RUSSELL

ON

CRIMES AND MISDEMEANORS

VOL. I.

SEVENTH EDITION

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A TREATISE

ON

CRIMES AND MISDEMEANORS

BY

SIR WM. OLDNALL RUSSELL, KNT.

Late Chief Justice of Bengal

IN THREE VOLUMES

VOL I.

SEVENTH EDITION

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WITH

CANADIAN NOTES

BY

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PREFACE TO THE SEVENTH EDITION.

Since the publication of the Sixth Edition of this work (in 1896) there has been a good deal of legislation with reference to the criminal law, both as to crimes, punishments, appeals, evidence and costs: but no apparent progress has been made towards the codification of Criminal Law or Criminal Procedure for England or Ireland. In this respect the Imperial Legislature has failed to profit by the example of the self-governing dominions of the King, such as Canada, New Zealand, Queensland and Western Australia, and of the Crown Colonies, which have in numerous instances adopted Criminal Codes framed on a model drafted by the late Sir Robert S. Wright, and subsequently revised for the Colonial Office.

Until Criminal Law and Procedure are re-arranged and simplified by codification it is still necessary to seek for them in a mass of scattered enactments and a congeries of judicial decisions of varying authority, and in the works of the old writers on the common law. The bulk of these enactments and decisions are embodied or referred to in this work. The aim of the present Editors has been to revise and shorten the text, and to re-arrange those materials which are of present value in a manner which may render them more easy of access and understanding. They have retained the characteristic feature of former editions, of a fairly full statement of the facts of the more important cases quoted. which has been found convenient for persons who have not the reports to hand: but it has been deemed desirable to re-arrange the titles and chapters in a more systematic manner than can be found in former editions.

The new arrangement follows the main lines of the Draft

Code of 1880: but the Editors have followed the lead of the author and former editors in omitting the subject of Treason and Treason-Felony.

Decisions on repealed statutes, where of use as authorities on the existing law, are incorporated with the text, and cases overridden by legislation are omitted. Decisions of substantial value or interest given since the publication of the last edition in 1896 have been included up to July, 1909.

The recent changes made in 1907 and 1908 with respect to the punishment of crime have rendered it necessary to set out, in Book I. Chapter VII., a fuller statement of the law as to punishment.

The portions of the Sixth Edition which dealt with procedure have been collected in Book XII., where also will be found the legislation of 1907 and 1908 as to Appeal and Costs in Criminal Cases.

The subject of evidence, treated in the earlier editions by Mr. E. Vaughan Williams, author of 'Williams on Executors,' and afterwards a judge of the Common Pleas, is dealt with in Book XIII., where in Chapter V. will be found the Criminal Evidence Act, 1898.

The Editors have been able somewhat to reduce the bulk of the text: but to effect this they have had to omit the subject of Highway and Bridge indictments. The reason which ultimately decided them to make this omission was, that such indictments, though public remedies, can no longer be regarded as criminal proceedings: for they have been assimilated to civil proceedings as to evidence (40 & 41 Vict. c. 14), appeal (7 Edw. VII. c. 23 s. 20 (3)), and costs (8 Edw. VII. c. 15 s. 9 (3)).

References to the criminal law of the United States have been advisedly reduced; since those who wish to study that law must necessarily refer to some standard American writers on Crimes, such as Bishop, and to the Codes of the States of the Union.

But the Editors have included references to decisions of the Courts of Canada, Australia, and New Zealand, and of some other colonies in which the English authorities have been considered, and decisions have been given which may be of

value with reference to certain parts of the English law, on which that of the colony is based.

The Editors have been careful to retain the valuable notes of Mr. C. S. Greaves, Q.C., editor of the Third and Fourth Editions, and draftsman of the Criminal Law Consolidation Acts of 1861. The cases marked MSS. C. S. G. are from his collection. Those marked MS. H. S. are from the collection of Mr. Horace Smith, editor of the Sixth Edition. Those marked MS. Bayley, J., are from a collection made by Mr. Justice Bayley.

References to series of reports not mentioned in the text have so far as possible been inserted in the Table of Cases. Repealed statutes (save in a few special cases) are not included in the Table of Statutes; but in the notes to existing Statutes will be found references to the former enactments which they supersede.

The Editors have to thank Mr. H. D. Roome, Barrister-at-Law, for valuable aid in preparing the Table of Cases.

W. F. CRAIES.
L. W. KERSHAW.

CORRIGENDA.

VOLUME I.

Page	620 (*g*).	*For* Daws *v.* Findar *read* Daws *v.* Paynter.
,,	620 (*j*).	*For* Dr. Tudor's case *read* Dr. Trevor's case ; *and for* Tuxton *v.* Morris *read* Juxon *v.* Morris.
,,	902 (*f*).	*For* Ince *v.* Cruikshank *read* Mee *v.* Cruikshank.
,,	902 (*h*).	*For* Hawkins *v.* Ellis *read* Rawlins *v.* Ellis.
,,	1027 (*k*).	*After* R. *v.* Middleton *dele* 1 Str. 177.
,,	1032 (*e*).	*After* R. *v.* Middleton *read* Fort. 201, *and dele* 1 Str. 77.
,,	1040 (*k*).	*Read* R. *v.* Dodd, Sess. Cas. 135 ; 93 E. R. 136.

PREFACE TO CANADIAN NOTES

The Canada Criminal Code and the Canada Evidence Act treat of the greater part of the subjects dealt with in the text of RUSSELL ON CRIMES. To set out these statutes herein would make these volumes unwieldy; to accurately express the meaning of the statutes more concisely would be impossible; and therefore these notes are necessarily confined to references to the statutory provisions and to judicial interpretations thereof.

As the Editors state in the preface, the text of RUSSELL ON CRIMES follows the arrangement of the English Draft Code, which is not the same as that of the Canada Criminal Code. These notes necessarily follow the order of the text, and as to subject matter do not go beyond the text except in reference to appeals in indictable offences, for which reasons there are no notes upon summary convictions or appeals therefrom, and few upon summary or speedy trials; but though the text contains nothing about certiorari, and little comparatively about the practice upon appeal, it has been considered advisable to refer extensively to these subjects in these notes.

By permission of the publisher, the writer has drawn extensively on the matter contained in "Canada Criminal Law," by W. J. Tremeear, a work so excellent and complete that it would be difficult to quote an important and relevant decision by Canadian Courts not referred to therein, save those given since that work was published.

Very valuable assistance in the preparation of these notes has been given by my son, A. Nevill Morine, LL.B.

ALFRED B. MORINE.

Toronto,
Dec. 2nd, 1909.

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A TREATISE

ON

CRIMES AND MISDEMEANORS.

BOOK THE FIRST.

PRELIMINARY MATTERS.

CHAPTER THE FIRST.

INTERPRETATION OF STATUTES DEALING WITH CRIMES.

THE object of this work is to treat of crimes—*i.e.* of those acts or omissions involving breach of a duty to which by the law of England a sanction is attached by way of punishment or pecuniary penalty in the public interest. The same acts or omissions may give a cause of civil action to an individual injured thereby. But in the case of crime the ordinary remedy is by indictment (*a*)—*i.e.* by accusation made by twelve or more grand jurors, and by trial thereon before a petty jury of twelve, unless statutory provision is made for punishing the offence in a summary or a different mode.

The general canons of construction applicable to statutes which create or punish criminal offences, or deal with criminal procedure, are in substance the same as those applicable to other statutes. There are numerous authorities in which it is said that penal statutes must be construed strictly, a rule founded on the plain principle that the power of punishment is vested in the Legislature, in which lies the authority to define crimes and ordain punishment (*b*). The true rule is that stated in the *Gauntlet* (*c*). 'No doubt all penal statutes are to be construed strictly—that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used; must not strain the words on any notion that there has been a slip, that there has been a *casus omissus;* that the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, though within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning

(*a*) *Vide post*, pp. 6, 17, and Bk. xii. c. ii.

(*b*) Att.-Gen. *v.* Sillem [1863], 2 H. & C. 431, 509, Pollock, C.B.

(*c*) L. R. 4 P.C. 184, 191, per James, L.J., in giving the judgment of the Judicial Committee (Mellish, L.J., James, L.J., and Sir James Colville and Sir Montague Smith). Cf. 2 H. & C. 531, Bramwell, B.

of the language used; and the Court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument' (*d*).

Observance of this canon is chiefly invoked to prevent the creation of offences by construction—*i.e.* to restrain the Courts from usurping the function of the Legislature by extending the words of a statute to acts or omissions not within its plain terms or manifest intention. But it does not debar the judges from reading into a statute creating an offence words omitted but obviously necessary to complete the clear intention of the Legislature (*e*).

The presumption against giving a retrospective operation to statutes operates most strongly in the case of statutes creating crimes (*f*).

An important rule of construction which has been applied to criminal statutes is that there is no vested right in procedure. Sect. 27 of the Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), which was passed on August 15, 1904, and came into force on October 1, 1904 (sect. 33 (3)), directed that six months should be substituted for three months as the limit of time for instituting prosecutions for carnally knowing a girl of the age of thirteen and under sixteen (48 & 49 Vict. c. 69, s. 5 (1)). C. D. was tried in January 1905 on an indictment charging the commission of such offence on July 15, 1904. The proceedings were instituted on December 27, 1904. It was held that sect. 27 dealt only with procedure, and came into force at a time when the accused was liable to prosecution, and extended the time during which he continued liable (*g*).

Certain definitions of terms often used in statutes creating crimes are included in the Interpretation Act, 1889 (52 & 53 Vict. c. 63) (*h*). Of these the more important are as follows:—

Gender and Number.—By sect. 1: '(1) In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act (January 1, 1890), unless the contrary intention appears, (*a*) words importing the masculine gender shall include females, and (*b*) words in the singular shall include the plural and words in the plural shall include the singular.

'(2) The same rules shall be observed in the construction of every enactment relating to an offence punishable on indictment or on summary conviction when the enactment is contained in an Act passed in or before the year one thousand eight hundred and fifty.'

(*d*) See Hardcastle on Statutes (4th ed., by Craies), pp. 425–432.

(*e*) R. *v.* Vasey [1905], 2 K.B. 748, decided on s. 13 of the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), which amends s. 32 of the Malicious Damage Act, 1861, by incorporating words which cannot be grammatically read into the earlier enactment. In R. *v.* Palin [1906], 1 K.B. 7, the words 'any document' in the second part of s. 1 of the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), were limited, by reference to the preamble, to documents belonging to the employer of the accused. And see R. *v.* Plowden, *Ex parte* Braithwaite [1909], 2 K.B. 269. 24 T. L. R. 430; 73 J. P. 266. R. *v.* Ettridge [1909], 2 K.B. 24.

(*f*) R. *v.* Griffiths [1895], 2 Q.B. 145, 148, Coleridge, C.J., as to the penal clauses in the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

(*g*) R. *v.* Chandra Dharma [1905], 2 Q.B. 355. *Secus*, if the prosecution had been statute barred under the old enactment before the new enactment came into operation, *l.c.* 339, Channell, J.

(*h*) This Act repeals Brougham's Act (13 & 14 Vict. c. 21).

By sect. 2: '(1) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate' (*i*).

'(2) Where, under any Act, whether passed before or after the commencement of this Act, any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.'

By sect. 3: 'In every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:

'The expression "month" shall mean calendar month' (*j*).

'The expressions "oath" and "affidavit" shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression "swear" shall, in the like case, include affirm and declare.'

By sect. 4: 'In every Act passed *after* the year 1850 and before the commencement of this Act (January 1, 1890) the expression "county" shall, unless the contrary intention appears, be construed as including a county of a city and a county of a town.'

By sect. 13: 'In this Act, and in every other Act, whether passed before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:

'(4) The expression "court of assize" shall, as respects England, Wales, and Ireland, mean a court of assize, a court of oyer and terminer, and a court of gaol delivery, or any of them, and shall, as respects England and Wales, include the Central Criminal Court.

'(5) The expression "assizes," as respects England, Wales, and Ireland, shall mean the courts of assize usually held in every year, and shall include the sessions of the Central Criminal Court, but shall not include any court of assize held by virtue of any special commission, or, as respects Ireland, any court held by virtue of the powers conferred by section sixty-three of the Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57).

'(10) The expression "the Summary Jurisdiction Acts," when used in relation to England or Wales, shall mean the Summary Jurisdiction

(*i*) This enactment replaces 7 & 8 Geo. IV. c. 28 (E), and 9 Geo. IV. c. 54, s. 35 (I). As to its effect *vide post*, p. 102.

(*j*) At common law month primarily means 'lunar' month. Bruner *v.* Moore [1904], 1 Ch. 305, Farwell, J. This enactment applies only to the term as used in statutes. By s. 12 (1) of the Prison Act, 1898 (61 & 62 Vict. c. 41): 'In any sentence of imprisonment passed after the commencement of this Act (January 1, 1899) the word month shall, unless the contrary is expressed, be construed as meaning calendar month.' By subsec. 2: 'A prisoner whose term of imprisonment or penal servitude expires on any Sunday, Christmas Day, or Good Friday, shall be discharged on the day next preceding.' Subject to this enactment, a person sentenced to a month's imprisonment is entitled to be discharged on the day in the next month immediately preceding the day corresponding to the one on which his sentence takes effect. Migotti *v.* Colvill, 4 C. P. D. 233: 48 L. J. C. P. 695.

(England) Acts (*k*), and when used in relation to Scotland the Summary Jurisdiction (Scotland) Acts, and when used in relation to Ireland the Summary Jurisdiction (Ireland) Acts.

'(11) The expression "court of summary jurisdiction" shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law (*l*).

'(14) The expression "court of quarter sessions" shall mean the justices of any county, riding, parts, division, or liberty of a county, or of any county of a city or county of a town, in general or quarter sessions assembled, and shall include the court of the recorder of a municipal borough having a separate court of quarter sessions.'

Person.—By sect. 19: 'In this Act and in every Act passed after the commencement of this Act the expression "person" shall, unless the contrary intention appears, include any body of persons, corporate or unincorporate.'

Writing.—By sect. 20: 'In this Act and in every other Act, whether passed before or after the commencement of this Act, expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form.'

Committed for Trial.—By sect. 27: 'In every Act passed after the commencement of this Act the expression "committed for trial" used in relation to any person shall, unless the contrary intention appears, mean, as respects England and Wales, committed to prison with the view of being tried before a judge and jury, whether the person is committed in pursuance of section twenty-two or of section twenty-five of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), or is committed by a court, judge, coroner, or other authority having power to commit a person to any prison with a view to his trial, and shall include a person who is admitted to bail upon a recognisance to appear and take his trial before a judge and jury.'

Offences under two or more Laws.—By sect. 33: 'Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts, or at common law, but shall not be liable to be punished twice for the same offence' (*m*).

Distance.—By sect. 34: 'In the measurement of any distance for

(*k*) The Summary Jurisdiction (England) Acts are the Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43) and 1879 (42 & 43 Vict. c. 49), and any Act, past or future, amending these Acts or either of them (52 & 53 Vict. c. 63, s. 13 (7)).

(*l*) This definition does not apply to justices acting for the grant of liquor licences or revision of jury lists. Boulter *v.* Kent JJ. [1897], A.C. 556. Hagmaier *v.* Willesden Overseers [1904], 2 K.B. 316.

(*m*) As to the effect of this section, see *post*, p. 6. There are numerous enactments containing a similar provision as to particular offences. See Hardcastle on Statutes (4th ed., by Craies), 306n.

the purposes of any Act passed after the commencement of this Act, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane' (*n*).

Citation of Acts.—By sect. 35: '(1) In any act, instrument, or document, an Act may be cited by reference to the short title (*o*), if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or the session, as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the section or subsection of the Act in which the enactment is contained (*p*).

'(2) Where any Act passed after the commencement of this Act contains such reference as aforesaid, the reference shall, unless a contrary intention appears, be read as referring, in the case of statutes included in any revised edition of the statutes purporting to be printed by authority, to that edition, and in the case of statutes not so included, and passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission; and in other cases to the copies of the statutes purporting to be printed by the King's Printer or under the superintendence or authority of His Majesty's Stationery Office.

'(3) In any Act passed after the commencement of this Act a description or citation of a portion of another Act shall, unless the contrary intention appears, be construed as including the word, section, or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.'

Effect of Repeal.—By sect. 11: '(1) Where an Act passed after the year 1850, whether before or after the commencement of this Act (January 1, 189), repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment.

(2) Where an Act passed after the year 1850, whether before or after the commencement of this Act, repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into operation.

By sect. 38: '(1) Where this Act, or any Act passed after the commencement of this Act (January 1, 1890), repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

'(2) Where this Act, or any Act passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

(*n*) See R. *v.* Wood, 5 Jur. 225, *post*, p. 20.

(*o*) For a list of short titles of statutes see Hardcastle on Statutes (4th ed., by Craies), Appendix B.

(*p*) As to the old rule of citation see R. *v.* Biers [1834], 1 A. & E. 327. Gibbs *v.* Pike [1841], 8 M. & W. 223.

'(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

'(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactments so repealed; or

'(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or

'(*d*) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or (*q*)

'(*e*) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed.'

In the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), 'the word "indictment" shall be understood to include "information" (*r*), "inquisition" (*s*), and "presentment" (*t*), as well as "indictment," and also any "plea," "replication," or other pleading, and any "nisi prius record" (*u*), and the term "finding of the indictment" shall be understood to include the "taking of an inquisition," the "exhibiting of an information," and "the making of a presentment"' (sect. 30).

Effect on Common Law or on Prior Legislation.—The effect of sect. 33 of the Interpretation Act, 1889, is to create a presumption (*v*) that offences created by modern Acts are cumulative upon, and not in substitution for, offences at common law or under prior statutes not expressly repealed.

The provision creating a presumption against the right to punish the offender twice for the same offence is in accord with the common law rule (*w*). It appears not to bar a prosecution.

In considering statutes relating to crime it has to be determined whether they override or supplement the common law or prior statutes, and whether the remedies, procedure, or punishments which they enact are exclusive of those existing or alternative to or cumulative on them.

In R. *v.* Thompson (*x*), however, it was held that an indictment

(*q*) Thus the Larceny Act, 1901, does not, by repealing ss. 75, 76 of the Larceny Act, 1861, affect liability to punishment for offences under those sections committed before the time when the Act of 1901 took effect.

(*r*) *i.e.* a criminal information exhibited by the Attorney-General *ex officio* or by leave of the High Court (K.B.D.).

(*s*) *i.e.* a coroner's inquisition. In R. *v.* Ingham, 33 L. J. Q.B. 183, it was held that indictment in s. 6 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), included a coroner's inquisition.

(*t*) By the grand jury of its own act. Such presentments in respect to highways and bridges are now by way of indictment only. See 51 & 52 Vict. c. 43, s. 78 (3).

(*u*) *i.e.* the record made up for trial of an indictment or information originating in or removed into the High Court. See Short & Mellor, Cr. Pr. (2nd ed.) 110.

(*v*) As to what is sufficient to rebut such presumption see Michell *v.* Brown, 28 L. J. M.C. 53; 2 E. & E. 267. Fortescue *v.* Bethnal Green [1891], 2 Q.B. 171, 178.

(*w*) Middleton *v.* Crofts [1736], 2 Atk. 650, 674; R. *v.* Miles, 24 Q.B.D. 423, 431. This subject is discussed *post*, Bk. xii. c. ii. under 'Autrefois convict,' 'Autrefois acquit.'

(*x*) 16 Q.B. 832; *sed quære.* The *ratio decidendi* was that conspiracy was a common law offence.

for conspiracy to violate a statute would lie after the repeal of the statute.

Effect of Repeal of Statutes creating Offences.—'It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed'(*y*). Where, therefore, a justice of the peace, under 13 Geo. III. c. 78, s. 24, presented the inhabitants of a parish for the non-repair of a highway, and the proceedings were removed into the Court of Queen's Bench, and the defendants pleaded, and issues of fact were joined, and a verdict found against the defendants, and the issues had been joined before, but tried after, the day on which the Highway Act, 1835 (*z*) (which repealed 13 Geo. III. c. 78), came into operation, the judgment was arrested, on the ground that the power to give judgment upon a presentment under 13 Geo. III. c. 78 was gone(*a*). So where the liability to repair certain highways in a parish was taken away from the parish by statute, and cast upon certain townships, and the statute gave a form of indictment against the townships for non-repair, and one of the townships was indicted under the statute, but before the trial the statute was repealed, and a verdict was found against the township, the judgment was arrested, on the ground that, although whatever had been done under the Act before it was repealed was valid, the statute when repealed was, with regard to any future operation, as if it had never existed, and the effect of the repeal is the same whether the alteration affects procedure only or matter of substance(*b*). So where a prisoner was indicted for privately stealing in a shop against 10 & 11 Will. III. c. 23, which was repealed (1 Geo. IV. c. 117, s. 1) after the commission, but before the trial, of the offence, it was held that the prisoner could not be sentenced under the repealed Act(*c*), there being no special clause in the repealing Act continuing the repealed Act as to matters arising before the repeal took effect (*d*).

Repealing Acts, however, sometimes contain clauses for the purpose of keeping alive the statutes they repealed so far as they relate to offences committed against them, and in repeals effected after 1889 there is a presumption to this effect(*e*). Where a bankrupt had committed an offence against 12 & 13 Vict. c. 106, s. 251, and an information had been laid before a magistrate for that offence, and a warrant issued for the prisoner's apprehension before 24 & 25 Vict. c. 134 came into operation, which by sect. 230 repealed the former Act, except as to 'any proceeding pending,' &c., 'or any penalty incurred,' &c., at the commencement of the Act, it was held that there was a proceeding pending within the meaning of this exception, and that the word 'penalty' in it extended to any penal consequences whatever, and was not restricted to a pecuniary penalty, and, consequently, that the bankrupt might be convicted and sentenced under the former Act(*f*).

(*y*) Surtees *v.* Ellison, 9 B. & C. 750, Tenterden, C.J. See 52 & 53 Vict. c. 63, ss. 11, 38, *ante*, p. 5.
(*z*) 5 & 6 Will. IV. c. 50.
(*a*) R. *v.* Mawgan, 8 A. & E. 496.
(*b*) R. *v.* Denton, 18 Q.B. 761.
(*c*) R. *v.* M'Kenzie, R. & R. 429.
(*d*) See Miller's Case [1764], 1 W. Bl. 450; 3 Wils. (K.B.) 420.
(*e*) 52 & 53 Vict. c. 63, s. 38(2), *ante*, p. 5. See R. *v.* Webb, 140 Cent. Cr. Ct. Sess. Pap. 627, Walton, J.
(*f*) R. *v.* Smith, L. & C. 131.

CANADIAN NOTES.

INTERPRETATION OF STATUTES.

See the Criminal Code, R.S.C. (1906) ch. 146, sec. 2, for the interpretation of words and phrases used therein.

Every provision of the Interpretation Act (R.S.C. (1906) ch. 1) extends and applies to every Act of the Parliament of Canada except in so far as such provision—

(*a*) Is inconsistent with the intent or object of such Act; or

(*b*) Would give to any word, expression or clause of any such Act an interpretation inconsistent with the context; or

(*c*) Is in any such Act declared not applicable thereto. R.S.C. (1906) ch. 1, sec. 2.

Interpretation of Criminal Statutes.—Penal statutes must be construed strictly, and where an enactment imposes a penalty for a criminal offence, a person against whom it is sought to enforce the penalty is entitled to the benefit of any doubt which may arise in the construction of the enactment. R. v. Wirth, 1 Can. Cr. Cas. 231.

Words and Phrases in Criminal Code.—See 11 Can. Cr. Cas., pp. 375-379; 12 Can. Cr. Cas. 583, 13 Can. Cr. Cas. 541.

The part headings of the Code are to be regarded as preambles to statutes. R. v. Brooks, 5 Can. Cr. Cas. 372.

"Bank Note," a forged paper purporting on the face of it to be a bank note is within the statute, although there be no such bank as named. R. v. Macdonald, 12 U.C.Q.B. 543.

"Everyone" includes bodies corporate unless the context requires otherwise. Union Colliery Company v. The Queen, 4 Can. Cr. Cas. 407.

"Capable of being stolen" (in Code sec. 354) includes anything capable of being stolen by anybody, not merely by the accused. R. v. Gildstaub, 5 Can. Cr. Cas. 357.

"Person" includes "bodies corporate" and "companies," but a corporation cannot be indicted for manslaughter. R. v. Great West Laundry Co., 3 Can. Cr. Cas. 5, at p. 519.

"Everyone" is a wider term than "person." Union Colliery v. The Queen, 4 Can. Cr. Cas., at p. 407.

A small room used for temporary detention of persons is not included in the phrase "a common gaol or prison." In re Burke (1894), 27 N.S.R. 286.

Valuable Security.—It was formerly held that the term "valuable security" meant a valuable security to the person who parted with it on the false pretence, and that the inducing a person to execute a mortgage on his own property was therefore not obtaining a "valuable security." R. v. Brady (1866), 26 U.C.Q.B. 13; but the definition in Criminal Code expressly includes any deed, bond, etc., which evidences title.

Defendant was indicted for forging an order for the payment of money, the order being in the following words: "John McLean, tailor, please give M. A. S. (defendant) to the amount of $3.50 and by doing you will oblige me, A. McP." It was proved that the signature A. McP. was forged by the prisoner, and the prisoner was convicted and sentenced. It was held that this was an order for the payment of money, and not a mere request, and the conviction was affirmed. R. v. Steele (1863), 13 U.C.C.P. 619 (following R. v. Tuke (1858), 17 U.C.Q.B. 296).

The true criterion as to whether a document is an order for payment of money or only a request, is, whether, if the instrument were genuine, and the person to whom it was directed paid it, he could recover the amount from the party by whom the order was given, or charge it to him, for if such be the case it is an order. R. v. Carter, 1 Cox 172; R. v. Ferguson, 1 Cox 241; R. v. Dawson, 3 Cox 220; R. v. Vivian, 1 Den. C.C. 35.

CHAPTER THE SECOND.

OF INDICTABLE OFFENCES.

OFFENCES which may be made the subject of indictment, and are below the crime of treason (*w*), fall into two classes, *felonies* and *misdemeanors*.

1. **Felony—Common Law.**—Felony is the common-law term employed to describe the graver crimes known to the common law below the degree of high treason or petty treason (*x*). The term has long been used to signify the degree or class of crime committed, rather than the penal consequences by way of forfeiture entailed by its commission. But the proper definition at common law appears to be—an offence (triable by indictment only at common law) which occasions a total forfeiture of either lands or goods, or both (*y*), at the common law; to which capital or other punishment *may be* superadded according to the degree of guilt (*z*). Capital punishment is not an essential element in the original definition, but was long so closely associated with felony that until 1827, if a statute made a new offence felony, the law implied that it should be punished not merely by forfeiture, but also by death (*a*), subject to the right of benefit of clergy (*b*), unless that were expressly denied by statute (*c*). This is merely a particular instance of the rule that where a statute describes a new offence as felony, it thereby by necessary consequence gives to the offence the like incidents that belong to a felony by the rules and principles of the common law or general statutory provisions. The chief of these incidents are:

1. Punishment (*d*).
2. The liability of persons aiding and abetting, committing or

(*w*) Treason (which is only incidentally treated in this work) is sometimes described as a form of felony (see 60 & 61 Vict. c. 18, s. 1); but the procedure for trial of treason is by statute different. See Archbold, Cr. Pl. (23rd ed.) 928; 1 Hawk. c. 17; 2 Stephen, Hist. Crim. Law, 241; Steph. Dig. Cr. Law (6th ed.), arts. 52-62; *Parl. Pap.* 1878, H. L. (No. 178), Report by Mr. R. S. Wright on Acts relating to Treason. As to piracy, see *post*, tit. 'Piracy,' p. 255.

(*x*) Now merged in murder: 24 & 25 Vict. c. 100, s. 8.

(*y*) These forfeitures were abolished in 1870, except in the case of outlawry: see 33 & 34 Vict. c. 23, s. 1.

(*z*) 4 Bl. Com. 95; and see 1 Hawk. c. 25, s. 1. In Scots law 'the higher crimes, rape, robbery, murder, arson, &c., were called felony, and, being interpreted want of fidelity to his lord, made the vassal lose his fief.' 2 Hume, App. ii. p. 129. The derivation of 'felony' is uncertain. It is by some traced to the Low Latin *fello* (Ital. *fellone*); by others to *feah* or *fie*, 'fief or estate,' and *lon*, 'price or value,' and is by them said to mean *pretium feudi*. See Spelm. Glos. *s.v.* 'Felon'; Murray, Dict. Eng. Lang. *s.v.*; 4 Bl. Com. 95.

(*a*) 4 Bl. Com. 98. R. *v.* Johnson, 3 M. & S. 539.

(*b*) Abolished in 1827. *Vide post*, p. 205n.

(*c*) 7 & 8 Geo. IV. c. 28, s. 8, *post*, p. 246, which overrides the common-law presumption in favour of capital punishment (which applied to all felonies except petty larceny and mayhem) by laying down a rule for the punishment of felonies not specifically punishable by other statutes.

(*d*) *Vide post*, p. 246. The result of legislation in the nineteenth century has been to make the punishment of every felony depend upon some statute.

procuring the new felony to be convicted as principals in the second degree (*e*), or accessories before the fact (*f*).

3. Liability to arrest without warrant.
4. Liability to indictment.
5. The right of peremptory challenge of twenty of the jurors summoned to try the indictment (*g*).

Felony—Statutes.—No statutory offence is treated as a felony unless it is made so by express words or necessary implication. Not only those crimes which are made felonies by express words in a statute, but also all those which are by statute decreed to have or undergo judgment of life and member become felonies thereby, whether the word '*felony*' be omitted or mentioned (*h*). And a statute which declares that the offender shall, under the particular circumstances, be deemed to have *feloniously* committed the act, makes the offence a felony, and imposes all the common and ordinary consequences attending a felony (*i*). So where a statute says that an offence, previously a misdemeanor, 'shall be deemed and construed to be a felony,' instead of declaring it to be a felony in distinct and positive terms, the offence is thereby made a felony (*j*). An enactment that an offence shall be felony, which was felony at common law, does not create a new offence (*k*). An offence is not to be made felony by the construction of doubtful and ambiguous words in a statute; and therefore, if it be prohibited under 'pain of forfeiting all that a man has,' or of 'forfeiting body and goods,' or of being 'at the king's will for body, land, and goods,' the offence created is only a misdemeanor (*l*). Where a statute has made the doing of an act *felonious*, if a subsequent statute make it *penal* only, the latter statute is considered as virtually repealing the former, so far as relates to the punishment of the offence (*m*). Thus, where a statute (9 Geo. I. c. 22) made an offence punishable with death and a subsequent statute (16 Geo. III. c. 30) imposed a forfeiture of £20 for the same offence when first committed, recoverable before justices of the peace, and made the second offence felony, the latter statute was held to be a virtual repeal of the former (*n*). 'Where a later statute again describes an offence which had been previously created by a former statute, and affixes a different punishment to it, and varies the procedure, or if the later enactment expressly alters the quality of the offence, as by making it a misdemeanor instead of a felony (*o*), or a felony instead of a misdemeanor (*p*), the later enactment must be

(*e*) The Coal-heavers' case, 1 Leach, 64; 1 East, P.C. 343.

(*f*) R. *v.* James, 24 Q.B.D. 439. As to accessories after the fact see 1 Hale, 613, 614, 704; 3 Co. Inst. 59; and 24 & 25 Vict. c. 94, s. 4, *post*, p. 131.

(*g*) Gray *v.* R., 11 Cl. & F. 427; 6 St. Tr. N. S. 117. 6 Geo. IV. c. 50, s. 29 (E). 7 & 8 Geo. IV. c. 28, s. 3 (E). As to colonies see Levinger *v.* R., L. R. 3 P.C. 282.

(*h*) 1 Hale, 703; 1 Hawk. c. 40, s 2. R. *v.* Horne, 4 Cox, 263, Patteson, J. This was an indictment on 5 Geo. IV. c. 84, s. 22, which enacts that persons at large in the United Kingdom during the term of a sentence of transportation 'shall suffer death as in cases of felony without benefit of clergy.' The indictment was held bad for omitting the word 'feloniously.'

(*i*) R. *v.* Johnson, 3 M. & S. 539, 556, Bayley, J.

(*j*) R. *v.* Salomons, 1 Mood. 292, overruling R. *v.* Cale, 1 Mood. 11.

(*k*) R. *v.* Williams, 7 Q.B. 253, Patteson, J.

(*l*) 1 Hawk. c. 40, s. 3.

(*m*) 1 Hawk. c. 40, s. 5.

(*n*) R. *v.* Davis, 1 Leach, 271.

(*o*) Id ibid.

(*p*) See R. *v.* Cross, 1 Ld. Raym. 711; 3 Salk. 193. It has been held, notwithstanding R. *v.* Cross, that an indictment

taken as operating by way of substitution (and implied repeal) and not cumulatively' (*q*).

Where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence has been committed after a conviction for the first; and unless this is stated in the indictment, the offence is punishable as a first offence (*q*).

2. **Misdemeanor.**—The word *misdemeanor* is applied to all offences (whether at common law or by statute) which are below the degree of felony, whether they are punishable on indictment or on summary conviction. They may be punished, according to the character of the offence, by fine or imprisonment, or both (*r*). The word is generally used in contradistinction to felony, and includes such offences as perjury, battery, libel, conspiracy, and public nuisance (*s*). Misdemeanors have been sometimes termed *misprisions:* indeed, the word misprision, in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the law; and it is said that a misprision is contained in every treason or felony whatsoever, and that a person guilty of felony or treason may be proceeded against for a misprision only, if the king please (*t*).

The term misdemeanor applies not only to completed offences below the degree of felony, but also to attempts (*u*), or incitements (*v*), or conspiracies (*w*) to commit a complete felony or misdemeanor which do not result in the commission of the full offence. An indictment lies at common law for all kinds of *inferior crimes* of a *public nature*, as misprisions, and all other contempts (*x*), all disturbances of the peace, oppressions, or misbehaviour by public officers (*y*), and all other misdemeanors whatsoever of a *public* evil example against the common law (*z*). An indictment will lie for contempt of court by attacking courts of justice or attempting to obstruct the course of justice (*a*): but it seems doubtful whether every contempt is indictable. In an early case, Holt, C.J., said: 'If a witness be insolent we may commit him for the immediate contempt or bind him to his good behaviour, but we cannot indict him' (*b*). It seems, however, to be established that whatever openly outrages decency and is injurious to public morals, is a misdemeanor at common law (*c*). Thus the exposure of a man's person in a public place is indictable (*d*).

will lie for receiving as a misdemeanor in cases not falling within 24 & 25 Vict. c. 96, s. 91. R. *v.* Payne [1906], 1 K.B. 97.

(*q*) Michell *v.* Brown, 2 E. & E. 267, Campbell, C.J. Cf. Henderson *v.* Sherborne, 2 M. & W. 236, 239. As to alternative remedies under different enactments *vide ante*, pp. 4, 6.

(*r*) Burn's Justice (30th ed.), tit. 'Misdemeanor,' citing Barlow's Justice, tit. 'Misdemeanor.' See *post*, c.vii. 'Punishment,' p. 249.

(*s*) 4 Bl. Com. 5, note 2. Burn's Justice (30th ed.), tit. 'Misdemeanor.'

(*t*) 1 Hawk. c. 20, s. 2, and c. 59, ss. 1, 2. Burn's Justice, tit. 'Felony.'

(*u*) *Post*, p. 140.

(*v*) *Post*, p. 203.

(*w*) *Post*, p. 146.

(*x*) *Post*, p. 537.

(*y*) *Post*, p. 601.

(*z*) 2 Hawk. c. 25, s. 4.

(*a*) R. *v.* Tibbits [1902], 1 K.B. 77. R. *v.* Gray [1900], 2 Q.B. 36. *Vide post*, Bk. vii. p. 537, and Oswald on Contempt (2nd ed.), chap. i.

(*b*) R. *v.* Rogers, 7 Mod. 28. See R. *v.* Nun, 10 Mod. 186.

(*c*) 4 Bl. Com. 65n.; 1 Hawk. c. 5, s. 4; 1 East, P.C. p. 3.

(*d*) R. *v.* Sedley, 1 Sid. 108; 3 Keb. 620. R. *v.* Holmes, Dears. 207. *Vide post*, Bk. xi. c. vi.

Breach of Statute—Test of Indictability.—In R. *v.* Hall (*e*), Charles, J., adopted the rule laid down in 2 Hawk. c. 25, s. 4, that 'it seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it' (*f*); and the law as laid down in R. *v.* Hall has been accepted as correct (*g*).

Where an act or omission, which is not an offence at common law is made punishable by a statute, the questions arise whether the criminal remedies are limited to the particular remedy given by the terms of the statute, or, in other words, whether the remedy given by the statute is exclusive of or alternative to other remedies given by other statutes or the common law. It has been laid down that where an act or omission is not an offence at common law, but is made an offence by statute, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given (*h*). 'Where a duty is created by statute which affects the public as the public, the proper mode if the duty is not performed is to indict or take the proceedings provided by the statute' (*i*). Thus, an unqualified person may be indicted for acting as an attorney contrary to the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 2, although sect. 35 and sect. 36 enact, that in case any person shall so act he shall be incapable of recovering his fees, and that such offence shall be deemed a contempt of court and punishable accordingly (*j*). And a clerk to borough justices has been held liable to indictment for being interested in the prosecution of offenders committed by borough justices, as he was not liable to the particular penalty prescribed by sect. 102 of the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76) (*k*). When a new offence is created by statute, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanor (*l*). And wherever a statute *forbids* the doing of a thing,

(*e*) [1891] 1 Q.B. 747, 753.

(*f*) See 1 Hawk. c. 22, s. 5; 2 Hawk. c. 25, s. 4.

(*g*) Saunders *v.* Holborn District Bd. of Works [1895], 1 Q.B. 64.

(*h*) R. *v.* Wright, 1 Burr. 543. R. *v.* Gregory, 5 B. & Ad. 555. R. *v.* Crossley, 10 A. & E. 132. R. *v.* Walker, 44 L. J. M.C. 169. R. *v.* Hall [1891], 1 Q.B. 747, 770, Charles, J.

(*i*) Clegg *v.* Earby Gas Co. [1896], 1 Q.B. 362, Wills, J. See Att.-Gen. v. L. N. W. R. [1900], 1 Q.B. 78.

(*j*) R. *v.* Buchanan, 8 Q.B. 883.

(*k*) Fox *v.* R., 29 L. J. M.C. 54 (Ex. Ch.).

(*l*) R. *v.* Harris, 4 T. R. 205, Ashhurst, J. And this principle has been held to apply where the clause annexing the penalty was in the same section of the statute. Thus 5 Eliz. c. 4, s. 31 (rep.) enacted, 'that *it shall not be lawful* to any person to set up, &c., any craft, mystery, &c., except he shall have been brought up therein seven years as an apprentice,' &c., *upon pain* that every person willingly offending or doing the contrary forfeit for every default forty shillings for every month; and the method of proceeding upon this statute was either by information *qui tam* in the court of oyer and terminer or sessions of the county, &c., where the offence was committed, to recover the penalty, or by *indictment* in those courts. But it should be observed that a subsequent section (39) gave authority to proceed by *indictment*, or by information, &c. See the cases collected in the note to

the doing it wilfully, although without any corrupt motive, is indictable (*m*). Thus, under 3 & 4 Vict. c. 97, s. 15 (rep.), which made it a misdemeanor if any person 'shall wilfully do, or cause to be done, anything in such a manner as to obstruct any engine or carriage using any railway, Maule, J., held, that if a person designedly placed on a railway substances having a tendency to produce an obstruction, he was within the Act, and that it was not necessary that he should have placed them there expressly with the view to obstruct an engine (*n*). It has also been ruled that if a statute *enjoins* an act to be done, without pointing out any mode of punishment, an indictment lies for disobeying the injunction of the Legislature (*o*). Thus, the father of a child was indictable if, being requested by the registrar within forty-two days of its birth so to do, he wilfully refused to inform the registrar of the particulars required by the Act to be registered touching the birth, contrary to sect. 20 of the Births and Deaths Registration Act, 1836 (6 & 7 Will. IV. c. 86) (*p*). And the remedy by indictment in such a case is not taken away by a *subsequent statute* pointing out a particular mode of punishment for such disobedience (*q*). Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as commitment, in case of neglect or refusal, it has been doubted whether an indictment will lie (*r*). But 'all that the authorities establish' on this point is that where there is a substantial general prohibition or command in one clause and there is a subsequent clause which prescribes a specific remedy, the remedy by indictment is not excluded (*s*). Where a statute only adds a further penalty to an offence prohibited by the common law, the offender may still be indicted at the common law (*t*); and if a statute gives a new punishment or new mode of proceeding for what before was a misdemeanor, without altering the class or character of the offence, the new punishment or new mode of proceeding is alternative only, and the offender may be proceeded against as before for the common-law misdemeanor (see sect. 33 of the Interpretation Act, 1889, *ante*, pp. 4 & 6).

R. *v.* Kilderby, 1 Wms. Saund. 312. See also Morris *v.* Loughborough Corporation [1908], 1 K.B. 205.

(*m*) R. *v.* Sainsbury, 4 T. R. 457, where it was held to be a misdemeanor in magistrates to grant an ale licence where they had no jurisdiction. See R. *v.* Nott, 4 Q.B. 768, Denman, C.J.

(*n*) R. *v.* Holroyd, 2 M. & Rob. 339; and see Jones *v.* Taylor, 1 E. & E. 20, as to the meaning of the words '*wilfully* trespass' in 3 & 4 Vict. c. 97, s. 16.

(*o*) R. *v.* Davis, Say. 163, discussed in R. *v.* Robinson, 2 Burr. 803 (refusal to receive a pauper removed under an order of justices). See also R. *v.* Harris, 4 T. R. 202.

(*p*) R. *v.* Price, 11 A. & E. 727. Sect. 20 was repealed in 1874, and replaced by s. 39 of the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), which makes the refusal an offence punishable on summary conviction.

(*q*) R. *v.* Boyall, 2 Burr. 832. R. *v.* Balme, 2 Cowp. 648, cited 2 Hawk. c. 25, s. 4, *in notis*. And, generally speaking, the Court of King's Bench cannot be ousted of its jurisdiction save by express words, or by necessary implication. Cates *v.* Knight, 3 T. R. 445, Ashhurst, J.

(*r*) R. *v.* Cummings, 5 Mod. 179. R. *v.* King, 2 Str. 1268, cases of indictments against overseers for neglecting to account, and for not paying over the balance within the time limited by the statute. See Couch *v.* Steel, 3 E. & B. 402. In 2 Nolan, P. L. 453, it is stated that an indictment will lie in these cases, though the statute provides another remedy by commitment. See cases there cited. As to modern statutes see 52 & 53 Vict. c. 63, s. 33, *ante*, p. 4.

(*s*) R. *v.* Hall [1891], 1 Q.B. 747, 770, Charles, J.

(*t*) 2 Hawk. c. 25, s. 4. R. *v.* Wigg, Ld. Raym. 1163; 2 Salk. 460. And see the cases collected in R. *v.* Dickenson, 1 Wms. Saund. 135*b*, note (4).

Therefore, notwithstanding the provisions of the Blasphemy Act, 1697 (9 & 10 Will. III. c. 35; Ruffhead, c. 32), it was held that a blasphemous libel might be prosecuted at common law (*u*). Where a statute makes that felony which before was a misdemeanor only, the misdemeanor is merged, and there can be no prosecution afterwards for the misdemeanor (*v*).

It is an offence at common law to obstruct the execution of powers granted by statute (*w*). But where a public Act merely regulates private rights, an indictment will not lie for the infringement of those rights: as, if a statute empowers the setting out of private roads and the directing their repairs, an indictment does not lie for not repairing them (*x*).

Disobedience of the orders of a competent tribunal is in most cases an indictable misdemeanor at common law (*y*), and where a statute empowered the King in Council to make an order as to quarantine, and did not annex any specific punishment for disobedience, the disobedience was held to be a misdemeanor indictable at common law (*z*). By the 'Epping Forest Amendment Act, 1872,' s. 5, the Epping Forest commissioners may make orders prohibiting, until after their final report, any inclosure or waste of land within the forest, subject, in their judgment, to any forestal or common rights. The commissioners made a general order prohibiting all persons from committing waste upon a piece of land described until the final report, or until further order; all persons affected to be at liberty to apply to them as there might be occasion. The defendant applied to the commissioners by counsel as a person affected, but they refused to enter into the question raised. The defendant was convicted upon an indictment for breach of this order, subject to the opinion of the Court of Queen's Bench, which held that the order and indictment were good (*a*).

In the case of acts commanded or prohibited by statute, three questions arise: whether the statute intended the remedy to be (1) by indictment, or (2) by civil proceedings, or (3) by some or other specified exclusive or alternative statutory remedy. As to certain classes of acts commanded or forbidden by statute in the public interest, the question arises whether the remedy by indictment is excluded by a particular remedy given by the statute, or is cumulative upon the statutory remedy (*b*). The true rule is stated to be this: 'Where the offence was punishable by a common-law proceeding, *before* the making of such statute prescribing a particular mode of punishing it, then either method may be pursued, as the particular remedy is *cumulative*, and does not exclude the common-law punishment; but where the statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a particular remedy against such new offence by a particular sanction and particular method of proceeding, such method of proceeding

(*u*) R. *v.* Carlisle, 3 B. & Ald. 161, 164.

(*v*) See R. *v.* Payne [1906], 1 K.B. 97, 101. R. *v.* Gregory, L. R. 1 C. C. R. 77, and *ante*, p. 9.

(*w*) R. *v.* Smith, 2 Dougl. 441.

(*x*) R. *v.* Richards, 8 T. R. 637.

(*y*) R. *v.* Robinson, 2 Burr. 799, 804; and *vide post*, Bk. vii. p. 542.

(*z*) R. *v.* Harris, 4 T. R. 269. See hereon R. *v.* Hall [1891], 1 Q.B. 747.

(*a*) R. *v.* Walker, 13 Cox, 94, where the form of indictment used is given.

(*b*) The term 'cumulative' with respect to this subject seems first to have been used by Lord Mansfield, C.J., in R. *v.* Robinson, 2 Burr. 799, 803, 805. 'Alternative' would be a happier expression, so far as concerns criminal remedies.

must be pursued and no other (*c*). The mention of other methods of proceeding impliedly excludes that of indictment (*d*); unless such methods of proceeding are given by a separate and substantive clause (*e*). Thus it is now settled (*f*), that where a statute making a new offence, not prohibited by the common law, appoints in the same clause a particular manner of proceeding against the offender, as by commitment or action of debt or information, without mentioning an indictment, no indictment can be maintained (*g*). It was decided on 21 Hen. VIII. c. 13, s. 1, which provides that no spiritual person shall take land to farm on pain to forfeit £10 per month; that as the clause prohibiting the act specified the punishment, the defendant was not liable to be indicted (*h*). And it was held not to be an indictable offence to keep an ale-house without a licence, because a particular punishment, namely, commitment by two justices, was provided by the statute (*i*). And an indictment for assaulting and beating a custom-house officer in the execution of his office was quashed, because 13 & 14 Car. II. c. 11, s. 6, appointed a particular mode of punishment for that offence (*j*). So an indictment will not lie against an overseer for wilful breaches of the duties imposed upon him by the Registration of Electors Act, 1843, in preparing and publishing voters' lists, inasmuch as the sections prescribing those duties contain no general prohibitory clause, and sect. 51 gives the revising barrister power to fine overseers for wilful breaches of duty, and sect. 97 gives the party aggrieved the right to bring a penal action against the overseer for every wilful misfeasance or wilful act of commission or omission contrary to the Act (*k*).

Matters not indictable at Common Law.—An indictment will not lie in respect of injuries of a private nature to individuals unless they in some way concern the King (*l*), or are accompanied by acts amounting to a breach of the peace (*m*). Thus an indictment did not lie for excluding commoners from a common by enclosing (*n*), or for infringing the rights of the inhabitants of a particular district (*o*), nor for acting, not

(*c*) R. *v.* Robinson, 2 Burr. 799, 805. R. *v.* Carlisle, 3 B. & Ald. 163. R. *v.* Boyall, 2 Burr. 832. See also Hartley *v.* Hooker, 2 Cowp. 524. R. *v.* Balme, 2 Cowp. 650. And see R. *v.* Faulkner, 1 Wms. Saund. 250*e*, note (3). See, however, R. *v.* Wright, 1 Burr. 543. R. *v.* Douse, 1 Ld. Raym. 672. R. *v.* Hall [1891], 1 Q.B. 747, *ante*, p. 11.

(*d*) 2 Hawk. c. 25, s. 4.

(*e*) *Ante*, p. 11; and see R. *v.* Briggs [1909], 1 K.B. 381; 78 L. J. K.B. 116.

(*f*) 2 Hawk. c. 25, s. 4. Glass's case, 3 Salk. 350.

(*g*) R. *v.* Hall [1891], 1 Q.B. 747.

(*h*) R. *v.* Wright, 1 Burr. 543.

(*i*) Anon., 3 Salk. 25. Watson's case, 1 Salk. 45. R. *v.* Edwards, 3 Salk. 27. R. *v.* Faulkner, 1 Wms. Saunders 248, 250*e*, note (3).

(*j*) Anon., 2 Ld. Raym. 991; 3 Salk. 189. So an indictment for keeping an ale-house was quashed, because 3 Car. I, c. 3, directed a particular remedy. R. *v.* James, cited in R. *v.* Buck, 1 Str. 679. R. *v.* Malland, 2 Str. 828.

(*k*) R. *v.* Hall [1891], 1 Q.B. 747; 17 Cox, 278, Charles, J.

(*l*) 2 Hawk. c. 25, s. 4. R. *v.* Richards, 8 T. R. 637. This distinction is stated also to have been taken in R. *v.* Bembridge & Powell ([1783], 22 St. Tr. 1, cited in R. *v.* Southerton, 6 East, 136), an indictment for enabling persons to pass their accounts with the pay-office in such a way as to enable them to defraud the Government. It was objected, that this was only a private matter of account, and not indictable: but the Court held otherwise, as it related to the public revenue.

(*m*) R. *v.* Bake, 3 Burr. 1731, where an indictment for forcible entry was quashed for lack of allegations as to breach of the peace, the indictment merely alleging a breaking and entering of the close of another.

(*n*) Willoughby's case [1588], Cro. Eliz. 90.

(*o*) See R. *v.* Hogan, 2 Den. 277; 20 L. J. M.C. 219; *post*, p. 16.

being qualified, as a justice of peace (*p*); nor for giving short measure (*q*); nor for an attempt to defraud, if neither by false tokens or conspiracy (*r*); nor for secreting another (*s*); nor for bringing a bastard child into a parish (*t*); nor for entertaining idle and vagrant persons in the defendant's house (*u*); nor for keeping a house to receive women with child, and deliver them (*v*); nor for enticing away an apprentice (*w*).

An indictment alleging that the prisoner contriving to injure the inhabitants of a parish, and unjustly to burthen them with the maintenance of her bastard child, being of very tender age and unable to move

(*p*) Castle's case, Cro. Jac. 644.

(*q*) R. *v.* Osborn, 3 Burr. 1697; but selling *by false measure* is indictable. Ibid.

(*r*) R. *v.* Channell, 2 Str. 793 (an indictment against a miller for taking and detaining part of the corn sent to him); and R. *v.* Bryan, 2 Str. 866. Anon., 6 Mod. 105. R. *v.* Wheatly, 2 Burr. 1125 (indictment of a brewer for delivering less beer than contracted for, held bad). R. *v.* Wilders, 2 Burr. 1128 (cit.) (indictment against a brewer for sending vessels of beer falsely marked as containing more than they in fact did, quashed). R. *v.* Pinkney [1730], 2 Sess. Cas. K.B. (2nd ed.) p. 198 (indictment for selling corn by false measure, quashed). In R. *v.* Haynes, 4 M. & S. 214, an indictment was found against a miller, for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome. For the prosecution was cited a note in 1 Hawk. c. 71, s. 1, referring to R. *v.* Wood [1740], 2 Sess. Cas. K.B. (2nd ed.) p. 277, where it is laid down, that changing corn by a miller, and returning bad corn instead of it, is punishable by indictment; for, being in the way of trade, it is deemed an offence against the public: but it was held that the indictment would not lie. Ellenborough, C.J., in giving judgment, said, that if the allegation had been that the miller delivered the mixture as an article for the food of man, it might possibly have sustained the indictment, but that he could not say that its being musty and unwholesome necessarily and *ex vi termini* imported, that it was for the food of man; and it was not stated that it was to be used for the sustentation of man, but only that it was a mixture of oat and barley meal. He added: 'As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, if the case had been that this miller was owner of a soke-mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it now is, it seems to be no more than the case of a common tradesman, who is guilty of a fraud in a matter of trade or dealing; such as is adverted to in R. *v.* Wheatley, and the other cases, as not being indictable.' And see also R. *v.* Bower, 1 Cowp. 323, as to the point that for an imposition, which a man's own prudence ought to guard him against, an indictment does not lie, but he is left to his civil remedy. But in R. *v.* Dixon, 3 M. & S. 11, it was held, that a baker who sells bread containing alum, in a shape which renders it noxious, is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in the manner which would have rendered it harmless.

(*s*) R. *v.* Chaundler, 2 Ld. Raym. 1368; an indictment for secreting A., who was with child by the defendant, to hinder her evidence, and to elude the execution of the law for the crime aforesaid. *Sed quære.*

(*t*) R. *v.* Warne, 1 Str. 644, it appearing that the parish could not be burthened, the child being born out of it. But see a precedent of an indictment for a misdemeanor at common law, in lodging an inmate, who was delivered of a bastard child, which became chargeable to the liberty. 2 Chit. Cr. L. 700. And see also id. 699, 4 Wentw. 353, and Cro. Circ. Comp. (7th edit.) 648, precedents of indictments for misdemeanors at common law, in bringing such persons into parishes in which they had no settlements, and in which they shortly died, whereby the parishioners were put to expense. In one case it is stated to have been held, that no indictment will lie for procuring the marriage of a female pauper with a labouring man of another parish, who is not actually chargeable. R. *v.* Tanner, 1 Esp. 304. But if the facts of the case will warrant a charge of conspiracy, the offence would be substantiated, if under the circumstances the parish might possibly be put to expense. See 1 Nolan, P. L. Settlement by Marriage, s. I. in the notes. R. *v.* Seward, 1 A. & E. 706; 3 N. & M. 557.

(*u*) R. *v.* Langley, 2 Ld. Raym. 790.

(*v*) R. *v.* Macdonald, 3 Burr. 1645.

(*w*) R. *v.* Daniel, 1 Salk. 380.

or walk, unlawfully did abandon the said child in the said parish without having provided any means for the support of the said child, the said child not being settled in the said parish, was held bad, because the mere abandonment, the possible consequence of which might be to injure the parish, was not indictable (*x*).

Where an indictment stated that the prisoner intending to burthen the inhabitants of a parish with the maintenance of her bastard child abandoned the said child in the said parish, and it appeared that the prisoner left the child in a dry ditch in a field in the parish; there was a pathway in the field by the ditch, and a lane separated from the ditch by a hedge neither of which was much frequented; Parke, B., held that there was no ground for imputing any intention to burthen the parish, as it was not placed in a position where it was likely to come to the knowledge of the officers of the parish (*y*).

The administration of a poisonous ingredient with intent to hurt and damage the body of another, whereby sickness and disorder of his body is caused, was not indictable at common law (*z*), but such an act is punishable under 24 & 25 Vict. c. 100, s. 24 (*post*, Bk ix. c. iv.).

Cases of *non-feasance and particular wrong* done to another are not in general the subject of indictment; and it has been doubted whether a clergyman is indictable for refusing to marry persons who were lawfully entitled to be married (*a*); but circumstances may exist of mere *non-feasance* towards a bedridden or helpless person or a child of tender years (such as the neglect or refusal to provide sufficient food and sustenance for such person being under the charge of the accused), which may amount to an indictable offence at common law if death or serious injury to health results from the neglect (*b*).

Where a mayor of a city, being a justice, made an order that a company in the city should admit one to be a freeman of that corporation, and the master of the company, being served with the order, refused to obey it, such refusal was not the subject of indictment (*c*). And an indictment will not lie for not curing a person of a disease according to promise, for it is not a public offence, and no more in effect than a ground for an action (*d*). To keep an open shop in a city, not being free of the city, contrary to the immemorial custom there, has been held not to be indictable (*e*).

Trespasses.—A mere act of trespass (such as entering a yard and digging the ground, and erecting a shed or cutting a stable) committed by one person, unaccompanied by any circumstances constituting a breach of the peace, is not indictable (*f*). And an indictment was held

(*x*) R. *v.* Hogan, 2 Den. 277. The indictment was also held bad, because it did not allege that the child suffered any injury.

(*y*) R. *v.* Renshaw, 2 Cox, 285.

(*z*) R. *v.* Hanson, 2 C. & K. 912, Williams and Cresswell, JJ. As to infecting another with an infectious or contagious disorder, see R. *v.* Clarence, 22 Q.B.D. 23.

(*a*) R. *v.* James, 2 Den. 1. The point was not decided, as there had been no sufficient demand to marry.

(*b*) R. *v.* Instan [1893], 1 Q.B. 450.

(*c*) R. *v.* Atkinson, 3 Salk. 188.

(*d*) R. *v.* Bradford, 1 Ld. Raym. 366; 3 Salk. 189. In an Anon. case, 2 Salk. 522, it appears to have been held, that if a pawnbroker refuses, upon tender of the money, to deliver the goods pledged, he may be indicted. But see R. *v.* Jones, 1 Salk. 379, *contra*.

(*e*) R. *v.* Gorge, 3 Salk. 188. Nor is it an indictable offence to exercise trade in a borough contrary to the bye-laws of that borough. R. *v.* Sharpless, 4 T. R. 777.

(*f*) R. *v.* Storr, 3 Burr. 1698. The indictment was quashed on motion. Cf. R. *v.* Bake, ibid. 1731, an indictment for breaking the close of another.

not to lie against one person for pulling off the thatch from the house of another, who was in peaceable possession (*g*). An indictment for taking away chattels will not lie unless it states or imports that such a degree of force was used as made the taking an offence against the public. Where an indictment averred that the defendant with force and arms unlawfully, forcibly, and injuriously seized, took, and carried away, of and from J. S., and against his will, a paper-writing purporting to be a warrant to apprehend the defendant for forgery, Perryn, B., held that the indictment was not valid, as it charged nothing but a mere private trespass, and neither the King nor the public appeared to have any interest therein (*h*).

But where an indictment stated the entering a dwelling-house, and *vi et armis and with strong hand* turning out the prosecutor, the Court refused to quash it (*i*). And an indictment will lie for taking goods forcibly, if such taking is proved to be a breach of the peace (*j*) : and though such goods are the prosecutor's own property, yet, if he takes them in that manner, he will be guilty (*k*).

Besides the common-law remedy by indictment for treason, felony, or misdemeanor, there are also the following other remedies :—

Coroner's Inquisition.—An inquisition taken by a coroner and his jury charging wilful murder or manslaughter (*l*), or concealment of treasure trove (*m*), is equivalent to an indictment for such offence.

Criminal Information.—Misdemeanors (but not treasons or felonies) may be prosecuted in the High Court of Justice without the intervention of a grand jury, on information filed *ex officio* by the Attorney-General (*n*), or on information filed by the King's Coroner and Attorney by leave of the Court (*o*). This remedy is now regarded as extraordinary, and is rarely used (*p*). The procedure is regulated by the Crown Office Rules, 1906, rr. 35–39, 79, 83, 84.

Summary Proceedings.—In the case of a very large number of offences newly created by statute the sole criminal remedy is by proceedings for a summary conviction under the Summary Jurisdiction Acts, 1848 to 1899, as amended by the Children Act, 1908 (8 Edw. VII. c. 67): and there is also much legislation giving power to convict summarily of certain forms of offence, particularly public nuisances, which at common law are punishable only on indictment. The power to convict summarily of the latter class of offence is alternative to and not exclusive of the power to indict (*q*).

Election to be tried on Indictment.—By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17, subs. 1, 'A person when charged before a Court of Summary Jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months (*r*), *and which is not an assault*, may, on appearing before the Court and before the charge is

(*g*) R. *v.* Atkins, 3 Burr. 1706.
(*h*) R. *v.* Gardiner, Salisbury, 1780, MS. Bayley, J.
(*i*) R. *v.* Storr, 3 Burr. 1698.
(*j*) Anon., 3 Salk. 187.
(*k*) Ibid. See Blades *v.* Higgs, 10 C.B. (N. S.) 713; 12 C.B. (N. S.) 501; 11 H. L. C. 621.
(*l*) See the Coroners Act, 1887 (50 & 51 Vict.), c. 71.
(*m*) *Vide post*, Bk. iv. p. 339.
(*n*) Short & Mellor, Cr. Pr. (2nd ed.) 151. Archb. Cr. Pl. (23rd ed.) 142.
(*o*) 4 & 5 W. & M. c. 18. Short & Mellor, Cr. Pr. (2nd ed.) 151. Archb. Cr. Pl. (23rd ed.) 144.
(*p*) See Archbold, Cr. Pl. (23rd ed.) 145. Encyc. Laws of England (2nd ed.) vol. vii. tit. 'Information,' p. 201.
(*q*) *Vide post*, Bk. xi. cc. iii. iv.
(*r*) See Carle *v.* Elkington, 17 Cox, 557.

gone into, but not afterwards, claim to be tried by a jury, and thereupon . . . the offence shall as respects the person so charged be deemed to be an indictable offence, and if the person so charged is committed for trial or bailed to appear for trial, shall be prosecuted accordingly . . . ' (*s*).

Similar provisions are made by two earlier Acts: the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 9; and the Prevention of Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77), s. 15: and by sect. 1 (6) of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), 'Any person charged with an offence under this section (relating to false trade marks and false trade descriptions) before a Court of Summary Jurisdiction shall, on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly' (*t*). As to summary trial of corrupt or illegal practices at elections see 46 & 47 Vict. c. 51, s. 43.

The offences to which sect. 17 applies are too numerous for enumeration here, and, so far as material, are mentioned under the appropriate titles, *post* (*u*). By subsect. 2, as interpreted by the judges, the justices must inform the accused of his election, so soon as it appears that by reason of a previous conviction or otherwise the accused is liable to more than three months' imprisonment, and, if they do not, the summary conviction is void (*v*). By subsect. 3, as amended in 1908, the section is not to apply to the case of a child under fourteen, unless the parent or guardian of the child is present. If the parent, etc., is present, the inquiry as to election is made of him, and the election is made by him (*w*).

Where an accused person elects, under sect. 17, to be tried by a jury, the subsequent procedure before justices is the same as that which is applicable to the case of indictable offences, and not that applicable to summary proceedings. The accused person may therefore be committed to take his trial in respect of any indictable offence disclosed by the depositions, and, in cases not falling within the Vexatious Indictments Acts, counts may be added to the indictment in respect of any indictable offence disclosed by the depositions, although the accused was not summoned before the justices in respect of such offence (*x*). The indictment need not include any reference to the election (*y*), but where the offence is punishable by more than three months' imprisonment by reason of a previous conviction, the previous conviction is charged in the indictment in the same manner as in ordinary indictable cases. But the previous conviction may not be proved until after conviction of the subsequent offence, unless its proof is essential to the proof of the complete or subsequent offence (*z*).

(*s*) As to costs see *post*, Bk. xii. c. v.

(*t*) See R. *v.* Phillips, 65 J. P. 41. The Vexatious Indictments Act applies (50 & 51 Vict. c. 28, s. 13), *vide post*, Bk. xii. c. i.

(*u*) For examples see R. *v.* Brown [1895], 1 Q.B. 119 ('Betting Houses'). R. *v.* Penfold [1902], 1 K.B. 547. A list, apparently complete, is given in Douglas's Summary Jurisdiction Procedure (9th ed.).

(*v*) R. *v.* Cockshott [1898], 1 Q.B. 582. R. *v.* Beesby [1909], 1 K. B. 849; 25 T. L. R. 337, 78 L. J. K.B. 482, dissenting from R. *v.* Fowler, 64 L. J. M. C. 9.

(*w*) Provision for the summary trial of children under fourteen, for all offences except homicide, is made by the Summary Jurisdiction Act, 1879, and the Children Act, 1908 (8 Ed. VII. c. 67), s. 128, and the liability of children to imprisonment is taken away by the latter Act (s. 102).

(*x*) R. *v.* Brown, *ubi sup.*

(*y*) R. *v.* Chambers, 65 L. J. M.C. 214.

(*z*) R. *v.* Penfold, *ubi sup.*

CANADIAN NOTES.

INDICTABLE OFFENCES.

Felony and Misdemeanour.—The distinction between "felony" and "misdemeanour" is abolished. Code sec. 14.

Misdemeanour Practice to Prevail.—When a certain practice would have been permissible in case of misdemeanour, and not in case of felony, the practice has been to apply the rule as in cases of misdemeanour, and such is the intention of the Code. R. v. Fox, 7 Can. Cr. Cas. 457.

Prisoner's Testimony as Witness at Another Trial.—Consent of prisoner's counsel. The distinction between felony and misdemeanour having been abolished, the consent of counsel for the accused which before the Code would have been effective in misdemeanours only, is now effective, although the offence charged was formerly a felony. And evidence given on the trial of another person including the evidence of the prisoner then called as a witness, may with the consent of the prisoner's counsel be admitted in evidence both for and against the prisoner. R. v. Fox, 7 Can. Cr. Cas. 457 (Ont.)

Felony or Misdemeanour.—A person committed for trial for an indictable offence which was a felony before the Code is not entitled as of right to bail. For indictable offences which were misdemeanours before the Code the accused committed for trial is entitled to bail as a matter of right. Ex parte Fortier, 6 Can. Cr. Cas. 191.

A provincial statute prior to Confederation, providing for the discharge from imprisonment in default of indictment of an accused person committed for a "felony" will apply equally to cases which were misdemeanours before the abolition of the distinction between felony and misdemeanour. R. v. Cameron (1897), 1 Can. Cr. Cas. 169 (Que.)

Enactments regulating the procedure in Courts are usually deemed imperative, and not merely directory. R. v. Riel (No. 2) (1885), 1 Terr. L.R. 23, 44.

Coroner's Inquisition.—No one shall be tried on any coroner's inquisition. Code sec. 940.

Upon a verdict of guilty being found before him, it is the duty of a coroner to direct by warrant that a person charged with manslaughter or murder shall be taken into custody, and conveyed before a magis-

trate or justice; or the coroner may direct that the accused enter into recognizances, with or without bail, to appear before a magistrate or justice. Code sec. 667.

A coroner's subpœna to a witness cannot be served outside the coroner's jurisdiction. Re Anderson & Kinrade, 13 O.W.R. 1082.

Criminal Information.—"Indictment" includes "information"—Code sec. 2(16)—and "finding the indictment" includes also "exhibiting an information" and "making a presentment"—Code sec. 5(*a*). "Attorney-General" includes "Solicitor-General." Code sec. 2(2).

Information.—The Superior Courts in Canada grant criminal information in proper cases on motion. See the following cases for statements of principles and practice. R. v. Ford (1853), 3 U.C.C.P. 209; R. v. Ed. Whelan (1863), 1 P.E.I. 223; Re Recorder, etc., of Toronto (1864), 23 U.C.Q.B. 376; R. v. Plimsoll (1873), noted in 12 Ch. J. 227; R. v. Thompson (1874), 24 U.C.C.P. 252; R. v. Kelly (1877), 28 U.C.C.P. 35; R. v. Wilkinson (1878), 42 U.C.Q.B. 492; R. v. Wilson (1878), 43 U.C.Q.B. 583.

Summary Proceedings.—Code, Pt. 15, secs. 705-770. Summary Convictions.

Election to be Tried on Indictment or Summarily.—Code, Pt. 16, secs. 771-799. Summary Trial of Indictable Offences. Certain offences can be tried summarily without the consent of the accused (secs. 774, 775, 776). In other offences, the consent of the accused to be tried summarily must be obtained after the charge is made (sec. 778). The magistrate has power to decide in any case not to proceed summarily. Section 784.

Trial of Juvenile Offenders for Indictable Offences.—Code secs. 800-821. An Act respecting Juvenile Offenders, Delinquents, etc. 7 & 8 Edw. VII. (Can.) ch. 40.

Speedy Trial of Indictable Offences.—Code secs. 822-842. The accused has the option to be tried before a Judge without a jury, or in the ordinary way. Section 827(*b*).

CHAPTER THE THIRD.

OF CRIMINAL JURISDICTION.

It is necessary to distinguish between national or territorial *jurisdiction* to try for crime, and *venue*, *i.e.* the proper district of England from which the jury must be summoned to try a crime which is within the jurisdiction of the English Courts (*a*). Consequently, this chapter necessarily to some extent includes procedure as well as jurisdiction.

In the view of English law, crime is primarily local, *i.e.*, depends on the law of the place in which it is committed, and not on the nationality of the person who commits it (*b*). On this principle aliens are amenable to the English criminal law, in respect of crimes committed in England (*c*), and British subjects are not amenable to that law in respect of offences committed outside England, unless committed within the Admiralty jurisdiction, or unless specially provided for by statute.

At common law the jurisdiction of English Courts to try persons accused of crime is regulated by the following rules :—

1. Courts of the common law could try only offences committed within the body of the realm. Offences committed by Englishmen outside the body of the realm were cognisable, if at all, only by the admiral or by the constable and marshal.
2. Indictments for crimes committed within the realm could be found and tried only by juries summoned from the county, liberty, borough, or other judicial area within which the crime or an integral part of it was alleged to have been committed (*d*). This rule created difficulties in the administration of justice where the acts constituting the crime were not all committed within the same judicial district. As regards larceny, this difficulty was got over by treating common law larceny as committing in any county in England into which the thief carried the stolen goods (*e*). As regards homicide, cases in which the fatal wound was given in one county and the death took place in another, were met by legislation, 2 & 3 Edw. VI. c. 24, s. 2, under which the trial was to be in the county where the death occurred.

It seems to have been established as a common-law rule that a misdemeanor committed partly in one county and partly in another could

(*a*) See British South Africa Co. *v.* Companhia de Moçambique [1893], A.C. 602.

(*b*) Sirdar Gurdyal Singh *v.* Rajah of Faridkote [1894], A.C. 670, Earl of Selborne.

(*c*) Barronet's case, 1 E. & B. 1 ; a charge of homicide arising out of a duel between foreigners in England. As to treason see De Jager *v.* Att.-Gen. of Natal [1907], A.C. 326.

(*d*) R. *v.* Weston, 4 Burr. 2507, 2511, Lord Mansfield.

(*e*) This rule did not apply where the theft was committed outside England. *Vide post*, vol. ii, p. 1307.

be tried in either county (*f*). 2 & 3 Edw. VI. c. 24, s. 2, was repealed in 1826 (*g*), and the following general rules were applied both to felonies and misdemeanors: 'For the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, it is enacted by the Criminal Law Act, 1826 (7 Geo. IV. c. 64), s. 12, "that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries (*h*), or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein"' (*i*).

The term 'county' (*j*) in these enactments includes not only counties at large, but counties of cities or towns (*k*), but does not include limited jurisdiction within counties (*l*). The section does not apply to offences partly committed on the high seas or on land outside England (*m*). The effect of the section is to put an end to conflicts of jurisdiction between two counties in cases to which the section applies. It authorises the laying and trial of the offence in either county (*n*), but not laying the offence in one county and trying it in the other (*o*).

Offences committed on a Journey or Voyage.—By the Criminal Law Act, 1826 (7 Geo. IV. c. 64), s. 13: 'Where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever employed on 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 county, through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the

(*f*) R. *v.* Burdett [1820], 3 B. & Ad. 717; 4 B. & Ad. 95.

(*g*) 7 Geo. IV. c. 64, s. 32.

(*h*) Measured geometrically in a direct line or as the crow flies. R. *v.* Welsh, 1 Mood. 175, Parke, B. *Vide ante*, p. 4.

(*i*) Cf. the somewhat similar provisions of the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), ss. 20, 39, as to offences committed on the boundary of two adjoining British possessions outside the British Islands.

(*j*) As to its meaning in modern Acts *vide* 52 & 53 Vict. c. 63, s. 4, *ante*, p. 3.

(*k*) R. *v.* Jones, Worcester Lent Assizes [1830], Jervis, K.C., MSS. C. S. G. Upon an indictment for manslaughter, found by the grand jury of the county of the city of W., alleging the blow which caused the death to have been struck in the county of Worcester, it was objected that the words, 'began in one county and completed in another,' did not apply to such a case, as the word 'completed' necessarily imported some cative and continuing agency in the person committing the offence in the county where the felony was completed; but it was held that the section extended to the case. The clerk of arraigns had consulted Littledale, J., who thought that the indictment ought to be preferred in the city, and it had been so preferred accordingly. C. S. G.

(*l*) In R. *v.* Wood [1841], 5 Jur. 225, where a larceny was committed in the City of London, but within 500 yards of the boundary of the county of Surrey and of the borough of Southwark, it was held that the offence could not be tried by the quarter sessions for the borough of Southwark. Cf. Mouflet *v.* Cole, 42 L. J. Ex. 8.

(*m*) See R. *v.* Ellis [1899], 1 Q.B. 230: goods obtained in England by false pretences in Scotland. R. *v.* Oliphant [1905], 2 K.B. 67: falsification of account-books in England procured by an employee who was in France.

(*n*) R. *v.* Ellis [1899], 1 Q.B. 230, 234, 239, Wills, J. All the earlier authorities are there discussed.

(*o*) R. *v.* Mitchell, 2 Q.B. 636, 643.

journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties, through or adjoining to, or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county' (*p*).

This enactment is general, and applies to any carriage whatever employed in any journey (*q*). Where the prisoners were tried for larceny of oats, &c., the property of their masters, it appeared that they had been sent with a waggon from a railway station, then in Middlesex, to Woolwich, then in Kent, that the usual quantity of oats for the horses was given out to them, and put into the waggon in nosebags, and that the prisoners sold the oats at Woolwich. It was held that they were triable in Middlesex; for the 'object of the statute was to enable a prosecutor, whose property is stolen from any carriage on a journey, to prosecute in any county through any part of which the carriage shall have passed in the course of that journey; because, in many cases, it might be quite impossible to ascertain at what part of the journey the offence was actually committed' (*r*).

The prisoner had acted as guard of a coach from P. in Cumberland to K. in Westmoreland, and was entrusted with a banker's parcel containing bank-notes and two sovereigns; on changing horses in Westmoreland, he carried the parcel to a privy, and while there took out of it the sovereigns. Parke, B., held that as the act of stealing was not 'in or upon the coach,' the case was not within the statute, and that the felony having been committed in Westmoreland, the indictment ought to be preferred in that county (*s*).

The prosecutor missed a dressing-case which had been in a railway carriage with him. The prisoner had accompanied the train, and had stated that he had found the dressing-case in a first-class carriage at a station in Staffordshire, and that he carried it to the engine and gave it to another prisoner, who opened it with a wrench, and on their return to Shrewsbury gave him some of the articles as his share. It was argued that the prisoner's statement showed that the larceny was not committed during the journey; for the removal of the dressing-case from the carriage did not constitute the larceny, according to the prisoner's statement, but it consisted in the distribution of the property at Shrewsbury; but Williams, J., held that there was evidence from which the jury might

(*p*) Cf. the similar provisions of the Post Office Act, 1908 (8 Edw. VII. c. 48), s. 72 (1), and the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), ss. 21, 39, as to offences committed on a journey between two British possessions (outside the British Islands).

(*q*) R. *v.* Sharpe [1854], Dears. 415, 417, Jervis, C.J.

(*r*) Id. ibid.

(*s*) R. *v.* Sharpe [1836], 2 Lew. 233.

find that the dressing-case was abstracted during the journey; as the evidence, with the exception of the prisoner's statement, was consistent with either supposition (*t*).

Where on a trial at the Central Criminal Court for assault, it appeared that the prosecutrix and the defendant left Brighton together by a train which ran to New Cross, within the jurisdiction of the Central Criminal Court; and the assault was committed in Sussex, and the prosecutrix at Three Bridges left the carriage in which she had been previously riding with the defendant, and travelled in another carriage to New Cross (*u*); it was held that by the combined operation of sect. 13 (*v*), and the Central Criminal Court Act, 1834 (4 & 5 Will. IV. c. 36) (*w*), the case might be tried at the Central Criminal Court. There was but one journey, and although the carriages were distinct, they all formed but one conveyance, and the fact that the prosecutrix and defendant rode in different carriages after the assault did not affect the question; it was the same as if they had occupied different parts of the same carriage. The words 'through which any carriage shall have passed' in sect. 13, refer to the time of the trial, and not to a time antecedent to the commitment of the offence, and therefore make the offence triable at any place within the limits of the beginning and end of the journey, and do not confine the trial to any county through which the train had passed up to the time of the offence (*x*).

In the enactments above set forth, the term 'county' referred to the geographical counties as then existing (including counties of cities or towns). The boundaries of most, if not all, counties in England have since 1826 been altered for administrative purposes and for Parliamentary elections. The effect of these changes upon the judicial county may be stated thus:

The changes of area effected by the Parliamentary Boundaries Act, 1832 (2 & 3 Will. IV. c. 64) (*y*), and the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76) (*z*), had the effect of removing completely from one county to another, for all purposes, the transferred areas (*a*). Where the prisoner was indicted for wounding with intent to do grievous bodily harm, at a place which was added to the borough of Haverfordwest (*b*), by the Acts last above mentioned, and declared to be part of the borough, it was held that the prisoner might be tried by a jury of the borough (*c*).

By the Counties (Detached Parts) Act, 1839 (2 & 3 Vict. c. 82) s. 1, 'it

(*t*) R. *v.* Pierce [1852], 6 Cox, 117.

(*u*) Then in Kent, now in the County of London.

(*v*) *Ante*, p. 20.

(*w*) Except when extended under the Winter and Spring Assizes Acts, the jurisdiction of the Central Criminal Court is confined to the City of London, the counties of London and Middlesex, and parts of Essex, Surrey, and Kent. 4 & 5 Will. IV. c. 36, s. 2; 51 & 52 Vict. c. 41, s. 89.

(*x*) R. *v.* French, 8 Cox, 252, the Recorder. An objection that 7 Geo. IV. c. 64, s. 13, did not apply to railway trains seems to have been tacitly overruled. Cf. R. *v.* Bexley, 70 J.P. 263 (a trial at the Central Criminal Court for killing a child found dead at the end of a railway journey).

(*y*) See 31 & 32 Vict. c. 46; 48 & 49 Vict. c. 23.

(*z*) Repealed in 1882 (45 & 46 Vict. c. 50, s. 5).

(*a*) R. *v.* Gloucestershire JJ. [1836], 4 A. & E. 689. This decision related to the county of the city of Bristol, and arose on the transfer of Clifton from Gloucestershire to the city of Bristol.

(*b*) Which is a county in itself by 34 & 35 Hen. VIII. c. 26, s. 61.

(*c*) R. *v.* Piller, 7 C. & P. 337, Coleridge, J.

shall be lawful for any justice or justices of the peace acting for any county, to act as a justice or justices of the peace in all things whatsoever concerning or in any wise relating to any detached part of any other county (*d*), which is surrounded in whole or in part by the county for which such justice or justices acts or act; and that all acts of such justice or justices of the peace, and of any constable or other officer in obedience thereto, shall be as good, and all offenders in such detached part may be committed for trial, tried, convicted and sentenced, and judgment and execution may be had upon them in like manner as if such detached parts were to all intents and purposes part of the county for which such justice or justices acts or act; and all constables and other officers of such detached parts are hereby required to obey the warrants, orders, and acts of such justice or justices, and to perform their several duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty' (*e*).

By sect. 3: 'The word "county" shall be taken to mean and include county, riding, division, and parts of a county having a separate commission of the peace' (*f*).

The grand jury of the county, which wholly surrounds a detached part of another county, may find an indictment for an offence committed in such detached part, and the prisoner may be tried by a jury of such surrounding county. The prisoner was indicted at the Dorsetshire assizes for larceny in a parish of Somersetshire, entirely detached from it, and surrounded by Dorsetshire. He had been committed by a Dorsetshire magistrate to the gaol of that county. The indictment laid the offence to have been committed in the parish of H., the same being a detached part of Somersetshire, surrounded in the whole by Dorsetshire; the venue in the margin was Dorset. The indictment did not state that the prisoner was in Dorsetshire, or that he was committed by a Dorsetshire magistrate. Fitzherbert objected, first, that this should have appeared on the face of the indictment; and, secondly, that the grand jury of Dorsetshire could not find the bill, as there were no words in the statute giving any power to find the bill; but Rolfe, B., overruled the objection, saying that it would strike the Act out of the statute-book (*g*).

(*d*) For the purposes of county police, these detached parts and all liberties and franchises (except municipal boroughs having a separate police force) are treated as part of the surrounding county. 2 & 3 Vict. c. 93, s. 27. That Act does not apply to the Metropolitan Police district (s. 28).

(*e*) This Act was declared by 21 & 22 Vict. c. 68, s. 2 (rep. S. L. R. 1892), to extend to parts of a county which did not form part of the county before the passing of 7 & 8 Vict. c. 101, in like manner as if they had always formed part of the county.

(*f*) Sect. 2, which provides for payment of expenses of prosecutions by the county to which the detached part belongs, seems to be superseded by 8 Edw. VII. c. 15, *post*, Bk. xii. c. v. tit. 'Costs.'

(*g*) R. *v.* Loader, *ex relatione* Mr. Fitzherbert. Reference was made *arguendo* to 7 Geo. IV. c. 64, s. 12, and 4 & 5 Will. IV. c. 36. S. C. Talf. Dick. Q.S. 188, where a *quære* is added to the decision by the learned editor; but with all respect to his opinion, it would seem that the decision is perfectly correct, as the object of the Act clearly was to render prisoners triable in the surrounding county, and to prevent expense, and the effect of a contrary decision would be that they never could be so tried in such county, except where an indictment had been found by a grand jury of the county to which the detached part belonged; which would greatly add both to the inconvenience and expense, which it was intended to avoid. It is difficult also to see how it can be correctly said that a person is 'tried in like manner as if such detached part

By the County Police Act, 1840 (3 & 4 Vict. c. 88), s. 2: 'It shall be lawful for the justices of any two or more neighbouring counties in their several general or quarter sessions assembled, from time to time to agree that such parts of their several counties as to them shall seem fit, shall, for the purposes of the County Police Act, 1839, be considered as forming part of any other of the said counties; and whenever any such district shall be so transferred, for the purpose of the said Act, from one county to another, with the consent of the justices of both the last-mentioned counties, such district shall be considered, for the purposes of the said Act, as if it were detached from the county to which it belongs, and wholly surrounded by the county to which it is so transferred, and all the provisions contained herein, or in the said Act, or in the Counties (Detached Parts) Act, 1839 (*supra*), shall be taken to apply to such transferred districts' (*h*).

By an Act of 1844 (7 & 8 Vict. 101), it was declared that every part of a county in England and Wales which is detached from the main body of the county should be considered as forming, for all purposes, part of the County in which it was included for Parliamentary elections, under the Parliamentary Boundary Act, 1832. This Act was repealed as spent in 1891 (S. L. R.) (*i*), but the repeal does not affect its past operation (*j*).

By the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 7 (which is incorporated into the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 6 (*k*): 'The acts of any justice or justices, and of any constable or officer in obedience thereto, shall be as good in relation to any detached part of any county which is surrounded in whole or in part by the county for which such justice or justices acts or act, as if the same were to all intents and purposes part of the said county.'

By the Liberties Act, 1850 (13 & 14 Vict. c. 105), provision was made for the union for judicial and other purposes of liberties with the counties in which they lie, and all liberties seem now to have been merged except those of Ripon, and the Soke of Peterborough, and the Isle of Ely.

The readjustment of county boundaries, with the exceptions above stated, has been effected by statutes confirming provisional orders. The Local Government Act, 1888 (51 & 52 Vict. c. 41), after providing for the readjustment of county boundaries for administrative purposes, provides, by sect. 59 (2): 'that a place which is part of an administrative county for the purposes of the Act shall, subject as in this Act mentioned, form part of that county for all purposes, whether sheriff, lieutenant, custos rotulorum, justices, militia, coroner, or other' (*l*). This enactment does

were to all intents and purposes part of the county for which such justice acts,' unless he is tried on an indictment found by the grand jury of such county; for that is the mode in which he would be tried if the part were to all intents part of that county. C. S. G.

(*h*) The Act of 1840 did not affect licensing jurisdiction. R. *v.* Worcestershire JJ. [1899], 1 Q.B. 59.

(*i*) It did not apply to inquests, which were regulated by 6 & 7 Vict. c. 12, and are now regulated by the Coroners Act, 1887 (50 & 51 Vict. c. 71).

(*j*) *Vide ante*, p. 5.

(*k*) By 26 & 27 Vict. c. 77, s. 1, the effect of s. 6 was declared not to have been cut down by 11 & 12 Vict. c. 43, s. 35.

(*l*) Then follow provisions that each of the entire counties of York, Lincoln, Sussex, Suffolk, Northampton, and Cambridge shall continue to be one county for those purposes so far as it was one county at the passing of the Act, and a saving as to the then existing privileges of cities or boroughs as to sheriffs, justices, &c.

not expressly refer to assizes. The corresponding provision of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 69, makes express reference to assizes, quarter or petty sessions, and jurors, and an Order in Council has been made adjusting the assizes to the counties as bounded under the Act of 1898.

In England the jurisdiction of courts of assize depends on the commission, and in the case of winter and spring assizes on the Orders in Council issued under the Winter and Spring Assizes Acts (*m*).

Counties of Cities.—Besides the geographical counties at large which exist for judicial as distinct from administrative purposes (*n*), the following cities and boroughs are counties in themselves (*o*): Berwick-on-Tweed, Bristol,* Caermarthen,* Canterbury, Chester, Exeter,* Gloucester, Haverfordwest,* Kingston-upon-Hull, Lichfield, Lincoln,* London City, Newcastle-upon-Tyne,* Norwich,* Nottingham,* Poole, Southampton, Worcester,* and York.* All these cities, &c., have separate quarter sessions; but at present separate assizes are held only for those marked with an asterisk.

Until 1798 there was an exclusive right that offences arising within the county of a city or town corporate should be tried by a jury of persons residing within the limits of the city or town. By the Counties of Cities Act, 1798 (38 Geo. III. c. 52), provision was made for indicting and trying in the adjoining county at large, persons accused of committing offences in the county of any city or town corporate except the City of London (ss. 2, 3, 10), or for transferring for trial at the assizes of the county at large, indictments found in the county of a city or town (s. 4) (*p*).

By the Criminal Law Act, 1851 (14 & 15 Vict. c. 55), s. 19: 'Whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which His Majesty has not been pleased for five years next before the passing of this Act to direct a commission of Oyer and Terminer and gaol delivery to be executed, and until His Majesty shall be pleased to direct a commission of Oyer and Terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this Act, and the recognisances to appear to prosecute and give evidence taken by such justice, justices, or coroner shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of Oyer and Terminer and gaol delivery for the next adjoining county (*q*); and

(*m*) See Index to Statutory Rules and Orders (ed. 1907), Supreme Court E, *1b.*

(*n*) Including, besides the common-law counties, the statutory county of London created in 1889. 51 & 52 Vict. c. 41, s. 40(2).

(*o*) *i.e.* they have their own sheriffs, and for judicial purposes are distinct from the counties at large which surround or adjoin them. The term 'county of a borough' is quite distinct from the administrative term 'county borough.' The borough of Leicester has a separate commission of assize, but is not a county in itself. Coventry ceased to be a county in 1842 (5 & 6 Vict. c. 110, s. 1).

(*p*) As to execution of sentence in such cases see 51 Geo. III. c. 100, s. 1.

(*q*) The words omitted were repealed in 1875. S. L. R. As to costs of prosecution see *post*, Bk. xii. c. v. 'Costs.'

the justice, justices, or coroner by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognisances, and inquisitions relative to such persons at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice or justices, or coroner, having authority so to commit, and the same proceedings shall and may be had thereupon, at the sessions of Oyer and Terminer or general gaol delivery for such adjoining county as in the case of persons charged with offences of the like nature committed within such county' (*r*).

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 188 and sched. 6 (*s*): 'The next adjoining county (for purposes of criminal trials) to Berwick-on-Tweed and Newcastle-upon-Tyne is Northumberland; to Bristol, Gloucester; to Chester, Cheshire; to Exeter, Devon; and to Kingston-upon-Hull, Yorkshire.'

Transitory Offences.—Certain offences wholly committed within the realm, are, for purposes of venue and trial, treated as not being local but transitory, *i.e.* the offender may be tried wherever he is found, apprehended, or in custody. The only offence which is transitory at common law seems to be larceny (*t*). Offences committed partly in one judicial district and partly in another, are triable in either, at common law or under 7 Geo. IV. c. 64, ss. 12, 13, (*ante* p. 20). Certain offences are, by statute, triable wherever the accused is found, or is apprehended, or is in custody, *e.g.* bigamy and forgery (*u*), and post-office offences (*v*).

Offences on Land outside England.—Apart from statute, existing English Courts (*w*) cannot take cognisance of any crime committed on land outside England, whether by a British subject (*x*), or an alien.

(*r*) The venue in the margin of an indictment was 'county of Norfolk, being the next adjoining county to the borough of Yarmouth'; the offence was committed in the parish of Gorlestone, in Suffolk. The whole of that parish is within the jurisdiction of the borough of Great Yarmouth, and the prisoner had been committed by the borough magistrates to the house of correction at Great Yarmouth. It was objected that the prisoner could not be tried in Norfolk. Pollock, C.B.: 'The words of the statute are, that in such a case as this the prisoner shall be tried "in the next adjoining county." Here the next adjoining county was either Norfolk or Suffolk. The place in the borough where the offence was committed has nothing to do with it. This would very likely have been a good trial in Suffolk, but I think that it is also a good trial in Norfolk.' R. *v.* Gallant, 1 F. & F. 517. It does not appear in the report whether Yarmouth was a county of a town, and it is submitted that the decision is based on a misreading of 14 & 15 Vict. c. 55, s. 19.

(*s*) These supersede 14 & 15 Vict. c. 55, s. 24, and sched. C of the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76).

(*t*) 1 Hawk. c. 33, s. 52; 1 East, P.C. 771. R. *v.* Fenley, 20 Cox, 252. Griffith *v.* Taylor, 2 C. P.D. 194, and *post*, Vol. ii. p. 1303.

(*u*) See the statutes under the titles relating to the crimes.

(*v*) 8 Ed. VII. c. 48, s. 72 (1).

(*w*) The Court of the Constable and Marshal (or Court of Chivalry) had such power, and conducted the trials according to the course of the civil law or by battle. It has not been constituted since Lord Reay's case, 1631. It has not been formally abolished, but its functions in respect to persons subject to military law are exercised by courts-martial under the Army Act (44 & 45 Vict. c. 58). See Official Manual of Military Law, c. 2. R. *v.* Depardo, 1 Taunt. 29, 30.

(*x*) *i.e.* a person who owes allegiance to the British Crown by birth in any part of the British Empire and *semble* also by naturalisation in the United Kingdom. R. *v.* Manning, 2 C. & K. 900. Naturalisation in a British possession appears to confer the status of British subject only in that possession. Mere service as a member of the crew of a British merchant ship does

Statutory authority has been given for the trial in England of the following offences committed outside England:—Treason and misprision of treason (*y*); murder or manslaughter on land out of the United Kingdom by a British subject (*z*); offences against the Dockyards Protection Act, 1772 (12 Geo. III. c. 24, s. 2); the Foreign Enlistment Act, 1870 (*a*); the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3, s. 7); the Official Secrets Act, 1889 (52 & 53 Vict. c. 52, s. 6), the Commissioners of Oaths Act, 1889 (52 & 53 Vict. c. 10, s. 9); the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23, s. 15); and bigamy by a British subject outside England and Ireland (*b*).

It would seem that no foreigner can be liable to trial or punishment under British law for any offence committed by him on land outside the dominions or protectorates of the Crown, even though the act committed by him takes effect in British territory (*c*). To these there may be one exception, in the case of an offence ashore by a foreigner who is one of the crew of a British merchant ship (*d*). But this has been doubted in R. *v.* Anderson (*e*).

Homicide.—By 24 & 25 Vict. c. 100, s. 9: 'Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the King's dominions or without, and whether the person killed were a subject of [His] Majesty or not (*f*), every offence committed by any subject of [His] Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act '(*g*).

not seem to make the seaman a British subject. R. *v.* de Mattos, 7 C. & P. 458, Vaughan, B., and Bosanquet, J.

(*y*) 35 Hen. VIII. c. 2, s. 1. R. *v.* Lynch [1903], 1 K.B. 744.

(*z*) 24 & 25 Vict. c. 100, s. 9, which re-enacts 9 Geo. IV. c. 31 s. 7, which replaced 57 Geo. III. c. 53. See R. *v.* Azzopardi, 2 Mood. 288 (an indictment of a Maltese for murdering a Dutchman in Smyrna), and R. *v.* de Mattos, 7 C. & P. 458: an indictment of a Spaniard who had been one of the crew of a British ship for killing a British subject at Zanzibar (57 Geo. III. c. 53).

(*a*) 33 & 34 Vict. c. 90, ss. 16, 17, *post*, p. 292. R. *v.* Jameson [1896], 2 Q.B. 425.

(*b*) 24 & 25 Vict. c. 100, s. 57 (*post*, p. 979). Earl Russell's case [1901], A.C. 446.

(*c*) Mayne, Ind. Cr. L. (ed. 1896) p. 269.

(*d*) 57 & 58 Vict. c. 60, s. 686, *post*, p. 43; 2 Steph. Hist. Cr. Law, p. 12.

(*e*) L. R. 1 C. C. R. 161.

(*f*) These words remove a doubt which arose on Geo. IV. c. 31, s. 7, as to whether the deceased must be a British subject. R. *v.* Azzopardi, 2 Mood. 288, where a Maltese killed a Dutchman in Smyrna.

(*g*) Framed from 9 Geo. IV. c. 31, s. 7 (E), and 10 Geo. IV. c. 34, s. 10 (I). By 9 Geo. IV. c. 31, s. 7, any person charged with any offence specified in the present enactment might be examined and committed by any justice of the place where the person so charged was, and thereupon a special commission was to be issued for the trial of such person. By 10 Geo. IV. c. 34, s. 10, where any person was charged in Ireland with any offence specified in the present enactment, he might be examined and committed by any justice of the place where the person so charged was, and thereupon he might be tried in that place in the same manner as if his offence had been there committed. This was a much better provision than that in 9 Geo. IV. c. 31, s. 7, as it got rid of the necessity for a special

Though 33 Hen. VIII. c. 23 (rep.) was not limited to offences committed within the King's dominions, yet it was held that it did not apply to a case where a prisoner of war had taken service on board an English merchant ship, and whilst in that capacity had killed an Englishman in a foreign country, on the ground that he could not be deemed a British subject. The offender, a Spaniard, was taken prisoner at sea, and whilst abroad, volunteered on board an Indiaman, and received the usual bounty and part of his pay for about three months, which he served on board the Indiaman. While the Indiaman was lying in the Canton river, about a third of a mile in width, within the tideway, at the distance of about eighty miles from the sea, the prisoner went ashore with the deceased, an Englishman, and there mortally wounded the deceased, who was carried on board ship, and died there the next day. Upon a case reserved, it was argued that the prisoner was not liable to be tried here, because he never became subject to the laws of this country; that he was not so by birth, and did not become so by entering on board the Indiaman. No judgment was given, but the prisoner was discharged (*h*).

An indictment charged, in substance, that the prisoner, at Lisbon, in the kingdom of Portugal, in parts beyond the seas without England, one H. G., in the peace of God and our lord the King, then and there being, feloniously did assault, shoot, and murder, against the peace of our said lord the King. It was held that the offence was triable in England, though committed in a foreign country, the prisoner and the deceased being both British subjects at the time; and that stating H. G. to be in the King's peace at the time, sufficiently imported that he was the King's subject at the time; and that the statement that this was against the King's peace, sufficiently imported that the prisoner was also a subject of this realm at that time (*i*). In R. *v.*

commission, and avoided a difficulty which was very likely to arise under 9 Geo. IV. c. 31, s. 7; for the special commission issued under that section recited the offence charged before the justice, and authorised the trial for that offence, and a fatal variance might well arise on the trial between the facts proved and the offence charged before the justice. The present section is substantially the same as 10 Geo. IV. c. 34, s. 10, but uses the terms of 9 Geo. IV. c. 31, s. 8, and under it the party charged may be examined before any justice of the place where he is, and tried in the same place. 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; as was held by Parke, B., in R. *v.* Ruck, 2 Russ. Cr. &. M. (4th ed.), p. 50. MSS. C. S. G., *post*, vol. ii. p. 1098. 9 Geo. IV. c. 31, s. 7 (E.), and 10 Geo. IV. c. 34, s. 10 (I), were confined to accessories after the fact in manslaughter, but the present section is so framed as to include an accessory before the fact in that offence, wherever there can be such an accessory, as to which see *post*, 'Manslaughter.' This section was carefully framed in order to remove any question as to the killing of a foreigner being within it; and instead of the words of 9 Geo. IV. c. 31, s. 7, 'where any of His Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder,' &c. (which, from their collocation, might afford an argument that no murder was within the clause unless it were committed by a British subject, and therefore a British subject would not be within it if he were accessory to a murder by an alien), the wording of this clause has been adopted so as to include an accessory to any murder by whomsoever committed. C. S. G.

