accuracy, thus states their effect: "Rape is felony by the common law, declared by parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years, with her will or against her will, and the offender shall not take the benefit of clergy;" and then Lord Coke refers to the 102 Inst. as to "what offence this was at common law," which have already been cited. It is plain, therefore, that Lord Coke put the same construction as I have done upon the 3 Edw. 1, c. 13, and 13 Edw. 1. st. 1, c. 34, and there can be no doubt that that construction was right. Equally clear is it that there was no intention in any way to alter what was the common law offence by these statutes, or to define the offence *de novo*. The alteration of the punishment left the offence as it was at common law.

Indictments for rape have always alleged the offence to be committed by violence *and* against the will, and nothing could more clearly show that proof of both is necessary. The indictment runs "the said A. *violently* and *against her will* feloniously did ravish." Robbery is exactly similar; there the indictment runs "from the person and *against the will* of the said A. feloniously and *violently* did steal." It seems impossible to draw any distinction between these forms; and the definition of robbery is stealing from the person and "*against the will by violence* and putting in fear," etc. Now both these offences require the act to be done with violence and against the will; and it is quite clear that in *robbery there must be some violence to the person beyond the force that may be used in taking the articles;* for no mere taking from the person, even against the will, can suffice in robbery. It is quite clear that merely taking an article from a man asleep or drunk would not suffice. And for the same reason it would seem that having connection with a woman in a state of insensibility can not constitute a rape, because there is no violence ultra the mere connection. In robbery the violence is the principle ingredient, and in rape it seems at least to be one necessary ingredient. Violence to the person has always been an offence; so that robbery is in truth compounded of two offences, larceny and assault. And it is difficult to understand how a case can amount to rape where there is no violence ultra the act itself.

It is certain that to obtain an article from any one by fraud without violence is not robbery; but if there be both fraud and violence the crime may be complete.

Nothing could more clearly show that violence to the person is essential to the crime of rape than the statute of William the Conqueror, and it is clear from it that the violence must be such as to overcome the resistance of the woman; even in the case of an attempt there must be a struggle, *luctamen*. It need hardly be added that a mere attrectation that is sufficient to constitute an assault in point of law is insufficient, unless indeed there were an overpowering terror otherwise created.

Speaking of an appeal of rape at common law Bracton says: "*cum virgo corrupta fuerit et oppressa, statim cum factum recens fuerit cum clamore et hutesio debet accurrere ad villas vicinas, et ibi injuriam sibi illatam probis hominibus ostendere, sanguinem et vestes suas sanguine tinctas et vestium scissuras. Lib. III, c. 28, f.* 147. Lord Hale cites this passage (1 *Hale*, 632); and evidently fully approves of it. (*Ibid* 633, 4). Nothing could more clearly prove that from the time of Bracton till Lord Hale wrote the act must have been done both violently and against the will in order to constitute the crime. And Lord Hale fully justifies my views as to the dangers to which innocent men may be subjected by false charges of rape.

In *R.* v. *Jackson*, *R. & R.* 487, the prisoner was convicted of a burglary with intent to commit a rape. The prisoner got into the woman's bed as if he had been her husband, and was in the act of copulation when she made the discovery, and immediately, and before completion, he desisted. The jury found that he entered the house with intent to pass for her husband, and to have connexion with her if she did not discover the mistake; but not with the intention of forcing her if she made that discovery. The question was reserved whether the connexion with the woman, whilst she was under that mistake, would have amounted to rape. Four of the judges thought that the having carnal knowledge of a woman whilst she was under the belief of its being her husband would be a rape; but the other eight judges thought that it would not; and Dallas, C. J., pointed out forcibly the difference between compelling a woman against her will, when the abhorrence, which would naturally arise in her mind, was called into action, and beguiling her into consent and co-operation. This case was not argued, nor was any case on the definition of rape referred to; and it was decided as if the only question was as to consent and that no violence was necessary. It is very difficult to see how a man can be guilty of a rape, who has no intention of forcing a woman; and equally so how a man can be

guilty of a burglary with intent to commit a rape under such circumstances. It has been held that there must be an intent to have connexion at all events; and notwithstanding any resistance on the part of the woman. *R.* v. *Lloyd*, 7 *C. & P.*, 318, per Patteson, J. The observations of Dallas, C. J., afford very sound grounds why the common law offence was confined to cases where the act was against the woman's will.

In *R.* v. *Saunders*, 8 *C. & P.*, 265, the prisoner was indicted for a rape on a married woman. Being asleep in bed she was awoke by a hand passed round her, which turned her round, and she, supposing it to be her husband, made no resistance to that or to the connexion that immediately followed, but while the connexion was going on, she perceived by the prisoner's breathing that it was not her husband, and she immediately pushed him off her. Gurney, B. "I am bound to tell you (the jury) that the evidence in this case does not establish the charge contained in this indictment as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband; but if you think that that was the case, and that it was a fraud upon her, and that there was not consent as to this person, you must find the prisoner guilty of an assault." Gurney, B., was a great criminal lawyer, and his words here are very correct.

In *R.* v. *Williams*, 8 *C. & P.* 286, the prisoner was indicted for a rape upon a married woman, and it was opened (according to the statement of the prosecutrix in the depositions) that the prisoner had got into bed with the prosecutrix whilst she was asleep, and had penetrated her person before she was aware that it was not her husband, and that he persisted in completing his purpose notwithstanding her resistance after she had discovered that he was not her husband; and it was submitted that this distinguished the case from *R.* v. *Jackson*. But the prosecutrix stated that she had allowed the prisoner to have connexion with her believing him to be her husband, and that she did not discover who he was until the connexion was over. Alderson, B.: "that puts an end to the capital charge. *R.* v. *Jackson*, is in point." It was then urged for the prisoner that to constitute an assault there must be resistance in the party assaulted. Alderson B.: "In an assault of this nature there need not be resistance—the fraud is enough."

In *R.* v. *Clarke*, *Dears.* 397, the prosecutrix, having fallen asleep, was awakened by a man in bed with her, drawing her towards

him, and having connexion with her; she assented to the connexion in the belief that the man was her husband. She afterwards discovered that the man was not her husband The jury found that he intended to have connexion with her fraudulently, but not by force; and if detected to desist. Upon a case reserved the case of *R.* v. *Jackson* was questioned, but Jervis, C. J., said: "We have conferred with several of the other judges, and we think we cannot permit this question to be opened now, but are bound by the decision in *R.* v. *Jackson*." One might have thought that this case at last had conclusively settled that fraud is not equivalent to force in cases of rape.

In *R.* v. *Camplin*, 1 *Den.* 89; 1 *C. & K.* 746, the prisoner was convicted of a rape on a girl of thirteen years of age. He had made her quite drunk, and when she was in a state of insensibility took advantage of it, and violated her. The jury found that he gave her the liquor for the purpose of exciting her, not with the intention of rendering her insensible, and then having sexual intercourse with her. Upon a case reserved it was contended for the prisoner that there must be actual force and an opposing will on the part of the woman. But ten judges held the conviction right, and three thought it wrong. In the course of the argument, Patteson, J., said: "if a man knocks a woman down, and makes her insensible, and then has connexion with her while she is insensible, according to you that would be no rape, because she did not resist and evinced no opposing will." This is exactly like the case where a man is knocked down and stripped of his property while senseless, which is clearly robbery.—2 *Russ. C. & M.* 109, and the violence has been used in order to effect the object and to prevent resistance. Alderson, B., added, "In cases of fraud the woman's will is exercised under the influence of fraud; but in the case put by my brother Patteson there is force. The resistance was impossible, owing to the blow given by the prisoner. Here it was rendered impossible by the liquor which he had administered." In the addenda to 1 *Den. C. C. XVI*, the reasons for this decision are given by Parke, B., "of the judges who were in favor of the conviction, several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether such state is caused by the man or not, the accused knowing at that time that she is in that state; and Tindal, C. J., and Parke, B., remarked that in a statute of Westminster 2, c. 34, the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing *against her will*." It is very difficult to con-

ceive a more erroneous statement. We have shown that that statute did not define the crime at all. The words are not merely "where she did not consent," but "where she did not consent, neither before nor after;" and, therefore, do not apply to the act itself, and the 3 Edw. 1, c. 13, which does apply to the act, and *must* be construed together with this act, has the words "against her will." If the statute had been referred to in the argument, the explanation we have given might have been offered, and it would have been seen that the statutes when properly considered have a totally different meaning.