(*h*) R. *v.* Depardo, 1 Taunt. 26; R. & R. 134. According to the report in R. & R., the indictment was for manslaughter. The case fell within no statute, as the wound was on shore, and the death within the Admiralty jurisdiction. See R. *v.* de Mattos, *post*, p. 29; and R. *v.* Coombes, *post*, p. 33.

(*i*) R. *v.* Sawyer, MS. Bayley, J.; R.

Helsham (*j*), it was ruled that an indictment upon 9 Geo. IV. c. 31, s. 7 (*k*), must aver, that the prisoner and deceased were subjects of His Majesty, but that the declarations of the prisoner were evidence to go to the jury to prove this fact. The indictment charged the murder to have been committed 'at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-bow, in the ward of Cheap,' &c. The grand jury objected to finding the bill, as it stated the death to have occurred in two different places. Bayley, J. (having conferred with Bosanquet, J., and the Recorder), directed the words 'to wit, at the parish of St. Mary-le-bow, in the ward of Cheap,' &c., to be struck out. His lordship also said, that it was deemed by the Court to be necessary to have inserted in the bill an allegation that the prisoner and the deceased were subjects of His Majesty; and the bill was so amended accordingly. Upon the trial it appeared that the deceased was killed in a duel at Boulogne, and that he was an Englishman, born at Islington; and the prisoner had said he was an Irishman, and had come from Kilkenny. It was objected that, under 9 Geo. IV. c. 31, s. 7, it was necessary to prove that the parties were natural-born subjects of His Majesty; the present Act differed from 33 Hen. VIII. c. 23, the words of which were 'any person or persons,' and that since it never could have been intended that this Act should apply to foreigners domiciled in England, or naturalised either by Act of Parliament (*l*), or by service to the state, it was necessary to prove, by some one acquainted with the fact, where the prisoner was born, which was a fact the prisoner could not know of his own knowledge. But it was held, that the declaration of the prisoner, unexplained, was, as against himself, evidence to go to the jury; and the case was left to the jury to say, whether they were satisfied by the evidence that the prisoner was a British *born* subject; for that they must be quite satisfied that such was the fact before they could pronounce him guilty. But it is questionable whether this ruling could now be accepted, and probably that R. *v.* Sawyer (*supra*) would be followed (*m*).

Where an indictment for manslaughter stated that the prisoner being a subject of His Majesty, on land out of the United Kingdom, to wit, at Zanzibar, did make an assault on J. K., and did give him divers mortal wounds, &c., of which he died, at Zanzibar aforesaid, and it appeared that the prisoner, a Spaniard, while in England, entered into articles to serve in a ship bound on a voyage to the Indian seas, and elsewhere, and back to the United Kingdom. On the ship's arrival at Zanzibar, then under the dominion of the Sultan of Muscat, the captain left the vessel, and set up in trade there, and engaged the prisoner to

& R. 294; and 2 C. & K. 101. In the latter report there is a very full account given of the previous cases. Another objection, that the indictment ought to have concluded *contra formam statuti*, was also overruled.

(*j*) 4 C. & P. 394, Bayley and Bosanquet, JJ., and Knowlys, R.

(*k*) See note (*g*), *ante*, p. 27.

(*l*) Under the Naturalisation Act, 1870 (33 & 34 Vict. c. 14), an alien naturalised in the United Kingdom is entitled to all rights, powers, and privileges, and becomes subject to all obligations, to which a natural-born British subject is entitled or subject. But he does not necessarily cease to be a citizen of his original state. See Report of Committee on Naturalisation (Parl. Pap. 1901, c. 723).

(*m*) See R. *v.* Audley [1907], 1 K.B. 383; bigamy by a British subject abroad. R. *v.* Jameson [1896], 2 Q.B. 425: offences in South Africa against the Foreign Enlistment Act, 1870.

go on shore and act as his interpreter. The new captain seems to have assented, but the crew did not. The ship went one or two short voyages without the prisoner, and having returned to anchor in a roadstead, a few hundred yards from Zanzibar, and the crew being allowed to go on shore, some dispute arose between the prisoner and the deceased, who was one of the crew, which led to the blows, of which the deceased afterwards died on board the ship. It was ruled that there was no evidence of the prisoner being a British subject or under British protection. To claim his allegiance, it must at least be shewn, that he was under British protection. And although he was on board a British ship for a time, yet it seemed as if the articles were abandoned, and he was living on shore, and had been so for months. And, secondly, that the offence was alleged to have been committed on land out of the United Kingdom, but though the blows were given on land, the death took place on board ship, and there was no clause in 9 Geo. IV. c. 31, providing for such a case (*n*).

In R. *v.* Bernard (*o*), the prisoner was charged as accessory before the fact in England to a murder committed in France; and many points were taken at the close of the case, and reserved (*p*), but as the accused was

(*n*) R. *v.* de Mattos, 7 C. & P. 458, Vaughan and Bosanquet, JJ. Rolfe, S.G., doubted whether the limitation put upon 9 Geo. IV. c. 31, s. 7, in R. *v.* Helsham (*supra*) was correct, and the Court seems to have thought that that construction was too narrow. Vaughan, J., in charging the grand jury, said, 'there are other ways which may constitute a man a British subject; as, for instance, he may owe allegiance for protection.' The case was decided on the ground that the prisoner was not a British subject in any sense of those words. C. S. G.

(*o*) 8 St. Tr. (N. S.) 887; 1 F. & F. 240. The first count alleged that Orsini, Gomez, and Rudio at Paris murdered N. Batty; and that the prisoner incited, &c., them to commit the murder; the second count was similar, but described the deceased as unknown. The third count was framed in the old form before 14 & 15 Vict. c. 100, by Mr. Greaves; because he thought it might be contended that 14 & 15 Vict. c. 100, s. 4, did not extend to indictments against accessories; and it alleged an assault, &c., by the principals, and charged the prisoner with inciting, &c. The fourth count charged the prisoner, being a subject of the Queen, with murdering Batty at Paris. The fifth was like the fourth, but described the deceased as unknown. C. S. G.

(*p*) The points were: 1. That the prisoner was not one of Her Majesty's subjects within 9 Geo. IV. c. 31, s. 7. 2. The prisoner was not an accessory before the fact to any murder within that section. 3. There was no proof of any murder having been committed within that section. 4. That the murder was committed by aliens on aliens in France. 5. No evidence of acts done by the prisoner on land out of the United Kingdom, and without the Queen's dominions, or of any act done by any other person in pursuance of any authority from him on land out of the United Kingdom and without the Queen's dominions, was receivable in evidence on this trial. 6. That the principal offence of murder charged in the first three counts was not alleged to have been committed by any of Her Majesty's subjects. 7. That by the special commission the Court had only jurisdiction to try the prisoner as accessory before the fact, and had no jurisdiction to try the prisoner as principal. 8. That the prisoner, being an alien, could not be tried as principal for a murder alleged in the fourth and fifth counts to have been committed at Paris. As to the first objection, it is clear that a foreigner resident in England is a subject of the Queen; all the authorities prove that rule in general, and 1 Hale, 542, and Courteen's case, Hob. 270, are express that a statute naming the subjects of the Queen includes aliens in England; and besides, 32 Hen. VIII. c. 16, s. 9, enacts that every alien who shall hereafter come into this realm or the dominions of the King, shall be bound by all the laws and statutes of this realm. As to the second, third, fourth, and sixth objections, see 24 & 25 Vict. c. 100, s. 9, *ante*, p. 27; and *post*, p. 835 *et seq.*, relating to conspiracies to murder. As to the fifth objection, every case that has been tried where the death was on land abroad is an answer; for such evidence was admitted in all, and necessarily so; for how can a man be tried for any offence abroad unless the acts relating to it done abroad are admissible in evidence? As to

acquitted, were never argued, and most of the points taken are covered by 24 & 25 Vict. c. 100, sect. 9 (*ante* p. 27), and the accessories and abettors clauses of the Acts of 1861.

Offences by Officials out of Great Britain.—By an Act of 1698 (11 Will. III. c. 12) (*q*), oppressions, crimes, and offences committed by governors, lieutenant-governors, or commanders-in-chief of plantations or colonies within the King's dominions beyond the seas are triable in England in the High Court (K.B.D.) The Act is expressed to be against oppression of the King's subjects within their respective governments, and other crimes and offences, 'contrary to the laws of this realm, or in force within their respective governments or commands.' By the Criminal Jurisdiction Act, 1802 (42 Geo. III. c. 85), crimes, misdemeanors, or offences committed out of Great Britain by a person in the service of the King, civil or military, or in any public station, office, or capacity, may be prosecuted in the High Court (K.B.D.) in England, either upon an information exhibited by the Attorney-General, or upon indictment found, and are triable in the counties of London or Middlesex (*r*). This Act has been held not to apply to felonies (*s*), but it has been applied to offences by British officials in foreign countries (*t*). There is also imperial legislation as to the trial in England of certain offences committed in India (*u*). The provisions of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), as to holding a preliminary inquiry as to offences committed on land beyond the seas for which an indictment may legally be preferred in England or Wales, apply to proceedings under the above Acts, and the High Court is a Court of Oyer and Terminer for trying such offences (*v*).

Offences in the Jurisdiction of the Admiralty of England.—The criminal jurisdiction of the Admiralty of England attaches:

1. In the case of piracy *jure gentium* to all vessels and persons of whatever nationality: and
2. To all British ships, public or private, on the high seas, outside the territorial waters of any state: and
3. To all vessels, British or foreign, within British territorial waters (*w*), including all ports, havens, and rivers, below bridges, where great ships go. To some extent the jurisdiction is concurrent with that of the common law courts in the case of waters which are within the body of a county: and

the seventh objection, 11 & 12 Vict. c. 46, s. 1 (now 24 & 25 Vict. c. 94, s. 1), making every accessory before the fact triable, &c., as a principal, is an answer. As to the eighth objection, see the remarks on 24 & 25 Vict. c. 94, s. 1, *post*, p. 130. C. S. G.

(*q*) 11 & 12 Will. III c. 12, in Ruffhead's edition.

(*r*) 42 Geo. III. c. 85, s. 1; 51 & 52 Vict. c. 41, s. 89.

(*s*) R. *v.* Shawe, 5 M. & Sel. 403. For other prosecutions under this Act see R. *v.* Jones, 8 East, 31. R. *v.* Picton, 30 St. Tr. 225 (relating to the application of Spanish procedure in Trinidad).

(*t*) R. *v.* Turner [1889], 24 L. J. (newsp.) 466.

(*u*) 10 Geo. III. c. 47 s. 4; 13 Geo. III. c. 63, s. 39; 21 Geo. III. c. 70, s. 7; 33 Geo. III. c. 52, s. 67. These enactments and others are collected and epitomised in Ilbert, Govt. of India (2nd ed.), 255–259.

(*v*) R. *v.* Eyre, L. R. 3 Q.B. 487.

(*w*) See 41 & 42 Vict. c. 73, *post*, p. 41. In R. *v.* Cunningham, Bell, 72, an American who on an American ship in the Bristol Channel wounded one of the crew was held to be triable in the county of Glamorgan. In this case the part of the sea where the ship lay was held to be within the body of the realm.

4. To all British public vessels in foreign territorial waters. The jurisdiction is probably exclusive of the jurisdiction of the state to which the waters belong (*x*) : and
5. To all British vessels, public or private, within foreign territorial waters. This jurisdiction is concurrent with, or perhaps subordinate to, the jurisdiction of the state to which the waters belong.

The Admiralty of England (*y*) has always had criminal jurisdiction in respect of piracy *jure gentium*, committed by persons or ships of any or no nationality (*z*), and of offences committed on British ships (*a*), whether public vessels or merchant ships on the high seas. Conflicts as to jurisdiction arose between the common Courts and the Admiralty as to matters arising in waters within the body of the realm, which led to statutes of 1389 (13 Rich. II. c. 3), and 1391 (15 Rich. II. c. 3). Under the earlier of these Acts the admiral is prohibited from meddling 'of anything done within the realm, but only of a thing done upon the sea.' The later Act, after providing that 'all manner of contracts, pleas and quarrels, and all other things rising within the bodies of counties as well by land as by water and wreck of the sea, shall be tried, determined, discussed and remedied by the laws of the land, and not before nor by the admiral nor his lieutenant in any wise,' proceeds: 'Nevertheless, if the death of a man and if a mayhem done in great ships being and hovering in the main stream of great rivers, only beneath the bridges (*b*) of the same rivers nigh unto the sea and in none other places of the same rivers the admiral shall have cognisance; and also to arrest ships in the great flotes for the great voyages of the King and of the realm—saving always to the King all manner of forfeitures and profits thereof coming: and he shall have the jurisdiction upon the said flotes during the said voyages only.' . . .

(*x*) But see Forbes *v.* Cochrane, 2 B. & C. 467, Best, J. and Report of Fugitive Slave Commission (Parl. Pap. 1876, vol. 28).

(*y*) As to the origin and history of the Admiralty jurisdiction see Selden Soc. Publications, vol. 6, Introduction; 2 Stubbs, Const. Hist. 289; and the opinions of the judges in R. *v.* Keyn [1876], 2 Ex. D. 63.

(*z*) R. *v.* Keyn, 2 Ex. D. 63, 168, Cockburn, C.J.

(*a*) In R. *v.* Keyn, 2 Ex. D. 63, the majority of the Court held that the Admiral had no jurisdiction to try offences by foreigners on foreign ships even within British waters. See 41 & 42 Vict. c. 78, *post*, p. 41.

(*b*) There are various readings in the Norman-French texts of this statute. In the Statutes of the Realm, printed from the Tower Roll, the words are, 'per aval les *pountz*.' In Rot. Parl. No. 30 the word is *pontz*: see 7 C. & P. 665n. Old printed copies have *pointz* or *poyntz* (4 Co. Inst. 137). Pulton's Calendar, 1612, Pulton's Statutes, 1661, and some old abridgements have *ports* (Cary's Abr. 1739). In *A Description of the River Thames* (Longman, 1752), it is said that the Lord Mayor of London used to summon a jury four times a year 'to make inquisition after all offences committed on the Thames and Medway up the river as far as Staines Bridge, and down the river as far as the *points* of it next the sea,' and that 'the jurisdiction of the City of London in the river of Thames from Staines Bridge westward unto the *points* of the river next to the sea eastward, appeareth to belong to the City.' All this appears to be taken from old charters. In 1347 it appears that persons setting kiddels ultra Genland (Yantlett) versus mare were fined (pp. 94, 95, 96). In later times Yendall or Yenlet seems from old charters to be the limit (p. 139). It is clear that 'bridges,' and not 'points' or 'ports,' is the true reading. In Moore, K.B. 892, Dodderidge J., in speaking of the statute, uses the words 'subtus le pont,' and in Leigh *v.* Burley, Owen, 122, the judge said: 'The translator mistook "bridges" for "points," *i.e.* the land's end.'

The jurisdiction thus preserved is (as to English rivers) concurrent with, and not exclusive of, the jurisdiction of the common-law Courts (*c*): and extends to offences committed on a British ship in foreign or colonial ports or waters (*d*). It is immaterial whether the ship is moving about the foreign waters (*e*), or at anchor therein (*f*) or moored to the land (*g*), so long as she is afloat and below bridges, at a part where the tide ebbs and flows and great ships go. All such waters are, for purposes of indictment and Admiralty jurisdiction, treated as part of the 'high seas,' an expression which, 'when used with reference to the jurisdiction of the Court of Admiralty, includes all oceans, seas, bays, channels, rivers, creeks and waters below low-water mark, and where great ships can go, with the exception only of such parts of such oceans, &c., as are within the body of some county' (*h*).

In R. *v.* Coombes (*i*), a sailor on board a boat which had run aground 100 yards from the shore was shot by a smuggler and died on the sea. The whole offence was held to have been committed within the Admiralty jurisdiction. The decision is supported on the ground that in the case of murder the intention is presumed to follow the act, and so the shot which took effect on the high seas must be presumed to be accompanied thither by the intention with which it was fired, and both these together operate (*j*); or that the blow struck by the bullet was an act done in the jurisdiction where it hit the sailor (*k*). According to the decision, the crime must, for the purpose of determining the venue, be held to have been committed on an English ship where the death occurred, a doctrine founded on a convenient fiction (*l*). R. *v.* Coombes was in the United States applied so as to exclude the jurisdiction of the United States Courts in the case of a death caused on a foreign vessel, in foreign territorial waters, caused by a shot from a United States vessel in these waters (*m*).

In R. *v.* Jemot (*n*) larceny from a British ship in a natural harbour in Cuba was held to be within the Admiralty jurisdiction.

In R. *v.* Allen (*o*) the indictment was for stealing three chests of tea out of the 'Aurora,' of London, on the high seas, and it was proved that the larceny was committed while the vessel lay off Whampoa, in a river, twenty or thirty miles from the sea. There was no evidence as to the

(*c*) 1 East, P. C. 388.

(*d*) The 'Mecca' [1895], P. 95, 107, Lindley, L.J.

(*e*) R. *v.* Anderson, L. R. 1 C. C. R. 161.

(*f*) R. *v.* Allen, 1 Mood. 494.

(*g*) R. v. Carr, 10 Q.B. 76.

(*h*) The 'Mecca' [1895], P. 95, 107, Lindley, L.J., citing the above cases, and 4 Co. Inst 134: Com. Dig. Admiralty (1), (7), (14).

(*i*) 1 Leach, 388. In Badische Anilin und Soda Fabrik *v.* Basle Chemical Works [1898], A.C. 200, 204, Halsbury, L.C., said, with reference to this case; 'I think one may say there is a confusion of thought between the technical rules of criminal venue and the question who is the person doing the act.'

(*j*) R. *v.* Keyn, 2 Ex. D. 63, 103, Denman, J.

(*k*) Ib. 234, Cockburn, C.J.

(*l*) Ib. 119, Amphlett, J.A.

(*m*) U. S., Davis, 2 Sumner, 482; discussed by Cockburn, C.J., in R. *v.* Keyn at 232.

(*n*) Old Bailey, Feb. 28, 1812, MS. Archb. Cr. Pl. (23rd ed.) 540, where the offence is said consequently to be piracy. In the *Times* of Feb. 29, 1812, the offence is spoken of as larceny, and this description is accepted in R. *v.* Carr, 10 Q.B D. 76, 83, Coleridge, C.J. The trial was at an Admiralty Session at the Old Bailey.

(*o*) [1837] 7 C. & P. 664. In the report in 1 Mood. 494, the judges are said to have affirmed the conviction, 'the place being where great ships go.' The trial was at the Central Criminal Court under 4 & 5 Will. IV. c. 36, s. 22, *post*, p. 38.

tide flowing, or otherwise, at the place where the vessel lay, but it was held that the fact that the tea was stolen on board the vessel, which had crossed the ocean, afforded sufficient evidence that the larceny was committed on the high seas.

In R. *v.* Anderson (*p*) an American citizen, engaged as a sailor on a British ship, was held to have been lawfully indicted and convicted of the manslaughter of another American citizen on that ship while she was sailing up the river Garonne, in France, on her way to Bordeaux. At the time when the offence was committed the ship was ninety miles up the river.

In R. *v.* Carr (*q*) a prisoner was held to have been lawfully indicted and convicted of larceny on a British ship which at the time of the committing of the offence lay moored to a quay in the port of Rotterdam in Holland, at a point on the river Maas seventeen or eighteen miles above the open sea, but below the bridges.

In R. *v.* Lesley (*r*), the defendant, who was master of an English ship, entered into a contract with the Chilian Government to carry from Valparaiso to Liverpool five persons who had been ordered by that Government to be banished. These persons were brought by force on board the ship, guarded by soldiers of that State, and conveyed by the defendant under the contract, and against their will, to Liverpool. At the time he received these persons on board, the ship was lying in the territorial waters of Chili. The defendant was indicted, tried and convicted at Liverpool for false imprisonment and assault. On a case reserved, it was held that so far as it related to what was done in Chilian waters the conviction could not be sustained. Erle, C.J., said: 'We assume that in Chili the act of the Government towards its subjects was lawful; and, although an English ship, in some respects, carries with it the laws of her country in the territorial waters of a foreign State, yet, in other respects, she is subject to the laws of that State, as to acts done to the subjects thereof. We assume that the Government could justify all that it did within its own territory, and we think that it follows that the defendant can justify all that he did there as agent for the Government, and under its authority.' But the conviction was sustained for that which was done out of the Chilian territory (*s*). As to this, Erle, C.J., said: 'It is clear that an English ship on the high seas out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are so much amenable to English law as they would be on English soil' (*t*). After referring to 18 & 19 Vict. c. 91, s. 21 (*u*), he continued: 'Such being the law, if the act of the prisoner amounted to a false imprisonment he was liable to be convicted. Now, as the contract of the prisoner was to receive the five persons on board the

(*p*) L. R. 1 C. C. R. 161.

(*q*) R. *v.* Carr, 10 Q.B.D. 76. In this case the words 'below the bridges' in the Act 15 Rich. II. c. 3, were construed as applying to foreign as well as British rivers.

(*r*) 29 L. J. M. C. 97.

(*s*) He then referred to Dobree *v.* Napier, 2 Bing. (N. C.) 781, a case in which the defendant was held justified in seizing the plaintiff's vessel in Portuguese waters on behalf of and by authority of the Queen of Portugal.

(*t*) He referred to R. *v.* Sattler, 27 L. J. M. C. 48, and Ortolan, *Diplomatie de la Mer*, Bk. ii. c. 13.

(*u*) Superseded by 57 & 58 Vict. c. 60, s. 687, *post*, p. 43.

ship and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to false imprisonment. It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili, out of that State, are powerless, and the lawfulness of the acts must be tried by English law.'

High and Low Water-mark.—Upon the open seashore the common law and the admiral have alternate jurisdiction between high and low water-mark (*i.e.* the admiral has jurisdiction *supra aquam* as long as the sea flows, and the common-law Courts jurisdiction over the land so long as the sea does not cover it (*v*). It is sometimes difficult to fix the line of demarcation between the county and the high sea in harbours, or below the bridges in great rivers. The question is often more a matter of fact than of law, and determinable by local evidence; but some general rules upon the point are collected in East's Pleas of the Crown, where it is said that 'in general it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties *where persons can see from one side to the other* (*w*). Lord Hale, in his treatise *De jure maris*, says that the arm or branch of the sea which lies within the *fauces terræ*, where a man may *reasonably discern* between shore and shore, is, or at least may be, within the body of a county. Hawkins, however, considers the line more accurately confined, by other authorities, to such parts of the sea where a man, standing on the one side of the land, *may see what is done on the other*; and the reason assigned by Lord Coke in the Admiralty case (*x*) in support of the county coroner's jurisdiction, where a man is killed in such places, *because that the county may well know it*, seems rather to support the more limited construction. But at least, where there is any doubt, the jurisdiction of the common law ought to be preferred' (*y*).

Bays.—Where a murder was committed in Roundstone Bay, and it appeared that the place in question was *within* the county of Galway, and that the headlands bounding the bay were so situated that a man could see from the one to the other, and that the place in question would fall within a straight line drawn from the one headland to the other, and that in that part of the bay there were fifteen fathoms water, and that a ship of 120 tons could sail there; but there was no evidence of it having been frequented by shipping, or of any Admiralty process having ever been executed within it; it was held by the judges in Ireland that the murderer was rightly tried under an Admiralty commission (*z*).

Roadsteads.—Upon an indictment for maliciously wounding in

(*v*) 3 Co. Inst. 113. 2 Hale, 17. See 2 Hawk. c. 9, s. 14, as to the jurisdiction of a county or borough coroner in offences on the seashore. Anon., 1 Lew. 242. See Jervis on Coroners (6th ed.), 103. 5 Co. Rep. 107.

(*w*) 'If the sea there be not of any county, the admiral hath jurisdiction, or else not.' Leigh *v.* Burley, Owen, 122, Coke, and Foster J.; Cf. Moore (K.B.), 892.

(*x*) 13 Co. Rep. 52.

(*y*) 2 East, P. C. 803, 804.

(*z*) R. *v.* Mannion, 2 Cox, 158.

the county of Glamorgan, it appeared that the prisoners were Americans, and they and the person wounded were part of the crew of an American ship, which sailed from the docks of Cardiff to an anchorage in Penarth Roads, and that the offence was committed shortly before she arrived at that anchorage, when the ship was three-quarters of a mile from land, in a place never left dry by the tide; but was within a quarter of a mile of land which is left dry by the tide. The shore of the county of Glamorgan extends many miles up and down the Bristol Channel from the place where the offence was committed. The spot in question was in the Bristol Channel, between the Glamorganshire and Somersetshire coasts, and was about ten miles from the opposite coast of Somersetshire. Two islands, called the Flat and Steep Holmes, are outside the anchorage-ground, and farther from the shore than it is, but not lower down the Channel, being abreast of the anchorage-ground. When the offence was committed the ship was inside, and about two miles from the Flat Holmes, and four or five miles from the Steep Holmes, and was within the Lavernock Point in Penarth Roads, but outside Penarth Head. Penarth Head and Lavernock Point form a bay. At Penarth Head persons can see from one to the other, and could see what a vessel was doing from one to the other, but could not see the people from one to the other. From where the ship was persons could see people at Lavernock, and see what they were doing if they took particular notice of them, and they could see the coast of Somersetshire on a clear day. The mouth of the Severn is at King's Road, higher up the Channel. The Holmes are part of the parish of St. Mary's, Cardiff. By an order of the Treasury, the port of Cardiff had been fixed so as to include the spot in question. It was objected that the prisoners could not be tried in the county of Glamorgan, as there was no proof that the offence was committed in that county; but it was held that the offence was committed in that county. Cockburn, C.J.: 'The question is, whether the part of the sea on which the vessel was at the time when the offence was committed forms part of the body of the county of Glamorgan; and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on one side, and the county of Glamorgan on the other. We are of opinion that, looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holmes, between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff, and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties, by the shores of which its several parts are respectively bounded. We are, therefore, of opinion that the place in question is within the body of the county of Glamorgan' (*a*).

Prior to the passing of the statutes now to be mentioned, wherever a murder or other felony against the law of nature or nations was committed in England or on the narrow seas (*b*), it was triable by jury in the

(*a*) R. *v.* Cunningham, Bell, 72. (*b*) See *post*, p. 38.

Court of King's Bench and Courts of Oyer and Terminer and gaol delivery. But wherever a murder or such other felony was committed on the high seas, it could not be tried by a jury (because a jury by the common law could only take cognisance of felonies committed within the local jurisdiction from which they were summoned), but such matters and other felonies were always triable by the Court of Admiralty, which proceeded according to the course of the civil law (*c*). To this proceeding there was the vital objection that it did not try by a jury (*d*), and either the accused must plainly confess his offence, or there must be two witnesses who saw the offence committed; and this led to the passing of the Offences at Sea Act, 1536 (28 Hen. VIII. c. 15). The preamble of that Act (*e*) recites that 'traitors, pirates, thieves, robbers, murderers, and confederators upon the sea many times escape unpunished because the trial of their offences hath heretofore been ordered, judged, and determined before the admiral or his lieutenant or commissary, after the course of the civil laws the nature whereof is that before any judgment of death can be given against the offenders, either they must plainly confess their offences (which they will never do without torture or pains), or else their offences be so plainly and directly proved by witness indifferent, such as saw their offence committed, which cannot be gotten but at chance at few times.' . . . Sect. 1 enacts 'that all treasons, felonies, robberies, murders, and confederacies, committed in or upon the sea (*f*), or in any other haven, river, creek, or place, where the admiral or admirals have, or pretend to have, power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged, in such shires and places in the realm as shall be limited by the King's commission, or commissions to be directed for the same, or like form and conditions as if any such offence or offences had been done in or upon the land' (*g*).

The Act did not create or alter any offence, but left the offences as they were before it passed, and all the offences mentioned in it were, before its passing, triable in the Court of Admiralty, and were by the Act made triable by a jury (*h*).

By the Offences at Sea Act, 1799 (39 Geo. III. c. 37), s. 1, 'all and every offence and offences, which, after the passing of this Act (May 10, 1799), shall be committed upon the high seas out of the body of any county of this realm, shall be, and they are hereby declared to be offences of the same nature respectively, and to be subject to the same punishments respectively, as if they had been committed upon the shore, and

(*c*) See 2 Hale, 12.

(*d*) Commissions of oyer and terminer to try piracy, &c., seem to have been issued to common-law Courts until 1361. The practice then dropped until 1536. See 6 Selden Society Publications, pp. xlv., lxxx.

(*e*) 'An Act for punishment of pirates and robbers of the sea.' See 3 Co. Inst. 112, and *post*, p. 257.

(*f*) In Leigh *v.* Burley, Owen, 122, Coke and Foster, J., explain this as meaning the high seas.

(*g*) S. 2 introduces the words 'manslaughters,' and uses the words 'havens,' &c., without the qualification in the first section, where the admiral has jurisdiction. One of the mischiefs recited in the first section, is, that the witnesses being commonly mariners and shipmen, depart without long tarrying or protraction of time. The statute is almost in the same terms as 27 Hen. VIII., c. 4 (rep. 1863, 26 & 27 Vict. c. 125), except that it adds 'treasons' to the offences. See R. *v.* Snape, 2 East, P. C. 807. R. *v.* Bayley, R. & R. 1. R. *v.* Amarro, R. & R. 286.

(*h*) See 3 Co. Inst. 112. R. *v.* Keyn, 2 Ex. 63, 169, Cockburn, C.J. R. *v.* Depardo, 1 Taunt. 26, 36, Sir J. Mansfield.

shall be inquired of, heard, tried, and determined and adjudged in the same manner as treasons, felonies, murders, and confederacies are directed to be by the Offences at Sea Act, 1536' (*i*). By the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28, s. 12), 'All offences prosecuted in the High Court of Admiralty of England shall upon every first and subsequent conviction be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land.' (*j*) By the Central Criminal Court Act, 1834 (4 & 5 Will. IV. c. 36), s. 22, 'the justices and judges named in the commission constitute the Court, or any two or more of them have power to inquire, hear, and determine any offence or offences committed or alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol of Newgate (or other appointed prison of the Court (*j*)), of any person committed thereto, or detained therein, for any offence or offences committed or alleged to have been done and committed upon the high seas, aforesaid, within the jurisdiction of the Admiralty of England: and all indictments found, and trials and other proceedings had and taken before the said justices and judges of oyer and terminer and gaol delivery shall be valid and effectual to all intents and purposes whatsoever' (*k*).

Before the passing of the nineteenth-century Acts, presently to be stated controversies arose in cases in which the Admiralty and the common-law Courts had or claimed concurrent jurisdiction on the narrow seas (*l*). In R. *v.* Bruce (*m*), a trial at the Admiralty session at the Old Bailey for murder committed in a part of Milford Haven, where it was about three miles across, about seven or eight miles from the mouth of the river, or open sea, and about sixteen miles below any bridges over the river, the question was raised whether the place where the murder was committed was within the limits to which the commission granted under the Offences at Sea Act, 1536 (*n*), by law extended. The judges were unanimously of opinion that the trial was properly had, and that there was no objection to the conviction on the ground of want of jurisdiction in respect of the place under the commission of the Court of trial. During the discussion of the point the construction of Hale (*o*) was much preferred to that of Coke (*p*); and most, if not all, of the judges, seemed to have thought that the common law has concurrent jurisdiction with the Admiralty in all havens, creeks, and rivers in this realm, and that the Act of 1536 applied to all great waters frequented by ships; that in such waters the admiral,

(*i*) It is not quite clear whether this Act applies to offences created by subsequent statutes.

(*j*) See Central Criminal Court Prisons Act, 1881 (44 & 45 Vict. c. 64).

(*k*) This enactment made it unnecessary to hold the Admiralty Sessions which had theretofore been held at the Old Bailey.

(*l*) *Ante*, p. 35. Before the passing of the Act of 1799 and s. 115 of the Larceny Act, 1861, it was important to ascertain whether the fact was done on the sea or within the body of a county, because in the latter event commissioners under the Act of 1536 had no jurisdiction, and in the former event the offender could not be indicted before a common-law Court, even when the offence was theft and the goods were carried ashore. 2 East, P. C. 805. 3 Co. Inst. 149. R. *v.* Prowes, 1 Mood. 349. R. *v.* Madge, 9 C. & P. 29. It would seem that the statutes above set out overrule these decisions.

(*m*) [1812] 2 Leach, 1093.

(*n*) *Post*, p. 39.

(*o*) 2 Hale, 16, 17.

(*p*) 3 Co. Inst. 119. 4 Co. Inst. 134.

in the time of Henry VIII., claimed jurisdiction; that by havens, &c., havens in England were meant to be included, though they are all within the body of some county; and that the mischief from the witnesses being sea-faring men was likely to apply to all places frequented by ships (*q*).

An accessory before the fact to a felony committed on the high seas within the jurisdiction of the Admiralty, may be indicted and tried at the Central Criminal Court, under 4 & 5 Will. IV. c. 36, s. 22 (*ante*, p. 38), although the principal had not been 'committed to, or detained in,' Newgate (*r*).

The Admiralty Offences Act, 1844 (7 & 8 Vict, c. 2), after reciting the Act of 1536 (*ante*, p. 37), and that it is expedient that provision be made for the trial of persons charged with offences committed within the jurisdiction of the Admiralty, enacts (sect. 1) 'that His Majesty's justices of assize or others His Majesty's commissioners by whom any Court shall be holden under any of His Majesty's commissions of oyer and terminer or general gaol delivery shall have severally and jointly all the powers which by any Act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty of England, and that it shall be lawful for the first-mentioned justices and commissioners, or any one or more of them, to inquire of, hear, and determine all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol in every county and franchise within the limits of their several commissions of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas and other places within the jurisdiction of the Admiralty of England; and all indictments found, and trials and other proceedings had, by and before the said justices and commissioners shall be valid' (*s*). This Act gives to Courts of Oyer and Terminer, &c., the same jurisdiction as was possessed by commissioners *under* the Act of 1536 and by the Court of Admiralty *before* that Act. It does not affect the jurisdiction of the Central Criminal Court or of special commissions under the Act of 1536 (*t*).

By sect. 2, 'in all indictments preferred before the said justices and commissioners under this Act the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts which in other indictments would be averred to have taken place in the county where the trial is had shall in indictments prepared (*u*) and tried under this Act be averred to have taken place "on the high seas"' (*v*). An indictment under this Act for

(*q*) MS., Bayley, J.

(*r*) R. *v.* Wallace, 2 Mood. 200; C. & M. 200. For Newgate read now 'the prison of the Court.' Newgate prison has been demolished.

(*s*) The residue, which related to costs, was repealed in 1882 (45 & 46 Vict. c. 55).

(*t*) S. 4.

(*u*) *Quære*, 'preferred.'

(*v*) S. 3 provides for the commitment of persons charged with offences committed within the jurisdiction of the Admiralty under 7 Geo. IV. c. 38, but so much of that Act as related to the examination and commitment of such persons was repealed by 11 & 12 Vict. c. 42, s. 34 (E), and 12 & 13 Vict. c. 69, s. 31 (I) and the examination and commitment of such persons are now regulated by 11 & 12 Vict. c. 42 (E), and 14 & 15 Vict. c. 93 (I). It seems, therefore, that 7 & 8 Vict. c. 2, s. 3 is virtually repealed.

larceny 'on the high seas' was held sufficient, without adding 'within the jurisdiction of the Admiralty' (*w*). The provisions as to alleging that the offence was committed on the high seas seems to be directory (*x*).

Each of the Criminal Law Consolidation Acts of 1861, 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; and c. 100, s. 68, contains the following clause:—

'All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England and Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas": Provided that nothing herein contained shall alter or affect any of the laws relating to the government of His Majesty's land or naval forces' (*y*).

It is to be noted that these enactments do not expressly extend to attempts to commit the crimes in question in the Admiralty jurisdiction. From this it would seem to follow that Courts of Quarter Sessions cannot, under the enactments, try such attempts, but that they are cognisable at assizes under 7 & 8 Vict., c. 2 (*ante*, p. 39).

By sect. 9 of the Accessories, &c., Act, 1861 (24 & 25 Vict. c. 94); 'Where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun elsewhere or completed within that jurisdiction, the offence of such person shall be felony' (*z*).

(*w*) R. *v.* Jones, 1 Den. 101; 2 C. & K. 165. The indictment need not conclude *contra formam statuti*. R. *v.* Serva, 2 C. & K. 53.

(*x*) R. *v.* Menham [1858], 1 F. & F. 369, 373, Wightman, J.

(*y*) Framed on the similar clauses contained in 7 & 8 Geo. IV. c. 29, s. 77; 7 & 8 Geo. IV. c. 30, s. 43; 9 Geo. IV. c. 31, s. 32; 9 Geo. IV. c. 55, s. 74 (I.); 9 Geo. IV. c. 56, s. 55 (I.); and 10 Geo. IV. c. 34, s. 41 (I.); together with 7 & 8 Vict. c. 2. Some of these enactments simply provided for the trial of offences committed within the jurisdiction of the Admiralty; whilst others provided in addition that the offences mentioned in the Act, which shall be committed within the jurisdiction of the Admiralty shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed on the land in England or Ireland. It seems clear that, wherever an Act creates new offences, this is the proper form of enactment; for, though in the case of offences against the law of nations, such as murder or piracy committed on the seas, the general course of legislation has been simply to provide for their trial, and no doubt correctly, because, in the eye of the law of England, they were offences of the same nature as if they had been committed on land in England, yet it may well be doubted whether that be sufficient in the case of newly created offences; and it is certainly much safer to have the provision with which this clause commences. C. S. G.

(*z*) The rest of the section as to indictment is in similar terms to those above quoted from the other Crim. Law Consolidation Acts.

Under these enactments, Courts of Assize (*a*) and Quarter Sessions (*b*) for counties or boroughs have authority to try any offender apprehended or in custody within their local jurisdiction for any offence or offences mentioned in the Acts of 1861, committed on the sea, which they might have tried if it had been committed within the local jurisdiction.

The Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict, c. 73) (*c*), begins by two recitals, 'Whereas the rightful jurisdiction of His Majesty, his heirs and successors extends, and has always extended, over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of His Majesty's dominions to such a distance as is necessary for the defence and security of such dominions' (*d*), and 'whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom, and of all other parts of His Majesty's dominions, by whomsoever committed, should be dealt with according to law.' By sect. 2: 'An offence committed by a person, whether he is or is not a subject of His Majesty on the open sea within the territorial waters of His Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.'

By sect. 3: 'Proceedings for the trial and punishment of a person who is not a subject of His Majesty and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any Court of the United Kingdom, except with the consent of one of His Majesty's principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of His Majesty out of the United Kingdom, except with the leave of the governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.'

By sect. 4: 'On the trial of any person who is not a subject of His Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor, as is required by this Act, has been given; and the fact of the same having been given shall be presumed, unless disputed by

(*a*) R. *v.* Dudley, 14 Q.B.D. 273.

(*b*) R. *v.* Peel, 32 L. J. M. C. 65, an indictment at Southampton Borough Quarter Sessions for larceny on a British ship on the high seas. The accused was arrested in Southampton. The case was decided on 24 & 25 Vict. c. 96, s. 115. The enactments appear not to extend to attempts to commit the offences.

(*c*) Passed in consequence of R. *v.* Keyn (the 'Franconia'), 2 Ex. D. 63. In that case the prisoner, who was a foreigner and in command of a foreign ship, whilst passing within three miles of the English shore, ran down and sank a British ship, whereby one of her passengers was drowned under circumstances which in English law would amount to manslaughter. He was tried at the Central Criminal Court, but on appeal it was held by the majority of the court that there was no power to try offences committed by foreigners on board foreign ships while within the three miles limit.

(*d*) This recital and s. 2 are declaratory of the law as laid down by the minority of the judges in R. *v.* Keyn. R. *v.* Dudley, 14 Q.B.D. 273.

the defendant at the trial; and the production of a document purporting to be signed by one of His Majesty's principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of His Majesty's dominions, and witnessing such consent and certificate, shall be sufficient evidence, for all the purposes of this Act, of the consent and certificate required by this Act.

'Proceedings before a justice of the peace or other magistrate, previous to the committal of an offender for trial, or to the determination of the justice or magistrate that the offender is to be put upon his trial, shall not be deemed proceedings for the trial of the offence committed by such offender, for the purposes of the said consent and certificate under this Act.'

By sect. 5: 'Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of His Majesty, his heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships, or in relation to persons on board such ships.'

By sect. 6: 'This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto (*e*), and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.'

By sect. 7: 'In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereafter assigned to them, that is to say: "The jurisdiction of the Admiral" as under this Act includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom or any other part of His Majesty's dominions shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom or other part of His Majesty's dominions to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer.'

'United Kingdom' includes the Isle of Man, the Channel Islands, and other adjacent islands.

'The territorial waters of His Majesty's dominions,' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom or the coast of some other part of His Majesty's dominions as is deemed by international law to be within the territorial sovereignty of His Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low water-mark, shall be deemed to be open sea within the territorial waters of His Majesty's dominions.'

'Offence,' as used in this Act, means an act, neglect, or default of

(*e*) See *post*, Bk. ii. p. 253, 'Piracy.'

such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force.

'Ship' includes every description of boat or other floating craft; 'foreign ship' means every ship which is not a British ship (*f*).

By sect. 686 (*g*) of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60): '(1) where any person being a British subject is charged with having committed an offence on board any British ship on the high seas, or in any foreign port or harbour, or on board any foreign ship to which he does not belong, or not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found (*h*), within the jurisdiction of any Court in His Majesty's dominions, which would have had cognisance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that Court shall have jurisdiction to try the offence as if it had so been committed.

'(2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849' (*i*).

By sect. 687 (*j*): 'All offences against property or person committed in or at any place either ashore or afloat out of His 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, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same Courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England' (*k*). By sect. 689, power is given to a British consular officer to detain any master, seaman, or apprentice employed on any British ship, on complaint that any offence against property or person has been committed by him, at any place, ashore or afloat, out of His Majesty's dominions or on the high seas, and may send him in custody to the United Kingdom or to any British possession, in which there is a court capable of taking cognisance of his offence.

To prove that a ship is a British merchant ship, it is not essential to produce the register or a copy thereof, it is sufficient to show that she carries the British flag, and belongs to British owners (*l*).

The prisoner was convicted of manslaughter committed on board a ship on the high seas, the ship was built at Kiel, in the duchy of Holstein, and sailed thence to London, and thence on the voyage in which the offence was committed. All the officers and crew were foreigners; the prisoner was the second mate, and the deceased the master. The ship

(*f*) The definition is wide enough to include foreign public vessels, but see the Parlement Belge, 5 P. D. 197, and Mail Ships Act, 1891 (54 & 55 Vict. c. 31).

(*g*) This section re-enacts the substance of 18 & 19 Vict. c. 91, s. 21, and 30 & 31 Vict. c. 124, s. 11.

(*h*) The word 'found' authorises trial at any place where the accused is at the time of trial. R. *v.* Lopez, D. & B. 525, decided on 18 & 19 Vict. c. 91, s. 21 (rep.).

(*i*) 12 & 13 Vict. c. 96, *post*, p. 50.

(*j*) This section re-enacts 17 & 18 Vict. c. 104, s. 267.

(*k*) The rest of the section relates to costs. See *post*, Bk. xii. c. v.

(*l*) R. *v.* Allen, 10 Cox, 405. R. *v.* Seberg, L. R. 1 C. C. R. 264: 39 L. J. M. C. 133.

was sailing under the English flag when the offence was committed. The crew were told before sailing that Mr. Rehder was sole owner. He was not born an Englishman. A certified copy of the register of the 'Gustav Adolph' under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), was admitted as *prima facie* evidence that the ship was a British ship. Certain letters were put in, which, it was urged, showed a partnership between Rehder and Ehlers, and it was urged that under ss. 18, 38, and 103, the owner of a beneficial interest in a British ship must be qualified in the same way as the owner of a legal interest; that, even admitting that the registration of the ship in the name of Rehder was *prima facie* evidence that he was owner, it could be no evidence of Ehler's qualification, and therefore the letters proving Ehler's interest in the ship rebutted the *prima facie* evidence that she was a British ship. On a case reserved, it was held that there was *prima facie* evidence that she was a British ship; as there was evidence of a certificate of registry in London, wherein Rehder was described as the owner at that time resident in London, and the ship was sailing under the British flag; but that the *prima facie* proof was rebutted by the proof that Rehder was alien born; and that there was no presumption that letters of denization or naturalisation had been granted to him, by reason that he, being alien born, would have become liable to penalties under the Act for registering the ship as belonging to a British owner (*m*).

By the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22, s. 18), 'For the purpose of giving jurisdiction to courts under this Act, a sea-fishing boat shall be deemed to be a ship within the meaning of any Act relating to offences committed on board a ship, and every court shall have the same jurisdiction over a foreign sea-fishing boat within the exclusive fishery limits of the British Islands and persons belonging thereto as such court would have if such boat were a British sea-fishing boat.'

By the Behring Sea Award Act, 1894 (57 & 58 Vict. c. 2 (*n*), persons committing, procuring, aiding, or abetting a contravention of the Act are guilty of a misdemeanor within the meaning of the Merchant Shipping Act, 1854, and by the Sea Fisheries North Pacific Act, 1895 (58 & 59 Vict. c. 21), like provisions are made as to contravention of Orders in Council (*o*).

To a count for murder which alleged to have been committed 'upon the high seas,' it was objected that it ought to have averred that the prisoners were on board a British ship, or that they were British subjects; and to counts alleging that the prisoner was master of a British ship afloat in the river Elbe, and that he there committed the murder, it was objected that these counts did not allege the murder to have been committed 'on the high seas.' The objection was overruled by Wightman, J. (*p*).

These enactments apply only to British merchant ships. Offences on public ships are dealt with under the Admiralty jurisdiction and the

(*m*) R. *v.* Bjornsen, L. & C. 545: 34 L. J. M. C. 180.

(*n*) Preserved by 57 & 58 Vict. c. 60, s. 745 (*f*).

(*o*) Continued by 8 Edw. VII. c. 18.

(*p*) R. *v.* Menham, 1 F. & F. 369. He said that as the alleged defects were on the record he did not know whether he had power to state a case under 11 & 12 Vict. c. 78.

other statutes above mentioned, or the Naval Discipline Act (29 & 30 Vict. c. 109). 'British ship' is defined by sect. 1 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), as one owned wholly by British subjects by birth or naturalisation or denizens, or by bodies corporate, established, and subject to the laws of some part of His Majesty's dominions, and having their principal place of business in these dominions. A prisoner was charged at the Liverpool Assizes with the wilful murder of the captain of the hulk 'Kent' in the Bonny River, Africa. It was proved that the 'Kent' had been a sailing ship, and was registered as a British ship though not British built. She had been for eighteen months dismasted and used as a floating depot in the Bonny River for a line of steamers trading from Liverpool. She floated in the tideway of the river and hoisted the British ensign at the peak. The prisoner was proved to have seized the captain and thrown him overboard, and he was not seen again. Archibald, J., held that there was sufficient evidence that the 'Kent' was a British ship to give the Court jurisdiction, and that it was not necessary that the crime should be wholly completed on board such ship (*q*). By sect. 2, a vessel required to be registered as a British ship, and not so registered is not recognised as a British ship. By sect. 72, 'where it is declared by this Act that a British ship shall not be recognised as a British ship, that ship shall not be entitled to any benefits, privileges, advantages, or protection usually enjoyed by British ships, nor to use the British flag or assume the British national character, but so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board such ship or by any persons belonging to her, such ship shall be dealt with in the same manner in all respects as if she were a recognised British ship' (*r*).

Sect. 687 applies to alien members of the crew as well as to British subjects. In R. *v.* Lopez (*s*), upon an indictment for wounding, with intent to do some grievous bodily harm, it was proved that the prisoner, a foreigner, being a sailor and one of the crew of a British ship, maliciously and unlawfully wounded Smith, also a foreigner and a sailor and one of the crew of the ship, whilst on the high seas and in the same ship, was tried and convicted at the Assizes at Exeter; and upon a case reserved, the conviction was affirmed. He was not found within the jurisdiction of the Court at Exeter, but was brought into the jurisdiction in custody and against his will having been 'found' in the ship (*t*). Lord Campbell, C.J., in giving the judgment of the Court said: 'We are all of opinion that the conviction must be sustained. We have no doubt that the offence committed by the prisoner was, under the circumstances, an offence against the laws of England. The prisoner, a foreigner, was in an English ship; he was under the protection of English laws, and he therefore owed obedience to the English laws, and was guilty of an offence against those laws when he maliciously wounded another foreigner, one of the crew of the same ship, on the high seas. It is

(*q*) R. *v.* Armstrong, 13 Cox, 184, Archibald, J.

(*r*) See R. *v.* Seberg, L. R. 1 C. C. R. 264: 39 L. J. M. C. 133.

(*s*) D. & B. 525; 27 L. J. M. C. 48, decided on the corresponding terms of 18 & 19 Vict. c. 91, s. 21.

(*t*) So argued. The case reserved did not state how he came into custody.

unnecessary to enter into a discussion of the authorities cited to prove that proposition,—they are quite overwhelming. Then the only other question is, whether there was jurisdiction under the commission of oyer and terminer to try the prisoner at Exeter for that offence; and upon that point we entertain as little doubt. The Court at Exeter would not have had jurisdiction (*u*) before 18 & 19 Vict. c. 91, s. 21 (*v*); but that statute is quite conclusive on the subject, and seems to have been passed for the purpose of removing any doubt that might arise. It provides that offences committed by foreigners in British vessels on the high seas may be tried by any Court within the jurisdiction of which the offender is found, if the offence is one which would have been cognisable by such Court, supposing it to have been committed within the limits of its ordinary jurisdiction. Here the offence, if committed within the county of Devon, would certainly have been triable at Exeter; and as the prisoner was found within that jurisdiction, it is the same as if the offence had been committed within the limits of that jurisdiction; and we therefore think there was clearly jurisdiction in the Court at Exeter to try him there, and that he was legally convicted.' This decision really turned on 17 & 18 Vict. c. 104, s. 267 (*uu*), but independently of legislation the offence was within the Admiralty jurisdiction (*vv*).

English Courts have not except in the case of piracy *jure gentium* (*w*) any jurisdiction to try any person for an offence committed on or by means of a foreign, public or private vessel *outside* British territorial waters (*x*). On the high seas a ship whether public or private is considered for purposes of jurisdiction a part of the territory of the nation to which the ship belongs, and (except in the case of piracy *jure gentium*), as subject only to the law of the flag which she is entitled to fly. In this context the term 'high seas' does not include the territorial waters of a nation other than that to which the ship belongs. The result of the rule is that a British subject is not punishable by the law of England for offences committed on the high seas on a foreign ship, whether he is or is not a member of the crew of the ship; and that a foreigner committing an offence on a British ship on the high seas is amenable to British justice whether he is or is not a member of the crew (*y*).

In R. *v.* Depardo (*z*) it was held that there was no jurisdiction to try in England under a commission issued in pursuance of 33 Hen. VIII.

(*u*) 'This dictum is unnecessary and erroneous. In the argument, Cockburn, C.J., said: "There is strong opinion that but for the venue a person committing an offence on the high seas on an English ship would have been amenable to punishment at the common law," and that opinion is clearly right.' C. S. G.

(*v*) Repealed and re-enacted as 57 & 58 Vict. c. 60, s. 686, *supra*, p. 43.

(*uu*) Repealed and re-enacted as 57 & 58 Vict. c. 60, s. 687, *ante*, p. 43.

(*vv*) R. *v.* Anderson, L. R. 1 C. C. R. 161.

(*w*) Att.-Gen. for Hong Kong *v.* Kwok a Sing, L. R. 5 P. C. 180, a case in which Chinese coolies on a French ship on the high seas killed the captain and some of the crew and took the ship back to China.

(*x*) See observations of Sir R. Phillimore in the 'Princess Royal' [1870], L. R. 3 Adm. & Eccl. 41, 48. No owner or part owner of the vessel was domiciled in England, and the master was a foreigner.

(*y*) 57 & 58 Vict. c. 60, s. 686, *supra*, p. 43.

(*z*) [1807] 1 Taunt. 26; R. & R. 134. In this case there was an argument that the alien had by this entering into the merchant service owed a local and temporary allegiance. The offence would be triable under 57 & 58 Vict. c. 60, s. 686.

c. 23 (*a*) and 43 Geo. III. c. 113, s. 66 (*b*); an indictment for manslaughter of an Englishman, committed in China, by an alien enemy who had been prisoner of war and was at the time of the alleged offence, acting as a mariner on a British merchant ship.

In R. *v.* Lewis (*c*) a foreigner on a foreign ship on the high seas, inflicted a blow on another foreigner which resulted in the death of the latter. The death took place in England. It was held that the offence was not rendered cognisable in England by 9 Geo. IV. c. 31, s. 8, by reason of the fact that the death occurred in England, because the act which caused the death was not cognisable in England, the accused not being a British subject, and not falling within sect. 2 of the Act. The enactments referred to are repealed and replaced by 24 & 25 Vict. c. 100, ss. 9, 10.

Homicide partly at Sea, partly on Shore.—Where a person was struck, &c., upon the high seas, and died upon shore, the admiral had no cognisance of the offence (*d*); and it was doubtful whether such offence could be tried at common law (*e*). By 24 & 25 Vict. c. 100, s. 10, 'Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place' (*f*).

Upon an indictment for manslaughter it appeared that the prisoner, who was not a British subject, shipped on board ship at New York, and signed articles to serve as a seaman therein, and so did the deceased, who was also not a British subject. The ship was American owned, commanded by an American master, and sailed under the flag of the United States. The prisoner during the voyage to Liverpool exercised much cruelty to the deceased, of which he died at Liverpool; the last act of cruelty was committed on the high seas four days before the ship arrived at Liverpool. Upon a case reserved, it was held that the prisoner was not liable to be tried in England. The Court considered that 9 Geo. IV. c. 31, s. 8 (*g*), was obviously intended to prevent a defeat of justice, from the difficulty of trial where the death occurred in a different place from that at which the blow causing it was given; and ought not to be construed as making a homicide cognisable in England by reason only of death occurring here, unless it would have been so cognisable if the

(*a*) Repealed in 1828 (9 Geo. IV. c. 31).
(*b*) Repealed in 1861 (24 & 25 Vict. c. 101).
(*c*) 26 L. J. M. C. 104; D. & B. 182.
(*d*) 2 Hale, 17, 20; 1 East, P. C. 365, 366.
(*e*) Id. and 1 Hawk. c. 31, s. 12.
(*f*) Taken from 9 Geo. IV. c. 31, s. 8 (E); and 10 Geo. IV. c. 34, s. 11 (I), with a modification so as to include accessories before the fact in manslaughter. See *post*, p. 119. The first change of the common law on the subject was by 2 Geo. II. c. 21, repealed in 1828.
(*g*) Re-enacted as 24 & 25 Vict. c. 100, s. 10, *supra*.

death had ensued at the place where the blow was given (*h*), the homicide would have been, in this particular case, by sect. 8, if the offender had been a British subject, but not otherwise (*i*).

Where a person standing on the shore of a harbour fired a loaded musket at a revenue cutter which had struck upon a sandbank in the sea, about a hundred yards from the shore, by which another was maliciously killed on board the boat, it was held that the trial must be in the Admiralty Court, and not at common law (*j*).

It is said that a foreigner illegally detained upon a British ship is not liable for acts done on the ship to effect his escape (*k*). But in respect of acts not done for such purposes he is liable as if he were voluntarily aboard. In R. *v.* Sattler (*l*) upon an indictment for murder, tried at the Central Criminal Court, it appeared that S. the prisoner was a foreigner and had committed a larceny in England, and then went with part of the stolen property to Hamburg. The deceased, who was a detective officer of the London police force, and a British subject, with the assistance of the police of Hamburg, arrested S. there, and brought him against his will on board an English steamer trading between Hamburg and London, in order that he might be tried for the larceny. Hamburg is on the river Elbe, sixty miles from the sea; but the tide flows higher up than the place where the steamer was when S. was taken on board. The steamer left Hamburg on November 21, S. being in irons, and on November 22, whilst on the high seas, he shot the deceased, who died of the wound. If the killing had been by an Englishman, in an English county, it would have been murder. The deceased had no warrant; and a case was reserved upon the question whether there was any jurisdiction to try S. at the Central Criminal Court. It was argued for the prisoner, (1) that the original arrest at Hamburg was unlawful and that the prisoner was illegally taken on board the steamer (*m*); (2) that as the prisoner was brought by force against his will into British jurisdiction no allegiance was created. For the Crown it was contended, that it was a general principle that a ship, public or private on the high seas, was, for the purpose of jurisdiction over crimes therein committed, a part of the territory of the country to which the ship belongs; and a person coming voluntarily or involuntarily on board an English ship was as much amenable to the

(*h*) Now represented by 24 & 25 Vict. c. 100, s. 10, *ante*, p. 47.

(*i*) R. *v.* Lewis, Dears & B. 182. See R. *v.* Coombes, *ante*, p. 33.

(*j*) In Ireland it was necessary to issue a special commission under 11, 12, & 13 Jac. I. c. 2 (I); and 23 & 24 Geo. III. c. 14, s. 4 (I), for the trial of all offences committed on the seas; but in England such offences might be tried under the ordinary commissions of Oyer and Terminer, or Gaol Delivery, by 7 & 8 Vict. c. 2. 24 & 25 Vict. c. 100, s. 68 follows that Act in providing for the trial and form of indictment in such cases, and renders the law the same in both countries.

(*k*) See R. *v.* Serva, 1 Den. 104; 2 C. & K. 53. In that case aliens were tried (under 7 & 8 Vict. c. 2) for murder on a Brazilian vessel which had been seized by a British cruiser for being concerned in the slave trade. The majority of the Court held that there was no jurisdiction, because there was not sufficient evidence to show that the vessel was lawfully in the possession of the British Crown. The persons responsible for the detention are liable to indictment under English law. R. *v.* Lesley, Bell, 220.

(*l*) D. & B. 525; 27 L. J. M. C. 48; *ante*, p. 34.

(*m*) There was no extradition treaty in force between Great Britain and the free city of Hamburg.

criminal law of England as if he came voluntarily or involuntarily into an English county (*n*).

Lord Campbell in giving the judgment of the Court said: 'We think it equally clear that, although the prisoner was a foreigner, the offence of which he was convicted was an offence against the laws of England. Here a crime is committed by the prisoner on board an English ship on the high seas, which would have been murder if the killing had been by an Englishman in an English county; and we are of opinion that, under these circumstances, whether the capture at Hamburg and the subsequent detention were lawful or unlawful, the prisoner was guilty of murder and an offence against the laws of England; for he was in an English ship,—part of the territory of England,—entitled to the protection of the English law, and he owed obedience to that law; and he committed the crime of murder—that is to say, he shot the detective officer, not for the purpose of obtaining his liberation, but for revenge, and of malice prepense. Then comes the question, whether the Central Criminal Court had jurisdiction to try the prisoner for this offence; and it appears to us that the late Act 18 & 19 Vict. c. 91, s. 21 (*o*), was framed for the purpose of obviating, and does obviate, all doubt upon such a subject. A man is "found" wherever he is actually present, and the prisoner was "found" within the jurisdiction of the Central Criminal Court, and we are all of opinion that the Court had jurisdiction to try him. It was contended that the prisoner was not "found" within the jurisdiction, because he was brought within it against his will; but, upon the construction of the statute, we are all of a different opinion.' And from the decision in R. *v.* Anderson (*p*) it would seem that the fact of the presence of a foreigner on board a British ship whether he is there as a member of the crew or casually, and whether voluntarily or involuntarily is enough to give jurisdiction to British Courts over crimes by him committed on the ship.

Offences in the Admiralty Jurisdiction. (Colonies and India).—The statutes above referred to relate only to the trial in England or Ireland of offences committed within the jurisdiction of the admiral. Colonial legislatures have not as a general rule any authority to give jurisdiction to the offences committed outside the territory or waters of the possession (*q*).

The Offences at Sea Act, 1806 (46 Geo. III, c. 54) (*r*), enacts, sect. 1. that, 'all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried, heard, determined and adjudged, according to the common course of the laws of this

(*n*) The questions reserved were, 'Was the custody of the prisoner on board the steamer lawful, and is there any distinction as to the times when the steamer was in the river Elbe, and whilst she was upon the high seas?' [On this the Court gave no opinion.] And, 'Supposing the custody not to have been lawful, was the killing necessarily only manslaughter?'

(*o*) Repealed and incorporated in 57 & 58 Vict. c. 60, s. 686, *ante*, p. 43.

(*p*) L. R. 1 C. C. R. 161; 38 L. J. M. C. 12.

(*q*) See Macleod *v.* Att.-Gen. of N. S. W. [1891], A.C. 455. Hardcastle on Statute Law (4th ed. by Craies), p. 408.

(*r*) The full title is, 'An Act for the more speedy trial of offences committed in distant parts on the sea.' The preamble recites 28 Hen. VIII. c. 15, and the Piracy Act, 1698 (11 Will. III. c. 7), *post*, p. 259.

realm used for offences committed upon the land within this realm, and not otherwise, in any of His Majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the King's commission or commissions, under the Great Seal of Great Britain, to be directed to any such four or more discreet persons as the Lord Chancellor of Great Britain, Lord Keeper, or Commissioner for the custody of the Great Seal of Great Britain for the time being, shall from time to time think fit to appoint; and that the said commissioners so to be appointed, or any three of them, shall have such and the like powers and authorities for the trial of all such murders, &c., within any such island, &c., as any commissioners appointed according to the directions of the Offences at Sea Act, 1536, by any law or laws now (May 23, 1806) in force, have or would have for the trial of the said offences within this realm.' And it further enacts, that 'all persons convicted of any of the said offences so to be tried, &c., shall be liable to the same pains, &c., as, by any laws now (May 23, 1806) in force, persons convicted of the same would be liable to in case the same were tried, &c., within this realm, by virtue of any commission according to the directions of the Offences at Sea Act, 1536.'

The Admiralty Offences (Colonial) Act, 1849 (12 & 13 Vict. c. 96), enacts sect. 1, that 'if any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever committed upon the sea (*ss*), or in any haven, river, creek, or place, where the admiral, or admirals, have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to any colony. Then, and in every such case, all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony, shall have, and exercise, the same jurisdiction and authority for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorised and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid, to trial and for and auxiliary to and consequent upon the trial of any such person, for any such offence, wherewith he may be charged as aforesaid, or by the law of the colony would, and ought, to have been had and exercised, or instituted and carried on by them respectively, if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the courts of criminal justice of such colony' (*s*).

Sect. 3: 'Where any person shall die in any colony of any stroke, poisoning, or hurt, such person having been feloniously stricken, poisoned, or hurt, upon the sea, or in any haven, river, creek, or place, where the admiral, or admirals, have power, authority, or jurisdiction, or at any place out of such colony, every offence committed in respect of any

(*ss*) As to the great lakes in North America see R. *v.* Meikleham [1906], 11 Ont. L. R. 366.

(*s*) S. 2, relating to punishments, was superseded by 37 & 38 Vict. c. 27, s. 3, *infra*, and repealed in 1891 (S. L. R.).

such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished, in such colony in the same manner, and 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 offence in respect of any person, who, having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning, or hurt, upon the sea, or in any haven, river, creek, or place, in which the admiral, or admirals, have power, authority, or jurisdiction, such offence shall be held for the purpose of this Act to have been wholly committed on the sea' (*t*).

Sect. 5: 'For the purposes of this Act colony shall mean any island, plantation, colony, dominion, fort, or factory, of His Majesty, except any island within the United Kingdom, and the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent thereto, respectively' (*u*). The Act of 1849 was extended to British India in 1860 (23 & 24 Vict. c. 88) (*v*), and is not affected by any of the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. 60) (*w*).

By the Admiralty Offences Colonial Act, 1860 (23 & 24 Vict. c. 122), it is made 'lawful for the legislature of any of His Majesty's possessions abroad to enact by any law or ordinance to be by them made in the usual manner that where any person being feloniously stricken, poisoned, or otherwise hurt at any place within the limits of such possession, shall die of such stroke, poisoning, or hurt upon the sea or at any place out of the limits of such possession, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished, in the possession within the limits of which such stroke, poisoning, or hurt shall happen in the same manner in all respects as if such offence had been wholly committed within the limits of such possession, or such legislature may by any such law or ordinance to be made, as aforesaid, to the like effect.'

The Courts Colonial Jurisdiction Act, 1874 (37 & 38 Vict. c. 27), enacts (sect. 3), that 'When by virtue of any Act of Parliament now, or hereafter to be, passed, a person is tried in the court of any colony (*x*) for any crime or offence committed on the high seas or elsewhere out of the territorial limits of such colony, and of the local jurisdiction of such

(*t*) The terms of this section were taken from 9 Geo. IV. c. 31, s. 8, repealed as to England in 1861, and replaced by 24 & 25 Vict. c. 100, s. 10 (*ante*, p. 47). 9 Geo. IV. c. 31, s. 8 was extended to India by 9 Geo. IV. c. 74, s. 56, as to which see Nga Hoong *v.* R., 7 Moore, Ind. App. 72; Ilbert, Govt. of India (2nd ed.), 242.

(*u*) S. 4 provides that the Act shall not affect the jurisdiction given to the Courts of New South Wales and Van Diemen's Land by 9 Geo. IV. c. 83.

(*v*) The High Court of Bengal has, under 33 Geo. III. c. 52, s. 156, power to try offences committed within the Admiralty jurisdiction. S. 2 of the Act of 1860 provides for the case of persons entitled to be tried before the Supreme Court of a presidency in India. See also Mayne, Ind. Cr. L. (ed. 1896), p. 263; Ilbert, Govt. of India (2nd ed.), 243–245.

(*w*) See s. 686, subs. 2, *ante*, p. 43.

(*x*) Defined by s. 2 so as to exclude the British Islands but to include British India, and any plantation, territory or settlement elsewhere within the King's dominions. Possessions under a central legislature are deemed to be one colony under the same local government.

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 local jurisdiction of the court, and no other, any thing in any Act to the contrary notwithstanding: Provided always that if the crime or offence is a crime or offence not punishable by the law 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 committed in England.' Offences within sects. 686 & 687, of the Merchant Shipping Act, 1894 (57 & 58 Vict. 60), are triable in the criminal Courts of British possessions (*y*).

The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), denies to the Courts created by or under the Act any 'jurisdiction under this Act to try or punish any person for an offence which, according to the law of England, is punishable on indictment,' sect. 2, sub-s. 3 (*c*).

Jurisdiction over Offences initiated outside, but taking Effect within the Realm.—The question from time to time arises whether, and to what extent, and on what principle an English court has jurisdiction to try indictments, in respect of acts done outside the realm, or initiated outside the realm, and taking effect within it. So far as concerns acts done on the sea, whether within or without the jurisdiction of the Admiralty of England, this subject is treated *ante*, pp. 31 *et seq.* As regards offences completely committed on land outside England; it seems clear that no jurisdiction to try in England can be asserted except under the express provisions of a statute.

But there remains another class of case in which the acts constituting the offence take place partly in England and partly on land outside England, or on a vessel not subject to the jurisdiction of the English Courts.

From the point of view of international law the cases fall into three divisions—

1. Where the act is initiated in another part of the British Empire, and takes effect in England.
2. Where the act is by a British subject, and is initiated in a foreign country, but takes effect in England.
3. Where the act is initiated in a foreign country, and takes effect in England, but is done by an alien.

In R. *v.* Johnson (*z*), an indictment was found in Middlesex against a judge of the Court of Common Pleas in Ireland, for causing the publication in Westminster of a seditious libel. The defendant filed a plea to the jurisdiction of the Court setting forth that he was a native of and resident in Ireland, and that Ireland was subject to its own laws and not those of Great Britain, and had its own competent Courts. This plea on demurrer was quashed for not stating what Court was competent to try the offence: but it was intimated that the proper mode of setting

(*y*) See R. *v.* Hinde [1902], 22 N.Z. L. R. 436.

(*z*) [1805] 6 East, 583.

up the defence that no English Court could try the defendant was by plea in bar or by evidence on plea of not guilty. Lord Ellenborough said (*a*), 'If then the circumstances attending the defendant, of his birth in Ireland and his residence there at the time of the publication made in this country, have the effect of rendering him not punishable in any Court of this country for such publication, this impunity must follow as a consequence of its being no crime in the defendant so circumstanced to publish a libel in Middlesex. And indeed the argument rested wholly upon this position, that the defendant owed no obedience to the laws of this part of the United Kingdom, and if he owed no obedience then he had been guilty of no crime in acting contrary to them (*b*). Such defence, if it can be, may prove available in law as matter of absolute bar.'

Judge Johnson was subsequently tried on the indictment (*c*), and after certain legal arguments (not involving the point left open as above stated), was found guilty. Lord Ellenborough, C.J., said: 'One who procures another to publish a libel is no doubt guilty of the publication in whatever county it is in fact published in consequence of his procurement.' This ruling, while undoubtedly correct as between county and county of England (*d*), does not specifically deal with a case in which the offender charged with procuring is not within the realm when he does the acts on which it is sought to make him criminally responsible.

In R. *v.* Munton (*e*), a government store-keeper in Antigua, while there resident, transmitted to his agent in London false returns, which were by the agent delivered at the Navy office in London. He was indicted in Middlesex for colluding with contractors by these false vouchers to defraud the Crown. It was objected that the Court could not take cognisance of matters committed out of the realm. Lord Kenyon held that that objection would be valid 'where the criminal matter arose wholly abroad,' and agreed that in such a case to warrant the interposition of the Court of King's Bench an Act of Parliament was expressly necessary: but he ruled that an offence was committed in London where the false returns were received and the fraud completed by their allowance, and that the jurisdiction of the Court then attached.

In R. *v.* Brisac (*f*), an information was filed at common law and tried in Middlesex for conspiracy between the captain and purser of a man-of-war, for planning and fabricating false vouchers to cheat the Crown. The evidence showed that the planning and fabrication took place on the high seas at Brassa Sound or at Lerwick in Shetland. The only acts proved to have been done in Middlesex were the delivery of the vouchers to the commissioners of victualling by innocent persons to whom they had been transmitted by the defendants, and the application for a receipt of payment there by the holder of a bill of exchange, the

(*a*) 6 East, 601.

(*b*) The Irish Courts rejected this contention as unfounded in law. See per McCleland, B., 6 East, 591, cit.

(*c*) [1805] 7 East, 65: 29 St. Tr. 81.

(*d*) See R. *v.* Bowes [1787], 4 East, 171, cit.

(*e*) [1793] 1 Esp. 62; 6 East, 590, cit. There is no doubt that now such an offence by an official committed outside Great Britain could be dealt with under 42 Geo. III. c. 85, or 49 Geo. III. c. 126, s. 14.

(*f*) 4 East, 164. See Greaves Crim. Cons. Acts (2nd ed.) 34.

consideration for which was evidenced by the false vouchers. After conviction it was objected on behalf of Brisac that the offence charged was committed on the high seas and could only be tried by virtue of 39 Geo. III. c. 37 (*g*), under a commission granted under 28 Hen. VIII. c. 15 (*h*). Grose, J., ruled (1) that these statutes did not take away the jurisdiction of the Courts of common law to try offences which they had power to try before the acts were passed; (2) that conspiracy may be tried wherever any distinct overt act of conspiracy is in fact committed. In support of this proposition he relied on R. *v.* Bowes (*i*), a case of conspiracy in which some overt acts were done in Middlesex, and the rest in other counties.

In R. *v.* Buttery (*j*) the defendant was indicted and tried in Herefordshire for obtaining goods by false pretences. The pretences were made in Herefordshire, and the goods supplied in Monmouthshire. It was ruled that the indictment was laid in the wrong county. The decision turned on the interpretation of 30 Geo. II. c. 24 (rep.), as to obtaining property by false pretences: and the only question was as to the proper county to try acts undoubtedly cognisable by English law. Certain doubts existed at that date as to whether felonies or misdemeanors committed partly in one county and partly in another could be tried in either (*k*), and these doubts were as to both felony and misdemeanor settled in 1826 (7 Geo. IV. c. 64, s. 12) (*l*), as between the counties of England. This decision does not touch cases in which the person accused was not in England when the act alleged to constitute the crime was done there (*m*).

In R. *v.* Ellis (*n*) the indictment was for obtaining credit by false pretences contrary to sects. 11 (13) and 13 (1) of the Debtors Act, 1869. The evidence was that the defendant carried on business in the county of Durham, and that goods were delivered to him there by a firm in Glasgow on the faith of false representations made by the defendant in Glasgow to the firm. On conviction, a question was raised as to the jurisdiction to try the offence in the county of Durham. The conviction was upheld. The majority of the (*o*) Court held that the offence consisted in obtaining the goods, and not in making the false representations, and that an English Court can try for obtaining goods within the jurisdiction by false representations made beyond the jurisdiction. Wright, J., held that the possession of the goods could on the evidence be treated as had in the county of Durham under a representation made in Glasgow, but continuing in Durham. The majority relied on the authority of R. *v.* Buttery and R. *v.* Burdett (*k*): but Wright, J., considered R. *v.* Buttery as inapplicable to a case where the pretence was in another country, saying, 'Where the false pretence has been made in a foreign country, the law of that country as to false pretences may not be the same as it is here' (*p*).

(*g*) *Ante*, p. 37.
(*h*) Ibid.
(*i*) [1787] 4 East, 171 cit.
(*j*) [1820] 4 B. & Ald. 179 cit.
(*k*) See R. *v.* Burdett, 4 B. & Ald. 95: 1 St. Tr. (N. S.) 1, *post*, p. 1031.
(*l*) *Ante*, p. 20.
(*m*) R. *v.* Ellis [1899], 1 Q.B. 230, 241, Wright, J.
(*n*) [1899] 1 Q.B. 230: 68 L. J. Q.B. 163.
(*o*) Hawkins, Wills and Bruce, JJ.
(*p*) *l.c.* p. 241.

In R. *v.* Oliphant (*q*) the defendant was indicted for omitting or concurring in omitting certain particulars from the cash-book of his employers, contrary to the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24). The evidence was that he was employed as manager in Paris of a branch establishment of a firm carrying on business in London: that it was his daily duty to make up on slips an account of all sums received by him in Paris, and transmit the slips to London, that the amounts might be entered in a cash-book kept in London: that he had received and fraudulently misappropriated certain sums, and omitted to enter the amounts so taken in the slips transmitted, knowing and intending that the sums omitted from the slips would, in consequence, be omitted from the cash-book. It was objected that there was no jurisdiction to try the offence in England. The Court overruled the objection on the authority of R. *v.* Munton (*r*) and R. *v.* Brisac (*s*). Reference was made arguendo to R. *v.* Johnson (*t*), R. *v.* Girwood (*u*), and R. *v.* Coombes (*v*).

In R. *v.* von Veltheim (*w*) the defendant, an alien, was convicted under sect. 44 of the Larceny Act, 1861, for sending a letter containing menaces without reasonable and probable cause. It was proved that the letters were posted in Russia and received in England, and that the defendant was in Hungary when he gave the letters to an agent to be posted.

In two cases the question has arisen whether acts initiated in England, but taking effect abroad, could be regarded as constituting offences against English law, or against the law of the country in which the act took effect. In R. *v.* Holmes (*x*) the indictment was in respect of false pretences contained in a letter posted in Nottingham, addressed to G. in France, by means of which G. was induced to send from France to Nottingham a draft which the prisoner there cashed. The decision was based on R. *v.* Burdett (*ante*, p. 54), and no attention was called to the distinction drawn by Wright, J., in R. *v.* Ellis (*supra*) to the difference between venue and jurisdiction (*y*). The case can be maintained on the ground that the draft was received in Nottingham by means of the pretence (*z*). In R. *v.* Nillins (*a*) N., being in Southampton, wrote and sent to Germany letters alleged to contain false pretences, and addressed to persons carrying on business in Germany, and thereby induced them to deliver goods to his order to persons in Hamburg. N. also sent to persons in Germany cheques alleged to be forged. An application was made for his extradition to Germany in respect of the false pretences and forgery. On proceedings for *habeas corpus* to prevent extradition, it was argued for the Crown that there was ample evidence of an offence committed in Germany, and that N. fell within the definition of fugitive criminal in the Extradition Act, 1870, sect. 26. Cave, J., said, 'It is clear that there may be cases

(*q*) No. 2 [1905]. 2 K.B. 67.
(*r*) *Supra*, p. 53.
(*s*) *Supra*, p. 52.
(*t*) 29 St. Tr. at 392, *ante*, p. 53.
(*u*) [1776] 1 Leach, 142, where an indictment for sending a threatening letter, which he had caused to be posted in the City of London, was held to lie in Middlesex, where the addressee received the letter.
(*v*) [1785] 1 Leach, 388, where the killing of a sailor in a boat on the sea, by a shot fired from the shore, was held to be cognisable by the Admiralty jurisdiction. *Vide ante*, p. 33.
(*w*) Cent. Crim. Ct. 12 Feb. 1908, Phillimore, J.
(*x*) 12 Q.B.D. 23; 53 L. J. M. C. 37.
(*y*) See British S. Africa Co. *v.* Companhia de Moçambique [1903], A.C. 602.
(*z*) R. *v.* Ellis, *ubi supra*.
(*a*) 53 L. J. M. C. 157, Cave, Day and A. L. Smith, JJ.

where a person has committed a crime in a foreign country without ever being there (*b*). This decision, if of sufficient authority, states a principle equally applicable to criminal acts taking effect in England done by persons in foreign countries by means of the post.

In the case of a crime committed through an innocent agent, *e.g.*, where a messenger is sent to cash a forged cheque, or a packet containing poison, or where a letter containing false pretences or threats, or a defamatory libel is sent through the post, the person who employs the agent or the post office in aid of his criminal purpose is treated as the principal offender (*c*). Where the offence is committed in England or within the Admiralty jurisdiction, the principal offender is regarded as constructively present where the cheque was uttered, or the poison or letter delivered, though he would apparently be equally triable by the Court having jurisdiction in respect of the place where the crime was set in motion. In R. *v.* Brisac (*d*) Grose, J., said: 'In the present case the delivering the vouchers, &c. (*e*), to the commissioners of the victualling office in Middlesex were the acts of both the defendants done in the county of Middlesex. I say it was their acts done by them both: for the persons who innocently delivered the vouchers were mere instruments in their hands for that purpose; the crime of presenting the vouchers was exclusively their own, as the crime of administering poison through the medium of a person ignorant of its quality would be the crime of the person procuring it to be administered.'

In R. *v.* Taylor (*f*) Pigott, B., said that if a person in a foreign country set other persons in motion as his agents, by whom a forged cheque was prescribed by his procurement in England, this would be an uttering for which he might be convicted in England.

In R. *v.* Coombes (*g*) it was held that the killing of a sailor in a boat by a shot fired from the shore was cognisable in the Admiralty jurisdiction. The reasons for the conclusion are not stated, and the opinion of the judges was that the prisoner was tried by a competent jurisdiction, not that the common-law Courts would not have had concurrent jurisdiction to try the offence (*h*).

It would seem that the above rule is equally applicable where the post is used by a person abroad for the transmission of letters containing matter which may be the subject of criminal proceedings (*i*).

It cannot be said that the authorities above cited show that any complete and effective consideration has been judicially given to the questions under discussion: but the trend of the decisions supports the statement in Wharton's Conflict of Laws (2nd ed.) s. 823, that 'the prevailing opinion in England and the United States is that a person who, when abroad,

(*b*) This decision has been questioned in Clarke on Extradition (4th ed.) 263.

(*c*) This view was not accepted by Cockburn, C.J. See R. *v.* Keyn, 2 Ex. D. 63, 237.

(*d*) 4 East, 172.

(*e*) It was proved that the vouchers were false and had been made on the high seas or at Lerwick in the Shetland Isles.

(*f*) 4 F. & F. 511, 513.

(*g*) 1 Leach, 388.

(*h*) The headnote in Leach seems to be inaccurate in suggesting that the jurisdiction of the Admiralty was exclusive. Coombes' case was criticised in Badische Anilin und Soda Fabrik *v.* Basle Chemical Works [1898], A.C. 200, 204, *ante*, p. 33 note (*i*), and is fully discussed in the opinions of the judges in R. *v.* Keyn, 2 Ex. D. 63, 103, 119, 234.

(*i*) R. *v.* de Marny [1907], 1 K.B. 388.

is concerned in directing a crime, may be punished for the same if arrested (or found) where the crime was committed, although he was at the time of commission and concoction out of the latter's jurisdiction'(*j*), and this view is supported by R. *v.* Stoddart(*k*). The indictment *inter alia* contained charges of obtaining money by false pretences, with reference to a coupon competition. Postal orders and letters containing money were in consequence of the advertisement of the competition posted in London addressed to Middelburg in Holland. It was contended that the obtaining of the money was in Holland and that there was no jurisdiction to try the charges at the Central Criminal Court. The contention was overruled on the ground that the offence was complete on the posting of the letters in London(*l*).

Where an intelligent acting agent is interposed between the foreigner initiating the crime and its commission in England, difficulties may arise as to the jurisdiction of the English Courts over the foreigner(*m*).

(*j*) Cf. s. 18. Wharton inquires (s. 825), What is the place of commencement where a crime is begun in one country to take effect in another, *e.g.*, by sending poison, explosives or libellous letters, or using long-range firearms? See too s. 811 and Wharton Crim. Law (8th ed.) ss. 278-283. R. *v.* Johnson, 7 East, 65, *ante*, p. 53. U. S. *v.* Davies [1837], 2 Sumner, 482, Story, J. This was the case of a gun fired from an American ship in the habour of Raiatea by which a person on a native schooner in the harbour was killed. Story, J., held that the act was in contemplation of law done on the foreign schooner where the shot took effect, and was not cognisable under the laws of the U. S. See also State *v.* Wyckoff, 2 Vroom. (N. J.) 69. R. *v.* Keyn, 2 Ex. D. 63, 237, Cockburn, C.J.

(*k*) [1909] 25 T.L.R. 612: 53 Sol. Jour. 578.

(*l*) The Court relied on R. *v.* Jones, 1 Den. 551; 19 L.J.M.C. 162 and Archb. Cr. Pl. (23rd ed.) 609.

(*m*) See Badische Anilin und Soda Fabrik *v.* Basle Chemical Works [1898], A.C. 200, 205, Halsbury, L.C.

CANADIAN NOTES.

CRIMINAL JURISDICTION.

Common Law Jurisdiction.—The common law jurisdiction as to crimes is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. R. v. Cole, 5 Can. Cr. Cas. 330.

Application of Criminal Law of England.—

(1) To Ontario. Code sec. 10.

(2) To British Columbia. Code sec. 11.

(3) To Manitoba. Code sec. 12.

(4) To Quebec:—

The Quebec Act, 1774.—The Criminal Law of England was introduced into the Province of Quebec by Royal Proclamation in 1763, and subsequently extended by 14 Geo. III. ch. 83 (Imp.) to what is now Ontario. After the erection of Upper Canada, now Ontario, into a separate province, the Provincial Legislature, after reciting the Imperial Act, 14 Geo. III. ch. 83, passed 40 Geo. III. ch. 81, in July, 1800, enacted that the Criminal Law of England as it stood on the 17th September, 1792, should be the Criminal Law of Upper Canada. R. v. Malloy (1900), 4 Can. Cr. Cas. 116 (Ont.).

(5) To Nova Scotia, New Brunswick and Prince Edward Island:—

The preamble to the Nova Scotia statute, 33 Geo. II. ch. 3 (1759), declares "that this Province of Nova Scotia, or Acadia, and the property thereof, did always of right belong to the Crown of England, both in priority of discovery and ancient possession." At that time Nova Scotia included New Brunswick, but not Cape Breton, but Cape Breton was ceded to Great Britain in 1763, and subsequently became a part of the Province of Nova Scotia. Prince Edward Island was also ceded to Great Britain in 1763, and annexed to Nova Scotia, but became a separate province in 1769. All the common law of England in 1758, unless obviously inconsistent with surrounding circumstances is in force in the territory which then constituted Nova Scotia. No

statute law of England in 1758 is in force in the said territory unless obviously applicable to the circumstances of the territory.

(6) The North-West Territories:—

The North-West Territories Act, R.S.C. ch. 62, sec. 12, enacts as follows: "Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, 1870, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter, as regards the Territories, repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom, or of the Parliament of Canada, applicable to the Territories, or by any ordinance of the Territories."

(7) The Yukon Territory:—

By the Yukon Act, R.S.C. ch. 63, sec. 19, it is provided: "Subject to the provisions of this Act the laws relating to civil and criminal matters and the Ordinances in force in the North-West Territories on the 13th day of June, 1898, shall be and remain in force in the (Yukon) Territory, in so far as the same are applicable thereto, and in so far as the same have not been or are not hereafter repealed, abolished or altered by the Parliament of Canada, or by any ordinance of the Governor in Council or the Commissioner in Council made under the provisions of this Act."

Offences on Land Outside Canada.—Issue of warrant by justice. Code sec. 656. By Code sec. 307, sub-sec. 4, no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

The Parliament of Canada has jurisdiction to constitute the leaving of Canada by a British subject resident therein, with intent to perform a prohibitive act, an indictable offence, upon the act itself being performed. Re Bigamy Sections of the Code (1897), 1 Can. Cr. Cas. 172; R. v. Brierly, 14 O.R. 525; see R. v. Plowman, 25 O.R. 656.

A British subject domiciled in Canada, only temporarily absent, continues to owe to His Majesty in relation to his government of Canada an obligation to refrain from the completion, whilst absent without any *animus manendi*, of a prohibited act, a material part of which is done by him in Canada. 1 Can. Cr. Cas. 172.

General Jurisdiction of Courts Within Province.—Code sec. 577.

Offences Committed in One Province are not Triable in Another.—Code sec. 888.

Transitory Offences—

On Water Between Jurisdictions.—Code sec. 584(*a*).

Begun in One Magisterial Jurisdiction and Completed in Another.—Code sec. 584(*b*).

On Mail, Vehicle or Vessel Passing Through Several Jurisdictions.—Code sec. 584(*c*).

Section 584, sub-sec. *c*, of the Code, is practically a reproduction of section 13 of the Criminal Law Act, 1826 (7 Geo. IV. ch. 54), with the distinction that the Code includes offences committed "on or in respect to mails or a person conveying a post letter bag, post letter, or anything conveyed by post."

Summons or Warrant May Issue.—Code sec. 653.

Where the accused was arrested for an offence alleged to have been committed in another province in respect of which a warrant of arrest had been there issued and notified by telegram to the Police Department at the place of arrest, the accused is not entitled to be discharged on habeas corpus in respect of the irregularity of his arrest, if the original warrant in due form and duly endorsed is returned in answer to the writ. The King v. Lee Chu, 14 Can. Cr. Cas. 322.

Preliminary Inquiry When Offence Committed Outside of Jurisdiction of Justice.—Code sec. 665.

Whenever the accused has been sent for trial by a magistrate or justice of the peace before the Court in any district of the same province, the Court sitting in such district has jurisdiction to try the accused. R. v. Hogle, 5 Can. Cr. Cas. 53. See Code secs. 653 and 665.

The power conferred on a magistrate under section 665 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction (but over which the magistrate still has jurisdiction because of the arrest of the accused within his district), to be taken before some justice having jurisdiction in the place where the offence was committed is permissive only. The Queen v. Burke, 5 Can. Cr. Cas. 29.

A magistrate may hold a preliminary inquiry in respect of an indictable offence committed in the same province outside of his territorial jurisdiction, if the accused is, or is suspected to be, within the

limits over which such magistrate has jurisdiction, or resides or is suspected of residing within such limits. R. v. Burke, 5 Can. Cr. Cas. 29; Code sec. 653.

The general rule is that the magistrate or justice of the peace has jurisdiction either by reason of the residence or presence of the accused in his district, or by reason of the commission of the offence within its limits. There is, however, an enlargement of this general rule in sec. 653, whereby, when an offence is begun in one magisterial jurisdiction, and completed within another, such offence may be considered as having been committed in either of them. R. v. Hogle, 5 Can. Cr. Cas. 53.

Where the offence charged was the making, circulation and publishing of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed. R. v. Gillespie (No. 2), 2 Can. Cr. Cas. 309.

In such case the Courts of the Province of Quebec have jurisdiction to try the accused if he has been duly committed for trial by a magistrate of the district. *Ibid.*

The offence of fraudulent conversion of the proceeds of a valuable security consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly the failure to account for them; and where the beginning of the operation is in one district, and the continuation and completion is in another district, the accused may be proceeded against in either district. R. v. Hogle, 5 Can. Cr. Cas. 53.

Offences Within Jurisdiction of the Admiralty.—Code sec. 591.

A charge against a seaman not a British subject on a British ship for inciting a revolt upon the ship while on the high seas, cannot if taken only under Code sec. 138, be made without the consent of the Governor-General under sec. 591 obtained prior to the laying of the information. But per Ritchie, J.—If the proceedings for the offence are taken under the Merchant Shipping Act, 1894 (Imp.), sec. 686, the consent of the Governor-General is not required, and Code sec. 591 would not apply. Per Weatherbe, J.—Code sec. 591 applies to the procedure in Canadian Courts in respect of offences committed within

the Admiralty jurisdiction whether the proceedings are taken under the Criminal Code or the Imperial Merchant Shipping Act or the Admiralty Offence Act, 1849 (Imp.). The King v. Heckman, 5 Can. Cr. Cas. 242 (N.S.).

A foreign seaman on a British ship cannot be summarily convicted for insubordination under the Canada Shipping Act, R.S.C. (1906) ch. 113, sec. 287, unless leave to lay the information has been granted by the Governor-General under sec. 591 of the Code. R. v. Adolph (1907), 12 Can. Cr. Cas. 413.

Under the Imperial statutes, 12-13 Viet. ch. 96, and the Merchant Shipping Act, 1894, sec. 686, any offence committed upon the sea or within the jurisdiction of the Admiralty, shall, in any British colony where the person is charged with the offence or brought there for trial, be dealt with as if it had been committed within the limits of the local jurisdiction of the Courts of criminal jurisdiction of such colony; and if any person dies in any colony in consequence of having been feloniously hurt or poisoned upon the sea, or within the limits of the Admiralty, or at any place out of the colony, the offence may be dealt with in such colony as if it had been wholly committed there.

A sea harbour enclosed within headlands such as the harbour of Halifax, is within the body of the adjacent county, and criminal offences committed in such harbour even upon foreign ships are not within the jurisdiction of the Admiralty except in the special cases provided by statute. R. v. Schwab (1907), 12 Can. Cr. Cas. 539 (N.S.).

A charge of theft by foreigners upon and from a foreign ship while lying in a harbour forming part of the body of the county may be prosecuted in the county without obtaining the leave of the Governor-General under sec. 591 of the Code. *Ibid.*

A preliminary inquiry may be begun in respect of an indictable offence committed by a foreigner on a British ship within the three mile limit without first obtaining the leave of the Governor-General under Code sec. 591 and the accused may be remanded for the purpose of obtaining the leave of the Governor-General for the trial and punishment of the accused.

The Territorial Waters Jurisdiction Act, 1878 (Imp.), from which Code sec. 591 is derived, applies, and the phrase "proceedings for the trial of the offence" used in Code sec. 591 must be construed in accordance to the statutory limitation which section 4 of the Imperial statute provides. The King v. Tano, 14 Can. Cr. Cas. 440.

The great lakes at the boundary of the Province of Ontario are within the jurisdiction of the Admiralty. R. v. Sharp, 5 P.R. (Ont.) 135.

Disclosing Official Secrets.—Code sec. 592.

Judicial Corruption.—Code sec. 593.

Making Explosive Substances.—Code sec. 594.

Sending Unseaworthy Ships to Sea.—Code sec. 595.

Criminal Breach of Trust.—Code sec. 596.

Fraudulent Acts of Vendor or Mortgagor.—Code sec. 597.

Uttering Defaced Coin.—Code sec. 598.

Offences in Unorganized Territory.—Code secs. 585, 586, 587, 588.

CHAPTER THE FOURTH.

OF CRIMINAL RESPONSIBILITY.

It is a general rule that no person is excused from punishment for disobedience to the laws of England, unless he is expressly exempted by law(*a*). The several pleas and excuses which may be urged on behalf of a person who has committed a forbidden act, as grounds of exemption from punishment, are now usually described as general exceptions, as being implied in the definition of every crime unless the contrary is expressed(*b*).

It is the general practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kind of coercion are assumed to be essential to criminality, but I do not believe that they are ever introduced into any statute by which any particular crime is defined(*c*). This principle was early expressed by laying down that a statute making a new felony did not extend to an infant under the age of discretion or to a lunatic(*d*).

The four general exceptions now recognised are—

I. Infancy. II. Unsoundness of mind. III. Subjection to the power of others. IV. Ignorance and mistake of *fact*.

I. Infancy.—The full age of man or woman by the law of England is twenty-one years(*e*).

Under seven.—Under the law of England(*f*) a child under seven years of age cannot be guilty of any criminal offence, whatever evidence may be available of his possessing a mischievous discretion; for *ex præsumptione juris* he 'has not discretion and understanding'(*g*); and the presumption cannot be rebutted(*h*). In consequence of this rule it has been held illegal to arrest a child under seven found stealing wood(*i*).

(*a*) 1 Bl. Com. 20. Cf. 1 Hale, 14.

(*b*) Steph. Dig. Cr. L. (6th ed.) p. 20. 2 Steph. Hist. Cr. L. cc. xviii., xix.

(*c*) R. *v.* Tolson, 23 Q.B.D. 168, 187, Stephen, J.

(*d*) Eyston *v.* Studd, Plowd. 459a, 465. See 1 Hale, 21, 22. Bac. Abr. Inf. (H.).

(*e*) See Co. Litt. ss. 104, 259.

(*f*) The civil law, as to capital punishments, distinguished the ages into four ranks: 1. *Ætas pubertatis plena*, which is eighteen years. 2. *Etas pubertatis*, or *pubertas* generally, which is fourteen to eighteen years, at which time persons were likewise presumed to be *doli capaces*. 3. *Ætas pubertati proxima;* from ten and a half (or, according to some, eleven) to fourteen, during which period the *capacitas doli* was in the *arbitrium* of the judge, but the party was not presumed to be *doli capax*. 4. *Infantia*, which lasts till seven years, within which age there can be no guilt of a capital offence. 1 Hale, 17-19.

(*g*) Reniger *v.* Fogossa, 1 Plowd. 1, 19. The rule is recognised by ss. 10, 11 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), as amended in 1908 (8 Edw. VII. c. 67), s. 128, which provides for the summary trial of children from seven to fourteen years for any indictable offence except homicide.

(*h*) 1 Hale, 27, 28. 1 Hawk. c. 1, s. 1, n.(1). 4 Bl. Com. 23. For a pardon for homicide granted to a child found to have been under seven at the date of the homicide, see 1 Hale, 27 (ed. 1800), note (*e*).

(*i*) Marsh *v.* Loader, 14 C.B. (N.S.) 535.

Between seven and fourteen.—A child of seven and under fourteen is presumed to be incapable of criminal intent (*doli incapax*); but the presumption may be rebutted, and weakens with the advance of the child's years towards fourteen, and the particular facts and circumstances attending the doing of the act and manifesting the extent of the understanding and disposition of the child. The evidence of criminal capacity which is allowed to displace the presumption (expressed in the phrase *malitia supplet aetatem*) should be strong and clear beyond all doubt and contradiction (*j*). It is said that in the case of capital crime the law was minute and circumspect, distinguishing with nicety the several degrees of age and discretion, though criminal responsibility depends not so much on years and days as on the delinquent's understanding and judgment (*k*). There are numerous cases in and before the eighteenth century in which the liability of children under fourteen to conviction and execution for capital felony has been solemnly discussed, and it was laid down that if it appeared to the Court and jury that the child was *doli capax* he might be convicted and suffer death (*l*). Under the Children Act, 1908 (8 Edw. VII. c. 67, s. 103) sentence of death cannot be passed on or recorded against a person under sixteen; but such children are now rarely if ever put on trial in respect of any of the few felonies which are still capital, although they cannot be summarily tried for homicide (*m*).