The note proceeds, "But all the ten judges agreed that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that, an unlawful act, and when also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, because *he had attempted to procure her consent and failed*, the offence of rape was committed. The other three judges did not think that this could be considered as being sufficiently proved." In neither *Den. C. C.* nor *C. & K.* is there anything to warrant the statement underscored.

But in passing sentence on the prisoner, Patteson, J., said: "It appeared upon the evidence that the prosecutrix refused her consent, so long as she had sense or power to express such want of consent." 1 *C. & K.* 749.

And the very learned judge added: "Your case, therefore, falls within the description of those cases, in which force and violence constitute the crime; but in which fraud is held to supply the want of both." We are quite unaware of any such cases; it is clear that fraud does not supply the force and violence necessary to constitute robbery; and even in larceny where a chattel is obtained by fraud from any one who has power to part with the property in it, a trespass is not committed, and consequently the offence is not even larceny.

In *R.* v. *Page*, 2 *Cox*, 33, Alderson, B., stated the decision in Camplin's case thus: "The judges in the affirmative thought that on these facts it must be presumed that this was *contra voluntatem*, it being clear that the woman had not consented when he began to administer the liquor, and that she never did actually consent at all; that his having connexion with her when insensible was, therefore, clearly *contra voluntatem ultimam*, which must be, as against him, presumed to continue unchanged. Denman, C. J., Parke, B., and Patteson, J., thought that a connexion without the consent of the woman was

rape, e. g., in the case of a woman insensibly drunk in the streets, not made so by the prisoner. And in *R.* v. *Page*, where the prosecutrix stated that she usually slept with her father, and, on waking from sleep, she found him having connexion with her, it was urged that *Camplin's Case* supported the position that if the prisoner had connexion with the girl while she was in such a state as to be incapable of giving consent, it was rape. Alderson B., said: "I do not understand that case to have gone so far as you affirm. It only decided that where the state of unconsciousness was caused by any act of the prisoner, connexion with the woman in such a state would constitute the offence. The wine was offered to her by the man in that case, and there was at any rate evidence to show that he had induced her to take it. I concurred in that judgment only on that ground."

In *R.* v. *Ryan*, 2 *Cox* 115, the prosecutrix was in a state not to understand right from wrong; but her general habits were those of decency and propriety, and Platt, B., left the question to the jury whether she was likely to have consented; and added that "if she was in a state of unconsciousness, whether it was produced by any act of the prisoner or by any act of her own, the prisoner having connexion with her in that state would be guilty of rape. If you believe that she was in a state of unconsciousness, the law assumes that the connexion took place without her consent." So on the trial for the rape of an idiot girl, Willes, J., directed the jury that if they were satisfied that the girl was in such a state of idiocy as to be incapable of expressing consent or dissent, and the prisoner had connexion with her without her consent, he was guilty; but a consent produced by mere animal instinct would prevent the act from being a rape. *Anon.* stated in *Bell C. C.* 70.

In *R.* v. *Fletcher*, *Bell*, *C. C.* 63, the prosecutrix was incapable of distinguishing right from wrong, and the prisoner met her, and was seen to have connexion with her. She was not shown to have offered any resistance, though she did exclaim whilst the prisoner was in the act that he hurt her, and on the prisoner rising from her and her getting up she made a start as if to run away. The jury found that *she was incapable of giving consent from defect of understanding*. Upon a case reserved it was contended that there must be either force or *fraud*, and that there was neither in this case; and the cases of *R.* v. *Jackson*, etc., were referred to; on which Lord Campbell, C.J., said: "In those cases it was at first held that fraud supplied the place of force,"

This is certainly a mistake. There are no such decisions in the books, and none are referred to in *R.* v. *Jackson*, which they would have been if they existed and had not been reported. Lord Campbell, C. J., also asked "what do you say to the definition of rape in the 13 Edw. 1, c. 34?" The answer was that that section imports the definition of the word rape into the word ravish, and it does not alter the common law definition of rape. But, strange to say, the previous statute of the 3 Edw. 1, c. 13, was never referred to in the case. Lord Campbell, C. J.: "The question is what is the real definition of the crime of rape, whether it is the ravishing a woman *against her will, or without her consent*. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved. *Camplin's case* seems to me really to settle what the proper definition is; and the decision in that case rests upon the authority of an act of Parliament. The statute of Westminster 2, c. 34, defines the crime to be where "a man do ravish a woman, married, maid or other, *where she did not consent neither before nor after*; 2 *Inst.* 433. We are bound by that definition, and it was adopted in *Camplin's case*, acted upon in *Ryan's case*, and subsequently in a case before my brother Willes."

It is perfectly clear that this decision wholly rests upon the ground that the 15 Ed. 1, c. 34, defines the crime of rape, and a more erroneous judgment never was delivered. It has been abundantly shown that that statute contains no definition of rape at all; that the words relied on do not apply to the act of rape itself; and that the 3 Ed. 1, c. 13, and 13 Edw. 1, c. 34, *must* be construed together; and as the former has the words "against her will" applied to the act itself, the act must be done against the consent of the woman.

Nor is it to be omitted that the court wholly failed to notice that there was no evidence of any violence or of any fraud that could supply that defect; and even the 13 Edw. 1, c. 34, in terms requires the connexion to be "with force;" and it is perfectly clear that the statute renders it essential that there should be force beyond that which is exerted merely in the connexion; for the words are "ravisheth" "with force;" and the word "ravisheth" at all events includes everything that is incident to the connexion. The force necessary to constitute the crime is force used to overcome the resistance of the woman, not the mere force used in the having the connection; in the same way as in robbery there must be force beyond the force used to remove the chattel.

Equally remarkable is it that the court never noticed that Lord

Coke, Lord Hale, and others all wrote upon the statutes, and all hold that in order to constitute a rape the act must be done against the will of the woman. On no subject is there a greater concurrence of opinion ; and on no point is there an opinion entitled to greater weight. It cannot be pretended that any judge of the present day is abler than Lord Coke or Lord Hale, and both were very much more conversant with our old statutes than any judge in our time ; and Lord Hale was an infinitely better criminal lawyer than any judge of recent times; but stranger still is it that Lord Campbell cites the 2 *Inst.* 433 for the clause in the statute, and never notices Lord Coke's note on it, which shows how erroneous his judgment was.

Lord Campbell, C. J., also added: "It would be monstrous to say that if a drunken woman returning from market lay down and fell asleep by the road side, and a man, by force, had connexion with her whilst she was in a state of insensibility and incapable of giving consent, he would not be guilty of rape." I totally dissent from this *obiter dictum*. Substitute for "had connexion with her" the words "took a purse from her," and the fallacy will at once appear. No one ever dreamt of such a case being a robbery, and yet it is a bad offence. The Greeks considered it so infamous to steal from a dead body that they had a proverb to denote the disgraceful nature of the act, viz., "he would even plunder a dead man." But disgraceful acts ought not to be included in well known crimes, however bad they may be, unless they clearly fall within them ; and it is to be feared that these cases are but too strong examples of the proverb that "bad cases make bad law." Some of the *dicta* in them naturally enough sprang from the indignation felt at the acts that had been done, and the attention seems to have been too exclusively confined to the particular cases. It seems never to have occurred to any one to consider what the consequences might be to innocent persons, and the door that might be opened to the fabrication of false charges. A very long experience in criminal courts satisfies me that the majority of charges of rape are false, and that innocent persons are put in great peril by them ; and for the most part no one except the man and woman are alleged to be present, and consequently it is open to the woman to fabricate any story she likes without fear of contradiction by any one except the prisoner ; and the stories that have turned out to be fabrications may be said to have culminated in a case, in which the prosecutrix, a nice looking girl of under age, told as clear a story as ever was heard

in examination in chief; but Gurney, B., who had taken down her examination in shorthand, desired her to repeat her story; which she did word for word as it was on his notes, on which that great criminal lawyer at once directed an acquittal. It is in consequence no doubt, of the prevalence of false charges that it has always been expected that marks on the person of the woman should have been seen; and this expectation was, no doubt, founded upon the belief that if the woman was true to herself, and resisted as she ought, her tender flesh would bear clear proof that violence had been offered to her in order to overcome her resistance. Of course there may be cases where the absence of marks may be explained; as by present fear of death or the intimidation of numbers. But the holding that fraud is equivalent to force opens the way to charges where no marks are to be expected. How very easy would it be to utilize *Camplin's Case*, in support of a false charge.

Suppose a man and woman are drinking together in a room, and she consents to connexion, and during it some one walks unexpectedly into the room, and finds them in the act, what would be more easy—nay what would be more probable than that she would charge the man with a rape?