Whenever a person under the age of fourteen is indicted for felony, the proper course is to leave the case to the jury to say whether, at the time of committing the offence, such person had guilty knowledge that he was doing wrong (*n*). And in a recent case it has been ruled that the mere fact that the child did the acts imputed to him as an offence is not in itself enough to rebut the presumption against criminal responsibility arising from his tender years (*o*). The presumption against capacity is now applied equally to felony and misdemeanor.

(*j*) R. *v.* Vamplew, 3 F. & F. 520.

(*k*) 4 Bl. Com. 23.

(*l*) 1 Hale, 25, 27. 4 Bl. Com. 32. See Dean's case, 1 Hale, 25, note (*u*): execution of a child between eight and nine for burning two barns; sentence to death (respited) of a child of nine for murder. 1 Hale, 27 (see Fitz. Rep. Corone, 57; B. Corone, 133; Dalt. c. 147): and conviction and execution of a child of ten (Spigurnal's case: 1 Hale, 26; Fitz. Rep. Corone, 118) and a girl of thirteen (Alice de Wableborough's case: 1 Hale, 26): in each case for murder. The fullest discussion of the rules applied in the eighteenth century is in York's case [1748], Fost. 70, an indictment of a boy of ten for murdering a girl of five. The boy was sentenced to death and respited until 1757, when he was pardoned on condition of entering the navy. Cf. R. *v.* Wild, 1 Mood. 452.

(*m*) 42 & 43 Vict. c. 49, s. 10: 52 and 53 Vict. c. 22, s. 2: 8 Edw. VII. c. 67, s. 128 (1).

(*n*) R. *v.* Owen, 4 C. & P. 236, Littledale, J. R. *v.* Smith, 1 Cox, 260, Erle, J. Former editions of this work contain the statement that if an infant apparently wanting discretion be indicted and found guilty of felony the justices themselves may dismiss him without a pardon (Y. B. 35 Hen. VI. 11 & 12); but that this authority must be understood of a reprieve before judgment; or of a case where the jury find the prisoner within the age of seven years, or not of sufficient discretion to judge between good and evil. 1 Hale, 27. 1 Hawk. c. 1, s. 8. They also raise a query whether in any case of an infant *convicted* by a jury, the judge would take upon himself to dismiss him. It is submitted that the regular course would be to respite execution, and recommend the prisoner for a pardon. Except in case of conviction of murder, these statements are of no present value: the Courts being free in non-capital cases to bind the prisoner to come up for judgment or put him on probation (*vide post*, p. 227).

(*o*) R. *v.* Kershaw, 18 T. L. R. 357, Bucknill, J. In R. *v.* Carvery [1906], 11 Canada Cr. Cas. 331, it was held that a charge of misdemeanor (perjury) against a boy of ten could not be sustained at common law unless he was conscious of the nature of

The law presumes that a male under fourteen cannot be guilty of rape (*p*); nor of an assault with intent to commit rape (*q*), nor of carnally knowing a girl under thirteen years of age (*r*). But, on an indictment for this offence, he may be convicted of indecent assault (*s*), an offence which may be committed by persons of either sex (*ss*). This presumption is absolute, and evidence is not admissible to prove that the infant is in fact physically capable of committing any such offence (*t*). But this presumption is upon the ground of impotency rather than want of discretion; for he may be a principal in the second degree, as aiding and assisting in rape as well as in other felonies, if it appears by sufficient circumstances that he had a mischievous discretion (*u*).

Fourteen and over.—An infant of fourteen years and over is presumed to be *doli capax*, and at common law was regarded as liable to capital punishment as much as a person of full age (*v*), and a statute declaring acts to be treason or felony extends to infants above fourteen. But they were said to be exempt from punishment in the case of some misdemeanors and non-capital offences (*w*). The distinctions drawn between the two classes of offence were probably based on a tendency to confuse between the criminal and civil aspects of misdemeanor, and it was recognised that in the case of any notorious breach of the peace, as a riot, battery, or the like, an infant above the age of fourteen is equally responsible as a person of full age (*x*).

An infant capable of taking the witnesses' oath is punishable for

his conduct, and was capable of appreciating that it was wrong. No evidence was given to shew the extent of the boy's intelligence, and the Court declined to presume from the mere commission of the act that the boy knew he was doing wrong. It has been suggested that a plea of guilty should not be accepted in the case of a child under fourteen, and that the Court or jury should require evidence of criminal capacity before convicting such a child. See 43 L. J. (newsp.) 688.

(*p*) R. *v.* Groombridge, 7 C. & P. 582. Gaselee, J., after consulting Abinger, C.B., as to whether the words 'every person' in 9 Geo. IV. c. 31, s. 16, altered the former law.

(*q*) R. *v.* Eldershaw, 3 C. & P. 396, Vaughan, J. R. *v.* Philips, 8 C. & P. 736, Patteson, J.

(*r*) R. *v.* Jordan, 9 C. & P. 118, Williams, J. R. *v.* Waite [1892], 2 Q.B. 600.

(*s*) R. *v.* Williams [1893], 1 Q.B. 320. In that case there were conflicting dicta as to the liability of a boy under fourteen to conviction for attempting to commit rape. See R. *v.* Angus, *infra*.

(*ss*) See R. *v.* Angus [1907], 24 N. Z. L. R. 948, and *post*, p. 955.

(*t*) R. *v.* Philips, and R. *v.* Jordan, *supra*.

(*u*) 1 Hale, 630. R. *v.* Eldershaw, *ubi supra*. R. *v.* Allen, 18 L. J. M. C. 72.

(*v*) Dr. & Stu. c. 26. Co. Lit. 79, 171, 247. Dalt. 476, 505. 1 Hale, 25. Bac. Abr. Inf. (A. & H).

(*w*) In 1 Jac. I. c. 11, as to bigamy (rep. 9 Geo. IV. c. 31, s. 1, and now represented by 24 & 25 Vict. c. 100, s. 57) there was a special exception of marriages within the age of consent; so that if the marriage were above the age of consent, though within the age of twenty-one years, it was not exempted from the penalty. So by 21 Hen. VIII, c. 7 (rep. 7 & 8 Geo. IV. c. 27), concerning felony by servants embezzling their masters' goods delivered to them, there was a special provision that it should not extend to servants under the age of eighteen years, who certainly would have been within the penalty, if above fourteen though under eighteen, unless there had been a special provision to exclude them. And so by 12 Ann. c. 7 (rep. 7 & 8 Geo. IV. c. 27), which made it felony without benefit of clergy to steal goods to the value of 40*s.* out of a house, though the house were not broken open, apprentices who should rob their masters were especially excepted (see Bac. Abr. Inf. (H.). Co. Lit. 147. 1 Hale, 20, 21, 22).

(*x*) See 4 Bl. Com. 23. 1 Hale, 20. Co. Lit. 247b. And as to riot, 1 Hawk. c. 65, s. 14. It is said that it was the course of the Crown Office for an infant to appear in the King's Bench by attorney and not by guardian. R. *v.* Tanner, 2 Ld. Raym. 1284.

perjury (*y*), and an infant may be indicted for cheating with false dice (*z*), or for larceny as a bailee, since bailment is not a contract but a delivery upon condition (*a*). An infant is not liable to indictment as a bankrupt for offence within the Debtors Act, 1869, as extended by the Bankruptcy Acts, 1883 and 1890, because he cannot be adjudicated bankrupt (*b*), but there seems to be no legal objection to his conviction for aiding and abetting an adult bankrupt to commit such offences (*c*).

In the following cases the criminal liability of an infant between fourteen and twenty-one is said to be qualified. It was said that general statutes imposing corporal punishment did not extend to infants: and on this reasoning it was held that an infant could not be imprisoned for ravishment of ward, notwithstanding the generality of the terms of the Statute of Merton (20 Hen. III. c. 6) (*d*). But this, if in any sense true, must be limited to cases in which the punishment is collateral to the offence, and not the direct object of the proceeding against the infant (*e*).

It is said that if an infant of the age of eighteen years be convicted of a disseisin with force, yet he shall not be imprisoned (*f*); and that though an infant at the age of eighteen or even fourteen, by his own acts may be guilty of a forcible entry, and may be fined for the same, yet he cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion; and it is not particularly mentioned in the statute against forcible entries, that he shall be committed for such fine (*g*). It is also said that an infant cannot be guilty of a forcible entry or disseisin by barely commanding one or by assenting to one to his use; because every command or assent of this kind by a person under such incapacity is void; but an actual entry by an infant into another's freehold gains the possession and makes him a disseisor (*h*).

It is also said that if the offence charged against the infant be a mere non-feasance (unless it be of such a thing as the party is bound to by reason of tenure or the like, as to repair a bridge, &c. (*i*), an infant is privileged by reason of his infancy; because laches in such a case is not imputable to him (*j*).

It is doubtful whether these authorities would now be followed, except where the contractual incapacity of the infant had a direct bearing on the offence with which he was charged. Recent legislation for purposes of punishment and reform, as distinct from legal responsibility, classifies infants from fourteen to sixteen separately from those between sixteen and twenty-three, and separates both from adults (*k*).

(*y*) But see *ante*, p. 60, note (*o*). The rule has been extended by recent legislation to children of tender years allowed to give evidence without oath. *Vide post*, Bk. xiii. c. v.

(*z*) Bac. Abr. Inf. (H.). Sid. 258.

(*a*) R. *v.* Macdonald, 15 Q.B.D. 323.

(*b*) R. *v.* Wilson, 5 Q.B.D. 28. Cf. Lovell *v.* Beauchamp [1894], A.C. 607.

(*c*) *Vide post*, p. 108.

(*d*) Bac. Abr. Infancy, (H.). 1 Hale, 21. Eyston *v.* Studd, 1 Plowd. 465a.

(*e*) Bac. Abr. tit. Inf. (H.). 1 Hale, 21.

(*f*) 1 Hale, 21.

(*g*) Bac. Abr. Inf. (H.). Dalt. 422. Co. Lit. 357. And see 1 Hawk. c. 64, s. 35, that the infant ought not to be imprisoned because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named.

(*h*) Bac. Abr. Inf. (H.). Co. Lit. 357. 1 Hawk. c. 64, s. 35.

(*i*) 2 Co. Inst. 703. R. *v.* Sutton, 3 A. & E. 597. In substance such indictments are now of a civil and not of a criminal character. See 7 Ed. VII. c. 23, s. 20 (3). 8 Ed. VII. c. 15, s. 9 (3).

(*j*) 1 Hale, 20. Bac. Abr. Infant (H.).

(*k*) *Vide post*, p. 230.

II. Unsoundness of Mind.—All persons who have reached the age of discretion (14 years) are presumed to be sane, and criminally responsible (*l*), and in cases where a person subject to attacks of insanity (*m*) has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper (*n*). It lies on the accused to prove that he was insane at the time of the commission of an offence (*o*), so as not to be liable to punishment as a sane person. The jury may draw the inference of insanity from direct evidence, or from the appearance and conduct of the accused at his arraignment or trial.

It has been considered, that there are four kinds of persons who may be said to be *non compotes mentes* :—1. An idiot. 2. One made *non compos* by illness. 3. A lunatic. 4. One who is drunk (*p*).

Idiocy is congenital imbecility or unsoundness of mind (*q*), (without lucid intervals) (*r*). A person is deemed an idiot who cannot count twenty, tell the days of the week, does not know his father or mother, his own age, &c. : but these are mentioned as instances only ; for whether idiot or not is a question of fact for the jury (*s*). A person deaf and dumb from birth is in presumption of law an idiot ; but if it appears that he has the use of understanding he is criminally responsible, and may be tried and convicted, though great caution should be used in such a proceeding (*t*). This form of mental incapacity has been described as *dementia naturalis*. The difficulty in cases of deaf and dumb persons accused of crime is oftener as to their capacity to plead and understand the proceedings at their trial than their mental incapacity (*u*).

Mental incapacity arising from post natal causes, such as illness

(*l*) Macnaughton's case, 4 St. Tr. (N. S.) 931, *post*, p. 67. R. *v.* Stokes, 3 C. & K. 185. *post*, p. 71. R. *v.* Layton, 4 Cox, 149, *post*, p. 78.

(*m*) 1 Hale, 33, 34. R. *v.* Oxford [1840], 4 St. Tr. (N. S.) 497 ; 9 C. & P. 525.

(*n*) 1 Hale 33, 34.

(*o*) The practice at the Central Criminal Court, approved in R. *v.* de Vere [1909], 2 Cr. App. R. 19, is for the defence to call the prison doctor or other witnesses. As to procedure in Scotland see Brown's case, [1907], 9 Fraser (Just.) 67. As to Canada see *Re* Duclos, 12 Canada Cr. Cas. 478.

(*p*) Co. Litt. 247. Beverley's case, 4 Co. Rep. 124, *post*, p. 87.

(*q*) *Dementia naturalis, vel fatuitas a nativitate.*

(*r*) *Post*, p. 63.

(*s*) Bac. Abr. Idiots, &c. (A). Dy. 25. Moore (K.B.), 4, pl. 12. Bro. Idiot, 1. F. N. B. 233.

(*t*) 1 Hale, 34 and note, where it is said that 'according to 43 Assis. pl. 30, and T. B. 8 Hen. IV. 2, if a prisoner stands mute, it shall be inquired whether it be wilful, or by the act of God ; whence Crompton infers that if it be by the act of God, the party shall not suffer, Crompt. Just. 29, a. But if one who is both deaf and dumb can show by signs that he has the use of his understanding, much more may one who is only dumb, and consequently such a one may be guilty of felony.' From the humane exertions of many ingenious persons, and from the charitable institutions for the instruction of deaf mutes, many of them have at the present day a very perfect knowledge of right and wrong. In R. *v.* Steel, 1 Leach, 451, a prisoner, who could not hear, and could not be prevailed upon to plead, was found mute by the visitation of God, and then tried, found guilty, and sentenced to be transported.

(*u*) In R. *v.* Jones, 1 Leach, 102, where the prisoner (who was indicted on 12 Ann. c. 7, for stealing in a dwelling-house), on being put to the bar appeared to be deaf and dumb, and the jury found a verdict, 'Mute by the visitation of God ;' after which a woman was examined upon her oath, to the fact of her being able to make him understand what others said, which she said she could do by means of signs, such prisoner was arraigned, tried, and convicted of the simple larceny. In R. *v.* Berry, 1 Q.B.D. 447, a deaf mute on trial for felony was found by the jury not to have understood the proceedings at the trial, and to be unable to understand them. This was held equivalent to a verdict of insanity. As to present procedure, *vide post*, p. 82.

(fever or palsy), or accident, injury, or shock to the brain, makes the person suffering from it not criminally responsible for acts done by him while it continues, is described by the older writers as *dementia accidentalis vel adventitia*, and is separately regarded as total or partial, or temporary (*v*) or permanent. They describe as lunatics persons afflicted by mental disorder only at certain periods and vicissitudes; having intervals of reason. Such persons during their frenzy are criminally as irresponsible as those whose disorder is fixed and permanent (*w*).

The great difficulty in cases of this kind is to determine whether a person is so far deprived of sound memory and understanding as not to be responsible for his actions; or whether, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions. Hale says that partial insanity is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and that this partial insanity seems not to excuse them in the committing of any capital offence. And further, 'Doubtless most persons that are felons of themselves and others are under a degree of partial insanity when they commit these offences: it is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes.' He concludes, 'the best measure I can think of is this: such a person as, labouring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony (*x*).

On the trial of Earl Ferrers in 1760 for murder (*y*), it was proved that he was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. But the murder was deliberate; and it appeared that when he committed the crime he had capacity sufficient to form a design and know its consequences. It was urged, on the part of the prosecution, that complete possession of reason was unnecessary to warrant the judgment of the law, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his actions, and discriminate between moral good and evil. And he was found guilty and executed.

In Arnold's case (*a*), a trial in 1724, for maliciously shooting, it appeared clearly that the prisoner was, to a certain extent, deranged, and that he had greatly misconceived the conduct of Lord Onslow; but it also appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. Tracey, J., told the jury,

(*v*) See R. *v.* Baines [1886], Kenny Cr. Law, p. 61, *cit.* The *dictum* of Darling, J. in R. *v.* Harding [1909], 1 Cr. App. R. 223 seems incorrect.

(*w*) Beverley's case, 4 Co. Rep. 125. Co. Litt. 247. 1 Hale, 31. Bac. Abr. Idiots, &c. (A).

(*x*) 1 Hale, 30.

(*y*) 19 St. Tr. 886, 947. See Wood Renton on Lunacy, 886.

(*a*) MS. Collinson, Lunacy, 475: 16 St. Tr. 764, 765. The jury found the prisoner guilty; but at Lord Onslow's request he was reprieved.

that where a person has committed a great offence, the exemption of insanity must be very clearly made out before it is allowed; that it is not every kind of idle and frantic humour of a man, or something unaccountable in his actions, which will show him to be such a madman as is to be exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, or a wild beast, he will properly be exempted from the punishment of the law.

In Parker's case (*b*), who was tried in 1812, for aiding the King's enemies, by entering into the French service in time of war between France and this country, the defence was rested upon the ground of insanity; and a witness on his behalf stated, that his general character from a child was that of a person of very weak intellect; so weak that it excited surprise in the neighbourhood when he was accepted for a soldier. But the evidence for the prosecution had shown the act to have been done with considerable deliberation and possession of reason; and that the prisoner, who was a marine, having been captured by the French, after a confinement of about six weeks entered voluntarily into the French service, and stated to a captive comrade that it was much more agreeable to be at liberty and have plenty of money than remain confined in a dungeon. The Attorney-General replied to this defence of insanity, that before it could have any weight in rebutting a charge so clearly made out, the jury must be properly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong.

T. Bowler (*c*) was tried on July 2, 1812, for wounding W. B. The defence set up for the prisoner was insanity, occasioned by epilepsy; and it was deposed by the prisoner's housekeeper, that he was seized with an epileptic fit on July 9, 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanor; that he would frequently rise at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to the rain; and that his spirits were so dejected that it was necessary to watch him, lest he should destroy himself. The keeper of a lunatic asylum deposed, that it was characteristic of insanity occasioned by epilepsy for the patient to imbibe violent antipathies against particular individuals, even his dearest friends, and to have a desire of taking vengeance upon them upon causes wholly imaginary, which no persuasion could remove, and that yet the patient might be rational and collected upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be deceived by assumed appearances. A commission of lunacy was also produced, dated June 17, 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from March 30. Le Blanc, J., told the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of

(*b*) 1 Collinson, Lun. 477. Shelf. Lun. 590. The jury returned a verdict of guilty.

(*c*) *Times*, July 4, 1812: 1 Collinson, 673n. The report in Collinson does not state the day on which the prisoner shot at W. Burrowes.

distinguishing right from wrong, or under the influence of any *illusion* in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty (*d*).

In Bellingham's case (*e*), who was tried in 1812 for the murder of Mr. Spencer Perceval, a part of the prisoner's defence was insanity. On this part of the case, Sir James Mansfield, C.J., stated to the jury, that in order to support such a defence it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder, or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement.

In R. *v.* Offord (*f*), on an indictment for murder, it appeared that the prisoner laboured under a notion that the inhabitants of H., and particularly the deceased, were continually issuing warrants against him with intent to deprive him of his liberty and life. Lord Lyndhurst, C.B., told the jury that 'they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature?' and expressed his complete agreement with the observations of Sir James Mansfield in the last case.

On the trial of Oxford, in 1840, for shooting at Queen Victoria, Lord Denman, C.J., told the jury, 'Persons *prima facie* must be taken to be of sound mind till the contrary is shewn. But a person may commit a criminal act, and not be responsible. If some controlling disease was,

(*d*) See 4 St. Tr. (N. S.) 508.

(*e*) Old Bailey, May 15, 1812. *Times*, May 16: Collinson Addend. 636. 'I will not refer to Bellingham's case, as there are some doubts as to the mode in which that case was conducted.' Per Campbell, Att.-Gen. in R. *v.* Oxford, 9 C. & P. 553; 4 St. Tr. (N. S.) 497, 508.

(*f*) [1831] 5 C. & P. 168.

in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed.' . . . 'On the part of the defence, it is contended that the prisoner was *non compos mentis*, that is (as it has been said) unable to distinguish right from wrong, or, in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong.' . . . 'Something has been said about the power to contract and to make a will; but I think that those things do not supply any test. The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime?' (*g*)

J. Hadfield was tried in the Court of King's Bench, in 1800 (*h*), for high treason, in shooting at King George III., and the defence was insanity. He had been a soldier and received many severe wounds in battle, which had caused partial derangement of mind, and had been dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most blasphemous kind; and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On May 11, 1800, preceding his commission of the act in question, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bedpost, and that God had ordered him to do so; and upon his wife screaming, and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of May 15 he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the King. He spoke very highly of the King, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of Odd Fellows; and, after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the Crown, it was proved that he had sat in his place in the theatre nearly three-quarters of an

(*g*) 9 C. & P. 525; 4 St. Tr. (N. S.) 497, Denman, C.J., Alderson, B., and Patteson, J.

(*h*) 27 St. Tr. 1281: 1 Collinson, Lunacy, 480.

hour before the King entered; that at the moment when the audience rose, on His Majesty's entering his box, he got up above the rest, and, taking deliberate aim, presented a pistol loaded with slugs, fired it at the King's person, and then let it drop; and when he fired his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra in the pit; and he took a deliberate aim, by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that 'he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed.' These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that 'his plan was to get rid of it by other means; he did not intend anything against the life of the King; he knew the attempt only would answer his purpose.' Erskine (*i*) for the prisoner put the case to the jury as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for them to be satisfied that the act in question was the immediate unqualified offspring of the disease. And Kenyon, C.J., ruled that as the prisoner was deranged immediately before the offence was committed, it was impossible that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet, there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted (*j*).

On an indictment of Daniel Macnaughton, in 1843, for the murder of D., the defence was insanity, and the medical evidence was that persons of otherwise sound mind might be affected with morbid delusions; that the prisoner was in that condition; that a person labouring under a morbid delusion might have a moral perception of right and wrong; but that, in the case of the prisoner, it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had a connection with his delusion; that it was the nature of his disease to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would at once break out into the most violent paroxysms. Tindal, C.J., said to the jury, 'The point I shall have to submit to you is whether on the whole of the evidence you have heard, you are satisfied that at the time the act for the commission of which the prisoner now stands charged he had that competent use of his understanding as that he knew that he was doing, by the very act itself, a wicked and a wrong thing. If he was not sensible at the time he committed that act, that it was a violation of the law of God and man (*k*), undoubtedly he is not responsible for that act, or liable to any punishment whatever flowing from it.' . . . 'If upon

(*i*) Later Lord Chancellor Erskine.

(*j*) The accused was acquitted on the ground of insanity. See 39 & 40 Geo. III. c. 94, *post*, p. 84.

(*k*) *Quære*, whether this position was not too favourable for the prisoner, as it required the jury to be satisfied that the prisoner was aware *both* of the laws of God and man?

balancing the evidence in your minds you should think the prisoner a person capable of distinguishing right from wrong with respect to the act with which he stands charged (*l*), he is then a responsible agent and liable to the penalties imposed upon those who commit the crime of which he is accused' (*m*).

Macnaughton was acquitted on the ground of insanity, and his acquittal gave rise to a discussion in the House of Lords, and the following questions were put to the judges (*n*), and answered by them all, except Maule, J., as follows, in June, 1843:—

Q. I. 'What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?'

A. I. 'Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that notwithstanding the accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.'

Q. II. 'What are the proper questions to be submitted to the jury where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?'

Q. III. 'In what terms ought the question to be left to the jury as to the prisoner's state of mind, at the time when the act was committed?'

A. II. and III. 'As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury ought to be told in all cases that *every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction;* and that *to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.* The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the

(*l*) *Quære*, this position also, as a man may not have a *perfectly* sound mind, and yet be criminally responsible?

(*m*) Macnaughton's case, 4 St. Tr. (N. S.) 847; 10 Cl. & F. 200; 8 E. R. 718.

(*n*) As to the authority of the H. L. to put questions to the judges on matters not judicially before the house, see Wood Renton, Lunacy, 889. For medical criticism on the case see Mercier, Criminal Responsibility, c. viii.

accused *at the time of doing the act knew the difference between right and wrong* (*o*); which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to *the party's knowledge of right and wrong, in respect to the very act with which he is charged.* If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas, the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. *If the accused was conscious that the act was one that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable;* and the usual course, therefore, has been to leave the question to the jury, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require' (*p*).

Q. IV. 'If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?'

A. IV. 'The answer must, of course, depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.'

Q. V. 'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?'

(*o*) See Mayne, Ind. Cr. L. (1896), 378.

(*p*) In Alison's Principles of the Criminal Law of Scotland, p. 634, cited in R. v. Oxford, 9 C. & P. 532; 4 St. Tr. (N. S.) 497, by Campbell, Att.-Gen., it is said, that 'to amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong, *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts.' Macnaughton's case has been followed in Scotland. Gibson's case, 2 Brown (Sc.), 332. But see Brown's case (1867), 9 Fraser (Just.) 67, 76. In American and Colonial Courts it is not accepted as fully expressing the directions proper to cases of irresistible impulse. See Archb. Cr. Pl. (23rd ed.), 26n.

A. V. 'We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not questions upon a mere matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right' (*q*).

In R. *v.* Vaughan (*r*) the prisoner, who was charged with stealing a cow, had had his cow taken from him under an illegal distress, and, with a view of recovering her, he had gone in the night to the close of the prosecutor, who had purchased her, and taken another cow out of it. Owing to the loss of his cow, and various other losses, the prisoner's mind

(*q*) 1 C. & K. 130, 10 C. & F. 200. Maule, J., after expressing the difficulty he felt in answering the questions, because they did not arise out of, and were not put with reference to, a particular case, or for a particular purpose, which might limit or explain the generality of their terms, said, in answer to the first question, 'So far as it comprehends the question whether a person circumstanced as stated in the question is for that reason only to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding, and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. *To render a person irresponsible for crime on account of unsoundness of mind the unsoundness should*, according to the law as it has been long understood and held, *be such as to render him incapable of knowing right from wrong*. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind.' To the second question the learned judge answered, 'If, on a trial such as is suggested in the question, the judge should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question as being, in my opinion, the law on this subject.' To the third question the learned judge replied, 'There are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.' To the fourth question the learned judge replied that the answer to the first question was applicable to this. To the fifth question the learned judge replied, 'Whether a question can be asked depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time when it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question, which is otherwise lawful, though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect. Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question; in principle it is open to the objection that as the opinion of the witness is founded on those conclusions of fact, which he forms from the evidence, and as it does not appear what these conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed given, and has never, that I am aware of, been successfully objected to; and I think the course and practice of receiving such evidence, confirmed by the very high authority of Tindal, C.J., Williams, J., and Coleridge, J., in R. *v.* Macnaughton, who not only received it, but left it, as I understand, to the jury without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open.'

(*r*) [1844] 1 Cox, 80.

was affected, and he was under the impression that every one was robbing him. Tindal, C.J., told the jury that it is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shewn that the prisoner 'had no competent use of his understanding, so as to know that he was doing a wrong thing in the particular act in question.'

In R. *v.* Higginson (*s*), a trial for murder, by burying a child alive, upon the surgeon, called for the prosecution, being asked whether a fracture of the skull was the cause of the death, or whether the child had, after the fracture of the skull, been suffocated by being buried while alive, the prisoner said, in open court, 'I put him in alive.' Two witnesses stated that the prisoner was of 'very weak intellect,' and the surgeon of the prison stated that the prisoner was of 'very weak intellect but capable of knowing right from wrong.' Maule, J., after adverting to the evidence adduced, said to the jury, 'If you are satisfied that the prisoner committed this offence, but you are also satisfied that, at the time of the committing the offence, the prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground; but if you think that, at the time of committing the offence, he did know right from wrong, he is responsible for his acts, although he is of weak intellect' (*t*).

In R. *v.* Stokes (*u*), upon an indictment for murder it appeared that the prisoner, in the soldiers' room in the barracks, took up his musket as if to clean it, levelled it at the deceased, fired and killed her on the spot; her husband and child being in the room, and two other soldiers being present. The prisoner was a man of singular habits, and seldom spoke to the other soldiers, was very 'secluded, sulky, and sullen,' and was described as 'a close-minded man,' and 'a man of a very nasty temper.' He had frequently complained of illness, and had made efforts to get into the hospital, but he was rejected, as having no visible disorder. (The report contains a statement of sundry other facts as to the prisoner's state of mind.) The defence was that the prisoner was insane, or that he was under such an insane impulse as to render him irresponsible. Rolfe, B., in summing up said: 'If a prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The *onus* rests on him; and the jury must be *satisfied* that he actually was insane. If the matter be left in *doubt*, it will be their duty to convict him; for every man must be presumed to be responsible for his acts till the contrary is clearly shewn. A case occurred some time ago at the Central Criminal Court, before Alderson, B., and the jury hesitated as to their verdict, on the ground that they were not satisfied whether the prisoner was or was not of sound mind when he committed the crime; and that learned judge told them, that, unless they were satisfied of his insanity, it would be their duty to find a verdict of guilty. Every man is held responsible for his acts by the law of this country, if he can discern right from wrong. This subject was a few years ago carefully considered by all the judges, and the law is clear upon the subject (*v*). It is true, that learned speculators, in

(*s*) [1843] 1 C. & K. 129.

(*t*) In R. *v.* Davies [1858], 1 F. & F. 69, 70, Crompton, J., said: 'You must find that from mental disease he did not know right from wrong.' *Cf.* R. *v.* Richards, ibid. 87, Crowder, J., a case of paroxysms.

(*u*) [1848] 3 C. & K. 185.

(*v*) See Macnaughton's case, *ante*, p. 67.

their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly compelled to commit some unlawful act (*w*). But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds? It has been urged that no motive has been shown for the commission of this crime. It is true that there is no motive apparently but a very inadequate one; but it is dangerous ground to take, to say that a man must be insane because men fail to discern the motive for his act. It has also been said that the conduct of the prisoner was that of a madman in committing the offence at such a time, in the presence of the woman's husband, who had arms within his reach; but it would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death, and the certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity' (*x*).

In R. *v.* Barton (*y*), on the trial of a man for the murder of his wife, it appeared that he had always treated her and their children with kindness; that they were talking with a neighbour at their door late at night, and at four o'clock next morning it was discovered that he had cut the throats of his wife and child, and had attempted to commit suicide. When questioned, he exhibited no sorrow or remorse for his conduct, but stated that 'trouble and dread of poverty and destitution had made him do it, fearing that his wife and child would starve when he was dead.' He said he had contemplated suicide for a week past; he had not had any quarrel with his wife, and that, having got out of bed to destroy himself, the thought had first come into his head to kill his wife and child; he had first attacked her whilst she was asleep in bed; she got away from him, and rushed to the window; he then killed the child, and seizing his wife, pulled her backwards to him, and cut her throat; he next tried to cut his own throat, but his powers failed him, and he did not succeed, though he wounded himself severely. This narrative, coupled with a knowledge of the prisoner's private circumstances, induced the surgeon to form the opinion that the prisoner, at the time he committed the act, had not, in consequence of an uncontrollable impulse, to which all human beings are subject, any control over his conduct. The desire to inflict pain and injury on those previously dear to the prisoner, was in itself a strong symptom of insanity, and the impossibility of resisting a sudden impulse to slay a fellow-being, was another indication that the mind was insane. There was not necessarily a connection between homicidal and suicidal monomania, though it would be more likely that a monomaniac who had contemplated suicide should kill another person, than for one who had not entertained any such feelings of hostility to his own existence. Monomania was an affection, which, for the instant, completely deprived the patient of all self-control in respect of some one particular subject which is the object of the disease. The prisoner had

(*w*) See Steph. Dig. Cr. Law (6th ed.), art. 28 (*c*). Mercier, Criminal Responsibility, (Oxford, 1906). Parl. Pap. 1908 (c. 4202), p. 141. 1 Bishop American Cr. L. ss. 383 (*b*), 387, 388.

(*x*) But see R. *v.* Jefferson, 72 J.P. 467; 1 Cr. App. R. 95.

(*y*) [1848] 3 Cox, 275.

no delusion, and his reasoning faculties did not seem to be affected; but he had a decided monomania evincing itself in the notion that he was coming to destitution. For that, there was some foundation in fact; but it was the surgeon's decided opinion that the prisoner was in an unsound state of mind at the moment he cut his wife's throat. On the day before, the prisoner had had his razor sharpened, saying he wanted it to give to some friend; and the prisoner had suffered a severe pecuniary loss not long before, and it had produced a decided effect upon his mind, giving rise to the most gloomy anticipations on account of his wife and family. Parke, B., told the jury that the only question was whether, at the time the prisoner inflicted the wound on his wife, 'he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question, whether he, at the time, knew the nature and character of the deed he was committing, and, if so, whether he knew he was doing wrong in so acting. This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men; but he must, nevertheless, express his decided concurrence with Rolfe, B.'s views of such cases (*z*), that learned judge having expressed his opinion that the excuse of an irresistible impulse co-existing with the full possession of reasoning powers might be urged in justification of every crime known to the law—for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the ground of insanity, and it would therefore be for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse, under which the prisoner had committed this deed, was one which altogether deprived him of the knowledge that he was doing wrong. Could he distinguish between right and wrong? Reliance was placed on the desire to commit suicide, but that did not always evidence insanity. And here the prisoner was led to attempt his own life by the pressure of a real substantial fact clearly apparent to his perceptive organs, and not by any unsubstantial delusion. The fact, however, must be taken into the account, for it might have had a serious effect on the mind of the prisoner, as also the absence of any attempt to escape from justice, and the want of all sense of sorrow and regret immediately after the death of his wife, contrasted with his more natural state of mind afterwards, when he felt and expressed regret and sorrow for his act. These circumstances ought all to be taken into consideration; but it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion' (*a*).

In R. *v.* Burton (*b*), the prisoner, a youth of eighteen, at first pleaded guilty to an indictment for murder; the judge warned him that this would not affect his fate; his counsel said he was insane, and desired to be hung; the prisoner, however, with apparently perfect intelligence, retracted his plea, and pleaded not guilty. The deceased, a boy, had been found with his throat cut, and the prisoner gave himself up, and admitted the act, recounting all the circumstances with perfect intelligence;

(*z*) Expressed in R. *v.* Stokes, *ante*, p. 71.

(*a*) Verdict guilty.

(*b*) [1863] 3 F. & F. 772.

and it did not appear that there was any ill-will to the boy, and the prisoner had said, 'I had no particular ill-feeling against the boy, only I had made up my mind to murder some one.' He added that he had wiped his hands and the knife. Afterwards he said that it was well for a Mr. C. that he had left Chatham, for he had prosecuted him, and he had made up his mind to murder him when he came out of gaol. Evidence was given on behalf of the prisoner of strange conduct, and a surgeon proved that on two occasions he had sent the prisoner's mother to a lunatic asylum: she was low and desponding, and attempted suicide. The prisoner's brother was of weak intellect. On two occasions he had attended the prisoner, and said he believed he was labouring under what, in the profession, would be considered as moral insanity; that is, he knows perfectly well what he is doing, but has no control over himself. By the moral feelings he meant the propensities which may be diseased, while the intellectual faculties are sound; and that, having heard the evidence, in his opinion, it was reasonable to believe that there must in the prisoner's case be some derangement of the brain,—some deviation from the normal condition of the brain. On cross-examination, he stated that he believed the prisoner knew what he was doing, but that an impulse came upon him, which he could not control; and he adopted an opinion of Dr. Winslow that no man could commit suicide in a state of sanity. He believed the prisoner had no proper control over his actions. He had a knowledge of right and wrong, but could not control his actions. Evidence on the part of the Crown was given to shew that the prisoner was sane. Wightman, J., said that 'in Macnaughton's case (*c*) the judges laid down the rule to be that there must, to raise the defence, be a defect of reason from disease of the mind, so as that the person did not know the nature and quality of the act he committed, or did not know whether it was right or wrong. It was not mere eccentricity of conduct which made a man irresponsible for his acts. The medical man called for the defence had defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This seemed to be a most dangerous doctrine, and fatal to the interests of society and security of life. The question was whether such a theory was in accordance with law. The rule, as laid down by the judges, was quite inconsistent with such a view; for it was, that a man was responsible for his actions if he knew the difference between right and wrong. It was urged that the prisoner did the act in order to be hanged, and so was under an insane delusion; but what delusion was he under? So far from it, it showed that he was quite conscious of the nature of the act and its consequences. He was supposed to desire to be hanged, and in order to attain the object committed murder. That might show a morbid state of mind, but not delusion. Homicidal mania, again, as described by the witnesses for the defence, showed no delusion; it merely showed a morbid desire for blood. Delusion meant the belief in what did not exist. The question for the jury was, whether the prisoner at the time he committed the act was labouring under such a species of

(*c*) *Ante*, p. 67 *et seq*

insanity as to be unaware of the nature, the character, or the consequences of the act he committed. In other words, whether he was incapable of knowing that what he did was wrong.'

In R. *v.* Townley (*d*) on an indictment for murder, it appeared that the prisoner had been engaged to the deceased, but her friends disapproved, and the engagement was broken off, but renewed afterwards. However, the deceased formed an attachment for another, and wrote to the prisoner to break off the engagement; and he wrote three very sensible letters in reply to hers, that he would not stand in her way if she was resolved to part with him, but that he should prefer to have an interview with her, and to hear her determination from her own lips. Accordingly he went to the place where she lived, and they were seen together, and she was afterwards found with her throat cut in three places. The prisoner came up and assisted to carry her to the house, repeatedly stating that he had done it, and should be hanged for it. He said also, 'Poor Bessie! you should not have proved false to me.' He told her grandfather, who asked what was amiss, 'It is your granddaughter, Betsy, murdered. She has deceived me, and the woman that deceives me must die.' The prisoner behaved throughout with apparent indifference, and, on the arrival of the police, said that he wished to give himself up for murdering the young lady; and added, 'I am far happier now I have done it than I was before, and I trust she is.' Evidence was given that there had been insanity in the family, and Dr. Winslow stated that he had seen the prisoner. 'I talked to him largely on the subject of the crime, and I am of opinion that at the present moment he is a man of deranged intellect. He told me he did not recognise he had committed any crime at all, neither did he feel any degree of pain, regret, contrition, or remorse for what he had done. I endeavoured to impress on his mind the serious nature of the crime he had committed. He repudiated the idea of its being a crime either against God or man, and attempted to justify the act, alleging that he considered Miss Goodwin as his own property; that she had been illegally wrested from him by an act of violence; that he viewed her in the light of his wife, who had committed an act of adultery; and that he had as perfect a right to deal with her life as he had with any other description of property,—as the money in his pocket, &c. I endeavoured to prove to him the gross absurdity of his statement and the enormity of his offence: he replied, "Nothing short of a miracle can alter my opinions." The expression that Miss Goodwin was his property was frequently repeated. He killed her, he said, to recover property which had been stolen from him. I could not disturb this, as I thought, very insane idea. I said, "Suppose anyone robbed you of a picture, what course would you take to recover it?" He said he would demand its restitution, and if it were not granted, he would take the person's life without compunction. I remarked that he had no right to take the law into his own hands; he should have recourse to legal measures to obtain restitution. He replied that he recognised the right of no man to sit in judgment upon him; he was a free agent; and as he did not bring himself into the world by any action of his own, he had perfect liberty to think

(*d*) [1863] 3 F. & F. 839.

and act as he pleased, irrespective of anyone else. I regard these expressions as evidence of a diseased intellect. He said he had been for some weeks under the influence of a conspiracy; there were six conspirators plotting against him, with a view to destroy him, with a chief conspirator at their head. This conspiracy was still going on while he was in prison, and he had no doubt that, if he were at liberty, they would continue their operations against him, and in order to escape their evil purposes he would have to leave the country. He became much excited, and assumed a wild, demoniacal aspect. I am satisfied that aspect was not simulated.' On cross-examination he said, 'I have no doubt he knows that these opinions of his are contrary to those generally entertained, and that, if acted upon, they would subject him to punishment. I should think that he would know that killing a person was contrary to law, and wrong in that sense. I should think, from his saying he should be hanged, that he knew he had done wrong. His moral sense was more vitiated than I ever found that of any other human being. His opinions were pretty much those of atheists, but he was beyond atheism. He seemed incapable of reasoning correctly on any moral subject. He denied the existence of a God and of a future world. He said it was a matter of perfect indifference whether he was dead or alive.' Martin, B., told the jury that what the law meant by an insane man was, a man who acted under delusions, and supposed a state of things to exist which did not exist, and acted thereupon. A man who did so was under a delusion, and a person so labouring was insane. In one species of insanity the patient lost his mind altogether, and had nothing but instinct left. Such a person would destroy his fellow-creatures, as a tiger did his prey, by instinct only. A man in that state had no mind at all, and therefore, was not criminally responsible. The law, however, went farther than that. If a man labouring under a delusion did something of which he did not know the real character—something of the effect and consequences of which he was ignorant—he was not responsible. An ordinary instance of such delusion was where a man fancied himself a king, and treated all around him as his subjects. If such a man were to kill another under the supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal, he would not be responsible. The result was, that if the jury believed that at the time the act was committed the prisoner was labouring under a delusion, and believed that he was doing an act that was not wrong, or of which he did not know the consequences, he would be excused. If, on the other hand, he well knew that his act would take away life—that that act was contrary to the law of God, and punishable by the law of the land—he was guilty of murder. In his opinion the law was best laid down by Le Blanc, J., in Bowler's case (*e*), who told the jury that it was for them to determine whether the prisoner, when he committed the offence, was incapable of distinguishing right from wrong, or under the influence of any illusion which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should

(*e*) *Ante*, p. 64.

be of opinion that when he committed the act he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to justice. After noticing other cases, Martin, B., told the jury that they must judge of the act by the prisoner's statements and by what he did at the time. Unless they were satisfied—and it was for the prisoner to make it out—that he did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder. The prisoner's letters appeared to be as sensible letters as ever he had read. Again, the reason the prisoner gave for his act was, 'She should not have proved false to me.' Now, if his real motive was that he conceived himself to have been ill-used, and either from jealousy of the man who was preferred to him, or from a desire of revenge upon her, committed the act, that would be murder. Those were the very passions which the law required men to control; and if the deed was done under the influence of those passions, there was no doubt it was murder. The prisoner's expression, that he should be hanged for it, indicated that he knew the consequences of his act. Another reason he gave for what he had done was, 'The woman who deceives me must die.' If a young lady promised to marry a man, and then changed her mind, it might be truly said that she deceived him; but what would be the consequences to society if men were to say every woman who treated them in that way should die, and were to carry out those views by cutting their throats? The prisoner claimed to exercise the same power over a wife as he could lawfully exercise over a chattel; but that was not a delusion, nor like a delusion. It was the conclusion of a man, who had arrived at results different from those generally arrived at, and contrary to the laws of God and man; but it was not a delusion. It had been said by one of the witnesses that the prisoner did not know the difference between good and evil. If that was a test of insanity, many men were tried who did not know that difference. In truth, it was no test at all. The idea of a conspiracy was a delusion, but the mere setting himself up against the law of God and man was not a delusion at all. The question for the jury was, Was the prisoner insane, and did he do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder.

In R. *v.* Haynes (*f*), a trial for murder of a woman, the prisoner appeared to have been on the most intimate terms with the deceased. No motive was assigned for the murder. The prisoner having seduced a young woman under a promise of marriage, which he had been unable to fulfil, his reason had been much affected by it. Bramwell, B., read the opinion of the judges in the House of Lords to the jury, and then said, 'It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and

(*f*) [1859] 1 F. & F. 666.

irresistible influence, or homicidal tendency. But the circumstances of an act being *apparently* motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable, which might prompt the act. A morbid and restless, but resistible, thirst for blood, would itself be a motive urging to such a deed for its own relief (*ff*). But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence,—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must return, therefore, to the simple question you have to determine—did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong?' (*g*)

In R. v. Layton (*h*), a trial for murder, the prisoner and his wife were walking along a road, and he had been for some time chiding her. He then fired a pistol at her and she fell; and he pulled her up, and they proceeded a few yards, when he pushed her down, and inflicted a second wound on her throat with a knife. He then got over a hedge into a field, and ran some distance, until he was overtaken by a person who had seen the woman fall. The prisoner wiped the blood off his hands, saying he had met with a misfortune and cut his finger. He would not tell what he had done with the pistol and knife, but said, 'I did it. I intended to do it, and that will put an end to it. I have been unhappy since Christmas.' When he shot and cut his wife, he must have known that persons were within a short distance, having just before met them. He had threatened to murder his wife before, and on the day before he was heard sharpening a knife, and the wife was afterwards seen running out of the house, followed by the prisoner with a knife similar to one found near the place where the murder was committed. The prisoner had been in gaol for debt for two months in the early part of the year, and had been unfortunate in building speculations. Several witnesses called for the prisoner stated that they believed that the prisoner was not in his right mind, and proved sundry statements made by him as to his property and other matters, which were alleged to be delusions, and that his conduct had been strange, and his manner greatly excited. For the prosecution, witnesses were called to prove that he was sane, and had acted in matters of business in a rational manner. Rolfe, B., told the jury that insanity was the most difficult question which could engage the attention of any tribunal. It was difficult to define it in words, or even in idea. The opinion of the judges was taken by the House of Lords a few years back, as to what was to constitute a definition of insanity, and it created very great difficulty, but after great and anxious deliberation, they came to the conclusion that the old description was

(*ff*) In homicide cases it is intent and not motive which is crucial. R. *v.* Dixon [1869], 11 Cox, 341. Montague Smith, J. R. *v.* Ellwood [1908], 1 Cr. App. R. 181 (C.C.A.).

(*g*) Cf. R. *v.* Brough, 2 F. & F. 838n.

(*h*) [1849] 4 Cox, 149.

the best, viz., that insanity should constitute a defence only when a party was in such a state of mind arising from disease as to be incapable of deciding between right and wrong; but that this definition was imperfect, as all definitions must be, and would require to be modified with reference to each particular case. Applying that law to the present case, what the jury had to consider was, whether the evidence was such as to satisfy them that at the time the act was committed by the prisoner, he was incapable of understanding right from wrong, as that he could not appreciate the nature of the act he was committing. Perhaps it would be going too far to say that a party was responsible in every case where he had a glimmering knowledge of what was right and wrong. In cases of this description, there was one cardinal rule which should never be departed from, viz., the burden of proving innocence rested on the accused. Every man committing an outrage on the person or property of another, must be, in the first instance, taken to be a responsible being. Such a presumption was necessary for the security of mankind. A man going about the world, marrying, dealing, and acting as if he were sane, must be presumed to be sane till he proves the contrary. The question, therefore, would be, not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind. They might arrive at the conclusion, from the nature of his conduct and acts up to the time of the act in question, or shortly preceding it, that he was insane; though he was not capable of proving it by positive testimony, as such was the nature of the mind, that it might be one minute sane, and the next insane, and therefore it might be impossible for a party to give positive evidence of its condition at the particular moment in question. The conclusion seemed irresistible, that the prisoner was to some extent labouring under a delusion, but he was not exempt from responsibility because he was labouring under a delusion as to his property, unless that had the effect of making him incapable of understanding the wickedness of murdering his wife. But when that was the question they had to consider, he could not say that it was altogether immaterial that he was insane on one point only (*i*). Indeed his insanity on that point might guide them to a conclusion as to his sanity on the point involved in this case, and, in this view of the matter, there were two circumstances in the evidence of great importance: these were, the want of motive for the commission of the crime, and its being committed under circumstances which rendered detection inevitable. They could come to no other conclusion than that the prisoner had taken away the life of his wife, and that this was murder, unless he had satisfied them that he was not capable at the time of appreciating his acts (*j*).

(*i*) *Quære*, omit 'only,' which seems inconsistent with the context.

(*j*) Cf. R. *v.* Law [1862], 2 F. & F. 836. In R. *v.* Leigh [1866], 4 F. & F. 915, where on the trial of an indictment for murder, insanity was set up as a defence, Erle, C.J., said, 'The question was, whether the prisoner was or was not responsible when he committed the act, not whether he was not guilty on the ground of insanity; that was an issue far too vague, indefinite, and undefined. The issue was, whether or not when he did the act, he was legally responsible; in other words, whether he knew its nature, and knew that it was wrong. The distance, indeed, between the extreme points of manifest mania and perfect sense was great, but they approach by gradual

It is usual but not essential in a question of insanity to call medical witnesses or lunacy experts (*k*).

In R. *v.* Wright (*l*), on a trial for murder, the prisoner was acquitted, but a question was reserved as to whether the evidence of a medical man was properly admitted. He volunteered his evidence, and wished to give his opinion upon the evidence as to the state of the prisoner's mind at the time the act was done; and he was allowed so to do. The judges did not come to any formal resolution; but they all thought that in such a case a witness of medical skill might be asked, whether in his judgment such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of the disorder in a person subject to it? and that by such questions the effect of his testimony might be got in an unexceptionable manner. Several of the judges doubted whether the witness could be asked on the very point which the jury were to decide; viz., whether, from the testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity? In R. *v.* Searle (*m*), a case of malicious wounding, where it was proposed to call a physician who had heard the whole evidence, to give his opinion as to the insanity of the prisoner, Park, J., after referring to the preceding case, allowed the physician to be asked whether the facts and appearances proved shewed symptoms of insanity.

In R. *v.* Frances (*n*), where the defence to an indictment for murder was that the prisoner was insane at the time he committed the act, and witnesses were called to prove that insanity had existed in many members of the prisoner's family and that he had been insane for three years, a physician, who had been in court during the whole trial, was asked by the counsel for the prosecution 'whether, from all the evidence he had heard, both for the prosecution and defence, he was of opinion that the prisoner, at the time he did the act, was of unsound mind?' and the opinion of the judges in answer to the fifth question in Macnaughton's case (*o*) was cited in support of the question. Alderson, B., and Cresswell, J., held that the question ought not to be put. The proper mode is to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinions of scientific men (*p*).

steps and slow degree. The law, however, did not say that when any degree of insanity existed, the party was not responsible, but that when he was in a state of mind to know the distinction between right and wrong, and the nature of the act he committed, he was responsible.' See also R. *v.* Southey [1866], 4 F. & F. 864.

(*k*) R. *v.* Dart, 14 Cox, 143.

(*l*) [1823] R. & R. 456.

(*m*) [1831] 1 M. & Rob. 75.

(*n*) 4 Cox, 57.

(*o*) *Ante*, p. 67.

(*p*) Cf. R. *v.* Burton, *ante*, p. 73. In Doe *v.* Bainbrigge, 4 Cox, 454, the trial of an ejectment where the question turned on the sanity of the testator, and a physician was asked whether in his opinion, from the facts proved in evidence, the testator was sane or insane, Campbell, C.J., said the witness might give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the testator; his lordship saying

Where the defence of insanity has been set up, it has been common practice to prove that other members of the prisoner's family have been afflicted with insanity; but it is a matter of fact that insanity is often hereditary in a family, and therefore that fact should be proved, in the first instance, by the testimony of medical men, and then the inquiry whether another member of the prisoner's family has been insane will be legitimate (*q*).

Where in support of a defence of insanity the prisoner's counsel attempted to quote from 'Cooper's Surgery' the author's opinions on the subject, in his address to the jury, on the ground that they were the sentiments of one who had studied the subject, and submitted that it was admissible in the same way as opinions of scientific men on matters appertaining to foreign law; Alderson, B., said: 'I should not allow you to read a work on foreign law. Any person who was properly conversant with it might be examined; but then he adds his own personal knowledge and experience to the information he may have obtained from books. We must have the evidence of individuals, not their written opinions. You surely cannot contend that you may give the book in evidence, and if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course?' And on its being said that it was certainly done in Macnaughton's case, Alderson, B., added, 'And that shows still more strongly the necessity for a stringent adherence to the rules laid down for our observance. But for the non-interposition of the judge in that case, you would not probably have thought it necessary to make this struggle now' (*r*).

The application of the rules and principles laid down in these cases to each particular case as it may arise, will necessarily in many instances be attended with difficulty; more especially with regard to the true interpretation of the expressions, which state that the prisoner, in order to be a proper subject of exemption from punishment on the ground of insanity, should appear to have been unable '*to distinguish right from wrong*,' or to discern '*that he was doing a wrong act*,' or should appear to have been '*totally deprived of his understanding and memory*'; as even in Hadfield's case (*s*) his expressions when apprehended, that 'he was tired of life,' that 'he wanted to get rid of it,' and that 'he did not intend anything against the life of the King, but knew that the attempt only would answer his purpose'; seem to shew that he must have been aware that he was doing *a wrong act*, though the degree of its criminality might have been but imperfectly presented to him, through the morbid delusion by which his senses and understanding were affected. But it is clear that idle and frantic humours, actions occasionally unaccountable and extraordinary, mere dejection of spirits, or even such insanity as will sustain a commission of lunacy, will not be sufficient to render a person irresponsible for a criminal act. And it seems that

peremptorily that he would not allow a physician to be substituted for a jury. The verdict was for the plaintiff, which prevented this ruling from being questioned in the court above.

(*q*) R. *v.* Tucket, 1 Cox, 103, Maule, J. R. *v.* Atkins, 1 Cr. App. R. 69.
(*r*) R. *v.* Crouch, 1 Cox, 94.
(*s*) *Ante*, p. 66.

though if there be a total permanent want of reason, or if there be a total temporary want of it when the offence was committed, the prisoner will be entitled to an acquittal; yet, if there be a partial degree of reason, a competent use of it, sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil; then, upon the fact of the offence proved, the judgment of the law must take place (*t*).

Procedure with reference to insane offenders.—At whatever stage insanity arises with reference to an alleged offence, its existence is treated as a bar to giving the verdict or judgment appropriate in the case of a prisoner of unsound mind.

It is stated by the older authorities that, if a man in his sound memory commits a capital offence, and before arraignment 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, he becomes 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 non-sane memory, execution shall be stayed; for, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution (*u*).

It is now the practice to bring up the prisoner for arraignment unless he is certified to be insane in manner provided by the Criminal Lunatics Act, 1884 (*v*) (47 & 48 Vict. c. 64). By that Act, s. 2, subsect. (1), 'where a prisoner is certified in manner provided in this section to be insane, a Secretary of State may, if he thinks fit, by warrant (*w*), direct such prisoner to be removed to the asylum named in the warrant, and thereupon such prisoner shall be removed to and received in such asylum and subject to the provisions of this Act, relating to conditional discharge, or otherwise, shall be detained therein, or in any other asylum to which he may be transferred in pursuance of this Act, as a criminal lunatic (*x*) until he ceases to be a criminal lunatic.' The effect of removal under the certificate is to prevent the arraignment or trial of the person to whom it relates, until he is remitted to prison for trial under sect. 3 (*y*).

(*t*) Per Yorke, Sol.-Gen., in Earl Ferrers's case, 19 St. Tr. 947, 948. R. *v.* Allen, Stafford Lent Assizes, 1807, MS., Lawrence, J. Att.-Gen. *v.* Parnther, 3 Br. Ch. Cas. 441; 29 E. R. 632, per Lord Thurlow.

(*u*) 4 Bl. Com. 23. 1 Hale, 35. See Wood-Renton on Lunacy, 807.

(*v*) As to the history of legislation with reference to criminal lunatics, see Wood-Renton on Lunacy, 793.

(*w*) The warrant may be signed by an under-secretary of state (s. 15).

(*x*) *i.e.*, as a person for whose safe custody during the King's pleasure, His Majesty or the Admiralty is authorised to give order, or a person whom a Secretary of State or the Admiralty has, in pursuance of any statute, directed to be removed to a place for the reception of the insane (s. 16). The disposal and treatment of criminal lunatics is regulated by the Criminal Lunatic Asylums Act, 1860 (23 & 24 Vict. c. 75), and by ss. 4–16 of the Act of 1884. The prisons appointed as asylums for criminal lunatics are Broadmoor and Parkhurst. See Stat. R. and Orders Revised (ed. 1904), tit. 'Lunatic (E).'

(*y*) *Ex parte* Collins, K.B.D. [1899], noted 34 L. J. (newsp.) 132. Under the former Act on the same subject (27 & 28 Vict. c. 29) it was held that a *habeas corpus* would lie to bring up for trial a person sent by Home Secretary's warrant to an asylum after committal for trial. R. *v.* Peacock, 12 Cox, 21.

This enactment was passed to deal with cases of persons obviously too mad to be arraigned (*z*).

By subsect. (2), 'A person shall cease to be a criminal lunatic if he is remitted to prison, or absolutely discharged in manner provided by this Act, or if any term of penal servitude or imprisonment to which he may be subject determines.'

By subsect. (3), 'where it appears to any two members of the Visiting Committee of a prison that a prisoner in such prison, not being under sentence of death, is insane, they shall call to their assistance two legally qualified medical practitioners, and such members and practitioners shall examine such prisoner and inquire as to his insanity, and after such examination and inquiry may certify in writing that he is insane.'

Subsect. (4) provides for an inquiry by the Secretary of State, where a prisoner under sentence of death appears to be insane.

By subsect. (5) in convict prisons the power of the section shall be exercised by the Directors of Convict Prisons or one of them (*a*).

By sect. 3, 'where it is certified by two legally qualified medical practitioners that a person being a criminal lunatic (not being a person with respect to whom a special verdict has been returned, that he was guilty of the act or omission charged against him, but was insane at the time when he committed the act or made the omission) is sane, a Secretary of State, if satisfied that it is proper so to do, may by warrant direct such person to be remitted to prison to be dealt with according to law.

By sect. 16, '"prison" means any prison or place of confinement to which a person may be committed, whether on remand or for trial, safe custody, or punishment, or otherwise under any other than civil process, and "prisoner" means any person so committed.'

Trial.—By the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38) (*b*), s. 2 (1), 'where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence, that he was insane so as not to be responsible according to law for his actions, at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid, at the time when he did the act or made the omission' (*bb*).

(2) 'When such special verdict is found the Court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till His Majesty's pleasure

(*z*) See R. *v.* Dwerryhouse, 2 Cox, 446.

(*a*) Now the prison commissioners: see Prison Act, 1898 (61 & 62 Vict. c. 41), s. 1.

(*b*) This Act superseded the provisions of 39 & 40 Geo. III. c. 94, s. 1, as to acquittal on the ground of insanity, and detention of the accused or insane during the King's pleasure. The superseded enactment applied only to treason, murder and felony. The present Act like 39 & 40 Geo. III. c. 94, s. 2 (*post*, p. 84), applies to all offences tried on indictment.

(*bb*) See R. *v.* Harding, 1 Cr. App. R. 219: 25 T. L. R. 139. When on a criminal appeal the appellant was insane, &c., they may quash the sentence and make an order as on a special verdict, 7 Edw. VII. c. 23, s. 5 (4). R. *v.* Jefferson, 72 J. P. 467: 1 Cr. App. R. 95.

shall be known, and it shall be lawful for His Majesty thereupon and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to His Majesty may seem fit' (*c*).

When the questions of fitness to plead and take trial have not been decided on arraignment they are dealt with by the jury with the question of criminal responsibility (*d*).

Under the law prior to this Act, if the jury were of opinion that the prisoner did not in fact do all the acts necessary in law that the law requires to constitute the offence charged, supposing the prisoner had been sane, they must find him not guilty generally, and the Court have no power to order his detention, although the jury should find that he was in fact insane. Where, therefore, on an indictment for treason, which stated, as an overt act, that the prisoner discharged a pistol loaded with powder and a bullet, the jury found that the prisoner was insane at the time when he discharged the pistol, but whether the pistol was loaded with ball or not there was not satisfactory evidence, the Court expressed a strong opinion that the case was not within the statute (*e*).

Under the Act of 1883, the jury find that the accused did the act or made the omission charged as an offence and then proceed to negative the defendant's responsibility according to law for his actions.

Where a prisoner's counsel set up the defence of insanity for him, and the prisoner objected to that defence, asserting that he was not insane, he was allowed to suggest questions to be put to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose (*f*).

Indictment.—If the acts proved to have been done by the prisoner be such as would have amounted to the crime charged, if they had been done by a person of sane mind, the grand jury are *bound* to find a true bill (*g*). The acts next to be cited do not apply to the grand jury.

Arraignment.—By the Criminal Lunatics Act, 1800 (*h*), 39 & 40 Geo. III. c. 94, s. 2, 'if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled 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 shall appear to the jury charged with such indictment to be insane (*i*), it shall be lawful for the Court, before whom any such person shall be brought to be

(*c*) Subsect. (4) applies to persons in respect of where a special verdict is found, the statutes applying to persons acquitted on the ground of insanity. The enactments then existing are repealed—3 & 4 Vict. c. 54, s. 7, by 47 & 48 Vict. c. 64, *ante*, p. 82, and 25 & 26 Vict. c. 86, s. 15, by s. 342 of the Lunacy Act, 1890 (53 Vict. c. 5); and the detention of such persons is now regulated by the Acts of 1860 and 1884, *ante*, p. 82, note (*x*).

(*d*) R. *v.* Southey, 4 F. & F. 864. 39 & 40 Geo. III. c. 94, s. 2, *infra*.

(*e*) R. *v.* Oxford, 9 C. & P. 525; 4 St. Tr. (N. S.) 497, Denman, C.J., Alderson, B., and Patteson, J.

(*f*) R. *v.* Pearce, 9 C. & P. 667, Bosanquet, J. For numerous unreported decisions on the same point, see Wood-Renton on Lunacy, 809.

(*g*) R. *v.* Hodges, 8 C. & P. 195, Alderson, B.

(*h*) Passed July 28, 1800. See Hadfield's case, *ante*, p. 66. S. 1 is superseded by 46 & 47 Vict. c. 38, s. 2, *ante*, p. 83.

(*i*) R. *v.* Little, R. & R. 430, and MS., Bayley, J. There is no appeal against a finding under this section negativing insanity. R. *v.* Jefferson, 72 J.P. 467. *Ex parte* Emery [1909], 2 K.B. 81-86.

arraigned or tried as aforesaid, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody till His Majesty's pleasure shall be known' : ' and if any person charged with any offence shall be brought before any Court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such Court to order a jury to be impanelled to try the sanity of such person ; and if the jury so impanelled shall find such person to be insane, it shall be lawful for such Court to order such person to be kept in strict custody, in such place, and in such manner as to such Court shall seem fit, until His Majesty's pleasure shall be known. And in all cases of insanity so found it shall be lawful for His Majesty to give such order for the safe custody of such person so found to be insane during his pleasure, and in such manner as to His Majesty shall seem fit' (*j*).

The prisoner was indicted for assaulting one E. Earl, and beating her with intent to murder her. The jury found specially that he was insane at the time of committing the offence, *and also at the time of the trial*, and that they acquitted him on account of such insanity, and the judge ordered him to be kept in custody accordingly. The judges were unanimously of opinion that sect. 2 applied to all offences, including misdemeanors,—and that though mere insanity at the time of the offence would not have warranted an order, yet insanity found at the time of the trial did warrant it (*jj*).

By the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28, s. 2), if any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the Court, if it shall so think fit, to 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.'

When a prisoner on arraignment stands mute the proper course is, To swear a jury (*k*) to determine—1. Whether the prisoner is mute of malice or by the visitation of God : 2. Whether he is able to plead : 3. Whether he is sane or not : on which issue the question is, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defence (*l*). In R. *v.* Thompson (*m*), where the prisoner being deaf and dumb, but able to read, the indictment was handed to him with the usual questions written upon paper, and he wrote his plea on paper. The jurors' names were then handed to him, with the question, ' whether he objected to any of them ? ' and he wrote for answer, ' No.' The judge's note of the evidence of each witness was handed to

(*j*) See Criminal Lunatic Asylums Act, 1860 (23 & 24 Vict. c. 75), and Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 84), ss. 4-16.

(*jj*) R. v. Little, R. & R. 430, and MS. Bayley, J.

(*k*) In R. *v.* Goode, 7 A. & E. 536, the jury were sworn *in haec verba*, ' You shall diligently inquire and true presentment make for and on behalf of our Sovereign Lady the Queen whether J. G., the defendant, be insane or not, and a true verdict given to the best of your understanding, so help you God.'

(*l*) R. *v.* Pritchard, 7 C. & P. 303, Alderson, B., where the jury were sworn separately on each of the three issues, approved in *Ex parte* Emery [1909], 2 K.B. 81. See R. *v.* Dyson, 7 C. & P. 305n. ; 1 Lew. 64, Parke, B., where a form of oath for the interpreter is given.

(*m*) 2 Lew. 137.

him, and he was asked in writing, if he had any question to put. In R. *v.* Whitfield (*n*), a case of misdemeanor, after a jury had found that the prisoner was mute by the visitation of God, but was of sound mind, his counsel was permitted to plead not guilty for him, and the trial proceeded in the usual manner, and the evidence was not interpreted to the prisoner. Where a prisoner, on being brought up to be arraigned, stands mute or it appears questionable whether he be sane or not, the proper course is to swear a jury to try the question, as it is for them and not for the Court to decide whether the prisoner stands mute of malice, or is insane (*o*). Where the verdict is mute of malice, a plea of not guilty is entered, and the trial proceeds (*p*).

Where the defendant does not stand mute, but his mental condition comes into question at the trial, the procedure is regulated by the Act of 1800, and a jury should be impanelled on arraignment to determine questions 2 or 3, *supra*.

If a prisoner have not at the time of the 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 (*q*).

Where a prisoner, indicted for uttering seditious words, upon arraignment shewed symptoms of insanity, and an inquest was forthwith taken under the statute, it was held that the jury might form their judgment of the state of the mind of the prisoner from his demeanor while the inquest was being taken, and might thereupon find him to be insane without any evidence being given as to his present state; and that it was unnecessary to ask him whether he would cross-examine the witnesses or offer any remarks or evidence, as that would be a useless prolongation of a painful proceeding (*r*). So the jury may take into consideration both the conduct of the prisoner in their presence and the evidence given (*s*).

Where on a prisoner being arraigned, his counsel stated that he was insane, and a jury was sworn to try whether he was so or not, Williams, J., held that the counsel for the prosecution should call his witnesses to shew that the prisoner was sane and capable of pleading; as this was not so much an issue joined as a preliminary inquiry for the information of the Court (*t*). But in a similar case, Cresswell, J., held, notwithstanding the preceding case, that, as the presumption is that a man is sane, if the prisoner's counsel suggested that he was insane, he must give evidence of the fact (*u*).

(*n*) 3 C. & K. 121, Williams, J.

(*o*) R. *v.* Israel, 2 Cox, 263.

(*p*) R. *v.* Schleter, 10 Cox, 409. As to former procedure, see 1 Hawk. c. 1, s. 4; R. *v.* Ley, 1 Lew. 239, Hullock, B.; Bac. Abr. Idiot (B); 1 Hale, 33, 35, 36; Somerville's case, 1 And. 107; 1 Sav. 50, 56; Fost. 46; Kel. (J.), 13; 1 Lev. 61; 1 Sid. 72.

(*q*) R. *v.* Dyson, 7 C. & P. 305n. 1 Lew. 64, Parke, B. See a number of unreported cases collected in Wood-Renton on Lunacy, 808, 809.

(*r*) R. *v.* Goode, 7 A. & E. 536.

(*s*) R. *v.* Davies [1853], 6 Cox, 326.

(*t*) R. *v.* Davies, 3 C. & K. 328.

(*u*) R. *v.* Turton, 6 Cox, 385. It is said in the old authorities that if a person in a frenzy happens by oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the Court upon his trial that he is mad, the judge in his discretion may discharge the jury of him and remit him to gaol to be tried after the recovery of his understanding, especially where any doubt appears upon the evidence touching his guilt, and this *in favorem vitæ*: and that if there is no colour of evidence to prove him guilty, or if there is pregnant evidence to prove his insanity at the time of the fact committed,

The prisoner being arraigned on two indictments for murder, and having with apparent intelligence pleaded to one and declined to plead to the other, the plea of not guilty was entered for him with the assent of his counsel. The case was then opened, and the first witness examined, and it was then set up by his counsel that he was insane and not in a fit state to be tried. It was held that the proper time for making that suggestion was before the prisoner pleaded, and that, had it then been made, a jury should have been impanelled to try the question whether he was sane and in a fit state to be tried; but that, as the trial had been begun, and it would be manifestly inconvenient to recommence the trial of the collateral issue, and as, moreover, it appeared that the evidence as to the prisoner's present sanity was very much mixed up with the general question of his sanity, it was open to the Court, under the Trial of Lunatics Act, 1800 (*v*), to take the whole of the evidence, and then leave to the jury both questions as to the prisoner's state of mind at the time of the act, and at the time of trial (*w*).

A person deaf and dumb from four years of age was indicted for larceny from the person, and not answering when called upon to plead, the jury found the prisoner 'mute by the visitation of God.' The Court then ordered a plea of 'not guilty' to be entered, and the trial to proceed. A relation of the person, who could in some degree communicate with the prisoner by means of signs, was sworn to interpret the nature of the proceedings and the evidence, and the Court assigned counsel to the prisoner. At the conclusion of the case, after the summing up of the presiding judge, the jury found the prisoner guilty, but in answer to a question left to them in the summing up found that the prisoner 'is not capable of understanding, and, as a fact, has not understood the nature of the proceedings.' On a case reserved, it was held, that the above finding shewed that the prisoner was at the time of the trial of non-sane mind, as he had not sufficient intellect to understand the proceedings; therefore, that it was wrong to enter a plea of not guilty, or allow the trial to proceed: and that the jury should have been discharged, and an order made to detain the prisoner under sect. 2 of the Act of 1800 (*x*).

Drunkenness.—Drunkenness is described by Coke and Hale as *dementia affectata*, or acquired madness.

Voluntary Drunkenness.—The older authorities lay it down as a general rule that voluntary drunkenness does not take away responsibility for any crime (*y*) and must be considered rather an aggravation than a defence (*z*). This rule is qualified by holding that drunkenness is not a defence to a

then upon the same favour of life and liberty it is fit that the trial proceed in order to his acquittal. Bac. Abr. Idiot (B). 1 Hale, 35, 36. 18 St. Tr. 411, Foster, J.

(*v*) *Ante*, p. 84.

(*w*) R. *v.* Southey, 4 F. & F. 864.

(*x*) R. *v.* Berry, 1 Q.B.D. 447: 45 L. J. M. C. 123, followed in *Ex parte* Emery [1909], 2 K.B. 81; 73 J.P. 284.

(*y*) Co. Litt. 247. 1 Hale, 32. Cf. 1 Hawk. c. 1, s. 6. R. *v.* Meade [1909], 1 K.B. 895.

(*z*) Co. Litt. 247. Beverley's case. 4 Co. Rep. 125. *Nam omne crimen ebrietas incendit et detegit.* Cf. 4 Bl. Com. 26. In Reniger *v.* Fogossa, 1 Plowd. 1, 19, it is said, 'if a person that is drunk kills another this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding or memory: but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.'

charge of crime unless it amounts to unsoundness of mind (*a*), or has produced in the defendant a mental or physical condition inconsistent with the inference that acts done by him under the influence of drink were intentional, where intent or premeditation is of the essence of the crime (*b*). A man who, while suffering from *delirium tremens*, feloniously wounded another, was held to have been insane when he committed the act (*c*), and the same has been held in a case of temporary mental derangement caused by drink (*d*).

In R. *v.* Meakin (*e*), a case of maliciously stabbing, Alderson, B., said that with regard to the intention, drunkenness might perhaps be adverted to according to the nature of the instrument used (*f*). If a man used a stick, a jury would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as they would if he had used a different kind of weapon; but where a dangerous instrument was used, which, if used, must produce grievous bodily harm, drunkenness could have no effect on the consideration of the malicious intent of the party (*g*). So drunkenness is often very material where the question is as to the intent with which an act was done. On an indictment for inflicting a bodily injury dangerous to life, with intent to murder, it appeared that the prisoners were both very drunk at the time, and Patteson, J., told the jury, that 'although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence' (*h*). So where a prisoner was indicted for shooting with intent to murder, and he was shewn to have been intoxicated shortly before he fired the shot; Coleridge, J., told the jury, that 'drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention' (*i*). And where, on an indictment for attempting to commit suicide, it appeared that the prisoner had thrown herself into a well, and the witness who

(*a*) It is immaterial whether the unsoundness is or is not due to habitual or voluntary drinking. 1 Hale, 32.

(*b*) 1 Hale, 32. R. *v.* Meade [1909], 1 K.B. 895, 898. Though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration. R. *v.* Grindley, Worcester Sum. Ass. 1819, MS. Holroyd, J. In a case of murder by stabbing with a bayonet, where R. *v.* Grindley was relied upon, Park, J., in the presence of Littledale, J., said, 'Highly as I respect that late excellent Judge (Holroyd), I differ from him, and my brother Littledale agrees with me. He once acted upon that case, but afterwards retracted his opinion, and there is no doubt that that case is not law.' R. *v.* Carroll, 7 C. & P. 145. But in this case there was evidence of provocation and in R. *v.* Meade (*ubi sup.*) R. *v.* Grindley was approved. See cases collected in Wood-Renton on Lunacy, 912n.

(*c*) R. *v.* Davis, 14 Cox, 563, Stephen, J.

(*d*) R. *v.* Baines, *Times*, Jan. 1, 1886, noted in Wood-Renton on Lunacy, 912, where Day, J., dissented from R. *v.* Burrow, 1 Lew. 75, and R. *v.* Rennie, 1 Lew. 76.

(*e*) 7 C. & P. 297.

(*f*) See R. *v.* Carroll, 7 C. & P. 145, *ante*, note (*b*).

(*g*) R. *v.* Meakin, *ubi sup.*

(*h*) R. *v.* Cruse, 8 C. & P. 541, 546. Cf. R. *v.* Doherty, 16 Cox, 306, Stephen, J.

(*i*) R. *v.* Monkhouse, 4 Cox, 55.

proved this, stated that at the time she did so, she was so drunk as not to know what she was about; Jervis, C.J., said, 'If the prisoner was so drunk as not to know what she was about, how can you say that she *intended* to destroy herself?' (*j*) So drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober (*k*). Where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the party uttering them is proper to be considered (*l*). But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded; for it would furnish no excuse (*l*). So, upon an indictment for stabbing, the jury may take into their consideration, among other circumstances, the fact of the prisoner being drunk at the time, in order to determine whether he acted under a *bona fide* apprehension that his person or property was about to be attacked (*m*). So on an indictment for an assault, in considering whether the prisoner apprehended an assault upon himself, the jury may take into consideration the state of drunkenness in which he was (*n*). There is no reported decision in England on the question whether drunkenness can be considered as negativing the *animus furandi* in larceny (*o*).

The English rule as to the effect of drunkenness on criminal responsibility seems to have been correctly laid down in a recent New Zealand case, R. *v.* Matheison (*p*). The indictment contained two counts: (1) for stealing tobacco and cigarettes in a store; (2) for breaking into the store with intent to steal. The defence raised was that the defendant was so drunk as not to be responsible. Cooper, J., charged the jury as follows: 'If a man chooses to get drunk, it is his own voluntary act. In cases, however, where intention is the main ingredient in an offence, drunkenness may under certain circumstances amount to a sufficient defence. . . .

'In the first count, alleging an actual theft, you must be satisfied that the prisoner, if he took the cigarettes, did so with a fraudulent intent; and in the second count, the intent is the sole ingredient of the alleged offence. The offence would not be complete under the second count unless the store was broken into by the prisoner with intent to commit an offence. . . .

'If that intent existed it does not matter whether the prisoner was drunk or sober, for a criminal intent may exist in the mind of an intoxicated person, and if so his drunkenness is no excuse. But if the drunkenness is such as to take away from his act all criminal intent (*pp*), then his

(*j*) R. *v.* Moore, 3 C. & K. 319. Cf. R. *v.* Doody, 6 Cox, 463.

(*k*) R. *v.* Thomas, 7 C. & P. 817, Parke, B. R. *v.* Pearson, 2 Lew. 144, Park, J.

(*l*) R. *v.* Thomas, *ubi supra*.

(*m*) R. *v.* Marshall, 1 Lew. 76. R. *v.* Goodier, ibid., Parke, J.

(*n*) R. *v.* Gamlen, 1 F. & F. 90, Crowder, J.

(*o*) It has been so held in R. *v.* Corbet [1903], Queensland State Reports, 246. In R. *v.* Egan [1897], 23 Vict. L. R. 159, a conviction of a mother for manslaughter of her infant by overlaying it was quashed on the ground that going to bed drunk with the child, and overlaying it by mischance, was not manslaughter. See 8 Edw. VII. c. 67, s. 13.

(*p*) [1906] 25 N. Z. L. R. 879.

(*pp*) See R. *v.* Meade [1909], 1 K.B. 895, 898.

act is not criminal. If the prisoner blundered into the store through a drunken mistake, and under such circumstances as to indicate inability to form any definite purpose, and especially to form the purpose of committing a larceny, then he ought to be acquitted. If, on the other hand, although under the influence of liquor, he was not so intoxicated as to be unable to form such purpose, and knew what he was about, then his partial intoxication will not excuse him ' (*q*).

Special provision is made by the Inebriates Act, 1898 (61 & 62 Vict. c. 60) (*r*), for dealing with habitual drunkards convicted of offences committed under the influence of drink, or of which drunkenness was a contributing cause. The statute appears to proceed on the theory that drunkenness is not an excuse for crime, but if habitual a ground for special treatment with a view to seclusion and reform of the offender.

The terms of sect. 1 of the Act shew some uncertainty as to the position of drunkenness with respect to criminal liability. For the section provides for the special treatment of persons convicted on indictment of certain kinds of offences, if ' the Court is satisfied from the evidence that the offence was committed *under the influence of drink, or that drunkenness was a contributory cause of the offence*,' and that the offender is a habitual drunkard. According to the common law rule above stated, if the offender was drunk enough he would be acquitted, and the Act of 1898 could not be brought into operation.

Involuntary Drunkenness.—If a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes frenzy, this puts him in the same condition with any other frenzy, and equally excuses him (*s*). This rule has been extended in Ireland to cases in which such causes as long watching, want of sleep, or depravation of blood, have reduced a person to such a condition that a smaller quantity of drink would make him drunk than would produce such a state if he were in health (*t*).

III. Compulsion, or Subjection to the Power of Others.—*General rule.*—Persons are properly excused from those acts which are not done of their own free will, but *in subjection to the power of others* (*u*). Actual physical force upon the person and present fear of death may in some cases excuse a criminal act. Thus, although the fear of having houses burnt or goods spoiled is no excuse in law for joining and marching with rebels, yet an actual force upon the person and present fear of death

(*q*) The jury found that the prisoner had blundered into the store under a drunken mistake, and without any intention to commit an offence, but that while in the store he appropriated the cigarettes, and knew *then* and there that he was taking the cigarettes of another person. On this finding, a verdict of guilty of larceny was directed. Cf. R. *v.* Nuttall [1908], 25 T. L. R. 76, where it was said that drunkenness, while no excuse for crime, was a matter to be considered in fixing the punishment.

(*r*) *Post*, p. 244. Cf. the Children Act, 1908 (8 Edw. VII. c. 67), s. 26, *post*, p. 912.

(*s*) 1 Hale, 32.

(*t*) R. *v.* Mary R. [1887], Palles, C.B., cited Wood-Renton on Lunacy, 913, where is also cited a suggestion made in R. *v.* Mountain, Leeds Assizes, April, 1888, by Pollock, B., that where insane predisposition was the proximate cause of the intoxication, the same rule as to irresponsibility would apply.

(*u*) 1 Hale, 43. Blackstone says (4 Com. 27), that though a legislator establish iniquity by a law, and command the subject to do an act contrary to religion and sound morality; yet obedience to such laws, while in being, is a sufficient extenuation of civil guilt before the municipal tribunal; though a different decree will be pronounced *in foro conscientiæ*.

may form such excuse, provided they continue all the time during which the party remains with the rebels (*v*). The rule is sometimes stated that obedience to usurped power, which would otherwise be treason, is excused only where actual physical compulsion is used, or directly available (*w*). And in general the person committing a crime will not be answerable if he was not a free agent, and was subject to actual physical force at the time the act was done. Thus, if A. by force takes the arm of B., in which is a weapon, and therewith kills C., A. is guilty of murder, but B. is not: but if it is only a moral force put upon B., as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse (*x*). Where a mob forced several persons to go with them, and to take actual part in breaking threshing machines, and one of them escaped as soon as he could, he was held not to be guilty of the breaking (*y*). An idiot or lunatic, or a child so young as not to be punishable for his criminal act, or any innocent agent, when made use of for the purpose of committing crimes, is merely an innocent instrument of the procurer, who is answerable as a principal (*z*). As to persons in *private relations*, neither a *child* nor a *servant* is excused for the commission of any crime, by the command or coercion of the parent or master (*a*). Sir J. Stephen expresses the opinion that in most, if not all cases, the fact of compulsion is matter of mitigation of punishment, and not matter of defence (*b*).

Necessity.—Closely related to compulsion is the plea which has been described as necessity (*c*) or choice of evils (*d*), which rests not on physical compulsion, but on the force of temptation, or on disputations as to whether stress of hunger or desire to save one's own life can justify theft or homicide. In R. *v.* Dudley (*e*), two sailors were held not to be excused from liability to conviction for murder, who, being adrift in an open boat, without food, under stress of hunger killed and ate a fellow sailor.

Coverture.—With a few obvious exceptions, a woman is not deemed incapable of crime or excused from responsibility of crime by reason of her sex (*f*). But the relationship of husband and wife creates in favour of the wife a position of non-responsibility in certain cases of crime. A wife cannot be made criminally liable as a principal by receiving her husband when his offence is treason (*g*), nor as an accessory after the fact to a felony committed by her husband (*h*), nor is she liable, criminally, for receiving jointly with her husband a traitor or felon (*i*), nor for

(*v*) McGrowther's case, Fost. 13; 18 St. Tr. 393, 394, Lee, C.J. R. *v.* Tyler, 8 C. & P. 616.

(*w*) See also Sir H. Vane's case, 6 St. Tr. 119; Kel. (J.), 14. Axtel's case, Kel. (J.), 13.

(*x*) 1 Hale, 43. 1 East, P.C. 225.

(*y*) R. *v.* Crutchley, 5 C. & P. 133.

(*z*) 1 Hawk. c. 31, s. 7. 1 East, P.C. 228. *Vide post*, p. 104, 'Accessories.'

(*a*) 1 Hale, 44, 516. 1 Hawk. c. 1, s. 14. Moore, K.B. 813, Kel. (J), 34.

(*b*) Dig. Cr. L. (6th ed.), p. 24n.

(*c*) Steph. Dig. Cr. L. (6th ed.), art. 25.

(*d*) R. *v.* Stratton [1780], 21 St. Tr. 1045, 1223, acts done by the Council of Madras to depose and restrain the Governor, who was acting in an arbitrary and illegal manner. Discussed in R. *v.* Dudley, 14 Q.B.D. at p. 285.

(*e*) 14 Q.B.D. 273.

(*f*) Hawkins (1 P.C. c. 65, s. 8) says a woman may be guilty of riot.

(*g*) 1 Hale, 47. 1 Hawk. c. 1, s. 10.

(*h*) 1 Hale, 48, 621, *post*, p. 128.

(*i*) 1 Hale, 48, 621, *vide post*, p. 128.

conspiracy with her husband (*j*); nor can she at common law be convicted of stealing her husband's goods (*k*). It is not clear whether these exemptions rest on the theory of identity of person created by marriage, or upon the theory that the wife's acts in receiving her husband or conspiring with him are done in obedience to his will (*l*), because she is in the eye of the law *sub potestate viri*. As regards crimes charged to have been committed by husband and wife jointly, no presumption arises in favour of the wife merely from the fact of the conjugal relation; but where certain forms of crime are committed by a wife *in the presence* of her husband, she is presumed to have committed them under his coercion (*m*). It is somewhat difficult to extract from the authorities any definite and reasoned classification of the crimes to which this presumption applies (*n*).

It is said that if a wife commits treason or murder (*o*) in company with, or by coercion of her husband (*p*), she is criminally responsible just as if she were a *feme sole* (*q*), and she is said by Blackstone to be responsible for

(*j*) 1 Hawk. c. 72, s. 8. Y. B. 38 E. 3, 3.

(*k*) 1 Hale, 514. The common law has been to some extent changed by the Married Women's Property Act, 1882. See *post*, Vol. ii. p. 1251, tit. 'Larceny.'

(*l*) R. *v.* Manning, 2 C. & K. 903n.

(*m*) R. *v.* Baines, 69 L. J. Q.B. 681. Cf. Brown *v.* Att.-Gen. of N. Z. [1898], A.C. 234, 237.

(*n*) The origin of the presumption is discussed by Sir James Stephen. Dig. Cr. L. (6th ed.) Appendix, p. 395.

(*o*) See R. *v.* Alison, 8 C. & P. 418, *infra*.

(*p*) R. *v.* Buncombe, 1 Cox, 183.

(*q*) 1 Hawk. c. 1, s. 11. 1 Hale, 45, 47, 48, 516. Kel. (J.) 31. 2 Bl. Com. 29. 'The reason given is the heinousness of those crimes. I find no *decision* which warrants the position in the text, as to treason, murder or robbery. Somerville's case, 1 And. 104, which is the only case where husband and wife have been convicted of treason, only shows that a wife may be convicted of treason with her husband. There Arden and his wife were charged with procuring Somerville to destroy the Queen, and both found guilty, but as none of the evidence is stated, it may have been that the wife was the instigator, and both properly convicted. In Somerset's case, which is the only case of a wife convicted, as well as her husband, as an accessory to a murder, according to 3 Co. Inst. 50, the Earl and Countess were indicted as accessories before the fact, to the murder of Sir T. Overbury, the wife was arraigned alone first, and pleaded guilty, and being asked what she had to say why judgment of death should not be given against her, she said, "I can much aggravate, but nothing extenuate my fault." (2 St. Tr. 957.) Assuming, therefore, that the indictment was joint against both, the case only proves that the wife *may* properly be convicted upon her own confession, which indicates that she was the more guilty party; as it is clear she was in this case. See Hume's Hist. Eng. vol. 6, p. 68, &c. But as the Earl and Countess were separately arraigned, and on different days, and as the indictment against the Earl, as recited in his pardon (2 St. Tr. 1014), is against him alone, I infer that the Countess was indicted alone; if so, the case is merely that of a wife pleading guilty to an indictment charging her alone as accessory, and unless in such a case she either pleaded that she committed the offence in company with her husband (as it seems she may, 1 Hale, 47. Y. B. M. 37 Ed. III. Rot. 34), or such appeared to be the case upon her trial, no question as to coercion could arise. In R. *v.* Alison, 8 C. & P. 418, Patteson, J., mentions an old case, where a husband and wife, intending to destroy themselves, took poison together; the husband died, but the wife recovered, and was tried for the murder, and "acquitted solely on the ground that, being the wife of the deceased, she was under his control, and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent;" but I know from the very learned judge himself that he guarded against subscribing to the reason given for this decision. Probably the case referred to is an anonymous one, Moore, K.B. 754, where it is said, the question was, whether it was murder in the woman, and the recorder caused the special matter to be found, but no decision is stated, nor have I been able to find the case elsewhere. Before Somerville's case, 26 Eliz., and Somerset's case [1616], I find no exception to the general rule that the coercion of the husband excuses the act of the wife. (See 27 Ass. 40, Staundf. P.C. 26, 27, 142. Poulton de Pace Regis, 130. Br. Ab. Coron. 108. Fitz. Ab. Coron. 130, 180, 199.) But after those cases I find the following exceptions in the Books:—Bac. Max. 57, except treason only. Dalton, c. 147, treason and

all crimes which, like murder, are *mala in se*, and prohibited by the law of nature (*r*). But this statement is obviously too wide, as it would include larceny. C. S. and his wife were indicted for the murder of a boy, who was bound as a parish apprentice to the husband. It appeared in evidence that both prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed that, in his judgment, the boy died from debility and want of proper food and nourishment, and not from the wounds, &c., which he had received. Lawrence, J., directed the jury, that as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withheld it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though *in foro conscientiæ* the wife was equally guilty with the husband, yet in point of law she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment (*s*). The presumption of coercion of a wife by a husband as to crimes committed in his presence has been applied to the following felonies: Burglary (*t*), robbery (*u*), larceny and

murder, citing for the latter Mar. Lect. 12 (which I conceive refers to the reading of Marrow, a Master in Chancery, in the time of Henry VII. See Willes *v.* Bridger, 2 B. & A. 282). 1 Hale, 45, 47, treason, murder and homicide; and p. 434, treason, murder and manslaughter. Kel. (J.), 31, an *obiter dictum*, murder only. Hawk. b. 1, c. 1, s. 11, treason, murder and robbery. Bl. Com. vol. i. p. 444, treason and murder; vol. iv. p. 29, treason, and *mala in se*, as murder and the like. Hale, therefore, alone excepts manslaughter, and Hawkins introduces robbery, without any authority for so doing; and, on the contrary, in R. *v.* Cruse, 8 C. & P. 545, a case is cited, where Burrough, J., held that the rule extended to robbery. It seems long to have been considered that the mere presence of the husband was a coercion (see 4 Bl. Com. 28), and it was so contended in R. *v.* Cruse; and Bac. Max. 56, expressly states that a wife *can* neither be principal nor accessory by joining with her husband in a felony, because the law intends her to have no will; and in the next page he says, "If husband and wife join in committing treason, the necessity of obedience doth not excuse the wife's offence, *as it does in felony*." Now if this means that it does not absolutely excuse, as he has stated in the previous page, it is warranted by Somerville's case, which shows that a wife *may* be guilty of treason in company with her husband, and which would be an exception to the general rule, as stated by Bacon. So also would the conviction of a wife with her husband for murder in *any* case be an exception to the same rule. Dalton cites the exception from Bacon without the rule, and Hale follows Dalton, and the other writers follow Hale; and it seems by no means improbable that the exceptions of treason and murder, which seem to have sprung from Somerville's and Somerset's cases, and which were probably exceptions to the rule as stated by Bacon, have been continued by writers without adverting to their origin, or observing that the presence of the husband is no longer considered an absolute excuse, but only affords a *prima facie* presumption that the wife acted by his coercion. See the learned argument of Mr. Carrington in R. *v.* Cruse, 8 C. & P. 541, 544, 552. In 1849, G. Manning and his wife were jointly convicted of murder, but the question discussed in this note was not raised, probably because upon the evidence it was plain that she was the more active party in the offence. The case as reported 2 C. & K. 887, and 1 Den. 467, does not advert to this question, but the charge of the recorder to the grand jury, 2 C. & K. 903, contains some observations upon it. See R. *v.* Smith, D. & B. 553 (*post*, p. 94), which is quite in accordance with this note.' C. S. G.

(*r*) 4 Bl. Com. 29.

(*s*) R. *v.* Squire and wife, Stafford Lent Assizes, 1799. See Pt. 2 of the Children Act, 1908, *post*, p. 912 *et seq.*

(*t*) 1 Hale, 32. R. *v.* Knight, 1 C. & P. 116. R. *v.* Wharton, Kel. (J.), 37.

(*u*) As to this offence the authorities are inconsistent. In 1 Hawk. c. 1, s. 11, robbery is said not to be within the presumption as to coercion. The contrary was ruled in a case cited in R. *v.* Cruse, 8 C.

receiving stolen goods (*v*), forgery (*w*), disposing of forged notes (*x*), wounding with intent to disfigure (*y*), sending threatening letters (*z*).

In R. *v.* Archer (*a*), on an indictment against husband and wife for jointly receiving stolen goods, it appeared that a burglary was committed by their two daughters. The mother and the daughters brought (*b*) two trunks, and packed them with a quantity of the stolen property. The trunks were afterwards found in London (in consequence of a statement made by the wife, who, when the house was searched had denied that any of the stolen goods were in it, and made various other false statements), and a quantity of the stolen property was found concealed in different parts of the house. On a verdict of guilty being returned against both husband and wife, it was held, that as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of the husband, the conviction of the wife could not stand, though she had been more active than her husband (*c*).

In R. *v.* McClarens (*d*), on an indictment against husband and wife for receiving stolen sugar it appeared that the husband received it in the first instance in the absence of his wife. Some remains of the sugar were found on searching in a sink in the kitchen, and the wife stated that she and her daughter had washed all the sugar away, and had burnt the bags in which it was contained, and that she thought it a hard case that she and her husband should be at a loss of four or five pounds. Coltman, J., told the jury that 'if the husband received the property, knowing it to be stolen, and if the wife received it from him with the like knowledge, and with the purpose of aiding and assisting him in the object which he had in view in receiving it, by turning it to pecuniary profit or in other like manner, although *prima facie* she might be supposed to be acting

& P. 545, and in R. *v.* Torpey, 12 Cox, 45; and in R. *v.* Dykes, 15 Cox, 771, where Stephen, J., directed a wife to be acquitted on an indictment for highway robbery with violence jointly with her husband, the jury having found that she had acted under her husband's compulsion. *Vide ante*, p. 92, note (*q*).

(*v*) 1 Hale, 45. 11 Hawk. c. 1, s. 9. 4 Bl. Com. 28. Kel. (J.) 31. According to some, if a wife commits larceny by the command of her husband, she is not guilty; which seems to be the law if the husband be *present*, but not if he be absent at the time and place of the felony committed. 1 Hale, 45. It is no ground for dismissing an indictment for burglary or larceny as to the wife that she is charged with her husband and described as his wife, for the indictment is joint or several according as the facts may appear, and on such an indictment the wife might be convicted and the husband acquitted. 1 Hale, 46.

(*w*) R. *v.* Hughes, 2 Lew. 229.

(*x*) See R. *v.* Atkinson [1814], Old Bailey Jan. Sess., MS. Bayley, J. The conjugal relation was not proved in this case.

(*y*) R. *v.* Smith, D. & B. 553. 'The jury found that the wife acted under the coercion of the husband, and did not herself personally inflict any violence upon the prosecutor, and it was held that she ought to have been acquitted. The facts (except as above stated) were not submitted to the judges. As the wife met the prosecutor at the railway station, and induced him to go to a lonely spot where her husband wounded him (see the note to the case), it is clear she was an accessory before the fact, and responsible as such for her acts in the absence of her husband, and under the statute then in force, 11 & 12 Vict. c. 46, s. 1, she ought to have been convicted as such accessory.' C. S. G.

(*z*) R. *v.* Hammond [1787], 1 Leach, 447.

(*a*) 1 Mood. 143.

(*b*) So in the report; *quære*, bought.

(*c*) 'The marginal note is "upon a joint charge against husband and wife, of receiving stolen goods, the wife cannot, properly, be convicted, if the husband is," which seems not to be warranted by the case, which, at most, only decides that where there is no evidence whatever that the wife was present when the goods were received, or of her conduct when they were received, she ought not to be jointly convicted with her husband.' C. S. G.

(*d*) 3 Cox, 425.

under the coercion of her husband, that was rebutted by the active part which she took in the matter with the intention above mentioned. But if the part she took was merely for the purpose of concealing her husband's guilt, and of screening him from the consequences, then she ought to be acquitted. A wife cannot be convicted of harbouring her husband, when he has committed a felony, and the mere circumstance of her attempting to conceal what may lead to his detection appears to come within the same principle.'

In R. *v.* Brooks (*e*), on an indictment against a wife for receiving stolen goods, it appeared that her husband stole the goods from a shop, and delivered them into her hands. Whether the articles were stolen at one or at several times, or delivered to the prisoner at one or at different times, did not appear. The husband absconded, his house was searched, and a box taken from the prisoner, after a struggle on her part to retain it. It contained pawn-tickets which related to the stolen goods. The prisoner pledged some of the stolen goods, and had made false statements about them. Parker, B., told the jury that, as her husband had delivered the stolen articles to the prisoner, the law presumed that she acted under his control in receiving them; but that this presumption might be rebutted: if therefore they were satisfied that at the time when the prisoner received the articles she knew that they were stolen, and in receiving them acted not by reason of any coercion of her husband, but voluntarily, and with a fraudulent intention, she might be found guilty; and on her being found guilty the questions were reserved, whether the direction was right, and whether on the evidence there was any case for the jury; and it was held that the case failed on both points; if there had been plenty of evidence there would have been no case to go to the jury; but it appeared that there was no evidence at all (*f*).

In R. *v.* Banks (*g*), on an indictment for larceny, it appeared that the goods were found in the house of the prisoner's husband, who was a blind man, and when they were found the prisoner said she had bought them a long time before. Erle, J., said that if the prisoner had said nothing, and the goods had simply been found in the house of the husband, there would have been no evidence to go to the jury, but as she said she bought the goods, it must be left to the jury to decide whether the goods were in the possession of the prisoner or her husband; and he told the jury that if they were of opinion that the goods were in the possession of the wife without the consent and control of her husband, they must find her guilty.

In R. *v.* Wardroper (*h*) the prisoner was indicted together with her

(*e*) Dears. 184.

(*f*) 'This decision was clearly right on the ground that there was no evidence whatever as to the guilty knowledge or conduct of the prisoner *at the time the goods were received*. Parke, B., said that, as the prisoner received the goods from her husband, "it is difficult to see how she could be guilty of this offence." With all deference it is perfectly easy to suggest cases where a wife may be convicted of receiving stolen goods from her husband. Suppose she incites him to steal a diamond necklace for her, and he does so in her absence, delivers it to her, and she wears it; or, suppose a thief brings stolen goods to a house, and the husband declines to receive them, but is induced by the wife so to do, and afterwards the husband delivers them to the wife; it cannot be doubted that in these and the like cases she may be convicted, for the plain reason that she is acting in no way under his coercion.' C. S. G.

(*g*) 1 Cox, 238.

(*h*) Bell, 249.

husband and P. for burglary and receiving. The jury found P. guilty of housebreaking, and the wife and her husband of receiving. Part of the stolen property was found in the house where the prisoner and her husband lived together, and the evidence warranted the jury in convicting the husband of receiving; but the only evidence which affected the wife was that, some time after the robbery, in the absence of her husband, she produced a quantity of the stolen property, and said it was to be destroyed, and said she had been changing some foreign money, and thought she was going to be taken up for it, and asked a young woman to come down, if she were taken, and say a foreign captain had given her part of the stolen property. It was contended that there was no evidence that she received the property either in the absence of her husband or from any other person than him; and that if there was evidence for the jury the question would be whether she received it from him, and if not, whether she received it in his absence; but Martin, B., ruled that there was evidence for the jury, and did not leave either of these questions to them. On a case reserved, it was held that the questions ought to have been left to the jury, and that it was perfectly consistent with the facts that the goods might have been received by the husband at his own house, and so have come into the possession of the wife through her husband in a manner that did not render her liable to be convicted (*i*).

In R. *v.* Matthews (*j*), on an indictment against husband and wife for jointly receiving stolen fowls, it appeared that the fowls were found in the husband's house, and the wife said she had bought part from people who came to the house in his absence, and that her husband bought some at S. market on Wednesday; and the husband afterwards said that he was not out of the place where he resided on the Wednesday, and had bought 'the fowls' from the person who stole them; so that the evidence shewed either a joint receiving by both or a separate receiving by each in the absence of the other, and the jury found both guilty. On a case reserved, it was held that, assuming the receiving to have been joint, the wife was entitled to be acquitted, as the offence was committed in her husband's presence; and assuming the receiving to have been separate, the offence against both was not proved as laid, and that the husband was rightly convicted, but the wife not (*k*).

In R. *v.* M'Athey (*l*), the jury found a wife guilty of stealing from the person, and her husband guilty of receiving the property stolen, knowing it to have been stolen, and also found that the wife acted voluntarily and without any restraint on the part of the husband, and that he received the property from his wife knowing it to have been stolen by her. It was held, on a case reserved, that the husband was rightly convicted of feloniously receiving the property from his wife.

In R. *v.* Dring (*m*), upon an indictment against husband and wife for

(*i*) Martin, B., at the trial rightly treated the indictment as joint and several. See 14 & 15 Vict. c. 100, s. 14; but there was no evidence of a receipt by the wife in the absence of her husband, so as to bring the case within that clause.

(*j*) 1 Den. 596.

(*k*) 1 Den. 596. There was nothing to shew any activity on the part of the wife at the time of the receipt. See now 24 & 25 Vict. c. 96, s. 94, by which persons charged with a joint receipt of stolen property may be convicted of separate receipts.

(*l*) L. & C. 250.

(*m*) D. & B. 329.

jointly receiving stolen goods, the jury found that the wife received them without the control or knowledge of and apart from her husband, and that the husband afterwards adopted his wife's receipt; and it was held that, upon this finding, the conviction of the husband could not be supported. The word 'adopted' might mean that the husband passively consented to what his wife had done without taking any active part in the matter, and in that case he would not be guilty of receiving. Or, it might mean that he did take such active part; but this rigid construction ought not to be put upon the word 'adopted' (*n*). But in R. *v.* Woodward (*o*), where the thief delivered the stolen property to the prisoner's wife in his absence, and she then paid sixpence on account, but the amount to be paid was not then fixed; and afterwards the prisoner and the thief met, agreed on the price, and the prisoner paid the balance; it was held that the receipt was not complete till the price was fixed, and the money paid, and consequently that the prisoner was rightly convicted of receiving the stolen property.

Misdemeanors.—As to whether the presumption in favour of coercion when a wife commits an offence in the presence of her husband extends to misdemeanor, the authorities are not consistent. They display some confusion between two distinct questions: (1) whether husband and wife can be jointly indicted (*p*) for an offence, and (2) whether if the wife is indicted, whether severally or jointly, for a misdemeanor committed in her husband's presence, the presumption of coercion by him arises.

It has been held a wife may be indicted and convicted with her husband for keeping a bawdy house (*q*), or gaming house (*r*).

In R. *v.* Dicks (*s*), it appears to have been held by all the judges, upon an indictment against a married woman, for falsely swearing herself to be next of kin and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath.

In R. *v.* Cruse (*t*), a wife was convicted with her husband of assault

(*n*) It was doubted, whether 14 & 15 Vict. c. 100, s. 14, applied to successive receipts of the *whole* property stolen. See the Statute of Frauds (29 Car. II. c. 3), s. 17, 'except the buyer shall accept part of the goods so sold, and actually receive the same.' No one ever doubted that a receipt of the whole was within this section, now embodied in s. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). Cf. R. *v.* Orris, 1 Cr. App. R. 199; 73 J. P. 15.

(*o*) L. & C. 122.

(*p*) In R. *v.* Martin, 8 A. & E. 481, husband and wife were convicted of obtaining goods by false pretences. The judgment was reversed, but not on the ground of coercion, or that the indictment was joint. There is no doubt that in all misdemeanors a wife *may* be jointly convicted with her husband, as she may be proved to have acted voluntarily.

(*q*) R. *v.* Williams, 10 Mod. 63. 1 Salk. 384. And see Baldwin *v.* Blackmore, 1 Burr. 595, 600. 'The *ratio decidendi* in R. *v.* Williams was that the wife might probably have as great, nay, a greater, share in the criminal management of the house, and that the offence was such as might generally be presumed to be managed by the intrigues of the sex. This case, and R. *v.* Ingram, 1 Salk. 384, were decided on motion in arrest of judgment, and the Court would presume if necessary that the wife had acted voluntarily, and the reasons given indicate that to warrant conviction the wife must have acted voluntarily and not under coercion.' C. S. G.

(*r*) 1 Hawk. c. 1, s. 12. R. *v.* Dixon, 10 Mod. 335. 1 Salk. 384 on demurrer. 'By the indictment the husband and wife *et utercque eorum* were charged with the offence. The Court did, it would seem, hold the indictment good because it might be proved that the wife was not under coercion.' C. S. G.

(*s*) [1817] 2 MS. Sum. *tit.* 'Of Offenders,' and MS. Bayley, J. It does not appear whether the *ratio decidendi* was that the presumption did not apply to false swearing or that it was rebutted by the evidence.

(*t*) 8 C. & P. 541.

upon an indictment for inflicting bodily injury dangerous to life, with intent to murder (*u*). A case was reserved by Patteson, J., and fully argued before all the judges on two points, the second being as to the application of the presumption as to coercion (*v*). All the judges were of opinion that the point as to presumed coercion did not arise, as the ultimate result of the case was a conviction for misdemeanor (*w*). This decision can be explained on the ground that the presumption, if any, was rebutted by the active part taken by the wife in the acts on which the indictment was founded, viz., ferocious ill-treatment of her own natural child. In R. *v.* Price (*x*), on an indictment of husband and wife for a misdemeanor in uttering counterfeit coin, it was ruled that the wife was entitled to acquittal on the ground that she uttered the coin in her husband's presence. Mirehouse, Common Serjeant, after consulting Bosanquet and Coltman, JJ., said, 'the judges agree with me, and I think the reason of the thing is that the same rule which applies in cases of felony should apply also to cases of misdemeanor like the present' (*y*). And in R. *v.* Torpey (*z*), Russell Gurney, Recorder, after consulting Bramwell, B., appears to have ruled that the presumption applied in favour of a wife jointly indicted with her husband for the misdemeanor of an assault causing actual bodily harm.

The presumption as to coercion of wife by husband arises only when the offence in question was committed in the husband's presence (*a*). Where a married woman offends alone without the company or coercion of her husband she is responsible for her offence as much as if she were a feme sole (*b*); and if it is of such a nature that it may be committed by her alone, without the concurrence of her husband, she may be indicted for it without the husband; the husband need not be included in an indictment for any offences to which he is in no way privy. Thus a married woman may be indicted for riot (*c*); for being a common scold (*d*); for assault and battery (*e*); for forcible entry (*f*); and for keeping a bawdy house (*g*); and for trespass (*h*). And she may also be indicted for larceny of goods of which she is bailee (*i*), or for receiving stolen goods by her own separate act without the privity of her husband; or if he, knowing thereof, leaves the house and forsakes her company,

(*u*) Framed on 7 Wm. IV. & 1 Vict. c. 88, s. 2 (rep.), which made the offence a capital felony. The jury returned a verdict for misdemeanor under the power given by 7 Wm. IV. and 1 Vict. c. 88, s. 11 (rep.).

(*v*) 8 C. & P. 552.

(*w*) 8 C. & P. 558.

(*x*) 8 C. & P. 19.

(*y*) He referred to a ruling of Bayley, J., in R. *v.* Conolly, MS. Durham Spring Assizes, 1829, an indictment for a misdemeanor in uttering coin. This case is referred to as Anon. Matthews Dig. Cr. L. 262. See the note in 8 C. & P. 21.

(*z*) [1871], 12 Cox, 45, 49.

(*a*) *Ante*, p. 92.

(*b*) 4 Bl. Com. 29. 1 Hawk. c. 1, s. 13. 1 Bac. Abr. Baron and Feme (G), where it is said in the notes, that she cannot be indicted for barratry, and Roll. Rep. 39 is cited. But *qu.* and see 1 Hawk. c. 81, s. 6, and *post*, p. 585, tit. 'Barratry.'

(*c*) Dalt. 447.

(*d*) R. *v.* Foxby, 6 Mod. 213, 239.

(*e*) Salk. 384.

(*f*) 1 Hale, 21. Co. Lit. 357. In 1 Hawk. c. 64, s. 35, the liability is said to be 'in respect of such actual violence as shall be done by her in person, but not in respect of what shall be done by others at her command, because such command is void.' The latter proposition appears not to be now law owing to the change in the status of married women.

(*g*) 1 Hawk. c. 1, s. 13, n. 11: 1 Bac. Abr. 294.

(*h*) 1 Bac. Abr. Baron and Feme (G).

(*i*) See R. *v.* Robson, L. & C. 93: and 45 & 46 Vict. c. 75.

she alone shall be guilty as accessory (*j*); and though in a serious offence, such as sending threatening letters, the husband is an agent in the transaction, yet, if he is so ignorantly by the artifice of the wife, she alone is punishable (*k*).

It is no excuse for the wife that she committed the offence by her husband's order and procurement, if she committed it in his absence; at least it is not to be presumed in such case that she acted by coercion. S. Morris was tried for uttering a forged order, knowing it to be forged, and her husband for procuring her to commit the offence; and it appeared that her husband ordered her to do it, but that she uttered the instrument in his absence. Upon a case reserved, the judges held that the presumption of coercion at the time of the uttering did not arise, as the husband was absent at that time; and that the wife was properly convicted of the uttering, and the husband of the procuring (*l*). In R. *v.* Hughes (*m*), where the prisoner was indicted for forgery and uttering Bank of England notes, the principal witness stated, that, in consequence of a conversation which he had had some time before with the prisoner's husband, he went to the husband's shop; that the husband was not present, but he bought of her three two pound notes, at one pound four shillings each; that he paid her for the notes, and was to receive eight shillings in change; and before he had received the change, the husband looked into the room, but did not come in or interfere with the business further than by saying, 'Get on with you.' After this the witness and the prisoner returned into the shop where the husband was; the prisoner gave him the change, and both the prisoner and her husband cautioned him to be careful. The counsel for the prisoner objected that she acted under the coercion of her husband; that the evidence would have been sufficient to have convicted the husband, if both the husband and wife had been upon their trial; and that therefore the prisoner ought to be acquitted (*n*). But Thomson, B., said, 'I am very clear as to the law on this point. The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie*, and *prima facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion (*o*): but it is absolutely necessary that the husband should in such case be actually present, and taking a part in the transaction. Here it is entirely the act of the wife; it is indeed in consequence of a communication previously with the husband, that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came: and it was sufficient if before that time she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law out of

(*j*) 22 Ass. 40. Dalt. c. 157.

(*k*) Hammond's case, 1 Leach, 447. She has also been held indictable for recusancy (Hob. 96. Foster's case, 11 Co. Rep. 62. 1 Sid. 410. Sav. 25); forestalling (Sid. 410. 2 Keb. 634; but see Bac. Abr. Baron and Feme (G), notes); and for selling gin contrary to 9 Geo. II. c. 23 (Croft's case, 2 Str. 1120, and see R. *v.* Taylor, 3 Burr. 1679).

(*l*) R. *v.* Morris [1814], R. & R. 270. MS. Bayley, J.

(*m*) *Coram* Thompson, B., Lancaster Lent Assizes, 1813. MS. 2 Lew. 229.

(*n*) He referred to 2 East, P.C. 559. 1 Hale, 46. Kel. 37.

(*o*) 1 Hale, 516. See R. *v.* Cohen, 11 Cox, 99. R. *v.* Torpey, 12 Cox, 45, *ante*, p. 98.

tenderness refers it *prima facie* to the coercion of the husband. But when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of the wife) can be referred to what was done in his absence.' And it seems that the correct rule is, that if a felony be shewn to have been committed by the wife in the presence of the husband, the *prima facie* presumption is that it was done by his coercion; but such presumption may be rebutted by proof that the wife was the more active party, or by shewing an incapacity in the husband to coerce. Thus, if the husband were a cripple, and confined to his bed, his presence would not be sufficient to exonerate the wife (*p*).

Where an indictment describes a woman as the wife of a man with whom she is jointly indicted no evidence is necessary to prove that she is his wife (*q*).

If a man and woman are indicted together, and the woman is not described in the indictment as the wife of the man, the onus of proving that she is his wife is upon her. Thus, where T. W. and J. J. were indicted for burglary, and the woman pleaded that she was married to W., and would not plead to the name of J., the grand jury who found the bill was sent for, and in their presence, and with their consent, the Court inserted the name J. W., otherwise J., not calling her the wife of T. W., but giving her the addition of spinster, upon which she pleaded; and the Court told her that if she could prove that she was married to W. before the burglary, she should have the advantage of it: but on the trial she could not, and was found guilty, and sentenced (*r*). If a woman indicted as a single woman pleads to the indictment, that is *prima facie* evidence that she is not a feme covert, but is not conclusive (*s*). In such a case evidence must be given to satisfy the jury that the prisoners are in fact husband and wife (*t*). But cohabitation and reputation will be sufficient evidence upon such point. W. and M. A. were indicted for disposing of forged bank notes; and it appeared that they had lived and passed for man and wife for some months; upon which it was put to Gibbs, C.B., whether the woman was not entitled to an acquittal, and he thought she was; and counsel for the prosecution at once acquiesced (*u*). Where, upon an indictment against a woman for harbouring a murderer, knowing him to have committed the murder, it was probable that a marriage had taken place between the parties, in Ireland, at a place where the registers were very imperfectly kept, and the parties had for many years considered each other as man and wife, no evidence was offered for the prosecution, with the sanction of the Court (*v*).

(*p*) R. *v.* Cruse, 2 Mood. 53, Tindal, C.J.

(*q*) R. *v.* Knight, 1 C. & P. 116, Park, J.

(*r*) R. *v.* Jones, Kel. (J.), 37.

(*s*) R. *v.* Quinn, 1 Lew. 1. R. *v.* Woodward, 8 C. & P. 561, Patteson, J.

(*t*) R. *v.* Hassall, 2 C. & P. 434, Garrow, B. *Quære*, whether the proper course for a woman so indicted is not to plead the wrong addition on arraignment, as by pleading to the felony she answers to the name by which she is indicted. C. S. G.

(*u*) R. *v.* Atkinson, O. B. Jan. Sess. 1814. MS. Bayley, J.

(*v*) R. *v.* Good, 1 C. & K. 185. Alderson, B., observed, 'If the prisoner went through the ceremony of marriage, and it should have turned out that there was some irregularity in the marriage, nevertheless if it appeared that she had acted under the supposition that she was the wife of the murderer, and according to the duty which she considered to be cast upon her, the Court would have felt it right to have inflicted a very slight punishment upon her.' As in

IV. Ignorance and Mistake.—*Ignorance of Law.*—The plea or excuse of ignorance applies only to ignorance or mistake of fact, and not to error of law. Ignorance of the law of England is not allowed to excuse any one who is of the age of discretion and *compos mentis* from its penalties when broken (*w*). On an indictment for a common nuisance by keeping a lottery, the jury returned a verdict of guilty, with a recommendation to mercy, on the ground that 'perhaps he did not know that he was acting contrary to law.' This was ruled to be a verdict for the Crown, for 'ignorance of a statute is no excuse if the statute is violated' (*x*). The rule applies to aliens as well as to citizens; and it is no defence for a foreigner charged with a crime committed in England, that he did not know he was doing wrong, the act not being an offence in his own country (*y*). Where, therefore, two Frenchmen were committed on a charge of murder in a duel, and alleged that they were ignorant of the law of England, and believed that acting as seconds in a fair duel was not punishable here, as it was not punishable in France, and that this was a fair duel, it was held that they were precisely in the same position as if they were native subjects of England, and the Court refused to bail them (*z*). And as a ship, public or private, on the high seas, is, for the purpose of jurisdiction over crimes committed therein, a part of the territory to which the ship belongs, a person on board an English ship is as much amenable to the criminal law of England as if he came voluntarily into an English county, and ignorance of the law is no more an excuse in the one case than in the other (*a*).

Ignorance or Mistake of Fact.—When an act is done, the law judges not only of the act but of the intent with which it was done. An act done with an unlawful and malicious intent may be criminal, although without such intent it would be innocent (*b*). The criminality of the intent usually depends to a great degree on the state of the knowledge or belief of the person who did the act. 'At common law an honest and reasonable belief in the existence of facts, which, if true, would make the act for which the prisoner is indicted an innocent act, has always been held a good defence.' . . . 'Honest and reasonable mistake of fact stands in fact on the same footing as absence of the reasoning faculty (in infants), or perversion of that faculty as in lunacy' (*c*). Thus if a man meaning to kill or disable a burglar in his own house, by mistake kills one of his

every case, except bigamy and criminal conversation, living together as man and wife is sufficient evidence of a marriage, (Morris *v.* Miller, 1 W. Bl. 632, 4 Burr. 2057; Woodgate *v.* Potts, 2 C. & K. 457), there seems to have been abundant evidence in this case of a marriage between the parties; but, assuming that not to be so, it is deserving of consideration whether, if a woman received and comforted a felon, honestly believing him to be her husband, that would not entitle her to an acquittal, upon the ground that no guilty intention could exist under such circumstances, but, on the contrary, she was doing that which she honestly believed to be her duty to do. C. S. G.

(*w*) 1 Hale, 42. '*Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is a maxim as well as of our own law as it was of the Roman.' 4 Bl. Com. 27, citing Plowd. 342*a*: and Dig. Lib. xxii. tit. 6, c. i.

(*x*) R. *v.* Crawshaw, 30 L. J. M. C. 58, 64.

(*y*) R. *v.* Esop, 7 C. & P. 456, Bosanquet, J., and Vaughan, B.

(*z*) Barronet's case, 1 E. & B. 1.

(*a*) R. *v.* Sattler, R. *v.* Lopez, D. & B. 525.

(*b*) R. *v.* Schofield, Cald. 397, Lord Mansfield. Cf. Dig. Lib. xxii. tit. 6, c. 1.

(*c*) R. *v.* Tolson, 23 Q.B.D. 168, 181, Cave, J., adopted by the Judicial Committee in Bank of N. S. W. *v.* Piper [1897], A. C. 383, 390. Cf. R. *v.* Prince, L. R. 2 C.C.R. 154.

own family, he is not criminally responsible (*d*). And, if a woman marries again during the life of her first husband, even though he has not been absent for seven years, she is not indictable for bigamy, if in good faith, and on reasonable grounds, she believed her first husband to be dead when she contracted the second marriage (*e*). The rule above stated is expressed in the phrase '*actus non facit reum nisi mens sit rea*,' which in substance means that 'the full definition of every crime contains expressly or by implication a proposition as to a state of mind,' and, if that mental element is proved to be absent in any case, the crime so defined is not committed (*f*). The latest and it would seem a perfectly correct statement of the law on this subject is: 'There is a presumption that *mens rea*, a knowledge of the facts which render the act unlawful, is an essential ingredient in every criminal offence. That presumption is, however, liable to be displaced by the words of the statute creating the offence or the subject-matter with which it deals, and both must be considered' (*g*). The particular mental elements necessary to constitute particular crimes (*h*) will be stated in the chapters dealing with each crime. In some cases enactments by their form seem to constitute the prohibited acts into crimes even in the absence of the knowledge and intention necessary to constitute a *mens rea* (*i*). Few, if any, such enactments relate to indictable offences, and usually they prohibit certain acts in the interests of the public revenue or private property (*j*).

Corporations.—At common law a corporation aggregate is regarded as in the nature of things incapable of treason, felony, or misdemeanors, involving personal violence, such as riots or assaults (*k*), or of perjury (*l*), or it would seem offences for which the only penalty is imprisonment or corporal punishment (*m*). By the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 2) (*n*), (1) 'in the construction of every enactment relating to an offence, punishable on indictment, the expression person shall, unless

(*d*) Levett's case, Cro. Car. 538. See *post*, pp. 809, 813. 4 Bl. Com. 27. 1 Hale, 42, 43. Cf. R. *v.* Dennis, 69 J. P. 256.

(*e*) R. *v.* Tolson, 23 Q.B.D. 168.

(*f*) Ibid. 187, Stephen, J. See R. *v.* Prince, L. R. 2 C. C. R. 154, decided on 24 & 25 Vict. c. 100, s. 55 (abduction of a girl under sixteen in reasonable belief she was sixteen or more). The dissentient opinion of Brett, J., contains strong reasoning against the conclusions of the majority of the Court. See 48 & 49 Vict. c. 69, ss. 5, 7 (*post*, p. 948), for statutory defence of reasonable belief that a girl is of or over the age of sixteen or eighteen.

(*g*) Toppen *v.* Marcus [1908], 2 Ir. Rep. 423, 425, Palles, C.B., adopting in substance the opinion of Wright, J., in Sherras *v.* de Rutzen [1895], 1 Q.B. 918, 921. The question in Toppen *v.* Marcus was, whether under 3 Edw. VII. c. 44, s. 22, a general dealer was guilty of an offence if on making a purchase he innocently entered in his books as true, a false name and address given by the seller.

(*h*) See Bank of N. S. W. *v.* Piper [1847], A.C. 383.

(*i*) See R. *v.* Bishop, 5 Q.B.D. 259, where a conviction was upheld for contravening a lunacy statute by receiving two or more lunatics into a place not registered for lunatics, although the jury specially found that the defendant honestly and reasonably believed the persons in question not to be lunatics. This decision has been justified as based on the scope of the Act to the purpose for which it was passed. R. *v.* Tolson, 23 Q.B.D. 168, Stephen, J.

(*j*) Such are the Acts against piracy of copyright works, trespass in pursuit of game, and the sale of food, drugs, intoxicants, manures, and the accuracy of weights and measures. See Sherras *v.* de Rutzen [1895], 1 Q.B. 918. Laird *v.* Dobell [1906], 1 K.B. 131. Emery *v.* Nolloth [1903], 2 K.B. 269.

(*k*) Pharmaceutical Society *v.* London and Provincial Supply Assocn., 5 App. Cas. 857.

(*l*) Wych *v.* Meal, 3 Peere Wms. 310.

(*m*) Pearks, Gunston & Tee, Ltd. *v.* Ward [1902], 2 K.B. 1, Channell, J. Hawke *v.* E. Hulton & Co. Ltd. [1909], 2 K.B. 93 (Lotteries Act, 1823, s. 41).

(*n*) Re-enacting 7 & 8 Geo. IV. c. 28, s. 14.

a contrary intention appears, include a body corporate.' It would seem that the common law rule affords a good guide as to the intention of a statute. At common law, corporations are indictable for nuisance and breaches of public duty, whether existing by the common law or created by statute, and whether the breach of duty is by misfeasance or non-feasance. Corporations are often indicted for non-repair or illegal obstruction of highways (*o*), and it would seem that a corporation aggregate is indictable for defamatory libel (*p*).

Aliens.—There is no exception in favour of aliens (*q*) from liability for offences committed in England or on British ships, either on the ground of want of allegiance (*r*), or ignorance of the law of England (*s*). But neither the common law nor the statute law extends to the acts of aliens outside the King's dominions (*t*), or outside the jurisdiction of the Admiralty of England (*u*), and the diplomatic representatives of foreign states and their suites are for the purposes of criminal law of England regarded as resident in the country of which they are accredited (*v*), and there is some doubt as to the criminal liability of an alien enemy, e.g., a prisoner of war (*w*).

(*o*) R. *v.* Birmingham & Gloucester Railway, 2 Q.B. 47. And see Att.-Gen. *v.* London & North-Western Railway [1900], 1 Q.B. 78. See *post*, Bk. xi. 'Nuisance.'

(*p*) 5 App. Cas. 857, 870, per Lord Blackburn.

(*q*) As to statutes binding aliens, see Y.B. 13 Edw. IV. p. 9, pl. 5.

(*r*) The allegiance of an alien who is in British territory, is local and temporary, and commensurate with the protection of the English law which he obtains by his presence. See de Jager *v.* Att-Gen. for Natal [1907], A.C. 326. Wharton, Conflict of Laws (2nd ed.), s. 819.

(*s*) *Ante*, p. 101.

(*t*) In Mortensen *v.* Peters [1906], 8 Fraser (Just.), 93, the Scots Court of Justiciary held that under 58 & 59 Vict. c. 42, s. 10, a foreigner could be convicted of fishing in a foreign vessel at a point outside the territorial waters of the British Crown. This decision, while it may be in accord with the specific terms of the relevant statutes, is admittedly not in accord with international law. See Parl. Deb. (4th series), vol. 169, p. 987.

(*u*) *Vide* ante, p. 31.

(*v*) See Diplomatic Privileges Act, 1788 (7 Ann. c. 12), *post*, p. 299.

(*w*) See R. *v.* Molieres, Fost. 188n. R. *v.* Johnson, 6 East, 583, 593. De Jager *v.* Att.-Gen. of Natal, *ubi supra*.

CANADIAN NOTES.

OF CRIMINAL RESPONSIBILITY.

Justification or Excuse, Common Law Rules Retained.—Code sec. 16.

Infancy.

(*a*) *Infant Under Seven not Responsible.*—Code sec. 17.

(*b*) *Under Fourteen, Conditional Responsibility.*—Code sec. 18.

(*c*) *Under Fourteen, not Capable of Rape.*—Code sec. 298.

A charge of perjury cannot be sustained against a boy under fourteen years without proof of guilty knowledge of wrong-doing. Code sec. 18 has not changed the common law, which presumed against guilty knowledge where the accused was under the age of fourteen years. R. v. Carvery, 11 Can. Cr. Cas. 331.

Section 18 refers exclusively to mental capacity to judge between right and wrong. R. v. Hartlen, 2 Can. Cr. Cas. 12.

No one under the age of fourteen years can commit rape. Sec. 298.

Unsoundness of Mind.

Lunatic not Responsible.—A case may be reserved at the instance of the Crown upon a question of law as to whether there was any evidence of insanity to support the jury's verdict of not guilty upon that ground. R. v. Phinney (No. 1), 6 Can. Cr. Cas. 469.

Without evidence to go to the jury, the prisoner cannot be acquitted upon the plea of insanity. If there is in such a case to be any appeal after a conviction, it must be on the ground that the evidence is so overwhelming in the favour of the insanity of the prisoner that the Court will feel that there has been a miscarriage of justice. A new trial should not be granted if the evidence were such that the jury could reasonably convict or acquit. R. v. Riel (No. 2), 1 Terr. L.R. 63.

The rule laid down by the Judges in reply to a question put to them by the House of Lords, in McNaghten's Case, 4 St. Tr. (N.S.) 847, that the accused was guilty if at the time of committing a crime he knew that he was acting contrary to law, was followed and applied in

R. v. Riel (No. 2), 1 Terr. L.R. 63, and leave to appeal was refused by the Privy Council, 10 A.C. 675.

The fact that the accused was so mentally defective that he was seized with an uncontrollable impulse to do the criminal act, although cognizant of its nature and quality and that the act was wrong, does not constitute a defence in law. The King v. Creighton, 14 Can. Cr. Cas. 349.

Ignorance and Mistake.

Of Law.—Ignorance of law is not a good defence. Code sec. 22; R. v. Brinkley, 12 Can. Cr. Cas. 454; R. v. Mailloux, 3 Pugsley (N.B.) 493; R. v. Moodie, 20 U.C.Q.B. 399.

Of Fact.—Ignorance of fact is an excuse where *mens rea* is an essential ingredient of the offence charged. R. v. Sellars, 9 Can. Cr. Cas. 153.

Compulsion.—Compulsion by threats is, in certain circumstances, an excuse of certain offences. Code sec. 20.

Compulsion of a wife by her husband is not to be presumed because the offence by the wife is committed in the presence of the husband. Code sec. 21.

The former common law principle that a wife was exempt from liability in certain criminal acts upon the ground of coercion on the part of her husband, did not apply where the wife had committed the offence by her husband's order or procurement if she had committed it in his absence. R. v. Williams, 42 U.C.Q.B. 462. And a plea of compulsion was rebutted by proof that the wife was the more active party, even when the offence was committed in the presence of her husband. R. v. Williams, 42 U.C.Q.B. 462; R. v. Howard, 45 U.C.Q.B. 346; R. v. MacGregor, 26 O.R. 115.

Corporations.—A corporation is not subject to indictment on a charge of any crime, the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk causing injury to others. Consequently there is no judgment or sentence applicable to a conviction of a corporation for manslaughter. R. v. Great Western Laundry Co., 3 Can. Cr. Cas. 514.

The liability of a corporation to summary conviction was affirmed in R. v. Toronto Railway Co., 2 Can. Cr. Cas. 471, and denied in Ex parte Woodstock Elec. Lt. Co., 4 Can. Cr. Cas. 107.

Sections 247 and 252, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. *Ibid.*

Although a corporation may not be guilty of manslaughter, it may be indicted under Code sec. 222, and possibly under sec. 284, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. R. v. Union Colliery Company, 3 Can. Cr. Cas. 523, 4 Can. Cr. Cas. 400, 31 S.C.R. 81.

Under sec. 247 the corporation may be indicted for omitting without lawful excuse to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. Union Colliery Co. v. R., 4 Can. Cr. Cas. 400, 31 S.C.R. 81.

There are offences, such as assaults, which it is physically impossible for a corporation to commit, but for such offences as they can commit, whether of misfeasance or malfeasance, and for which the prescribed punishment is one they can be made to endure, they are as amenable to the criminal law as are natural persons. R. v. Central Supply Association, 12 Can. Cr. Cas. 371.

Administering the Law.—For freedom from criminal responsibility when administering the law, see Code secs. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38.

Protection from Criminal Responsibility.—Sections 27, 28 and 29 deal only with criminal responsibility while in cases to which sec. 26 applies, the sentence or process is a justification both as to civil and criminal responsibility.

A peace officer executing a warrant of arrest which he believes to be good is exempt from criminal responsibility therefor by this section, although the warrant was bad on its face as following a conviction also bad on its face. Gaul v. Township of Ellice (1902), 6 Can. Cr. Cas. 15.

A police officer is not the agent of the municipal corporation which appoints him to the position and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible for such negligence in provinces where the English common law applies. McCleave v. City of Moncton, 6 Can. Cr. Cas. 219.

Defective Process.—A search warrant affords absolute justification to the officer executing it if it has been issued by competent authority and is valid on its face, although the warrant may in fact be bad and although it be set aside by reason of a failure to comply with legal requirements. Sleeth v. Hurlbert (1896), 3 Can. Cr. Cas. 197, 25 Can. S.C.R. 620.

A conviction for resisting a sheriff's officer will be supported notwithstanding the fact that the date of the judgment under which it was issued was erroneously stated therein, such an error being an irregularity only and amendable. R. v. Monkman, 8 Man. R. 509.

And a warrant of commitment which is valid on its face is a justification to the constable who executes it, although the imprisonment it directs is not authorized by law. R. v. King, 18 O.R. 566.

CHAPTER THE FIFTH.

OF PARTIES TO THE COMMISSION OF CRIME.

SECT. I.—PRELIMINARY.

WHEN two or more persons are to be brought to justice for participation in the same crime, questions arise as to the degree in which they have participated, *i.e.*, whether they are principal offenders, accessories, or abettors, or whether their participation is innocent so that the acts done by them do not make them *participes criminis*. At common law the question of the exact degree of complicity was of more importance than under the statutes which now govern trial and punishment of participators in crime.

To make a man responsible for a crime, whether felony or misdemeanor, it is not essential that he should be present at the place where the crime takes effect, if he has, in fact, set in motion the agencies by which the crime is effected. Controversies in respect of venue or jurisdiction arise when the crime is initiated in one country and takes effect in another, or is initiated in one judicial district and takes effect in another(*a*). But in case of absence from the scene of the crime, to make a man responsible as a principal offender, he must have set in force physical agencies or have employed an innocent agent.

Innocent Agent.—If a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a crime, the inciter is the principal *ex necessitate*, though absent when the thing was done(*b*). In point of law, the act of the innocent agent is as much the act of the procurer as if he were present and did the act himself(*c*). Where the prisoner had induced a child of the age of nine years to take money from his father's till and give it him, Wightman, J., left it to the jury to say whether the child was an innocent agent, that is, whether he knew that he was doing wrong or was acting altogether unconsciously of guilt and at the dictation of the prisoner(*d*).

The rule also applies in the case of libels published through the agency of the post office(*e*), or the transmission of poison by the hands of a person of any age, who is ignorant of its nature (*f*) and for the purpose for which he is to deliver it to the person intended to be killed or injured, or the uttering of a forged document through a person who does not know that it is forged(*g*). It is not essential that the principal should be present at the place where the crime takes effect. This is obvious in

(*a*) Discussed *ante*, p. 52.
(*b*) Fost. 349. Kel. (J.) 52.
(*c*) See R. *v.* Brisac, 4 East, 163, *ante*, p. 53.
(*d*) R. *v.* Manley, 1 Cox, 104.
(*e*) R. *v.* Johnson, 7 East, 65.
(*f*) Fost. 349.
(*g*) R. *v.* Palmer, 1 B. & P. (N.R.) 96.

the cases of crimes such as libels and false pretences and threatening letters transmitted by post, and also applies in cases where poison is placed for another person, and is taken by him in the absence of the person who placed it (*h*).

A prisoner went to a die-sinker and ordered four dies of the size of a shilling to be made, stating them to be for two whist clubs. Before making them, the die-sinker communicated with the officers of the Mint, who directed him to execute the prisoner's order, which he did by making the first and third dies, and from these counterfeit shillings could be coined. It was held that the prisoner was the principal, as the die-sinker was an innocent agent (*j*). Where the prisoners applied to an artist to engrave a copy of the coupons of the Netherlands Bank, and the artist suspecting that there was an intention to defraud, communicated with the Dutch consul, and under his direction, employed persons to engrave the plate in pursuance of the orders given him : it was held that the artist was an innocent agent (*k*).

B. in London, and S. on the Continent, were engaged in planning the forgery of a plate, as appeared by letters which had passed between them. The order for the plate was given by B. to an innocent agent in England before S. came to England. On his arrival he and B. went to the manufacturer, and the plate was given to them. It was contended that B. was the principal, and that S. was only an accessory before the fact, and that it was the same as if B. had engraved the plate, and, if so, S. was only an accessory. Tindal, C.J., said: 'That reasoning would be good if the actual maker had been a guilty party, because he would stand in a different position to those who had counselled him to the commission of the crime. But it altogether fails where the immediate agent is an innocent one. Then, those who have plotted and arranged that he should do the particular act are themselves principals. Suppose the prisoners had been both abroad, and that, having planned the forgery, one of them had given the order for the plate by letter, can it be doubted that they would be indictable as principals ; and can it make any difference that one of them is in this country ? It seems to me, then, that the circumstance of the immediate agent in this forgery being an innocent person renders the rule of law as to principal and accessory inapplicable.' And Alderson, B., said : 'If a person does an act of this kind, with a guilty intent, he is not the agent of any one. If he does it innocently, he is the agent of some person or persons ; and if two have agreed to employ him, he is the agent of both. In this case, therefore, it is a question for the jury whether the prisoners were jointly acting in procuring this plate to be made. If they were, then the engraver acts on behalf of both. It makes no difference whether they were in England or elsewhere ; when they have once agreed to do the thing, the act of one is the act of all, although the rest be absent at the time' (*l*).

The prisoner was indicted for forging a receipt for 5*l*. in the name of W. S., who had gone to America ten years before. On receipt from the

(*h*) Fost. 349. Steph. Dig. Cr. Law (6th ed.), 30. Kel. (J.) 52. 4 Co. Rep. 446.

(*j*) R. *v.* Bannen, 2 Mood. 309.

(*k*) R. *v.* Valler, 1 Cox, 84, Gurney, B., and Wightman, J.

(*l*) R. *v.* Bull, 1 Cox, 281. *Ante*, p. 52.

prisoner of a letter addressed to M. S., M. S. sent a letter containing a post-office order, directed to W. S. This letter was opened by B., who wrote to the prisoner and informed him of the receipt of the post-office order. The prisoner wrote a letter in reply enclosing one purporting to come from W. S., desiring B. to obtain payment of the post-office order, and saying that he was 'at liberty to sign his hand,' if necessary, to the post-office order. In consequence of this letter B. signed the name 'W. S.' to the post-office order, and received the money and transmitted the balance, after paying the expenses, 4*l.* 17*s.* 6*d.*, to the prisoner. B. stated that he considered the letter gave him sufficient authority to sign the name 'W. S.,' which he wrote in his ordinary hand, without imitating any person's signature. It was urged that in order to constitute forgery the writing of the name by an innocent agent must be as if it were the act of the person whose name was written. Here the signing was as an agent, and the prisoner had only been guilty of giving an authority, which he had no right to give. B. did not sign as W. S., but on the ground that he was authorised to sign W. S.'s name for him. Secondly, it was not sufficient to give an innocent agent 'liberty' or licence to do an act to make the party giving such licence a principal, for a bare permission would not make a man a principal (*m*). Platt, B., after consulting Pollock, C.B., 'We agree in thinking that as B. was an innocent agent, the signing the name W. S. by him is just the same as if it had been signed by the prisoner himself, and that it is therefore a forgery. We also think that the terms of the letter, which induced B. to sign, are quite immaterial, as it was in consequence of that letter that the name was written' (*n*).

But if a person who receives and utters a note knows that it is forged, the person who gave it will not be punishable as a principal (*o*); and where a person, having incited another to lay poison, is absent at the time of laying it, he is an accessory only, though he prepared the poison, if the person laying it is amenable as a principal; but is punishable as a principal if the person laying the poison is not so amenable (*p*).

Sect. II.—Principals and Accessories in Felony.

All persons who take any part in the *commission* of a felony are in construction of law felons (*q*): but at common law a distinction is drawn in the case of felony between—(i.) Principals in the first degree; (ii.) principals in the second degree, or accessories *at* the fact; (iii.) accessories *before* the fact; (iv.) accessories *after* the fact. This distinction was of importance with reference both to procedure and punishment: but much of the earlier case law on the subject has been rendered obsolete by legislation.

(i.) *Principals in the First Degree.*

1. Principals in the first degree are those who have *committed the fact with their own hands or through an innocent agent* (*r*), whether the fact be a complete crime or an incitement to commit crime.

(*m*) R. *v.* Maddock, 2 Russ. C. & M. p. 946 (4th ed.). 1 Russ. C. & M. 57 (4th ed.), and 1 Hale, 616, were cited.
(*n*) R. *v.* Clifford, 2 C. & K. 202.
(*o*) R. *v.* Soares, R. & R. 25.
(*p*) Fost. 349.
(*q*) Fost. 417.
(*r*) *Vide ante*, p. 104.

2. In treason and in misdemeanor all persons participating are liable as principals. (*Vide post*, p. 138.)

The first count of an indictment charged the prisoners with uttering a counterfeit sixpence to A., and on the same day uttering another to B.; the second count with uttering to C.; and a third count with uttering to D. The prisoners were in a town together all the day in question, and in the evening quitted a public-house together, having first changed their clothes for the purpose of disguise. Each of them uttered three bad sixpences, made in the same mould, and of the same metal, to shopkeepers living within a short space of each other, and the prisoners were found together immediately afterwards with counterfeit money on their persons, but there was no proof that they were together at either of the utterings. There were other facts to shew a community of purpose. On these facts, Erskine, J., at first called on counsel for the prosecution to elect against which of the prisoners he intended to proceed. It was then contended that if the prisoners jointly provided themselves with the coin for uttering, and shared the proceeds afterwards, they were jointly guilty of each act of uttering; that in misdemeanor there being no accessories, the acts which would make them accessories before the fact in felony made them principals on this charge, and that at all events one of them could be convicted of the two utterings on the same day, and the other of the single uttering, of which he was guilty, on one of the other counts. Erskine, J., then directed the trial to proceed, and in summing up told the jury, that if two persons, having jointly prepared counterfeit coin, planned the uttering, and went on a joint expedition, and uttered, in concert and by previous arrangement, the different pieces of coin, then *the act of one would be the act of both*, though they might not be proved to be *actually together* at each uttering. It might be different if, having possession of the counterfeit coin, they shared it between them, and each went his own way, and acted *independently* of the other. If they thought they were acting in concert in the utterings charged, they should convict on the whole indictment. If they thought they were uttering independently of each other, they might convict one of the two utterings on the first count, and the other on the other counts (*s*).

So, where, on an indictment against G. and J. for uttering counterfeit coin, it appeared that the uttering was by J. in the absence of G.; but that both were together before the uttering, under circumstances which left no doubt of their joint engagement in a common purpose of uttering base shillings and sharing in the proceeds, Talfourd, J., directed the jury that if they thought G. was engaged on the evening in question with J. in the common purpose of uttering counterfeit shillings, having one stock of such coin, for their mutual benefit; and if, in pursuance of such purpose, J. uttered the shilling, they ought to find G. guilty, subject to the question of law whether the actual presence of G., in or so near the neighbourhood as to amount to association in the very act, was necessary to support the charge. The jury found both guilty; but, in deference to the authority of R. *v.* Else (*t*) and R. *v.* Page (*u*), the question whether

(*s*) R. *v.* Hurse, 2 M. & Rob. 360.
(*t*) R. & R. 42.
(*u*) 2 Mood. 290.

G. was properly convicted was reserved for the opinion of the judges; who were unanimously of opinion that he was rightly convicted, on the ground that, at common law, persons who in felony would have been accessories before the fact, in misdemeanor were principals, and therefore R. *v.* Else and R. *v.* Page were wrongly decided (*v*).

(ii.) *Principals in the Second Degree.*

Principals in the second degree are those who were *present, aiding and abetting* at the commission of a felony. They are often termed *aiders and abettors*, and sometimes accomplices: but the latter appellation will not serve as a term of definition, as it includes all the *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact (*w*).

Presence actual or constructive.—A person may be a principal in the second degree in felony even if by reason of age or sex physically incapable of being a principal in the first degree (*x*). In order to render a person a principal in the second degree, he must be *present aiding and abetting* at the fact, or ready to afford assistance if necessary, as when one commits a murder, and another keeps watch and ward at some convenient distance (*y*). But a person may be present, and, if not aiding and abetting, be neither principal nor accessory: as, if A. happens to be present at a murder and takes no part in it, nor endeavours to prevent it, or to apprehend the murderer, this course of conduct will not of itself render him either principal or accessory (*z*).

The *presence* need not be a strict actual immediate presence, such a presence as would make him an eye-witness or ear-witness of what passes, but may be a constructive presence. So that if several persons set out together, or in small parties, upon one common design, felonious or unlawful in itself, and each takes the part assigned to him; some to commit the fact, others to watch at proper distances and stations to prevent surprise, or to favour, if need be, the escape of those more immediately

(*v*) R. *v.* Greenwood, 2 Den. 453, overruling R. *v.* Hayes, 2 Cox, 68, and R. *v.* West, 2 Cox, 237. R. *v.* Skerritt, 2 C. & P. 427, appears also to fall with this ruling.

(*w*) Fost. 341. The course and order of proceeding against offenders founded upon the distinction between principals in the first degree and principals in the second degree, appears to have been unknown to the most ancient writers on our law, who considered the persons present aiding and abetting in no other light than as *accessories at the fact* (Fost. 347). But as such accessories they were not liable to be brought to trial till the principal offenders had been convicted or outlawed, the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed. With a view to obviate this mischief the judges by degrees adopted a different rule: and at length it became settled law that all persons present, aiding and abetting, when a felony is committed, are principals in the second degree. Coal-heaver's case, 1 Leach, 66. And see Fost. 428, and R. *v.* Towle, R. & R. 314. This law was by no means settled till after the time of Edward III.; and so late as the first of Queen Mary a chief justice of England strongly doubted of it, though indeed it had been sufficiently settled before that time.

(*x*) 1 Hale, 636. R. *v.* Eldershaw, 3 C. & P. 396, boy under fourteen principal in second degree in rape. R. *v.* Lord Baltimore [1768], 4 Burr. 2179. R. *v.* Ram, 17 Cox, 609, women principals in second degree in rape.

(*y*) 1 Hale, 615. Fost. 350. 4 Bl. Com. 34.

(*z*) 1 Hale, 439. Fost. 350.

engaged; they are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them; each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise (*a*). But there must be some participation; therefore if a special verdict against a man as a principal does not shew that he did the act, or was present when it was done, or did some act at the time in aid which shews that he was present, aiding and assisting, or that he was of the same party, in the same pursuit, and under the same expectation of mutual defence and support with those who did the fact, the prisoner cannot be convicted (*b*). So, if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them maim a pursuer to avoid being taken, the others are not principals in that maiming (*c*). And it has been held not sufficient to make a man a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn where they put up a little before he uttered it, joined him again in the street a short time after the uttering, and at a distance of 150 yards from the place of uttering, and ran away when the utterer was apprehended (*d*). In R. *v.* Brady (*e*), on an indictment for forging and uttering a cheque, Graham, B., is reported to have said: 'It has frequently been held that what would amount to a constructive presence at common law will not be sufficient upon an indictment under a statute. A case under this statute occurred before me at Derby (*f*). Two persons went in concert to utter a forged note; one went into a shop to utter it, whilst the other remained at some little distance in the street; it was objected that the latter was not liable as a principal. I saved the point; and the judges were of opinion that the utterer only was liable' (*e*). The general rule applies to offences by statute as well as at common law, viz., that all present at the time of committing an offence are principals, although one only acts, if they are confederates, and engaged in a common design, of which the offence is part (*g*). And where three persons were charged with uttering a forged note, other acts done by all of them jointly, or by any of them separately, shortly before the offence, may be given in evidence to shew the confederacy and common purpose, although such acts constitute distinct felonies (*h*). And what was found upon each may be proved against each to make out such confederacy, although it were not found until some time after the commission of the offence (*i*).

K. and M. were indicted for stealing oats. K. was hired by the prosecutor to draw oats in sacks from a vessel to the prosecutor's warehouse, and M. was employed by the prosecutor to load the sacks into

(*a*) Fost. 350, 2 Hawk. c. 29, ss. 7, 8. See R. *v.* Howell, 9 C. & P. 437, Littledale, J. R. *v.* Vanderstein, 10 Cox, 177 (Ir.).

(*b*) R. *v.* Borthwick, 1 Dougl. 207.

(*c*) R. *v.* White & Richardson, R. & R. 99.

(*d*) R. *v.* Davis & Hall, East. T. 1806. MS. Bayley, J.; and R. & R. 113.

(*e*) O. B. June, 1813. 1 Stark. Cr. Pl. 84n.

(*f*) This seems to be R. *v.* Brady, *ubi supra.*

(*g*) R. *v.* Tattersal, East. T. 1801. MS. Bayley, J.

(*h*) Id. ibid.

(*i*) Id. ibid.

trams belonging to K. on which they were carried. Whilst one load was being conveyed to the warehouse, K. said to M., 'It's all right,' and shortly afterwards M. emptied some oats out of two sacks which were on a tram close to the vessel, into a nosebag which he then placed under the tram. K., at this time, was absent with a load, but returned in a few minutes to the vessel with an empty tram, took the nosebag from under the tram, where M. had placed it, and put it on the tram, and drove off with it, M. being, at the time K. took the nosebag from under the tram, on the vessel, which lay close to the tram, and within three or four yards of K. It was submitted that K. was entitled to be acquitted, as he was not present at the time when the oats were stolen. Maule, J., said: 'I think the evidence shews that this was all one transaction, in which both concurred; and I think both having concurred, and both being present at some parts of the transaction, both may be convicted' (*j*).

Upon an indictment for larceny against H. and G., it appeared that G. was the foreman of the prosecutor, a canvas manufacturer, but had no authority to sell any yarn. On one occasion H. sent his servants to the warehouse of the prosecutor to bring away yarn, and G. delivered with the yarn an invoice made out in the name of the prosecutor. Subsequently, H. sent two of his men to the warehouse of the prosecutor, and, on arriving, they found H. and G. there. Some yarn was pointed out as the yarn which they were to take to H.'s premises: and they thereupon, in the presence of H. and G., carried away the yarn in question. When H. was charged he produced the invoice which G. gave him on the first occasion, and stated that, except on that occasion, he had had no dealings with him. It was submitted that H. was only guilty of receiving the yarn, knowing it to have been stolen, but Coltman, J., held that if H. knew that in the transaction in question G. was, in fact, committing a felony, he, as well as G., was guilty of the same felony; and, therefore, the question for the jury was whether, at the time of the pretended sale by G., H. knew that G. was exceeding his authority and defrauding his master (*k*).

Going towards the place where a felony is to be committed in order to assist in carrying off the property, and assisting accordingly, will not make the party a principal if he was at such a distance, at the time of the felonious taking, as not to be able to assist in it. The prisoner and J. S. went to steal two horses; J. S. left the prisoner half a mile from the place in which the horses were, and brought the horses to him, and both rode away with them. Upon a case reserved, the prisoner was held to be an accessory *before the fact* only, not a principal, because he was not present at the original taking (*l*). Where a servant let a person into his master's house, in order that he might steal his master's money, and he continued in the house till the robbery, but the servant left the house before the robbery was committed, it was held that the servant was an accessory before the fact (*m*). On an indictment for stealing in a dwelling-house, it was proved that a servant had unlocked the door of the house, in order

(*j*) R. *v.* Kelly, 2 C. & K. 379. Maule, J., refused to reserve the point.

(*k*) R. *v.* Hornby, 1 C. & K. 305.

(*l*) R. *v.* Kelly, MS. Bayley, J., and R. & R. 421.

(*m*) R. *v.* Tuckwell, C. & M. 215, Coleridge, J. It is not stated how long before the theft the servant left.

that another person might get in and steal the property, which he did *about twenty minutes after the servant had left the house.* It was contended that, as it was clear that if the servant had been indicted for house-breaking and stealing he might have been convicted (*n*), that shewed that he was guilty of stealing the money, for that could not depend upon the form of the indictment. But it was held that the servant was only an accessory before the fact to the offence charged in the indictment (*o*). Where three prisoners were jointly indicted for maliciously wounding with intent to maim, &c., and one of them did not come up and take any part until the wound had been inflicted by the others, it was held that the latter only could be convicted, though the former kicked the prosecutor several times after he came up (*p*). So, if two prisoners go to a house, intending to commit a theft in it, and one enters first and is apprehended, and then the other enters and commits the theft, the former is only an accessory before the fact (*q*).

But where a man committed a larceny, in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the judges came to a different conclusion. The accomplice was indicted and convicted as a receiver; and the learned judge before whom he was tried was of opinion, that as the thief stole the property in his own room, and required no assistance to commit the felony, the conviction of the accomplice as a receiver might have been supported, if the jury had found that the thief had brought the goods out of the house, and delivered them to the accomplice; but as the jury had found that the thief threw the things out of the window, and that the accomplice was in waiting to receive them, he thought the point fit for consideration. And the judges were of opinion that the accomplice in this case was a principal, and that the conviction of him as a receiver was wrong (*r*).

So, where on an indictment against G. for stealing, and H. for receiving pork, it appeared that the prisoners went together to the prosecutor's warehouse, and G. went into the warehouse and took the pork out of a tub, and brought it out of the warehouse and gave it to H., who had remained on the outside, and who was not in a position to see what G. did in the warehouse, but was sufficiently near to have rendered him aid in case he had been taken into custody; that is to say, the evidence was sufficient to have convicted him as a principal in the second degree; and the jury having found H. guilty, upon a case reserved upon the question whether a person who was a principal in the second degree could, under the above circumstances, be convicted as a receiver of the goods stolen, the judges were unanimously of opinion that he could not; and, therefore, the conviction of H. was wrong (*s*).

(*n*) R. *v.* Jordan, 7 C. & P. 432.

(*o*) R. *v.* Jefferies & Bryant, Gloucester Spr. Ass. 1848. Cresswell and Patteson, JJ., 3 Cox, 85, MSS. C. S. G. The decision seems to turn on the length of the interval between the departure of the servant and the arrival of the thief.

(*p*) R. *v.* M'Phane, C. & M. 212; Tindal, C.J.

(*q*) R. *v.* Johnson, C. & M. 218, Maule, J., and Rolfe, B.

(*r*) R. *v.* Owen, 1 Mood. 96.

(*s*) R. *v.* Perkins, 2 Den. 459. 'This case must not be taken to decide that a principal cannot, under any circumstances, be a receiver, as the marginal note would seem to indicate. If a principal were to deliver the goods to another, and afterwards at a distance from the place where the felony was committed were to receive them again,

An indictment charged S. with stealing 18*s.* 6*d.*, and C. with receiving the same. S. was a barman at a refreshment bar. C. went up to the bar, called for refreshments, and put down a florin. S. served C., took money from his master's till in the presence of C., and gave to C. 18*s.* 6*d.* change for the florin, which C. pocketed. There was evidence of recognition and common purpose between S. and C. S. was convicted of stealing, and C. of receiving the 18*s.* 6*d.* It was held, that upon the evidence, the jury should have been directed that they might convict C. as a principal in the second degree, and that he was not properly convicted as a receiver (*t*).

Common Purpose.—In order to make a person who is present when a felony is committed a principal in the second degree, there must be a *community of purpose* with the party actually committing the felony, at the time when the felony is committed. One count charged H. and M. with stealing from the person; another charged them with feloniously receiving the stolen property. H. was walking by the side of the prosecutrix, and M. was seen just previously following behind her. The prosecutrix felt a tug at her pocket, found her purse was gone, and, on looking round saw H. behind her, walking with M. in the opposite direction and saw her hand something to M. The jury were directed that, if they did not think, from the evidence, M. was participating in the actual theft, it was open to them on these facts to find him guilty of receiving. The jury found H. guilty of stealing and M. guilty of receiving; and it was held that the direction was right, as to make M. a principal in the second degree there must have been a community of purpose with H. in the actual stealing (*u*).

And 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 entices the owner away, in order that the party who has obtained such possession may carry the goods off, all will be guilty of felony, the receipt by one, under such circumstances, being a felonious taking by all (*v*). So, where a prisoner asked a servant, who had no authority to sell, the price of a mare, and desired him to trot her out, and then went to two men, and having talked to them, went away, and the two men then came up and induced the servant to exchange the mare for a horse of little value, it was held that if the prisoner was in league with the two men to obtain the mare by fraud and steal her he was a principal (*w*).

If a murder is committed *in prosecution of some unlawful purpose*, even a bare trespass, all persons who went to give assistance, if need were, in carrying the unlawful purpose into execution, are guilty of murder. But this applies only where the murder is committed *in prosecution of some unlawful purpose*, in which the combining parties *united*, and for the effecting whereof they are assembled; for unless this appears, though

there can be no doubt that he might be convicted as a receiver.' C. S. G.

(*t*) R. *v.* Coggins, 12 Cox, 517 (C. C. R.).

(*u*) R. *v.* Hilton, 1 Bell, 20, referred to in R. *v.* Coggins as R. *v.* M'Ewin. In R. *v.* Coggins, Blackburn, J., approved the direction in R. *v.* Hilton.

(*v*) R. *v.* Standley, MS. Bayley, J., and R. & R. 305. R. *v.* County, MS. Bayley, J. As to liability for larceny by aiding and abetting as ring dropping, see R. *v.* Moore, 1 Leach, 314.

(*w*) R. *v.* Sheppard, 9 C. & P. 121, Coleridge, J.

the person giving the mortal blow may himself be guilty of felonious homicide, yet the others who came together for a different purpose will not be involved in his guilt (*x*). Thus, where three soldiers went together to rob an orchard: two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him; it was ruled to be murder in the man who stabbed, but that those on the tree were innocent. It was considered that they came to commit a small, inconsiderable trespass, and that the man was killed upon a sudden affray without their knowledge. But the decision would have been otherwise if they had all come thither *with a general resolution against all opposers*; for then the murder would have been committed in prosecution of their original purpose (*y*).

Where on a trial for murder the case for the Crown was, that the prisoner and J. had followed the deceased for the purpose of robbing him, and that, in pursuance of that object, one or both of them struck the deceased on the head and killed him, and the preceding passage was cited for the prisoner: Bramwell, B., told the jury, 'The rule of law is this: if two persons are engaged in the pursuit of an unlawful object, the two having the same object in view, and, in the pursuit of that common object, one of them does an act which is the cause of death under such circumstances that it amounts to murder in him, it amounts to murder in the other also. The cases which have been referred to may be explained in this way. The object for which the parties went out was a comparatively trifling one, and it is almost impossible to suppose that if one had committed a murder whilst engaged in the pursuit of such an object, the act could have been done in furtherance of the common object they had in view, which was comparatively so unimportant. Suppose two men go out together, and one of them holds a third man for the purpose of enabling his companion to cut that man's throat, and his companion does so, no one could doubt that they were both equally guilty of murder. Therefore, if you find the common unlawful object in the two prisoners, and death ensuing from the act of J. in pursuance of that common unlawful object, under such circumstances that it was murder in him, it is your duty to find the prisoner guilty' (*z*).

Where there is *a general resolution against all opposers*, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from

(*x*) Fost. 351, 352. 2 Hawk. c. 29, s. 9. See R. *v.* Howell, 9 C. & P. 437, per Littledale, J.

(*y*) Fost. 353. Case at Salisbury, Lent Assizes, 1697, MS. Denton & Chapple, 2 Hawk. c. 29, s. 8. R. *v.* Skeet, 4 F. & F. 931. And see R. *v.* Hodgson and others, 1 Leach, 6; and an Anon. case [1664], 1 Leach, 7, note (*a*), where several soldiers, who were employed by the messengers of the Secretary of State to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be; and having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony in all; and Holt, C.J., citing the case, says, 'That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first; yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; for this reason, because they knew not of such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands.'

(*z*) R. *v.* Jackson, 7 Cox, 357.

their number, arms, or behaviour, at or before the scene of action, and homicide is committed by any of the party, every person present in the sense of the law when the homicide is committed will be involved in the guilt of him who gave the mortal blow (*a*). Thus where several persons are together for the purpose of committing a breach of the peace, assaulting persons who pass, and, while acting together in that common object, a fatal blow is given, it is immaterial which struck the blow, for the blow given under such circumstances is in point of law the blow of all, and it is unnecessary to prove which struck the blow (*b*).

But this doctrine applies only to assemblies formed for carrying into execution some common purpose, *unlawful in itself*. For if the original intention was lawful, and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, according to the circumstances; but the persons engaged with him will not be involved in his guilt, *unless they actually aided and abetted him in the fact;* for they assembled for another purpose which was lawful, and consequently the guilt of the person actually killing cannot by any fiction of law be carried against them beyond their original intention (*c*).

It is submitted that the true rule of law is, that where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty.

When several are present and abet a fact, an indictment may lay it generally as done by all, or specially, as done by one and abetted by the rest (*d*). Or if the punishment for principals in the first and second degrees is the same, all may be indicted as principals in the first degree (*e*).

Homicide Cases.—If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there is no malice aforethought in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former (*f*). Several persons conspired to kill E., and set upon him accordingly, when S., who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master, but knew nothing of his master's design. A servant of E., who supported his master, was killed. The Court told the jury that malice against E. would make it murder in all those whom that malice affected, as the malice against E. would imply malice against all who opposed the design against E.: but, as to S., if he had no malice, but took part

(*a*) Fost. 353, 354. 2 Hawk. c. 29, s. 8. See *post*, p. 721, 'Murder.'

(*b*) R. *v.* Harrington, 5 Cox, 231, Martin, B. See the Sissinghurst-house case and others cited *post*, Bk. ix. c. i. p. 721.

(*c*) Fost. 354, 355. 2 Hawk. c. 29, s. 9.

(*d*) 2 Hawk. c. 23, s. 76, and c. 25, s. 64. R. *v.* Young, 3 T. R. 98.

(*e*) This is so even in a case of rape. According to the old practice it was thought better to charge the parties according to the facts as intended to be proved. R. *v.* Vide, Fitz. Corone, pl. 86. R. *v.* Burgess, 1813, Tr. T. *Post*, p. 931 *et seq.* As to common law indictments for murder against several, see R. *v.* Gordon, 1 Leach, 515; 1 East, P.C. 352.

(*f*) 1 East, P.C. 350.

suddenly with those who had, without knowing of the design against E., it was only manslaughter in him. The jury found S. guilty of manslaughter and three others of murder, and the three were executed (*g*).

If the person charged as principal in murder be acquitted, a conviction of another charged in the indictment as present aiding and abetting him in the murder, is good. Holt, C.J., said: 'Though the indictment be against the prisoner for aiding, assisting, and abetting A., who was acquitted, yet the indictment and trial of this prisoner is well enough, for all are principals, and it is not material who actually did the murder' (*h*). And all who are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are called principals in the second degree (*i*). So that if A. is indicted for homicide, or manslaughter, and C. and D. for being present and assisting A., and A. does not appear, but C. and D. appear, they shall be arraigned; and if convicted shall receive judgment, though A. neither appears nor is outlawed (*j*). And if A. is indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment may be given against them all; for it is only a circumstantial variance, and in law it is the stroke of all that were present aiding and abetting (*k*).

Where the first count charged D. as principal in the first degree in the murder of W. C. by shooting him with a gun, and P. as being present aiding and abetting D., and the second count charged P. as principal in the first degree, alleging that he 'afterwards' assaulted 'the said W. C.,' &c., and D. as being present aiding and abetting P.; the jury found both guilty, but added that they were not satisfied which of the prisoners fired the gun, but were satisfied that one of them fired the gun, and that the other was present aiding and abetting. It was thereupon submitted that, the prisoners being charged differently in the two counts, the jury must be instructed to find them guilty on one or the other of the counts only; but Coltman, J., thought that, as the evidence equally supported either count, it was not necessary to give any such direction, and therefore told them that if they were satisfied that one of the two fired the gun, and that the other was present aiding and abetting, they were both liable to be found guilty, and the jury returned a general verdict of guilty. Upon a case reserved, the conviction was held right, for both counts substantially related to the same person killed and to one killing (*l*).

Where a count charged A. with murder, and B. and C. with being present aiding and abetting in the commission of the murder, and it appeared that A. was insane at the time of committing the murder, it

(*g*) R. *v.* Salisbury [1553], Plowd. 100. 75 E. R. 158. See 1 Hale, 446, and *post*, Bk. ix. c. i.

(*h*) R. *v.* Wallis, 1 Salk. 334. R. *v.* Taylor, 1 Leach, 360: 1 East, P.C. 351.

(*i*) 1 Hale, 437. Plowd. 100a. Anciently the man who gave the fatal stroke was considered the principal, and those present only accessories.

(*j*) 1 Hale, 437. Gittin's case, Plowd. 98, 100: 75 E. R. 155.

(*k*) 1 Hale, 438. Plowd. 98a. R. *v.* Mackalley, 9 Co. Rep. 676. 1 East, P.C. 350. R. *v.* Turner, 1 Lew. 177, Parke, B. R. *v.* Phelps, C. & M. 180.

(*l*) R. *v.* Downing, 1 Den. 52, Maule, J., *diss.* See 2 C. & K. 382, for the indictment. Now the proper course in such case would be simply to allege that the prisoners murdered C., according to 24 & 25 Vict. c. 100, s. 6; *post*, p. 818.

was held that B. and C. could not be convicted on this count (*m*). Where a count charged B. and C. as principals in the first degree with a murder, and it appeared that A., an insane person, collected a number of persons together, who armed themselves, having a common purpose of resisting the lawfully constituted authorities, A. having declared that he would cut down any constables who came against him, and a constable having come with his assistants, and a warrant to apprehend A., A., in the presence of B. and C., who were two of his party, shot one of the assistants; it was held that the prisoners were guilty of murder as principals in the first degree, and that it was no ground of defence that A. and his party had no distinct or particular object in view when they assembled together and armed themselves; because, if their object was to resist all opposers in the commission of any breach of the peace, and for that purpose the parties assembled together and armed themselves with dangerous weapons, however blank the mind of A. might be as to any ulterior purpose, and however the minds of the prisoners might be unconscious of any particular object, still, if they contemplated a resistance to the lawfully constituted authorities of the country, in case any should come against them while they were so banded together, there would be a common purpose, and they would be answerable for anything which they did in the execution of it (*n*).

(iii.) *Accessories Before the Fact.*

An accessory before the fact is he who, being absent at the time of the offence committed, procures, counsels, commands, or abets another to commit a felony (*o*). The term accessory is in practice confined to cases of felony. It is not used with reference to high treason (*p*). In crimes under the degree of felony there are no accessories: but all persons concerned therein, if guilty at all, are principals (*q*). Those who by hire, command, counsel, or conspiracy, or by shewing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact (*r*). Thus, if A. bids his servant to hire some one, no matter whom, to murder B., and furnishes him with money for the purpose, and the servant procures C., a person of whom A. never saw or heard to commit the murder, A. is an accessory before the fact to the murder by C. (*s*).

(*m*) R. *v.* Tyler, 8 C. & P. 616, Denman, C.J. *Sed quære.*

(*n*) R. *v.* Tyler, ibid.

(*o*) 1 Hale, 615. 24 & 25 Vict. c. 94, s. 2.

(*p*) 2 Hawk. c. 29, ss. 2, 5. Hale, 613. Fost. 341. 4 Bl. Com. 35.

(*q*) R. *v.* Burton, 13 Cox, 71. 1 Hale, 613. 4 Bl. Com. 36.

(*r*) 2 Hawk. c. 29, s. 16. Cf. 1 Hale, 435, as to homicide. Coke in speaking of forgery says (3 Inst. 169) that to *cause* is to procure or counsel one to forge; to *assent* is to give his assent or agreement afterwards to the procurement or counsel of another; to *consent* is to agree at the time of the procurement or counsel, and he in law is a procurer. In a strict sense he who caused a forgery to be done is a forger himself, and should be so charged in the indictment; R. *v.* Stocker, 5 Mod. 138. The *assent* here mentioned must be understood of an assent to the design of forging, before the fact of the forgery committed (2 East, P.C. 973), since, according to Hale, (1 P.C. 684) an assent *after* the fact committed makes not the party assenting guilty or principal in forging; but it must be a precedent or concomitant assent.

(*s*) Fost. 125. R. *v.* McDaniel, 19 St. Tr. 746, 789. 2 Hawk. c. 29, ss. 1, 10.

But words which amount to bare permission will not make an accessory, as if A. says he will kill J. S., and B. says, 'You may do your pleasure for me,' this will not make B. an accessory (*t*). And it seems to be generally agreed that he who barely conceals a felony which he knows to be intended is guilty only of misprision of felony, and shall not be adjudged an accessory (*u*). The same person may be a principal and an accessory in the same felony, as where A. commands B. to kill C., and afterwards actually joins with him in the fact (*v*).

Probably, in point of law, any degree of incitement, with the actual intent to procure the commission of the crime, is sufficient, and it is no defence to shew that the crime was not committed in consequence of the incitement, but from some other motive (see 2 Stark, Ev. 8, 2nd ed.). But there must be some degree of *direct* incitement. The prisoner, at the request of a pregnant woman who wished to procure abortion, obtained corrosive sublimate for her at her instigation, and influenced by a threat that she would destroy herself if she did not get it. He knew the purpose for which she wanted it, but though he gave it to her for that purpose, he was unwilling that she should use it, and did not administer it to her, nor cause her to take it. She, however, took it for the purpose assigned, and died in consequence. On a case reserved, it was held that the prisoner was not an accessory before the fact (*w*). The facts of the case would have been sufficient to convict the prisoner upon a charge of procuring or supplying poison, under sect. 59 of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100) (*x*).

Where the prisoner held the stakes for a prize fight, which resulted in the death of one of the combatants, Cockburn, C.J., said: 'To support an indictment for being accessory before the fact to manslaughter, there must be an active proceeding on the part of the prisoner. He is perfectly passive here, all he does is to accept the stakes' (*y*).

At common law the offence of an accessory before the fact was regarded as so different from that of a principal in the second degree, that where a woman was indicted as an accessory before the fact, it was held that she could not be convicted of that charge upon evidence proving her to have been present aiding and abetting; it being clearly admitted to be necessary to charge a principal in the second degree with being *present*, aiding and abetting (*z*).

Where D. was indicted for a burglary, and with stealing goods in the house, and V. as an accessory to 'the said burglary,' and D. had been acquitted of the burglary, but found guilty of the larceny, and V. found

(*t*) 1 Hale, 615.

(*u*) 1 Hale, 616. 2 Hawk. c. 29, s. 23.

(*v*) 2 Hawk. c. 29, s. 1, where it is said also that he may be charged as principal and accessory in the same indictment; but this was not allowed (R. *v.* Madden, 1 Mood. 277; R. *v.* Galloway, ibid. 234) until 11 & 12 Vict. c. 46, s. 1. In Atkins' case, who was tried for the murder of Sir E. Godfrey two indictments were found against him, one as principal, the other as accessory; and he was arraigned upon both at the same time. But the first was abandoned, and evidence given only in support of the second; the verdicts appear, however, to have been pronounced successively. 7 St. Tr. 231.

(*w*) R. *v.* Fretwell, L. & C. 161: 31 L. J. M.C. 145.

(*x*) *Post*, p. 864.

(*y*) R. *v.* Taylor, L. R. 2 C. C. R. 148: 44 L. J. M. C. 67: 13 Cox, 68.

(*z*) R. *v.* Gordon, 1 Leach, 515; 1 East, P.C. 352. And see Heydon's case, 4 Co. Rep. 42b.

guilty as accessory, it was objected that as the jury had acquitted the principal of the burglary, the accessory must be acquitted altogether. But a great majority of the judges were of opinion that, as D. acted in order to detect the other prisoner, he was free from any felonious intent, and therefore the charge against V., as accessory, of course could not be supported (*a*).

If an Act of Parliament enacts that an offence shall be felony, though it says nothing of accessories before or after, yet virtually and consequentially those who counsel or command the offence are accessories before the fact (*b*), and those who knowingly receive the offender are accessories after (*c*).

Statutes as to Accessories.—The Legislature, in statutes concerning accessories before the fact, has not confined itself to any certain mode of expression; but has rather chosen to make use of a variety of words all conveying the same general idea. In the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94) (*d*), which contains general provisions applicable to all felonies, whether at common law or under any statute, past or future, the words used to describe an accessory before the fact are, 'whosoever shall counsel, procure, or command any other person to commit any felony' (s. 2). The other Criminal Law Consolidation Acts of 1861, and most modern Acts, use the word accessories simply, without further words descriptive of the offence (*e*). Some early statutes have the words abetment, procurement, helping, maintaining, and counselling (*f*); or aiders, abettors, procurers, and counsellors (*g*). One describes the offence by the words command, counsel, or hire (*h*); another calls the offenders procurers or accessories (*i*). One having made use of the words comfort, aid, abet, assist, counsel, hire, or command, immediately afterwards, in describing the same offence in another case, uses the words counsel, hire, or command only (*j*). One statute calls them counsellors and contrivers of felonies (*k*); and many others make use of the terms counsellors, aiders, and abettors, or barely aiders and abettors. Upon these different modes of expression, all plainly descriptive of the same offence, Foster, J., thinks it may be safely concluded that in the construction of statutes we are not to be governed by the bare sound, but by the true legal import of the words; and that every person who comes within the description of these statutes, various as they are in point of expression, is in the judgment of the Legislature an accessory before the fact; unless he is present at the fact, and in that case he is a principal (*l*).

(*a*) R. *v.* Danelly & Vaughan, 2 Marsh, 571; R. & R. 310.

(*b*) 1 Hale, 613, 614, 704. 3 Co. Inst. 59.

(*c*) R. *v.* James, 24 Q.B.D. 439.

(*d*) *Post*, p. 130.

(*e*) The same will be found in some early statutes: 31 Eliz. c. 12, s. 5 (rep.); 21 Jac. I. c. 6 (rep.).

(*f*) 23 Hen. VIII. c. 1, s. 3 (rep.).

(*g*) 1 Ed. VI. c. 12, s. 13 (rep.).

(*h*) 4 & 5 Ph. & M. c. 4 (rep.).

(*i*) 39 Eliz. c. 9, s. 2 (rep.).

(*j*) 3 Will. & M. c. 9 (rep.).

(*k*) 1 Ann. st. 2, c. 9 (rep.).

(*l*) That is, a principal in the first degree if the actual perpetrator, or a principal in the second degree if only an aider and abettor, Fost. 131. And see Fost. 130, where, speaking of a case in 1 And. 195, in which an indictment was held to be sufficient, though the words of the statute of Ph. & M. were not pursued, the words *excitavit, movit, et procuravit*, being deemed tantamount to the words of the statute and descriptive of the same offence, he says that he takes that case to be good law, though he confesses it is the only precedent he has

It is an incontrovertible principle of law that he who procures the commission of a felony is a felon (*m*); and when he procures its commission by the intervention of a third person, who is not an innocent agent (*n*), he is an accessory before the fact; for there is nothing in the notion of commanding, hiring, counselling, aiding, or abetting, which may not be affected by the intervention of a third person without any direct immediate connection between the first mover and the actor. And a peer was found guilty of murder, upon evidence which shewed that he had contributed to the murder, by the intervention of his lady and of two other persons who were themselves no more than accessories, without any sort of proof that he had ever conversed with the person who was the only principal in the murder, or had corresponded with him directly by letter or message (*o*). For it is not necessary that there should be any direct communication between an accessory before the fact and the principal offender.

In all felonies there may be accessories before the fact except in those felonies which by judgment of law are sudden and unpremeditated.

Manslaughter.—Such are some cases of manslaughter and the like (*p*). But there are cases of manslaughter where there may be accessories before the fact. Upon an indictment for manslaughter it appeared that the death of the prisoner's wife was caused by swallowing sulphate of potash for the purpose of procuring abortion, she believing herself to be pregnant, although in reality she was not. The prisoner purchased the sulphate of potash, and gave it to his wife in order that she might swallow it for the above-mentioned purpose, but he was absent at the time when she swallowed it. For the prosecution, it was contended that the wife committed a felony in swallowing the sulphate of potash, and as death ensued therefrom, she also committed murder (*q*); that the prisoner was an accessory before the fact to this felony, and to the consequent murder, and might be tried under 11 & 12 Vict. c. 46, s. 1 (*r*), and that, although the evidence shewed his offence was murder, yet it would support an indictment for manslaughter. For the prisoner it was contended that there could not be an accessory before the fact in manslaughter; but it was held, upon the facts of this case, that the prisoner might be convicted of manslaughter (*s*).

met with where the words of the statute have been totally dropped.

(*m*) Fost. 125, and *vide ante*, p. 116.

(*n*) *Vide ante*, p. 104.

(*o*) The case of the Earl of Somerset, indicted as an accessory before the fact to the murder of Sir Thomas Overbury, 2 St. Tr. 951. Cf. R. *v.* Cooper, 5 C. & P. 535, Parke, J.

(*p*) Bibithe's case, 4 Co. Rep. 43. Goose's case, Moore (K.B.), 461: 72 E. R. 695. Cro. Eliz. 540. 4 Bl. Com. 36. 1 Hale, 615. 2 Hawk. c. 29, s. 24. There may be accessories after the fact in manslaughter, and if the principal is found guilty of manslaughter, upon an indictment for murder, a party charged as accessory after the fact to the murder, may be found guilty as accessory to the manslaughter. R. *v.* Greenacre, 8 C. & P. 35, Tindal, C.J., Coleridge and Coltman, JJ. Approved R. *v.* Richards, 2 Q.B.D. 311.

(*q*) R. *v.* Russell, 1 Mood. 356. See R. *v.* Fretwell, L. & C. 161, *ante*, p. 117.

(*r*) Repealed in 1861 (24 & 25 Vict. c. 95, s. 1), and replaced by 24 & 25 Vict. c. 94, s. 1, *post*, p. 130.

(*s*) R. *v.* Gaylor, D. & B. 288. During the argument, 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, another had counselled him to do it, would not he who counselled be an accessory before the fact?' See R. *v.* Smith, 2 Cox, 233, Parke, B. See the observations on this subject, Greaves' Crim. Cons. Acts, 43

Forgery.—In the older authorities it is laid down that all are principals in forgery, and that whatever would make a man accessory before the fact in felony would make him a principal in forgery (*t*); but this must be understood of forgery at common law, which is only a misdemeanor (*u*). And Bothe's case (*v*) decided upon 5 Eliz. c. 14, which would seem to lead to a contrary conclusion, seems from its circumstances merely an illustration of the general rule, that when a statute makes a new felony, it incidentally and necessarily draws after it all the concomitants of felony, namely, accessories before and after (*w*).

If several combine to forge an instrument, and each executes by himself a distinct part of the forgery, they are all principals, though they are not together when the instrument is completed. On an indictment for forgery against A., B., and C., it appeared that A. and B. bought the paper, and cut it into pieces of the proper size at their house; it was then taken to C., who struck off in blank all the printed part of the note except the date line and the number, and impressed on the paper the wavy horizontal lines. The blanks were then brought back to the house of A. and B., where the water-mark was introduced into the paper; after which A., in the presence of B., impressed the date line and number, and B. added the signature. It did not appear that C. was present at this time. The jury found that all three concurred and co-operated in the design and execution of the forgery, each taking his own part, and that A. and B. acted together in completing the notes. The judges were of opinion that, as each of the prisoners acted in completing some part of the forgery, and in pursuance of the common plan, each was a principal in the forgery; and that although C. was not present when the note was completed by the signature, he was equally guilty with the others (*x*).

So if several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others (*y*). On an indictment against D., K., and S., for forging a note, and against A. and C. as accessories before the fact, it appeared that S. made the paper, K. engraved the plate, and struck off the impression; and D. in the absence of S. and K., filled up and finished the note. S., when he made the paper, did not know that K. or D. were to have anything to do with the forgery; nor did K. know, when he engraved the plate and made the impression, that D. or S. were, or were to be, concerned. A. and C. were the movers, and through them all the parties were set to work. D. was not upon his trial, and A. and C. could not properly be tried, unless S. and K. were to be deemed principals. The judges held that K. and S. were principals, that the ignorance of S. and K. of those who were to effect the other parts of the forgery was immaterial; and that

(2nd ed.); and see R. *v.* Wilson, D. & B. 127; and R. *v.* Farrow, ibid. 164.

(*t*) Bothe's case, Moore (K.B.), 666: 72 E. R. 827. 1 Sid. 312. See also 2 Hawk. c. 29, s. 2, and authorities cited in 2 East, P.C. 973.

(*u*) 2 East, P.C. 973; and see R. *v.* Morris, 2 Leach, 1096, note (*a*).

(*v*) Goose's case, Moore (K.B.), 461.

(*w*) 2 East, P.C. 973, 974.

(*x*) R. *v.* Bingley, R. & R. 446.

(*y*) R. *v.* Kirkwood, 1 Mood. 304. R. *v.* Dade, ibid. 307. R. *v.* Bingley, R. & R. 446.

it was sufficient if they knew it was to be effected by somebody (*z*). There was another indictment against D. and K. for forgery. K. engraved the plate, and worked off the impression from it, and D., in his absence, filled up the notes; D. was not on his trial. It was held that K. was a principal (*a*).

It follows, from the two last cases, that those who procure and cause an instrument to be forged, but execute no part of the forgery, and are not present when it is executed, are accessories before the fact, and not principals.

Three prisoners, S., A., and B., were charged by the indictment with feloniously uttering a forged bank note for £5 knowing it to be forged, &c., with intent to defraud the Bank of England. The indictment also contained the other usual counts, for forging, and for disposing of and putting away the note with the like intent; together with counts stating the intent to be, to defraud the person to whom it was offered in payment. The prisoner B. offered the note in question in payment for a pair of gaiters at a shop in G., and the other two prisoners, S. and A., were not with B. at the time he so offered the note, but were waiting at P. till he should return to them, it having been previously concerted between the three prisoners that B. should go over the water from P. to G., for the purpose of passing the note, and when he had passed it, should return to join the other two prisoners at P.; they all three knowing that it was a forged note, and having been concerned together in putting off another note of the same sort, and in sharing the produce among them. The counsel for the prisoners S. and A. objected, that they were not guilty of the charge made against them in this indictment, not having been present at the time the other prisoner uttered the note, nor so near as to be able to aid and assist him; and that they could be charged only as accessories before the fact. The jury found that the forged note was uttered by the prisoner B., in concert with the other two prisoners, and found them all three guilty. The prisoner B. was left for execution: but as to the other two, on a case reserved, the judges had no doubt that they were entitled to an acquittal on this indictment charging them as principals, they not being present at the time of the uttering, or so near as to be able to afford any assistance to the accomplice who actually uttered the note (*b*).

But where three persons were jointly indicted under 1 Will. IV. c. 66, s. 19 (rep.), for feloniously using plates containing impressions of forged foreign notes, it was held that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using or assisted in one such act, as by two using, and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to shew that the parties were general dealers in forged notes, and that at different times they had singly used

(*z*) R. *v.* Kirkwood, 3 Burn's J. (D. & W. ed.), 286: MSS. Bayley, B. R. *v.* Dade, 1 Mood. 307.

(*a*) R. *v.* Kirkwood, 3 Burn's J. (D. & W. ed.), 286: MSS. Bayley, B. 1 Mood. 304.

(*b*) R. *v.* Soares, MS. and 2 East, P.C. 974. R. & R. 25. Cf. R. *v.* Badcock, R. & R. 249, and R. *v.* Stewart, R. & R. 363.

the plates, and were individually in possession of forged notes taken from them (*c*).

And where three prisoners were indicted under the same section, for feloniously engraving a promissory note of the Emperor of Russia, and it appeared that the plates were engraved by an Englishman, who was an innocent agent, and two of the prisoners only were present at the time when the order was given for engraving the plates, but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction; it was held, that in order to find all three guilty, the jury must be satisfied that they *jointly* employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and all three concurred in the employment of the engraver (*d*).

In R. *v.* Morris (*e*) a wife was indicted as a principal in a forgery on 49 Geo. III. c. 123, s. 13 (rep.), and her husband as an accessory before the fact at common law. The indictment charged S. M. with forging an order and certificate for receiving prize money, which had become due to one H. T., a petty officer in the naval service, with intent to defraud, &c.; and J. M., with inciting, counselling, aiding, procuring, &c., the said S. M. to commit the said felony. The second count charged S. M. with having uttered the order and the certificate by the incitement of J. M. And there were many other counts in which the offence was charged, with some variations. The prisoner, S. M., who was the wife of the other prisoner, J. M., and real or pretended daughter of H. T. (a petty officer on a King's ship), applied to a clerk in the cheque office for the payment of prize money then due to H. T.; and produced at the same time the order stated in the indictment. She went away, leaving the order with the clerk, but in about four or five days came again, when the order was given back to her with a request that she would not apply again until she was duly informed that the money had been remitted to the office. Almost immediately after this second visit, the other prisoner, J. M., wrote a letter to the Clerk of the Cheque on the subject. On December 8, notice was given to S. M. that the prize money was come in, and that she might receive the share of it to which H. T. was entitled; upon which she went to the office with the same order and certificate, which she produced; and had nearly obtained the warrant for the payment of the money, when circumstances occurred which caused suspicion, and she and her husband were shortly afterwards apprehended. H. T., whose name purported to be signed to the order, could not write, and was obliged always to make a mark whenever his signature was required; and the name of the officer, by whom the certificate purported to be subscribed, was not in his handwriting. The landlord of the house in which the prisoners lodged, stated that the prisoner, J. M., had, in two or three instances, ordered his wife, S. M., to go to Greenwich Hospital respecting about £30 of prize money due to H. T., his wife's father. He

(*c*) R. *v.* Harris, 7 C. & P. 416, Littledale and Gaselee, JJ.

(*d*) R. *v.* Mazeau, 9 C. & P. 676, Patteson, J.

(*e*) 2 Leach, 1096.

also testified that he really believed that S. M. went to receive it in obedience to her husband's orders. And it was proved that the prisoner, J. M., had signed a paper, stating that his wife had acted in this business entirely under his orders and directions. It was also proved by a witness that the prisoner, J. M., represented to him that there was about £30 prize money due to his father-in-law, H. T., and that he would be obliged to him if he would fill up the blanks in certain papers which he produced; that the witness accordingly filled up the blanks, excepting the signatures; and that, on observing there was a spare half-sheet to the papers he so filled up, he advised the prisoner, J. M., to send it by the post to his father-in-law; but that he replied that his wife would get it done. This witness further stated, that he afterwards met the prisoner, J. M., who then told him that he had got the papers regularly signed by H. T. and the captain; and that he was going to send his wife for the money. It was submitted that as S. M., in the part she took in this transaction, had clearly acted under the directions and coercion of her husband, she could not be found guilty (*f*); and that if she was innocent as a principal, the other prisoner could not be guilty as an accessory. And the jury having found both the prisoners guilty, on a case reserved, the twelve judges were unanimously of opinion that the prisoner, S. M., was guilty of uttering the forged instrument, knowing it to be forged; and that the prisoner, J. M., was guilty of the offence of an accessory before the fact at common law.

Liability of Accessory where Principal does not follow the Preconcerted Plan.—There has been much discussion as to the liability of an accessory when the principal does not act in conformity with the plans and instructions of the accessory. *If the principal totally and substantially varies* from the terms of the instigation, if being solicited to commit a felony of one kind, he wilfully and knowingly commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt (*g*). Thus if A. commands B. to burn C.'s house, and he in so doing commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and inconsequential nature (*h*). And if A. counsels B. to steal goods of C. on the road, and B. breaks into C.'s house and steals them there, A. is not accessory to the breaking the house, because that is a felony of another kind (*i*). He is, however, accessory to the stealing (*j*). But if *the principal complies in substance* with the instigation of the accessory, varying only in circumstances of time or place, or in the manner of execution, the accessory will be involved in his guilt: as if A. commands B. to murder C. by poison, and B. does it by a sword or other weapon or by any other means, A. is accessory to this murder; for the murder of C. was the object principally in contemplation, and that is effected (*k*). And if A. counsels B. to steal goods in C.'s house, but not to break into it, and B. does break into it, A. is accessory to the breaking (*l*). And where *the principal goes beyond* the terms of the solicitation, yet if, in the event,

(*f*) As to coercion, *vide ante*, p. 93 *et seq.*
(*g*) Fost. 369. 1 Hale, 436.
(*h*) 1 Hale, 617. 4 Bl. Com. 37.
(*i*) Plowd. 475.
(*j*) 1 Hale, 617.
(*k*) Fost. 369, 370. 2 Hawk. c. 29, s. 20. 4 Bl. Com. 37.
(*l*) Bac. Max. Reg. 16.

the felony committed was a *probable consequence* of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. Thus if A. advises B. to rob C., and in robbing him B. kills him, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery, in such a case A. is accessory to the murder as well as to the robbery (*m*). And if A. solicits B. to burn the house of C., and B. does it accordingly; and the flames taking hold of the house of D., that likewise is burnt: A. is accessory to B. in the burning of the houses both of C. and of D. The advice, solicitation, or orders of A. were pursued in substance; and the events, though possibly falling out beyond his original intention, were, in the ordinary course of things, the probable consequences of what B. did under the influence and at the instigation of A. (*n*).

Where A. counselled a pregnant woman to murder her child when it should be born, and she murdered it accordingly, A. was held to be accessory to the murder; the procurement before the birth being considered as a felony continued after the birth, and until the murder was perpetrated by reason of that procurement (*o*).

Commission of a Crime other than that commanded.—If A. commands B. to beat C., and B. beats him so that he dies, A. being absent, B. is guilty of murder as principal, and A. as accessory; the crime having been committed in the execution of a command which naturally tended to endanger the life of another (*p*). It is also said, that if one commands a man to rob another, and he kills him in the attempt but does not rob him, the person giving such command is guilty of the murder, because it was the direct and immediate effect of an act done in execution of a command to commit a felony (*q*).

Where an indictment charged certain persons with the murder of B. at Paris, and the prisoner as accessory before the fact, and it appeared that two grenades were first thrown and exploded, and a third about a minute afterwards, and that B. was one of the Gardes de Paris on duty at the time, and that he died of wounds caused by the explosion; Lord Campbell, C.J., told the grand jury, 'as to the objection that the prisoner could have had no intention that those who were killed by the explosion of the grenades should be put to death, it may be observed that such a question can only arise where the principal does not act in strict conformity with the plans and instructions of the accessory. But here, if the prisoner was privy to the plot, the other persons in throwing the grenades as they did must be considered as having acted strictly in conformity with his plans and instructions, and he is answerable as accessory for the consequences. It is even laid down that where the principal goes beyond the terms of the solicitation, yet, if in the event the felony committed was a probable consequence of what was ordered or devised, the person giving such orders or advice will be an accessory to that felony. . . . The true test is, " was the event alleged to be the crime to which the accused

(*m*) Fost. 370.
(*n*) Ibid.
(*o*) R. *v.* Parker, Dy. 186a., pl. 2. 1 Hale, 617. 2 Hawk. c. 29, s. 18. 4 Bl. Com. 37.
(*p*) 1 Hale, 435. 2 Hawk. c. 29, s. 18. 4 Bl. Com. 37.
(*q*) 2 Hawk. c. 29, s. 18.

is charged to be accessory, a probable consequence of the act he committed ? ' ' (*r*).

More difficult questions arise where the principal *by mistake commits a different crime* from that to which he was solicited by the accessory. It has been said, that if A. orders B. to kill C., and he by mistake kills D., or aiming a blow at C. misses him and kills D., A. will not be accessory to this murder, because it differs in the person (*s*). And in support of this position *Saunders'* case (*t*) is cited ; who, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it her to eat ; and the wife, having eaten a small part of it, and having given the remainder to their child, Saunders (making only a faint attempt to save the child whom he loved, and would not have destroyed) stood by and saw it eat the poison, of which it soon afterwards died. And it was held, that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to that murder. But Foster, J., thinks that this case of Saunders does not support the position (which he calls a merciful opinion) to its full extent ; and he proposes the following case as worthy of consideration : ' B. is an utter stranger to the person of C. ; A. therefore takes upon him to describe him by his stature, dress, age, complexion, &c., and acquaints B. when and where he may probably be met with. B. is punctual at the time and place ; and D., a person possibly in the opinion of B. answering the description, unhappily comes by and is murdered, upon a strong belief on the part of B. that this is the man marked out for destruction. Here is a lamentable mistake,—but who is answerable for it ? B. undoubtedly is ; the malice on his part *egreditur personam*. And may not the same be said on the part of A. ? The pit which he, with a murderous intention, dug for C., D. *through his guilt* fell into and perished. For B., not knowing the person of C., had no other guide to lead him to his prey than the description A. gave of him. B. in following this guide fell into a mistake, which it is great odds any man in his circumstances might have fallen into. I therefore, as at present advised, conceive that A. was answerable for the consequence of the flagitious orders he gave, since that consequence appears, in the ordinary course of things, to have been highly probable ' (*u*).

Foster, J., then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to turn : ' Did the principal commit the felony he stands charged with under the influence of the flagitious advice ; and was the event, in the ordinary course of things, a probable consequence of that felony ? or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind, or upon a different subject ? ' (*v*).

Countermanding.—If A. commands B. to kill C., but before the execution thereof repents and countermands B., yet B. proceeds in the execution thereof ; A. is not accessory, for his consent continues not, and he gave

(*r*) R. *v.* Bernard, 1 F. & F. 240 : 8 St. Tr. (N. S.) 887, 895.
(*s*) 1 Hale, 617. 3 Co. Inst. 51.
(*t*) Plowd. 475. 1 Hale, 431.
(*u*) Fost. 370, 371.
(*v*) Fost. 372.

timely countermand to B. But even though A. had repented, yet if B. had not been actually countermanded before the fact committed, A. would be an accessory before the fact (*w*).

(iv.) *Accessories After the Fact.*

An accessory after the fact is a person who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon (*x*), *e.g.*, in the case of murder by assisting the murderer to conceal the death or to evade the pursuit of justice (*y*). Any assistance given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, seems to be a sufficient receipt to make a man an accessory after the fact: as where one assists a felon with a horse to ride away, or with money or victuals to support him in his escape, or where one harbours and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbours in his house and openly protects such a felon, by reason whereof the pursuers dare not take him (*z*). If A. has his goods stolen by B., and B. comes to C. and delivers him the goods to keep for him, C. knowing that they were stolen, and that B. stole them, or if C. receives the goods to facilitate the escape of B., or if C. knowingly receives them upon agreement to furnish B. with supplies out of them, and accordingly supplies him, this makes C. an accessory. But the bare receiving of stolen goods, knowing them to be stolen, makes not an accessory; for he may receive them to keep for the true owner, or till they are recovered or restored by law (*a*).

Where, after setting out the conviction of a principal for robbery of a £100 note, an indictment alleged that the prisoner did receive, harbour, maintain, relieve, aid, comfort, and assist the principal, knowing him to have committed the robbery, and it appeared that shortly after the robbery the prisoner applied to his landlady to change the note, but did not succeed, and that the principal went to a shop to purchase some articles, for the payment of which he tendered the note, and received a large part of it in change, and that during the time he was in the shop the prisoner was waiting outside; Maule, J., held that there was evidence of comforting and assisting. If a man stole a horse, and another assisted him in colouring and disguising him, so that he could not be known again, that would make him an accessory. Here the prisoner assisted the party who had stolen the note to get rid of it, and thus evade the justice of the country (*b*).

Where a boy robbed the bank in which he was clerk, and the same evening went to the room of the prisoner, a man, where he stayed twenty

(*w*) 1 Hale, 617.

(*x*) 1 Hale, 618. 4 Bl. Com. 37.

(*y*) R. *v.* Greenacre, 8 C. & P. 35, Tindal, C.J., Coleridge and Coltman, JJ. 'It is said that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make such person accessory to the homicide; for till death ensues there is no homicide committed. 4 Bl. Com. 38. 2 Hawk. c. 29, s. 35. But it would seem that he is accessory to the maliciously wounding.' C. S. G.

(*z*) 2 Hawk. c. 29, s. 26. 1 Hale, 618, 619. 4 Bl. Com. 38.

(*a*) 1 Hale, 619.

(*b*) R. *v.* Butterfield, 1 Cox, 39.

minutes, and both of them proceeded together that evening, by coach, to Bristol, and thence to Liverpool, where they were apprehended before they set sail for America, whither the prisoner had said they were going: it was held that this was evidence to go to the jury, upon an indictment charging the prisoner with harbouring, receiving, and maintaining the boy, although the places in the coaches were paid for by the boy (*c*). So a man who employs another person to harbour the principal may be convicted as an accessory after the fact, although he himself did no act of relieving or assisting the principal (*d*).