It may well be asked, also, if fraud is equivalent to force and want of consent, how far is it to be extended? A married or single man induces a woman to yield to his wishes by a promise to marry her. No one can doubt that this is a gross fraud; but is it a rape? A man administers drugs to a woman and thereby so excites her passions as to yield to his desires; no doubt it is a gross fraud, but, is it a rape? Is it not turning cases of seduction into rape?

There is a class of cases which seem to bear extremely strongly upon this point. A man being lawfully married to a wife still living induces a maiden to marry him. Here from first to last he must have acted fraudulently with intent to obtain the possession of her person; and her consent to the marriage and to the connexion must have been obtained by the fraud; and she must have consented to the connexion *under the honest belief that he was her husband;* whereas he was no more her husband than the stranger in *Jackson's Case, etc.* The bigamy acts plainly prove that cases of bigamy never have been considered as cases of rape. Consider also the Abduction Statutes, 3 Hen. 7, c. 2, etc.

Lord Coke tells us that Isabell, late wife of John Botiler, by her petition showed how William Pull, by duress and menaces of

imprisonment enforced her to marry him, and by color thereof ravished her, for which she prayed an appeal, and it was granted her. (3 *Inst.* 60, *citing Rot. Parl.* 15 *H.* 6, *nu.* 15). And also that an appeal was granted in the similar case of dame Joan Beamont against E. Lancaster, who had married her against her will and ravished her. (*Rot. Parl.* 31 *H.* 6, *nu.* 72.) In these cases the appeal was specially, given by Parliament, and they strongly tend to show that a marriage procured by fraud alone would not be rape, but that there must be force in order to constitute the crime ; and the 31 H. 6, c. 9, which was passed in consequence of the preceding case, in order to give a remedy to women forced to enter into bonds, tends the same way.

In *R. v. Fletcher*, 14 *Law T. R.* 573, the prisoner was tried for a rape, and the question reserved was whether the case ought to have gone to the jury, there being no evidence, except the fact of the connexion, and the imbecile state of mind of the girl. Of the fact of connexion there was the fullest proof, for it was admitted by the prisoner. There was, however, no evidence that the connexion was against the will of the girl. The indictment charged the prisoner with having committed the offence against her will and without her consent. The judges were all of opinion that some evidence of that allegation as a fact should have been given ; and that there was not that sort of testimony, on which a judge would be justified in leaving the case to a jury to find a verdict. "We are unanimously of opinion that there was here no evidence to establish either that the connexion was against her will or without her consent." And Pollock, C. B., added : " I wish to add for myself that I think the act of Parliament (24-25 V., c. 100, ss. 50, 51,) which makes sexual connexion a criminal offence in the case of children of tender years has a tendency to throw light upon the case before us. Here the contention on the part of the crown must be that an idiot is incapable of consent; but it may be said in answer that the same cause, which required an act of Parliament to make the mere fact of connexion a criminal offence in the case of children of tender years would require an act of Parliament in the case also of idiots." The same remark arises upon the 1 Edw. 1, c. 13, as to maidens within age. The case of *R. v. Pressy*, 17 *Law T.* 295, only decided that the prisoner being charged with having committed a rape on the prosecutrix *against her will* his answer, " Yes I did," was evidence to go to the jury ; and so it clearly would have been, if the crime must be committed against the will. In *R. v. Barrow*, 19 *Law T.* 293, the prose-

cutrix was in bed, and her husband beside her. She had her baby in her arms, and was between waking and sleeping; but was completely awakened by a man having connexion with her, and pushing the baby out of her arms. She thought it was her husband, and she could count five after she completely awoke before she found it was not her husband. Kelly, C.B., thought, especially on the authority of the judgment of Lord Campbell in *R.* v. *Fletcher*, that the case was made out; as it was sufficient that the act was done by force and without consent before or afterwards; that the act itself, coupled with the pushing aside of the child, amounted to force, and there was certainly no consent before and the reverse immediately afterwards. But on a case reserved the conviction was quashed. Bovill, C. J., "It does not appear that the prosecutrix was asleep or unconscious at the time when the first act of connexion was committed. What was done was, therefore, with her consent, though that was obtained by fraud. We are of opinion that this case comes within that class of cases, in which it has been decided that where, under such circumstances, consent has been obtained by fraud, the offence does not amount to rape." This case, therefore, is another strong confirmation of the class of cases, of which *R.* v. *Jackson* was the first; and it is a distinct authority against the doctrine that in cases of rape fraud amounts to force. See *R.* v. *Sweenie*, 8 *Cox*, 223, as stated in 2 *Heard's Leading Criminal Cases*, 259.