Whoever rescues a felon from an arrest for the felony, or voluntarily and intentionally suffers him to escape, is an accessory after the fact to the felony (*e*): and it has been said, that those are in like manner guilty who oppose the apprehending of a felon (*f*). A man may be an accessory after the fact by receiving one who was an accessory before, as well as by receiving a principal (*g*). And a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting in his escape (*h*).

In order to support a charge of receiving, harbouring, comforting, assisting, and maintaining a felon, there must be some act proved to have been done to assist the felon personally; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen (*i*).

An indictment alleged that M. sent letters demanding money with menaces, and that the prisoner did 'feloniously receive, harbour, maintain, and assist' the said M., knowing her to have committed the said felony. The letters contained threats of exposing the immorality of the prosecutor, and one of them threatened to insert a paragraph in the 'Satirist'; and immediately afterwards articles reflecting on the prosecutor appeared in that paper, of which the prisoner was the proprietor, and on being cautioned as to the course he was pursuing, the prisoner said he could not stop the publication of such articles in future, and referred to M., and gave her address, and on being told that the prosecutor would submit to a little extortion rather than have his character assailed, the prisoner consented to wait a week that the prosecutor might be spoken to on the subject. Notices, however, that further articles of the same nature would be published continued to appear in the 'Satirist.' It was contended that there was no evidence to prove that the prisoner was an accessory; it was answered that any assistance given to the principal to enable her to carry out the object with which the felony was committed was sufficient. Erle, J., said: 'I do not agree to that proposition; the assistance must tend to prevent the principal felon from being brought to justice. The question is, did he, after the felony was complete, assist the felon to elude justice? It is no part of this felony that

(*c*) R. *v.* Lee, 6 C. & P. 536, Williams, J.

(*d*) R. *v.* Jarvis, 2 M. & Rob. 40, Gurney, B.

(*e*) 2 Hawk. c. 29, s. 27. 1 Hale, 619; but not the merely suffering him to escape, where it is a bare omission. 1 Hale, 619. 2 Hawk. c. 29, s. 29.

(*f*) 2 Hawk. c. 29, s. 27.

(*g*) 2 Hawk. c. 29, s. 1.

(*h*) Fost. 123. Cromp. Just. 41b, pl. 4 and 5.

(*i*) R. *v.* Chapple, 9 C. & P. 355. Law, Recorder, after consulting Littledale, J., and Alderson, B.

the money should be paid: the crime is complete as soon as the demand is made. Can it be said, then, that by assisting in a fresh attempt to obtain money, he aided her in concealing or even carrying out the one completed?' (*j*).

Where a statute makes an offence felony, without mentioning accessories, yet those who knowingly receive the offender are accessories *after* the fact (*k*). It has, however, been said, that if the statute creating the felony, in express terms, comprehends accessories *before*, but does not mention accessories *after*, there can be no accessories *after* (*l*). But by others it is considered to be settled law, that in all cases where a statute makes any offence treason, or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there is an express provision to the contrary (*m*). Hale says that (*n*) 'although generally an Act of Parliament creating a felony consequentially brings accessories *before* and *after* within the same penalty, yet the special penning of the Act in such cases sometimes varies the case.' Thus, 3 Hen. VII. c. 2 (rep.), against abduction of women, made the taking away, the procuring and abetting, and also the wittingly receiving, all equally felonies.

It is necessary for a receiver to have had notice, either express or implied, of the felony having been committed, in order to make him an accessory by receiving the felon (*o*); and the felony must be complete at the time of the assistance given to make the assistant an accessory. So that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent; this does not make him accessory to the homicide, for till death ensues that felony is not committed (*p*).

A married woman does not become an accessory after the fact to a felony committed by her husband by receiving him, nor does she become a principal in receiving her husband when his offence is treason, the law considering that she is bound to receive him and not to discover him (*q*). Nor is she liable, criminally, for receiving jointly with her husband any offender (*r*).

Prosecutions against accessories after the fact grounded on the common law are seldom instituted; nor do they ever appear to have had any great effect (*s*).

(*j*) R. *v.* Hansill, 3 Cox, 597. He left the case to the jury, intending to reserve the point, but the prisoner was acquitted.

(*k*) 1 Hale, 613. *Ante*, p. 118.

(*l*) 1 Hale, 614.

(*m*) 2 Hawk. c. 29, s. 14.

(*n*) 1 Hist. P.C., 614, unless he means the same penalty as is incurred by such accessories to a common law felony his statement is inaccurate.

(*o*) 2 Hawk. c. 29, s. 32.

(*p*) 2 Hawk. c. 29, s. 35. 4 Bl. Com. 38. 'I apprehend it would make him accessory to the felony of maliciously wounding.' C. S. G. *Vide ante*, p. 126, note (*y*).

(*q*) 1 Hawk. c. 1, s. 10. 2 Hawk. c. 29, s. 34. 1 Hale, 47, 621. R. *v.* Good, 1 C. & K. 185, and *vide ante*, p. 91. This applies to no other relation besides that of a wife to her husband; and the husband may be an accessory for the receipt of his wife. 1 Hale, 621.

(*r*) 1 Hale, 48, 621. But if the wife alone, the husband being ignorant, do knowingly receive B., a felon, the wife is accessory and not the husband. 1 Hale, 621.

(*s*) Fost. 372.

Sect. III.—Misprision of Felony.

Misprision of felony closely resembles the offence of being accessory after the fact to felony. It consists in concealing or procuring the concealment of a felony known to have been committed (*t*), whether it be felony by the common law or by statute (*u*). The offence differs from the offence of the accessory in that it is not necessary to prove either privity in the commission of the principal offence, or any active assistance of the felon to escape from justice: but it is sufficient to shew mere silent observation of the commission of a felony without using any endeavour to bring the offender to justice (*v*), or to inform the officers of the law of the commission of the felony, or that the accused has silently observed the commission of a felony without any endeavour to apprehend the offender (*w*). Under sect. 8 (1) of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), 'Every person in a county shall be ready and apparelled at the command of the Sheriff, and at the cry of the county, to arrest a felon, whether within franchise or without, and in default shall, on conviction, be liable to a fine' (*x*). And it is said that it is the duty of a man to discover the felony of another to a magistrate (*y*), and that the law does not allow private persons the right to forgo a prosecution (*z*). There must be mere knowledge without assent, for any assent or participation will make the man a principal or an accessory (*a*). Concealment of treasure trove is described as a form of misprision of felony (*b*). Misprision of felony is a misdemeanor at common law, punishable by imprisonment without hard labour (*c*). Misprision of felony is also distinct from theft-bote (*cc*) and from compounding a felony (*d*).

In 1275, the punishment of this offence in an officer was fixed by the First Statute of Westminster (3 Edw. I. c. 9), which enacted (as amended), that 'if any bailiff within a franchise, or without, for reward, or for prayer, or for fear, or for any manner of affinity, conceal, consent, or procure to conceal, the felonies done in their liberties; or otherwise will not attach nor arrest such felons there (as they may), or otherwise will not do their office, for favour borne to such misdoers, and be attainted thereof, they shall have one year's imprisonment, and after make a grievous fine at the King's pleasure, if they have wherewith; and if they have not whereof, they shall have imprisonment of three years.' This enactment has been repealed and superseded by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), which enacts, sect. 29 (1), that 'if a person, being a

(*t*) 1 Hawk. cc. 20, 59. 3 Co. Inst. 139. 1 Chit. Cr. L. 3. See Steph. Dig. Cr. L. (6th ed.), p. 401. For a precedent of indictment, see 2 Chit. Cr. L. 232.

(*u*) 1 Hawk. c. 59, s. 2.

(*v*) 1 Hale, 374, 375. 1 Hawk. c. 59, s. 2, n. (1).

(*w*) 1 Hale, 371–375. 3 Co. Inst. 140. 1 Hawk. c. 59, s. 6. See R. *v.* Sherlock, L. R. 1 C. C. R. 20: 35 L. J. M. C. 92.

(*x*) The section also provides further penalties if the offender is bailiff of a franchise.

(*y*) 3 Inst. 140.

(*z*) R. *v.* Daly, 9 C. & P. 342, Gurney, B.; *sed quære*, Is not the duty merely to inform of the crime?

(*a*) 4 Bl. Com. 121. But see 1 Hale, 616.

(*b*) 4 Bl. Com. 121. 3 Co. Inst. 133. See R. *v.* Thomas, L. & C. 313. R. *v.* Toole, Ir. Rep. 2 Ch. 36.

(*c*) *Vide post*, p. 249.

(*cc*) 3 Co. Inst. 134. R. *v.* Burgess, 16 Q.B.D. 141, *post*, p. 579.

(*d*) *Post*, p. 579.

sheriff, under-sheriff, bailiff, or officer of a sheriff, whether within a franchise or without, does any of the following things, that is to say—

(*a*) Conceals or procures the concealment of any felon, or

(*b*) Refuses to arrest any felon within his bailiwick : . . .

he shall (without prejudice to any other punishment under the provisions of this Act) be guilty of a misdemeanor, and be liable, on conviction, to imprisonment for a term not exceeding one year, and to pay a fine, or if he has not wherewith to pay a fine, to imprisonment for a term not exceeding three years.' The punishment in the case of other persons is imprisonment (without hard labour) for a discretionary time, or fine, or both (*e*).

Sect. IV.—Trial and Punishment of Accessories to Felony.

The procedure for the trial and punishment of accessories now rests almost entirely on statute (*f*).

The Accessories and Abettors Act, 1861, which came into operation on August 6, 1861, after reciting that it is expedient to consolidate and amend the statute law of England and Ireland relating to accessories to and abettors of indictable offences, enacts as follows :—

As to Accessories Before the Fact.—Sect. 1. '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' (*g*).

Sect. 2. 'Whosoever shall counsel, procure, or command any other person to commit any felony (*h*), 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

(*e*) The old authorities speak of fine or ransom at the King's pleasure. 4 Bl. Com. 121, where it is said, 'which pleasure of the King must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; *voluntas Regis in curia, non in camera.*'

(*f*) It is an old maxim that *accessorius sequitur naturam sui principalis* (3 Co. Inst. 139 : 4 Bl. Com. 36), and that an accessory cannot be guilty of a higher crime than his principal.

(*g*) Taken from 11 & 12 Vict. 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. A. and B. were jointly indicted for stealing certain cotton. A. was acquitted and called as a witness against B.; and it clearly appeared that A. had stolen the cotton at the instigation of B., and in his absence. It was contended, that as A. had been acquitted, B. 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, 242. 11 & 12 Vict. c. 46, s. 1, was held to apply to murder (Staffordshire Summer Assizes, 1850, Williams, J., MSS. C. S. G., which has always been held a form of felony). Anon. Keilw. 91b. 2 Hale, 45. 3 Co. Inst. 236. Greaves' Crim. Law Cons. Acts (2nd ed.), 20.

(*h*) Incitement to commit an offence which is not in fact committed is not within ss. 1, 2, but is a misdemeanor only. R. *v.* Gregory, L. R. 1 C. C. R. 77 : 36 L. J. M. C. 60, *post*, p. 203.

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' (*i*).

Accessories After the Fact.—Sect. 3. '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' (*j*).

Sect. 4. 'Every accessory after the fact to any felony (except where it is otherwise specially enacted) (*k*), whether the same be a felony at common law or by virtue of any Act *passed or to be passed*, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour; and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to such punishment: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.'

As to Accessories Generally.—Sect. 5. '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 (*l*), 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 (*m*).

Sect. 6. 'Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, *and may be tried together*, notwithstanding the principal felon

(*i*) Taken from 7 Geo. IV. c. 64, s. 9 (E), and 9 Geo. IV. c. 54, s. 1 (I). At common law the accessory might be tried with the principal offender, but could not without his consent be separately tried till the principal offender had been convicted or outlawed. 2 Hawk. c. 29, s. 45.

(*j*) Taken from 11 & 12 Vict. c. 46, s. 2. At common law the accessory could not, except by his own consent, be tried until the guilt of the principal offender had been ascertained by conviction or outlawry, unless they were tried together. 2 Hawk. c. 29, s. 45. Fost. 360. 1 Hale, 623. A person indicted as a principal cannot be convicted as an accessory after the fact. R. *v.* Fallon, L. & C. 217 (indictment for stealing from the person). Richards *v.* R., 66 L. J. Q.B. 459.

(*k*) *e.g.*, in the case of receivers of stolen goods, 24 & 25 Vict. c. 96, s. 91, *post*, p. 1465. S. 4 is general, and may be held to overlap the similar provisions of the Criminal Law Consolidation Acts of 1861, *post*, p. 133.

(*l*) There is now no attainder on conviction of treason or felony. 33 & 34 Vict. c. 23, s. 1, *post*, p. 250.

(*m*) Taken from 7 Geo. IV. c. 64, s. 11 (E) and 9 Geo. IV. c. 54, s. 25 (I). At common law an accessory could not be tried unless the principal offender had been attainted, so that if he stood mute of malice or challenged peremptorily above the legal number of jurors, or refused directly to answer to the charge, the accessory could not be tried. Fost. 362. 1 Hale, 625. 1 St. Tr. 314.

shall not be included in the same indictment, or shall not be in custody or amenable to justice' (*n*).

Sect. 7. 'Where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act by reason whereof such person shall have become such accessory shall have been committed; and in every other case the offence of any person who shall be 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 shall have jurisdiction to try the principal felony *or any felonies committed in any county or place in which such person shall be apprehended or be in custody*, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within His Majesty's dominions or without, or partly within His Majesty's dominions and partly without; provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence' (*o*).

This section, like 7 Geo. IV. c. 64, s. 9, from which it was framed, appears to extend only to accessories who at common law could be tried with or after the principal, and not to make persons triable who could not be tried at common law as accessories (*p*).

By the earlier part of sect. 7, where the principal felony is wholly committed in England or Ireland, the accessory may be tried either in the county where the principal felony may be tried, or in the county where the act by which he became an accessory was done. But where the principal felony is not committed wholly in England or Ireland, the accessory may be tried by any court which has jurisdiction to try the principal, or in any county in which the accessory may be apprehended or be in custody. The object of this latter provision is to meet cases

(*n*) Framed from 14 & 15 Vict. c. 100, s. 15, with the addition of the words in italics. 'The Committee of the Commons who sat on 14 & 15 Vict. 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 s. 15; 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.

'The marginal note to the section "several accessories, &c.," was erroneously altered after the Bill went to the House of Lords. It began "separate accessories," because the clause applies only to accessories at different times. "Several" persons may become accessories at one and the same time and place.' C. S. G.

(*o*) Taken from 7 Geo. IV. c. 64, ss. 9, 10 (E); 9 Geo. IV. c. 54, ss. 23, 24 (I); and 11 & 12 Vict. c. 46, s. 2. Under those enactments accessories might be tried by any Court which had jurisdiction to try the principal, whether the principal felony had been committed on the sea or on land, and whether within the Queen's dominions or without, and where the principal felony was committed in one county, and the act by which the person became an accessory was done in another county, the accessory might be tried in either.

(*p*) R. *v.* Russell, 1 Mood. 356, where it was held that R. could not be tried under 7 Geo. IV. c. 64, s. 9, as accessory before the fact to *felo de se*. Cf. R. *v.* Leddington, 9 C. & P. 79, Alderson, B.

where the principal felony may have been committed, either on land or sea, out of England and Ireland. In such cases no court had jurisdiction to try the principal until he was apprehended in England or Ireland, and consequently where the principal in such cases had not been apprehended, the accessory would not have been triable at all under the former enactments. The words in italics cure this defect of the law.

As to Other Matters.—24 & 25 Vict. c. 94, s. 9. 'Where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act *passed or to be passed*, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be a felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed "on the high seas"; provided that nothing herein contained shall alter or affect any of the laws relating to the government of His Majesty's land or naval forces' (*q*).

Each of the Criminal Law Consolidation Acts of 1861 contains a section in substantially identical terms providing that 'in the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act [except murder] (*r*) shall be liable to be imprisoned for any term not exceeding two years with or without hard labour; and every accessory after the fact to murder shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour . . .' (*s*). These enactments were passed, and came into effect on the same day as the Accessories, &c., Act, 1861 (*supra*).

Similar provisions are made by the Piracy Act, 1837 (7 Will. IV. & 1 Vict. c. 88), s. 4 and the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), s. 7.

Whenever it is doubtful whether a person is a principal or an accessory before the fact, an indictment under sect. 1 (*ante*, p. 130), will be sufficient, whether it turns 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. But cases of accessories *after* the fact must be indicted as such, and not as principals.

(*q*) The object of the earlier part of this section is to remove a doubt, perhaps unfounded, whether a person who became an accessory on the sea in the cases mentioned in it, was a felon. 7 Geo. IV. c. 64, s. 9, contained a similar enactment. The latter part of the section is framed from 7 & 8 Vict. c. 2. By sect. 10, 'nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.'

(*r*) These words are only in 24 & 25 Vict. c. 100, s. 67. 24 & 25 Vict. c. 96, s. 98, excepts receivers of stolen property.

(*s*) 24 & 25 Vict. c. 96, s. 98 (larceny); c. 97, s. 56 (malicious damage); c. 98, s. 49 (forgery); c. 99, s. 35 (coinage offences); c. 100, s. 67 (offences against the person). For the rest of the sections, which deal with misdemeanors, see *post*, p. 139.

Where the offence of the principal is local, *e.g.*, a burglary committed in county A., if it is proposed to try the accessory in county B., it will be prudent to include a count under sect. 2 (*ante*, p. 130), since sect. 1 only allows the accessory to be tried under it as a principal felon, *i.e.*, in county A. (*t*): although sect. 7 may be read as authorising indictment and trial in county B., where the evidence shews that the accused became accessory before the fact in that county.

Where an indictment stated that L. cast away a vessel, and that the prisoner incited him to commit the said felony, it was objected that the indictment was not properly framed as for a substantive offence, under 7 Geo. IV. c. 64, s. 9 (rep.), but was in the form of an indictment at common law against principal and accessory, and as the principal had not been convicted, and was not on his trial, the accessory could not be tried. But it was held that the description of the offence was not altered by the statute. It might have been put in a different shape, but every allegation in this indictment would have been included in any other (*u*). So where M. was indicted for sending letters demanding money with menaces, and H. with receiving, harbouring, &c., M., knowing her to have committed the said felony, Erle, J., held that H. might be tried before M. on this indictment under 11 & 12 Vict. c. 46, s. 2 (*v*), as that clause was only intended to alter the course of trial, and not the mode of describing the offence (*w*). In one case an indictment alleging that a certain evil-disposed person feloniously stole, and that before the said felony was done the prisoner did feloniously incite the said evil-disposed person to commit the said felony, was held bad as being too uncertain (*x*).

Where the proceedings are against the accessory alone for receiving stolen goods, the name of the principal need not be stated (*y*). Where the proceedings are against both principal and accessory, the indictment may contain counts for a substantive felony, *e.g.*, receiving stolen goods, without naming the principal, and upon such an indictment the receiver may be convicted, although the person indicted as principal is acquitted (*z*).

A man cannot be convicted as accessory *after* the fact to murder on an indictment for the principal offence (*a*). But a count charging a person with being accessory *before* the fact may be joined with a count charging the same person with being accessory *after* the fact to the same felony, and the prosecutor cannot be compelled to elect upon which he will proceed, and the party may be found guilty upon both (*b*). In one case

(*t*) It might, however, be held that s. 1 in effect makes every indictment charging a person as principal in felony, charge him also as accessory before the fact. In the 6th edition of this work there is a discussion as to challenging the indictment by writ of error (now abolished) or motion in arrest of judgment. It would seem that technical objections of this kind would be disregarded under the Criminal Appeal Act, 1907, *post*, Bk. xii. c. 4.

(*u*) R. *v.* Wallace, 2 Mood. 200, C. & M. 200. But see R. *v.* Ashmall, 9 C. & P. 237.

(*v*) Repealed in 1861 (24 & 25 Vict. c. 95), but re-enacted as 24 & 25 Vict. c. 94, s. 3, *ante*, p. 131.

(*w*) R. *v.* Hansill, 3 Cox, 597.

(*x*) R. *v.* Caspar, 2 Mood. 101.

(*y*) R. *v.* Jervis, 6 C. & P. 156, Tindal, C.J. R. *v.* Wheeler, 7 C. & P. 170, Coleridge, J. R. *v.* Caspar, 2 Mood. 101.

(*z*) R. *v.* Pulham, 9 C. & P. 280, Gurney, B. R. *v.* Austin, 7 C. & P. 796, Parke and Bolland, Bs.

(*a*) R. *v.* Fallon, L. & C. 217. Richards *v.* R., 66 L. J. Q.B. 459. R. *v.* Bubb, 70 J.P. 143 (C. C. R.).

(*b*) R. *v.* Blackson, 8 C. & P. 43, Parke, B., and Patteson, J. R. *v.* Tuffin, Surrey Assizes, July, 1903, Darling, J. Arch. Cr. Pl. (23rd ed.) 89, 1307; 19 T. L. R. 640.

a party was indicted and tried both for receiving stolen goods, and for receiving, harbouring and comforting, the felon, and was convicted (*c*).

A count charged a prisoner with stealing certain cotton, and another count charged him with receiving the property aforesaid, and it was proved that the prisoner had solicited a servant to rob his master; which he did, and took the cotton to the prisoner, in whose possession it was afterwards found, and he stated that he had got it from the servant, and the jury found a general verdict of guilty; on a case reserved, it was held, that the jury might upon this evidence reasonably convict the prisoner as an accessory before the fact upon the count for stealing, under 11 & 12 Vict. c. 46, s. 1 (*d*), and that there was no inconsistency in finding that he was guilty of being an accessory before the fact, and that he received the goods knowing them to have been stolen (*e*). But where one count charged the prisoner with stealing sheep, and another with receiving the said sheep knowing them to have been stolen, and the jury found a verdict of guilty on both counts, the verdict and judgment was set aside on the ground that this was an inconsistent verdict. The Court assumed that the counts were inserted under 11 & 12 Vict. c. 46, s. 3, and held that that statute only authorised the jury to convict either of stealing or receiving, and not of both (*f*).

An indictment against an accessory should state that the principal committed the offence; and it is not sufficient merely to state, that he was indicted for it (*g*).

Even at common law a man indicted as accessory to two or more persons might be convicted as accessory to one (*h*).

(*c*) R. *v.* Blackson, *ubi sup.*, per Parke, B.

(*d*) Repealed in 1861, and re-enacted as 24 & 25 Vict. c. 94, s. 1, *ante*, p. 130.

(*e*) R. *v.* Hughes, Bell, 242.

(*f*) R. *v.* Evans, 7 Cox, 151 (Ir.). The Court said that, 'it might be possible that a man may have stolen goods, and, after disposing of them, may afterwards get them into his hands knowing them to be stolen, and be thus guilty of stealing and receiving the same goods.' Now, suppose, on the trial of this indictment, the facts had been as thus stated, it seems plain that the jury ought to have found the verdict they did, and upon the finding as it stood the Court were bound to presume that the evidence proved both counts. But the Court add, 'The statements in this record negative such a state of facts;' and 'the unity of the offence in the ordinary language is put beyond doubt, the stealing and receiving are of the same chattel, laid as the property of the same person, on the same day.' This is a plain error; the property must be the same, and the time laid is perfectly immaterial; but even if it were material, a man may on the same day steal goods at one place, part with them, and receive them again at another place. Again, 11 & 12 Vict. c. 46, s. 3, only said, 'it shall be lawful' for the jury to convict either of stealing or receiving; but it does not forbid them to convict of both. Suppose a written confession of the prisoner proved both offences, how can a jury on their oaths acquit of either? In point of law there never was any objection to the insertion of several distinct felonies in one indictment; it was no ground of demurrer, arrest of judgment or error (1 Chit. Cr. L. 253), but it was mere matter for the discretion of the judge to put the prosecutor to elect on which charge he would proceed. 11 & 12 Vict. c. 46, s. 3, had taken away that discretion in this case, and made a prisoner triable at the same time for stealing and receiving, and as the Act contains no prohibitory words, the necessary consequence follows that the jury may convict of both if the evidence prove both offences. If it were otherwise, they must find a false verdict either on the one or other count, and thereby save the prisoner from the punishment of one of the two offences he had committed. C. S. G.

(*g*) Lord Sanchar's case, 9 Co. Rep. 114, 117a. R. *v.* Read, 1 Cox, 65. R. *v.* Butterfield, 1 Cox, 39.

(*h*) Fost. 361, 9 Co. Rep. 119. 1 Hale, 624. 2 Hawk. c. 29, s. 46. Plowd. 98, 99. Fost. 361. See 24 & 25 Vict. c. 94, s. 6, *ante*, p. 131.

Formerly if A. were indicted as principal and acquitted, he might have been afterwards indicted as accessory before the fact (*i*), and if he were indicted and acquitted as accessory he might be indicted again as principal (*j*). But now an acquittal as principal is a bar to an indictment for being accessory before the fact; for on an indictment as principal an accessory before the fact may be convicted under 24 & 25 Vict. c. 94, s. 1 (*ante*, p. 130). If a man is indicted as principal and acquitted, he may be indicted as accessory '*after the fact*'; and if indicted as accessory *before* the fact and acquitted, he may be indicted as accessory *after* the fact (*k*). The Act of 1861 enacts, that no person who shall be once duly tried for any offence of being an accessory shall be liable to be again indicted or tried for the *same offence* (*l*).

An indictment charged four prisoners with feloniously inciting a certain evil-disposed person unknown to forge a will; another count charged two of them with uttering the will, and three of them as accessories before the fact to the uttering. The evidence did not shew any joint act done by the prisoners, but only separate and independent acts at separate and distinct times and places. After all the evidence on the part of the prosecution had been given, one of the prisoners pleaded guilty, and it was argued that all the other prisoners were entitled to an acquittal; that the indictment charged a joint inciting, and there being no evidence of any joint acting, and one prisoner being convicted the others could not be convicted jointly with her; but Williams, J., overruled the objection (*m*).

Where the principal and accessory are tried together upon the same indictment, the accessory may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; for the accessory is in this case to be considered as *particeps in lite*; and this sort of defence necessarily and directly tends to his own acquittal. Where the accessory is brought to trial after the conviction of the principal, and it comes out in evidence upon the trial of the accessory that the offence of which the principal was convicted *did not amount to felony in him, or not to that species of felony with which he was charged*, the accessory may avail himself of this, and ought to be acquitted (*n*). For though it is not necessary upon such trial for the prosecution to enter into details of the evidence on which the conviction of the principal was founded, and the record of the conviction is sufficient evidence against the accessory to put him upon his defence (*o*); yet the presumption raised by the record that everything in the former

(*i*) R. *v.* Birchenough, Ry. & M. 477, overruling 1 Hale, 626; 2 Hale, 244, *vide post*, Bk. xii. c. ii. '*Autrefois Acquit.*'

(*j*) See 1 Hale, 625. R. *v.* Gordon, 1 Leach, 515. 1 East, P.C. 35.

(*k*) 1 Hale, 626.

(*l*) 24 & 25 Vict. c. 94, s. 7, *ante*, p. 132. Cf. 52 & 53 Vict. c. 63, s. 33, *ante*, pp. 4, 6. As to pleas of *autrefois acquit*, *vide post*, Bk. xii. c. ii.

(*m*) R. *v.* Barber, 1 C. & K. 442. R. *v.* Messingham, 1 Mood. 257, was cited in support of the objection. 'I have always been, and still am, clearly of opinion that this decision was wrong. Suppose the incitings had each been in a different county, it is quite clear that at common law (if triable at all) each could only have been tried in the county where it took place, and this proves that they are separate and distinct felonies. And no rule is more clearly settled than that on a joint charge you must prove a joint offence.' C. S. G. See *ante*, p. 131, as to including several accessories in the same indictment.

(*n*) Fost. 365. R. *v.* M'Daniel, 19 St. Tr 806.

(*o*) But see R. *v.* Turner, *post*, p. 137.

proceeding was rightly and properly transacted must, it is conceived, give way to facts manifestly and clearly proved; and as against the accessory the conviction of the principal will not be conclusive, being as to him *res inter alios acta* (*p*). This was the opinion of Foster, J., upon it, counsel for an accessory was allowed to controvert the propriety of the conviction of the principal by *viva voce* testimony, and to shew that the act done by the principal did not amount to a *felony*, and was only a *breach of trust* (*q*). And in a later case, it was also admitted that the record of the conviction of the principal was not *conclusive* evidence of the felony against the accessory, and that he has a right to controvert the propriety of such conviction (*r*).

It seems that the accessory may insist upon the *innocence of the principal*. Foster, J., says, 'If it shall manifestly appear, in the course of the accessory's trial, that in point of fact the principal was innocent, common justice seems to require that the accessory should be acquitted. A. is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of B.; C. is afterwards indicted as accessory to this murder; and it comes out upon the trial, by incontestable evidence, that B. is still living (Lord Hale somewhere mentions a case of this kind). Is C. to be convicted or acquitted? The case is too plain to admit of a doubt. Or, suppose B. to have been in fact murdered, and that it should come out in evidence, to the satisfaction of the Court and jury, that the witnesses against A. were mistaken in his person (a case of this kind I have known), and that A. was not, nor could possibly have been, present at the murder' (*s*).

Upon an indictment against an accessory, the guilt of the principal cannot be proved by his confession, but must be proved *aliunde*, especially if the principal be alive, and could be called as a witness; and it seems that even the conviction of the principal would not be admissible to prove the guilt of the principal. The prisoner was indicted for receiving sixty sovereigns, which had been stolen by R. A confession by R., made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner, was tendered in evidence. Patteson, J., refused to receive anything said by R., respecting the prisoner, but admitted what she said respecting herself only. R. had been found guilty on another indictment, but had not been sentenced, and might have been called as a witness. The judges (*t*) were of opinion that R.'s confession was no evidence against the prisoner; and many of them appeared to think that had R. been convicted, and the indictment against the prisoner stated not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means (*u*). Upon the authority of this case, where an accessory

(*p*) Fost. 365.

(*q*) Smith's case, 1 Leach, 288.

(*r*) R. *v.* Prosser (mentioned in a note to R. *v.* Smith, 1 Leach, 290). *Cor.* Gould, J. See R. *v.* Blick, 4 C. & P. 377, Bosanquet, J. and R. *v.* M'Daniel, 19 St. Tr. 806.

(*s*) Fost. 367, 368; and see Cook *v.* Field, 3 Esp. 134, where it was stated by Bearcroft, and assented to by Lord Kenyon, that where the principal has been convicted it is nevertheless on the trial of the accessory competent to the defendant to prove the principal innocent. And see R. *v.* M'Daniel, 19 St. Tr. 806.

(*t*) Lyndhurst, C.B., and Taunton, J., were absent.

(*u*) R. *v.* Turner, 1 Mood. 347: 1 Lew. 119.

before the fact to a murder was tried after the principal had been convicted and executed, Parke, B., ordered the proceedings to be conducted in the same manner as if the principal was then on his trial (*v*). And where two persons were indicted together, one for stealing and the other for receiving, and the principal pleaded guilty, Wood, B., refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver (*w*).

The prisoner was indicted as an accessory after the fact to M., who was charged with sending letters demanding money with menaces, and Erle, J., held these letters admissible against the accessory as evidence of acts done, for it was necessary to prove a demand of the money, and these letters constituted the demand (*x*). But where R. was indicted as accessory before the fact to felony by S., Maule, J., refused to admit in evidence *conversations* with S. held in the absence of R. (*y*). Where, on an indictment against H. and P. for murder, P. was tried first, and H. was alleged to have fired the fatal shot in a duel, it was held that it might be proved that H. on the morning before the duel had said, 'I will shoot him as I would a partridge.' Erle, J., saying, 'This statement is an act indicating malice aforethought in H., and that is a fact which the jury have to ascertain. The intentions of a person can only be inferred from external manifestations, and words are some of the most usual and best evidence of intention. It is not a declaration after the act done narrating the past, but it shows the mind of the party' (*z*). In the same case, Erle, J., held that what H. said after the duel relating to what passed at the spot where the duel took place was not admissible.

As to harbouring thieves, &c., in public-houses and brothels, see the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112, ss. 10, 11), as amended by 39 & 40 Vict. c. 20, s. 5 (S. L. R.). These offences are punishable on summary conviction.

Sect. V.—Abettors in Misdemeanor.

In the case of misdemeanor, no distinction in respect of procedure or punishment has ever been made between parties or privies to the offence who could, in the case of felony, be principals in the first or second degree, or accessories *before* the fact. Indeed, there is no such person as accessory in point of law to a misdemeanor (*a*).

The Accessories and Abettors Act, 1861, enacts as follows:—

Sect. 8. 'Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor (*b*), 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' (*c*).

(*v*) R. *v.* Ratcliffe, 1 Lew. 121.
(*w*) Anon., cited in R. *v.* Turner, *supra.*
(*x*) R. *v.* Hansill, 3 Cox, 597.
(*y*) R. *v.* Read, 1 Cox, 65.
(*z*) R. *v.* Pym, 1 Cox, 339.
(*a*) R. *v.* Burton [1875], 13 Cox, 71, Blackburn, J., cited and approved in Du Cros *v.* Lambourne [1907], 1 K.B. 40, 43, Alverstone, C.J. Darling, J., at p. 47, it is submitted erroneously, spoke of an aider and abettor as a principal in the second degree.
(*b*) This is not limited to indictable misdemeanors. Du Cros *v.* Lambourne, *ubi supra.*
(*c*) Framed from 7 & 8 Geo. IV. c. 30, s. 26; 9 Geo. IV. c. 56, s. 33 (I), &c., and really only a declaration of the common law on the subject (R. *v.* Greenwood, 2 Den. 453. Du Cros *v.* Lambourne, *ubi supra.*

Each of the Criminal Law Consolidation Acts of 1861, except the Coinage Offences Act, 1861, contains as to the misdemeanors punishable under such Act a clause in the terms of this section. See 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 100, s. 67. And there is a similar provision in sect. 12 of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90). Like provisions are made as to misdemeanors punishable on summary conviction by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), which enacts (s. 5), that 'every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as such principal offender is or shall be liable(*d*).

In R. *v.* Bubb(*e*), on an indictment of T. and B. as principals in misdemeanor, the jury returned a verdict against T. as a principal, and against B. as accessory *after* the fact. A judgment of guilty, entered on the latter verdict, was quashed by the Court for Crown Cases Reserved. The Court declined to construe the verdict as meaning that B. was a principal in the second degree, or an accessory at the time when the misdeameanor was committed, and held that she was not indictable under 24 & 25 Vict. c. 94, s. 8(*f*). Aiders and abettors in misdemeanors may be charged either separately or as principals(*g*).

In R. *v.* de Marny(*h*), it was held that a man could lawfully be convicted of aiding and abetting the publication in England of obscene literature by sending it through the post, contrary to sect. 4 of the Post Office Protection Act, 1884 (47 & 48 Vict. c. 76)(*i*), on evidence that by inserting advertisements, which he knew to relate to such literature, in a paper published in England, he had facilitated, or, as the judges held, procured and caused the sending of such literature from abroad into England through the post.

R. *v.* de Marney [1907], 1 K.B. 388); by which all persons, who would be accessories in felony, are principals in misdemeanor, hence it follows that a person indicted for committing a misdemeanor may be convicted, if it appear that he caused it to be committed, although he is absent when it is committed. R. *v.* Clayton, 1 C. & K. 128. R. *v.* Moland, 2 Mood. 276.

(*d*) As to this section, see Benford *v.* Sims [1898], 1 Q.B. 641.

(*e*) [1906] 70 J.P. 143. (C.C.R.) The Court followed the rule already stated, *ante*, p. 131 note(*j*), as to felonies.

(*f*) Darling, J., suggested that the statute did not preclude an indictment (*qu.* at common law) of an accessory *after* the fact to misdemeanor.

(*g*) Stacey *v.* Whitehurst, 18 C.B. (N.S.) 4. Du Cros *v.* Lambourne [1907], K.B. 40, 44, Alverstone, L.C.J.

(*h*) [1907], 1 K.B. 388.

(*i*) S. 4 is repealed and re-enacted as s. 63 of the Post Office Act, 1908 (8 Edw. VII. c. 48).

CANADIAN NOTES.

OF PARTIES TO THE COMMISSION OF CRIME.

Sec. 1.—Preliminary.

Innocent Agent.—As to freedom from criminal responsibility, see notes to the last preceding chapter.

Sec. 2.—Principals and Accessories before the Fact.

See Code sec. 69. (This section is subject to secs. 17 and 18 of the Code, as to children.)

This section makes any person who does an act for the purpose of aiding any other person to commit an offence or who abets any other person in commission of an offence, a party to the offence committed by such other person. To abet is to be personally or constructively present at the commission of an offence, and to assist in the criminal act; but to aid is to help, or in any way to promote, facilitate or bring about the accomplishment of any criminal purpose by another, and this may be done without being present when the offence is perpetrated. Under the old rule of law the abettor, or the person who was present inciting or helping, was a principal in the second degree, while the person who, being absent, counselled, helped or facilitated in any way the commission of an offence which was afterwards perpetrated was an accessory before the fact. R. v. Roy, 3 Can. Cr. Cas. 472.

To counsel and procure a person to commit an offence constitutes the counsellor or inciter a party to the offence, when it is committed; and by this section he can be proceeded against as a principal. The Queen v. Gregory, L.R. 1 C.C.R. 79.

The words aider, abettor, accessory and accomplice as applied to crimes, are often used as having the same meaning. But they are by no means synonymous. It is unlawful to aid or encourage the commission of a crime. It is unlawful under certain circumstances to conceal the commission of a crime. One who aids is, in ordinary language, called an aider or abettor. An accessory is one who takes an active, but subordinate, part. An accomplice, according to the ordinary meaning of the word, would seem to imply one who not only takes an active part, but positively aids in the accomplishment or completion of the crime. R. v. Smith, 38 U.C.Q.B. 281, 287.

To make a person an "aider and abettor" he must have been present actually or constructively. A person is present in construction

of law aiding and abetting if with the intention of giving assistance, he is near enough to afford it should occasion arise, or to favour the escape of those who were immediately engaged; he would be a principal in the second degree. Per MacMahon, J., in R. v. Lloyd, 19 O.R. 352.

If a person sees that a crime is about to be committed in his presence and does not interfere to prevent it, that is not a participation rendering him liable, without evidence that he was there in pursuance of a common unlawful purpose with the principal offender. R. v. Curtley, 27 U.C.Q.B. 613.

Aid rendered to the principal offenders after the commission of the crime is alone insufficient to justify a conviction of the person so aided as a principal under this section. R. v. Graham, 2 Can. Cr. Cas. 388.

On an indictment for, with three other persons, attempting to steal goods in a store, evidence was given by an accomplice that prisoner went with him to see a store, that prisoner went into the store to buy something to see how the store could be got into, and that they and others planned the robbery and fixed the date; the prisoner saw them off, but did not go with them; the others went out and made the attempt, which was frustrated. It was held that as those actually engaged were guilty of the attempt to steal, the prisoner was properly convicted under 27 and 28 Vict. ch. 19, sec. 9, which enacted that whosoever shall aid, abet, counsel or procure the commission of any misdemeanour shall be liable to be tried, indicted and punished as a principal offender. R. v. Esmonde, 26 U.C.Q.B. 152.

A person who knowingly assists a thief to conceal stolen money which he is in the actual and proximate act of carrying away, by receiving money for the purpose of concealing it, is guilty of aiding and abetting in theft and may under sub-sec. (*c*) be convicted as a principal. R. v. Campbell, 2 Can. Cr. Cas. 357.

Although the theft may be complete by the mere taking and carrying away of stolen property the subsequent carrying of same to a place of concealment by a person who did not participate in the taking, if done with a guilty knowledge and as a continuation of and proximately at the same time as the theft is an "aiding and abetting" of the same. *Ibid.*

An act done which may enter into the offence, although the crime may be complete without it, may be considered as a continuation of the criminal transaction so as to make the participator an aider and abettor, although his participation occurs only after such acts have been done as in themselves would constitute the crime. *Ibid.*

If the accused were not an aider and abettor or a principal in the second degree in the commission of the theft, the circumstance that he was an accessory before the fact by counselling and procuring the commission of the theft, and therefore liable under sec. 69 to be convicted

as a principal, does not prevent his conviction for the substantive offence of afterwards receiving the stolen property knowing it to have been stolen. Such an accessory before the fact who afterwards becomes a receiver of the stolen property may be legally convicted both of the theft and of "receiving." R. v. Hodge, 2 Can. Cr. Cas. 350. *Note.*—The theft here was complete before the "receiving."

If it be contrary to law to sell liquor or any other article in a shop, a sale by any clerk or assistant in his shop would *primâ facie* be the act of the shopkeeper. It may be, if he could shew that the act of selling was an isolated act wholly unauthorized by him, and not in any way in the course of his business, but a thing done wholly by the unwarranted or wilful act of the subordinate he might escape personal responsibility. Where one H. swore that he got a bottle of brandy and paid for it one dollar in K.'s shop, that a woman served him, and no one else was in the store at the time, K. was convicted and the Court upheld the conviction. R. v. King, 20 U.C.C.P. 247.

In R. v. Williams, 42 U.C.Q.B. 462, it was said that whereas both employer and employed may be liable, yet both ought not to be punished for the same offence.

In R. v. King, 20 U.C.C.P. 246, the accused was convicted for a sale in his absence by his son, the statute enacting a presumption of authority by the father which the magistrate held was not rebutted by the direct evidence of the father, on which he did not rely.

A broker who merely acts as such for two parties, one a buyer the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties, to gamble in stocks and merchandise, is not liable as an accessory. R. v. Dowd, 4 Can. Cr. Cas. 170.

Common Purpose.—Where a parcel containing revolvers was thrown into a cab conveying prisoners, and the accused and at least one of the other prisoners in the cab armed themselves with the revolvers and formed the common intention of prosecuting the unlawful purpose of escaping from lawful custody, by the use thereof, and of assisting each other therein, the shooting by one of them of the constable in charge was an offence committed by one of them in the prosecution of such common purpose, and the commission thereof was or ought to have been known to be a possible consequence of the prosecution of such common purpose; each of them was, therefore, a party to such offence, and the offence being murder in the actual perpetrator thereof, was murder in the defendant, even if he were not an actual perpetrator thereof, and he was properly found guilty by the jury of that offence. R. v. Rice, 5 Can. Cr. Cas. 509, 4 O.L.R. 223.

Trade Mark Offences.—No servant of a master, resident in Canada, who *bonâ fide* acts in obedience to the instructions of such master, and,

on demand made by or on behalf of the prosecutor, gives full information as to his master, is liable to any prosecution or punishment for any offence defined in the part of the Code relating to trade mark offences, sec. 495.

Liability of an Accessory before the Fact where the Principal does not Follow the Preconcerted Plan.—Code sec. 70.

Commission of Crime other than that Commanded.—See Code sec. 70(2).

Accessory after the Fact.—See Code secs. 71, 76, 267, 574, 575, 849.

Misprision of Felony.—The Code makes no provision as to this. The common law, therefore, is still in force concerning it. Burbidge on Criminal Law, 508.

CHAPTER THE SIXTH.

OF ATTEMPTING, CONSPIRING, AND INCITING TO COMMIT CRIMES.

PRELIMINARY.

FOR the purposes of classification and punishment a distinction is drawn between completed crimes in cases in which the whole of that which was intended has been successfully done, and those preparations to commit crimes which are punishable, although the complete offence has not been accomplished, *e.g.*, where there has been a conspiracy, an incitement, or an attempt to accomplish the complete offence.

In the case of high treason, no distinction is drawn between the attempt, incitement, or conspiracy and the full offence, such acts as could in other cases be evidence of inchoate crime being treated as overt acts of high treason (*a*). All attempts, incitements, or conspiracies to commit felony or misdemeanor are indictable as misdemeanors at common law unless a statute directs that the particular form of attempt, &c., shall be treated as a felony. In the case of an unsuccessful attempt or incitement to commit crime, it would seem that the law as to aiders and abettors (*ante*, p. 138) is applicable in the same manner as in the case of completed crimes, and when the attempt or incitement is made felony by statute the law as to accessories would seem to apply (*ante*, p. 116).

A.—ATTEMPTS TO COMMIT CRIME.

It is a misdemeanor indictable at common law to attempt to commit any felony (*b*), including *felo de se* (*c*), or any misdemeanor (*d*), whether such felony or misdemeanor is an offence at common law or is created by statute (*e*). In certain cases which will be stated in later chapters the attempt to commit an offence is by statute punishable in the same manner as the completed offence, or is specifically punished as a substantive felony or misdemeanor (*ee*).

(*a*) This rule is expressed by the phrase, '*voluntas reputatur pro facto*,' and seems, by early writers, to have been extended to homicide. '*Sed haec voluntas non intellecta fuit de voluntate nudis verbis aut scriptis propalata sed mundo manifestata fuit per apertum factum*.' 3 Co. Inst. 5. Fost. 193.

(*b*) R. *v.* Higgins, 2 East, 5, 21. R. *v.* Kinnersley, 1 Str. 196. 1 Hawk. c. 25, s. 3. That attempts to commit felony are indictable misdemeanors is recognised by the statute empowering Courts to award imprisonment with hard labour for such attempts. 3 Geo. IV. c. 114, *post*, p. 212.

(*c*) R. *v.* Burgess, L. & C. 258. R. *v.* Doody, 6 Cox, 463.

(*d*) In R. *v.* Scofield [1784], Cald. 397, 403, Lord Mansfield denied the validity of a distinction drawn between acts done with intent to commit a felony and acts done with intent to commit a misdemeanor.

(*e*) R. *v.* Cartwright [1806], R. & R. 107n. R. *v.* Higgins, 2 East, 5, 8, Grose, J. R. *v.* Welham, 1 Cox, 192, Parke, B. R. *v.* Chapman, 1 Den. 432. R. *v.* Butler, 6 C. & P. 368, Patteson, J. R. *v.* Roderick, 7 C. & P. 795. R. *v.* Martin, 2 Mood. 123.

(*ee*) *e.g.*, 8 Edw. VII. c. 45, s. 1 (3), *post*, p. 973.

No act is indictable as an attempt[1] to commit felony or misdemeanor, unless it is a step towards the execution of his criminal purpose (*f*), and as an act directly approximating to, or immediately connected with, the commission of the offence which the person doing it has in view. There must be an overt act intentionally done towards the commission of some offence; one or more of a series of acts which would constitute the crime if the accused were not prevented by interruption (*f*), or physical impossibility, or did not fail for some other cause in completing his criminal purpose.

In R. *v.* McPherson (*g*), it was held that a prisoner could not be properly convicted of breaking and entering a building and attempting to steal goods which were not there. It was at one time considered that when the full offence was physically impossible, there could be no conviction for the attempt. In R. *v.* Collins (*h*), it was held that a man who, with intent to steal put his hand into an empty pocket, could not be convicted of an attempt to steal. But in R. *v.* Brown (*i*), it was held that the prisoner had properly been convicted of the statutory misdemeanor of

(*f*) Where a particular intent is an essential element in the definition of the completed crime, certain difficulties arise in applying the rule as to attempts. If a man in a sudden passion struck at another with a knife, and his hand was arrested, it would be an attempt to inflict grievous bodily harm, and yet there might be no intent to inflict grievous bodily harm, but the intent might be to prevent apprehension or otherwise. There is in short such an offence as attempting to wound with intent to do grievous bodily harm, and another offence of attempting to inflict grievous bodily harm without that particular intent. So also by statute a felony is committed by any one who throws a stone upon a railway line with intent to obstruct an engine, and a person might be found guilty of attempting to commit that felony. But by the same statute a misdemeanor is committed by any one who obstructs an engine, and a person might be found guilty of attempting to obstruct an engine, although he had no intent to obstruct it; but if he has attempted to do an act which would end if uninterfered with in an offence within the section, he has committed an attempt to obstruct, and his attempt involves no doubt an intentional act, but it is not a felonious 'intent to obstruct' within the meaning of the felony section, but an implied intent to do what is forbidden by the misdemeanor section. And see 1 Hawk. c. 55. Some boys were indicted at Derby (1875) March Assizes, for throwing the coping-stone off a bridge upon the railway, with intent to obstruct an engine. They were only 'larking,' and the jury negatived the 'intent to obstruct.' They were also indicted for obstructing, but as it happened the stone fell so as not to obstruct the line, the learned counsel for the prosecution submitted that they might be found guilty of attempting to obstruct; but the learned commissioner thought that as the jury had negatived the intent to obstruct, they could not be found guilty of the attempt. But it is submitted that if the jury thought the prisoners wilfully tried to throw the stone upon the line, they might have been found guilty of the attempt, as the probable consequence of throwing the stone on the line would be the obstruction of the engine. MS. H. S. See R. *v.* Holroyd, 2 M. & Rob. 339, *ante*, p. 12.

(*g*) D. & B. 199.

(*h*) L. & C. 471: 33 L. J. M. C. 177.

(*i*) 24 Q.B.D. 357: 59 L. J. M. C. 47.

AMERICAN NOTE.

[1] 'Attempts' are defined by Bishop as follows: 'Where the non-consummation of the intended criminal result is caused by an obstruction in the way, or by the want of the thing to be operated upon, if such an impediment is of a nature to be unknown to the offender, who used what seemed appropriate means, the punishable attempt is committed.' S. 752 (2) or (3). 'Whenever the laws make criminal one step toward the accomplishment of an unlawful object done with the intent or purpose of accomplishing it, a person taking that step with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that by reason of some fact unknown to him at the time of his criminal attempt it could not be fully carried into effect in the particular instance.' See C. *v.* Jacobs, 9 Allen (Mass.), 274.

attempting to commit an unnatural offence, although on physical grounds perpetration of the complete offence was impossible; and R. *v.* Collins was declared no longer law. And in R. *v.* Ring (*j*), a conviction for attempt to steal from a woman unknown by hustling her and endeavouring to find her pocket, was held good, and R. *v.* Collins was stated to be overruled (*k*). In R. *v.* Ring there was also a count for assault with intent to commit a felony.

A man may have in his mind a criminal purpose to commit a felony or misdemeanor, but so long as that purpose rests in bare intention (*l*), he does not become amenable to the criminal law (*m*). Attempting to commit a crime is distinct from intending to commit it (*n*).

In Dugdale *v.* R. (*o*), the defendant was charged (1) with preserving and keeping in his possession obscene prints, with intent unlawfully to utter the same, and (2) with obtaining and procuring obscene prints with a like intent. It was held that the first set of charges were bad, for they were consistent with the possibility that the prisoner might have originally had the prints in his possession with an innocent intention, and there was no act shewn to be done which could be considered as the first step in the commission of a misdemeanor; but that the second set of charges were good, for the procuring of such prints was an act done in the commencement of a misdemeanor.

Questions have arisen whether the possession of materials or implements for coining or house-breaking for the purpose of committing these offences, can without more be treated as criminal at common law. The preponderating weight of the decided cases is against considering possession as such an act as would constitute the offence of attempting or preparing for, the commission of the full offence. In R. *v.* Sutton (*p*), the defendant was indicted for having coining instruments in his custody, with *intent* to coin half guineas, shillings and sixpences, and to utter them as and for the current coin, Lord Hardwicke, who tried the case, doubted what the offence was. But the Court of King's Bench held the offence to be a misdemeanor; Lee, J., saying, that 'all that was necessary in such a case was an act charged, and a criminal intention joined to that act' (*q*). This doctrine, if correct, does not appear to have been applicable to the facts of the case as charged, which did not amount to a criminal *act* by the defendant. It appears to have been

(*j*) 61 L. J. M. C. 29. Cf. R. *v.* Greenaway, 72 J. P. 389; 1 Cr. App. R. 31, attempting to ring the changes.

(*k*) The judgment in R. *v.* Brown, which also completely overrules R. *v.* McPherson, has been criticised as unsatisfactory. Pritchard, Quarter Sessions (2nd ed.), 900.

(*l*) R. *v.* Sutton [1736], Cas. K.B. temp. Hardw. 370, 372, Lee, J. 2 Str. 1074.

(*m*) R. *v.* Eagleton, Dears. 515. 'The devil himself cannot try the thought of a man,' Brian, C.J. Y. B. 17 Edw. IV. 2, pl. 2.

(*n*) R. *v.* McPherson, D. & B. 199, Cockburn, C.J.

(*o*) 1 E. & B. 435.

(*p*) Cas. K.B. temp. Hardw. 370. 2 Str. 1074.

(*q*) In this case there were cited, in support of the prosecution, a case of a conviction of three persons for having in their custody divers picklock keys *with intent* to break houses and steal goods; R. *v.* Lee, Old Bailey, 1689; and a case of an indictment for making coining instruments, and having them in possession *with intent* to make counterfeit money. R. *v.* Brandon, Old Bailey, 1698; and also a case where the party was indicted for buying counterfeit shillings with an intent to utter them in payment. R. *v.* Cox, Old Bailey, 1690. As to the unlawful possession of coining implements, see *post*, p. 365, 'Coinage Offences.'

accepted by Lord Mansfield as good law in R. *v.* Scofield (*r*): but R. *v.* Sutton was disapproved in R. *v.* Stewart (*s*), where it was held that having counterfeit silver in possession with intent to utter it as good is no offence, there being no criminal act done. The prisoner had been found guilty of unlawfully having in possession counterfeit silver coin with intent to utter it as good: but the judges were of opinion that there must be some *act* done to constitute a crime, and that the having in possession only was not an act (*s*).

Legislation has been passed with respect to persons having implements for house-breaking, &c., in their possession with a *felonious intent*. The Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 4), makes persons having in their possession implements of house-breaking or weapons with intent (*t*) to commit any felonious act, liable to summary conviction as rogues and vagabonds. Sect. 58 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), makes persons armed with offensive weapons, or in possession of implements of house-breaking, guilty of a misdemeanor. And in some instances an act, accompanied with a certain intent, has been made a felony by particular statutes; as by sect. 38 of the same Act, the severing with intent to steal the ore of any metal, or any coal, &c., from any mine, bed, or vein thereof, is made felony punishable by two years' imprisonment (with or without hard labour). And by sect. 14 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), damaging certain articles in the course of manufacture, with intent to destroy them, and entering certain places with intent to commit such offence, is made felony.

In R. *v.* Hensler (*u*), the defendant was held to have been rightly convicted of attempting to obtain money by false pretences contained in a begging letter, though he had, in fact, received money in answer to a letter from the recipient who knew the pretence to be false (*v*).

In R. *v.* Williams (*w*), it was held that a boy under fourteen could not, by reason of his age, be convicted of a felony under sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); but Hawkins, J., with the apparent concurrence of Cave, J., seems to have been prepared to hold when the case arose that the boy might, under sect. 9 of the Act, be convicted of an attempt to commit a felony within sect. 4. Coleridge, L.C.J., seems to have been of a contrary opinion (*x*).

The question in each case is whether the acts relied on constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary steps towards completing that offence, but falling short

(*r*) [1784] Cald. 397, 403.

(*s*) [1814] R. & R. 288. R. *v.* Heath [1810], R. & R. 184. As to this offence, see 24 & 25 Vict. c. 99, ss. 10, 11, *post*, pp. 357, 358.

(*t*) See 34 & 35 Vict. c. 112, s. 7; 54 & 55 Vict. c. 69, s. 6.

(*u*) [1870] 11 Cox, 570 (C. C. R.). In R. *v.* Mills [1857], 7 Cox, 263 (C. C. R.), it has been decided that a conviction for obtaining money by false pretences cannot be had if the prosecutor parted with his money knowing the pretences to be false.

(*v*) Blackburn, J., said, 'You may attempt to steal from a man who is too strong to permit you.' Mellor, J., said, 'An attempt may be made to steal a watch that is too strongly fastened by a guard. Here the prosecutor had the money, and was capable of being deceived, and the prisoner attempted to deceive him.' Kelly, C.B., said, 'So soon as ever the letter was put in the post the attempt was committed.'

(*w*) [1893] 1 Q.B. 320.

(*x*) See the discussion of this case in R. *v.* Angus [1907], 24 N. Z. L. R. 948, Denniston, J.

of completion by the intervention of causes outside the volition of the accused, or because the offender of his own free will desisted from completion of his criminal purpose for some reason other than mere change of mind.

In R. *v.* Eagleton (*y*), a baker was indicted for attempting to obtain money by false pretences. He had contracted with a poor law authority to deliver loaves of a certain weight to poor people, in exchange for tickets given to them by the relieving officer, which the baker was to retain on delivering the loaves, and to present weekly to the relieving officer as vouchers for payment, with a statement of the amount of the loaves. The amount shewn by the statement and vouchers was credited to the baker, and was payable at a later date, subject to a right to make deductions for breach of contract. The defendant had delivered to the poor short weight against the tickets presented, and returned to the relieving officer the tickets received. It was held that he was guilty of attempting to obtain money by false pretences by fraudulently obtaining credit with the relieving officer for a weight of bread in excess of that delivered, on the ground that the baker had done the last act depending on himself towards obtaining payment, and that that act was sufficiently proximate to (and) or not too remote from the offence of obtaining money by false pretences (*z*).

In R. *v.* Cheeseman (*a*), the prisoner was servant to an army meat contractor, who, in the course of his duties, took meat daily into camp, where it was weighed by a quartermaster-sergeant, for distribution to the troops, and the surplus meat, after satisfying the day's requirements, was to be taken back to the contractor. The prisoner fraudulently falsified the scales used so as to give the troops short weight, and to leave a larger surplus for return to the contractor. His intention was to appropriate the difference between the just surplus and the actual surplus. The fraud was detected and he absconded. It was held that he was guilty of an attempt to steal the difference, as he had done all that was necessary to complete his criminal purpose, except to carry away and dispose of the proceeds of the fraud, which he would have done if not interrupted by detection of his scheme.

In R. *v.* Taylor (*b*), a man was tried for the statutory felony of attempting to set fire to a stack of corn, on proof that he had asked for work and money of the prosecutor, and, on refusal, threatened to burn him up, and that he was then seen to go to a stack, and kneeling down close to it to light a lucifer match, though, on seeing that he was watched, he blew out the match and went away. Pollock, C.B., ruled that to warrant a conviction, the act must be one tending directly and immediately to the execution of the principal crime, and done under such circumstances that the prisoner had the power of carrying his intention into execution (*c*).

Certain acts done in furtherance of a criminal purpose have been held

(*y*) [1855] 24 L. J. M. C. 158, argued before the fifteen judges; judgment of the Court delivered by Parke, B.

(*z*) The Court were in some doubt whether the attempt was to obtain credit or cash.

(*a*) 31 L. J. M. C. 89.

(*b*) [1859], 1 F. & F. 511, Pollock, C.B.

(*c*) The last part of the ruling must be read subject to R. *v.* Brown, *ante*, p. 141.

to be indictable misdemeanors, which cannot exactly be described as attempts, but are closely analogous. Such are abandoning a child without food with intent that it may die (*d*); making a false oath before a surrogate to obtain a marriage licence (*e*); procuring dies for the purpose of counterfeiting coin (*f*); procuring indecent prints for the purpose of publishing them (*g*); handing poison to A., and endeavouring to get A. to administer it to B. (*h*), attempting to bribe a Cabinet minister and member of the Privy Council to give the defendant an office in the Colonies (*i*); promising money to a member of a corporation to vote for the election of B. as mayor (*j*); attempting, by bribery, to influence a juryman in giving his verdict (*k*); or a judge in his decision (*l*); or attempting to bribe a customs officer (*m*). Certain acts intended or calculated to pervert, delay, or defeat the course of justice which are regarded as indictable (*n*), as being attempts to the prejudice of the community (*o*), are separately treated, *post*, Book VII. p. 537. A fraudulent attempt to get a conviction set aside by means of false declarations has, in Australia, been held to be a misdemeanor at common law (*p*), on the authority of O'Mealy *v.* Newell (*q*).

The cases where an attempt to commit crime is a misdemeanor at common law are distinct from those in which by statute an act is made felony, if done with a certain intent, but a misdemeanor if done without such intent. The criminal quality of the completed act in such cases varies with the intent with which it was done.

Whether the attempt is a common-law misdemeanor or a statutory offence, the rules already stated as to what is sufficient to constitute an attempt apply, unless the statute dealing with the subject-matter provides another criterion (*r*).

Attempts to murder, which at common law are misdemeanors, are dealt with as felonies in unnecessary detail in ss. 11-15 of the Offences against the Person Act, 1861 (*s*).

On an indictment for an attempt it is unnecessary to negative the commission of the full offence (*t*): and it is for the defendant to shew, if he please, that the minor was merged in the greater offence.

(*d*) R. *v.* Renshaw, 2 Cox, 285. It is doubtful whether this could be brought within 24 & 25 Vict. c. 100, s. 15.

(*e*) R. *v.* Chapman, 1 Den. 432. The offence is not perjury, and it is not a statutory offence to obtain a marriage licence by a false oat See *post*, p. 528.

(*f*) R. Roberts, Dears. 539; 25 L. J. M. C. 17. The prisoner was held indictable for a misdemeanor, although his acts in furtherance of his criminal purpose were not sufficiently proximate to the complete offence to support an indictment for an attempt to execute it. See *post*, p. 365 *et seq.*

(*g*) Dugdale *v.* R., 1 E. & B. 435.

(*h*) R. *v.* Williams, 1 Den. 39.

(*i*) R. *v.* Vaughan, 4 Burr. 2494. See *post*, p. 627, 'Bribery.'

(*j*) R. *v.* Plympton, 2 Ld. Raym. 1377.

(*k*) R. *v.* Young, 2 East, 14, 16 cit. In this case a criminal information was exhibited.

(*l*) 3 Co. Inst. 147.

(*m*) R. *v.* Cassano, 5 Esp. 231.

(*n*) 1 Hawk. c. 21, s. 15. 2 East, P.C., p. 816.

(*o*) R. *v.* Higgins, 2 East, 5, Lawrence, J. R. *v.* Vreones [1891], 1 Q.B. 360, an indictment for fabricating evidence for the purpose of a contemplated arbitration. *Vide post*, p. 530.

(*p*) White *v.* R. [1906], 4 Australian Commonwealth L. R. 152.

(*q*) 8 East, 374.

(*r*) See R. *v.* Duckworth [1892], 2 Q.B. 83, as to what is an attempt to shoot. *Vide post*, p. 842.

(*s*) *Post*, p. 839.

(*t*) None of the precedents of indictments for attempts to ravish or rob contains any such negative averment. See 3 Chit. Cr. L. 807, 816. Archb. Cr. Pl. (23rd ed.), 1295.

B.—Of Criminal Conspiracies.

Criminal conspiracy consists in 'an unlawful combination of two or more persons (*u*), to do that which is contrary to law, to cause a public mischief (*v*), or to do that which is wrongful and harmful towards another person' (*w*), or to do a lawful act for an unlawful end (*x*), or by unlawful means (*y*), or wrongfully to prejudice a third person (*z*). It has even been said that if several illegally concur in doing an act with a common object, they may be guilty of conspiracy, though they were previously unacquainted with each other (*a*). But few things are left so doubtful in the criminal law as the point at which a combination of several persons for a common object becomes unlawful (*b*).

The best established definition of the offence is that given by Willes, J., on behalf of all the judges in Mulcahy *v.* R. (*c*), and accepted by the House of Lords in that (*d*) and subsequent cases (*e*).

'A conspiracy consists not merely in the *intention* of two or more, but in the *agreement* of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means (*f*). And so far as proof goes conspiracy, as Grose, J., said in R. *v.* Brisac (*g*),

(*u*) Husband and wife are regarded as one person and as incapable of conspiring together (1 Hawk. c. 72, s. 8), though they can severally or jointly conspire with other persons. R. *v.* Whitehouse, 6 Cox, 38, Platt, B.

(*v*) R. *v.* Brailsford [1905], 2 K.B. 730, 745 (*post*, p. 151) and cases there cited, and see R. *v.* Boulton, 12 Cox, 87.

(*w*) Quinn *v.* Leathem [1901], A.C. 495, 528: 70 L. J. P.C. 76, Ld. Brampton. In R. *v.* Vincent, 9 C. & P. 91, Alderson, B., laid it down that conspiracy is 'a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means.' In O'Connell *v.* R. (11 Cl. & F. 155; 5 St. Tr. (N. S.) 1), Tindal, C.J., in delivering the opinion of all the judges, said: 'The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful.' In R. *v.* Seward, 1 A. & E. 713, Denman, C.J., said, 'An indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means;' but in R. *v.* Peck, 9 A. & E. 686, upon this dictum being cited he said, 'I do not think the antithesis very correct;' and in R. *v.* King, 7 Q.B. 782, he said, 'The words "at least" should accompany that statement.' In R. *v.* Jones, 4 B. & Ad. 345; 1 N. & M. 78, however, several judges gave a similar definition of the crime of conspiracy. C. S. G.

(*x*) 'With a corrupt intent,' 8 Mod. 320. 1 Wils. (K.B.) 41. See R. *v.* Delaval, 3 Burr. 1434, 1439.

(*y*) See Mulcahy *v.* R., *infra*.

(*z*) 1 Hawk. c. 72, s. 2. Quinn *v.* Leathem [1901], A.C. 495, *n.* Unless the word 'wrongfully' means criminally, the authorities cited by Hawkins do not support his proposition. Wright on Conspiracy, p. 12.

(*a*) By Lord Mansfield in the case of the prisoners in the King's Bench, Hil. T. 26 Geo. III. 1 Hawk. c. 72, s. 2, in the notes. See the instance given in R. *v.* Parnell, 14 Cox, 508, 515, *post*, p. 174.

(*b*) 3 Chit. Cr. L. 1130.

(*c*) L. R. 3 H. L. 306, 317.

(*d*) *l.c.* 374, Lord Cairns.

(*e*) Quinn *v.* Leathem [1901], A.C. 495, 529, Lord Brampton. See R. *v.* Brailsford [1905], 2 K.B. 730, 746.

(*f*) A civil action does not lie for a conspiracy unless it is put into execution and causes damage. 9 Co. Rep. 57. W. Jones, 93. Savile *v.* Roberts, 1 Ld. Raym. 378. 1 Wms. Saund. 229b, 230. Barber *v.* Lesiter, 7 C. B. (N. S.) 175. Quinn *v.* Leathem [1901], A.C. 495, 510, Lord Macnaghten: 542, Lord Lindley.

(*g*) 4 East, 171.

is generally "a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them" (*h*). The number and the compact give weight, and cause danger, and this is more especially the case in a conspiracy like that charged in this indictment.' The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties (*i*). The external or overt act of the crime is concert by which mutual consent to a common purpose is exchanged (*j*). In an indictment, it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous, and which gives the public an interest to interfere by indictment (*k*).

In order to make any person criminally responsible for conspiracy, it is essential to establish that he entered into an agreement falling within the above definition with one or more other persons (*l*), whether charged with him in the indictment or not, and whether known or unknown (*m*). So where two persons were indicted for conspiring together (no other parties being alleged), and one was convicted, and the jury disagreed as to the other, it was held that the conviction of the one could not stand (*n*); and where three were charged jointly with conspiring together, and one pleaded guilty, but the other two were tried and acquitted, it was held that the sentence imposed on the one who had pleaded guilty could not stand (*o*). As a matter of procedure it would seem that if A. be indicted and tried alone for conspiring with others, he could be lawfully convicted, though the others referred to or included in the indictment had not appeared or pleaded (*p*), or were dead before (*q*) or after the

(*h*) The question involved was whether a conspiracy, charged and proved, was an overt act of felony within the Treason Felony Act, 1848 (11 & 12 Vict. c. 12).

(*i*) 1 East, P.C. 462. R. *v.* Best, 2 Ld. Raym. 1167: 6 Mod. 185. R. *v.* Spragg [1760], 2 Burr. 993 (conspiracy to indict for a capital offence). R. *v.* Rispal [1762], 3 Burr. 1320, where conspiracy to injure a man by a false charge was held unlawful and a trespass tending to a breach of the peace. See O'Connell *v.* R., 11 Cl. & F. 155: 5 St. Tr. (N. S.) 1.

(*j*) Sir W. Erle on Trade Unions, p. 31, adopted by Bruce, J., in R. *v.* Plummer [1902], 2 K.B. 339, 348. And see Mulcahy *v.* R., L. R. 3 H. L. 306, 328, Lord Chelmsford.

(*k*) Mogul SS. Co. *v.* McGregor, 21 Q.B.D. 544, Coleridge, C.J. In certain of the older authorities reference is made to a bare conspiracy, unexecuted, as criminal. See R. *v.* Rispal, 3 Burr. 1320. 1 Lev. 62, 125. 1 Ventr. 304. 1 Ld. Raym. 379. 1 Salk. 174. 1 Str. 193. T. Raym. 417.

(*l*) 'One alone cannot conspire.' Harison *v.* Errington [1565], Poph. 202. Cf. R. *v.* Thorp, 5 Mood. 221: Comb. 228.

(*m*) 1 Hawk. c. 72, s. 8. 3 Chit. Cr. L. 1141. In R. *v.* Herne, cited in R. *v.* Kinnersley, 1 Str. 193, 195, the indictment alleged that Herne with A., *et multis aliis*, did conspire to accuse a man of an offence; the grand jury ignored the bill as to A., but found it as to Herne, who was convicted; and it was moved in arrest of judgment, that there being an *ignoramus* as to A., Herne could not be guilty of conspiring with him; but the whole Court held that it was sufficient, it being found that he, *cum multis aliis*, did conspire, and that it might have been laid so at first.

(*n*) R. *v.* Manning, 12 Q.B.D. 241: 53 L. J. M. C. 85.

(*o*) R. *v.* Plummer, [1902], 2 K.B. 339: 71 L. J. K.B. 805, Wright, J., approving a dictum of Cockburn, C.J., in Robinson *v.* Robinson, 1 Sw. & Tr. 362, 392, 393. The Court might have allowed the plea of guilty to be withdrawn at any time before judgment. R. *v.* Plummer, at pp. 347, 349.

(*p*) R. *v.* Kinnersley, 1 Str. 193.

(*q*) R. *v.* Nichols, 2 Str. 1227: better reported 12 East, 412n. A conspiracy by N. with B., who had died before indictment found.

indictment was preferred (*r*), or before pleading not guilty (*s*), or were subsequently and separately tried. But it is not settled whether, in cases of separate trials of the conspirators, the acquittal of those tried later would avoid the conviction of one earlier tried and convicted for the same conspiracy (*t*). When the indictment alleges a conspiracy between several, a verdict that two or more, but not all, entered into the conspiracy will support a conviction (*u*).

In R. *v.* Sudbury (*v*), where only two out of three were found guilty of riot and there was no allegation of *cum aliis*, judgment was arrested. Holt, C.J., said, 'If the indictment had been that the defendants, with divers other disturbers of the peace, &c., had committed this riot and battery, and the verdict had been as in this case, the King might have had judgment.'

In R. *v.* Thompson (*w*), all the counts of the indictment alleged that A.,

(*r*) R. *v.* Scott [1761], 3 Burr. 1262. An indictment of four for riot. Conviction of two held good, though the other two had died before trial.

(*s*) R. *v.* Kenrick, 5 Q.B. 49.

(*t*) R. *v.* Plummer [1902], 2 K.B. 339, 344. It is said that where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried. R. *v.* Horne Tooke, 1 Chit. Burn. 823. See note (*w*), *infra*.

(*u*) R. *v.* Quinn, 19 Cox, 78 (Ir.), Fitzgibbon, L.J. But see O'Connell *v.* R., 11 Cl. & F. 155; 5 St. Tr. (N. S.) 1.

(*v*) 1 Ld. Raym. 484; 12 Mod. 262. Cited and adopted in R. *v.* Plummer [1902], 2 K.B. 339, 343, Wright, J.

(*w*) 16 Q.B. 832, Erle, J., *diss.* Campbell, C.J., Patteson, J., and Coleridge, J., rested the decision on the ground that 'other persons' must mean persons other than Tillotson and Maddock; and that the acquittal of those defendants, therefore, must have the same effect as if Thompson, Tillotson and Maddock had alone been charged with the conspiracy; in which case it was clear Thompson must have been acquitted. Campbell, C.J., said: 'The acquittal of two involves the acquittal of the third,' and Patteson, J., said: 'I cannot see how Thompson can be convicted of conspiring with persons unknown; upon the evidence he conspired, if at all, with Tillotson or Maddock.' Erle, J., was of opinion that, 'according to the rules of pleading, this charge, as to each individual, must be construed as if he were charged solely, and it follows that the acquittal of the two becomes immaterial; and the verdict may be found in any terms comprised in the indictment. The finding may be that Thompson conspired with Tillotson, or with Maddock, or with other persons unknown; and so there may be similar findings as to the others. Therefore if any one be found guilty, the verdict must stand as against him; the judge must take the opinion of the jury as to each, whatever may be the finding as to the others. "Are you of opinion that Thompson conspired with Tillotson?" "No." "With Maddock?" "No. But we are satisfied that he conspired with some one; we do not know whom." The conspiracy, then, cannot be truly predicated of either Tillotson or Maddock, because the jury do not know which of these two was the conspirator; they do, however, know that one of them was; so that against Thompson, the verdict should be that he conspired with some one, it is not known with whom.' R. *v.* Thompson was accepted as good law in R. *v.* Plummer [1902], 2 K.B. 339, 343, 345, and the criticisms on R. *v.* Thompson by Mr. Greaves, in the 4th edition of this work (vol. iii. p. 146), were treated as ill-founded in law. He said: 'It is quite an error to suppose that the word "other," as used in indictments, means "different from." It is a mere word of form, used like "further" and "afterwards." See R. *v.* Downing, 1 Den. 52. If the indictment had contained three counts, the first alleging a conspiracy between Thompson and Tillotson, the second between Thompson and Maddock, and the third between Thompson and divers other persons to the jurors unknown, and the facts had been as in this case, the verdict must have been not guilty on the first two counts, and guilty on the third; and yet each count in this indictment was in point of law exactly the same as such three counts.'

'The authorities seem to show, that if several persons are indicted for a riot or a conspiracy, and the jury acquit all except two in riot and one in conspiracy, the latter must also be acquitted. It is very confidently submitted that these authorities rest on a fallacy, viz., that because some are acquitted, therefore the others could not have been guilty of the offence together with those that are acquitted. The acquittal of A. necessarily amounts to no more than that A. was not proved to be guilty. Suppose A. and B. are indicted for a con-

B., and C. conspired, &c., 'with divers other persons to the jurors aforesaid unknown.' The jury stated their opinion, upon the evidence, to be that A. had conspired with either B. or C., but that they did not know with which. No evidence was given of participation by any other party; and thereon the judge directed a verdict of not guilty as to B. and C., and a verdict of guilty as to A.; and it was held that as B. and C. had been acquitted, the verdict could not be supported against A.

In R. *v.* Cooke (*x*), on an indictment against four for a conspiracy, two pleaded not guilty; one pleaded in abatement, to which plea there was a demurrer; and the fourth never appeared. Before the argument of the demurrer the record was taken down for trial, and one of the defendants who had pleaded not guilty acquitted, and the other found guilty of conspiracy with him who had pleaded in abatement. The demurrer was afterwards argued, and judgment of *respondeat ouster* given, whereupon a plea of not guilty was pleaded. The Court of King's Bench held that judgment might be pronounced upon the one found guilty before the trial of the other; for although it was possible that the latter might be acquitted, yet the Court were not warranted in coming to the conclusion that that would be so against the verdict that had been found, or in forbearing to pronounce judgment upon the defendant found guilty (*x*). In R. *v.* Ahearne (*y*), where three prisoners were indicted in Ireland for the (then capital) offence of conspiring to murder, and, having refused to join in their challenges, one of them was tried alone and convicted; it was held, on a case reserved, that he had been properly tried and convicted, and that there was no ground for respiting or arresting the judgment.

In R. *v.* Quinn (*z*), also an Irish case, the indictment was against eight persons for conspiring together to defraud a railway company by

spiracy, and A. has made a written confession that he did conspire with B., and B. with him, but the evidence fails as against B., is A. to be acquitted? Suppose, in such a case, A. had pleaded guilty, is his plea to be set aside because B. for want of evidence is acquitted? This shows that in fact one may be guilty, though the rest are acquitted, and that the doctrine in question rests on an entire fallacy.' This reasoning has been rejected as involving the dangerous theory that a verdict of not guilty does not fully establish the innocence of the person to whom it relates. R. *v.* Plummer [1902], 2 K.B. 339, 349, Bruce, J. See R. *v.* Stoddart [1909], 25 T. L. R. 612. Again it is conceived that a still more fatal objection to the doctrine exists. It is apprehended that the acquittal of B. can in no case be admissible in evidence for A. It is obvious that the conviction of A. would not be evidence against B. And the rule is, that 'no record of a conviction or verdict can be given in evidence, but such whereof the benefit may be mutual.' See R. *v.* Warden of the Fleet, Holt, 133; and other cases, 2 Phill. Evid. c. 1, s. 1.

(*x*) 5 B. & C. 538. 7 D. & R. 673. Littledale, J., said, 'If the other defendant shall hereafter be acquitted, perhaps this judgment may be reversed.' Mr. Greaves (Russell on Crimes (4th ed.), vol. iii. p. 146) queried this ruling on grounds to a large extent equally applicable to the case of a joint trial, saying: 'Such acquittal would not *necessarily* show that the verdict of guilty on the former trial was wrong, as witnesses might be dead or absent who were examined on the former trial, or the one defendant might have been convicted on his own confession, which would not be admissible against the other defendant.' But in R. *v.* Plummer [1902], 2 K.B. 239, 345, Wright, J., considered the criticism not justified by the authorities already stated in the text.

(*y*) [1852] 6 Cox, 6: 2 Ir. Rep. C. L. 381. In R. *v.* Plummer [1902], 2 K.B. 339, 344, Wright, J., seems to have wrongly inferred from the fact that the prisoners were sentenced to death, that the indictment was for murder.

(*z*) [1898] 19 Cox, 78, Fitzgibbon, L.J. He distinguished O'Connell *v.* R., 11 Cl. & F. 155: 5 St. Tr. (N. S.) 1.

stealing and selling uncancelled but used railway tickets. Three were convicted of conspiracy, two of misdemeanor, and two were acquitted. It was ruled that the count was good and was sustainable by a finding that two or more were concerned in the conspiracy charged.

In R. *v.* Duguid (*a*), it was held that D. could lawfully be convicted of conspiring with the mother of a child under fourteen to take the child by force from the possession of its lawful guardian, although sect. 56 of the Offences against the Person Act, 1861, under which such abduction is criminal, contains an express provision excepting from criminal liability a person who shall have claimed any right to the possession of such child. The mother was not tried with D. nor amenable to justice. The Court did not determine whether the mother came within the exception, but ruled that her immunity if established had no legal bearing on the question whether a conspiracy by D. with her to commit the statutory crime was criminal so far as concerned D (*aa*).

In consequence of the nature of the crime, it has been held where an indictment for conspiracy was tried in the Court of King's Bench, a new trial granted as to one of several convicted of conspiracy operated as a grant of a new trial as to the others convicted, although the grounds for the grant of the new trial applied only to the one. But where of those indicted for conspiracy some were convicted and some acquitted, the grant of a new trial in favour of those convicted did not affect the verdict of acquittal (*b*). A new trial can no longer be granted in England on conviction of any criminal offence (*c*); but the principles involved in the above rulings may have to be considered in the event of an appeal by one conspirator where several have been convicted.

Conspiracies to commit Offences Punishable by the Criminal Law.—Whatever doubt may exist as to other forms of conspiracy, it is clearly established that every conspiracy to commit an offence punishable by law is an indictable offence. Where the conspiracy is executed, it appears to merge in the completed offence (*d*). Conspiracies of this kind are merely auxiliary to the law which creates the principal crime (*e*).

It is immaterial whether the principal offence is a felony (*f*) or a misdemeanor (*g*), or whether it is an offence at common law or by statute (*h*),

(*a*) [1906] 75 L. J. K.B. 470: 70 J. P. 294. Cf. R. *v.* Whitchurch, 24 Q.B.D. 420.

(*aa*) In R. *v.* Crossman, 24 T. L. R. 157, on an application on behalf of the mother (who was out of the jurisdiction) to compel the withdrawal of a warrant against her for taking part in the conspiracy, the Court declined to decide, in the absence of the mother, whether she was liable for the conspiracy.

(*b*) R. *v.* Gompertz, 9 Q.B. 824. Cf. R. *v.* Quinn, 19 Cox, 78 (Ir.). As to the rule where one is convicted and the rest acquitted, see R. *v.* Plummer, *ante*, p. 47.

(*c*) 7 Edw. VII. c. 23, s. 20, *post*, Bk. xii. c. iv. For former practice see Archbold, Cr. Pl. (23rd ed.), 291: Crown Office Rules, 1906, rr. 156 *et seq.*: and Short & Mellor, Crown Practice (1st ed.), 253.

(*d*) See Ld. Raym. 711.

(*e*) Wright on Conspiracy, 80.

(*f*) Conspiracy to commit treason or treason felony is an overt act of treason or treason felony. Mulcahy *v.* R., L. R. 3 H. L. 306. For an indictment for conspiring to take from the United States Consul in Samoa and lynch a man committed for trial for murder, see Hunt *v.* R. [1878], Fiji Reports (Udal), 29.

(*g*) For precedents of conspiracies to commit riots see 2 Chit. Cr. L. 506, note (*a*). R. *v.* Vincent, 9 C. & P. 91. In R. *v.* Pollman, 2 Camp. 229, it seems to have been held that to purchase an office under the Customs was a misdemeanor at common law (see R. *v.* Vaughan, 4 Burr. 2494), and it was held that conspiring to obtain money by procuring an appointment to such office was indictable. See 49 Geo. III. c. 126, *post*, p. 621.

(*h*) See R. *v.* Best, [1705], 2 Ld. Raym. 1167.

and whether punishable on indictment or on summary conviction (*i*), or *brevi manu*, as in the case of contempt of court. And this form of conspiracy includes combination to violate the provisions of a statute (*j*), or of a by-law made, or a proclamation issued, under statutory authority, if the violation of the statute, by-law, &c., is a misdemeanor at common law, or visited by a specific criminal penalty (*k*); and also extends to include combination to commit a breach of the peace (*l*). The fact that conspiracy to commit felony is indictable, was recognised by the provision for payment out of public funds of the costs of prosecuting such an offence (14 & 15 Vict. c. 55, s. 2). A person may be convicted of conspiracy to commit a crime of which he could not, if he stood alone, be convicted. Thus, a woman has been held to have been properly convicted of conspiring with others to administer drugs to herself, or use instruments to herself, with intent to procure abortion (*m*), when it was proved that she believed erroneously that she was with child (*n*).

Convictions have been had for conspiracies to poison human beings (*o*) or horses (*p*), to commit forgery (*q*), larceny (*r*), marine barratry with intent to defraud underwriters (*s*), and prison breach (*t*), and to form an unlawful assembly (*u*). Conspiracy to murder is a statutory felony (*v*), as are certain combinations or agreements for the purpose of treason, felony, or sedition (*post*, p. 327).

In R. *v.* Brailsford (*w*), it was held to be criminal for two to conspire to obtain a passport from the Foreign Office in the name of one of them by falsely pretending that he desired to travel in Russia, and with intent that the passport should be used by another person. The passport was obtained and sent to the other person and used in Russia by a revolutionist. The conspiracy was laid as being in fraud of the Foreign Office to the injury, prejudice, and disturbance of the lawful free and customary intercourse between the King's subjects and those of the Czar, and to the public mischief of the King's subjects, and to the endangerment of peaceful relations between the King and Czar, and between their respective subjects. It was argued for the Crown that the offence was indictable at common law independently of conspiracy (*x*). This contention the Court considered well founded as to frauds and cheats, and apparently as to any other acts tending to produce a public mischief (*y*), and held that obtaining a passport by a false pretence, *i.e.*, cheating and deceiving

(*i*) R. *v.* Bunn, 12 Cox, 316, Brett, J. On the objections to this extension, see Wright on Conspiracy, 83.

(*j*) R. *v.* Thompson, 16 Q.B. 832, *ante*, p. 148. In that case it was said that as conspiracy is an offence at common law, if parties conspire to commit an offence created by statute, they may be indicted for such conspiracy, although the statute be repealed before the indictment is preferred.

(*k*) See Wright on Conspiracy, 83.

(*l*) 4 St. Tr. (N. S.) 1347.

(*m*) A felony within 24 & 25 Vict. c. 100, s. 58, *post*, p. 829.

(*n*) R. *v.* Whitchurch, 24 Q.B.D. 420. Cf. R. *v.* Duguid, 70 J. P. 294, *ante*, p. 150.

(*o*) R. *v.* Maudsley [1820], 1 Lew. 51.

(*p*) R. *v.* King [1820], 2 Chit. (K.B.), 217.

(*q*) R. *v.* Brittain [1848], 3 Cox, 76.

(*r*) R. *v.* Taylor, 21 L. T. (N. S.) 75.

(*s*) R. *v.* Kohn [1864], 4 F. & F. 68, *post*, p. 178.

(*t*) R. *v.* Desmond [1868], 11 Cox, 146.

(*u*) R. *v.* Hunt [1820], 3 B. & Ald. 566; 1 St. Tr. N. S. 171.

(*v*) 24 & 25 Vict. c. 100, s. 4, *post*, p. 835.

(*w*) [1905] 2 K.B. 730.

(*x*) They cited: R. *v.* Higgins, 2 East, 5, 21, Lawrence, J. R. *v.* Wheatly, 2 Burr. 1125, 1127; 1 W. Bl. 273, Lord Mansfield. Young *v.* R., 3 T. R. 98, 104, cit. Buller, J. R. *v.* Vaughan, 4 Burr. 2494.

(*y*) They relied on R. *v.* de Berenger, 3 M. & S. 67, and R. *v.* Dixon, 3 M. & S. 11.

the Foreign Office, was an act which would render a conspiracy to carry it into effect criminal, and that the particular conspiracy was clearly calculated and intended to produce a grave public mischief, because it sought to obtain by false representations and improper purpose the issue of a public document by a public department of state.

Conspiracy for seditious purposes is indictable, sedition itself being a criminal offence (*z*). In R. *v.* Vincent (*a*), some of the counts of an indictment charged the defendant with conspiring to cause a great number of persons to meet together for the purpose of exciting discontent and disaffection in the minds of the subjects of the Queen, and for the purpose of exciting the said subjects to hatred and contempt of the government and constitution, and it appeared that a large number of persons had assembled at meetings, at which violent speeches had been made respecting the government and constitution and the people's charter. Alderson, B., told the jury, 'The purpose which the defendants had in view, as stated by the prosecutors, was to excite disaffection and discontent, but the defendants say that their purpose was by reasonable argument and proper petitions to obtain the five points mentioned by their learned counsel. If that were so, I think it is by no means illegal to petition on those points. The duration of Parliaments and the extent of the elective franchise have undergone more than one change by the authority of Parliament itself; and with respect to the voting by ballot, persons whose opinions are entitled to the highest respect are found to differ (*b*). There can also be no illegality in petitioning that members of Parliament should be paid for their services by their constituents; indeed, they were so paid in ancient times, and they were not required to have a property qualification till the reign of Queen Anne (*c*), and are now not required to have it in order to represent any part of Scotland or the English Universities.' And he directed the jury to say whether they were satisfied that the defendants conspired to excite disaffection, and if they were to find them guilty of conspiracy.

The first count in an indictment against Daniel O'Connell (*d*) and others alleged that the defendants, intending to create discontent and disaffection amongst the subjects of the Queen, and to excite the said subjects to hatred of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to create discontent and disaffection amongst the subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution and to unlawful and seditious opposition to the government and constitution, and to stir up jealousies and ill-will between different classes of Her Majesty's subjects, and especially to promote among Her Majesty's subjects in Ireland feelings of ill-will

(*z*) R. *v.* Redhead Yorke, 25 St. Tr. 1003. R. *v.* Hunt, 1 St. Tr. (N. S.) 171; 3 B. & Ald. 566. O'Connell *v.* R., 11 Cl. & F. 155; 5 St. Tr. (N. S.) 51. R. *v.* McHugh [1901], 2 Ir. Rep. 569. See *post*, p. 327 *et seq.*, 'Sedition.' It is not seditious candidly, fully and freely to discuss public matters or criticise the Government, unless the discussion or criticism is under circumstances calculated or intended to create tumult, or statements are made inciting to violence. R. *v.* Burns, 16 Cox, 355, where the earlier authorities are discussed.

(*a*) 9 C. & P. 91. Cf. R. *v.* Shellard, 9 C. & P. 277.

(*b*) See the Ballot Act, 1872 (35 & 36 Vict. c. 33, *temp.*).

(*c*) Nor since 1858, when it was abolished by 21 & 22 Vict. c. 26.

(*d*) 11 Cl. & F. 155: 5 St. Tr. (N. S.) 1.

and hostility towards and against Her Majesty's subjects in the other parts of the United Kingdom, and especially in that part called England and further, to excite discontent and disaffection amongst divers of Her Majesty's subjects serving in the army; and further, to cause and procure, &c., divers subjects unlawfully and seditiously to meet and assemble together in large numbers, at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution; and further, to bring into hatred and disrepute the courts by law established in Ireland for the administration of justice, and to diminish the confidence of the said subjects in Ireland in the administration of the law therein, with the intent to induce the subjects to withdraw the adjudication of their differences from the cognizance of the said courts, and to submit the same to the determination of other tribunals to be constituted for that purpose. The count then alleged various overt acts done in order to excite discontent with, hatred of, and disaffection to the government, laws, and constitution. The second count was exactly like the first, but omitted the overt acts. The third count alleged that the defendants, intending to create discontent and disaffection amongst the subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to raise and create discontent and disaffection amongst the subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution, and to unlawful and seditious opposition to the said government and constitution, and to stir up hatred, jealousies, and ill-will between different classes of the said subjects, and especially to promote amongst the said subjects in Ireland feelings of ill-will and hostility against the said subjects in other parts of the United Kingdom, and especially in that part called England; and further, to excite discontent and disaffection amongst divers subjects serving in Her Majesty's army; and further, to cause and procure, &c., divers subjects to meet and assemble together in large numbers at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition of great physical force at such assemblies and meetings, changes in the government, laws, and constitution; and further, to bring into hatred and disrepute the courts in Ireland for the administration of justice, &c. The fourth count was the same as the third, omitting the charges as to creating discontent in the army, and the diminishing the confidence in the courts of law. The fifth count alleged that the defendants, intending to cause and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, and to unlawful and seditious opposition to the government and constitution, and also to stir up jealousies, hatred, and ill-will between different classes of the said subjects, and

especially to promote amongst the said subjects in Ireland feelings of ill-will and hostility against the subjects in the other parts of the United Kingdom, and especially in England. Tindal, C.J., in expressing to the House of Lords the opinion of the consulted judges, said: 'There can be no question but that the charges contained in the first five counts do amount, in each, to the legal offence of conspiracy, and are sufficiently described therein. There can be no doubt but that the agreeing of divers persons together to raise discontent and disaffection amongst the liege subjects of the Queen, to stir up jealousies, hatred, and ill-will between different classes of Her Majesty's subjects, and especially to promote amongst Her Majesty's subjects in Ireland feelings of ill-will and hostility towards Her Majesty's subjects in other parts of the United Kingdom, and especially in England—which charges are found in each of the first five counts—do form a distinct and definite charge in each, against the several defendants, of an agreement between them to do an illegal act (*e*); and it therefore becomes unnecessary to consider the other additional objects and purposes alleged in some of these counts to have been comprised within the scope of the agreement of the several defendants.

The eighth count in the indictment charged a conspiracy to bring the tribunals of justice into contempt, and to cause the subjects to withdraw their differences from the said tribunals, and to submit the same to other tribunals. The ninth was similar to the eighth, but substituted for withdrawing their differences, &c., 'to assume and usurp the prerogative of the Crown in the establishment of courts for the administration of the law.' The tenth count charged a conspiracy to bring into disrepute the tribunals for the administration of justice. And the eleventh count alleged that the defendants, intending by means of intimidation and demonstration of physical force, &c., by causing large numbers of persons to meet and assemble in Ireland, and by means of seditious and inflammatory speeches to be delivered to the said persons, and by means of publishing divers unlawful and seditious writings, to intimidate the Lords Spiritual and Temporal and Commons of the Parliament of the United Kingdom, and thereby to effect changes in the laws and constitution, unlawfully and seditiously did conspire, &c., to cause large numbers of persons to meet together in divers places and at divers times in Ireland, and by means of seditious speeches to be made at the said places and times, and by means of publishing to the subjects of the Queen unlawful and seditious writings, &c., to intimidate the Lords Spiritual and Temporal and the Commons of the Parliament of the United Kingdom, and thereby to effect and bring about changes and alterations in the laws and constitution. Tindal, C.J., in giving to the House of Lords the opinion of the consulted judges, said (*f*): 'We all concur in opinion that the object and purpose of the agreement entered into by the defendants, as disclosed upon these counts, is an agreement for the performance of an act, and the attainment of an object, which is a violation of the laws of the land. We think it unnecessary to state reasons in support of the opinion that

(*e*) *Qu.* a criminal act.

(*f*) 11 Cl. & F. 155; 5 St. Tr. (N. S.) 1.

an agreement between the defendants to diminish the confidence of Her Majesty's subjects in Ireland in the general administration of the law therein, or an agreement to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, are each and every of them agreements to effect purposes in manifest violation of the law. Upon the sufficiency of the eleventh count, no doubt whatever has been raised.'

Conspiracy to obtain money by getting from the lords of the treasury the appointment of a person to an office in the customs has been held a misdemeanor at common law. Counsel for the defendant proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of a coast waiter, and that, however reprehensible such a practice might be, it could only be made an indictable offence by Act of Parliament. But Ellenborough, C.J., said: 'If that be a question it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of R. *v.* Vaughan (*g*), it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor.' And Grose, J., in passing sentence, likewise observed that there could be no doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law (*h*).

Nuisance.—It is said to be criminal to conspire to injure the public health as by selling unwholesome food. Many acts tending to the injury of the public health are nuisances at common law, or punishable summarily, or on indictment, and conspiracies to commit such offences would be criminal under the rule stated, *ante*, p. 150. The selling unwholesome provisions may be in some cases treated as a cheat or fraud at common law (*i*). In R. *v.* Mackarty (*j*), the indictment charged that the defendants, F. and M., falsely and deceitfully intending to defraud T. C., &c., together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine, of him the said F., for certain goods of C.; and that, upon such bartering, &c., the said F. pretended to be a merchant, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines; and the said M., on such bartering, &c., pretended to be a broker, when, in fact, he was not, and that the said C., giving credit to the said deceits, did barter, sell, and exchange to F., and did deliver to M., as the broker between the said C. and F., for the use of F., goods, for the pretended new Portugal wine; and that M. and F., on such bartering, &c., affirmed that it was true new wine of Portugal, and was the wine of F., when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to F., to the great deceit and damage of the said C., and against the peace, &c. It is observed of this indictment, which was for a cheat at common law, that though it did not charge that the defendants *conspired eo nomine*, yet it charged that they together, &c., did the acts imputed to them, which might be considered to be

(*g*) 4 Burr. 2494.
(*h*) R. *v.* Pollman, 2 Camp. 229.
(*i*) *Vide post*, Bk. x. p. 1501, *et. seq.*; Bk. xi. c. iii.
(*j*) 2 Ld. Raym. 1179; 3 id. 325; 6 Mod. 301; 1 Salk. 286; 6 East, 133, 141 cit.

tantamount (*k*). The case was considered as one of doubt and difficulty, but it seems that judgment was ultimately given for the Crown (*l*). In Treeve's case (*m*) it was ruled that an indictment lay for wilfully, maliciously, and deceitfully supplying to prisoners of war food unfit for human food. According to the statement of Alverstone, C.J., in R. *v.* Brailsford [1905], 1 K.B. 730–745, the *ratio decidendi* was not that stated in 1 East, P.C. 822, that to do as alleged *lucri causa* was indictable, but that the acts tended to produce a public mischief.

Conspiracies as to Paupers.—By the Poor Law Act, 1844 (7 & 8 Vict. c. 101), s. 8, it is a misdemeanor for any officer of any union, parish, or place to induce any person to contract a marriage by any threat or promise respecting any application to be made or order to be enforced with respect to the maintenance of a bastard child.

Conspiring and contriving, by sinister means, to marry a pauper of one parish to a settled inhabitant of another, in order to bring a charge upon it, has been held indictable (*n*). It is observed respecting a conspiracy of this kind, that, considering the offence is a prostitution of the sacred rites of marriage, for corrupt and mercenary purposes, and that, by artful and sinister means, persons are seduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming so close an union, and on which the happiness of them both so entirely depends; and this for the sake of some gain or saving to others who bring about such marriage; in this light it seems a fit ground for criminal cognisance, not only as being a great oppression upon the parties themselves more immediately interested, but as an offence against society in general, being an abuse of that institution by which society is best continued and legal descents preserved, and a perversion of the purposes for which it was ordained (*o*). Upon an indictment against parish officers for a conspiracy of this kind, it appeared that a man of one parish having gotten with child a woman belonging to another parish, the defendants had agreed with the man (who was of the age of twenty-nine), with the approbation of his father, to give him two guineas if he would marry the woman, and that he afterwards married her on such condition, and received the money from the defendants immediately after the marriage; and it was also sworn, both by the man and the woman, that they were willing to marry at the time. Buller, J., directed an acquittal, notwithstanding the proof of the money having been given to procure such consent; and this after the putative father had been arrested under a justice's warrant, and was in custody of the overseers. He ruled that it was necessary, in support of such an indictment, to shew that the defendants had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage without the voluntary consent or inclination of the parties themselves; and

(*k*) The indictment was for bartering pretended port wine alleged to be unwholesome. In R. *v.* Southerton, 6 East, 133, Ellenborough, C.J., said that the vending of such an article was clearly indictable, a deceit or public cheat, but the indictment was not framed for conspiracy. In R. *v.* Wheatly, 2 Burr. 1127, 1129, Denison, J., said that R. *v.* Mackarty was a case of conspiracy as well as of false tokens.

(*l*) 2 East, P.C. c. 18, s. 5.

(*m*) [1796] 2 East, P.C. 821.

(*n*) R. *v.* Tarrant, 4 Burr. 2106. R. *v.* Herbert, 1 East, P.C. 461. R. *v.* Compton, Cald. 246. See R. *v.* Edwards, 8 Mod. 320.

(*o*) 1 East, P.C. 461.

that the act of marriage, being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means (*p*).

Where the indictment stated the marriage to have been procured by threats and menaces against the peace, &c., it was held sufficient, without averring in terms that the marriage was against the will or consent of the parties, though that must be proved (*q*).

And an indictment does not lie for conspiracy merely to exonerate one parish from the charge of a pauper and to throw it on another, nor for conspiring to cause a male pauper to marry a female pauper for that purpose, it not being stated that the conspiracy was to effect such marriage by force, threats, or fraud, or that it was so effected in pursuance of the conspiracy (*r*). An allegation in such an indictment that a poor unmarried woman in a parish was with child is not equivalent to an allegation that she was chargeable to such parish (*s*). And it has been doubted whether an allegation that the defendants conspired together for the purpose of exonerating, is equivalent to allegation that they conspired to exonerate (*t*).

Upon an indictment for conspiring to give and giving a man money to marry a poor helpless woman, who was an *inhabitant* of B., in order to settle her in the parish of A., where the husband was settled, judgment was arrested, because it was not averred that she was last legally settled in B. (*u*). But it seems perfectly immaterial where the woman's settlement was, if it were not in A., provided that fact distinctly appeared (*v*). It was, however, usual to aver the settlements of the parties in their respective parishes, and also that the woman was chargeable to her own parish at the time, though this latter has never been adjudged to be necessary, nor seems to be required according to the general rules which govern the offence of conspiracy (*w*): for in such cases both the purpose and the means used are clearly unlawful.

Conspiring to let a pauper land to the intent that he may gain a settlement is illegal (*x*).

Acts Contra Bonos Mores.—Conspiracy to do acts regarded as *contra bonos mores*, is punishable by ecclesiastical law, but not criminal or tortious by common law or statute. In the seventeenth century the Court of King's Bench assumed jurisdiction to superintend offences *contra bonos mores* (*y*).

Conspiring to charge a man with being the father of a bastard child is indictable, whether the intent be to extort money or not. Where the object is stated to be to extort money, it is immaterial whether the woman

(*p*) R. *v.* Fowler, 1 East, P.C. 461. And the learned judge said that this point had been so ruled several times by several judges.

(*q*) R. *v.* Parkhouse, 1 East, P.C. 462, Buller, J.

(*r*) R. *v.* Seward, 1 A. & E. 706. Cf. a precedent in 4 Wentworth, 129, to bring a pregnant pauper to settle in a parish.

(*s*) Per Denman, C.J., and Taunton, J., ibid.

(*t*) Per Williams, J., ibid., citing R. *v.* Nield, 6 East, 417. But in R. *v.* Ridgway, 5 B. & Ald. 527, R. *v.* Nield was doubted by Tenterden, C.J.

(*u*) R. *v.* Edwards, 8 Mod. 320.

(*v*) 1 East, P.C. 462.

(*w*) Id. ibid.

(*x*) R. *v.* Edwards, 8 Mod. 320.

(*y*) R. *v.* Delaval [1763], 3 Burr. 1434, 1438, per Lord Mansfield.

is or is not pregnant (*z*), or whether the charge is or is not false (*a*), or that the child was likely to be chargeable (*a*). In a case where no intent to extort was alleged, the Court doubted upon the objection that the charge was not stated to be false, but ultimately held the indictment to be sufficient, as the defendants were at least charged with conspiring to accuse the prosecutor of fornication, and although that was a spiritual offence, conspiring to accuse of it was a temporal offence (*a*).

The same rule seems to have been applicable to conspiracies to charge with heresy, or any other spiritual defamation (*a*) or to charge another with slanderous matter (*c*). Combinations to subvert religion are said to be criminal (*d*).

It has been held criminal to conspire to prevent the burial of a corpse, or take up dead bodies for dissection (*e*). Digging up dead bodies without lawful authority is indictable at common law (*f*), and it is also contrary to ecclesiastical law and modern statutes (*g*).

In the following cases it has been held criminal at common law to conspire to debauch females under twenty-one. Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley (she being under the custody, &c., of her father), and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him; and, further, the defendants were charged, that in prosecution of such conspiracy, they took away the Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady and to the evil example, &c. The defendants were found guilty, though there was no proof of any force, but, on the contrary, it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shewn that any artifice was used to prevail on her to leave her father's house; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control (*h*).

A count charged that the prisoners did between themselves conspire,

(*z*) R. *v.* Armstrong, 1 Ventr. 304; 1 Lev. 62. R. *v.* Timberley, 1 Sid. 68. See Wright on Conspiracy, 21.

(*a*) R. *v.* Best, 2 Ld. Raym. 1167. *Vide* 1 Hawk. c. 72, s. 8. R. *v.* Hollingberry, 4 B. & C. 329. R. *v.* Jacobs, 1 Cox, 173. The truth or falsity of the charge may be material on the question of intent.

(*c*) See R. *v.* Armstrong, *supra*. R. *v.* Best, 1 Salk. 174. R. *v.* Kinnersley, 1 Str. 193.

(*d*) Fitzgibbon, 66. *Vide post*, p. 393.

(*e*) See R. *v.* Young, 2 T. R. 733, cit.: 2 Chit. Cr. L. 36.

(*f*) R. *v.* Lynn, 2 T. R. 733.

(*g*) See *post*, Bk. xi. c. v.

(*h*) R. *v.* Lord Grey, 9 St. Tr. 127; 1 East, P.C. 460. In Wright on Conspiracy, 26, 106, it is suggested that the offence charged was not conspiracy but abduction from her father's house and procurement of a girl of seventeen, and that this offence was punishable at common law. The word *conspirantes* is regarded by Mr. Wright as meaning 'contriving.'

combine, confederate, and agree together knowingly and designedly to procure, by false representations, false pretences, and other fraudulent means, J. C., a poor child, under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man whose name was to the jurors unknown, and, upon a case reserved, the judges were unanimously of opinion that this count charged an indictable offence at common law (*i*).

A count alleged that the prisoners unlawfully conspired, &c., to solicit, persuade, and procure, and in pursuance of the said conspiracy did unlawfully solicit, incite, and endeavour to procure L. M., an unmarried girl, within the age of eighteen years, to become and be a common prostitute, and to commit whoredom and fornication for lucre and gain with men; and it was urged, in arrest of judgment, that the count was bad, as it did not aver that the girl was chaste; the fact of a loose woman committing fornication was not punishable by law; but it was held that the count was good, as it charged a conspiracy to bring about an illegal condition of things (*j*).

In R. *v.* Delaval (*k*), leave was given to exhibit a criminal information against a master, an attorney, and a gentleman to assign over a female apprentice by her own consent for purposes of prostitution.

In R. *v.* Robinson and Taylor (*l*), a woman was indicted for conspiring with a man that he should personate her master, and in that character should solemnise a marriage with her, for the purpose of afterwards raising a specious title to the property of the master, in pursuance of which conspiracy the parties intermarried. It was held that it was the province of the jury to collect, from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed, and that it was not necessary to prove any direct or immediate injury (*l*). Marriage under a false name is now a criminal offence (*m*).

In R. *v.* Serjeant (*n*) the defendant was held to have been properly convicted on an indictment, which charged that M. A. W. was a person of ill-fame and bad character, and a common prostitute, and that W. B. S. was an infant within the age of twenty-one years, and that M. A. W. and P. D. and S. J., intending to defraud the said W. B. S. of his property,

(*i*) R. *v.* Mears, 2 Den. 79: 20 L. J. M. C. 59. See Wright on Conspiracy, p. 33. The indictment also contained two counts framed to charge an attempt to commit an offence under 12 & 13 Vict. c. 76 (rep. 1891, S. L. R.), but no opinion was expressed as to these counts. By ss. 4 & 5 (1) of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), having or attempting carnal knowledge of a girl under sixteen is criminal, and by s. 3 (2) it is criminal by false pretences or false representation to procure any woman or girl not being a common prostitute or of known immoral character to have any unlawful carnal connection.

(*j*) R. *v.* Howell, 4 F. & F. 160, Bramwell, B., and Russell Gurney, Recorder. The dicta of Bramwell, B., go too far. See Wright on Conspiracy, 106. By s. 1 of the Criminal Law Amendment Act, 1885, it is criminal to procure or attempt to procure any woman or girl to become either within or without the King's dominions a common prostitute.

(*k*) [1763] 3 Burr. 1434: 1 W. Bl. 410. It is suggested in Wright on Conspiracy, p. 32, that it is an offence at common law for a master to induce his apprentice to practise prostitution for his profit.

(*l*) 1 Leach, 37; 2 East, P.C. 1010. In Wade *v.* Broughton, 3 V. & B. 172, it was said that persons conspiring to procure the marriage of a female for the sake of her fortune may be indicted for a conspiracy.

(*m*) *Vide post*, p. 1013.

(*n*) Ry. & M. 352.

conspired for the purpose aforesaid to procure a marriage to be solemnised between the said W. B. S. and the said M. A. W., by means of a false oath to be taken by the said M. A. W., and by divers false pretences, and without the consent of the mother of the said W. B. S., his father being dead, and that the said M. A. W. and P. D. and S. J., in pursuance of the said conspiracy, did prevail on the said W. B. S. to consent to marry the said M. A. W., and by means of such persuasion, and by means of a false oath taken by the said M. A. W., in order to obtain a licence for the solemnisation of marriage between the said W. B. S. and the said M. A. W., did cause the said W. B. S. to marry the said M. A. W., and a marriage by such licence was accordingly solemnised between them, without the leave of the mother of the said W. B. S., who then was such infant as aforesaid.

In Gibbon Wakefield's case (*o*), an indictment was held to lie for conspiring to carry away a woman under twenty-one from the custody of her parents and instructors, and afterwards to marry her to one of the offenders, contrary to the provisions of 4 & 5 Ph. & M. c. 8, ss. 3 & 4 (rep.), and also for conspiring to commit the capital felony (under 3 Hen. VII. c. 2, s. 1 (rep.)) of taking away an heiress against her will, and afterwards marrying her to one of the defendants. The young lady, who was the heiress of a gentleman of large fortune, and was only fifteen years of age, was induced to leave the house where she had been placed, by means of a fictitious letter, fabricated by the defendants, who conveyed her to Gretna Green, where she was induced by means of false representations to go through the ceremony of a Scotch marriage, and to consent to become the wife of one of the defendants: and the defendants were convicted.

Public Justice.—All combinations to subvert public justice are now regarded as indictable. They fall into three classes:—

1. Conspiracies to make false accusations of crime or unfounded civil claims.
2. Conspiracies to threaten to make false accusations or claims.
3. Conspiracies to interfere with the fair trial of pending proceedings.

Conspiracies to make False Charges.—According to Sir R. S. Wright, conspiracy is a crime of statutory origin (*p*), and historically the oldest form of criminal conspiracy is that defined by the old statutes and ordinances, 28 Edw. I. c. 10 (*q*), and 33 Edw. I. But in O'Connell *v.* R. (*r*), Tindal, C.J., after saying that 'The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means,

(*o*) R. *v.* Wakefield, 2 Lew. 1. The marriage being in Scotland, an indictment for felony under 3 Hen. VII. c. 2, s. 1, could not have been supported, and there was no evidence to support an indictment under 4 & 5 Ph. & M. c. 8, s. 4. An indictment was preferred upon 4 & 5 Ph. & M. c. 8, s. 3, but no judgment given upon it. See Murray's report of the case.

(*p*) It is said that a false indictment is no crime as referred to the individual, but that a conspiracy to prefer one subjected the offenders to the villainous judgment. 1 Edw. III. st. 2, c. 11; 2 Co. Inst. 384. This judgment does not seem to have been pronounced since the time of Edw. III. R. *v.* Spragg, 2 Burr. 996, 997.

(*q*) This statute seems to give only civil remedies.

(*r*) 13 Cl. & F. 155, citing R. *v.* Best, 2 Ld. Raym. 167, and R. *v.* Edwards, 8 Mod. 320.

something which in itself may be indifferent, or even lawful,' adds 'that it was an offence known to the common law, and not first created by the 33 Edw. I. stat. 2 (*s*), is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be "a definition of conspirators." It has accordingly always been held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not.'

The description of conspirators in the *ordinacio de conspiratoribus* (33 Edw. I.) (*t*), is that 'conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved (*s*): and such as retain men in the country with liveries or fees for to maintain their malicious enterprises, and to drown the truth; and this extendeth as well to the takers, as to the givers; and stewards and bailiffs of great lords, who by their seigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves' (*u*). The ordinance is repealed as to combinations with respect to wages (*v*), and the definition contained in it is, of course, not exhaustive of the varieties of conspiracy (*w*).

One of the oldest definitions of conspiracy is 'a consultation and agreement between two or more to appeal, or indict an innocent person falsely and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterwards the party is lawfully *acquitted* by the verdict of twelve men' (*x*).

From the statutory definition it seems clearly to follow that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution or not (*y*).

It appears not only from the words of the statute but also from the plain reason of the thing, that no confederacy whatsoever to maintain a

(*s*) Appeals of felony were abolished in 1819. (59 Geo. 3 c. 46, rep.)

(*t*) Sometimes cited as 21 Edw. I.

(*u*) The latter part of the ordinance deals with maintenance (*q. v. post*, p. 587). In some old books confederacy is applied to agreements to maintain, and conspiracy to agreements to indict. See Wright on Conspiracy, 18.

(*v*) By 6 Geo. IV. c. 129, s. 2. As to combinations affecting trade, see *post*, p. 176.

(*w*) R. *v.* Tibbits [1902], 1 K.B. 77, 89.

(*x*) 3 Co. Inst. 143. 4 Bl. Com. 136.

(*y*) 1 Hawk. c. 72, s. 2. In R. *v.* Spragg, 2 Burr. 993, 998, Serjeant Davy said: 'There is a distinction between a writ of conspiracy and an indictment for conspiracy. In an action the damage is the gist of the action; and therefore the writ and declaration must charge "that he was indicted and sustained damage"; but that is not necessary in an indictment, which is for an offence against the public. And this distinction explains Lord Coke's meaning in 3 Inst. 143.'

suit can come within the words of the 33 Edw. I. stat. 2, unless it is both false and malicious (*z*).

By the conjoint effect of the ordinance and the common law (*a*), it is criminal unlawfully to agree to injure any person by a false charge, whether the offence charged is a temporal or an ecclesiastical offence (*b*), and whether it is treason felony or misdemeanor, or merely a charge affecting his credit or reputation.

This form of conspiracy is not criminal if the charge was to be preferred honestly and with reasonable belief in its truth (*c*). Several persons may lawfully meet together and consult to prosecute a guilty person, or one against whom there is probable cause of suspicion; but not to prosecute one who is innocent, right or wrong (*d*). And associations to prosecute felons, and even to put the laws in force against political offenders, are lawful (*e*).

It seems not to be any justification of a conspiracy to carry on a false and malicious prosecution, that the indictment which was preferred, or intended to be preferred in pursuance of it, was insufficient, or that the Court wherein the prosecution was carried on or designed to be carried on had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was, in truth, in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a conspiracy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, is criminal (*f*). On an indictment for wickedly and unlawfully conspiring to accuse another of taking hair out of a bag, without alleging it to be an unlawful and felonious taking, it was said by Lord Mansfield that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and that whether the conspiracy were to charge a man with criminal acts or such only as may affect his reputation, it was sufficient (*g*).

It is immaterial whether the conspirators proceed to indict the object of the conspiracy or whether they stop short at the formation of the conspiracy or at any point short of the actual indictment and trial. Where the indictment has been preferred and tried it is not essential to prove acquittal (*h*) to found an indictment for conspiracy to prefer the charge.

In R. *v.* M'Daniel, the defendants were charged with a conspiracy, in causing a man to be executed for a robbery, of which they knew he was innocent, with intent to get into their possession the

(*z*) 1 Hawk. c. 72, s. 7.

(*a*) In 1 Hawk. c. 72, s. 2, it is said to be safer and more advisable to indict at common law because it does not seem to have been resolved that persons offending by a false and malicious accusation against another are indictable under the statute.

(*b*) R. *v.* Best, 2 Ld. Raym. 1167; 1 Salk. 174.

(*c*) R. *v.* Jacobs, 1 Cox, 173.

(*d*) R. *v.* Best, *ubi sup.*; and see 1 Hawk. c. 72, s. 7.

(*e*) R. *v.* Murray [1823], Abbott, C.J., 1 Chit. Burn's Just. 817; Matth. Dig. 90. The law as to maintenance does not apply to the maintenance of criminal proceedings. See *post*, p. 588.

(*f*) 1 Hawk. c. 72, s. 3.

(*g*) R. *v.* Rispal, 3 Burr. 1320; 1 W. Bl. 368. Cf. Pippet *v.* Hearn, 5 B. & Ald. 634.

(*h*) 2 Hawk. c. 72, s. 2. See R. *v.* Spragg, 2 Burr. 993, 998. In this case the conspiracy was executed by actual indictment.

reward offered by Act of Parliament (*i*). And it would have been equally a conspiracy, though the defendants had failed in their infamous design, and the man had been acquitted.

2. *A conspiracy to indict for the purpose of extorting money* is criminal whether the charge is true or false (*j*), and so is a conspiracy to enforce by legal process the payment of money known by the conspirators not to be due (*k*). A conspiracy to threaten prosecution or exposure, or injury, with a view to extort are clearly criminal, because such threats by an individual are criminal (*l*), either absolutely or when made without reasonable and probable cause for the demand made (*m*).

In the case of a conspiracy to extort, it is immaterial whether the charge or imputation threatened to be made is true or false (*n*).

Where the plaintiff had been arrested at the suit of C., and B. had become bail for her, and some proceedings had been taken against him as bail, and B., C., and others went to the plaintiff's lodgings, and B. said he must have his money or the plaintiff must go to gaol, and stated that two others were officers, which was not the fact; and the plaintiff being frightened, delivered to B. a watch and other articles, and two of the others wrote two papers, which were signed by the plaintiff and B., and which papers stated that the articles were deposited with B. as a security; Lyndhurst, C.B., held that, as the defendants all acted in concert, they were guilty of a conspiracy, for which they might all have been indicted (*o*).

3. *Conspiracies to interfere with the fair trial of proceedings, civil or criminal*, are indictable (*p*). The interference itself is in many, if not in all cases summarily punishable as contempt of court (*q*), if the proceedings are pending in a superior court of record, and is indictable in whatever court the proceedings are pending (*r*).

The following conspiracies have been held criminal:—

To interfere with the course of Justice, or to pervert the minds of magistrates or jurors, by publishing, pending criminal proceedings, matter calculated to prejudice a fair trial, *e.g.*, by publishing in newspapers assertions of the guilt or imputations against the character of a prisoner awaiting trial (*s*).

To dissuade or prevent witnesses from giving evidence (*t*), or to prevent

(*i*) 19 St. Tr. 745; 1 Leach, 45. And see Fost. 130. It would seem that the only objection to this being treated as a conspiracy was that which might arise from its being considered as a crime of the highest degree (*i.e.*, murder), in which the misdemeanor would be merged. As to the impropriety of prosecuting for conspiracy when the offence contemplated has been completed, see R. *v.* Rowlands, 5 Cox, 497; R. *v.* Boulton, 12 Cox, 87; R. *v.* Goodfellow, 10 Canada Cr. Cas. 424.

(*j*) R. *v.* Hollingberry, 4 B. & C. 329. Cf. R. *v.* Jacobs, 1 Cox, 173.

(*k*) R. *v.* Taylor, 15 Cox, 265, 268.

(*l*) 24 & 25 Vict. c. 96, ss. 44-49 (threats to accuse of crime, &c.); 24 & 25 Vict. c. 100, s. 16 (threats to murder); 24 & 25 Vict. c. 97, s. 56 (threats to burn or destroy); 6 & 7 Vict. c. 96, s. 3 (threats to publish libel), *post*, Vol. ii. pp. 1156 *et seq.*

(*m*) See R. *v.* Chalmers, 10 Cox, 450 (C. C. R.); and cf. R. *v.* Craig [1903], 29 Victoria L. R. 28.

(*n*) R. *v.* Hollingberry, *ubi sup.*

(*o*) Bloomfield *v.* Blake, 6 C. & P. 75.

(*p*) This form of conspiracy is described in the argument in R. *v.* Mawbey, 6 T. R. 619, as one 'where the subject-matter is *malum prohibitum* as referred to the individual, and the criminality in law is thereby aggravated when executed.'

(*q*) See *post*, p. 537.

(*r*) R. *v.* Parke [1903], 2 K.B. 432. R. *v.* Davies [1906], 1 K.B. 32.

(*s*) R. *v.* Tibbits [1902], 1 K.B. 77, where the earlier authorities are collected.

(*t*) R. *v.* Lawley, 2 Str. 904; 1 Hawk. c. 21, s. 15. R. *v.* Steventon, 2 East, 362. In R. *v.* Gray [1903], 22 N. Z. L. R. 52, an indictment was preferred for dissuading a witness from giving evidence. Cf. R. *v.* Loughran, 1 Crawf. & Dix. (Ir.), 79.

a witness from attending the trial (*u*), or to prepare witnesses to suppress truth (*v*). To bribe or tamper with jurors (*w*), or to corrupt judges (*x*). Deceit and collusion in Courts of Justice by submitting fabricated evidence or otherwise (*y*). As to conspiring to indemnify bail, see R. *v.* Stockwell, 66 J.P. 376.

Secreting Witness.—A count alleged that S., J., and B. had been committed for trial for obtaining money by false pretences from H., and that H. agreed with W. and P. and the wife of B., intending to defeat the due course of law, that H. should not attend to prosecute or give evidence, and should receive, in consideration thereof, 400*l.* from the said wife of B., and then alleged that H. did receive the 400*l.* The three following counts alleged the object to be to defeat and obstruct the due course of law. The averments were proved. For the defendants it was alleged that B. had such influence over H. that the latter had made an affidavit exculpating B. from any participation in the fraud, and that he was thus placed in the dilemma that, if he did not prosecute, he forfeited his recognisances, and, if he did prosecute, he might be indicted for perjury; and that P., who was his guardian, in order to extricate his ward from this position, had been a party to the compromise, but without any intention to do wrong, or to obstruct the course of justice. But Campbell, C.J., held that, if the necessary effect of the agreement was to defeat the ends of justice, that must be taken to be the object; and the jury were directed to say, on the first and second counts, whether the defendants did not agree not to prosecute as therein alleged; and on the third and fourth counts whether they conspired to obstruct and defeat the ends of justice. If they did so agree and conspire, whatever might be their private reasons, it was the duty of the jury to convict the defendants (*z*).

Fabricating Evidence.—In R. *v.* Mawbey (*a*), it was held that a certificate by justices of the peace that an indicted highway is in repair, is a legal instrument, recognised by the courts of law, and admissible in evidence after conviction, when the Court is about to impose a fine; and that, consequently, it was illegal to conspire to pervert the course of justice by producing a false certificate in evidence to influence the judgment of the Court. The indictment stated that a highway was indicted as being out of repair, and a plea of not guilty, but that it was intended to apply to withdraw the plea and plead guilty; that two justices of the county, and two other persons, conspired to pervert the course of justice

(*u*) R. *v.* Hall, 2 W. Bl. 1110. In R. *v.* Roderick, at the Glamorgan Summer Assizes (Aug. 1906), before Jelf, J., two persons were convicted of conspiring to keep away from the assizes a girl who was prosecutrix in a charge of criminal assault, by sending her to the United States.

(*v*) 3 Co. Inst. 106. Hollis's case, Hob. 271; see 2 Show. 1. It is incitement, procurement, or subornation, of perjury.

(*w*) Co. Litt. 157. 32 Hen. VIII. c. 9, s. 3. 6 Geo. IV. c. 50, s. 61. 1 Wms. Saund. 300. 1 Ld. Raym. 148. 1 Burr. 510. 4 T. R. 285, *vide post*, p. 598.

(*x*) 3 Edw. I. c. 29. 2 Co. Inst. 212, 217.

(*y*) R. *v.* Vreones [1891], 1 Q.B. 360. See 3 E. 1 (*Stat. West.* 1), c. 29 (deceits by pleaders or others, not repealed).

(*z*) R. *v.* Hamp, 6 Cox, 167. Campbell, C.J., held that the facts did not support counts charging a conspiracy to obtain money from the wife of Broome, with intent to cheat him of it. The first count had only the word 'agree' and not conspire, and on its being said that this count did not charge a conspiracy, Lord Campbell said, 'Nothing turns on that. Conspire is nothing; agreement is the thing.'

(*a*) 6 T. R. 619.

and impose on the Court by producing a false certificate from the two defendants, who were justices, that the road was in repair, and that they did so. There was a verdict against the two justices, and a rule was obtained to arrest the judgment, but after full argument was discharged. Ashhurst, J., said: 'The principal question is whether a conspiracy to pervert the course of justice by producing in evidence a false certificate be or be not a crime? It seems to me a greater offence can hardly be stated than that of obstructing or perverting the course of justice, on which the lives and properties of all the subjects depend.' Grose, J., said: 'It is laid down in some of the cases that an attempt to persuade another not to give evidence in a Court of justice is indictable; then it cannot be doubted but that an attempt to mislead the Court by misrepresentation is equally criminal. The course of justice is perverted if the certificate of the justices be false. If they agree to certify that a road is in repair for the purpose of perverting the course of justice it is a crime and indictable; and it is not necessary that they should know at the time of such agreement that the road is out of repair; it is sufficient that they did not know that the fact which they certified to be true was true.' Lawrence, J., said: 'The question is, whether a conspiracy to do an act from which the public may receive any damage be or be not indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the Court of the Assizes were not bound to receive the certificate of the defendants, it not being on oath. But on examination it appears that the practice of receiving the certificates of magistrates respecting the state of roads, has existed as far as the memory of living persons extends, and the books carry it still further back. I have not been able to discover how or when the practice of receiving these certificates arose; but a practice that has been adopted in the Courts at least as long back as the reign of Charles the First, goes a great way to show what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops with respect to marriages are received; the customs of London are certified by the recorder; so formerly were certificates received from the captain of Calais; and in Cro. Eliz. 502, this court said that they would give credit to the certificates of the judges in Wales respecting the practice of their Court, and that the custom of the Court is a law in that Court.'

Where one brother had executed a conveyance of land to another for the avowed object of giving the latter a colourable qualification to kill game, and to get rid of an information then pending against him, it seems to have been considered as quite clear that they were both guilty of conspiracy (*b*).

Conspiracy to Cheat and Defraud.—It is said that private deceits coupled with conspiracy are indictable (*c*), and it is clearly criminal to conspire to commit public frauds in trade (*d*) or public cheats (*e*), whether

(*b*) Doe d. Roberts *v.* Roberts, 2 B. & Ald. 367.

(*c*) 6 Mod. 42, 301. R. *v.* Wheatly, 2 Burr. 1127, 1129. R. *v.* Mackarty, 6 Mod. 301; 2 Ld. Raym. 1179. 3 Ld. Raym. 325. 2 Str. 866.

(*d*) Comb. 16. 1 Sess. Cas. 217. 1 Sid. 409. 1 Ventr. 13. In Canada it has been held not indictable to conspire 'to defraud a candidate at an election (to a provincial legislature), the electors of the division, and the public,' by illegally obtaining the return of the opposing candidate. R. *v.* Sinclair [1906], 12 Canada Cr. Cas. 20.

(*e*) See *post*, vol. ii. p. 1501. 2 Ld. Raym. 865. 1 Barnard. (K.B.) 330. 1 Latch. 202. 1 Rolle Rep. 2. 5 St. Tr. 486.

the fraud or cheat, if done by an individual without conspiracy would give only a ground for civil remedies at law or in equity, or would be criminally punishable. Conspiracies to obtain property by false pretences may be treated as conspiracies to commit a crime punishable by law (*f*). But it is usual also to charge the conspiracy as one to cheat by subtle means and devices (*g*). And it is under the head of conspiracy that many forms of swindling are reached by the criminal law.

Sales.—Thus it is criminal to conspire to defraud another in the sale of goods or chattels. Thus where the defendants conspired to make a false representation that horses were the property of a private person and not of a horse-dealer, and were quiet to ride and drive, and thereby induced a gentleman to buy them at a large price, they were held to have been rightly convicted on a count which charged them with conspiring by false pretences and subtle means to cheat the gentleman of his money (*h*).

An indictment against B. and C. for conspiracy alleged that one S. sold to B. a mare for £39, and that the prisoners, whilst the said sum was unpaid, conspired by false and fraudulent representations that the said mare was unsound of her wind, and that she had been examined by a veterinary surgeon, who had pronounced her a roarer, and that B. had sold her for £27 to induce S. to receive a much less sum in payment for the said mare than B. had agreed to pay S. for the same, and thereby to cheat S. of a large part of the said sum agreed to be paid for the said mare. The mare had been sold by S. to B. for the price as alleged on credit. The prisoners afterwards conspired to send a false account of the mare to S., and thereby to get him to forgo part of the agreed price; and sent a letter to S. stating that the mare was unsound and had been examined by a veterinary surgeon, and he had pronounced her a roarer. In consequence of this letter S. saw C., who stated that he had examined the mare and that she was unsound, which he knew to be false. S. afterwards saw B., who told him that he had sold the mare for £27 only (which was false), and persuaded him to receive that sum in satisfaction of his claim, but no receipt or other discharge was given. Upon a case reserved, it was held that the indictment was sustainable, and that the facts given in evidence did sustain it. The substance of the charge was that the prisoners conspired to use unlawful means, namely, false representations, to induce the prosecutor to forgo a part of his claim; and there was no force in the argument that, because the prisoners did not by means of their false representations alter the right of the prosecutor to his full claim, the indictment is not sustainable; since in no case where a change is made in the possession of a chattel through a fraud is the property altered. It was not necessary that the fraud should be successful. The offence charged and proved came within the legal definition of a conspiracy (*i*).

(*f*) 8 & 9 Vict. c. 109, s. 17 (cheating at games). 24 & 25 Vict. c. 96, ss. 88-90. *Post*, vol. ii. p. 1514, *et seq.*

(*g*) On such an indictment it is not necessary to prove the statutory false pretence. R. *v.* Yates, 6 Cox, 441, Crompton, J., after consulting Coleridge, J. R. *v.* Hudson, Bell, 263, *post*, p. 167.

(*h*) R. *v.* Kenrick, 5 Q.B. 49.

(*i*) R. *v.* Carlisle, Dears. 337. Cf. R. *v.* Read, 6 Cox, 134.

Games.—A count alleged that the prisoners unlawfully did conspire by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to win from R. the sum of £2 10*s.* of his money, and unlawfully to cheat him of the same. The prisoners and R. were in a public-house, and in concert with the other two prisoners, D. placed a pen-case on the table, and left the room to get writing-paper. Whilst he was absent the other prisoners, H. and S., were alone with R., and H. took up the pen-case, and took the pen from it, placing a pin in the place of it, and put the pen he had taken out under the bottom of R.'s drinking glass, and H. then proposed to R. to bet D., when he returned, that there was no pen in the pen-case. R. was induced by H. and S. to stake fifty shillings in a bet with D. that there was no pen in the pen-case, which money R. placed on the table, and H. snatched up to hold. The pen-case was then turned up into R.'s hand, and another pen with the pin fell into his hand, and then the prisoners took his money. It was contended, on a case reserved, that this was a mere deceit not concerning the public, and that there was no false pretence on which any of the prisoners could have been convicted of obtaining money by false pretences. The prosecutor intended to cheat D., and was a party to the fraud, and could not maintain this indictment. Pollock, C.B., said, 'We are all of opinion that the conviction is good. The expression "by false pretences" used in the count is not to be construed in the technical sense contended for by the counsel for the prisoners. We think that there was abundant evidence of a conspiracy to cheat. Though it be an ingredient in that conspiracy to induce the man who is cheated to think that he is cheating some one else, that does not prevent those who use that device from being amenable to punishment' (*j*).

False Accounts, &c.—Where an indictment alleged that a joint stock company had been established, the capital of which was to consist of 2,000 shares, and charged the defendants with conspiring to fabricate a great number of other shares in addition to the said 2,000, and it appeared that the company had not been legally established, Abbott, C.J., was of opinion that if, in point of fact, a combination to the effect stated in the indictment were made out, such conduct, in point of law, constituted a criminal conspiracy, notwithstanding the original imperfection of the company's formation (*k*). If bankers combine to deceive and defraud their shareholders by publishing false balance sheets, they are indictable for a conspiracy (*l*).

An indictment against the manager and secretary of a joint stock bank, contained many counts, some charging that the defendants concurred in making and 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, and they having elected to rely on the counts for conspiracy, it was held, that it was not

(*j*) R. *v.* Hudson, Bell, 263 (see 8 & 9 Vict. 109, s. 17), Channell, B.: 'If the count had omitted the words "by false pretences," it would have been good.' Blackburn, J.: 'If proof was given of an agreement by fraudulent devices to obtain the money, which is the substance of the third count, is there not evidence for the jury?'

(*k*) R. *v.* Mott, 2 C. & P. 521.

(*l*) R. *v.* Esdaile, 1 F. & F. 213; *s. c.* as R. *v.* Brown, 7 Cox, 442.

enough to prove that the defendants made and put forth false statements intended and calculated to deceive, unless they had entered into a precedent and fraudulent conspiracy to do so. The chief count relied upon not stating an intent to defraud any particular parties; it was held, that though there were auditors, whose duty it would be to discover any frauds, that was no answer to the prosecution, if the defendants were party to such conspiracy to deceive them and the directors. But, on the other hand, the jury were told that evidence that the directors were privy to all that was done was very material, with a view to negative such conspiracy, on the part of the defendants, to deceive (*m*).

An indictment charged that the defendants H., B., and M., fraudulently and unlawfully conspired that B. should write his acceptance to a certain paper-writing, purporting to be a bill of exchange, &c., for £30 (the tenor of which was set out), in order that H. might, by such acceptance, and by the name M. being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange, truly drawn at Bath, by one J. C., for S. and Co., as partners in the business of bankers, under the style of Bath Bank, as persons well known to them the said defendants, and thereby fraudulently to obtain from the King's subjects goods and monies; that B., in pursuance of such conspiracy and agreement, did fraudulently and unlawfully *write his acceptance* to the said paper-writing, well knowing the firm of S. & Co. to be fictitious; that the defendants procured the indorsement 'B. M.' to be written on the same, and that the said H., in pursuance of such fraudulent conspiracy, did utter the said paper-writing to one S. R., as and for a good bill of exchange, truly drawn, &c., and accepted by the said B. as a person able to pay the said sum of £30, in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value eighteen guineas, and £11 2*s.* in money; whereas, in truth, at the time of drawing, accepting, and uttering the said bill, there were no such persons as S. & Co. in the business of bankers at Bath, and the said B. was not of sufficient ability to pay the said £30, they, the defendants, well knowing the same, &c., whereby they defrauded the said S. R. of the said goods and monies. The facts so charged being fully proved, the defendants were convicted (*n*).

It has been held criminal to conspire to cause the conspirators or others to be believed persons of large property for the purpose of defrauding tradesmen (*o*): and to conspire to enable a person to get goods on credit by means of a false character, knowing that he did not intend to pay for them (*p*).

Knock outs.—In Levi *v.* Levi (*q*), an action for slander, it appeared that certain brokers were in the habit of agreeing together to attend sales by auction, and that one of them only should bid for any particular article, and that after the sale they should have a meeting consisting of

(*m*) R. *v.* Burch, 4 F. & F. 407. See R. *v.* Barry, 4 F. & F. 389.

(*n*) R. *v.* Hevey, 1 Leach, 229: 2 East, P.C. 856.

(*o*) R. *v.* Roberts, 1 Camp. 339, Ellenborough, C.J. See R. *v.* Whitehouse, 6 Cox, 38, *post*, p. 195.

(*p*) R. *v.* Orman, 14 Cox, 381, Bramwell, L.J. In this case it was ruled that obtaining credit without means to pay though not criminal was unlawful. By 32 & 33 Vict. c. 62, s. 13 (1), it is a misdemeanor to obtain credit under false pretences or by means of any other fraud. *Vide post*, Vol. ii. pp. 1451 *et seq.*

(*q*) 6 C. & P. 239.

themselves only, at another place, to put up to sale among themselves, at a fair price, the goods that each had bought at the auction, and that the difference between the price at which the goods were bought at the auction, and the fair price at this private resale, should be shared among them; Gurney, B., was of opinion that, as owners of goods had a right to expect at an auction that there would be an open competition from the public, if a knot of men went to an auction upon an agreement among themselves of the kind that had been described, they were guilty of an indictable offence, and might be tried for a conspiracy. But this ruling has in a later case of higher authority been declared to be a mere *nisi prius dictum* (*r*).

Mock Auctions.—A mock auction, with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth, is an offence at common law; and persons aiding or abetting such a proceeding may be indicted for a conspiracy with intent to defraud (*s*).

Bankruptcy.—It is criminal to conspire to defeat creditors by disposing of goods in contemplation of bankruptcy (*t*); and to conspire to conceal and embezzle the personal estate of a bankrupt (*u*); or within four months before the presentation of a bankruptcy petition to fraudulently remove the debtor's property to the value of £10 (*v*), and this last form of conspiracy is criminal if the agreement to remove the goods was made in contemplation of bankruptcy, even if in the result no adjudication was obtained (*w*).

Partnership Matters.—It has been held criminal to conspire to cheat by false representations as to the amount of profits of a business carried on by one of the defendants, whereby they induced a third person to enter into partnership with one of them (*x*). On the dissolution of a partnership between the prisoner and L., the prisoner agreed with W. and P. to forge documents, and to make false entries in the books and accounts of a partnership, so as to make it appear that debts existed and were owing which did not exist, so as to reduce the amount divisible between the partners, with intent to cheat and defraud L. Held, that the prisoner was rightly convicted of conspiring with W. and P. to defraud L. (*y*).

Stocks and Shares.—The defendants were indicted, as directors and

(*r*) Doolubdass *v.* Ram Loll, 5 Moore Ind. App. 109: 18 E. R. 836, Parke, B.

(*s*) R. *v.* Lewis, 11 Cox, 404, Willes, J.

(*t*) R. *v.* Hall, 1 F. & F. 33, Watson, B. See the provisions of the Debtors Act, 1869, *post*, Vol. ii. p. 1451.

(*u*) See R. *v.* Jones, 4 B. & Ad. 345: 1 N. & M. 78. This case was decided on 6 Geo. IV. c. 16 (rep.). The old Bankruptcy Acts were limited to traders. The Debtors Act, 1869, and the Bankruptcy Acts, 1883 and 1890, are not so limited. In R. *v.* Jones it was laid down that the indictment must set out the petitioning creditor's debt, the trading, and the act of bankruptcy. This seems now to be needless. 32 & 33 Vict. c. 62, s. 19.

(*v*) Heymann *v.* R., L. R. 8 Q.B. 102. This case is reported mainly as to the form of indictment. In such an indictment it is expedient and perhaps essential to state that the conspiracy was formed in contemplation of bankruptcy. See Myerson *v.* R., 5 Australian C. L. R. 597, where Heymann *v.* R. is discussed.

(*w*) Ibid.

(*x*) R. *v.* Timothy, 1 F. & F. 39, Channell, B. It was held that the conspiracy was indictable, although the representations, not being in writing, gave no cause of action. 9 Geo. IV. c. 14, s. 16.

(*y*) R. *v.* Warburton, L. R. 1 C. C. R. 274: 40 L. J. M. C. 22.

promoters of a limited company, for conspiring to induce the committee of the Stock Exchange to order a quotation of the shares of the company in their official list, and thereby to induce and persuade divers subjects of the Queen, who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed and constituted, and had in all respects complied with the rules and regulations of the . . . Stock Exchange, so as to entitle the said company to have their shares quoted in the official list of the said Stock Exchange. Held, that the indictment disclosed an indictable offence, since there was an agreement to cheat and defraud by means of false pretences those subjects who might buy shares in the company (*z*). But in Ireland an indictment charging a conspiracy 'by false pretences to defraud all such persons as should apply' to the prisoners for a loan of money, was held bad (*a*).

It is criminal to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day, and that the indictment was well enough without specifying the particular persons who purchased as the persons intended to be injured, and that the public government funds of this kingdom might mean either British or Irish funds, which since the Union were each a part of the United Kingdom. After argument in arrest of judgment, Lord Ellenborough, C.J., said: 'I am perfectly clear that there is not any ground for the motion in arrest of judgment. A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives a fictitious price by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day.' Bayley, J., said: 'It is not necessary to constitute this an offence that it should be prejudicial to the public in its aggregate capacity, or to all the King's subjects, but it is enough if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation.' Dampier, J.: 'I own I cannot raise a doubt, but that this is a complete crime of conspiracy according to any definition of it. The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase' (*b*).

(*z*) Aspinall *v.* R., 1 Q.B.D. 738: 2 Q.B.D. 48: 46 L. J. M. C. 145.

(*a*) White *v.* R., 13 Cox, 318 (Ir.).

(*b*) R. *v.* de Berenger, 3 M. & S. 67. This decision was treated as correct in Scott *v.* Brown [1892], 2 Q.B. 724 (C.A.), and applied in R. *v.* Brailsford [1905], 2 K.B. 730, *ante*, p. 151. Cf. R. *v.* Gurney, 11 Cox, 414.

It seems also to be criminal to raise the price of a commodity by fictitious sales (*c*). And it has been held criminal to conspire to deal fraudulently in railway tickets (*d*).

Conspiracy to do Acts not wrongful if done by one Person.—In many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy at common law, though the same act, if done separately by each individual without any agreement amongst themselves, would not have been criminal or even actionable (*e*).

The application of this theory has caused much difficulty and controversy, especially as to combinations with reference to trade, or of employers against workmen or workmen against employers (*f*); and the rule has been altered by statute with respect to certain acts done legitimately and not maliciously in furtherance of trade disputes (*g*).

This theory has been applied to an agreement between several to maintain each other right or wrong (*h*), and to a combination between military officers of the East India Company to resign their commissions in order to intimidate the Company into granting certain allowances (*i*).

It has been said with respect to premeditated and systematic tumults at a theatre, that 'the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment' (*j*).

The accepted authority with respect to this branch of the law of conspiracy is the judgment of Bowen, L.J., in Mogul Steamship Co. *v.* McGregor, Gow & Co. (*k*), approved and adopted in the H. L., on appeal (*l*)

It would seem that the acts of the defendants were criminal independently of conspiracy. 7 & 8 Vict. c. 24, s. 1, *post*, Bk. xi. c. ix., specially refers to and keeps alive 'the offence of spreading or conspiring to spread any false rumour with intent to enhance or decry the price of any goods or merchandise.'

(*c*) R. *v.* Hilbers, 2 Chit. (K.B.) 163. This was a motion for a criminal information for a conspiracy to raise the price of oil by making fictitious sales, and the Court held that it must appear that two combined together, as it was no offence for an individual separately to endeavour.

(*d*) R. *v.* Absolon, 1 F. & F. 498.

(*e*) R. *v.* Mawbey, 6 T. R. 636, Grose, J. R. *v.* Journeymen Tailors of Cambridge, 8 Mod. 11 (a common-law conspiracy by workmen to raise wages). R. *v.* Rowlands, 17 Q.B. 671. R. *v.* Parnell, 14 Cox, 508.

(*f*) These are discussed *post*, p. 176 *et seq.*

(*g*) *Post*, p. 177. See Quinn v. Leathem, [1901], A.C. 495, 512, Ld. Macnaghten.

(*h*) 9 Co. Rep. 56.

(*i*) See Vertue *v.* Clive, 4 Burr. 2472, 2476, Yates, J.

(*j*) By Sir James Mansfield, C.J., in Clifford *v.* Brandon, 2 Camp. 369. See Gregory *v.* Duke of Brunswick, 6 M. & G. 953, approved in Quinn *v.* Leathem [1901], A.C. 495, 503. In an unreported case, K.B. 18 or 19 Geo. III., Lord Mansfield is said to have ruled that where several conspired to hiss at the Birmingham theatre it was indictable, though each might have hissed separately. This seems to be R. *v.* Leigh, 1 C. & K. 28n.; 2 Camp. 372n.; 6 M. & G. 217n.; 4 Wentw. Pl. 443. See Wright on Conspiracy, 37.

(*k*) 23 Q.B.D. 598. In this case an associated body of traders endeavoured to get the whole of a limited trade into their own hands by offering exceptional and very favourable terms to customers who would deal exclusively with them,—terms so favourable that but for the object of keeping the trade to themselves they would not have given such terms, but with the intention not of injuring their rivals, but of preventing rival traders from competing with them. The combination was held not to be an indictable conspiracy.

(*l*) [1892] A.C. 25.

and in subsequent cases (*m*). He said, 'Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm and not to exercise one's own just rights (*n*). In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public (*o*). . . . But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means; O'Connell *v.* R. (*p*), R. v. Parnell (*q*), and the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? . . . The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one with a view to harm him as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause,—is evidence (to use a technical expression) of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. . . . Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity (see R. *v.* Waddington) (*r*); to combine to purchase all the shares of a company against a coming settling day, or to agree to give away articles of trade gratis in order to withdraw custom from a trade? May two itinerant match-vendors combine to sell matches below their value in order by competition to drive a third match-vendor from the street? . . . The question must be decided by the application of the test I have indicated. Assume that what is done is intentional and that it is calculated to do harm to others. Then comes the question, Was it done without just cause

(*m*) *e.g.*, Allen *v.* Flood [1898], A.C. 1, 93, Lord Watson. Quinn *v.* Leathem [1901], A.C. 495, 535, Lord Lindley.

(*n*) In S. Wales Miners Federation *v.* Glamorgan Coal Co. [1905], A.C. 239, 252, Ld. Lindley said: 'It is useless to try and conceal the fact that an organised body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based on this undeniable truth.'

(*o*) See hereon Giblan *v.* National Amalgamated Labourers Union [1903], 2 K.B. 600, 622, Stirling, L.J.

(*p*) 11 Cl. & F. 155: 5 St. Tr. (N. S.) 1.

(*q*) 14 Cox, 508, and see Mulcahy *v.* R., *ante*, p. 146.

(*r*) 1 East 143. In this case it was held that even if a convicted prisoner waived his motion in arrest of judgment the Court would not pass sentence if they could see that no crime was shewn. See R. *v.* Plummer [1902], 2 K.B. 339, 346.

or excuse? If it was *bona fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable (see R. *v.* Rowlands, 17 Q.B. 671). But such legal justification would not exist when the act was merely done with the intention of causing temporal harm without reference to one's own lawful gain or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances, and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts before referred to, it could not in my opinion properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J., in R. *v.* Rowlands, 17 Q.B. 671, 687, of workmen and of masters. "The intention of the law is at present to allow either of them to follow the dictates of their own will with respect to their own actions and their own property, and either, I believe, has a right to study to promote his own advantage or to combine with others to promote their mutual advantage."'

It has been held criminal for two or more to combine to make for sale pirated copies of copyright music in order to obtain profits out of that music to which the conspirators are not entitled. Such a combination has been regarded as a conspiracy for the unlawful purpose of depriving the owner of his property or civil rights (*s*).

'A combination to violate without just cause' (*t*) 'private rights, contractual or other, in which the public has a sufficient interest, is a criminal conspiracy if the violation of the private right is an actionable wrong' (*u*). 'It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done would be criminal. It is enough that the acts agreed to be done, although not criminal, are wrongful, *i.e.*, amount to a civil wrong' (*v*). An agreement by members of either House of Parliament to deceive the House by making false defamatory statements in Parliament has been held not to be indictable (*w*).

A combination without justification (*x*) to insult, annoy (*y*), injure, or impoverish (*z*) another person is a criminal conspiracy.

In R. *v.* Starling (*a*), it was held criminal to combine to depauperate

(*s*) R. *v.* Willetts [1906], 70 J.P. 127, Bosanquet, Common Serjeant. It is not a criminal act to infringe copyright, nor is it larceny to pirate music. R. *v.* Kidd [1907], 72 J.P. 104, Bosanquet, C.S. 42 L. J. (Newsp.) 785. In 1906 it was made an offence to be in possession of pirated music (6 Edw. VII. c. 36, s. 1).

(*t*) Mogul SS. Co. *v.* McGregor, 23 Q.B.D. 614, Bowen, L.J., *ante*, p. 171.

(*u*) Mogul SS. Co. *v.* McGregor [1892], A.C. 25, 48, Lord Bramwell.

(*v*) R. *v.* Warburton, L. R. 1 C. C. R. 276, cited with approval in Quinn *v* Leathem [1901], A.C. 495, 529, Ld. Brampton.

(*w*) *Ex parte* Wason, 38 L. J. Q.B. 302.

(*x*) Quinn *v.* Leathem [1901], A.C. 495. Giblan *v.* National Amalgamated Labourers Union [1903], 2 K.B. 600, 618, Romer, L.J.

(*y*) Mogul case [1892], A.C. 25, 38, approving the ruling in R. *v.* Druitt, 10 Cox, 592.

(*z*) Mogul SS. Co. *v.* McGregor [1892], A.C. 25, 38. Quinn *v.* Leathem [1901], A.C. 495, 511, Lord Macnaghten, and see Allen *v.* Flood [1898], A.C. 1, 72.

(*a*) 1 Sid. 174; 1 Lev. 125; 1 Keb. 650, 655. In Thorp's case, 5 Mod. 224, it seems to have been thought that the conspiracy in R. *v.* Starling was to brew nothing but small beer.

the farmers of excise, because the information shewed that the excise was parcel of the revenue of the crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the crown. This case is treated in R. *v.* Daniell (*b*), as one to do an act of a public nature.

In R. *v.* Eccles (*c*), several persons were convicted on an indictment which charged them with conspiring to impoverish one H. B., a tailor, and to prevent him, by indirect means, from carrying on his trade. This, however, appears to have been considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public (*d*). So far as this case depends on the theory of restraint of trade, it seems now of little authority (*e*).

An indictment cannot be supported for a conspiracy to deprive a man of the office of secretary to an *illegal* unincorporated trading company. Ellenborough, C.J., said that the society being certainly illegal, to deprive an individual of an office in it could not be treated as an injury: and that when the prosecutor was secretary to the society, instead of having an interest which the law would protect, he was guilty of a crime (*f*).

In R. *v.* Parnell (*g*), it was held to be criminal to combine to solicit tenants of land in Ireland to refuse to pay rent, and to prevent tenants from paying their lawful rent by threatening them with boycotting or social excommunication. This ruling was approved in Quinn *v.* Leathem (*h*).

Trespass to Land.—In R. *v.* Turner (*i*), it was ruled that an indictment would not lie for conspiring to commit a civil trespass to land, by agreeing to go, and by going into, a preserve for hares, the property of another, for the purpose of snaring them, though it was alleged to be done in the night-time, and that the defendants were armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them (*i*). Lord Ellenborough, C.J., in pronouncing the judgment of the Court, said: 'I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment' (*ii*). It may be observed that it was not stated in the indictment that the weapons were

(*b*) [1704] 6 Mod. 99; 1 Salk. 380. Wright on Conspiracy, 38.

(*c*) 1 Leach, 274; 13 East, 230n.; Willes Rep. 583n.; 1 Hawk. c. 72, s. 2. The indictment in R. *v.* Druitt, 10 Cox, 572, was framed on this case.

(*d*) R. *v.* Turner, 13 East, 228, Ellenborough, C.J. See R. *v.* Duffield, 5 Cox, 404, Erle, J. R. *v.* Rowlands, 17 Q.B. 671, Campbell, C.J. Mogul Steamship Co. *v.* McGregor, Gow & Co., 23 Q.B.D. at p. 631, Fry, L.J.

(*e*) See Wright on Conspiracy, 45.

(*f*) R. *v.* Stratton, 1 Camp. 549n. See R. *v.* Hunt, 8 C. & P. 642.

(*g*) 14 Cox, 509.

(*h*) [1901] A.C. 495, 511.

(*i*) 13 East, 228, 231. 'But *qu.* as to what is reported in this case (p. 230) to have been said by Lord Ellenborough in the course of the argument, viz. that "*all* the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity." The facts stated in this case would constitute an offence within 9 Geo. IV. c. 69, and it is conceived that a conspiracy to commit an offence within that statute would be indictable, although not carried into effect. See R. *v.* Wakefield, *ante*, p. 160. See also the observations on this case in Deac. Game L. 175.' C. S. G.

(*ii*) *Vide ante*, p. 160, note (*p*).

dangerous, nor that the defendants conspired to go, &c., *with strong hand*. But in R. *v.* Rowlands (*j*), Campbell, C.J., said of R. *v.* Turner: 'I have no doubt whatever that it was wrongly decided. Going into the prosecutor's close against his will, armed with offensive weapons for the purpose of opposing any persons who should endeavour to apprehend, obstruct, or prevent them, would in itself be an indictable offence; and conspiring to commit such an offence must be an indictable conspiracy.'

In R. *v.* Druitt (*jj*), the indictment was for a conspiracy by unlawful ways, contrivances, and stratagems to impoverish P. and others in their trade and business, and to restrain their freedom of trade and of personal action. The defendants were members of a tailors' trade union, and during a strike instigated by the union picketed the doors of employers to note work-people who went in and out, in order to deter them from continuing to work and to induce them to join the union. This conduct was ruled to be intimidation and molestation and obstruction within the statutes then restricting the combination of workmen (6 Geo. IV. c. 129, s. 3, and 22 Vict. c. 34, s. 1). Bramwell, B., ruled that it was not an offence to picket if the picketing were done in a way to excite no reasonable alarm, and not to coerce or annoy those who were subject to it, and that peaceful persuasion without coercion or intimidation was lawful (*k*). He also said that the right to personal liberty which the law protected included liberty of the mind and will as well as of the body (*l*), and that 'if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. He was referring to coercion or compulsion—something that was unpleasant and annoying to the mind operated upon—and he laid it down as clear and undoubted law that if two or more persons agreed that they would by any such means co-operate together against that liberty they would be guilty of an indictable offence.' This ruling was discussed and questioned by Coleridge, C.J., in Gibson *v.* Lawson (*m*), and the Mogul case (*n*): but in the latter case (*o*) Lord Halsbury said: 'I am unable to concur with the Lord Chief Justice's criticism, if its meaning was rightly interpreted, which I very much doubt, on the observations made by my noble and learned friend Lord Bramwell in R. *v.* Druitt, if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it beyond all doubt or question that such a combination would be an indictable misdemeanor.'

In R. *v.* Bunn (*p*), Brett, J., ruled that an indictment would lie at common law for conspiring to commit an offence which under statute was summarily punishable. The indictment was for conspiracy by gas stokers to force their employers to conduct their business contrary to their own will by improper threats or improper molestation, by forcing the employers

(*j*) 17 Q.B. 671.
(*jj*) [1867] 10 Cox, 592.
(*k*) It is so declared by 6 Edw. VII. c. 47, s. 2 (1), *post*, Vol. ii. p. 1912.
(*l*) Quoted with approval in Quinn *v.* Leathem [1901], A.C. 495, 525, Ld. Brampton.
(*m*) [1891] 2 Q.B. 545.
(*n*) 21 Q.B.D. 551.
(*o*) [1892] A.C. 25, 38.
(*p*) [1872] 12 Cox, 316.

against their will to employ a man whom they objected to employ, and alleged that they endeavoured to obtain the object of their combination by simultaneously breaking their contracts of service. The result of this combination was to create a great public mischief by leaving London unlit. Other rulings in the case led to the repeal of 34 & 35 Vict. c. 32, and the enacting of 38 & 39 Vict. c. 86 (*q*).

Conspiracies with Reference to Trade Disputes.—Prior to 1871, it had often been held criminal to conspire under certain circumstances—for workmen to combine to raise the rate of wages (*r*); or to injure or obstruct employers (*s*); or to induce workmen to leave their employment (*t*); or to procure their discharge (*u*); or to strike (*v*); or to picket the works of the employers (*w*).

Many cases in the books relate to such conspiracies. Certain of these cases relate to conspiracies in breach of statutes relating to combination by workmen. The earlier Acts were repealed in 1824, and replaced by 5 Geo. IV. c. 95, itself repealed in 1826, and replaced by 6 Geo. IV. c. 129. That Act and subsequent amending Acts were repealed in 1871 (*x*) and replaced by the Trade Union Acts, 1871 (*y*), and 1876 (*z*), and by the Conspiracy and Protection of Property Act, 1875 (*a*), and the Trade Disputes Act, 1906 (*b*). The portions of these Acts relating to the constitution, registration, and internal government of trade unions are not relevant to the purposes of this treatise (*c*). By sect. 16 of the Act of 1876 (*d*): The term "trade union" means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act (of 1871) had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its

(*q*) See Gibson *v.* Lawson [1891], 2 Q.B. 545, where R. *v.* Bunn is disapproved, as laying down that acts expressly legalised by statute remain crimes at common law. And see Wright on Conspiracy, 50–59. There seems nothing to prevent indictment at common law for combining to do acts which if done by individuals are punishable under the Act of 1875 (*vide post*, p. 177).

(*r*) R. *v.* Tailors of Cambridge [1721], 8 Mod. 10. R. *v.* Mawbey, 6 T. R. 119. Quinn *v.* Leathem [1901], A.C. 495, 530. 3 Steph. Hist. Cr. Law, 217. Wright on Conspiracy, 54.

(*s*) Hilton *v.* Eckersley, 6 E. & B. 47. R. *v.* Rowlands, 17 Q.B. 671.

(*t*) R. *v.* Rowlands, 5 Cox, 436 (in error, 17 Q.B. 671, *supra*). In this case the question of intimidation was involved.

(*u*) R. *v.* Bykerdyke, 1 M. & Rob. 179.

(*v*) Wright on Conspiracy, 57.

(*w*) R. *v.* Druitt, *ante*, p. 175.

(*x*) 34 & 35 Vict. c. 32, s. 7.

(*y*) 34 & 35 Vict. c. 31, passed on the report of a Royal Commission of 1867, made in 1869 (Parl. Pap., 1869, c. 4123.)

(*z*) 39 & 40 Vict. c. 22.

(*a*) 38 & 39 Vict. c. 86, passed on the reports of a Royal Commission of 1874. (Parl. Pap. 1874, c. 1094, & 1875, c. 1157.)

(*b*) 6 Edw. VII. c. 47, passed after the report of a Royal Commission. (Parl. Pap. 1906, c. 2825.)

(*c*) By s. 18 of the Act of 1871, 'If any person with intent to mislead or defraud gives to any member of a trade union registered under this Act, or to any person intending or applying to become a member of such trade union, a copy of any rules or of any alterations or amendments of the same other than those respectively which exist for the time being, on the pretence that the same are the existing rules of such trade union, or that there are no other rules of such trade union, or if any person with the intent aforesaid gives a copy of any rules to any person on the pretence that such rules are the rules of a trade union registered under this Act which is not so registered, every person so offending shall be deemed guilty of misdemeanor.'

(*d*) This section supersedes s. 23 of the Act of 1871.

purposes being in restraint of trade.' By sect. 5 (2) of the Trade Disputes Act, 1906 (6 Edw. VII. c. 47), this definition is extended so as to 'include any combination as therein defined, notwithstanding that such combination may be the branch of a trade union.' To this definition the following proviso of sect. 23 of the Act of 1871 applies :—

'Provided that this Act shall not affect—

1. Any agreement between partners as to their own business ;
2. Any agreement between an employer and those employed by him as to such employment ;
3. Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft.'

'Trade Dispute.'—In the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), and in the Trade Disputes Act, 1906 (6 Edw. VII. c. 47), the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of employment, or with the conditions of labour of any persons, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises (*e*).

Restraint of Trade.—By the Act of 1871, sect. 2, 'The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise' (*f*).

By sect. 3, 'The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.'

Offences punishable under the above Acts independently of conspiracy are dealt with in Book XI. Chapter VIII.

By sect. 3 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), as amended by sect. 1 of the Trade Disputes Act, 1906, 'An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute (*g*) . . . shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime' (*h*).

(*e*) 6 Edw. VII. c. 47, s. 5 (3), passed in consequence of the decision in Quinn *v.* Leathem [1901], A.C. 495.

(*f*) See Quinn *v.* Leathem [1901], A.C. 495, 526, Ld. Brampton. The Act is not limited to registered trade unions. See Chamberlain's Wharf, Ltd. *v.* Smith [1900], 2 Ch. 605. Registration is not compulsory, and if the purposes of the trade union are unlawful, registration is void (34 & 35 Vict. c. 31, s. 6).

(*g*) 6 Edw. VII. c. 47, s. 5 (2), defines 'trade dispute,' *ut supra*, and repeals the words between 'employer' and 'workman' in 38 & 39 Vict. c. 86, s. 3, as to which, see Quinn *v.* Leathem [1901], A.C. 495.

(*h*) It has been held that this clause distinctly legalises strikes in the broadest terms, subject to the exceptions enumerated in ss. 4, 5. Gibson *v.* Lawson [1891], 2 Q.B. 545. (As to earlier views of the criminality ot strikes, see Hilton *v.* Eckersley, 6 E. & B. 47. Walsby *v.* Anley, 30 L. J. M. C. 121. Erle on Trade Unions, 85.) Wood *v.* Bowron, L. R. 2 Q.B. 21 ; Wright on Conspiracy, 43. It would be more accurate to say that the Act takes away the criminality of combinations in the cases to which it applies. It does not affect civil remedies in respect of such combinations. Quinn *v.* Leathem [1901], A.C. 495, 511, Ld. Macnaghten ; 527, Ld. Brampton. And the words 'the broadest terms' are too wide. 'It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or anyone else, by force or threats of violence, to prevent other people from working on any terms which they think proper,' ibid. 541, Ld.

'An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without such agreement or combination, would be actionable' (*i*).

Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.

A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned either absolutely or at the discretion of the Court, as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person' (*j*).

The offences by individuals against the Act are dealt with *post*, Book XI. Chapter VIII.

Jurisdiction, Venue and Court of Trial.—A conspiracy within the realm, to do outside the realm, and outside the Admiralty jurisdiction acts which would be crimes by English law, appears to be indictable in England. In the case of conspiracy to murder, this is definitely provided by statute (*k*).

In Gibbon Wakefield's case (*l*), the conspiracy was to abduct an heiress and to marry her in Scotland. By the construction put by some of the judges on the statute on which the crime of abduction then depended, it was of the essence of the crime that the purposes of the abduction should be consummated, and they took the view that the conspiracy did not amount to an attempt to commit the full crime in England. But the law of conspiracy gave jurisdiction by attaching criminality to the agreement, as evidenced by acts done in England in furtherance of the design, although these acts did not amount to an attempt to commit the crime in England (*m*).

In R. *v.* Kohn (*n*), the prisoner, a foreigner, was indicted for conspiring at Ramsgate with the owner, the master, and the mate of a ship, to cast away the ship, with intent to prejudice the underwriters. (See

Lindley. He held that a combination to annoy a person's customers, so as to compel them to leave him unless he obeyed the combination, was not permitted by s. 3. See Lyons *v.* Wilkins (No. 1) [1896], 1 Ch. 811; No. 2 [1899], 1 Ch. 255.

(*i*) This paragraph was added by 6 Edw. VII. c. 47, s. 1, to override Quinn *v.* Leathem, *ubi sup.*, and applies to civil remedies s. 3 of the Act of 1875, as amended in 1906.

(*j*) This Act does not apply to seamen or apprentices to the sea service (s. 16). R. *v.* Lynch [1898], 1 Q.B. 61; Kennedy *v.* Cowie [1891], 1 Q.B. 77.

(*k*) 24 & 25 Vict. c. 100, s. 4, which removed doubts raised in R. *v.* Bernard, 8 St. Tr. (N. S.) 887; 1 F. & F. 240.

(*l*) *Ante*, p. 160.

(*m*) Wright on Conspiracy, 81.

(*n*) 4 F. & F. 68.

24 & 25 Vict. c. 97, s. 43.) The ship was a Prussian merchant vessel, and arrived at Ramsgate, and afterwards sailed thence, and she was in six days' time scuttled and sunk by the prisoner and others. The prisoner was apprehended, and made statements implicating himself, the captain, and the mate. He said that the mate had said in Ramsgate that the ship would never reach her place of destination, and spoke of the making away of the ship in an unlawful manner; and when the prisoner said: 'Then we had better sink her here at once on the bar,' the mate replied that was too close to land to make away with the ship in an unlawful manner, or to sink her. Martin, B., told the jury: 'The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal by our law. And this case does not raise the point which arose in R. *v.* Bernard, 1 F. & F. 240 (*o*), as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited; for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. . . . The question is, was it agreed by and between the prisoner and any other person at Ramsgate that the ship should be destroyed, whether at sea or in port?' (*p*)

In an indictment for conspiracy the venue should be laid where the conspiracy was, and not where the result of such conspiracy was put in execution (*q*). But there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried, wherever one distinct overt act of conspiracy is in fact committed, as well as the crime of high treason, in compassing and imagining the King's death, or in conspiring to levy war (*r*). So in R. *v.* Quinn (*s*), Fitzgibbon, L.J., said: 'Some one or more of the people who had the common intention must entertain or manifest it by something done within the venue, and they are entitled to be tried in any of the counties where that had taken place.' And in R. *v.* Bowes (*t*), the trial proceeded upon this principle; and, though no proof of actual conspiracy, embracing all the several conspirators in Middlesex, where the trial took place, was attempted to be given, and though the individual acts of some of the conspirators were wholly confined to other counties than Middlesex, yet the conspiracy as against all having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was held to be satisfied by overt acts,

(*o*) *Vide* 8 St. Tr. (N. S.) 887.

(*p*) See R. *v.* Boulton, 12 Cox, 87, as to putting in evidence acts done outside the jurisdiction.

(*q*) R. *v.* Best [1705], 1 Salk. 174; 2 Ld. Raym. 1167; 6 Mod. 185.

(*r*) R. *v.* Brisac, 4 East, 164, *ante*, p. 53. In this case the conspiracy was on the high seas or in Shetland, to fabricate vouchers for stores, which in pursuance of the conspiracy were transmitted to Middlesex, and there delivered with fraudulent intent.

(*s*) [1898] 19 Cox, 78 (Ir.).

(*t*) Cited in R. *v.* Brisac, 4 East, 164, 171.

done by some of them, in prosecution of the conspiracy in the county where the trial was had.

By the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 1, 'neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons, for (*inter alia*) unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person' (*u*).

To a count alleging that the prisoners conspired, by divers false pretences, against the form of the statute in that case made and provided, to defraud the prosecutor of his money it was objected that the facts ought to have been set out so as to shew that the offence intended to be committed was within the jurisdiction of the sessions, by whom the indictment had been tried. It was held (after verdict) that the jury must be taken to have found the accused guilty of conspiracy to defraud by such false pretences as were cognisable by a Court of Quarter Sessions (*v*).

In R. *v.* King (*w*) the Court refused to change the venue in an indictment for a conspiracy to destroy foxes and other vermin, on the ground that the persons who were likely to serve on the jury to try the indictment were much addicted to fox-hunting.

Indictment.—Indictments for conspiracy are subject to the provisions of the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), as amended in 1867 (30 & 31 Vict. c. 35) (*ww*). The technical averment of the agreement and conspiracy, generally used in the indictment, charges that the defendants 'did conspire, combine, confederate, and agree together'; but it is said that other words of the same import seem to be equally proper (*x*). To the counts for a conspiracy may be joined counts for such other misdemeanors as the circumstances of the case may seem to require (*y*).

But the Court may, if the joinder embarrasses the defendants, sever the trials of the counts or of the defendants (*z*), or put the prosecution to election which count they will proceed. Thus, where an indictment contained counts for a conspiracy and counts for libel, and there was no evidence to affect one of the two defendants as to the libel; Coleridge, J., at the close of the case for the prosecution, put the prosecutor to elect upon which charge he would proceed (*a*).

In R. *v.* Warren (*b*), an indictment for a long firm conspiracy contained, besides a general count for conspiracy between all the defendants, a series of counts charging other conspiracies between two or more of the defendants. Bosanquet, Common Serjeant, quashed the several counts, being of opinion that it was unfair to the defendants, and embar-

(*u*) In R. *v.* Rispal, 3 Burr. 1320; 1 W. Bl. 368, conspiracy was described as a trespass against the peace indictable at quarter sessions. Cf. R. *v.* Edwards [1724], 8 Mod. 320; 2 Str. 707; 2 Sess. Cas. 836.

(*v*) Latham *v.* R., 5 B. & S. 635.

(*w*) 2 Chit. (K.B.) 217.

(*ww*) *Post*, Bk. xii. c. i.

(*x*) 3 Chit. Cr. L. 1143. See R. *v.* Hamp, *ante*, p. 164.

(*y*) See R. *v.* Johnson, 3 M. & S. 550, Ellenborough, C.J.

(*z*) R. *v.* Ahearne [1852], 2 Ir. C. L. Rep. 381.

(*a*) R. *v.* Murphy, 8 C. & P. 297.

(*b*) 71 J. P. Rep. 566; 147 Cent. Cr. Ct. Sess. Pap. 1023.

rassing to the Court and jury, to throw different crimes upon the accused separately, after giving evidence of a general conspiracy between them all. In R. *v.* Perryman (*c*), A. T. Lawrence, J., explained this ruling as meaning that, where separate and independent conspiracies were charged, they should not be included in one indictment, but that it did not preclude the inclusion in one indictment in cases where a conspiracy was formed, and other persons later came in and joined in an existing conspiracy.

Though it is usual first to state the conspiracy, and then to aver that in pursuance of it certain overt acts were done, it is sufficient to state the conspiring alone (*d*). Where the conspiracy is to commit a criminal offence it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. Thus in R. *v.* Gill (*e*), an indictment for conspiring by divers false pretences and subtle means and devices to get money from J. S., and cheat him thereof, is not objectionable on the ground that it is too general, or does not sufficiently show the *corpus delicti*, or specify any overt act. So a count alleging that the defendants 'unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together by divers false pretences and subtle means and devices to obtain and acquire to themselves from one G. W. F. divers large sums of money of the monies of the said G. W. F., and to cheat and defraud him thereof,' has been held good (*f*). So R. *v.* Gompertz (*g*), where a count alleged that the defendants unlawfully, falsely, fraudulently, and deceitfully did conspire, combine, confederate, and agree together, by divers false pretences and indirect means, to cheat and defraud the prosecutor of his monies, the Court of Queen's Bench held that this count was good, on the authority of R. *v.* Gill (*supra*), and in Sydserff *v.* R. (*h*). So where a count alleged that the defendants 'unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud' the prosecutor 'of his goods and chattels;' upon error in the Exchequer Chamber it was held that this case was not distinguishable from R. *v.* Gill, and that the count was good (*h*).

Where the alleged conspiracy is to effect objects made unlawful by statute it is sufficient to follow the terms of the statute. But as a general rule where the conspiracy is not to commit an offence, but to do an unlawful act or a lawful act by unlawful means the indictment must, it is said, allege the doing of the unlawful act or the use of the unlawful means, or it will be insufficient (*i*).

A count alleged that C. C. died possessed of certain East India stock, and that the defendants conspired, &c., by divers false, fraudulent, and unlawful ways, means, and contrivances, and by false pretences

(*c*) Cent. Crim. Ct., Nov. 6, 1907. 42 L. J. (Newsp.) 683.

(*d*) R. *v.* Best, 2 Ld. Raym. 1167; 1 Salk. 174; 3 Chit. Cr. L. 1143. Poulterers' case, 9 Co. Rep. 55. R. *v.* Kimberly, 1 Lev. 62. R. *v.* Starling, 1 Lev. 125.

(*e*) 2 B. & Ald. 204.

(*f*) R. *v.* Kenrick, 5 Q.B. 49.

(*g*) 9 Q.B. 824. It appears from this case that R. *v.* Biers, 1 A. & E. 327, has never been considered as overruling R. *v.* Gill. R. *v.* Biers was also discussed in Sydserff *v.* R., 11 Q.B. 245.

(*h*) 11 Q.B. 245. Cf. R. *v.* Seward, 1 A. & E. 706.

(*i*) R. *v.* Rowlands, 17 Q.B. 671.

and false swearing, unlawfully, &c., to obtain the means and power to and for S. P. of transferring and disposing of the said stock; and that in pursuance of the said conspiracy the defendants afterwards caused a certain false deposition, purporting to have been made on oath by S. P. as one of the lawful children of the said C. C., wherein S. P. falsely stated that the widow of the said S. P. died without having taken upon her letters of administration of his goods, to be exhibited in the Prerogative Court of Canterbury; and did then fraudulently procure letters of administration to be issued of the goods of C. C. to S. P., as one of the lawful children of C. C. After alleging two other overt acts of a similar kind, the count alleged that the defendants presented such letters of administration to the East India Company, and did, by such false ways, &c., false pretences and false swearing, fraudulently obtain the means and power to and for S. P. of transferring and disposing of the stock; and that S. P. did transfer and dispose of the said stock, &c., with intent to defraud the widow of C. C. It was objected (1) that the conspiracy as alleged did not amount to any offence, as no legal meaning could be ascribed to obtaining 'the means and power' of doing an act: (2) that the person intended to be defrauded ought to have been shewn with more certainty: (3) that it ought to have been stated to whom the stock belonged. But the Court held that the statement of the means used for effecting the object of the conspiracy was so interwoven with the charge of conspiracy as to shew on the face of the count an unlawful conspiracy. But if that were not so, the overt acts shewed an indictable misdemeanor (*j*).

Where the indictment is for conspiring to obtain property by 'false pretences' these words are not construed in the technical sense in which they are used in indictments for obtaining by false pretences (*k*), nor is it necessary under such a count to prove a statutory false pretence (*l*), that the prosecutor was innocent of the crime imputed to him by the conspirators (*m*). Where the conspiracy is to accuse falsely of crime, the indictment need not aver the innocence of the prosecutor, the principle being that innocence must be intended until the contrary appears (*n*). In a case of a conspiracy to charge a person with being the father of a bastard child, it was held unnecessary to aver that the prosecutor was not the father. The words of the indictment were 'did *falsely* conspire *falsely* to charge,' &c.; but even without those words the indictment was held sufficient, it being deemed unnecessary to state that the charge was false, or that the child was likely to become chargeable, &c. (*o*). And an indictment for a

(*j*) Wright *v.* R., 14 Q.B. 148, affirmed ibid. 180, on the authority of Sydserff *v.* R., *supra*. The indictment contained several other counts, varying the intent to defraud, and omitting some of the overt acts. The seventh count alleged that H. M. C. was entitled to the stock, and that the defendants conspired by false, &c., and unlawful ways and means, and by false pretences, unlawfully to obtain the means and power to and for S. P. of transferring and disposing of the said stock. The eleventh count stated that the defendants unlawfully conspired by false, &c., and unlawful pretences, &c., to obtain and get into their possession of and from one S. B. divers large sums of money with intent to defraud S. B. The Court of Queen's Bench arrested the judgment on these counts.

(*k*) R. *v.* Hudson, Bell. 263, *ante*, p. 167.

(*l*) R. *v.* Whitehouse, 6 Cox, 38, Platt, B.

(*m*) R. *v.* Kinnersley, 1 Str. 193.

(*n*) R. *v.* Best, 1 Salk. 174; 2 Ld. Raym. 1167.

(*o*) R. *v.* Best, 2 Ld. Raym. 1167.

conspiracy was held good, although it was not alleged *in the charge itself* that the defendants conspired *falsely* to indict the prosecutor, and although it did not appear of what *particular crime or offence* they conspired to indict him, but only in *general* that the defendants did wickedly and maliciously conspire to indict and prosecute the prosecutor for a capital crime (*p*).

Where the act conspired to be done is in itself illegal (*i.e.*, either wrongful or criminal), it is not necessary to state the means by which the conspiracy was effected. Thus where an indictment charged that the defendants conspired together by indirect means to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded,—the means used for the purpose; Lord Mansfield, C.J., said: 'The conspiracy is stated and its object; it is not necessary that any means should be stated;' and Buller, J., said: 'If there be any objection it is that the indictment states too much; it would have been good certainly if it had not added "by indirect means," and that will not make it bad' (*q*). And where an indictment charged that the defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof; it was held that the gist of the offence being the conspiracy, it was quite sufficient to state that fact, and its object, and not necessary to set out the specific pretences. Bayley, J., said: 'That when parties had once agreed to cheat a particular person of his monies, although they might not then have fixed on any means for that purpose, the offence of conspiracy was complete' (*r*). But where the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements, as in the cases which have been cited of conspiracies to marry paupers (*s*).

In the indictment in O'Connell *v.* R. (*t*), the sixth count alleged that the defendants unlawfully and seditiously intending, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the government, laws, and constitution, unlawfully and seditiously did conspire, &c., to cause, and procure, &c., divers subjects of the Queen to meet and assemble together in large numbers, at various times and at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes in the government, laws,

(*p*) R. *v.* Spragg, 2 Burr. 993. Of this case, Tindal, C.J., in R. *v.* King, 7 Q.B. 782, said: 'The point decided in that case appears to have been merely this, that, in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without probable cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient, and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common-law misdemeanor.'

(*q*) R. *v.* Eccles, 13 East, 230n.

(*r*) R. *v.* Gill, 2 B. & Ald. 204. In R. *v.* Parker, 3 Q.B. 292, Williams, J., said: 'It has been always thought that in R. *v.* Gill the extreme of laxity was allowed.'

(*s*) *Ante*, p. 156, and see R. *v.* Steward, 1 A. & E. 706.

(*t*) 11 Cl. & F. 155; 5 St. Tr. (N. S.) I.

and constitution, &c. The seventh count was like the sixth, with the addition, 'and especially, by the means aforesaid, to bring about and accomplish a dissolution of the legislative union now subsisting between Great Britain and Ireland.' Tindal, L.J., in giving to the House of Lords the opinions of the consulted judges, said: 'With respect, however, to the sixth and seventh counts, we all concur in opinion that they do not state the *illegal purpose and design* of the agreement entered into between the defendants with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. Each of those two counts does in substance state the agreement of defendants to have been "to cause and procure divers subjects to meet together in large numbers, for the unlawful and *seditious* purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm." Now, though it may be inferred from this statement, that the object of the defendants was probably illegal, yet it does not appear to us to be so alleged with sufficient certainty. The word "*intimidation*" is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate. But these counts contain no intimation whatever upon what persons this *intimidation* was intended to operate; it is left in complete uncertainty whether the intimidation was directed against the peaceable inhabitants of the surrounding places, against the subjects of the Queen dwelling in Ireland in general, against persons in the exercise of public authority there, or even against the legislature of the realm. Again, the mere allegation that these changes were to be obtained by the exhibition and demonstration of physical force, without any allegation that such force was to be used, or threatened to be used, seems to us to mean no more than the mere display of numbers, and consequently to carry the matter no further.'

In an indictment for conspiring to pervert the course of justice by producing in evidence a false certificate of a justice of peace, it was held unnecessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false, on the ground that it is criminal for persons with intent to obstruct the course of justice to conspire to state a fact as true, which they do not know to be true; and that the defendants were bound to have known that the fact was true which they agreed to certify as such (*u*).

The question with respect to the sufficiency of an indictment for conspiracy is whether the counts are framed with sufficient certainty, with respect to the substance of the charge of conspiracy; for if any such counts are framed in so loose, uncertain, or inapt a manner, that the defendants might have availed themselves of the insufficiency

(*u*) R. *v.* Mawbey, 6 T. R. 619. *Ante*, p. 164. Lawrence, J., said that it was not unlike the case of perjury where a man swears to a particular fact without knowing at the time whether the fact be true or false; which is as much perjury as if he knew the fact to be false, and equally indictable. *Vide post*, p. 476.

of the indictment upon demurrer, there was nothing to prevent them from taking the same advantage of the objection by appeal, or case stated, except where the defect is such as would be cured by verdict (*v*).

Particularity.—The Court refused to quash on motion an indictment charging the defendants with conspiring 'to defraud J. W. of divers goods, and in pursuance of that conspiracy defrauding him of divers goods, to wit, of the value of £100'; on the ground that the gist of the indictment was the conspiracy, and that there might be so much uncertainty in the transaction, which was the subject of the indictment, that the allegation could not be made with greater certainty, as the conspiracy might be to defraud the prosecutor, not of any particular goods, but of any goods the prisoner could get hold of (*w*).

In R. *v.* de Berenger (*x*), it was held that an indictment which alleged an intention to injure the subjects who should purchase public funds on a particular day was good; for it followed from the nature of the charge that the persons could not be named, because the charge was of conspiracy on a previous day to raise the funds on a future day, so that it was uncertain who would be the purchasers; and the offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular (*x*).

So where a count stated that the defendants conspired to defraud divers of Her Majesty's subjects, who should bargain with the defendants for the sale of goods of the said subjects without making payment for the same, with intent to acquire to the said defendants divers sums of money; it was held that it was no valid objection that the count did not state what particular creditors the defendants meant to defraud; for if the offence went no further than the conspiracy, it could not be known what particular persons fell into the snare. But the count was held defective for not stating with sufficient particularity what the defendants conspired to do; for obtaining goods without making payment was not necessarily a fraud, as the words of the indictment might apply to the obtaining goods to sell on commission (*y*). The second count alleged that the defendants being 'indebted to divers persons in large sums of money,' conspired to defraud the said creditors of the defendants of payment of their said debts, and in pursuance of the said conspiracy unlawfully did execute a certain false and fraudulent deed of bargain and sale and assignment of certain fixtures, stock in trade, and goodwill, of great value, belonging to the said defendants, from two of themselves to the third, for divers false and fraudulent considerations, with intent thereby to procure to the said defendants divers sums of money and other emoluments. This count was held bad because it did not state in what respect the deed was false and fraudulent, and therefore the

(*v*) O'Connell *v.* R., 11 Cl. & F. 155, per Tindal, C.J., 5 St. Tr. (N. S.) 1. The law lords concurred in this opinion. Writs of error, referred to in that case, are abolished in England. See *post*, Bk. xii. c. ii. 'Pleading': c. iv. 'Appeal.'

(*w*) Anon. [1819], 1 Chit. (K.B.) 698. In R. *v.* Parker, *post*, p. 186, it was said that the objection in this case was that the particular goods were not specified, and probably only so much as shewed that was stated in the report. In an indictment for larceny the goods stolen must be specified, *post*, Vol. ii. p. 1296.

(*x*) 3 M. & S. 68, *ante*, p. 170.

(*y*) R. *v.* Peck, 9 A. & E. 686. Peck *v.* R., 8 L. J. M. C. 22.

Court had only the prosecutor's general opinion upon this point, not the facts on which it was founded (*z*).

An indictment alleged that an issue in an action between H. B. and G. C. was tried, and that the plaintiff recovered a verdict for £17, and that the judge certified that execution ought to issue forthwith, and that the defendants 'did conspire falsely and fraudulently to cheat and defraud the said H. B. of the fruits and advantages of the said verdict and certificate.' Denman, C.J., held the indictment bad, as the allegation was too general, and did not convey any specific idea which the mind could lay hold of, to determine whether any unlawful act had been done or attempted, and because the terms used did not import in what manner the plaintiff was to be deprived of the fruits and advantages of his verdict, and it was not even alleged that the verdict would lead to any fruits and advantages (*a*). Where a count for conspiracy is framed in a general form in accordance with the rule in R. *v.* Gill, the Court may make an order for particulars giving such information as would be given in a special count, even though the details are contained in the depositions taken at the preliminary inquiry (*b*).

In the British Bank case an order had been made on the first day of the trial that particulars of Cameron's debt, which was stated to be £36,000, should be delivered to him; and it was objected that until the particulars had been given that case could not be gone into. It was answered that Cameron had had access to the accounts for some months: and Campbell, C.J., ruled that the Crown could not be precluded from giving evidence on that part of the case (*c*).

Where an indictment charged a conspiracy between the defendants and divers other persons, not adding 'to the jurors unknown,' the prosecution were ordered to give the names of such persons (*d*).

The particulars need not state the specific acts the defendants are charged with having done, or the times or places at which such acts are alleged to have taken place. But where a count alleges overt acts, the Court will not order particulars to be delivered, where there is no affidavit on the part of the defendant that he has no knowledge of the overt acts charged, and does not possess sufficient information to enable him to meet them. The particulars may be ordered to be given forthwith, so as to avoid the necessity of adjourning the trial (*e*).

In R. *v.* Parker (*f*), the first count alleged that the defendants, intending to cheat and defraud divers of the subjects of the Queen of their goods, &c., unlawfully conspired by divers false pretences to obtain from

(*z*) R. *v.* Peck, *supra*.

(*a*) R. *v.* Richardson, 1 M. & Rob. 402.

(*b*) R. *v.* Hamilton, 7 C. & P. 448, Littledale, J., after consulting several of the other judges. R. *v.* Rycroft, 6 Cox, 76, Williams, J. R. *v.* Probert, Dears. 32 (*a*); Archb. Cr. Pl. (23rd ed.), 70. 'In Anon. 1 Chit. (K.B.), 698, the Court refused to order such particulars to be given on motion, but intimated that the correct course was to apply to the prosecutor to give some information as to the particulars upon which he meant to rely in support of the indictment, and if he refused, then an application might be made to postpone the trial in order that the question might be more maturely discussed. From which it is to be inferred that the motion had been made without any previous application for particulars to the prosecutor.' C. S. G.

(*c*) R. *v.* Stapylton, 8 Cox, 69.

(*d*) R. *v.* Esdaile, 1 F. & F. 213.

(*e*) R. *v.* Perrin [1908], 73 J. P. 144; 24 T. L. R. 487, Walton, J.

(*f*) 3 Q.B. 292; 11 L. J. M. C. 102.

divers of the subjects, &c., then carrying on business in the City of London, to wit, T. T. and D. L., warehousemen and copartners, and E. F. and R. F., cotton yarn manufacturers and copartners, &c., divers goods of great value, to wit, &c., and to cheat and defraud the said liege subjects of the said goods. The count then set out several overt acts as to obtaining goods from the parties above named, and concluded by averring that the defendants did by the means aforesaid obtain from the said T. T. and D. L., and E. F. and R. F., &c., the goods aforesaid, and did cheat and defraud them thereof. The second count was similar, but did not state the overt acts. The third count stated the conspiracy to be to cause it to be believed that one of the defendants, who was then an uncertificated bankrupt, was not B. P., but J. P., and that he carried on an extensive shipping business, and was a man of large property, and had a large capital in the business, and by means of the said belief to obtain from divers liege subjects (not naming them) divers goods, wares, and merchandise, and to cheat and defraud the said liege subjects of the said goods, &c. The fourth count charged that the defendants unlawfully combined by divers false pretences to obtain from divers liege subjects (not naming them) divers other goods of great value, and to cheat and defraud the said liege subjects of the said goods, &c. The defendants having been convicted, judgment was arrested on the ground that the indictment was bad for not stating to whom the goods belonged, it being consistent with the statements in the indictment that the goods belonged to the defendants. The Court said that where the object charged was a conspiracy to obtain from certain persons named divers goods, and to cheat and defraud them of the same, and they were obtained, and the parties defrauded, no precedent was to be found to shew that an indictment was good which omitted to state whose the goods were. The first count, therefore, was imperfect, and the objection applied more strongly to the fourth count, where the conspiracy charged was to obtain divers goods and to cheat and defraud certain persons named, not with intent to cheat and defraud them of the same, though perhaps that would have made no difference. As there was no statement to whom the goods belonged, the charge did not, in the view of the Court, of necessity, import any offence, as it was consistent with an attempt by the defendants to obtain by some means their own goods unlawfully detained from them; and to hold that the use of the words 'to cheat and defraud' necessarily implied that the goods belonged to the parties who were stated to be defrauded, would be letting in a generality, which was not shewn ever to be allowed (*g*).

(*g*) See R. *v.* Bullock, Dears. 653. Although there appears at first sight to be some little discrepancy in the cases upon this point, perhaps they are not irreconcilable. The correct distinction to be drawn from them appears to be this, that where there has been merely a conspiracy for a particular purpose (*e.g.*, to raise the funds), and such conspiracy has not been carried into execution, an indictment in general terms will be sufficient; but where there has not only been a conspiracy, but such conspiracy has been carried into effect, there the indictment ought to specify precisely what has been effected, as the parties injured, the property obtained, and to whom it belonged. The reason of such a distinction is that in the one case it is impracticable to state with minuteness what never was carried beyond the intention, whereas in the other case what was actually effected may easily be stated. The case may be compared to the cases of burglary with intent to steal, and burglary accompanied by an actual stealing; in the former it is sufficient to state that the prisoner

In an indictment for obtaining property by false pretences, it is not necessary to state to whom the property belongs (*h*), and it is submitted that it is not necessary to have greater particularity in indictments for conspiracy to obtain by false pretences (*i*).

In R. *v.* Blake (*j*), a count alleged that the defendants did unlawfully combine, conspire, confederate, and agree together to cause and procure certain goods, in respect whereof certain duties of customs were due and payable to the Queen, to be taken away from the port of London and delivered to the respective owners thereof without payment to the Queen of a great part of the duties of customs payable thereon with intent to defraud the Queen in her revenue of the customs. A motion was made to arrest judgment on the ground that the count was insufficient, because no description of the goods was given, by which it could be judged whether the goods were liable to duty. But the Court held that it was not necessary to specify the goods; that it was matter of evidence what the goods were to which the conspiracy related; that the parties might have conspired without knowing what they were; and that they might have laid their heads together to cheat the Queen of whatever customable goods they could pass.

In R. *v.* King (*k*), a count alleged that W. H. King, E. A. Birch, and A. D. Phillips, did 'unlawfully combine, conspire, confederate and agree together to cheat and defraud certain liege subjects of our Lady the Queen, being tradesmen, of divers large quantities of their goods and chattels:' and that B., in pursuance of the said conspiracy, did fraudulently order and obtain upon credit from W. A. W. and C. W. divers goods, &c., belonging to the said W. A. W. and C. W.; from F. B. and W. J., divers goods, &c., belonging to the said F. B. and W. J.; and from divers other tradesmen whose names are to the jurors unknown, divers other goods, &c., belonging to the said last mentioned persons; and that E. A. B., 'in further pursuance of the said conspiracy,' and in

broke and entered the house with intent to steal the goods (without describing them) of one A. B.; and in the latter the goods stolen must be particularised. So where a conspiracy has been detected before it is carried into execution so far as to ascertain the parties intended to be injured by it, an indictment would be good without naming such parties. R. *v.* de Berenger, *ante*, p. 170. But where the conspiracy had proceeded so far as to fix the parties intended to be injured, such parties should be expressly named, and if the object was to defraud them of *their* goods, or their goods had been actually obtained thereby, the indictment should state in the one case the intent to defraud them of *their* goods, and in the other that they were defrauded of *their* goods. This position has been fully borne out by R. *v.* King, *infra*. It may, perhaps, admit of some doubt whether the possibility of the goods belonging to the defendants in the principal case necessarily rendered the indictment bad; for as a party may be guilty of larceny in stealing his own goods, there seems no reason why parties who conspired to obtain their own goods from another, and thereby to cheat and defraud him, under such circumstances as did not amount to larceny, should not be indictable for a conspiracy. The better ground to rest the decision upon would seem to be that the indictment did not adopt such a degree of particularity as the facts enabled the prosecutor to do, and the rules of criminal pleading require to be adopted where it is practicable. C. S. G.

(*h*) 24 & 25 Vict. c. 96, s. 88, *post*, Vol. ii. p. 1514.

(*i*) But in White *v.* R., 13 Cox, 318, C. C. R. (Ir.), the contrary seems to have been held.

(*j*) 6 Q.B. 126. Cf. R. *v.* Rispal, 3 Burr. 1320. All the reasoning in the judgment of the Exchequer Chamber in R. *v.* King, *infra*, tends to shew that this decision was wrong, as the goods had been imported and clearly ascertained. The terms '*a great part of* the duties of customs' seem very objectionable.

(*k*) 7 Q.B. 782.

order that the said goods might be taken in execution as hereinafter mentioned, did order the said goods to be delivered at her house; and that the said goods were so delivered, and no payment made for the said goods by any of the defendants at any time; and that, 'in further pursuance of the said conspiracy,' the said E. A. B. did procure the said goods to remain in her house until they were taken in execution as hereinafter mentioned, and that the defendants, 'in further pursuance of the said conspiracy,' did falsely and fraudulently pretend that certain debts were due from the said E. A. B. to the said W. H. K. and A. D. P. respectively, and that the said W. H. K. and A. D. P., 'in further pursuance of the said conspiracy, and in order to obtain payment of such false and fictitious debts,' did commence by collusion with the said E. A. B. separate actions against the said E. A. B. And that afterwards, 'in further pursuance of the said conspiracy,' judgments were collusively signed by the said W. A. K. and A. D. P. in each of the said actions for want of a plea. And that afterwards, 'in further pursuance of the said conspiracy, writs of *fieri facias* were collusively sued out upon the said judgments; by virtue of which writs the said goods were, before the expiration of the said respective times of credit, taken in execution and sold in due course of law to satisfy the fictitious debts falsely and fraudulently alleged to be due from the said E. A. B. And so the jurors aforesaid find that the defendants, in manner and by the means aforesaid, unlawfully did cheat and defraud the said W. A. W. and C. W., F. B. and W. J., &c., of their said goods' (*l*). A conviction on this indictment was quashed in the Exchequer Chamber. Tindal, C.J., in delivering the judgment of the Court, said: 'The charge is that the defendants conspired to cheat and defraud *divers* liege subjects, being tradesmen, of their goods, &c.; and the objection is that these persons should have been designated by their Christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain definite individuals, who must always be described by name, or a reason given why they are not; and if the conspiracy was to cheat indefinite individuals, as for instance those whom they should afterwards deal with, or afterwards fix upon, it ought to have been described in appropriate terms, shewing that the objects of the conspiracy were, at the time of making it, unascertained, as was in fact done in the case of R. *v.* de Berenger (*m*), and R. *v.* Peck (*n*); and it was argued that if, on the trial of this indictment, it had appeared that the intention was not to cheat certain definite individuals, but such as the conspirators should afterwards trade with or select, they would have been entitled to an acquittal; and we all agree in this view of the case, and think that the reasons assigned against the validity of this part of the indictment are correct. But then it was urged on the part of the Crown that this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment, the part stating the overt acts as well as that stating the conspiracy; and R. *v.* Spragg (*o*) was cited as an authority that the whole ought to be

(*l*) The indictment is set out in R. *v.* Whitehouse, 6 Cox, 46n.

(*m*) 3 M. & S. 67, *ante*, p. 170.

(*n*) 9 A. & E. 686, *ante*, p. 185.