In *R.* v. *Barratt*, 29 *Law T.* 406, the prosecutrix was blind and out of her mind; if told to lie down she would do so, and she had been told to lie on a couch until her sister returned. The prisoner knew her state, and he was seen lying on her on the couch, and on going into the room her father found the prisoner standing up at the end of the couch buttoning up his trowsers, while she was lying quietly on the couch. The jury were directed that "if the prisoner had connexion by force with the girl, and if the girl was in such an idiotic state that she did not know what the prisoner was doing, and the prisoner was aware of her being in that state, they might find him guilty of rape; but if the girl, from animal instinct, yielded to the prisoner without resistance, or if the prisoner, from the girl's state and condition, had reason to think the girl was consenting, they ought to acquit him." The jury found him guilty of an assault with intent, etc. The case was argued only on the part of the crown—(a course which ought never to be allowed.) It was held that the

conviction was right, upon the ground that the prosecutrix was incapable of giving her consent, and rests entirely upon the decision of *R.* v. *Fletcher*, *Bell*, *C. C.* 63.

In *R.* v. *Flattery*, 36 *Law T.* 32, the prisoner professed for money to give medical and surgical advice, and the prosecutrix, being in ill-health, went with her mother to consult him. The prisoner put several questions to the mother as to the condition of the daughter, and made some examination of her person. The prisoner then fraudulently, and knowing that he was speaking falsely, told the mother, in the hearing of the daughter, that "it was nature's string wanted breaking," and asked if he might break it. The mother replied that she did not know what he meant, but that she did not mind if it would do her daughter any good. The prisoner went into an inner room with the girl, and there had connexion with her, she making but feeble resistance, believing that the prisoner was merely treating her medically, and performing a surgical operation to cure her of her "illness and fits," and submitting to his treatment solely because she so believed. Unless such submission in law constitutes consent, there was no consent. It was held, on a case reserved, that the offence was rape, upon the ground that there was no consent to the prisoner having connexion with the girl. The decision proceeded entirely on the case of *R.* v. *Camplin*, and the erroneous opinion that the 13 Ed. 1, c. 34, defined the crime of rape. *R.* v. *Barrow* was much questioned; and Kelly, C. B., said: "I lament that it has ever been decided to be the law that, where a man obtains possession of a woman's person by fraud, it does not amount to rape."

There had been previous cases where indictments for assault had been held to be supported by proof of the like false pretences of medical or surgical treatment, by which females had been deceived and suffered their persons to be handled. (*R.* v. *Rosinski*, *R. & M. C. C.* 19,) or otherwise indecently dealt with (*R.* v. *Stanton*, 1 *C. & K.* 415) or connexion to take place (*R.* v. *Case*, 1 *Den.* 580.) In this case Wilde, C. J., said, the cases showed that "where consent is caused by fraud, the act is at least an assault, and perhaps amounts to rape." The cases referred to were *R.* v. *Saunders*, 8 *C. & P.* 265; and *R.* v. *Williams*, 8 *C. & P.* 286; and, instead of showing that the act is rape in such cases they are clear decisions to the contrary.

Some expressions appear to have been used equivocally in these cases.

Thus the expression "incapable of consent" has been applied as well to the case where the woman was actually senseless as where she was devoid of reason, but possessed of her animal propensities. There can be no doubt, that many unfortunate persons, devoid of sufficient understanding to decide between right and wrong, are subject to very strong animal passions, which would lead them to assent to, if not actually to court, connexion; and it cannot be contended that connexion with such persons is a rape. In *R.* v. *Barratt* it was rightly left to the jury that the girl, though out of her mind, might yield from animal instinct. But in *R.* v. *Fletcher*, *Bell C. C.* 63, the jury were erroneously told that if "the girl was incapable of giving consent, or of exercising any judgment on the matter, they might convict;" and they found that the girl was incapable of giving consent from want of understanding. Upon such a direction and finding the verdict of guilty was clearly erroneous. The case is exactly like that of very young children, who can consent to connexion, though they are incapable of judging of the nature and quality of the act. In *R.* v. *Read*, 1 *Den.* 377, the jury found that a girl of nine years of age assented, but that "from her tender age she did not know what she was about;" and it was held that the prisoner could not be convicted of an assault. So where the girl was too young to be examined; Patteson, J., said "we know that a child can consent to that which, without such consent, would constitute an assault." *R.* v. *Cockburn*, 3 *Cox*, 543. This great judge also said "my experience has shown me that children of very tender age may have very vicious propensities." See *R.* v. *Johnson*, 12 *Law T.* 503.