(*o*) 2 Burr. 993. See *ante*, p. 183, note (*p*), for the remarks on this case.

read together. But if we examine the allegations in this indictment, there is no sufficient description of any act done after the conspiracy which amounts to a misdemeanor at common law. None of the overt acts are shewn by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and if it is said that because it is averred to have been done in pursuance of the conspiracy before mentioned, it must be taken to be equivalent to an averment that the conspiracy was to cheat the named individuals of their goods, the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A. in the execution of an ulterior purpose to cheat B. of his goods. And secondly, if the averment is to be taken to be equivalent to one that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective, as not containing a *direct and positive averment* that the defendants did conspire to cheat and defraud those persons, which an indictment for a conspiracy, where the conspiracy is itself the crime, ought certainly to contain. The other allegations of what are termed overt acts are open to the same objection. In none is there complete description of a common-law misdemeanor independently of the conspiracy; and the allegation of the conspiracy is insufficient, and not direct and positive. For these reasons the judgment must be reversed' (*p*).

In R. *v.* Button (*q*), a count charged that the defendants were employed by L. as his servants in the management of the business as a dyer, and that it was their duty as such servants to employ the vats and dye of L. for his benefit and for dyeing such materials as might belong to themselves or be intrusted to them by L. for those purposes, and for no other purposes and on no other materials; and that the defendants unlawfully conspired, fraudulently, and without the consent of L., to employ the vats and dye in dyeing materials not belonging to themselves and not intrusted to them by L., and to obtain thereby to themselves large profits, and to deprive L. of the use and benefit of the said vats and dye; and that the defendants, in pursuance of the said conspiracy, wilfully and without the consent of L., received into their possession divers large quantities of materials, and wilfully and without the consent of L., at his expense and with his said vats and dye, dyed the same materials for their own profit and benefit. It was objected that the count did not shew that the goods which the defendants dyed were not their own, and that it appeared by the record that they had permission to dye their own goods; but the count was held good on the ground that it was clear that the essential part of the count was the charge of a conspiracy; so that

(*p*) In the argument in the Court of Queen's Bench in this case it was also objected that the conspiracy ought to have been laid to defraud divers tradesmen of their goods '*respectively*,' but the Court held that this was not necessary, and this point does not appear to have been raised in the Exchequer Chamber.

(*q*) 11 Q.B. 929.

if the evidence proved the conspiracy the count would have been sufficiently proved, even if there was no proof of the overt acts, *i.e.*, that the conspiracy was carried into effect (*r*).

Evidence.—The existence of a conspiracy is in most cases 'a matter of inference deduced from criminal (or unlawful) acts done in pursuance of a common criminal purpose' (*s*).

The evidence in support of an indictment for a conspiracy is generally circumstantial; and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case (*t*). Although the common design is the root of the charge, it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, for in many cases of the most clearly established conspiracies there are no means of proving any such thing (*v*). If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the common object they were pursuing, the jury are free to infer that they have been engaged in a conspiracy to effect that object (*w*). It is not necessary to prove the existence of a conspiracy before giving in evidence of the acts of the alleged conspirators, and isolated acts may be proved as steps by which the conspiracy itself may be established (*x*). In R. *v.* Duffield (*y*), Erle, J., directed the jury that it does not happen once in a thousand times when the offence of conspiracy is

(*r*) There was another count similar to the above, which was objected to on the ground that it did not allege any duty in the defendants not to employ the dye for their own profit; but the Court held it good, as the allegation of the conspiracy was sufficient. There was also a question as to the conspiracy having merged in the felony decided in this case. But as 14 & 15 Vict. c. 100, s. 12, has got rid of all such questions it has been omitted. In R. *v.* Ward, 1 Cox, 101, a count alleged that the defendants, having in their possession two horses, conspired by divers false pretences to obtain large sums of money from such persons as might be desirous of purchasing the said horses, and to cheat and defraud such persons of such sums of money, and that the defendants, in pursuance of the said conspiracy, made certain false pretences, which were set out; and that the defendants, in pursuance of the said conspiracy, did obtain from W. A. an order for the payment of £115 10*s*. It was objected that this count was bad, because it did not shew that W. A. was one of the persons who was desirous of purchasing the horses, and therefore he was not shewn to be within the objects of the conspiracy. The count is said to have been held bad. If correctly reported this ruling is clearly erroneous. The allegation that the defendants did obtain the money from W. A. '*in pursuance of* the conspiracy' is the regular mode of connecting the overt act with the conspiracy, especially where, as in this case, the overt act could not be foreseen at the time when the conspiracy was entered into. The overt act, therefore, was well laid. But even if it had been otherwise, the count was good without it; for the conspiracy was clearly well laid; and where that is the case, an acquittal of the overt act is immaterial. R. *v.* Starling, 1 Lev. 125, shews that the overt act is in such a case immaterial.

(*s*) R. *v.* Brisac, 4 East, 164, 171, *ante*, p. 53, approved by the consulted judges in Mulcahy *v.* R., L. R. 3 H. L. 306, 317. See Taylor, Evidence (10th ed.), s. 591.

(*t*) R. *v.* Parsons, 1 W. Bl. 392.

(*v*) R. *v.* Murphy, 8 C. & P. 297, Coleridge, J. R. *v.* Brittain, 3 Cox, 76, Coltman, J. See the case mentioned in R. *v.* Parnell, 14 Cox, 505, where two Irish Americans who had fought on different sides in the American Civil War and had never met were indicted for participation in the Fenian conspiracy, a treason felony.

(*w*) R. *v.* Murphy, *supra*, Coleridge, J.

(*x*) Ford *v.* Elliott, 4 Ex. 78, Alderson, B.

(*y*) 5 Cox, 404.

tried that anybody comes before the jury to say that he was present at the time when the parties did conspire together, and when they agreed to carry out their unlawful purposes; that species of evidence is hardly ever to be adduced before a jury; but the unlawful conspiracy is to be inferred from the conduct of the parties; and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end, which their conduct appears so obviously adapted to effectuate. In R. *v.* Cope (*z*), a husband and wife, and their servants, were indicted for conspiring to ruin the trade of the King's card-maker. The evidence against them was, that they had at several times given money to his apprentices to put grease into the paste, which had spoiled the cards; but there was no account given that ever more than one at a time was present, though it was proved they had all given money in their turns; it was objected that this could not be a conspiracy, on the ground that several persons might do the same thing, without having any previous communication with each other. But it was ruled that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. And it seems to have been ruled that a banker who permitted a sum of money to be lodged at his house, to be paid over for corruptly procuring an appointment under government, might be indicted for conspiring with those who were to procure the appointment, and receive the money (*a*).

The following rule has been suggested with respect to the acts or words of one conspirator being evidence against the others. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party, and therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, is not admissible as evidence to affect them on their trial for the same offence (*b*). And, in general, enough must be proved to make a case for the Court, or proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person done or made in the absence of the prisoner (*c*). It is for the Court to judge whether such connection has been sufficiently established;

(*z*) 1 Str. 144.

(*a*) R. *v.* Pollman, 2 Camp. 233.

(*b*) 1 Phill. Evid. (7th ed.), 94, 95; 9th ed. 201. Taylor, Evidence (10th ed.), s. 590.

(*c*) 1 East, P. C. 96. 2 Stark. Evid. 326, and 1 Phill. Evid. 477, citing Queen Caroline's case, 2 B. & B. 302. R. *v.* Jacobs, 1 Cox, 173. R. *v.* Duffield, 5 Cox, 404. See R. *v.* Gurney, 11 Cox, 414, where defendants were indicted for a conspiracy to cheat and defraud by means of a false prospectus of a public company.

but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others. Thus, where S. was indicted for treason, and one of the overt acts charged was conspiring with J. and others to collect intelligence, and to communicate it to the King's enemies in France, &c., after evidence had been given to connect the prisoner with J. in the conspiracy as charged, the Secretary of State for the Foreign department was called to prove that a letter of J.'s, containing treasonable information, had been transmitted to him from abroad, but in a confidential way, which made it impossible for him to divulge by whom it was communicated; and such letter was received in evidence (*d*). So, after evidence had been given of a treasonable conspiracy, in which the prisoner was concerned, it was held that papers found in the lodging of a co-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, upon strong presumptive proof being given that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers, although no absolute proof had been given of their existence previous to the prisoner's apprehension (*e*). But it seems that if such papers had not been proved to have been intimately and immediately connected with the objects of the conspiracy, they would not have been admissible; as, in the same case, a paper containing seditious questions and answers, found in the possession of a co-conspirator, was not read in evidence, the court doubting whether it was sufficiently connected by evidence with the object of the conspiracy to render it admissible (*f*).

Every person concerned in any of the criminal parts of the transaction alleged as a conspiracy may be found guilty, though there is no evidence that such persons joined in concerting the plan, or that they ever met the others, and though it is probable they never did, and though some of them only join in the latter parts of the transaction, and probably did not know of the matter until some of the prior parts of the transaction were complete (*g*). If several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy. Where, therefore, upon an information for a conspiracy to ruin M., an actor, in his profession, it was objected that in support of the prosecution evidence should be given of a *previous* meeting of the parties accused for the purpose of confederating to carry their object into execution; Sir James Mansfield, C.J., overruled the objection, saying that if a number of persons met together for different purposes, and afterwards joined to execute one common purpose to the injury of the person, property, profession, or character of a third party, it was a conspiracy,

(*d*) R. *v.* Stone, 6 T. R. 527.

(*e*) R. *v.* Watson, 2 Stark. (N.P.) 140; 32 St. Tr. 1. See R. *v.* MacCafferty, 10 Cox, 603. R. *v.* Meaney, 10 Cox, 506.

(*f*) R. *v.* Watson, *supra*. But it was held that if proof were to be given that the instrument was to be used for the purposes of the conspiracy, it would clearly be admissible.

(*g*) R. *v.* Lord Grey, 9 St. Tr. 127. R. *v.* Murphy, 8 C. & P. 297, Coleridge, J. R. *v.* Parnell, 14 Cox, 508, 515.

and it was not necessary to prove any previous consultation or plan among the defendants against the person intended to be injured (*h*).

It appears to have been held that upon an indictment for a conspiracy, where, from the nature of the case, it would be difficult to prove the privity of the parties accused, without first proving the existence of a conspiracy, the prosecutor may go into general evidence of its nature, before it is brought home to the defendants. The indictment charged the defendants, who were journeymen shoemakers, with a conspiracy to raise their wages; and evidence was offered on the part of the prosecution of a plan for a combination amongst the journeymen shoemakers, formed and printed several years before, regulating their meetings, subscriptions, and other matters for their mutual government in forwarding their designs. This evidence was objected to by counsel for the defendant; but Kenyon, C.J., said, that if a general conspiracy existed, general evidence might be given of its nature, and of the conduct of its members, so as to implicate men who stood charged with acting upon the terms of it years after those terms had been established, and who might reside at a great distance from the place where the general plan was carried on; and he, therefore, permitted a person, who was a member of this society, to prove the printed regulations and rules of the society, and that he and others acted under them, in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of such society, and equally concerned; but he observed, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy (*i*). And in several important cases, evidence has been first given of a general conspiracy before any proof of the particular part which the accused parties have taken (*j*).

The prosecutor may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner next day, it was held that directions given by one of the party on the day of their meeting as to where they were to go and for what purpose, were admissible, and the case was said to fall within R. *v.* Hunt (3 B. & Ald. 566), where evidence of drilling at a different place two days before and hissing an obnoxious person was held receivable (*k*).

But after such general evidence has been received the parties before the Court must be affected for their share of it. And mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, seem not to be evidence to prove its existence, although consultations for the purpose, and letters

(*h*) R. *v.* Leigh or Lee, 1 C. & K. 28n; 2 Camp. 372n.; 6 M. & G. 217n.; 2 Stark. Evid. 324; 2 M'Nally, Evid. 634. See R. *v.* Murphy, 8 C. & P. 297, Coleridge, J. *Vide ante*, p. 191.

(*i*) R. *v.* Hammond, 2 Esp. 718. Lord Kenyon referred to the state trials in 1745, where from the nature of the charge it was necessary to go into evidence of what was going on at Manchester, and in France, Scotland, and Ireland, at the same time.

(*j*) Lord Stafford's case, 7 St. Tr. 1218. Lord Russell's case, 9 St. Tr. 577. Lord Lovat's case, 18 St. Tr. 530. R. *v.* Hardy, 24 St. Tr. 129. R. *v.* Horne Tooke, 25 St. Tr. 1.

(*k*) R. *v.* Frost, 9 C. & P. 129, Tindal, C.J., Parke, B., and Williams J.

written in prosecution of the design, but not sent, are admissible (*l*). The admissibility of the act or declaration of a co-conspirator against the party defendant before the court, does not depend on whether such co-conspirator is indicted or not, or tried or not with the defendant (*m*). The evidence is admitted on the ground that the act or declaration of one is the act or declaration of both when united in one common design.

Where the indictment charged the defendants with conspiring to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune; and then a witness was called to prove that at a different time they had made a similar representation to another tradesman. The evidence of this witness was objected to on the ground that it was not competent to the prosecutor to prove various acts of this kind, and that he was bound to select and confine himself to one. But Ellenborough, C.J., said, 'This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence' (*n*). And, in a similar case, the same course was allowed as to acts done both in and out of the county where the indictment charged the conspiracy to have been (*o*).

Upon an indictment for conspiring to annoy a broker who distrained for church-rates, it was proved that one of the defendants, in the presence of the other, excited the persons assembled at a public meeting to go in a body to the broker's house. It was held that evidence was admissible to shew that they did so go, although neither of the defendants went with them, but that evidence of what a person, who was at the meeting, said a few days after the meeting when he himself was distrained on for church-rates, was not admissible (*p*). And where an indictment charged the defendant with conspiring with J., who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a Chartist association, and that J. was also a member, and that in the evening of November 3 the defendant had been at J.'s house, and was heard to direct the people there assembled to go to the race-course, where J. had gone on before with others; it was held that a direction given by J. in the forenoon of the same day to certain parties to meet on the race-course was admissible; and it being further proved that J. and the persons assembled on the race-course went thence to the New Inn, it was held that what J. said at the New Inn was admissible, as it was all part of the same transaction (*q*).

Where a number of persons were charged with murder committed by an act done in the course of a conspiracy for the purpose of liberating a prisoner, of which conspiracy he was cognisant: it was held that acts

(*l*) Taylor, Evid. (10th ed.) ss. 589, 593.
(*m*) 2 Stark. Evid. 329.
(*n*) R. *v.* Roberts, 1 Camp. 399, *ante*, p. 168.
(*o*) R. *v.* Whitehouse, MSS. C. S. G. and 6 Cox, 38.
(*p*) R. *v.* Murphy, 8 C. & P. 297, Coleridge, J.
(*q*) R. *v.* Shellard, 9 C. & P. 277, Patteson, J.

of that prisoner within the prison, and articles found upon him, were admissible in evidence against the persons so charged (*r*).

On an indictment under sect. 3 of the Treason Felony Act, 1848 (11 & 12 Vict. c. 12), which makes it a felony to compass, &c., to deprive the Queen of her crown or to levy war, &c., it appeared that the prisoners from July 26 to August 16 had attended meetings where plans for securing the people's charter and the repeal of the union were organised, and took a prominent part at those meetings; large bodies of men were formed into societies, with class leaders, &c.; some of them were selected and organised as fighting men, and an attempt at insurrection was to be made on August 16; and on that night a great number of the conspirators were found at the several places of meeting previously fixed, provided with arms, &c. A witness stated that at a meeting, at which none of the prisoners were present, he received a leaf of a book from one B., which was to serve as an introduction to a subsequent meeting; and on July 20 he attended a second meeting, and produced the leaf; the chairman compared it with a book, and the witness was admitted. The prisoners were not shewn to have been parties to the conspiracy at the time. But it was held that the witness might prove what B. said to him when he gave him the leaf, and also what took place at the second meeting, on the ground that the prosecution had a right to go into general evidence of the nature of the combination between the persons assembled, though the prisoners might not be present (*s*). And it having been proved that a large number of armed men were found assembled at a public-house on August 16, the time which had been fixed for the general outbreak, but none of these men had been previously connected with the conspiracy, nor did it appear that the house had ever been recognised as a place of meeting; it was held that evidence was admissible of what was done at that public-house; because it appeared that on this day there was to be a collection of armed persons (*t*).

In R. *v.* Duffield (*u*), on an indictment for conspiracy to prevent workmen from continuing in their service as tin-plate workers, it appeared that the workmen had been holding shop meetings and discussions, and the prosecutor, a manufacturer, had published a placard offering constant employment to tin-plate workers, and after that a handbill was circulated about the town, and copies of it stuck up in the windows of beer-shops and public-houses, and one of them in a window of a public-house frequented by the tin-plate workers, and another at a public-house at which one P., G., and W., alleged conspirators, lodged, and the defendants had been continually into those houses whilst the bill was in the windows. The bill was signed by P. as general secretary, and mentioned G. and W. as having visited the prosecutor, but did not mention any of the defendants. Erle, J., held that the bill was not admissible as the act of the defendants, either by themselves or as published or recognised by them. 'You may make a handbill evidence against a man, if I may so say, by retrospective light arising from his

(*r*) R. *v.* Desmond, 11 Cox, 146.

(*s*) R. *v* Lacy, 3 Cox, 517, Platt, B., and Williams J., who considered R. *v.* Frost, 9 C. & P. 129, and R. *v.* Hunt, 3 B. & Ald. 566, expressly in point, and refused to reserve the point. See *ante*, p. 194.

(*t*) Ibid.

(*u*) 5 Cox, 404.

conduct. If a handbill says that certain things will be done by certain persons, and that handbill is circulated, where those persons probably saw it, and they do the very thing that the handbill indicates they would do, when that is in evidence, I am of opinion that the bill would be admissible against them; but we are not at that stage yet.' But in R. *v.* Rowlands (*v*), another indictment arising out of the same transactions, where, in addition to the evidence in the previous case, it was proved that R. had been at the 'Swan' whilst the bill was exhibited there, and P. had been seen going in and out, and the bill was in such a situation that he must have seen it; Erle, J., held that it was admissible. 'If it is evidence against any one of the defendants, it is admissible.' 'I believe it is admissible against those in respect of whom I draw the inference that they saw it in the window; those in respect of whom it announces any intention. G. and W. are the two that are named in it. It purports to be an instrument by P., and I think there is evidence before me, from which I am of opinion that P. had seen that instrument, and it is probable, by his not objecting to it, that he permitted his name to be used to that instrument.' 'I am clear that it is evidence as against one of the defendants, it being published in his name, and, according to the evidence, being probably seen by him' (*w*).

In R. *v.* Blake (*x*), on an information for a conspiracy with one T. to pass imported goods without paying the full duty, it appeared that T. acted as agent for the importer of the goods, and B. as landing-waiter at the Custom-house, and that it was T.'s duty to make an entry known describing the quantity and particulars of the goods necessary to determine the amount of duty. The entry was left at the Custom-house, and the particulars were copied into a Blue-book at the Custom-house, which was delivered to B., whose duty was to examine the goods, and, if he found them correspond with the particulars in the Blue-book, to write 'Correct' across the entry, whereupon the goods would be delivered to the importer upon payment of the duties so ascertained. The goods were passed to T., the duty having been paid on the entry made out by T., which corresponded with the entry in the Blue-book. It was then proposed to put in T.'s Day-book, and to shew by T.'s own entry therein that the quantity of goods was much larger than appeared by the Perfect Entry and the Blue-book, and that the importer had been charged the duties by T. on such larger amount, and had paid them accordingly. It was objected for B.—T. not being on his trial—that the entry in T.'s book was not evidence against B.; but Denman, C.J., admitted the evidence; and on a motion for a new trial it was held that the Day-book was evidence of something done in the course of the transaction, and was properly admitted as a step in the proof of the conspiracy (*x*). Evidence was also given to shew that a cheque drawn by T. for a certain sum, and dated after the goods were passed, had been cashed, and the proceeds traced to B. It was then proposed to put in evidence the counterfoil of the cheque in T.'s cheque-book, on which was written an account shewing that the cheque was drawn for a sum amounting to

(*v*) 5 Cox, 436.

(*w*) This ruling does not appear to have been questioned in the Court of Queen's Bench. See 17 Q.B. 671.

(*x*) 6 Q.B. 126.

half the profit arising from transactions, including the alleged fraud on the revenue, as manifested by the several items in that account. It was held that this evidence was not admissible, for the conspiracy to defraud the customs had been carried into effect before the cheque was drawn; and the writing on the counterfoil was in effect a declaration by T. for what purpose he had drawn the cheque, and how the money was to be applied; and no declaration of T. could be received in evidence against B. which was made in B.'s absence, unless it related to the furtherance of the common object; which this did not (*y*).

On an indictment for conspiracy to defraud the shareholders of the British Bank by falsely representing its affairs to be prosperous, the examination of one of the defendants, which had been taken on a petition for winding up the bank after the date of the alleged conspiracy, was tendered in evidence. This examination shewed that this defendant was aware of the insolvency of the bank, and alleged that the other directors had the same knowledge. It was objected that this examination was not evidence of any act done in furtherance of the conspiracy; and that it was not admissible until the other defendants were connected with this defendant in the conspiracy. But Campbell, C.J. (after consulting the other judges of the Queen's Bench), said: 'We are all of opinion that the deposition is admissible against this defendant, as tending to shew his knowledge before and at the time of his committing the overt act, but not as against the other defendants. Therefore only such parts should be read as refer to the deponent alone' (*z*).

Where an indictment alleged that the defendants conspired falsely to accuse the prosecutor of having feloniously forged a cheque, and that in execution of such conspiracy a letter was written by one of the defendants, in which he stated that he had been employed to investigate the circumstances attending the forging of the cheque, and proof was given of the letter, and also of conversations referring in like manner to a cheque, which the defendants charged the prosecutor with having forged, but the cheque itself was not produced; it was objected that the cheque was so incorporated with the evidence, that the prosecutor was not entitled to prove the conversations without producing the cheque to which they referred, which it appeared from the evidence was in existence, and in the possession of the defendants. Tenterden, C.J., ruled that it was not essential to prove the contents of the cheque or to produce it, but that it was enough to take the conversations as they passed; and on a motion for a new trial this ruling was affirmed, the Court being of opinion that the whole of the charge against the defendants was founded on the letter set out in the indictment, which was written by one of the defendants upon the application of the other; and they having taken upon themselves to treat as an existing thing a cheque, it was not necessary, on the part of the prosecutor, to produce it in evidence, even although it appeared that it actually existed. But it might be a fabrication on the part of the defendants; there might be no such cheque, and then it could not be produced (*a*).

(*y*) R. *v.* Blake, *supra*.
(*z*) R. *v.* Esdaile, 1 F. & F. 213.
(*a*) R. *v.* Ford and Aldridge, 1 N. & M. 776.

A count alleged that the defendants, a husband, wife, and daughter, being in low and indigent circumstances, conspired to cause the husband to be reputed and believed to be a person of considerable property, and in opulent circumstances, for the purpose and with the intent of cheating and defrauding divers tradesmen who should bargain with them for the sale to the husband of goods, the property of such tradesmen, of great quantities of such goods, without paying for the same. The wife and daughter were usually together, and on some occasions represented that they were in independent circumstances, having an income derived from the interest of money coming in monthly; and in others the wife had said her husband was in independent circumstances. These statements were made in the absence of the husband; but it was proved that he either occupied the lodgings which were hired under these representations, or that the goods were delivered at the places where all the defendants lodged. Platt, B., is reported to have held that there was no evidence of any conspiracy to represent the husband as a person of considerable property (*b*). Another count alleged the conspiracy in the same manner as the preceding, but charged the intent to be to defraud persons who should let the husband lodgings for hire, of divers large sums of money, being the sums agreed to be paid for the hire of such lodgings; and Platt, B., is reported to have held that this count was not supported, as well on the ground on which the preceding count was not supported, as because the object of the defendants was to obtain possession of the lodgings, and to deprive the landlord of the use of the rooms, but not to deprive him of the price, which was only incidental to their occupation. They had no object in depriving him of the profits of the rooms, apart from their own occupation of them (*c*).

Two counts of an indictment charged the defendants with conspiring to obtain from the prosecutor certain bills of exchange accepted by him, and to cheat and defraud him of the proceeds of the said bills; other counts charged a conspiracy to defraud the prosecutor of his monies. Evidence was given to shew the obtaining of the acceptances, but it appeared that the prosecutor had not parted with any money, and there was no reason to suppose that he intended to take up the acceptances, and it was not shewn that the bills which he accepted were ever in his hands, except for the purpose of his writing his acceptances, they having been brought to him complete, except as to his signature. The jury having found the defendants guilty on these counts, a new trial was moved for on the ground that the verdict was unsupported by the evidence, because the charge was of a conspiracy to obtain acceptances from the prosecutor, whereas he proved that the acceptances were ready written, and in possession of the defendants, or some of them, and nothing was sought but his signature. But the Court of Queen's Bench considered that it was only by the signature of the prosecutor that the bills became

(*b*) R. *v.* Whitehouse, 6 Cox, 38.

(*c*) Ibid. 'I was counsel for the Crown in this case, and my recollection of it is that the case went to the jury on all the counts. The main question in the case was whether every representation made was the representation of all. The prisoners came to the town together, lived together, and enjoyed the fruits of their fraud together; but the conspiracy could only be inferred from a great number of isolated acts, in none of which were all of the prisoners engaged.' C. S. G.

complete; and his acceptance when given, being without any consideration, was at the instant his, and in his possession. It was also urged that the entire transaction, as proved by the evidence, was at variance with the indictment, as all parties well knew that the prosecutor had no money, nor could be defrauded of any; and that the real fraud was on the prosecutor's part, to the prejudice of some expected lender of the sums mentioned in the bills, in return for acceptances of no value. But the court held that, though there might be some ground for this imputation on the prosecutor, yet it would not disprove the fraud practised upon him, by inducing him to accept bills without a corresponding advance of cash. Though there was little appearance of solvency in the prosecutor, those who fraudulently induced him to incur the liability must have speculated on some pecuniary advantage from it; and though the money could in such case only have come from his respectable friends, as he had no funds of his own, the money intended to be so procured might well be described for this purpose as his money (*d*).

A. and C. were indicted for conspiring to defraud a railway company by obtaining and selling to others non-transferable excursion tickets. A. had sold the tickets to C. at B., and C. attempted to use them for the purpose of sending some children back to London. It did not appear how A. got the tickets; he had others in his possession. Wightman, J., left it to the jury to determine whether the prisoners did concert together that the tickets should be obtained and used for the purpose of defrauding the company (*e*).

On an indictment for conspiracy to cause tinplate-workers to leave their employment, it appeared that the prosecutors, in consequence of their workmen leaving their service, had employed Frenchmen. Erle, J., held that it was not competent to prove how much the firm had lost by these Frenchmen, as the amount of loss by any particular set of workmen was clearly unconnected with the issue whether there was a conspiracy or not; but that the sum total of the loss might be proved; for the very issue in the matter was the intention to obstruct the business, and the result of the operations was a relevant fact as to that (*f*).

Two persons were indicted for felony, in attempting to poison A. B., by administering certain poisonous ingredients, as set forth in the indictment. At the same time, an indictment was found against them for conspiracy to poison the same individual by the same means. On the trial of the first indictment, the prisoners were acquitted, there being no proof that the ingredients were poisonous. Parke, J., thereupon directed an acquittal for the conspiracy also, there being no other proof of a conspiracy to poison than that by which it was attempted to establish the felony, viz., that the ingredients were poisonous (*g*).

Where an indictment against A., B., C., and D., charged that they conspired together to obtain, 'viz., to the use of them the said A., B., and C., and certain other persons to the jurors unknown,' a sum of money for procuring an appointment under government; and it appeared that D. (although the money was lodged in his hands, to be paid to A. and B.

(*d*) R. *v.* Gompertz, 9 Q.B. 824.
(*e*) R. *v.* Absolon, 1 F. & F. 498.
(*f*) R. *v.* Rowlands, 5 Cox, 436. All the counts ended, 'to the great damage' of the prosecutors. See 17 Q.B. 671.
(*g*) R. *v.* Maudsley, 1 Lew. 51.

when the appointment was procured) did not know that C. was to have any part of it, or was at all implicated in the transaction ; it was held, that the averment concerning the application of the money was material, though coming under a viz., and that as to D., the conspiracy was not proved as laid (*h*).

Husband and Wife.—On an indictment for conspiracy, the wife of one defendant was held not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband (*i*). And, upon an indictment against the wife of W. S. and others for a conspiracy in procuring W. S. to marry, it was held that W. S. was not a competent witness in support of the prosecution (*j*). The present position of the law as to calling the husband or wife of a defendant as witness against the defendant is considered *post*, Book XIII. Chapter V., 'Evidence.'

Trial and Verdict.—Counsel for the Crown is entitled, before opening his case, to have any of the defendants acquitted, without the assent of the other defendants, in order that he may call them as witnesses (*k*).

In R. *v.* Kroehl (*l*), the indictment was against A., B., and C. ; and after the case for the prosecution was closed, C. *only* called a witness, whom he examined as to a conversation between himself and A. It was ruled, that counsel for the prosecution might cross-examine such witness as to any other conversation between A. and C., although the evidence should tend chiefly to criminate A. (*l*).

If upon an indictment for conspiracy, the jury find the defendants guilty of so much of the indictment as amounts to a misdemeanor, the Court may pass judgment upon the defendants. The defendants were indicted for conspiring falsely to indict A. B. for keeping a gaming-house, for the purpose of extorting money from A. B., and the jury found the defendants guilty of conspiring to indict A. B., for the purpose of extorting money, but not to indict him falsely ; and it was held that enough of the indictment was found to enable the Court to give judgment; for, in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law ; and the jury had found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, and that is a misdemeanor, whether the charge were or were not false (*m*).

Before the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), *post*, Vol. ii. p. 2009, it was ruled, that after a conviction for a conspiracy, the defendants must be present in court when a motion was made on their behalf in arrest of judgment (*n*). It was not a sufficient excuse for absence that they were in custody on civil process ; but if they were in custody on criminal process, the case would be different, for then they might be charged with the conspiracy also (*o*). But where an indictment had been removed into the Court of King's Bench, after verdict, but

(*h*) R. *v.* Pollman, 2 Camp. 231.
(*i*) R. *v.* Lockyer, 5 Esp., Ellenborough, C.J. R. *v.* Frederick [1738], 2 Str. 1095.
(*j*) R. *v.* Serjeant, Ry. & M. 352.
(*k*) R. *v.* Rowland, Ry. & M. 401, Abbot, C.J.
(*l*) 2 Stark. (N. P.) 343.
(*m*) R. *v.* Hollingberry, 4 B. & C. 329.
(*n*) R. *v.* Spragg, 2 Burr. 928 ; 1 W. Bl. R. 209. As to new trials see R. *v.* Teal, 11 East, 307. R. *v.* Askew, 3 M. & S. 9. R. *v.* Lord Cochrane, 3 M. & S. 10.
(*o*) R. *v.* Hollingberry, *ubi sup.*

before judgment, it does not appear to have been necessary that the defendants should appear in the Court of King's Bench, the proceeding being in the nature of a special verdict, and the party not being considered as convicted, until after the Court had determined upon the verdict (*p*). The Criminal Appeal Act, 1907, deals with special verdicts and abolishes new trials, but does not deal specifically with motions in arrest of judgment (*q*).

Where a count contains only one charge of conspiracy against several defendants, the jury cannot find one of them guilty of more than one charge. Where, therefore, a count charged several defendants with conspiring to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, the finding was held bad; as it amounted to finding that one defendant was guilty of two conspiracies, though the count charged only one (*r*). So where a count charged eight defendants with one conspiracy to effect certain objects, a finding that three of the defendants were guilty generally and that five of them were guilty of conspiring to effect some, and not guilty as to the residue of these objects, was held to be bad and repugnant; for the finding that three were guilty was a finding that they were guilty of conspiracy with the other five to effect all the objects of the conspiracy; whereas, by the finding as to the five, it appeared that those five were guilty of conspiring to effect only some of those objects (*s*).

Punishment.—The present (*t*) punishment for most forms of conspiracy, which are indictable as misdemeanors, is by imprisonment, fine, and sureties for the good behaviour, at the discretion of the Court (*u*).

By 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice, the court may award imprisonment for any term now warranted by law, and hard labour during the whole or any part of such imprisonment. By 24 & 25 Vict. c. 100, s. 4, conspiracies to murder are punishable as statutory felonies.

Where a general verdict is returned on some or all of the counts of an indictment for conspiracy, framed on the same facts, judgment should be entered separately on each count to which it applies, so that if any count is subsequently declared bad the judgment may stand on the good counts (*v*).

(*p*) R. *v.* Nicholls, 2 Str. 1227. Short & Mellor, Cr. Pr. (2nd ed.), 122.

(*q*) Short & Mellor, Cr. Pr. (2nd ed.), 142.

(*r*) O'Connell *v.* R., 11 Cl. & F. 155; 5 St. Tr. (N. S.) 1.

(*s*) Ibid.

(*t*) In former times, persons convicted of a conspiracy at the suit of the King to accuse another person of a capital offence, were liable to receive what was called the *villainous* judgment, used in attaints for crimes of falsity in relation to justice, that is, to lose their *liberam legem*, whereby they were discredited and disabled as jurors or witnesses; to forfeit their goods and chattels and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their bodies committed to prison. But this judgment was not inflicted upon those who were convicted only of conspiracies of a less aggravated kind, at the suit of the party. 1372, 46 Ass. 11, pl. 307; Wright on Conspiracy, 20; 1 Hawk. c. 72, s. 9; 4 Bl. Com. 136. The pillory was also part of the punishment until its abolition, *vide post*, p. 250.

(*u*) *Post*, pp. 211, 217, 218, 249, tit. 'Punishments.'

(*v*) O'Connell *v.* R., 11 Cl. & F. 155. Castro *v.* R., 6 App. Cas. 229. R. *v.* Gompertz, 9 Q.B. 824.

By 38 & 39 Vict. c. 86, s. 3 (*ante*, p. 178), the punishment is limited in the case of conspiracies to commit offences punishable on summary conviction, to three months' imprisonment or such longer term as could be imposed if the offence had been committed by one person.

C.—Soliciting or Inciting to Commit a Crime.

It has already been shewn (*ante* c. v.) that where a crime has been committed, those who counselled, procured, or commanded its commission are liable as accessories before the fact in felony, and as principals in misdemeanor. Even where a crime is not in fact committed, those who have unsuccessfully solicited or incited another to commit it are, at common law, guilty of an indictable misdemeanor (whether the crime to which the solicitation or incitement related is either by common law or statute a felony (*w*) or a misdemeanor), quite distinct from the offences dealt with by the Accessories and Abettors Act, 1861 (*ante* p. 130) (*x*). The line between inciting to commit a crime and 'attempting' to commit a crime is not very clearly defined. Where a person was indicted for soliciting a servant to conspire to cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to sell his master's goods at less than their value, it was held that he might properly be convicted of inciting (*y*). And it has been held an indictable misdemeanor to endeavour to provoke another to commit the misdemeanor of sending a challenge to fight a duel (*z*): and to attempt to incite a lad to commit a felony by sending him a letter which did not reach him (*a*), or which he did not read (*b*). The first of these cases is rather of provocation than incitement, and the second treats incitement as a substantive misdemeanor, and an attempt to incite is also a misdemeanor; conversely it would seem to be an offence to incite another to attempt to commit a crime (*c*). In an old case, attempt to suborn another to commit perjury was held a misdemeanor (*d*). The offence would now be described as inciting to commit perjury, for the offence of subornation of perjury is not committed unless the perjury itself is committed. From one point of view it may be said that the term attempt applies to a person who tries to commit the crime himself, and the terms solicitation or incitement to the person who tries to get another to commit the crime, who, if the crime were committed, would be an accessory before the fact.

The gist of the offence of incitement here under discussion is that the person incited has not committed the crime to which the incitement

(*w*) In R. *v.* Leddington, 9 C. & P. 79, Alderson, B., is reported as having ruled that an indictment did not lie for inciting another to commit suicide: *sed quære*. See Steph. Dig. Cr. Law (6th ed.), art. 48, and *post*, pp. 661 *et seq.*

(*x*) R. *v.* Gregory, L. R. 1 C. C. R. 77: 36 L. J. M. C. 60.

(*y*) R. *v.* de Kromme, 17 Cox, 492.

(*z*) R. *v.* Phillips, 6 East, 464. Lawrence, C.J., there said, 'All such acts or attempts as tend to the prejudice of the community are indictable.'

(*a*) R. *v.* Banks, 12 Cox, 393.

(*b*) R. *v.* Ransford, 13 Cox, 9. In this case Pollock, B., relied on R. *v.* Scofield [1784], Cald. 397.

(*c*) See R. *v.* Brown, MS. Archb. Cr. Pl. (23rd ed.), 1294, an indictment for inciting to commit an offence against 24 & 25 Vict. c. 100, s. 58, *post*, p. 829.

(*d*) Anon. before Adams, B., cited in R. *v.* Scofield, Cald. 400, and R. *v.* Higgins, 2 East, 14, 17, 22. This is probably the same case as R. *v.* Edwards, MS. Sum. tit. 'Perjury.'

relates. To solicit a servant to steal, or to conspire with the inciter to steal his master's goods, or to solicit a person to conspire to cheat and defraud, is a misdemeanor, and on an indictment for the solicitation it is not necessary to aver or prove that the servant stole the goods, or entered into the proposed conspiracy to steal them, nor to prove more than the soliciting and inciting (*e*). In such a case it is left for the defendant to prove that the incitement was merged in the completed offence, whether felony or misdemeanor, and that consequently the indictment does not lie for the incitement, *i.e.*, that the alleged inciter was, in fact, accessory before or at the fact. The question has been raised whether a person can be guilty of inciting another to commit a crime, unless the person incited knows the act intended is a crime (*f*). Mr. Greaves was of opinion that the guilt of the inciter cannot depend on the state of mind of the incited, and that the state of mind and intention of the inciter, coupled with the act of incitement, that constitute the offence (*g*). It is well established that a man is liable as a principal who commits a crime through an innocent agent (*h*). B. may incite A. to do an act which B. knows to be a crime, *e.g.*, to carry away goods which B. does, and A. does not know, belong to C., or to present a cheque which B. knows and A. does not know to be forged. In the view of Sir James Stephen (*i*), the facts in R. *v.* Welham indicate that the accused incited H. to carry off corn which H. supposed the accused to have a right to remove, and he considers that the offence was an attempt to commit a felony by an innocent agent, and not an incitement to commit a felony. In a case where incitement to commit a felony (murder) was made a statutory felony, it was held that to warrant conviction for the statutory offence it must be proved that a letter or communication containing the incitement actually reached the person incited, but that in the case of the common-law misdemeanor of incitement it would be enough to shew that the incitement had been posted to the person on whom it was intended to operate (*j*).

(*e*) R. *v.* Higgins, 2 East, 5. R. *v.* Gregory, *ubi sup.* R. *v.* de Kromme, *ubi sup.*

(*f*) R. *v.* Welham, 1 Cox, 192, Patteson, J., after consulting Parke, B. Felony was here in question.

(*g*) 1 Russell on Crimes (6th ed.), 196n.

(*h*) *Ante*, p. 104.

(*i*) Dig. Cr. Law (6th ed.), note ii. p. 399. He supports his opinion by reference to R. *v.* Williams, 1 Den. 39, cited in R. *v.* Roberts, 1 Dears. 547, where instigation to A. to administer poison to B. under circumstances which would have rendered A. an accessory before the fact if poison had been given, was held not to be an attempt to administer poison within 7 Will. IV. & 1 Vict. c. 85, s. 1, now replaced by 24 & 25 Vict. c. 100, s. 11.

(*j*) R. *v.* Krause [1902], 66 J. P. 121, Alverstone, C.J.

CANADIAN NOTES.

OF ATTEMPTING, CONSPIRING, AND INCITING TO COMMIT CRIME.

(*a*) *Attempt to Commit Crime.*—An act or omission with intent to commit an offence is an attempt to commit the offence.—Code sec. 72.

(1) *Punishment for Attempt to Commit Certain Indictable Offences.*—Code sec. 570.

(2) *To Commit other Indictable Offences.*—Code sec. 571.

(3) *To Commit Statutory Offences.*—Code sec. 572.

Indictment not Insufficient for Lack of Detail.—Code sec. 863.

Special provision is made by the Code in respect of "attempted" offences as follows: To take unlawful oath, sec. 130; to influence member of a municipal council, sec. 161(*b*); to obstruct justice, sec. 180(*d*); to break prison, sec. 188; to commit sodomy, sec. 203; to procure indecent act with a male person, sec. 206; girl to have unlawful carnal connection with a third party, sec. 216; to carnally know an idiot, sec. 219; to commit murder, sec. 264; to commit suicide, sec. 270; to choke, sec. 276; to cause bodily injuries by explosives, sec. 280; to commit rape, sec. 300; to defile children under fourteen, sec. 301; to commit arson, sec. 512; to set fire to crops, sec. 514; to wreck, sec. 523; to injure or poison cattle, sec. 536.

When the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. Code secs. 949 and 951.

When an attempt to commit an offence is charged, but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt 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 the complete offence.

(2) After a conviction for such attempt, the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit. Code sec. 750.

An indictment, charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person, without giving the name of the person against whom the offence was committed, or the description of the property

the accused attempted to steal, is sufficient. And where a prisoner is indicted for an attempt to steal, and the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the Court discharges the jury and directs that the prisoner be indicted for the complete offence (Code sec. 712). R. v. Taylor (1895), 5 Can. Cr. Cas. 89 (Que.).

A defendant charged with offering money to a person to swear that A, B and C gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and a recognizance taken by one justice of the peace. It was held that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitment to give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that section 696 of the Code did not apply. R. v. Cole, 5 Can. Cr. Cas. 330, 3 O.L.R. 389.

If a person is charged with the commission of an offence and there is not sufficient evidence to convict him of the offence charged, but there is evidence of an attempt to commit the offence notwithstanding that the accused was acquitted, he could not again be put on trial for an attempt to commit the offence for that was included in the charge on which he was tried, and he should have been convicted of the attempt. R. v. Cameron, 4 Can. Cr. Cas. 385.

This provision applies to the summary trial of indictable offences, as well as to speedy trials and trials by jury. And when the prisoner consented to be tried summarily upon a charge of pocket picking, he must be taken to have assented to be tried summarily for whatever offence he might properly be found guilty of upon the said charge, and having been properly found guilty upon the said charge of an attempt to commit the offence charged, he must be held to have been legally convicted upon the said trial. R. v. Morgan (No. 1), 5 Can. Cr. Cas. 272, 3 O.L.R. 356.

Where on an indictment for a principal offence, and for an attempt to commit such offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only will not be set aside, although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence. It is within the province of the jury to believe, if it sees fit to do so, a part only of a witness's testimony, and not to believe the remainder of the same witness's testimony, and it may therefore credit the testimony in respect of a greater offence only in so far as it shews a lesser offence, R. v. Hamilton, 4 Can. Cr. Cas. 251.

Note.—It is an irrebutable presumption of law that a boy under fourteen is not capable of having carnal knowledge, and therefore cannot be convicted of rape or sodomy. R. v. Allen, 1 Dennison's Cr. Cas. 364; R. v. Hartlen, 2 Can. Cr. Cas. 12. Could he be convicted of an attempt to commit either offence, in view of Code sec. 72? The elements of intent and an overt act would be present, and the section says that possibility of accomplishment is not an essential to the commission of the offence. The Imperial Draft Code, 1879, says: "Everyone who, believing that a certain state of facts exists, does or omits an act, the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was, by reason of the non-existence of that state of facts at the time of the act or omission, impossible."

The Imperial Bill of 1880 adopted the language now used in section 72 of the Canadian Code, and in Taschereau's Criminal Code, p. 44, it is said that the section is "somewhat altered in shape and phraseology, but not in substance," from the English Draft Code of 1879, quoted above.

In C. v. Jacobs, 9 Allen (Mass.) 274, it is said that an accused "*himself capable* of doing every act on his part to accomplish that object cannot protect himself from responsibility by shewing that by reason of some fact unknown to him at the time of his criminal attempt, it could not be carried fully into effect in the particular instance."

The Code of 1879 in enacting that the non-existence of certain facts should not be a defence to the charge of an attempt, deals, apparently, with facts extrinsic to an accused himself capable of completely committing the crime attempted, whereas the incapacity of a minor is a fact, irrebutably presumed, intrinsic to the accused, who under the definition in the Massachusetts case above cited, would not be guilty of an attempt, not being "himself capable."

It is suggested that the language of Code sec. 72 is broader than the words of the section in the Code of 1879, and wide enough to cover even the intrinsic incapacity of the accused, and, therefore, that a boy under fourteen can be convicted of an attempt to commit rape or sodomy.

(*b*) *Conspiracy.*

The offence of conspiracy is treated of in the following Code sections:—

Conspiring (*a*) *to do His Majesty Bodily Harm.*—Code sec. 74(*e*).
(*b*) *To Levy War.*—Code sec. 74(*g*).
Conspiring is an Overt Act.—Code sec. 75.
Intention (*a*) *to Depose the King.*
(*b*) *To Levy War.*

(*c*) *To Induce Invasion, Manifested by Conspiring with any Person, is a Treasonable Offence, Punishable by Imprisonment for Life.*—Code sec. 78.

Conspiracy to Intimidate a Legislature.—Code sec. 79.

Conspiracy to bring about a change in the government by bribing members of the Legislature to vote against the government is an indictable offence as a common law misdemeanour. The fact that the Legislature has power by statute to punish as for a contempt does not oust the jurisdiction of the Courts where the offence is of a criminal character; the same act may be in one aspect a contempt of the Legislature and in another aspect an indictable offence. R. v. Bunting, 7 Ont. R. 524.

Seditious Conspiracy, Definition of.—Code secs. 132, 134.

Conspiracy to bring False Accusation.—Code sec. 178.

To Induce a Woman to Commit Adultery.—Code sec. 218.

To Murder.—Code sec. 266.

To Commit Indictable Offence.—Code sec. 573.

Conspiracy to Defraud.—See Code sec. 444.

A conspiracy to defraud is indictable, although the conspirators have been unsuccessful in carrying out the fraud. R. v. Frawley, 1 Can. Cr. Cas. 253.

A conspiracy to defraud is indictable, although the object was to commit civil wrong, and although if carried out the act agreed upon would not constitute a crime. R. v. Defries, 1 Can. Cr. Cas. 207.

The doctrines of commercial agency do not apply to prevent the operation of the criminal law. So where one Clark, a policyholder of a fire insurance company, conspired with Howse, their local agent, to defraud the company, and handed to Howse for transmission to the company an unfounded proof of claim for pretended losses for fire, and obtained the money through Howse from the company, it was held that the knowledge of Howse of the falsity of the pretence could not be imputed as the knowledge of the company so as to affect the criminality of Clark. R. v. Clark, 2 B.C.R. 191.

Upon a charge of conspiracy to defraud the Canadian Pacific Railway by bribing clerks in the company's employ, to illegally and fraudulently disclose information of the secret audits of trains to be made, and to furnish such information to the conductors to enable them to be prepared for the audits when made, and at other times to be free to retain fares and to allow passengers to ride free or at a reduced fare, the Court properly rejected evidence of conductors to the effect that if they knew the date of a proposed secret audit, they would communicate it to the conductor whose train was to be audited for a purpose other than that of defrauding the company. R. v. Carlin (No. 2), 6 Can. Cr. Cas. 507.

An indictment for conspiracy to defraud may properly charge that the conspiracy was with persons unknown, if neither the Crown nor the private prosecutor had definite information of the identity of the alleged co-conspirators. Where at the trial of such an indictment the name of one of the alleged co-conspirators is for the first time disclosed in the testimony of a Crown witness, that information may then be added to the statement of particulars of the indictment. R. v. Johnston, 6 Can. Cr. Cas. 232.

In an indictment charging a conspiracy to defraud it is not necessary to set out overt acts done in pursuance of the illegal agreement or conspiracy, nor is it necessary to name the person defrauded or intended to be defrauded. Before the acts of alleged conspiracy can be given in evidence there ought to be some preliminary proof to shew an acting together, but it is not necessary that a conspiracy should first be proved. R. v. Hutchinson, 8 Can. Cr. Cas. 486, 11 B.C.R. 24.

The offence of conspiracy to defraud under Code sec. 444 does not include a conspiracy to defeat a candidate's chances of election by the employment of unlawful devices. A charge of conspiracy the particulars of which severally allege that the accused conspired to defraud a candidate at an election to the Saskatchewan Legislature, the electors of the division and the public, by illegally obtaining the return of the opposing candidate, does not disclose an offence under sec. 573 of the Code, for the acts alleged as the object of the conspiracy do not constitute an indictable offence either by statute or at common law. R. v. Sinclair, 12 Can. Cr. Cas. 20.

Extradition.—Conspiracy to defraud is in itself not an extraditable offence between Canada and the United States, but extradition will lie as for a separate crime in respect of an overt act of a conspiracy which constitutes one of the crimes mentioned in the extradition arrangement. And the extraditable offence of larceny or participation in larceny is charged sufficiently in an information laid on instituting extradition proceedings therefor, if, following a charge of conspiracy to defraud between the accused and another person and an embezzlement and theft by such other person in pursuance thereof, the information alleges that the accused "did participate in the said offence of embezzlement and theft." United States v. Gaynor; Re Gaynor and Greene (No. 3), 9 Can. Cr. Cas. 205 (P.C.).

Conspiracy in Restraint of Trade.—Code secs. 496, 497, 498, 581.

Trade Union.—The Trade Unions Act, R.S.C., 1906, ch. 125, defines the expression "trade union" to mean (unless the context otherwise requires) such combination whether temporary or permanent for regulating the relations between workmen and masters or for imposing restrictive conditions on the conduct of any trade or business as would, but for that statute, have been deemed to be

an unlawful combination by reason of some one or more of its purposes being in restraint of trade. R.S.C. 1906, ch. 125, sec. 2; and see Code sec. 6.

Undue Limitation and Unreasonable Enhancement.—The prevention of every enhancement of prices or every lessening of competition in the purchase, barter or sale of commodities was not intended to be included in sub-sec. (*b*), of sec. 498, for where enhancing, preventing or lessening is specifically referred to it is qualified by the word "unreasonably" or "unduly." Sub-sec. (*b*) cannot well have been intended to embrace every combination to prevent or restrain particular kinds of systems of trading or particular kinds of bargains. At most, it includes only combinations for the direct purpose of preventing or materially reducing trade or commerce in a general sense with reference to a commodity or certain commodities, or for purposes designed or likely to produce that effect. Gibbins v. Metcalfe (1905), 15 Man. R. 583.

Sub-section (*b*) of sec. 498, originated with the Code Amendment of 1900. It applies not only to regularly organized trade unions, as that term is defined by the Trade Union Act, R.S.C. ch. 125, but to any voluntary organization of labourers. Senate Debates, 1900, page 1044. As to trade unions there is a provision in R.S.C. ch. 125, as follows: (Sec. 2): "The purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, or so as to render void or voidable any agreement or trust."

1. The definition of a trade combination or conspiracy in Code sec. 496 applies to sub-sec. (*b*) of sec. 498, not to sub-secs. (*a*), (*c*) and (*d*) thereof which in themselves define the classes of offence to which they relate.

2. A conviction on indictment for conspiring with certain persons named and others unknown "or with some or one of them" is not invalid for uncertainty, the names of the persons being in the nature of particulars only and not material to the constitution of the offence.

3. Where a defendant is arraigned and tried alone upon a charge of conspiracy he may be convicted and sentenced without first proceeding with the trial of the co-conspirators.

4. On an appeal both on the facts and the law under Code sec. 1012 in a trade combine case tried without a jury, the Court of Appeal is to decide whether the judgment below should have been for the accused or whether there was evidence on which the judgment against him could be reasonably supported. R. v. Clarke (No. 2), 14 Can. Cr. Cas. 57.

A lock-out agreement made by an employers' association following a demand from the employees' trade union for an increase in wages, is not a contravention of sec. 498 of the Code, as to trade combinations, although the contracting parties thereby agree to discharge from their employ all members of the employees' union, and not to re-employ them on a higher scale of wages than the rate prevailing at the date of the agreement.

2. On proof of damage to the signatories of the agreement through breach of the conditions, a civil action lies upon the promissory note given by the defaulting subscriber to trustees for the association to ensure the carrying out of such agreement. Lefebvre v. Knott, 13 Can. Cr. Cas. 223.

The offence of conspiring to unduly prevent or lessen competition in the sale or supply of an article of commerce under Cr. Code sec. 498(*d*) may exist without regard to the question whether the effect of the combine has been to raise or lower prices.

Such a charge as regards the lumber trade is supported by evidence that a trade association for whose actions the defendant was responsible assumed to fix a regular price of lumber in the various localities in which their members traded and to prevent persons from engaging in the lumber trade in those localities except with the consent and approval of the association through its officers and subject to its control both as to the minimum prices to be charged the public and as to the places in which new lumber yards should be started. The King v. Clarke (No. 1), 14 Can. Cr. Cas. 46.

Indictment for Conspiracy.—Code secs. 859, 860, 863.

An indictment for conspiracy to defraud is valid without setting out any overt acts and the name of the person injured or intended to be injured need not be stated therein. R. v. Hutchinson (1904), 8 Can. Cr. Cas. 486 (B.C.).

In a case of conspiracy to do that which is not a crime or to do a wrong which is not well known as being the subject of a criminal conspiracy, the facts should be set out in the indictment that it may appear whether or not the conspiracy charged is an indictable offence. An indictment for conspiracy to cure another of a sickness endangering life, "by unlawful and improper means" and thereby causing his death is bad and should be quashed because it does not specify the unlawful and improper means nor indicate the specific crime or wrong intended to be relied upon. R. v. Goodfellow (1906), 10 Can. Cr. Cas. 424, 11 O.L.R. 359.

Particulars furnished under sec. 859 of the Code have not the effect of amending or extending the scope of the original indictment or charge, and the inclusion of a separate and distinct offence as a particular under a charge of conspiracy will not authorize a conviction

which would otherwise not be within the scope of the indictment. R. v. Sinclair (1906), 12 Can. Cr. Cas. 20 (Sask.).

Any overt act of conspiracy is to be viewed as a renewal or continuation of the original agreement made by all of the conspirators, and if done in another jurisdiction than that in which the original concerted purpose was formed, jurisdiction will then attach to authorize a trial of the charge in such other jurisdiction. R. v. Connolly, 1 Can. Cr. Cas. 468.

It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the defendants' conduct, either together or severally, that they were acting in concert. R. v. Fellowes, 19 U.C.Q.B. 48, 58. Farquhar v. Robertson, 13 Ont. P.R. 156.

The jury may group the detached acts of the parties severally, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy. R. v. Connolly, 1 Can. Cr. Cas. 468.

When the existence of the common design on the part of the defendants has been proved, then evidence is properly receivable as against all of what was said or done by either in furtherance in the common design. *Ibid.*

Limitation of Prosecution.—Code sec. 1141, which limits certain proceedings for penalties and forfeitures to two years after the offence, does not apply to bar a prosecution where the offence was a continuing one, the association remaining in active operation under the presidency of the defendant up to the commencement of the prosecution. The King v. Elliott, 9 Can. Cr. Cas. 505, 9 O.L.R. 648.

Inciting to Commit Crime.—Counselling a woman in Canada to submit in a foreign country to an operation to procure her miscarriage the submission to which in Canada would be an indictable offence is not, in itself, indictable in Canada, if the operation is performed in a foreign country. R. v. Walkem, 14 Can. Cr. Cas. 122.

CHAPTER THE SEVENTH.

OF PUNISHMENTS.

SECT. I.—DEATH.

WHEN the first edition of this work was published, high treason, piracy, and a very large number of felonies were punishable by death (*a*). In fact, at common law, and by the legislation prior to 1820, the usual sentence of the law on a conviction for felony was death by hanging. To this rule there were only two exceptions at common law, mayhem, and larceny of money or chattels of a value not exceeding 12*d*.—an exception dating back to Saxon times (*b*). The number of offences for which capital punishment can now be awarded has, by piecemeal legislation between 1808 and 1861 (*c*), been reduced to four—high treason (*d*), felonies against the Dockyards Protection Act, 1772 (12 Geo. III. c. 24), piracy accompanied by violence (7 Will. IV. & 1 Vict. c. 88), s. 2, and wilful murder (24 & 25 Vict. c. 100, s. 2).

By the Children Act, 1908 (8 Edw. VII. c. 67), s. 103, 'sentence of death shall not be pronounced on or recorded against a child (*e*) or young person (*f*), but in lieu thereof the Court shall sentence the child or young person to be detained during His Majesty's pleasure, and if so sentenced he shall, notwithstanding anything in the other provisions of this Act, be detained in such place and under such conditions as the Secretary of State may direct, and whilst so detained shall be deemed to be in legal custody' (*g*).

The severity of the old law was mitigated by the privileges of benefit of clergy (*h*). During the nineteenth century, the policy of the legislature was

(*a*) The number is said to have been about 180 in 1819; Walpole, Hist. Eng. i. 191, ii. 58; Steph. Hist. Cr. L. i. 470.

(*b*) 'The King has also ordained that no one should be slain for less property than xii. pence worth, unless he should flee or defend himself.' *Judicia civitatis Lundoniæ, temp.* Athelstan; Ancient Laws, &c., of England, ff. 97, 103.

(*c*) Given in some detail in Steph. Hist. Cr. L. vol. i. pp. 472—475. See Report of Royal Commission on Capital Punishment, Parl. Pap. 1866.

(*d*) Outside the scope of this work. See Arch. Cr. Pl. (23rd ed.), tit. 'Treason.'

(*e*) *i.e.* a person of seven and under fourteen. 8 Edw. VII. c. 67, s. 131.

(*f*) *i.e.* a person of fourteen and under sixteen. 8 Edw. VII., c. 67, s. 131.

(*g*) By another Bill introduced in 1908 it was proposed to limit the death sentence to murder in the first degree, *i.e.* with express malice aforethought, and to make the killing by a mother of a child under one month no longer murder, and by an amendment to the Children Act, 1908, moved by the Lord Chancellor but rejected, it was proposed to empower the Court to substitute penal servitude or other punishment in the case of conviction of a mother for murdering her infant under one year of age.

(*h*) Benefit of clergy was the claim of persons in holy orders to exemption from the jurisdiction of lay tribunals. The claim was by degrees extended to all persons who could read, and ultimately to all persons (6 Anne, c. 9). The test of capacity to read was by requiring the claimant to read the 'neck verse' (Ps. li. 1). The claim could be made only on a first conviction unless a certificate of ordination was produced (28 Hen. VIII. c. 1; 1 Edw. VI. c. 12). The claim, if established, exempted from capital punishment

continuous in reducing the number of crimes for which the sentence of death could be imposed; and with the alleviation of the extreme severity of the law, benefit of clergy was abolished (as anomalous and as an anachronism) by sect. 6 of the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28), and by sect. 7 of the same Act it is provided that 'no person convicted of felony shall suffer death unless it be for some felony which was excluded from the benefit of clergy before or on the first day of the present session of Parliament (November 14, 1826), or which hath been or shall be made punishable with death by some statute passed after that day' (*i*).

By a series of Acts passed in 1837, the punishment of death was abolished as to a number of other felonies. The Forgery Act, 1837 (7 Will. IV. & 1 Vict. c. 84) (*j*), s. 1 substitutes transportation (*k*) for life as the maximum punishment for forgeries within a series of enactments relating to that offence (*l*). The Piracy Act, 1837 (7 Will. IV. & 1 Vict. c. 88), s. 3 makes the like provisions as to all offences in the nature of piracy (*m*) except piracy with violence mentioned (*ante*, p. 205). 7 Will. IV. & 1 Vict. c. 91, s. 1, does the like as to felonious riot, and inciting to mutiny and unlawful oaths, and offences under sect. 9 of the Slave Trade Act, 1824 (5 Geo. IV. c. 113). The penalty of death retained by other Acts of the year, 1837, as to administering poison (c. 85, s. 2), and burglary with violence (c. 86, s. 2), and robbery with wounding (c. 87, s. 2), and setting fire to dwelling-houses, any person being therein, or to ships, and hanging out false signals (c. 89, ss. 2, 4, 5), was abolished as to these offences in 1861 (*n*).

Recording Sentence of Death.—The Judgment of Death Act, 1823 (4 Geo. IV. c. 48), after reciting that '*it is expedient that in all cases of felony not within the benefit of clergy, except murder, the court before which the offender or offenders shall be convicted shall be authorised to abstain from pronouncing judgment of death, whenever such court shall be of opinion that under the particular circumstances of any case, the offender or offenders is or are a fit and proper subject or fit and proper subjects to be recommended*

on a first conviction. Benefit of clergy was abolished in 1827 (7 & 8 Geo. IV. c. 28, s. 6), as to commons and clergy, and as to peers in 1841 (4 & 5 Vict. c. 22). Before that date benefit of clergy had as to many felonies been taken away by statute. See 1 Pollock & Maitland, Hist. Eng. Law, 424—440. 2 Pike Hist. Cr. 452. 1 Steph. Hist. Cr. L. 460.

(*i*) Like provision is made as to Ireland by 9 Geo. IV. c. 54, s. 13.

(*j*) This Act was repealed in 1874 (37 & 38 Vict. c. 39) as to the punishment of offences formerly punishable under the Acts 11 Geo. IV. & 1 Will. IV. c. 66; 5 & 6 Will IV. c. 45, or 3 & 4 Will. IV. c. 51, and (except as to Scotland) as relates to the punishment of offences formerly punishable under 2 & 3 Will IV. c. 123, or 3 & 4 Will. IV. c. 44. S. 2 was repealed in 1891 (54 & 55 Vict c. 67), s. 3 in 1893 (S. L. R. No. 2), and s. 4 in 1890 (53 & 54 Vict. c. 51). These repeals do not revive the former law; *vide ante*, p. 5.

(*k*) Now penal servitude, see *post*, p. 210.

(*l*) 11 Geo. IV. & 1 Will. IV. c. 66; 2 & 3 Will. IV. c. 59, s. 19; 2 & 3 Will. IV. c. 123; 2 & 3 Will. IV. c. 125, s. 64; 5 & 6 Will IV. c. 45, s. 12; 5 & 6 Will. IV. c. 51, s. 5. All the recited Acts were repealed in 1837 (7 Will. IV. and 1 Vict. c. 84), or 1861 (24 & 25 Vict. c. 95).

(*m*) Under 28 Hen. VIII. c. 15; 11 Will. III. c. 7; 4 Geo. IV. c. 11; 8 Geo. I. c. 24; 18 Geo. II. c. 30. See 'Piracy,' *post*, p. 255.

(*n*) 24 & 25 Vict. c. 95. By 1839 only fourteen felonies were capitally punishable. 4th Rep. Crim. Law Commnrs. App. X. The number was further reduced in 1861 to those stated *ante*, p. 205.

(*o*) This Act was passed on July 8, 1823. The preamble has been repealed by the Statute Law Revision Act (No. 2, 1890). It is said that this Act was passed to avoid the necessity of presenting to King George IV. the report of the Recorder of London at the conclusion of each session of the Old Bailey,

shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy (*p*) in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask, if such offender hath or knoweth anything to say, why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may and is hereby authorised to abstain from pronouncing judgment of death upon such offender, and, instead of pronouncing such judgment, to order the same to be entered of record; and thereupon such proper officer as aforesaid shall and may and is hereby authorised to enter judgment of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before which such offender shall have been convicted.'

By sect. 2. 'A record of every such judgment, so entered as aforesaid, shall have the like effect to all intents and purposes, and be followed by all the same consequences, as if such judgment had actually been pronounced in open court, and the offender had been reprieved by the court' (*pp*). The Act was applied to the Central Criminal Court in 1837 (*q*).

The exception of murder from the Act of 1823 was removed in 1836 (*r*). But by sect. 2 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), 'upon every conviction for murder the court *shall* pronounce sentence of death' (*rr*).

The mode of executing a sentence of death for murder is prescribed by sects. 2, 3 of the Offences against the Person Act, 1861, and by the Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), and rules made thereunder (*s*).

The Act of 1868 applies only to murder (sect. 2), and there are no statutory provisions as to executing a sentence of death for other capital felonies.

Denman, the Recorder, having been counsel for Queen Caroline on her trial. The report was abolished in 1837 (7 Will. IV. & 1 Vict. c. 77, s. 1). Denman was Common Serjeant only in 1829, but a difficulty did then arise about his attending the King in the place of the Recorder. See Greville, Memoirs, vol. i. pp. 156, 246, 250.

(*p*) *Ante*, p. 205, note (*h*).

(*pp*) *Vide post*, p. 253. The Act applies to England and Ireland, but not to Scotland (s. 3).

(*q*) By 7 Will. IV. and 1 Vict. c. 77, s. 3; repealed as to murder in 1861 (24 & 25 Vict. c. 95).

(*r*) By 6 & 7 Will. IV. c. 30, s. 2 (E & I) 'sentence of death may be pronounced after convictions for murder in the same manner, and the judge shall have the same power in all respects as after convictions for other capital offences.' In R. *v.* Hogg (2 M. & Rob. 380), Denman, C.J., held that under this section sentence of death might be recorded on a conviction for murder. 6 & 7 Will. IV. c. 30, s. 2 was repealed in 1861 (24 & 25 Vict. c. 95).

(*rr*) *Vide ante*, p. 205.

(*s*) See Rules of 5 June, 1902, St. R. & O. 1902, No. 444. The treatment of prisoners under sentence of death is regulated by the Local Prison Rules, 1899 (St. R. & O. 1899, No. 322), rr. 93–95, and where they are appealing against their conviction by the Prison Rules, 1908. *Vide post*, Bk. xii. c. iv.

Sect. II.—Exile, Banishment, and Expulsion.

At common law sentence of banishment or exile could not be imposed on a British subject by any Court (*t*). The nearest approach to it was abjuration of the realm (*u*) by persons who had taken sanctuary.

By the Roman Catholic Emancipation Act, 1829 (10 Geo. IV. c. 7), s. 34, power is given to sentence to banishment from the United Kingdom for the term of their natural life persons who within the United Kingdom become Jesuits or brothers or members of any other male religious order, community, or society of the Church of Rome, and by sects. 35, 36, provisions are made for enforcing the sentence and for punishing by transportation for life persons found at large in the United Kingdom after the end of three months from the sentence of banishment. These provisions, though unrepealed, have never been put into force (*v*).

By sect. 15 of the Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), it is declared that transportation shall include banishment beyond the seas, and by that Act the power to impose sentences of transportation was limited to terms of fourteen years or upwards. By the Penal Servitude Act, 1857 (*w*), transportation as the sentence of a court was abolished.

At the present time (1909), the banishment of a British subject is effected only by means of terms imposed in granting a conditional pardon: and the course of legislation in the United States and British possessions has made it inexpedient to include such terms in pardons.

Expulsion of Aliens.—The right to exclude or expel aliens is by the law of nations vested in the supreme power of every state, which, as a necessary consequence has power to make and enforce laws for those purposes (*x*).

In the case of aliens, the Aliens Act, 1905 (5 Edw. VII. c. 13), enacts:

Sect. 1. 'The Secretary of State may, if he thinks fit, make an order (in this Act referred to as an expulsion order) requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom—

(*a*) if it is certified to him by any court (including a court of summary jurisdiction) that the alien has been convicted by that court of any felony, or misdemeanor, or other offence for which the court has power to impose imprisonment without the option of a fine, or of an offence under paragraph twenty-two or twenty-three of section three hundred and eighty-one of the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), or of an offence as a prostitute under section seventy-two of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103),or paragraph eleven of section fifty-four

(*t*) 2 Hawk. c. 33, s. 137. Countess of Portland *v.* Prodgers [1683], 2 Vern. 104.

(*u*) Abolished in 1623 (21 Jac. I. c. 28). It was connected with sanctuary, and dropped on its abolition.

(*v*) R. *v.* Kennedy [1902], 86 L. T. 753.

(*w*) *Post*, p. 210.

(*x*) Att.-Gen. for Canada *v.* Cain [1906], A.C. 542, 546. As to Canada, see that case. As to Victoria, Musgrove *v.* Chun Teeong Toy [1891], A.C. 72. As to Mauritius, *Re* Adam, 1 Moore, P. C. 460. As to the Commonwealth of Australia, see Robtelmes *v.* Brenan [1906], 4 Australia C. L. R. 395. As to India, see Alter Caufman *v.* Bombay Govt. [1894], Ind. L. R. 18 Bombay, 636. And see *Law Quarterly Review*, vol. iv. 1890, p. 27.

of the Metropolitan Police Act, 1839, and that the court recommend that an expulsion order should be made in his case, either in addition to or in lieu of his sentence; and

(*b*) if it is certified to him by a court of summary jurisdiction after proceedings taken for the purpose within twelve months after the alien has last entered the United Kingdom, in accordance with rules of court made under section twenty-nine of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), that the alien—

(i) has, within three months from the time at which proceedings for the certificate are commenced, been in receipt of any such parochial relief as disqualifies a person for the parliamentary franchise, or been found wandering without ostensible means of subsistence, or been living under insanitary conditions due to over-crowding; or

(ii) has entered the United Kingdom after the passing of this Act, and has been sentenced (*y*) in a foreign country with which there is an extradition treaty for a crime not being an offence of a political character, which is, as respects that country, an extradition crime within the meaning of the Extradition Act, 1870 (*z*).

(2) If any alien in whose case an expulsion order has been made is at any time found within the United Kingdom in contravention of the order, he shall be guilty of an offence under this Act' (*a*).

Sect. 4.—(1) 'Where an expulsion order is made in the case of any alien, the Secretary of State may, if he thinks fit, pay the whole or any part of the expenses of or incidental to the departure from the United Kingdom, and maintenance until departure, of the alien and his dependants (if any) . . .' (*b*).

Sect. III.—Transportation and Penal Servitude.

The punishment of transportation, first devised as a statutory punishment *temp.* Elizabeth (*c*), was also used by way of conditional pardon without statutory authority in respect of many crimes (*d*). In the eighteenth century it became a statutory punishment for many felonies (*e*),

(*y*) It is not stated whether this includes a conviction *par contumace* followed by a sentence passed *in absentia*.

(*z*) 33 & 34 Vict. c. 52, s. 3 (1). *Ex parte* Castioni [1891], 1 Q.B. 149. *Ex parte* Meunier [1894], 2 Q.B. 415. *Re* Arton [1896], 1 Q.B. 108.

(*a*) And liable to be dealt with as a rogue and a vagabond under s. 4 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83). See 5 Edw. VII. c. 15, s. 7 (1). Provision is made by Prison Rules of 1906 (St. R. & O. 1906, No. 160) for measuring and photographing aliens imprisoned and ordered to be expelled.

(*b*) In cases specified in subs. 2 of this section the master of the ship by which the alien arrived is liable to recoup the expenses of expulsion, or to reconvey the alien and his dependents to the port of embarkation.

(*c*) 39 Eliz. c. 4 (rep.), which enacted that rogues, vagabonds, &c., might, by the justices in sessions, be banished out of the realm, and conveyed at the charges of the county to such parts beyond the seas as should be assigned by the privy council, or otherwise adjudged perpetually to the galleys of this realm; and any rogue so banished, and returning again into the realm, was to be guilty of felony. See 6 Evans Coll. Stat. Pt. V. cl. xxv. (G) pp. 852, 853, and as to the history of transportation, 6 *Law Quarterly Review*, 388.

(*d*) See the transportation rules, Kel. (J.) 4, and 18 Car. II., c. 3, s. 2 (rep.).

(*e*) 4 Geo. I. c. 11 (rep.).

and some misdemeanors, *e.g.*, perjury (*f*). The earlier legislation was repealed and consolidated with amendments in the Transportation Act, 1824 (5 Geo. IV., c. 84). Owing to difficulties which arose as to inducing the Australian Colonies (*g*) to accept transported convicts and in finding other places for transportation, certain prisons in England were substituted, in 1847, for the penal settlements in the colonies (10 & 11 Vict. c. 67), and in 1853 sentences of transportation for less than fourteen years were abolished (16 & 17 Vict. c. 99, s. 1). Penal servitude was substituted for terms of transportation under fourteen years (sect. 2), and the Courts were given a discretion to substitute penal servitude under the Act for transportation for terms of fourteen years or over, (sect. 3). The legislation applicable to persons under sentence of transportation was so far as consistent with the Act of 1853, applied to sentences of penal servitude (sect. 7).

In 1857 (20 & 21 Vict. c. 3), transportation under the sentence of a Court was abolished (*h*), and penal servitude definitely substituted. Certain portions of the Act of 1824 are specifically retained and applied to persons sentenced to penal servitude (*i*).

By the Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), penal servitude was introduced in lieu of transportation in certain cases and under certain regulations (*j*), without affecting the power to impose alternative punishments (s. 14).

The alterations do not affect the prerogative of mercy, but the Crown may grant pardons conditional on serving a term of penal servitude (sects. 5, 13). The substitution of penal servitude for transportation does not affect the power of Courts to impose other punishments additional to, or in substitution for transportation (sect. 14). By the Children Act, 1908 (8 Edw. VII. c. 67), s. 102, a child of seven and under fourteen, and a young person of fourteen and under sixteen, may not be sentenced to penal servitude.

By sect. 6 of the Act of 1853, 'every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation, may now by law be confined, or in any other prison in the United Kingdom, or in any part of His Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of His Majesty's principal secretaries of state may from time to time direct; and such person may during such term be kept to hard labour, and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined' (*k*).

By sect. 2 of the Penal Servitude Act, 1857 (20 & 21 Vict. c. 3), which

(*f*) 2 Geo. II. c. 25, s. 2, *post*, p. 479.

(*g*) See Morton, British Colonies (1835), vol. iv. p. 440; Rusden, Hist. Australia (1883), ii. 534; 6 St. Tr. (N. S.) 698*a*.

(*h*) Power to send a convict out of the realm to serve a term of penal servitude still remains. 20 & 21 Vict. c. 3, s. 3.

(*i*) See *post*, p. 575, as to being at large during a sentence of 'penal servitude.'

(*j*) Ss. 1–4 of this Act were superseded and repealed by the Act of 1857 (20 & 21 Vict. c. 3). For s. 5 relating to conditional pardons, *vide post*, p. 252.

(*k*) S. 7 applies to the Act of 1853 all Acts and provisions in Acts relating to transportations so far as consistent with the express provisions of the Acts of 1853. S. 8 applies the Act to Ireland.

is to be read as one Act with the Act of 1853 (*l*), 'after the commencement of this Act (June 26, 1857), no person shall be sentenced to transportation; and any person who, if this Act and the said Act [of 1853] had not been passed, might have been sentenced to transportation, shall be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said Act and this Act had not been passed; and in every case where at the discretion of the Court one of any two or more terms of transportation might have been awarded, the Court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorised to be awarded instead of such terms of transportation' . . . (*m*).

By sect. 6, 'Where in any enactment now in force the expression 'any crime punishable with transportation,' or 'any crime punishable by law with transportation,' or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude.'

By the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 1: '(1) Where under any enactment in force when this section comes into operation (August 5, 1891) a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, and not exceeding either five years, or any greater period authorised by the enactment' (*n*).

. . . . . .

'(3) Sect. 2 of the Penal Servitude Act, 1864 (27 & 28 Vict. c. 47) is hereby repealed with respect to any sentence awarded after the date at which this section comes into operation' (*o*).

Under most of the sections of the Criminal Law Consolidation Acts of 1861 the minimum term of penal servitude was three years.

The mode in which sentences of penal servitude are to be carried out is regulated by prison rules, in which regard must be had to the sex, age, health, industry, and conduct of the convicts (*p*).

Sect. IV.—Imprisonment.

Without Hard Labour.—Imprisonment without hard labour is recognised by the common law as one of the lawful modes of punishing

(*l*) 16 & 17 Vict. c. 99. See 20 & 21 Vict. c. 3, s. 7.

(*m*) The rest of this section was repealed in 1892 (S. L. R.), as to all His Majesty's dominions. Ss. 3, 4 of the Act of 1857 apply the Transportation Acts to persons under sentence of penal servitude imposed in England or Ireland *vide post*, pp. 573 *et seq.*

(*n*) See R. *v.* Peters 1 Cr. App. R. 141 as to the effect of this Act and Statute Law revision repeals on the maximum sentence of penal servitude. For subsec. 2 see *post*, p. 212. At one time the opinion prevailed that for certain offences fixed terms of transportation or imprisonment should be imposed. This policy was overridden in 1846 (9 & 10 Vict. c. 24, rep. 1892, S. L. R.) as to certain cases of felony. In the Acts of 1861 a minimum term of penal servitude was prescribed for only one offence (24 & 25 Vict. c. 100, s. 61), which minimum has been reduced to three years by the Act of 1891.

(*o*) The repealed section made the minimum term of penal servitude seven years in the case of conviction on indictment of a crime or offence punishable by penal servitude after a previous conviction of felony. For decisions thereon see R. *v.* Deane, 2 Q.B.D. 305. R. *v.* Willis, 41 L. J. M. C. 104. R. *v.* Summers, L. R. 1 C. C. R. 182. S. 2 had already been repealed in 1879 (42 & 43 Vict. c. 55, s. 1) as to the minimum term of penal servitude on a conviction of an offence punishable by penal servitude after a previous conviction of felony.

(*p*) 61 & 62 Vict. c. 41, s. 4: Convict Prison Rules, 1899 (St. R. & O., 1899, No. 320).

misdemeanors. Successive terms of imprisonment may be imposed in respect of several convictions at the same time for similar misdemeanors(*q*).

There are now two forms of imprisonment—with and without hard labour (*qq*). A child of seven and under fourteen may not be sentenced to imprisonment (8 Edw. VII. c. 67, s. 102 (1)) and a young person (of fourteen and under sixteen) may not be sentenced to imprisonment for an offence or committed to prison in default of payment of a fine, damages, or costs, unless the Court certifies that he is too unruly or too depraved for detention as a youthful offender (sect. 102 (3)).

By the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 1 (2), "Where under any Act now (August 5, 1891) in force, or under any future Act, a court is empowered or required to award a sentence of penal servitude, the court may, in its discretion, unless such future Act otherwise requires, award imprisonment for any term not exceeding two years, with or without hard labour' (*r*). This enactment applies to all felonies not punishable by death (*rr*), and to certain misdemeanors, *e.g.*, perjury and obtaining by false pretences, for which penal servitude may be imposed. (*Vide post*, Book VII. Chapter I., Book X. Chapter XXVII.)

Hard Labour.—A sentence to imprisonment with hard labour (*s*) is never obligatory upon any Court, and cannot lawfully be imposed except under statutory authority. The more general statutory provisions on the subject are that above stated, and the two enactments now to be noticed (*t*).

By the Hard Labour Act, 1822 (3 Geo. IV. c. 114), after reciting 53 Geo. III. c. 162, it is enacted, that 'whenever any person shall be convicted of any of the offences hereafter specified and set forth, that is to say . . . any attempt to commit felony; any riot; . . . keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house; wilful and corrupt perjury, or of subornation of perjury; . . . in each and every of the above cases, and whenever any person shall be convicted of any or either of the aforesaid offences, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorised to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this Act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct' (*u*).

(*q*) Castro *v.* R., 6 App. Cas. 229, *post*, p. 248. (*qq*) *Vide post*, pp. 213, 214.

(*r*) This enactment superseded all statutory provisions allowing imprisonment as an alternative to transportation or penal servitude, and most of such provisions have now been repealed by Statute Law Revision Acts of 1892 and 1893. In particular, 7 & 8 Geo. IV. c. 28, s. 9, and 7 Will. IV. & 1 Vict. c. 84, s. 3, printed in the 6th ed. of this work, vol. i. pp. 65, 82, are so repealed.

(*rr*) *Vide post*, p. 246.

(*s*) The mode in which a sentence of hard labour is to be carried out is determined by Prison Rules made under s. 4 of the Prison Act, 1898 (61 & 62 Vict. c. 41), and varies according to the age and sex of the prisoner. In the case of males between sixteen and twenty-four, special rules have been made. 1902, June 5; 1906, July 13.

(*t*) For the special provisions of particular statutes authorising imprisonment with hard labour see the title relating to the offence.

(*u*) The omitted portions of this enactment have been superseded and repealed by other legislation and the Criminal Law Consolidation Acts of 1861.

By the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 29, 'whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person . . . (*v*); any public selling, or exposing for public sale or to public view of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.'

By the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 4 (*w*), 'Every accessory *after* the fact to any felony, except where it is otherwise specially enacted (*x*), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction (*y*), for any term not exceeding two years, with or without hard labour' . . . (*z*).

By the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 40, 'The Prison Commissioners shall see that any prisoner under sentence, inflicted upon conviction of sedition or seditious libel, shall be treated as a misdemeanant of the first division within the meaning of sect. 67 of the Prison Act, 1865 (28 & 29 Vict. c. 126), notwithstanding any statute, provision, or rule, to the contrary.' By sect. 41. 'Any person who shall be imprisoned under any rule, order, or attachment for contempt of any court shall be in like manner treated as a misdemeanant of the first division, within the meaning of the said section of the said Act' (*zz*).

By the Prison Act, 1898 (61 & 62 Vict. c. 41), s. 6, (1) 'Prisoners convicted of offences, either on indictment or otherwise, and not sentenced to penal servitude or hard labour, shall be divided into three divisions.'

(2) 'Where a person is convicted by any court of an offence and is sentenced to imprisonment without hard labour, the court may, if it thinks fit, having regard to the nature of the offence and the antecedents of the offender, direct that he be treated as an offender of the first division or as an offender of the second division. If no direction is given by the court, the offender shall, subject to the provisions of this section, be treated as an offender of the third division' (*a*).

. . . . . .

(4) 'Any person imprisoned for default of entering into a recognisance, or finding sureties for keeping the peace or for being of good behaviour,

(*v*) The words here omitted were repealed in 1861 (24 & 25 Vict. c. 95, s. 1).

(*w*) *Ante*, p. 126.

(*x*) *e.g.* accessories after the fact to murder (24 & 25 Vict. c. 100, s. 67), and receivers of stolen goods (24 & 25 Vict. c. 96, ss. 91, 98).

(*y*) Now in a local prison under the Prison Acts, 1865 to 1898.

(*z*) Similar provisions are made in 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35; c. 100, s. 67.

(*zz*) See Osborne *v.* Milman, 18 Q.B.D. 471.

(*a*) Subsec. 3 relates to imprisonment without hard labour for default in paying a debt, including a civil debt recoverable summarily, or in lieu of distress for money adjudged to be paid by a Court of summary jurisdiction.

shall be treated under the same rules as an offender of the second division, unless he is a convicted prisoner, or unless the court direct that he be treated as an offender of the first division.'

(5) 'References in sects. 40, 41, of the Prison Act, 1877 (*b*), to a misdemeanant of the first division within the meaning of sect. 67 of the Prison Act, 1865 (*c*), shall be construed as references to an offender of the first division within the meaning of this section.'

Criminal Courts have not, in the opinion of the Secretary of State (*d*), sufficiently kept in mind the power given to them to classify persons sentenced to imprisonment without hard labour given by the enactment above stated, nor the terms of the Prison Rules applicable to the three divisions created by the enactment. It would seem that cases for directing the offender to be put in the first division are not of common occurrence, and that the reasons for placing an offender in the second division are not so much the legal character of the offence (except in cases where the imprisonment is ordered in default of paying a fine), but the character and antecedents of the prisoner and the circumstances under which the offence was committed, *e.g.*, where the prisoner does not belong to the criminal class and has not been generally of criminal habits, and there is evidence of good character over a considerable period, and it is clear that exceptional temptation or special provocation has led to a merely temporary deviation from the path of honesty or to an act of violence not in consonance with the natural disposition of the prisoner (*e*). The state of the prisoner's health appears to be no sufficient reason for placing him in the second division, because under the prison administration prisoners of whatever class are excused from discipline to which their state of health unfits them.

The mode in which sentences of imprisonment, with or without hard labour, are to be carried out in prisons is regulated by prison rules, in which regard is had to the sex, age, health, industry and conduct of the prisoners (*f*), and the rules provide for enabling a prisoner sentenced to imprisonment, whether by one sentence or a cumulative sentence, for a period prescribed by the rules (*g*), to earn by special industry and good conduct a remission of a portion of his imprisonment, and on his discharge (in virtue of such remission) his sentence shall be deemed to have expired (*h*).

In any sentence of imprisonment passed on or since January 1, 1899, month means calendar month unless a contrary intention is expressed by the Court; and a prisoner whose term of imprisonment expires on Sunday, Christmas Day, or Good Friday, is to be discharged on the next preceding day (*i*).

Solitary Confinement.—Under many statutes passed between 1827 and 1862, power was given to sentence a prisoner to solitary confinement.

(*b*) *Ante*, p. 43.

(*c*) S. 67 is repealed by 61 & 62 Vict. c. 41, s. 15 (2), as from May 1, 1899, the date when the first Prison Rules made under 61 & 62 Vict. c. 41, s. 2 came into force. Prison Rules, 1899 (St. R. & O. 1899, No. 322).

(*d*) See Home Office Circulars to Justices of April, 1899, and Dec. 31, 1906.

(*e*) Home Office Circular, April, 1899.

(*f*) 61 & 62 Vict. c. 41, s. 4. Local Prison Rules, (St. R. & O. 1899, No. 322), r. 34.

(*g*) Rules dated Aug. 12, 1907, St. R. & O., 1907, No. 617.

(*h*) 61 & 62 Vict. c. 41, s. 8. Local Prison Rules, 1899, r. 36.

(*i*) 61 & 62 Vict. c. 41, s. 12.

Most, if not all, these enactments were repealed in 1893 (*j*), having fallen out of use in consequence of the provisions of the Prison Acts and Rules (*k*), under which solitary confinement is a matter of prison regulation and not of judicial sentence.

Sect. V.—Whipping.

Whipping in public or in private was recognised by the common law as an appropriate mode of punishing misdemeanants of either sex (*l*), and in a few cases was made a statutory punishment for felony or misdemeanor (*ll*).

Females.—The whipping of females is absolutely forbidden by 1 Geo. IV. c. 57, s. 1, and imprisonment with hard labour for not less than one month nor more than six months is substituted for the punishment of whipping in cases in which, prior to July 15, 1820, the punishment of whipping had formed the whole or part of the judgment or sentence on a female offender (sect. 2).

Adult Males.—At the present time the whipping of adult males is authorised (i) by the Knackers Act, 1786 (26 Geo. III. c. 71), ss. 8, 9; (ii) by the Vagrancy Act, 1824 (5 Geo. IV. c. 83), in the case of men sent to quarter sessions to be dealt with as incorrigible rogues (*m*); (iii) by the Garrotters Act, 1863 (26 & 27 Vict. c. 44), in the case of offences within sect. 43 of the Larceny Act, 1861, and sect. 21 of the Offences against the Person Act, 1861; (iv) in the case of males under sentence of penal servitude, or convicted of felony, or sentenced to hard labour, who are guilty of mutiny or incitement to mutiny, or of gross personal violence to an officer or servant of the prison in which they are (*n*).

Youthful Males.—In the case of taking a reward for helping to the discovery of stolen property, whipping can be inflicted on a male offender who is under the age of eighteen (24 & 25 Vict. c. 96, s. 101). In many other cases (*o*) this punishment can be inflicted on male offenders under the age of sixteen, *e.g.*, by sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), in case of offences against girls under thirteen. This section expressly incorporates the provisions of 25 & 26 Vict. c. 18. It would, therefore, seem that it is the intention of the legislature, where a sentence of whipping is imposed on a boy over fourteen and under sixteen years of age, that the instrument to be used should be a birch rod, and the number of strokes should not be more than twenty-five.

(*j*) 56 & 57 Vict. c. 54 (S. L. R.). This statute repealed in particular 7 & 8 Geo. IV. c. 28, s. 9; 7 Will. IV. & Vict. c. 90, s. 2; 7 Will. IV. & 1 Vict. c. 91, s. 2; 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 98, s. 40; and c. 100, s. 70.

(*k*) See Local Prison Rules, 1899, r. 77.

(*l*) Vide Pollock and Maitland, Hist. Eng. Law, ii. 517, 542.

(*ll*) 2 Hawk. c. 48, s. 14.

(*m*) See s. 10. The power appears to extend to offences created by subsequent Vagrancy Acts, including that of 1898 (61 & 62 Vict. c. 39), as to men living on the earnings of prostitution.

(*n*) Prison Act, 1898 (61 & 62 Vict. c. 41, s. 5). This section provides for an inquiry by the board of visitors or visiting committee of the prison, or other officer to be appointed by the Home Secretary, and for submission to him for confirmation of any order made for whipping. See Convict Prison Rules, 1899, rr. 83, 84, 85: Local Prison Rules, 1899, rr. 89, 90, 91. In military and naval prisons corporal punishment is abolished.

(*o*) Chiefly relating to offences against property. See the enactments under the particular titles.

Regulations as to Whipping.—Each of the Criminal Law Consolidation Acts of 1861 (24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 100, s. 70), contains the following clause:—

'Whenever whipping may be awarded for any indictable offence under this Act, the Court may sentence the offender to be once privately whipped; *and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the Court in the sentence.*'

These enactments do not prescribe the instrument or limit the number of strokes.

By the Whipping Act, 1862 (25 & 26 Vict. c. 18), s. 1, where whipping is ordered by a Court of Summary Jurisdiction (in England or Ireland) the order sentence or conviction must specify the number of strokes to be given and the instrument to be used; and in the case of an offender under fourteen years of age, the instrument is to be a birch rod, and the number of strokes is not to exceed twelve. By sect. 2, 'No offender shall be whipped more than once for the same offence.'

The Garrotters Act, 1863 (26 & 27 Vict. c. 44), is as follows:—

'Whereas by sect. 43 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), it is provided that "whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person, or shall together with one or more other person or persons rob or assault with intent to rob any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person;" and by sect. 21 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), that "whosoever shall by any means attempt to choke, suffocate, or strangle any person, or by any means calculated to choke, suffocate, or strangle, attempt to render any person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement"; and whereas the punishment awarded by the said section is insufficient to deter from crimes of violence:'

BE IT ENACTED as follows:

1. 'Where any person is convicted of a crime under either of the said sections, the Court before whom he is convicted may, in addition to the punishment awarded by the said sections or any part thereof, direct that the offender, if a male, be once, twice, or thrice privately whipped, subject to the following provisions:

(1) That in the case of an offender whose age does not exceed sixteen years the number of strokes at each such whipping do not exceed twenty-five, and the instrument used shall be a birch rod:

(2) That in the case of any other male offender the number of strokes do not exceed fifty at each such whipping:

(3) That in each case the Court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used:

Provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence; provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison with a view to his undergoing his sentence of penal servitude (*oo*).'

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 10 as amended by s. 128 (1) of the Children Act, 1908 (8 Edw. VII. c. 67), limits the whipping to six strokes of a birch rod in the case of a male child between seven and fourteen. Under this Act the whipping is private, and is inflicted by a police constable in the presence of a police inspector or other officer above the rank of a constable, and, if desired, of the parent or guardian of the child. The Children Act, 1908, does not add to or take away from the list of offences for which youthful offenders may be whipped. (See sect. 107.)

Sect. VI.—Fine.

On conviction of any misdemeanor the Court may impose a fine in addition to or in substitution for any other lawful punishment, unless a statute relating to the offence otherwise provides. The amount of the fine (sometimes in the earlier statutes called a ransom) is in the discretion of the Court (*p*), unless a limit is fixed by statute (*q*).

Each of the Consolidation Acts of 1861, (24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38, and c. 100, s. 71) contains a provision that 'Wherever any person shall be convicted of any indictable misdemeanor *punishable* (*r*) under this Act, the Court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorised, fine the offender.' . . .

A fine cannot at common law be imposed on conviction of felony. By sect. 5 of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), the Court may sentence a person convicted of manslaughter 'to pay such fine as the Court shall award, in addition to or without any such other discretionary punishment as aforesaid (*rr*).'

The fine imposed is levied as a Crown debt of record (*s*), under the Levy of Fines Acts, 1822 and 1823 (*t*), or enforced by imprisonment (without hard labour) until it is paid. The Courts have no power to remit or mitigate a fine when once duly recorded, and applications for remission are made to the Treasury (*u*). It used to be said that a fine

(*oo*) An appeal lies against a sentence of whipping passed on an incorrigible rogue, or on conviction or indictment, *vide* R. *v.* Anthony, 1 Cr. App. R. 22, and *post*, vol. ii. p. 2011.

(*p*) 1 Chit. Cr. L. 710. Subject to the provision of the Bill of Rights, 1 Will. & M. Sess. 2, c. 2, 'That excessive bail ought not to be required nor excessive fines imposed.' Cf. Magna Charta, 25 Edw. I. c. 14.

(*q*) The particular statutes fixing such limits are given under the title relating to the particular offence.

(*r*) Many offences within the Acts are offences at common law for which the Acts prescribe statutory punishments.

(*rr*) *i.e.*, in lieu of imprisonment, *vide ante*, p. 212.

(*s*) R. *v.* Woolf, 2 B. & Ald. 609; 21 R. R. 412.

(*t*) 3 Geo. IV. c. 46; 4 Geo. IV. c. 37, as amended with reference to Quarter Sessions by 12 & 13 Vict. c. 45, s. 17, and 16 & 17 Vict. c. 30, s. 2.

(*u*) In the case of imprisonment for non-payment of fines imposed by a Court of summary jurisdiction, the term of imprisonment is reducible by part payment of the

could not in general be imposed on a married woman, as she had nothing to pay with (*v*). But since the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), this theory has little or no force.

By the Children Act, 1908, s. 99, (1) 'Where a child or young person is charged before any Court with any offence for the commission of which a fine, damages, or costs may be imposed, and the Court is of opinion that the case would be best met by the imposition of a fine, damages, or costs, whether with or without any other punishment, the Court may in any case, and shall, if the offender is a child, order that the fine, damages, or costs awarded be paid by the parent or guardian (*x*) of the child or young person, instead of by the child or young person, unless the Court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person.

(2) Where a child or young person is charged with any offence, the Court may order his parent or guardian' to 'give security for his good behaviour.

(3) Where a Court of Summary Jurisdiction thinks that a charge against a child or young person is proved, the Court may make an order on the parent or guardian under this section for the payment of damages or costs or requiring him to give security for good behaviour without proceeding to the conviction of the child or young person.

(4) An order under this section may be made against a parent or guardian who, having been required to attend, has failed to do so, but, save as aforesaid, no such order shall be made without giving the parent or guardian an opportunity of being heard.

(5) Any sums imposed and ordered to be paid by a parent or guardian under this section, or on forfeiture of any such security as aforesaid, may be recovered from him by distress or imprisonment in like manner as if the order had been made on the conviction of the parent or guardian of the offence with which the child or young person was charged.

(6) A parent or guardian may appeal against an order under this section

(*a*) if made by a Court of Summary Jurisdiction to a Court of Quarter Sessions; and

(*b*) if made by a Court of Assize or a Court of Quarter Sessions to the Court of Criminal Appeal in accordance with the Criminal Appeal Act, 1907 (*xx*), as if the parent or guardian against whom the order was made had been convicted on indictment, and the order were a sentence passed on his conviction.'

Sect. VII.—Recognisances and Sureties to keep the Peace or for Good Behaviour.

In the case of a misdemeanor, the Courts have, at common law, in addition to any other lawful punishment imposed, the power to require the offender on conviction to enter into recognisances and to find sureties,

fine by the ratio borne by the sum paid to the term of imprisonment imposed (61 & 62 Vict. c. 41, s. 9).

(*v*) See R. *v.* Loveden, 8 T. R. 615, 618 (*d*). As to earlier practice see 2 Hawk. P. C. c. 25, s. 3; R. *v.* Thomas, cas. *temp.* Hardw. 278.

(*x*) The attendance of the parent, &c., may be required under s. 98.

(*xx*) *Post*, vol. ii. p. 2009.

both or either, to keep the peace and be of good behaviour (*y*). This power applies even to married women (*z*). Each of the Consolidation Acts of 1861 (24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; and c. 100, s. 71), contains the following clause:—

'Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the Court may, if it shall think fit, in addition to, or in lieu of any of the punishments by this Act authorised, . . . require him to enter into his own recognisances, and to find sureties, both or either, for keeping the peace and being of good behaviour, and in case of any felony punishable under this Act (*a*), the Court may, if it shall think fit, require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace in addition to any punishment by this Act authorised: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year' (as to such imprisonment *vide* 61 & 62 Vict. c. 41, s. 6 (4), *ante*, p. 213).

Sect. VIII.—Probation of Offenders.

A. *Release of Convicts on Licence.*

Provision is made by the Penal Servitude Acts for release, on licence or ticket of leave, of persons sentenced to penal servitude (*b*).

By the Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), s. 9, 'It shall be lawful for His Majesty, by an order in writing under the hand and seal of one of His Majesty's principal secretaries of state, to grant to any convict now under sentence of transportation, or who may hereafter be sentenced to transportation, or to any punishment substituted for transportation by this Act, a licence to be at large (*c*) in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such licence shall be expressed, during such portion of his or her term of transportation or imprisonment, and upon such conditions in all respects as to His Majesty shall seem fit; and it shall be lawful for His Majesty to revoke or alter such licence by a like order at His Majesty's pleasure.'