A woman may be quite incapable of exercising reasoning power, and yet be perfectly capable of exerting her natural appetites; and consequently the want of the former in no way negatives the existence of the latter. The verdict, therefore, in *R.* v. *Fletcher*, *Bell, C. C.*, 63, was clearly wrong.

Nor can there be any doubt that in many cases of unsound mind the animal passions are extremely strong; and in the absence of reason to control them, the reasonable inference is that they will be gratified whenever an opportunity occurs, and when there is no evidence to the contrary, it would seem that the fair presumption is that that is the case. This point, though one of fact, deserves more consideration than it has received.

Several cases have turned on the distinction that has been taken

between consent and submission. In *R.* v. *Day*, 9 *C. & P.* 722, Coleridge, J., said, "There is a difference between consent and submission. Every consent involves a submission; but it by no means follows that a mere submission involves a consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law." And it was left to the jury to say "whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed." See also *R.* v. *Jones*, 4 *Law. T.* 154. *R. v. Case*, 1 *Den.* 580. An important question arises occasionally in these cases in addition to the question whether the woman submitted, but did not consent. It is "did the man *bonâ fide* believe that she was consenting?" In *R.* v *Flattery*, Denman, J., said "there is one case where a woman does not consent to the act of connexion, and yet the man may not be guilty of rape, that is where the resistance is so slight and her behavior such that the man may *bonâ fide* believe that she is consenting." And, *a fortiori*, that may be the case where the woman submits, and makes no resistance at all. In *R.* v. *Barratt*, where the girl was blind and out of her mind, and there was no evidence whatever of resistance, the surgeon proved that there were no external marks of violence, but that in his opinion there had been recent connexion, and he thought she had been *in the habit of having connexion*, there would seem to have been cogent evidence that the animal passions of the girl had led to the connexion, and the case ought to have ended in an acquittal

It may admit of question whether the distinction drawn in *R.* v. *Flattery*, between consent obtained by fraud from a married woman, and consent obtained by fraud from a girl to what she supposes is medical treatment, can be supported. In the one case the consent is given to a connexion with a man, as to whom the woman is completely deceived. In the other it is given to an act, as to the nature of which she is completely deceived, and in both the act done is totally different from the act to which the assent was given. In each case the power to do the act is obtained by fraud; and in each the nature and quality of the act is totally different from what the woman supposed it would be. The intent, the object, the fraud,

and the end obtained are all the same in both cases; then how is it possible to draw any sound distinction between them? False pretences are very similar; in them the only material points are "were these false pretences?" "Were they fraudulently used?" "Was the chattel obtained by them?" Every kind of false pretence is sufficient, and no distinction is ever drawn between one false pretence and another. They are merely the means by which the fraud is effected, and it is quite immaterial what they are, for the fraud is the gist of the offence.

That *Camplin's case* was not a well considered decision is plain from the different grounds assigned for the judgment by Parke and Alderson, B. B., and Patteson, J.; and the numerous cases that have since been reserved prove not only that it has not been considered satisfactory, but also that it has given rise to many difficulties; which of itself is sufficient to throw doubt on any decision. Whether, however, if the mistake, on which it was founded, if pointed out, would induce our judges to come to a contrary decision, it is impossible to predict. All that can be said is that, as the judges in *Camplin's Case and Fletcher's Case, Bell, C. C.* 63, held that they were *bound by one statute*, the judges ought to consider themselves *bound by the two statutes* to decide according to the true construction of their provisions. That the law on this point is in a very unsettled state cannot be doubted; and where that is the case, especially in so penal a matter, it would be well to remember that *nusquam major est servitus quam ubi jus aut vagum aut incognitum.*

20*th February*, 1878.

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