Sect. 10. 'So long as such licence shall continue in force and unrevoked, such convict shall not be liable to be imprisoned or transported

(*y*) R. *v.* Dunn, 12 Q.B. 1026. R. *v.* Hart, 30 St. Tr. 1131; and see Wise *v.* Dunning [1902], 1 K.B. 167. As to the differences between recognisances for good behaviour and recognisances to keep the peace, see Dalton, c. 123; 7 Mod. 29; 1 Hawk. 483, 486; Burn's Justice (30th ed.), vol. v. 763.

(*z*) R. *v.* Thomas, cas. K.B. *temp.* Hardw. 278. It used to be held that a married woman could not be bound by recognisance. Lee *v.* Lady Baltinglas, Styles, 475. Bennet *v.* Watson, 3 M. & S. 1. Elsy *v.* Mawdit, Styles, 226. The reason alleged was that the recognisance of a married woman could not be estreated. 1 Chit. Cr. L. 100. But a woman married since Dec. 31, 1882 appears to be able to enter into a recognisance to the same extent as a *femme sole*.

(*a*) The Offences Against the Person Act 1861 (24 & 25 Vict. c. 100), here adds 'otherwise than with death' (s. 71).

(*b*) These provisions take the place of provisions in the Transportation Acts for assigning convicts as servants or otherwise letting out their services. The practice continues in some of the United States under the name of peonage: *vide post*, p. 277, note (*n*).

(*c*) Usually styled a ticket of leave. Such tickets were given in Australia to transported convicts. See Martin, British Colonies (1835), vol. iv. p. 444

by reason of his or her sentence, but shall be allowed to go and remain at large according to the term of such licence.'

Sect. 11. If it shall please His Majesty to revoke any such licence, a secretary of state by warrant under his hand, may signify to any one of the police magistrates of the metropolis that such licence has been revoked, and may require such magistrate to issue his warrant for the apprehension of the convict, and such magistrate shall issue his warrant accordingly, and such warrant shall and may be executed by the constable to whom the same shall be delivered for that purpose in any part of the United Kingdom, or in Jersey, Guernsey, Alderney, or Sark, and the convict when apprehended shall be brought before the magistrate who issued the warrant, or some other magistrate of the same Court; and he shall thereupon make out his warrant for the recommitment of the convict [to the prison from which he was released] (*d*), and such convict shall be so recommitted accordingly and shall thereupon be remitted to his or her original sentence, and shall undergo the residue thereof as if no such licence had been granted.

By the Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), s. 4, 'a licence granted under the said Penal Servitude Acts' (of 1853 & 1857) 'may be in the form set forth in Schedule (A.) to this Act annexed, and may be written, printed, or lithographed. If any holder of a licence granted in the form set forth in the said Schedule (A.) is convicted, either by the verdict of a jury or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction (*e*). . . .

Sect. 8. Where any holder of any licence granted in the form set forth in the said Schedule (A.) is convicted of an offence, punishable summarily under this or any other Act, the justices, sheriff, sheriff-substitute, or other magistrate convicting the prisoner, shall, without delay, forward by post a certificate in the form given in Schedule (B.) to this Act annexed, if in England or Scotland to one of his Majesty's principal secretaries of state, or if in Ireland to the Lord Lieutenant; and thereupon, the licence of the said holder may be revoked in manner provided by the said Penal Servitude Acts.'

Sect. 9. 'Where any licence granted in the form set forth in the said Schedule (A.) is forfeited by a conviction [on indictment of any offence] (*f*), or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, *after* undergoing any other punishment to

(*d*) The words in brackets were expressly repealed in 1875 (38 & 39 Vict. c. 66), having been already virtually repealed by the Penal Servitude Act, 1857 (20 & 21 Vict. c. 3), under s. 5 whereof 'such convict may be recommitted by the magistrate issuing his warrant in that behalf either to the prison from which he was released by virtue of his licence or to any other prison in which convicts under sentence of penal servitude may be lawfully confined.'

(*e*) Rest of section rep. in 1875 (S. L. R.). S. 5 imposes penalties on licence holders for failure to produce the licence or for certain specified breaches of the conditions of the licence.

(*f*) The Court of trial has no option under this section. R. *v.* King [1897], 1 Q.B. 214. And it cannot order the subsequent sentence to be served concurrently with the *remanet* of the old uncompleted sentence, R. *v.* Hamilton [1908], 1 Cr. App. R., 87, R. *v.* Wilson, C. C. A., 24 June, 1909: or *after* the *remanet*, R. *v.* Smith, C. C. A., 24 June, 1909. As to cases within s. 9 see further 54 & 55 Vict. c. 69, s. 3, *post*, p. 226.

which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall, for the purpose of his undergoing such last mentioned punishment, be removed from the prison of any county, borough, or place in which he may be confined, to any prison in which convicts under sentence of penal servitude may lawfuly be confined, by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence' (*g*).

Sect. 10 empowers His Majesty or the Lord Lieutenant of Ireland to grant licences in any other form than that set forth in Schedule (A.) and containing different conditions; and such licences shall be revocable at pleasure by the authority by which they were granted; but a breach of their conditions is not to subject any holder of a licence to summary conviction (*h*).

By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 3, 'any constable in any police district may, if authorised so to do in writing by the chief officer of police of that district, without warrant take into custody any convict who is the holder of a licence granted under the Penal Servitude Acts, if it appears to such constable that such convict is getting his livelihood by dishonest means, and may bring him before a court of summary jurisdiction for adjudication (*i*). If it appears from the facts proved before such court that there are reasonable grounds for believing that the convict so brought before it is getting his livelihood by dishonest means, such convict shall be deemed to be guilty of an offence against this Act, and his licence shall be forfeited.'

By sect. 4, 'where in any licence granted under the Penal Servitude Acts, any conditions different from or in addition to those contained in Schedule A. of the Penal Servitude Act, 1864 (*j*) are inserted, the holder of such licence, if he breaks any such conditions by an act that is not of itself punishable, either upon indictment or upon summary conviction, shall be deemed guilty of an offence against this Act, and shall be liable to imprisonment for any period not exceeding three months, with or without hard labour. A copy of any conditions annexed to any licence granted under the Penal Servitude Acts, other than the conditions contained in Schedule A. of the Penal Servitude Act, 1864, shall be laid before both Houses of Parliament within twenty-one days after the making thereof, if Parliament be then sitting, or if not, then within fourteen days after the commencement of the next session of Parliament.'

By sect. 5, 'every holder of a licence granted under the Penal Servitude Acts who is at large in Great Britain or Ireland shall notify the place of

(*g*) The words in brackets were substituted for the words 'of any indictable offence,' in 1891 (54 & 55 Vict. c. 69, s. 3 (3)) and the form in Schedule A was amended by substituting 'on indictment of some offence' for 'of some indictable offence.'

(*h*) The provisions of this section as to licences in the form in Schedule A. are applied also to a licence in any other form authorised by the section. 54 & 55 Vict. c. 69, s. 5, *post*, p. 226.

(*i*) For further provisions see 54 & 55 Vict. c. 69, s. 2 (1), *post*, p. 225.

(*j*) As amended in 1891, 54 & 55 Vict. c. 69, s. 3, *post*, p. 226.

his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district [*and whenever he is about to leave a police district he shall notify such his intention to the chief officer of police of that district, stating the place to which he is going, and, as far as is practicable, his address at that place, and whenever he arrives in any police district he shall forthwith notify his place of residence to the chief officer of police of such last-mentioned district*] (*k*); moreover, every male holder of such a licence as aforesaid shall, once in each month, report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself, or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter (*l*).

[*If any person to whom this section applies fails to comply with any of the requisitions of this section, he shall in any such case, be guilty of an offence against this Act* (*ll*), *unless he proves to the satisfaction of the Court before whom he is tried, either that being on a journey he tarried no longer in the place, in respect of which he is charged with failing to notify his place of residence, than was reasonably necessary, or that otherwise he did his best to act in conformity with the law; and on conviction of such offence, it shall be lawful for the Court in its discretion either to forfeit his licence or to sentence him to imprisonment, with or without hard labour, for a term not exceeding one year* (*m*)].

Sect. 6, (sub-sects. 1-5) provides for keeping registers of all persons convicted of crime in the United Kingdom, and for making periodical

(*k*) The words in brackets were substituted by 54 & 55 Vict. c. 69, s. 4, for the original words of the section.

(*l*) By the Prevention of Crime Act, 1879 (42 & 43 Vict. c. 55), s. 2, 'Any holder of a licence required, under s. 5, and any person subject to the supervision of the police required, under s. 8 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), to notify his residence or any change of his residence to a chief officer of police, shall comply with such requirement by personally presenting himself and declaring his place of residence to the constable or person who at the time when such notification is made is in charge of the police station or office of which notice has been given to such holder or person, as the place for receiving his notification, or if no such notice has been given, in charge of the chief office of such chief officer of police.'

'The power of the chief officer of a police district to direct that the reports required by ss. 5 & 8 of the Prevention of Crimes Act 1871, to be made by holders of licences and persons subject to the supervision of the police, shall be made to some other person, shall extend to authorise him to direct such reports to be made to the constable or person in charge of any particular police station or office without naming the individual person. Any appointment, direction, or authority purporting to be signed by the chief officer of police, and to have been made or given for the purposes of this Act or of ss. 5 & 8 of the Prevention of Crimes Act, 1871, or one of them, shall be evidence until the contrary is proved, that the appointment, direction, or authority thereby made or given by the chief officer of police; and evidence that it appears from the records kept by authority of the chief officer of police that a person required as above mentioned to notify his residence or change of residence, or to make a report, has failed to comply with such requirement, shall be *primâ facie* evidence that the person has not complied with such requirement; but if the person charged alleges that he made such notification or report to any particular person or at any particular time, the Court shall require the attendance of such persons as may be necessary to prove the truth or falsehood of such allegation.'

(*ll*) S. 17 states how offences against the Act may be prosecuted before a Court of summary jurisdiction.

(*m*) The words in brackets were substituted by 54 & 55 Vict. c. 69, s. 4, for the original words of the section in the Act of 1871.

returns of the persons convicted of crime, who came into the custody of the gaoler or governor of any prison (*mm*).

By sect. 8 of the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69) power is given to make regulations as to the measuring and photographing 'of all prisoners who may, for the time being, be confined in any prison' (*n*). The regulations are made in England by the Home Secretary, or in Scotland by the Secretary for Scotland, and in Ireland by the Lord Lieutenant (*o*). The regulations must be laid before Parliament as soon as practicable after they are made (*p*).

Special Offences by Persons twice convicted of Crime.—By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 7 (*pp*): Where any person is convicted on indictment of a crime (*q*), and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances, or any of them :—

First. If, on his being charged by a constable with getting his livelihood by dishonest means, and being brought before a Court of Summary Jurisdiction, it appears to such Court that there are reasonable grounds for believing that the person so charged is getting his livelihood by dishonest means : or

Secondly. If, on being charged with any offence punishable on indictment or summary conviction, and on being required by a Court of Summary Jurisdiction to give his name and address, he refuses to do so, or gives a false name or a false address : or,

Thirdly. If he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction : or

Fourthly. If he is found in or upon any dwelling-house, or any building, yard, or premises, being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure ground, or nursery ground, or in any building or erection in any garden, orchard, pleasure ground, or nursery ground, without being able to account to the satisfaction of

(*mm*) See also 39 & 40 Vict. c. 23, s. 2.

(*n*) In the Act of 1871 the power was limited to photographing, and to all prisoners convicted of crime as defined in s. 20 of that Act, *post*, p. 224, note (*s*). By the Prevention of Crimes Amendment Act, 1876 (39 & 40 Vict. c. 23), s. 2, power was given to prescribe the classes of convicted prisoners to which alone the rules as to registry and photographing should be applied. The changes made by the Act of 1891 authorise measurement as well as photography, and cover all prisoners whether convicted or not, and in 1893 (S. L. R.), so much of s. 6 of the Act of 1871 as dealt with photographing was repealed.

(*o*) 34 & 35 Vict. c. 112, s. 6 (6). 54 & 55 Vict. c. 69, s. 9.

(*p*) The regulations of 1877 & 1896 now in force are printed in Statutory Rules & Orders Revised (ed. 1904), tit. 'Prisons, England, Scotland, and Ireland.' Regulations as to measuring and photographing aliens imprisoned and ordered to be expelled were made in February, 1906 (St. R. & O., 1906, No. 160).

(*pp*) Extended by 54 & 55 Vict. c., s. 6, *post*, p. 226.

(*q*) See the interpretation clause, s. 20, *post*, p. 224, note (*s*).

the Court before whom he is brought for his being found on such premises.

Any person charged with being guilty of any offence against this Act mentioned in this section may be taken into custody as follows; (that is to say,)

In the case of any such offence against this Act as is first in this section mentioned, by any constable without warrant, if such constable is authorised so to do by the chief officer of police of his district;

In the case of any such offence against this Act as is thirdly in this section mentioned, by any constable without warrant, although such constable is not specially authorised to take him into custody;

Also, where any person is charged with being guilty of an offence against this Act fourthly in this section mentioned, he may, without warrant, be apprehended by any constable, or by the owner or occupier of the property on which he is found, or by the servants of the owner or occupier, or by any other person authorised by the owner or occupier, and may be detained until he can be delivered into the custody of a constable.'

B. *Police Supervision.*

Police Supervision.—By sect. 8 (*r*), 'where any person is convicted on indictment of a crime (*s*), and a previous conviction of a crime is proved against him, the Court having cognisance of such indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or of such less period as the Court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes. Every person subject to the supervision of the police who is at large in Great Britain or Ireland shall notify the place of his residence to the chief officer of police of the district which in his residence is situated, and shall whenever he changes such residence within the same police district notify such change to the chief officer of police of that district, *and whenever he is about to leave a police district he shall notify such his intention to the chief officer of police of that district stating the place to which he is going, and also if required and so far as practicable his address at that place, and whenever he arrives in any police district he shall notify his place of residence to the chief officer of police of such last-mentioned district* (*t*); moreover, every person subject to the supervision of the police, if a male, shall once in each month report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself or to such other person as that officer may direct, and such report may,

(*r*) Orders made under this section render the supervisee subject to the provisions of 42 & 43 Vict., c. 55, s. 2, *ante*, p. 222, note (*l*).

(*s*) By s. 20, the expression 'crime' means, in England and Ireland, any felony, or the offence of uttering false or counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under the s. 58 of the Larceny Act, 1861 (24 & 25 Vict., c. 96): and in Scotland, any of the pleas of the crown, any theft which, in respect of any aggravation, or of the amount in value of the money, goods or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing, falsehood, fraud and wilful imposition, uttering base coin, or the possession of such coin with intent to utter the same.

(*t*) Words in italics substituted for former words by 54 & 55 Vict., c. 69, s. 4 (1); as to notification see 42 & 43 Vict., c. 55, s. 2, *ante*, p. 222, note (*l*).

according as such chief officer directs, be made personally or by letter' (*u*).

The requirements of sect. 8 may be remitted by a secretary of state, either generally or in the case of an individual supervisee (*v*).

Sect. 8 further provides that '[If any person to whom this section applies fails to comply with any of the requisitions of this section, he shall, in any such case, be guilty of an offence against this Act, unless he proves to the satisfaction of the Court before whom he is tried, either that being on a journey he tarried no longer in the place, in respect of which he is charged with failing to notify his place of residence, than was reasonably necessary, or that otherwise he did his best to act in conformity with the law; and on conviction of such offence it shall be lawful for the Court in its discretion either to forfeit his licence, or to sentence him to imprisonment with or without hard labour for a term not exceeding one year]' (*w*).

The accused may elect to be tried on indictment (42 & 43 Vict. c. 49, s. 17) (*x*). If he does the provisions of sect. 9 of the Act of 1871 (*y*) as to the indictment do not apply (*z*).

Sect. 15 provides for the amendment of sect. 4 of the Vagrancy Act, 1824, 5 Geo. IV. c. 83, by substituting for the words 'highway or place adjacent' the words 'or any highway or any place adjacent to a street or highway'; and provides also that, 'in proving the intent to commit a felony it shall not be necessary to shew that the person suspected was guilty of any particular act or acts tending to shew his purpose or intent, and he may be convicted if from the circumstances of the case and from his known character as proved to the justice of the peace or Court before whom or which he is brought, it appears to such justice or Court that his intent was to commit a felony . . .'

By the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 2—(1) 'Any constable may take into custody without warrant any holder of a licence under the Penal Servitude Acts, or any person under the supervision of the police in pursuance of the Prevention of Crimes Act, 1871, whom he reasonably suspects of having committed any offence, and may take him before a Court of Summary Jurisdiction to be dealt with according to law.

(2) Any convict may be convicted before a Court of Summary Jurisdiction of an offence against sect. 3 of the Prevention of Crimes Act, 1871 (*ante*, p. 221), although he was brought before the Court on some other charge, or not in manner provided by that section.'

Sect. 3.—(1) 'Where an offender is, under sect. 9 (*a*) of the Penal Servitude Act, 1864, undergoing, or liable to undergo, a term of penal servitude in consequence of the forfeiture or revocation of a licence granted in pursuance of the Penal Servitude Acts, His Majesty may grant a licence

(*u*) Persons failing to comply with the section render the supervisee liable to summary conviction (subject to his election to be tried on indictment (42 & 43 Vict. c. 49, s. 17), to imprisonment with or without hard labour for not over one year. 54 & 55 Vict. c. 69, s. 4 (1).

(*v*) 54 & 55 Vict. c. 69, s. 4 (2).

(*w*) Words in brackets substituted by 54 & 55 Vict. c. 69, s. 4, for the original terms of s. 8.

(*x*) *Ante*, p. 17.

(*y*) *Post*, Bk. xii. c. ii.

(*z*) R. *v.* Penfold [1902], 1 K.B. 547.

(*a*) *Ante*, p. 220.

to the offender in like manner as if the forfeiture or revocation of the former licence were a sentence of penal servitude which the offender is liable to undergo.

(2) Where a person is sentenced on any conviction to a term of penal servitude, and by virtue of the same conviction his licence is forfeited, the term for which he is sentenced, together with the term which he is required further to undergo under the said section, shall, for all purposes of the Penal Servitude Acts relating to licences, be deemed to be one term of penal servitude, and those Acts shall apply as if, on conviction of the offence, the offender had been sentenced to the combined term' (*aa*).

By sect. 4 (1) sects. 5 and 8 of the Prevention of Crimes Act, 1871 (*b*), and sect. 2 of the Prevention of Crimes Act, 1879 (*c*) (which recites and refers to those sections), are modified as shewn above, pp. 222, 224, 225.

By sub-sect. (2) 'His Majesty may, by order under the hand of a Secretary of State, remit any of the requirements of sects. 5 and 8 of the Prevention of Crimes Act, 1871, either generally or in the case of any holder of a licence or person subject to the supervision of the police.'

By sect. 5 'The provisions of the Penal Servitude Act, 1864 (*d*), applying to a licence in the form set forth in Schedule A. to that Act, shall apply also to a licence in any other form for the time being authorised by sect. 10 of that Act.'

By sect. 6 'A person who has been convicted on indictment of a crime within the meaning of the Prevention of Crimes Act, 1871 (*dd*), and against whom a previous conviction of such a crime is proved, shall,

(*a*) if the second sentence is to a term of imprisonment, then at any time within seven years after the expiration of the sentence; and

(*b*) if the second sentence is to a term of penal servitude, then whilst at large on licence under that sentence, and also at any time within seven years after the expiration of the sentence, be guilty of an offence against the Prevention of Crimes Act, 1871, under the circumstances stated in sect. 7 of that Act (*ante*, p. 223), or any of them, and may be taken into custody in manner provided by that section.'

By sect. 7 'Sect. 4 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83), as amended by sect. 15 of the Prevention of Crimes Act, 1871 (*e*), shall be read and construed as if the provisions applying to suspected persons and reputed thieves frequenting (*f*) the places and with the intent therein described, applied also to every suspected person or reputed thief loitering about or in any of the said places and with the said intent.'

Youthful Offenders.—Youthful offenders sent to certified industrial or reformatory schools, or subject to detention pursuant to the directions of the Secretary of State, may be released on licence under the Children Act, 1908 (*ff*). The licence is revocable on breach of the conditions on which it was granted.

(*aa*) As to sub-s. 3 of s. 3, *vide ante*, p. 221, note (*g*).

(*b*) *Ante*, pp. 221, 224.

(*c*) *Ante*, p. 222, note (*l*).

(*d*) *i.e.* s. 10, *ante*, p. 221.

(*dd*) S. 20, *ante*, p. 224, note (*s*).

(*e*) *Ante*, p. 225. As to the place where the offence must be committed and the mode of proving intent to commit felony.

(*f*) See Clark *v.* R., 14 Q.B.D. 92.

(*ff*) 8 Edw. VII. c. 67, s. 67 (*post*, p. 235), (industrial schools and reformatories), s. 105 (places of detention under the direction of the Secretary of State).

Habitual Criminals.—For the provisions as to conditional release of habitual criminals, *vide post*, pp. 243 *et seq.*

C. *The Probation of Offenders Act*, 1907.

At common law the Courts have power, except in capital cases, instead of inflicting immediate punishment, to release an offender on his entering into a recognizance, with or without sureties, to come up for judgment when called on, and in the meantime to keep the peace or be of good behaviour (*g*). Statutory provision was made in 1887 (*h*) for the release on probation of certain classes of offenders. Completer provision is made by the Probation of Offenders Act, 1907 (7 Edw. VII. c. 17) (*i*), which came into operation on January 1, 1908 (*ii*).

Conditional Release.—Sect. 1.—(1) 'Where any person is charged before a Court of Summary Jurisdiction with an offence punishable by such Court, and the Court thinks that the charge is proved, but is of opinion that, *having regard to the character, antecedents, age, health, or mental condition of the person charged*, or to the trivial nature of the offence, or *to the extenuating circumstances under which the offence was committed*, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, without proceeding to conviction, make an order either—

(i) dismissing the information or charge; or

(ii) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on *at any time during such period, not exceeding three years, as may be specified in the order* (*j*).

(2) Where any person has been convicted on indictment of any offence punishable with imprisonment (*k*), and the Court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order (*kk*).

(3) The Court may, in addition to any such order, order the offender

(*g*) *Vide ante*, p. 218.

(*h*) 50 & 51 Vict. c. 25.

(*i*) This Act repeals the Act of 1887, s. 16 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and s. 12 of the Youthful Offenders Act, 1901 (1 Edw. VII. c. 20).

(*ii*) S. 10 (3).

(*j*) This subsection is based on 42 & 43 Vict. c. 49, s. 16, but the provisions italicised are new.

(*k*) This does not appear to be limited to cases in which imprisonment only or a less punishment may be awarded, but seems to extend to cases in which penal servitude may be imposed as an alternative to imprisonment.

(*kk*) This subsection does not, except as to release on probation, add anything to the common-law powers of the Court.

to pay such damages *for injury or compensation for loss* (not exceeding in the case of a Court of Summary Jurisdiction £10, or, if a higher limit is fixed by any enactment relating to the offence, that higher limit) and to pay such costs of the proceedings as the Court thinks reasonable' . . . (*l*).

Probation Orders and Conditions of Recognizances.—Sect. 2.—(1) A recognizance ordered to be entered into under this Act shall, if the Court so order, contain a condition that the offender be under the supervision of such person as may be named in the order (*ll*) during the period specified in the order, and such other conditions for securing such supervision as may be specified in the order, and an order requiring the insertion of such conditions as aforesaid in the recognizance is in this Act referred to as a probation order.

(2) A recognizance under this Act may contain such additional conditions as the Court may, having regard to the particular circumstances of the case, order to be inserted therein with respect to all or any of the following matters :—

(*a*) for prohibiting the offender from associating with thieves and other undesirable persons, or from frequenting undesirable places ;

(*b*) as to abstention from intoxicating liquor, where the offence was drunkenness or an offence committed under the influence of drink (*m*) ;

(*c*) generally for securing that the offender should lead an honest and industrious life.

(3) The Court by which a probation order is made shall furnish to the offender a notice in writing stating in simple terms the conditions he is required to observe.

Probation Officers.—Sect. 3.—(1) There may be appointed as probation officer or officers for a petty sessional division such person or persons of either sex as the authority having power to appoint a clerk to the justices of that division may determine, and a probation officer when acting under a probation order shall be subject to the control of petty sessional Courts for the division for which he is so appointed.

(2) There shall be appointed, where circumstances permit, special probation officers, to be called children's probation officers, who shall, in the absence of any reasons to the contrary, be named in a probation order made in the case of an offender under the age of sixteen.

(3) The person named in any probation order shall—

(*a*) where the Court making the order is a Court of Summary Jurisdiction, be selected from amongst the probation officers for the petty sessional division in or for which the Court acts ; or

(*b*) where the Court making the order is a Court of Assize or a Court of Quarter Sessions, be selected from amongst the probation officers for the petty sessional division from which the person charged was committed for trial :

Provided that the person so named may, if the Court considers it

(*l*) The rest of this section is repealed by the Children Act, 1908 (8 Edw. VII. c. 67), and replaced by ss. 99, 107 of that Act.

(*ll*) Cf. 8 Edw. VII. c. 67, s. 60.

(*m*) See R. *v.* Davies [1909], 1 K.B. 892 ; 25 T. L. R. 279.

expedient on account of the place of residence of the offender, or for any other special reason, be a probation officer for some other petty sessional division, and may, if the Court considers that the special circumstances of the case render it desirable, be a person who has not been appointed to be probation officer for any petty sessional division.

(4) A probation officer appointed for a petty sessional division may be paid such salary as the authority having the control of the fund out of which the salary of the clerk to the justices of that petty sessional division is paid may determine, and if not so paid by salary may receive such remuneration for acting under a probation order as the Court making the order thinks fit, not exceeding such remuneration as may be allowed by the regulations of such authority as aforesaid, *and may in either case be paid such out-of-pocket expenses as may be allowed under such regulations as aforesaid*, and the salary or remuneration *and expenses* shall be paid by that authority out of the said funds.

(5) *A person named in a probation order not being a probation officer for a petty sessional division may be paid such remuneration and out-of-pocket expenses out of such fund as the Court making the probation order may direct, not exceeding such as may be allowed under the regulations of the authority having control of the fund out of which the remuneration is directed to be paid.*

(6) The person named in a probation order may at any time be relieved of his duties, and *in any such case or in case of the death of the person so named*, another person may be substituted by the Court *before which the offender is bound by his recognizance to appear for conviction or sentence*, or, if he be a probation officer *for a petty sessional divison*, by a Court to whose control that officer is subject.

(7) In the application of this Act to the City of London and the metropolitan police court district, the city and each division of that district shall be deemed to be a petty sessional division.

Sect. 4. *It shall be the duty of a probation officer, subject to the directions of the Court—*

(*a*) *to visit or receive reports from the person under supervision at such reasonable intervals as may be specified in the probation order or, subject thereto, as the probation officer may think fit ;*

(*b*) *to see that he observes the conditions of his recognizance ;*

(*c*) *to report to the Court as to his behaviour ;*

(*d*) *to advise, assist, and befriend him, and, when necessary, to endeavour to find him suitable employment.*

Varying or Discharging Recognizances.—Sect. 5. *The Court before which any person is bound by his recognizance under this Act to appear for conviction or sentence may, upon the application of the probation officer, and after notice to the offender, vary the conditions of the recognizance and may, on being satisfied that the conduct of that person has been such as to make it unnecessary that he should remain longer under supervision, discharge the recognizance.*

Provision in Case of Breach of Condition.—Sect. 6.—(1) If the Court *before which an offender is bound by his recognizance under this Act to appear for conviction or sentence*, or any Court of Summary Jurisdiction, is satisfied

by information on oath that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension, or may, if it thinks fit, instead of issuing a warrant in the first instance, issue a summons to the offender and his sureties (if any) requiring him or them to attend at such Court and at such time as may be specified in the summons.

(2) The offender, when apprehended, shall, if not brought forthwith before the Court before which he is bound by his recognizance to appear for conviction or sentence, be brought before a Court of Summary Jurisdiction.

(3) The Court before which an offender on apprehension is brought, or before which he appears in pursuance of such summons as aforesaid, may, if it is not the Court before which he is bound by his recognizance to appear for conviction or sentence, remand him to custody or on bail until he can be brought before the last-mentioned Court.

(4) An offender so remanded to custody may be committed during remand to any prison to which the Court having power to convict or sentence him has power to commit prisoners (*mm*). . . .

(5) *A Court before which a person is bound by his recognizance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence or, if the case was one in which the Court in the first instance might, under sect. fifteen of the Industrial Schools Act*, 1866 (*n*), *have ordered the offender to be sent to a certified industrial school, and the offender is still apparently under the age of twelve years, make such an order.*

Power to make Rules.—Sect. 7. *The Secretary of State may make rules* (*o*) *for carrying this Act into effect, and in particular for prescribing such matters incidental to the appointment, resignation, and removal of probation officers, and the performance of their duties, and the reports to be made by them, as may appear necessary* (*p*).

Sect. IX.—Punishment of Persons under Sixteen.

The Children Act, 1908 (7 Edw. VII. c. 67), has made considerable changes in the law as to punishment of persons under sixteen, and repeals and re-enacts with amendments the Industrial and Reformatory Schools Acts (*q*).

By sect. 131, 'for the purposes of this Act, unless the context otherwise requires—

The expression "child" means a person under the age of fourteen years (*r*);

The expression "young person" means a person who is fourteen years of age or upwards and under the age of sixteen years;

(*mm*) The rest of this section is repealed by the Children Act, 1908 (8 Edw. VII. c. 67), and replaced by s. 107 (*k*) of that Act, *post*, p. 232.

(*n*) 29 & 30 Vict. c. 118, now incorporated in the Children Act, 1908: 8 Edw. VII. c. 67, Pt. iv.

(*o*) Rules were made Nov. 27, 1907, as to the appointment and duties of probation officers and as to reports by them (St. R. & O. 1907, No. 945).

(*p*) Ss. 8, 9 make the modifications necessary to apply the Act to Scotland and Ireland. S. 10 deals with repeals, &c.

(*q*) 29 & 30 Vict. cc. 117, 118; 35 & 36 Vict. c. 21; 43 & 44 Vict. c. 15; 54 & 55 Vict. c. 23; 56 & 57 Vict. c. 48; 57 & 58 Vict. c. 33; 62 & 63 Vict. c. 12.

(*r*) Under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 49, child meant a person under twelve, and young person a person of twelve and under sixteen. This definition is altered by s. 128 of the Children Act, 1908.

The expression "guardian" in relation to a child, young person, or youthful offender, includes any person who, in the opinion of the Court having cognizance of any case in relation to the child, young person, or youthful offender, or in which the child, young person, or youthful offender is concerned, has for the time being the charge of or control over the child, young person, or youthful offender;

The expression "legal guardian," in relation to an infant, child, young person, or youthful offender, means a person appointed, according to law, to be his guardian by deed or will, or by order of a Court of competent jurisdiction.'

Youthful offender means an offender under the age of sixteen.

By sect. 102—(1) 'A child (*rr*) shall not be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages, or costs.

(2) A young person (*s*) shall not be sentenced to penal servitude for any offence.

(3) A young person shall not be sentenced to imprisonment for an offence, or committed to prison in default of payment of a fine, damages, or costs, unless the Court certifies that the young person is of so unruly a character that he cannot be detained in a place of detention provided under this Part of this Act (*t*), or that he is of so depraved a character that he is not a fit person to be so detained' (*u*).

For sect. 103, abolishing capital punishment of children or young persons, *vide ante*, p. 205.

By sect. 104, 'Where a child or young person is convicted on indictment of an attempt to murder, or of manslaughter, or of wounding with intent to do grievous bodily harm, and the Court is of opinion that no punishment which, under the provisions of this Act, it is authorised to inflict is sufficient, the Court may sentence the offender to be detained for such period as may be specified in the sentence; and where such a sentence is passed, the child or young person shall during that period, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and on such conditions as the Secretary of State may direct, and whilst so detained shall be deemed to be in legal custody' (*v*).

By sect. 106, 'Where a child or young person is convicted of an offence punishable, in the case of an adult, with penal servitude or imprisonment, or would, if he were an adult, be liable to be imprisoned in default of payment of any fine, damages, or costs, and the Court considers that none of the other methods in which the case may legally be dealt with is suitable, the Court may, in lieu of sentencing him to imprisonment or committing him to prison, order that he be committed to custody in a place of detention provided under this Part of this Act (*w*),

(*rr*) Defined s. 131.
(*s*) Ibid.
(*t*) See ss. 106, 108.
(*u*) Defined by s. 44.
(*v*) S. 105 empowers the Secretary of State to release on licence children in detention under ss. 103, 104.
(*w*) Provided by the police authority under s. 108. By s. 109 the order or judgment committing the offender is a sufficient authority for his detention.

and named in the order for such term as may be specified in the order, not exceeding the term for which he might, but for this Part of this Act, be sentenced to imprisonment or committed to prison, nor in any case exceeding one month.'

By sect. 107, 'Where a child or young person charged with any offence is tried by any Court, and the Court is satisfied of his guilt, the Court shall take into consideration the manner in which under the provisions of this or any other Act enabling the Court to deal with the case, the case should be dealt with, namely, whether—

(*a*) by dismissing the charge; or
(*b*) by discharging the offender on his entering into a recognisance; or
(*c*) by so discharging the offender and placing him under the supervision of a probation officer (*vide* s. 60); or
(*d*) by committing the offender to the care of a relative or other fit person; or
(*e*) by sending the offender to an industrial school (*vide* s. 58); or
(*f*) by sending the offender to a reformatory school (*vide* s. 57); or
(*g*) by ordering the offender to be whipped (*x*); or
(*h*) by ordering the offender to pay a fine (*y*), damages, or costs; or
(*i*) by ordering the parent or guardian of the offender to pay a fine, damages, or costs (*vide* s. 99 (1)); or
(*j*) by ordering the parent or guardian of the offender to give security for his good behaviour (*vide* s. 99 (2)); or
(*k*) by committing the offender to custody in a place of detention provided under this part of this Act (*vide* ss. 103, 104, 108); or
(*l*) where the offender is a young person, by sentencing him to imprisonment (*vide* s. 102 (3)); or
(*m*) by dealing with the case in any other manner in which it may be legally dealt with:

Provided that nothing in this section shall be construed as authorising the Court to deal with any case in any manner in which it could not deal with the case apart from this section' (*z*).

Industrial Schools.—By sect. 58(*a*), (2) 'Where a child apparently under the age of twelve years is charged before a Court of Assize or Quarter Sessions or a Petty Sessional Court, with an offence punishable in the case of an adult by penal servitude or a less punishment, the Court if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to a certified industrial school' (*b*).

. . . . . .

(7) Where under this section a Court is empowered to order a child to be sent to a certified industrial school the Court, in lieu of ordering

(*x*) *Ante*, p. 215.
(*y*) *Ante*, p. 217.
(*z*) The proviso means that the legal authority for the mode of dealing with the case selected must be found in another section of the Act or in some other statute or the common law.
(*a*) Ss. 44–56 deal with the definition, certification, and inspection of reformatory and industrial schools.
(*b*) Framed on 29 & 30 Vict. c. 118, s. 15; 1 Edw. VII. c. 15, s. 5. Children not apparently of the age of twelve or thirteen not previously convicted who are charged before Courts of summary jurisdiction with such offences may be sent to an industrial school subject to a power by the Secretary of State to transfer them to a reformatory, s. 58, subs. 3. Industrial school is defined by s. 44 of the Act of 1908.

him to be so sent, may in accordance with the provisions of Part II. of this Act (*c*), make an order for the committal of the child to the care of a relative or other fit person named by the Court, and the provisions of that Part shall, so far as applicable, apply as if the order were an order under that Part.

. . . . . .

By sect. 60, 'Where under the provisions of this part of this Act an order is made for the committal of a child or young person to the care of a relative or other fit person named by the Court, the Court may in addition to such order make an order under the Probation of Offenders Act, 1907 (*ante*, p. 227), that the child or young person be placed under the supervision of a probation officer:

Provided that the recognizance into which the child, if not charged with an offence, or the young person is required to enter, shall bind him to appear and submit to the further order of the Court.'

A child ordered to be detained under this or following sections continues to be subject to the order during the whole period of detention, even though he attains the age of fourteen before it has expired (*d*).

Reformatories.—By sect. 57, (1) 'Where a youthful offender, who in the opinion of the Court before which he is charged is twelve years of age or upwards but less than sixteen years of age, is convicted, whether on indictment or by a Petty Sessional Court, of an offence punishable, in the case of an adult, with penal servitude or imprisonment, the Court may, in addition to or in lieu of sentencing him according to law to any other punishment, order that he be sent to a certified reformatory school:

Provided that where the offender is ordered to be sent to a certified reformatory school he shall not in addition be sentenced to imprisonment.

(2) Where such an order has been made in respect of a youthful offender of the age of fourteen years or upwards, and no certified reformatory school can be found the managers of which are willing to receive him, the Secretary of State may order the offender to be brought before the Court which made the order or any Court having the like jurisdiction, and that Court may in lieu of the detention order make such order or pass such sentence of imprisonment as the Court may determine, so however that the order or sentence shall be such as might have been originally made or passed in respect of the offence.'

Power to send Offenders conditionally pardoned to Reformatory Schools.—By sect. 84, 'Where a youthful offender has been sentenced to imprisonment or penal servitude, and has been pardoned by His Majesty on condition of his placing himself under the care of some charitable institution for the reception and reformation of youthful offenders, the Secretary of State may direct him, if under the age of sixteen years, to be sent to a certified reformatory school, the managers of which consent to receive him, for a period of not less than three and not more than five years, but not in any case extending beyond the time when he will in the opinion of the Secretary of State attain the age of nineteen years; and thereupon the offender shall be subject to all the provisions of this Part of this Act,

(*c*) Relating to cruelty, &c., *post*, pp. 912 *et seq.*

(*d*) See s. 44 (1), definition of child.

as if he had been originally sentenced to detention in a certified reformatory school' (*e*).

By sect. 61, 'An order of a Court ordering a youthful offender or child to be sent to and detained in a certified school (in this Act referred to as a detention order), may, if the Court think fit, be made to take effect either immediately or at any later date specified therein, regard being had to the age or health of the youthful offender or child.'

By sect. 62, (1) 'The school to which a youthful offender or child is to be sent under a detention order shall be such school as may be specified in the order, being some certified school (whether situate within the jurisdiction of the Court making the order or not) the managers of which are willing to receive the youthful offender or child:

Provided that if it is found impossible to specify the school in the detention order, the school shall, subject to the provisions of this Act with respect to the determination of the place of residence of a youthful offender or child, be such as a justice having jurisdiction in the place where the Court which made the order sat may by endorsement on the detention order direct' (*f*).

By sect. 63, If—

(*a*) a detention order is made but is not to take effect immediately; or,

(*b*) at the time specified for the order to take effect the youthful offender or child is unfit to be sent to a certified school; or,

(*c*) the school to which the youthful offender or child is to be sent cannot be ascertained until inquiry has been made,

the Court may make an order committing him either to custody in any place to which he might be committed on remand under Part V. of this Act (*g*), or to the custody of a relative or other fit person to whose care he might be committed under Part II. of this Act (*h*), and he shall be kept in that custody accordingly until he is sent to a certified school in pursuance of the detention order.

By sect. 64, (1) 'The person by whom any youthful offender or child ordered to be sent to a certified school is detained shall at the appointed time deliver him into the custody of the constable or other person responsible for his conveyance to school, who shall deliver him to the superintendent or other person in charge of the school in which he is to be detained, together with the order or other document in pursuance of which the offender or child was detained and is sent to the school.

(2) The detention order in pursuance of which the youthful offender or child is sent to a certified school shall be a sufficient authority for his conveyance to and detention in the school or any other school to which he is transferred under this Part of this Act' (*i*).

By sect. 65, 'The detention order shall specify the time for which the youthful offender or child is to be detained in the school, being—

(*a*) in the case of a youthful offender sent to a reformatory school, not less than three and not more than five years, but not in any case

(*e*) Framed from 29 & 30 Vict. c. 117, s. 32.

(*f*) Subsect. 2 provides for cases of children who are physically or mentally defective.

(*g*) *i.e.* a place of detention provided by the police authority under ss. 108, 109.

(*h*) *Vide* s. 20, *post*, p. 915 *et seq.*, 'Ill-treatment of Children.'

(*i*) Framed from 29 & 30 Vict. c. 117, s. 15; 29 & 30 Vict. c. 118, s. 22; 56 & 57 Vict. c. 48, s. 2.

extending beyond the time when the youthful offender will, in the opinion of the Court, attain the age of nineteen years ; and

(*b*) in the case of a child sent to an industrial school, such time as to the Court may seem proper for the teaching and training of the child, but not in any case extending beyond the time when the child will, in the opinion of the Court, attain the age of sixteen years ' (*j*).

By sect. 66, (1) The Court or justice, in determining the certified school to which a youthful offender or child is to be sent, shall endeavour to ascertain the religious persuasion to which the offender or child belongs, and the detention order shall, where practicable, specify the religious persuasion to which the offender or child appears to belong, and a school conducted in accordance with that persuasion shall, where practicable, be selected (*k*).

. . . . . .

(3) Where an order has been made for sending a youthful offender or child to a certified school which is not conducted in accordance with the religious persuasion to which the offender belongs, the parent, legal guardian, nearest adult relative, or person entitled to the custody of the offender or child may apply—

(*a*) If the detention order was made by a Petty Sessional Court, to a Petty Sessional Court acting in and for the place in and for which the Court which made the order acted ; and

(*b*) in any other case, to the Secretary of State,

to remove or send the offender or child to a certified school conducted in accordance with the offender's or child's religious persuasion, and the Court or Secretary of State shall, on proof of the offender's or child's religious persuasion, comply with the request of the applicant :

Provided that—

(i) the application must be made before the offender or child has been sent to a certified school, or within thirty days after his arrival at the school ; and

(ii) the applicant must show to the satisfaction of the Court or Secretary of State that the managers of the school named by him are willing to receive the offender or child (*l*) :

(iii) nothing in this section shall be construed as preventing any such person as aforesaid from making an application to the Secretary of State after the expiration of the said period of thirty days to exercise the powers of transfer conferred on him by the other provisions of this Act.

Sect. 67 empowers the managers to release children or youthful offenders on licence (with the consent of the Secretary of State), and provides as to the conditions of the licence, and for forfeiture or breach of conditions (*m*).

By sect. 68—(1) ' Every youthful offender sent to a certified reformatory school shall, on the expiration of the period of his detention, if

(*j*) Framed from 29 & 30 Vict. c. 118, s. 18 ; 56 & 57 Vict. c. 48, s. 1.

(*k*) Subsect. 2 provides for visits to the youthful offender by a minister of the persuasion.

(*l*) Framed from 29 & 30 Vict. c. 117, ss. 14, 16 ; c. 118, ss. 18, 20, 25.

(*m*) Framed from 29 & 30 Vict. c. 117, s. 18 ; c. 118, s. 17 ; 39 & 40 Vict. c. 79, s. 14.

that period expires before he attains the age of nineteen years, remain up to the age of nineteen under the supervision of the managers of the school.

(2) Every child sent to an industrial school shall, from the expiration of the period of his detention, remain up to the age of eighteen under the supervision of the managers of the school (*n*).

(3) The managers may grant to any person under their supervision a licence in the manner provided by this Part of this Act, and may revoke any such licence, and recall any such person to the school; and any person so recalled may be detained in the school for a period not exceeding three months, and may at any time be again placed out on licence: Provided that—

(*a*) a person shall not be so recalled unless the managers are of opinion that the recall is necessary for his protection; and

(*b*) the managers shall send to the chief inspector of reformatory and industrial schools an immediate notification of the recall of any person, and shall state the reasons for his recall; and

(*c*) they shall again place the person out as soon as possible, and at latest within three months after the recall, and shall forthwith notify the chief inspector that the person has been placed out.

(4) A licence granted to a youthful offender or child before the expiration of his period of detention shall, if he is liable to be under supervision in accordance with this section, continue in force after the expiration of that period, and may be revoked in manner provided by this Part of this Act.

(5) The Secretary of State may at any time order that a person under supervision under this section shall cease to be under such supervision (*o*).

. . . . . .

By sect. 69, (1) The Secretary of State may at any time order a youthful offender or a child to be discharged from a certified school, either absolutely or on such conditions as the Secretary of State approves, and may, where the order of discharge is conditional, revoke the order on the breach of any of the conditions on which it was granted, and thereupon the youthful offender or child shall return to school, and if he fails to do so he and any person who knowingly harbours or conceals him or prevents him from returning to school shall be liable to the same penalty as if the youthful offender or child had escaped from the school.

(2) The Secretary of State may order—

(*a*) a youthful offender or child to be transferred from one certified reformatory school to another, or from one certified industrial school to another;

(*b*) a youthful offender under the age of fourteen years detained in a certified reformatory school to be transferred to a certified industrial school;

(*c*) a child over the age of twelve years detained in a certified industrial school, who is found to be exercising an evil influence over the other children in the school, to be transferred to a certified reformatory school;

(*n*) This does not apply to children sent to industrial schools to enforce an attendance order (proviso to subs. 2).

(*o*) Framed on 57 & 58 Vict. c. 33, ss. 1, 3, 4. By subs. 6 parents may not exercise their parental rights so as to interfere with the supervision of the managers.

so however that the whole period of the detention of the offender or child shall not be increased by the transfer.

(3) Where a youthful offender or child is detained in a certified school in one part of the United Kingdom, the central authority for that part of the United Kingdom may, subject to the provisions of this section, direct the youthful offender or child to be transferred to a certified school in another part of the United Kingdom if the central authority for that other part consents.

For the purpose of this provision central authority means the Secretary of State, the Secretary for Scotland, or the Chief Secretary, as the case may be' (*p*).

By sect. 70, 'If any youthful offender or child detained in or placed out on licence from a certified school, or a person when under the supervision of the managers of such a school, conducts himself well, the managers of the school may, with his own consent, apprentice him to, or dispose of him in, any trade, calling, or service, including service in the Navy or Army, or by emigration, notwithstanding that his period of detention or supervision has not expired; and such apprenticing or disposition shall be as valid as if the managers were his parents:

Provided that where he is to be disposed of by emigration, and in any case unless he has been detained for twelve months, the consent of the Secretary of State shall also be required for the exercise of any power under this section' (*q*).

Sect. X.—Detention in Borstal Institutions of Offenders between Sixteen and Twenty-three.

By the Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), s. 1—

(1) 'Where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the Court—

(*a*) that the person is not less than sixteen nor more than twenty-one years of age; and

(*b*) that, by reason of his criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime,

it shall be lawful for the Court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal Institution (*r*) for a term of not less than one year nor more than three years:

Provided that before passing such a sentence, the Court shall consider any report or representations which may be made to it by or on behalf of the Prison Commissioners as to the suitability of the case for treatment in a Borstal Institution, and shall be satisfied that the character, state of health, and mental condition of the offender, and the other

(*p*) Framed on 29 & 30 Vict. c. 117, s. 17; c. 118, ss. 42, 43.

(*q*) Framed on 29 & 30 Vict. c. 117, s. 19; c. 118, s. 28; 56 & 57 Vict. c. 48, s. 1.

(*r*) Defined s. 4, *post*, p. 238.

circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid.

(2) The Secretary of State may by order direct that this section shall extend to persons apparently under such age not exceeding the age of twenty-three (*s*) as may be specified in the order, and upon such an order being made this section shall, whilst the order is in force, have effect as if the specified age were substituted for "twenty-one":

Provided that such an order shall not be made until a draft thereof has lain before each House of Parliament for not less than thirty days during the session of Parliament, and if either House, before the expiration of that period, presents an address to His Majesty against the draft or any part thereof, no further proceedings shall be taken thereon, but without prejudice to the making of any new draft order.'

Substitution of Borstal Institution for Reformatory.—Sect. 2. 'Where a youthful offender sentenced to detention in a reformatory school (*t*) is convicted under any Act before a Court of Summary Jurisdiction of the offence of committing a breach of the rules of the school, or of inciting to such a breach, or of escaping from such a school, and the Court might under that Act sentence the offender to imprisonment, the Court may, in lieu of sentencing him to imprisonment, sentence him to detention in a Borstal Institution for a term not less than one year nor more than three years, and in such case the sentence shall supersede the sentence of detention in a reformatory school.'

Transfer from Prison to Borstal Institution.—Sect. 3. 'The Secretary of State may, if satisfied that a person undergoing penal servitude or imprisoned in consequence of a sentence passed either before or after the passing of this Act, being within the limits of age within which persons may be detained in a Borstal Institution, might with advantage be detained in a Borstal Institution, authorise the Prison Commissioners to transfer him from prison to a Borstal Institution, there to serve the whole or any part of the unexpired residue of his sentence, and whilst detained in, or placed out on licence from, such an institution, this Part of this Act shall apply to him as if he had been originally sentenced to detention in a Borstal Institution.'

Sect. 4.—(1) 'For the purposes of this Part of this Act the Secretary of State may establish Borstal Institutions (*u*), that is to say, places in which young offenders whilst detained may be given such industrial training and other instruction, and be subjected to such disciplinary and moral influences as will conduce to their reformation and the prevention of crime, and for that purpose may, with the approval of the Treasury, authorise the Prison Commissioners either to acquire any land or to erect or acquire any building or to appropriate the whole or any part of any land or building vested in them or under their control, and any expenses incurred under this section shall be paid out of moneys provided by Parliament.

(2) The Secretary of State may make regulations for the rule and

(*s*) Recommended by the Prison Commissioners (Parl. Pap. 1908, c. 3738, p. 26).

(*t*) *Vide ante*, p. 233.

(*u*) Up to 1908 offenders were dealt with on the Borstal system in Borstal and Lincoln Prisons under special rules of July, 1906 (St. R. & O. 1906, No. 525), and in certain other prisons. See Prison Commissioners' Report (Parl. Pap. 1908, c. 3738, pp. 14–26).

management of any Borstal Institution, and the constitution of a visiting committee thereof, and for the classification, treatment, and employment and control of persons sent to it in pursuance of this Part of this Act, and for their temporary detention until arrangements can be made for sending them to the institution, and, subject to any adaptations, alterations, and exceptions made by such regulations, the Prison Acts, 1865 to 1898 (including the penal provisions thereof), and the rules thereunder, shall apply in the case of every such institution as if it were a prison.'

Sect. 5.—(1) 'Subject to regulations by the Secretary of State, the Prison Commissioners may at any time after the expiration of six months, or, in the case of a female, three months, from the commencement of the term of detention, if satisfied that there is a reasonable probability that the offender will abstain from crime and lead a useful and industrious life, by licence permit him to be discharged from the Borstal Institution on condition that he be placed under the supervision or authority of any society or person named in the licence who may be willing to take charge of the case.

(2) A licence under this section shall be in force until the term for which the offender was sentenced to detention has expired, unless sooner revoked or forfeited.

(3) Subject to regulations by the Secretary of State, a licence under this section may be revoked at any time by the Prison Commissioners, and where a licence has been revoked the person to whom the licence related shall return to the Borstal Institution, and if he fails to do so may be apprehended without warrant and taken to the institution.

(4) If a person absent from a Borstal Institution under such a licence escapes from the supervision of the society or person in whose charge he is placed, or commits any breach of the conditions contained in the licence, he shall be considered thereby to have forfeited the licence.

(5) A Court of Summary Jurisdiction for the place where the Borstal Institution from which a person has been placed out on licence is situate or where such a person is found may, on information on oath that the licence has been forfeited under this section, issue a warrant for his apprehension, and he shall, on apprehension, be brought before a Court of Summary Jurisdiction, which, if satisfied that the licence has been forfeited, may order him to be remitted to the Borstal Institution, and may commit him to any prison within the jurisdiction of the Court until he can conveniently be removed to the institution.

(6) The time during which a person is absent from a Borstal Institution under such a licence shall be treated as part of the time of his detention in the institution: Provided that where that person has failed to return to the institution on the licence being forfeited or revoked, the time which elapses after his failure so to return shall be excluded in computing the time during which he is to be detained in the institution.

(7) A licence under this section shall be in such form and shall contain such conditions as may be prescribed by regulations made by the Secretary of State.'

Supervision after Expiration of Term of Sentence.—Sect. 6.—(1) 'Every person sentenced to detention in a Borstal Institution shall, on the

expiration of the term of his sentence, remain for a further period of six months under the supervision of the Prison Commissioners.

(2) The Prison Commissioners may grant to any person under their supervision a licence in accordance with the last foregoing section, and may revoke any such licence and recall the person to a Borstal Institution, and any person so recalled may be detained in a Borstal Institution for a period not exceeding three months, and may at any time be again placed out on licence :

Provided that a person shall not be so recalled unless the Prison Commissioners are of opinion that the recall is necessary for his protection, and they shall again place him out on licence as soon as possible and at latest within three months after the recall, and that a person so recalled shall not in any case be detained after the expiration of the said period of six months' supervision.

(3) A licence granted to a person before the expiration of his sentence of detention in a Borstal Institution shall, on his becoming liable to be under supervision in accordance with this section, continue in force after the expiration of that term, and may be revoked in manner provided by the last foregoing section.

(4) The Secretary of State may at any time order that a person under supervision under this section shall cease to be under such supervision.'

Transfer from Borstal Institution to Prison.—Sect. 7. 'Where a person detained in a Borstal Institution is reported to the Secretary of State by the visiting committee of such institution to be incorrigible, or to be exercising a bad influence on the other inmates of the institution, the Secretary of State may commute the unexpired residue of the term of detention to such term of imprisonment, with or without hard labour, as the Secretary of State may determine, but in no case exceeding such unexpired residue.'

Sect. 8. 'Where a society has undertaken the duty of assisting or supervising persons discharged from a Borstal Institution, either absolutely or on licence, there may be paid to the society out of money provided by Parliament towards the expenses of the society incurred in connection with the persons so discharged such sums on such conditions as the Secretary of State, with the approval of the Treasury, may recommend.'

Transfer from one Part of British Islands to Another.—Sect. 9. 'Where a person has been sentenced to detention in a Borstal Institution in one part of the United Kingdom, the Secretary of State, the Secretary for Scotland, or the Lord Lieutenant of Ireland, as the case may be, may, as authority under this Act for that part of the United Kingdom, direct that person to be removed to and detained in a Borstal Institution in another part of the United Kingdom, with the consent of the authority under this Act for that other part.'

Sect. XI.—Preventive Detention of Habitual Criminals.

By the Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), which came into force on August 1, 1909 (*vide* s. 10 (2)).

Sect. 10.—(1) 'Where a person is convicted on indictment of a crime,

committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal (*v*), and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the Court may determine, and such detention is hereinafter referred to as preventive detention, and a person on whom such a sentence is passed shall, whilst undergoing both the sentence of penal servitude and the sentence of preventive detention, be deemed for the purposes of the Forfeiture Act, 1870 (*vv*), and for all other purposes, to be a person convicted of felony.

(2) A person shall not be found to be a habitual criminal unless the jury finds on evidence—

(*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment, been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and he is leading persistently (*w*) a dishonest or criminal life; or

(*b*) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

(3) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

(4) In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again:

Provided that a charge of being a habitual criminal shall not be inserted in an indictment—

(*a*) without the consent of the Director of Public Prosecutions (*ww*); and

(*b*) unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge,

and the notice to the offender shall specify the previous convictions, and the other grounds upon which it is intended to found the charge.

(5) Without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life.

(*v*) Cf. the provisions as to habitual drunkards, *post*, p. 244. Habitual offenders confined in local prisons have been separated from other offenders since 1899. See Local Prison Rules, 1899 (St. R. & O. 1899, No. 322). In convict prisons persons undergoing penal servitude have been classified into ordinary and long sentence divisions. The latter includes a 'recidiviste' class. Convict Prison Rules, 1905 (St. R. & O. 1905, No. 75), ss. 1–16.

(*vv*) 33 & 34 Vict. c. 23, *vide post*, p. 250.

(*w*) See R. *v.* Raybould, 2 Cr. App. R. 184.

(*ww*) As to this office, *vide post*, Bk. xii. c. i.

(6) For the purposes of this section the expression "crime" has the same meaning as in the Prevention of Crimes Act, 1871, (34 & 35 Vict. c. 112), and the definition of "crime" in that Act, set out in the schedule to this Act (*y*), shall apply accordingly.'

Sect. 11. 'A person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907 (*z*), appeal against the sentence without the leave of the Court of Criminal Appeal.'

Power in Certain Cases to commute Penal Servitude to Preventive Detention.—Sect. 12. 'Where a person has been sentenced, whether before or after the passing of this Act, to penal servitude for a term of five years or upwards (*zz*), and he appears to the Secretary of State to have been a habitual criminal within the meaning of this Act, the Secretary of State may, if he thinks fit, at any time after three years of the term of penal servitude have expired, commute the whole or any part of the residue of the sentence to a sentence of preventive detention, so, however, that the total term of the sentence when so commuted shall not exceed the term of penal servitude originally awarded.'

Effect and Execution of Sentence.—Sect. 13.—'(1) The sentence of preventive detention shall take effect immediately on the determination of the sentence of penal servitude, whether that sentence is determined by effluxion of time or by order of the Secretary of State at such earlier date as the Secretary of State, having regard to the circumstances of the case, and in particular to the time at which the convict, if sentenced to penal servitude alone, would ordinarily have been licensed to be at large, may direct.

(2) Persons undergoing preventive detention shall be confined in any prison or part of a prison which the Secretary of State may set apart for the purpose, and shall (save as otherwise provided by this Act) be subject to the law for the time being in force with respect to penal servitude as if they were undergoing penal servitude:

Provided that the rules applicable to convicts and convict prisons shall apply to persons undergoing preventive detention, and to the prisons or parts of prisons in which they are detained, subject to such modifications in the direction of a less rigorous treatment as the Secretary of State may prescribe by prison rules within the meaning of the Prison Act, 1898 (*a*).

(3) Persons undergoing preventive detention shall be subjected to such disciplinary and reformative influences, and shall be employed on such work as may be best fitted to make them able and willing to earn an honest livelihood on discharge.

(4) The Secretary of State shall appoint for every such prison or part of a prison so set apart a board of visitors, of whom not less than two shall be justices of the peace, with such powers and duties as he may prescribe—by such prison rules as aforesaid.'

(*y*) Viz., 'The expression "crime" means, in England and Ireland, any felony or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under the fifty-eighth section of the Larceny Act, 1861 (24 & 35 Vict. c. 112).'

(*z*) See the Act, *post*, Bk. xii. c. iv.

(*zz*) See R. *v.* Warner, 2 Cr. App. R. 177; 25 T. L. R. 142.

(*a*) 61 & 62 Vict. c. 41.

Discharge on Licence.—Sect. 14.—'(1) The Secretary of State shall, once at least in every three years during which a person is detained in custody under a sentence of preventive detention, take into consideration the condition, history, and circumstances of that person with a view to determining whether he shall be placed out on licence, and, if so, on what conditions.

(2) The Secretary of State may at any time discharge on licence a person undergoing preventive detention if satisfied that there is a reasonable probability that he will abstain from crime and lead a useful and industrious life or that he is no longer capable of engaging in crime, or that for any other reason it is desirable to release him from confinement in prison.

(3) A person so discharged on licence may be discharged on probation, and on condition that he be placed under the supervision or authority of any society or person named in the licence who may be willing to take charge of the case, or on such other conditions as may be specified in the licence.

(4) The Directors of Convict Prisons shall report periodically to the Secretary of State on the conduct and industry of persons undergoing preventive detention, and their prospects and probable behaviour on release, and for this purpose shall be assisted by a committee at each prison in which such persons are detained, consisting of such members of the board of visitors and such other persons of either sex as the Secretary of State may from time to time appoint.

(5) Every such committee shall hold meetings, at such intervals of not more than six months as may be prescribed, for the purpose of personally interviewing persons undergoing preventive detention in the prison and preparing reports embodying such information respecting them as may be necessary for the assistance of the Directors, and may at any other times hold such other meetings, and make such special reports respecting particular cases, as they may think necessary.

(6) A licence under this section may be in such form and may contain such conditions as may be prescribed by the Secretary of State.

(7) The provisions relating to licences to be at large granted to persons undergoing penal servitude shall not apply to persons undergoing preventive detention.'

Sect. 15.—'(1) The society or person under whose supervision or authority a person is so placed shall periodically, in accordance with regulations made by the Secretary of State, report to the Secretary of State on the conduct and circumstances of that person.

(2) A licence under this part of this Act may be revoked at any time by the Secretary of State, and where a licence has been revoked, the person to whom the licence related shall return to the prison, and, if he fails to do so, may be apprehended without warrant and taken to prison.

(3) If a person absent from prison under such a licence escapes from the supervision of the society or person in whose charge he is placed, or commits any breach of the conditions contained in the licence, he shall be considered thereby to have forfeited the licence, and shall be taken back to prison.

(4) A Court of Summary Jurisdiction for the place where the prison from which a person has been discharged on licence is situate, or where such a person is found, may, on information on oath that the licence has been forfeited under this section, issue a warrant for his apprehension, and he shall, on apprehension, be brought before a Court of Summary Jurisdiction, which, if satisfied that the licence has been forfeited, shall order him to be remitted to preventive detention, and may commit him to any prison within the jurisdiction of the Court until he can conveniently be removed to a prison or part of a prison set apart for the purpose of the confinement of persons undergoing preventive detention.

(5) The time during which a person is absent from prison under such a licence shall be treated as part of the term of preventive detention.

Provided that, where such person has failed to return on the licence being forfeited or revoked, the time which elapses after his failure so to return shall be excluded in computing the unexpired residue of the term of preventive detention.'

Absolute Discharge.—Sect. 16. 'Without prejudice to any other powers of discharge, the Secretary of State may at any time discharge absolutely any person discharged conditionally on licence under this Part of this Act, and shall so discharge him at the expiration of five years from the time when he was first discharged on licence if satisfied that he has been observing the conditions of his licence and abstaining from crime' (*b*).

Sect. XII.—Detention of Habitual Drunkards.

The following enactments provide for special treatment of offenders who are habitual drunkards.

'Habitual drunkard means a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself and his or her affairs' (*c*).

By the Inebriates Act, 1898 (61 & 62 Vict. c. 60), sect. 1, (1) Where a person is convicted (*d*) on an indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied from the evidence (*e*) that the offence was committed under the influence of drink, or that drunkenness was a contributory cause of the offence (*f*), and the offender admits that he is, or is found by the jury to be, an habitual drunkard, the Court may, *in addition to or in substitution*

(*b*) Ss. 16, 17 adapt the Act to Scotland and Ireland. S. 18 (2) fixes the commencement of the Act, Aug. 1, 1909.

(*c*) 42 & 43 Vict. c. 19, s. 3, incorporated by 61 & 62 Vict. c. 60, s. 30. See Eaton *v.* Best [1909], 1 K.B. 632; 73 J. P. 113.

(*d*) Convicted has been held to include a plea of guilty. R. *v.* Mehan [1905], 2 Ir. Rep. 577.

(*e*) *Quære*, including the depositions. So held in R. *v.* Mehan, *ubi sup.* Palles, C.B., dissented. The question seems to be for the Court, not for the jury.

(*f*) As to criminal responsibility of drunken persons, *vide ante*, p. 87.

for any other sentence, order that he be detained for a term not exceeding three years in any state inebriate reformatory, or in any certified inebriate reformatory the managers of which are willing to receive him.

(2) In any indictment under this section it shall be sufficient, after charging the offence, to state that the offender is an habitual drunkard. In the proceedings on the indictment the offender shall, in the first instance, be arraigned on so much only of the indictment as charges the said offence, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless the offender admits that he is an habitual drunkard, be charged to inquire whether he is an habitual drunkard, and in that case it shall not be necessary to swear the jury again.

Provided that, unless evidence that the offender is an habitual drunkard has been given before he is committed for trial, not less than seven days' notice shall be given to the proper officer of the Court by which the offender is to be tried, and to the offender, that it is intended to charge habitual drunkenness in the indictment.

Special powers as to habitual drunkards convicted of cruelty to children are given by the Children Act, 1908 (8 Edw. VII. c. 67, s. 26, *post*, Book IX., Chapter VIII.).

By sect. 2, '(1) Any person who commits any of the offences mentioned in the first schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is an habitual drunkard, shall be liable on conviction on indictment, or if he consents to be dealt with summarily (*g*), on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him (*gg*).

(2) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), shall apply to proceedings under this section as if the offence charged were specified in the second column of the first schedule to the Act' (*h*).

If the accused elects to be tried on indictment under sub-sect. 2, the Court of trial cannot impose any punishment for the offence of which he is then convicted, but can only deal with him as an habitual drunkard.

By the Inebriates Act, 1899 (62 & 63 Vict. c. 35), s. 1, the costs of a prosecution or indictment under the above section are payable out of the local rate (*vide post*, Book XII., Chapter V.).

Sects. 3–12 of the Act of 1898 provide for the establishment and regulation of state inebriate reformatories (*i*), and for certification and regulation of inebriate reformatories maintained by county or borough councils or private enterprise (*j*).

(*g*) Under 42 & 43 Vict. c. 49, s. 12, the consent is a condition precedent to the right to try summarily. Commissioner of Police *v.* Donovan [1903], 1 K.B. 895; 19 Cox, 435.

(*gg*) But not also to imprisonment. R. *v.* Briggs [1909], 1 K.B. 381.

(*h*) Which relates to the summary trial of indictable offences by adults by their consent.

(*i*) Prison Commissioners' Report (Parl. Pap., 1908, c. 3738), p. 58, with reference to the State inebriate reformatories at Aylesbury and Warwick.

(*j*) See Report on working of Inebriates Acts (Parl. Pap. 1908, cc. 4438, 4439).

First Schedule.

Being found drunk in a highway or other public place, whether a building or not, or on licensed premises. Being guilty while drunk of riotous or disorderly behaviour in a highway or other public place, whether a building or not. Being drunk while in charge, on any highway or other public place, of any carriage, horse, cattle, or steam-engine. Being drunk while in possession of any loaded firearms.	Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12.
Refusing or failing when drunk to quit licensed premises when requested.	Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 18.
Refusing or failing when drunk to quit any premises or place licensed under the Refreshment Houses Act, 1860, when requested.	Refreshment Houses Act, 1860 (23 & 24 Vict. c. 2), s. 41.
Being found drunk in any street or public thoroughfare within the metropolitan police district, and being guilty while drunk of any riotous or indecent behaviour.	Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 58.
Being drunk in any street and being guilty of riotous or indecent behaviour therein.	Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 29.
Being intoxicated while driving a hackney carriage.	Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 61.
Being drunk during employment as a driver of a hackney carriage, or as a driver or conductor of a stage carriage in the metropolitan police district.	London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 28.
Being drunk and persisting, after being refused admission on that account, in attempting to enter a passenger steamer. Being drunk on board a passenger steamer, and refusing to leave such steamer when requested (*k*).	Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 287 (*k*).
. . . . .	. . . . .
All similar offences in local Acts (*l*).	

(*k*) By the Licensing Act, 1902 (2 Edw. VII. c. 78, s. 2 (3)), there is added to the schedule the offence of being drunk in a highway or public place or on licensed premises while in charge of a child apparently under the age of seven.

(*l*) The schedule also includes the following enactments relating to Scotland or Ireland: 55 & 56 Vict. c. 55, ss. 380, 381 (S); 6 & 7 Will. IV. c. 38, s. 12 (I); 5 & 6 Vict. c. 24, s. 15 (Dublin); 23 & 24 Vict. c. 107, s. 42 (I.). Two scheduled enactments relating to Scotland, 25 & 26 Vict. 35, ss. 19–23, were repealed in 1903 and replaced by 3 Edw. VII. c. 25, s. 70 (1), (2), which is to be read as incorporated in the above schedule (subs. 3).

Sect. XIII.—General Rules as to Other Punishments.

Persons under sixteen may not be sentenced to death or to penal servitude for any offence. As to the substituted penalties, *vide ante*, pp. 205, 231.

Felonies.—By the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28), s. 8, 'Every person convicted of any felony, not punishable with death (*m*), shall be punished in the manner prescribed by the statute or statutes specially relating to such felony (*n*); and every person convicted of any felony, for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years or to be imprisoned for any term not exceeding two years: (*nn*)

By sect. 11 (*o*), 'If any person shall be convicted of any felony not punishable with death, committed after a previous conviction of felony (*p*), such person shall on such subsequent conviction be liable . . . to be transported beyond the seas (*q*) for life, or for any term not less than *seven* years . . .' (*r*).

These provisions do not apply to persons under sixteen (*vide ante*, p. 231).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 7 (*s*), 'Whosoever shall commit the offence of simple larceny after a previous conviction for felony, *whether such conviction shall have taken place upon an indictment, or under the provisions of the Act* 18 & 19 *Vict. c.* 126 (*t*), shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years . . . (*u*), or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*v*).

Larceny after Conviction of an Indictable Misdemeanor.—Sect. 8. 'Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny (*w*) after having been

(*m*) See *ante*, p. 206.

(*n*) For the special statutes, see the titles relating to particular felonies.

(*nn*) As to minimum term of penal servitude and as to hard labour, *vide ante*, pp. 211, 212.

(*o*) A like provision is made as to Ireland by 9 Geo. IV. c. 31, s. 21.

(*p*) Superseded as to 'larceny' by the enactments specified *infra*, and as to certain coinage offences by 24 & 25 Vict. c. 99, ss. 12, 21.

(*q*) Now penal servitude, *vide ante*, p. 211.

(*r*) Now not less than three years, or imprisonment with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1 (*ante*, pp. 211, 212). The rest of the section was repealed, as to whipping in 1888 (S. L. R.), and as to minimum term of imprisonment in 1893 (S. L. R. No. 2).

(*s*) By s. 12 of the Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), the punishment in case of larceny after a previous conviction of felony was reduced to a term of penal servitude for not less than four nor more than ten years. This enactment was repealed in 1861 (24 & 25 Vict. c. 95, s. 1), and replaced by that set out in the text.

(*t*) By 18 & 19 Vict. c. 126, justices of the peace might convict persons guilty of larceny, &c., summarily, and this clause renders persons so convicted, who afterwards are guilty of larceny, liable to the same punishment as if they had been previously convicted upon an indictment for felony. It is superseded by the Summary Jurisdiction Act of 1879 (42 & 43 Vict. c. 49).

(*u*) As to other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212, and as to police supervision, see *ante*, p. 224.

(*v*) The omitted portions were repealed in 1893 (S. L. R. No. 2). As to whipping, see *ante*, p. 215.

(*w*) That is by ss. 31, 32, 33, and 36. S. 8 does not apply to a conviction under s. 88 for false pretences. R. *v.* Horn, 15 Cox, 205.

previously convicted of any indictable misdemeanor punishable under this Act, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*x*).

Larceny after Two Summary Convictions.—Sect. 9. 'Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in . . . the Act of the session held in the tenth and eleventh years of Queen Victoria, chapter eighty-two, . . . or in this Act or the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97) (whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions or either of them shall have been or shall be before or after the passing of this Act), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*y*).

Punishment of Principals in Second Degree, and Accessories.—The Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94, ss. 4, 8), and each of the Criminal Law Consolidation Acts of 1861 (24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35; and c. 100, s. 67), enact that 'In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable (*z*), . . . and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender' (*a*).

Cumulative Sentences. — By the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28), s. 10, 'Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be

(*x*) This section was new in 1861. See R. *v.* Garland, 11 Cox, 222. The omitted portions were repealed in 1893 (S. L. R. No. 2). *vide ante*, pp. 211, 212.

(*y*) Taken from 12 & 13 Vict. c. 11, s. 3, and extended so as to include persons twice summarily convicted under 14 & 15 Vict. c. 92, ss. 3, 4, 5, & 6 (1), or the Malicious Damage Act, 1861, or the Larceny Act, 1861. The omitted portions of s. 9 were repealed in 1893 (S. L. R. No. 2). They included references to a number of statutes now repealed, viz., 7 & 8 Geo. IV. cc. 29, 30; 9 Geo. IV. cc. 55, 56; 11 & 12 Vict. c. 59; and to ss. 3, 4, 5, and 6 of 14 & 15 Vict. c. 92. It is not clear why the reference to 10 & 11 Vict. c. 82 remains, as that Act was repealed in 1879 (42 & 43 Vict. c. 49, s. 55), not why 14 & 15 Vict. c. 92 was struck out, as s. 6 is not repealed. As to minimum term of penal servitude, see p. 211. As to hard labour, see *ante*, p. 212. As to whipping, see *ante*, p. 215.

(*z*) As to accessories after the fact, *vide ante*, p. 126.

(*a*) This clause is omitted in the Coinage Offences Act, 1861, but the omission is supplied by s. 8 of the Accessories, &c., Act, 1861, *ante*, p. 138.

already under sentence, either of imprisonment or of transportation (*b*), the Court, if empowered to pass sentence of transportation (*b*), may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation (*b*) to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation (*b*) respectively may exceed the term for which either of those punishments could be otherwise awarded.' The rule above laid down as to felony applies at common law to misdemeanor (*c*).

So that, where a person is convicted of several offences at the same time, of the same kind, he may be sentenced to several terms of penal servitude or imprisonment one after the conclusion of the other (*d*). Where an indictment for perjury contained two counts charging perjury on two different occasions but with the same object, it was held that they were distinct offences which might, however, be included in one indictment; that a general verdict of guilty was good, and that the full punishment of seven years' penal servitude might be inflicted for each offence, the second term to begin at the termination of the first (*e*).

As to the effect of conviction of a person out on ticket of leave, see 27 & 28 Vict. c. 47, s. 9, as amended by 54 & 55 Vict. c. 69, s. 3, *vide ante*, p. 220.

Misdemeanors. — As a general rule all offences less than felony, which exist at common law, and have not been regulated by any particular statute, are punishable within the discretion of the Court (*f*). Fine, and imprisonment, without hard labour (*ante*, p. 212), are the remaining common-law punishments in cases of misdemeanor. On the abolition of the punishment of the pillory (*g*), it was provided by 56 Geo. III. c. 128, s. 2, that the Courts might pass such sentence of fine or imprisonment, or of both, in lieu of a sentence of pillory, as to the Court should seem proper. Whipping also was ordinarily awarded in former times, but it is not now adjudged except under statutory authority. The offender may, at common law, in addition to fine and imprisonment, be required to find sureties to keep the peace or be of good behaviour (*h*).

The common-law punishments may be imposed where a statute declares an offence to be a misdemeanor but prescribes no specific punishment, and in cases where disobedience to the command or prohibition of a statute is held by the Courts to be a misdemeanor (*i*).

(*b*) Now penal servitude. See 20 & 21 Vict. c. 3, s. 6, *ante*, p. 211.

(*c*) R. *v.* Wilkes, 19 St. Tr. 1132. R. *v.* Cutbush, L. R. 2 Q.B. 379. R. *v.* Robinson, 1 Mood. 413. Castro *v.* R., 6 App. Cas. 229. Concurrent sentences of penal servitude and imprisonment are thought undesirable. R. *v.* Jones, 1 Cr. App. R. 196. R. *v.* Martin, 1 Cr. App. R. 209.

(*d*) R. *v.* Williams, 1 Leach, 529, 536. See Gregory *v.* R., 15 Q.B. 974; 19 L. J. Q.B. 366.

(*e*) Castro *v.* R., 6 App. Cas. 229.

(*f*) 1 Chit. Cr. L. 710. R. *v.* Thomas, cas. K.B. *temp.* Hardw. 278. It used to be held that a married woman could not be fined, as she had no personalty of her own. Since the changes in her status and capacity effected by the Married Women's Property Acts, the reasons for this theory have practically, if not absolutely, disappeared.

(*g*) *Infra.*

(*h*) R. *v.* Dunn, 12 Q.B. 1026. R. *v.* Hart, 30 St. Tr. 1131. This rule was applied even in the case of a married woman (R. *v.* Thomas, *ubi sup.*), although it was considered that she could not herself enter into a recognisance. Lee *v.* Lady Baltinglas, Styles, 475. Bennet *v.* Watson, 3 M. & S. 1. Elsy *v.* Mawdit, Styles, 226. Anon., Styles, 321. See 1 Chit. Cr. L. 100.

(*i*) *Vide ante*, c. ii, pp. 11 *et seq.*

Sect. XIV.—Obsolete Punishments.

Pillory.—On conviction of misdemeanor it was not unusual to sentence the offender to the pillory (*j*). The punishment was recognised by the common law, and in some cases imposed by statute (*k*); but was partially abolished by the Pillory Abolition Act, 1816 (56 Geo. 3, c. 138) (*l*), and wholly abolished in 1837 (*m*). By sect. 2 of the Act of 1816, 'in all cases where the punishment of the pillory has hitherto (*i.e.* before July 2, 1816) formed the whole or a part of the judgment to be pronounced, it shall and may be lawful for the Court before whom such offence is tried to pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory as to the said Court shall seem most proper; provided that nothing herein contained shall extend, or be construed to extend, in any manner to change, alter, or affect any punishment which may now be by law inflicted in respect of any offence except only the punishment of pillory.'

Stocks.—At common law it is said that every township was bound to provide stocks in which the constable might confine offenders for security but not by way of punishment. By statutes most if not all now repealed setting in the stocks was authorised by way of punishment after conviction (*n*).

Ducking Stool.—The punishment of the ducking stool for scolds has not been formally abolished (*o*).

Sect. XV.—Civil Effects of Conviction.

Treason and Felony: Forfeitures for Felony, &c.

The Forfeiture Act, 1870 (33 & 34 Vict. c. 23), recites that it is expedient to abolish the forfeiture of lands and goods for treason and felony, and to otherwise amend the law relating thereto. By sect. 1, 'From and after the passing of this Act, no confession, verdict, inquest, conviction, or judgment of, or for any treason or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture, or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry' (*p*).

Sect. 2. 'Provided nevertheless, that if any person hereafter convicted of treason or felony, for which he shall be sentenced to death, or penal servitude, or any term of imprisonment, with hard labour, or exceeding twelve months, shall at the time of such conviction hold any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation, or be entitled to any pension, or superannuation allowance, payable by the public,

(*j*) See 3 Co. Inst. 219. 1 Pike Hist. Cr. vol. i. 213, 237–8; vol. ii. 285, 378. For the form of the pillory and the mode of executing the sentence, see Andrews, Old Time Punishments (1890), 64–103.

(*k*) See 5 Eliz. c. 9, s. 1 ('Perjury'), *post*, p. 526.

(*l*) Eaton was pilloried for blasphemy in 1812. *Vide* 31 St. Tr. 958.

(*m*) By 7 Will. IV. and 1 Vict. c. 23 (rep.).

(*n*) 2 Hawk. P. C. c. 73. See Andrews, Old Time Punishments (1890), pp. 120–137, where evidence is given of the use of the stocks in Anglo-Saxon times.

(*o*) *Vide post*, Bk. xi. c. ii.

(*p*) As to procedure on outlawry, see Crown Office Rules, 1906, rr. 88–110; Short & Mellor Cr. Pr. (2nd ed.) 270, 525.

or out of any public fund, such office, benefice, employment, or place, shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person shall receive a free pardon from His Majesty within two months after such conviction, or before the filling up of such office, benefice, employment, or place, if given at a later period; and such person shall become, and (until he shall have suffered the punishment to which he had been sentenced, or such other punishment as by competent authority may be substituted for the same, or shall receive a free pardon from His Majesty) shall continue thenceforth incapable of holding any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever within England, Wales, or Ireland' (*q*).

By the Children Act, 1908 (8 Edw. VII. c. 67), s. 101, 'The conviction of a child or young person shall not be regarded as a conviction of felony for the purposes of any disqualification attaching to felony' (*qq*).

Conviction of treason or felony, or outlawry, or criminal process, or conviction of infamous crime, unless pardoned, disqualifies the offender from serving as a juror (*r*).

By sect. 4 of the Act of 1870, 'it shall be lawful for any such Court as aforesaid, if it shall think fit upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding one hundred pounds, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the Court to be paid under the last preceding section of this Act' (*s*).

By sect. 5, 'The word "forfeiture," in the construction of this Act, shall not include any fine or penalty imposed on any convict by virtue of his sentence' (*t*).

By sect. 32, 'Provided always that nothing in this Act shall be deemed to alter or in any wise affect the law relating to felony in England, Wales, or Ireland, except as herein is expressly stated.'

By the Wine and Beerhouse, &c., Act, 1870 (33 & 34 Vict. c. 29), s. 14, 'Every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to

(*q*) As to ordering a person convicted of treason or felony to pay the costs of [the prosecution, see *post*, Bk xii. c. v. 'Costs.'

(*qq*) A re-enactment of 1 Edw. VII. c. 20, s. 1.

(*r*) 33 & 34 Vict. c. 70, ss. 7, 10 (E); 34 & 35 Vict. c. 65, s. 7 (I); 39 & 40 Vict. c. 78, s. 21 (I).

(*s*) See R. *v.* Lovett, 11 Cox, 602.

(*t*) Ss. 6–30 regulate the administration, &c., of the property of convicts sentenced to penal servitude for treason or felony, while they are in prison undergoing their sentence. The sections cease to apply if they die or become bankrupt, or receive a pardon (s. 7), and do not apply to property acquired while at large on licence (s. 30). As to these sections, see Carr *v.* Anderson [1903], 1 Ch. 90; 2 Ch. 279; and Gaskell & Walters' Contract [1906], 2 Ch. 1; and see 8 Edw. VII. c. 15, *post*, Bk. xii. c. v.

any person who shall have been so convicted as aforesaid; and if any person shall, after having been so convicted as aforesaid, take out or have any licence to sell spirits by retail, the same shall be void to all intents and purposes; and every person who, after being so convicted as aforesaid, shall sell any spirits by retail in any manner whatever, shall incur the penalty for doing so without a licence' (*u*).

In the case of convictions of felony not falling within sects. 2, 6–27 of the Act of 1870, and in the case of conviction for misdemeanor, the civil rights of the offender in respect of his property are not affected. But conviction and imprisonment for crime disqualify the offender from holding certain offices, *e.g.*, district councillor or guardian of the poor (*v*).

Sect. XVI.—Pardon or Remission or Mitigation of Punishment.

In passing a sentence on conviction, the Court should take into consideration all offences of a similar nature already committed by the prisoner, and of which he admits the commission, but for which he has not been actually tried (*vv*).

When a sentence involving punishment has been passed and duly recorded, the Court of trial has no power to remit it. On appeal to the Court of Criminal Appeal the punishment may be reduced or increased by the appellate Court (*w*).

The power to pardon the offence, or commute or remit or reduce the punishment or fine for a criminal offence, is part of the prerogative of the Crown (*x*), which cannot be delegated to a subject as to matters in England and Wales (27 Hen. VIII. c. 24, s. 1), and is distinct from the provisions made under the statutes and rules relating to convict prisons and local prisons which authorise the absolute or conditional release of offenders before the expiration of any term of penal servitude or imprisonment lawfully adjudged.

A. *Pardon.*

By virtue of the prerogative of mercy the Crown may grant a free pardon for an offence, which restores the offender to the status which he held before conviction (*y*).

A free pardon may be granted either before or after trial. Where a pardon is granted at any one's suggestion, the fact of the suggestion and the name of the person making it should be in the pardon (27 Edw. III. st. 1, c. 2); and pardons for treason, murder, or rape are not to be granted unless the offence is specified in the pardon (13 Rich. II. st. 2, c. 1; 16 Rich. II. c. 6. See 1 C. & P. 456, note to R. *v.* Beacall).

At common law pardons must be under the Great Seal (*z*).

(*u*) See Hay *v.* Tower Justices, 24 Q.B.D. 561.

(*v*) For statutes, see Chronological Index to Statutes, tit. 'Disqualification.'

(*vv*) R. *v.* Syres, 73 J.P. 13. R. *v.* Taylor, 2 Cr. App. R. 158.

(*w*) 7 Edw. VII. c. 23, ss. 4 (3), 19, *post*, Bk. xii. c. iv.

(*x*) The power to remit does not extend to the penalties of praemunire under the Habeas Corpus Act, 1679 (31 Car. II. c. 2), s. 11; nor it would seem in the case of attachment or committal in the case of civil contempts of Court. Criminal contempts of Court may be pardoned or the sentence remitted. *Re* Bahama Islands [1893], A.C. 138. For other limitations on the power to pardon, see 2 Hawk. c. 37.

(*y*) Hay *v.* Tower Justices, 24 Q.B.D. 561. Leyman *v.* Latimer, 3 Ex. D. 15, 352. And see 33 & 34 Vict. c. 23, s. 2, *ante*, p. 250.

(*z*) R. *v.* Boyes, 30 L. J. Q.B. 301.

Conditional Pardon.—The Crown may grant a pardon on conditions.

A conditional pardon for treason may be granted and the condition enforced even if the convict do not assent to it (*a*).

A pardon granted on a void condition is void (*b*).

By the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28), s. 13 (*c*), 'Where the King's Majesty shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign manual (*cc*), countersigned by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the 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 under the Great Seal for such offender, as to the felony for which such pardon shall be so granted: provided always, that no free pardon, nor any such 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 committed after the granting of any such pardon.'

By the Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), s. 5, 'Whenever His Majesty, or the lord lieutenant or other chief governor or governors of Ireland for the time being, shall be pleased to extend mercy to any offender convicted of any offence for which he may be liable to the punishment of death, upon condition of his being kept to penal servitude for any term of years, or for life, such intention of mercy shall have the same effect and may be signified in the same manner, and all courts, justices, and others shall give effect thereto and to the condition of the pardon in like manner, as in the cases where His Majesty, or the lord lieutenant or other chief governor or governors of Ireland for the time, is or are now pleased to extend mercy upon condition of transportation beyond seas, the order for the execution of such punishment as His Majesty, or the lord lieutenant or other chief governor or governors of Ireland for the time being, may have made the condition of her, his, or their mercy being substituted for the order for transportation' (*d*).

The Civil Rights of Convicts Act, 1828 (9 Geo. IV. c. 32), s. 3, after reciting that it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies, not capital, who have undergone the punishment to which they were adjudged, enacts that: 'Where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effect and consequences as a pardon under the Great Seal as to the felony whereof the offender was so

(*a*) See 12 & 13 Vict. c. 27 (I).

(*b*) Canadian Prisoners' case [1839], 3 St. Tr. (N. S.) 1034.

(*c*) As to Ireland, see 9 Geo. IV. c. 54, s. 3. As to pardon conditional on imprisonment, see 11 Geo. IV. & 1 Will. IV. c. 39, s. 7.

(*cc*) Sign manuals were used before this Act as authority to discharge a prisoner. See 1 Leach, 74.

(*d*) Similar provisions as to pardon conditional on transportation are made by 5 Geo. IV. c. 84, s. 3 (not repealed, but of no present importance). That section extends to Scotland. As to Ireland, see 12 & 13 Vict. c. 27.

convicted: provided always, that 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 felony.'

B. *Respite and Reprieve.*

By respite in criminal cases is usually meant postponement of judgment or sentence till a later date (*e*), *e.g.*, where a case is stated for the consideration of the Court of Criminal Appeal, or an appeal is pending under the Criminal Appeal Act, 1907 (*f*). Where judgment has been respited for a capital offence, it may be given by subsequent justices of gaol delivery for the same county (*g*).

By 'reprieve' is meant suspension of the execution of a sentence of death (*h*): (*a*) *ex mandato regis*, in exercise of the royal prerogative of mercy; (*b*) at the discretion of the Court, *ex arbitrio judicis* (except on conviction of murder), to enable the offender to apply for pardon or commutation of sentence (*i*); (*c*) *ex necessitate legis*, where some fact is disclosed entitling the offender to delay execution of sentence, *e.g.*, where a woman convicted of murder is found to be pregnant (*j*), or where the offender becomes insane between judgment and execution (*k*).

Under the Criminal Appeal Act, 1907, the execution of a judgment, subject to any special order, is suspended from the time of giving notice of appeal, and where an appeal is brought by leave or of right, until the appeal is determined (*l*).

(*e*) Keen *v.* R., 10 Q.B. 928.
(*f*) See *post*, Bk. xii. c. iv.
(*g*) 1 Edw. VI. c. 7, s. 5.
(*h*) 2 Hawk. c. 51, s. 8; 1 Chit. Cr. L. 758.
(*i*) See 4 Geo. IV. c. 48, and 7 Will. IV. & 1 Vict. c. 77, ss. 3, 4, *ante*, p. 207; and 24 & 25 Vict. c. 100, s. 2.
(*j*) 3 Co. Inst. 17; 1 Chit. Cr. L. 759.
(*k*) 3 Co. Inst. 4; 1 Chit. Cr. L. 761.
(*l*) 7 Edw. VII. c. 23, ss. 7 (2), 14, 21, *post*, Bk. xii. c. iv.

CANADIAN NOTES.

OF PUNISHMENTS.

Sec. 1.—*Death.*

The offences to which the penalty of death is attached are as follows:—(*a*) Treason, sec. 74(2); (*b*) Levying War in Canada, sec. 77; (*c*) Piracy accompanied by violence to person, sec. 137; (*d*) Murder, sec. 263; (*e*) Rape, sec. 299.

Execution of a pregnant woman may be arrested. Code sec. 1008.

In all cases where an offender is sentenced to death, the sentence or judgment to be pronounced against him shall be that he be hanged by the neck until he be dead. Code sec. 1062.

Report of the sentence of death must forthwith be made to the Secretary of State. Code sec. 1063.

If delay after sentence be necessary, a Judge of the Court in which the conviction took place may reprieve the offender. Code sec. 1063(2).

After judgment the offender shall be separately confined. Code sec. 1064.

Only certain persons may be present at an execution. Code secs. 1066, 1067.

Judgment of death shall be carried into effect within the walls of the prison in which the offender is confined. Code sec. 1065.

A certificate of death shall be given by the medical officer. The sheriff, gaoler, and other persons present if required shall sign a declaration. Code sec. 1068.

Deputies may act for the sheriff, gaoler, or medical officer. Code sec. 1069.

An inquest shall be held within twenty-four hours. Code sec. 1070.

The body shall be buried within the walls of the prison. Code sec. 1071.

Irregularities do not make an execution illegal. Code sec. 1073.

The certificate must be sent to the Secretary of State, and printed copies exhibited at or near the principal entrance to the prison. Code sec. 1072.

Execution under Sentence of High Court.—In Cashell's case (1903), 40 C.L.J. 54 (N.W.T.), an order was made by Sifton, C.J., postponing the execution for a week, the prisoner having broken jail and escaped.

In an unreported Ontario case (Reg. v. Young (1876)) the prisoners were, on March 27, 1876, found guilty of murder and were sentenced to be hanged on June 21 following. They effected their escape, and continued at large until midsummer, and were then retaken.

Counsel for the Crown moved before the full Court on August 27, for writs of habeas corpus and certiorari to bring up the prisoners from the jail at Cayuga, and the indictment against them, for the purpose of applying for a new sentence of death; which, on return made to the writs, was passed upon them. 40 C.L.J. 131.

The sentence may be commuted. Code sec. 1078.

Sec. 4.—Imprisonment.

The Dominion Parliament has the constitutional power to establish prisons for the incarceration of offenders against Dominion laws. Re Goodspeed (1903), 7 Can. Cr. Cas. 240 (N.B.)

The Courts of a province in which is situate a penitentiary common to that and another province, should not enquire on habeas corpus into the validity of an indictment upon which the prisoner was tried in the other province and sentenced to imprisonment in such penitentiary. R. v. Wright (1905), 10 Can. Cr. Cas. 461 (N.B.).

If the certificate of sentence to imprisonment in a penitentiary is irregular for omission of the date of sentence leave may be given on a habeas corpus motion to return an amended certificate correcting the omission. R. v. Wright, 10 Can. Cr. Cas. 461.

The certified copy of sentence is sufficient warrant for the imprisonment of a convict in the penitentiary and it is not necessary that it should contain every essential averment of a formal conviction. Where the venue is mentioned in the margin of a commitment, in the case of an offence which does not require local description, it is not necessary that the warrant should describe the place where the offence was committed. A warrant of commitment (or certified copy of sentence) following a conviction on indictment, need not state the time from which the term of imprisonment shall begin to run, as both under the Penitentiaries Act and the Prisons Act, terms of imprisonment commence on and from the day of the passing of the sentence. Ex parte Smitheman (1904), 35 Can. S.C.R. 189, 490, 9 Can. Cr. Cas. 10, 17.

Where no punishment is specially provided, a person convicted of an indictable offence, is liable to imprisonment for five years. Code sec. 1052.

Everyone summarily convicted of an offence for which no punishment is specially provided is liable to a penalty not exceeding fifty dollars, or to imprisonment not exceeding ten months, with or without hard labour, or to both. Code sec. 1052(2).

Second Offence.—Everyone convicted of an indictable offence, not punishable with death, committed after previous offence, is liable to imprisonment for ten years, unless some statute directs some other punishment. Code sec. 1053.

But a person who, after a previous conviction for any indictable offence, is convicted of an offence under Part VII. of the Code for which a punishment on a first conviction is less than fourteen years' imprisonment is liable to fourteen years' imprisonment. Code sec. 465.

Where a statute of Canada imposes a fine and also imprisonment, the punishment is in the discretion of the Court, which is not bound to inflict both, but may inflict either one or the other of the two kinds of punishment by virtue of section 1028. R. v. Robidoux (1898), 2 Can. Cr. Cas. 19 (Que.)

Second Offence—Certificate of Previous Conviction, etc.—Under the Ontario Liquor License Act, R.S.O. 1897, ch. 245, sec. 101, the question of the identity of the accused, charged with a second offence, with the person previously convicted is one for the magistrate to determine upon the evidence before him apart from his personal recollection, but a certificate of the previous conviction in the same locality of a person of the same name is some evidence of identity.

A certificate under the Liquor License Act of a prior conviction thereunder is not affected by Code sec. 982, under which evidence of identity apart from and in addition to a certificate of the prior conviction is required on the trial for an indictable offence if a prior conviction of the accused is to be proved.

Per Britton, J.—Quære, whether Code sec. 982 has any application other than to the trial of indictable offences. The King v. Leach et al., 14 Can. Cr. Cas. 375.

Maximum Term Shortened.—Everyone 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, prescribed for the offence of which he is convicted. Code sec. 1054.

For Terms Less than Two Years.—Sentence for imprisonment for less than two years, unless some other place is named, shall be in the common gaol or place of confinement, not a penitentiary, in the place in which the sentence is pronounced. A person sentenced at the same sittings to penitentiary and gaol, or sentenced for less than two years while in a penitentiary, may be sentenced to serve in a penitentiary. In Manitoba offenders sentenced to terms of less than two years may be imprisoned in any gaol in the province. Code sec. 1056.

A prisoner convicted at the one time of two offences and sentenced on each to three months' imprisonment without specification as to the terms being concurrent or otherwise, is not entitled to a discharge on a

habeas corpus after three months' imprisonment. There is no presumption that sentences passed at the one time are to be concurrent. Ex parte Bishop (1895), 1 Can. Cr. Cas. 118 (N.B.).

With or Without Hard Labour.—An offender convicted

(*a*) of an indictable offence,

(*b*) before a Judge of a Superior Court in Saskatchewan or Alberta; or

(*c*) before a stipendiary magistrate in the North-West Territory; or

(*d*) before a Judge of the Territorial Court in the Yukon Territory,

may be sentenced to undergo hard labour while imprisoned, in the discretion of the Court or person passing sentence. In other cases hard labour may be imposed by the sentence if it be part of the punishment prescribed by law for the offence. Code sec. 1057.

Where the sentence imposed upon a summary trial by consent before a city stipendiary magistrate for common assault, was, in the first instance, three months' imprisonment without mention of hard labour, and the minute of adjudication did not include hard labour, a formal conviction, including hard labour, and a commitment thereon in similar terms, are invalid and the accused will be discharged on habeas corpus. Ex parte Carmichael (1903), 8 Can. Cr. Cas. 19 (N.S.).

If a statute merely directs imprisonment as the punishment of an offence, no Court of justice can, in the absence of any general discretionary power to that effect, award hard labour in addition. It is an additional substantive punishment. Hard labour is in fact a statutable addition to imprisonment, generally to be found enacted in the Act creating the offence, sometimes in statutes giving it as a discretionary power to a Court on awarding imprisonment. R. v. Frawley (1881), 46 U.C.Q.B. 153; R. v. Allbright, 9 P.R. (Ont.) 25.

Imprisonment in Default, with Hard Labour.—Section 739(2) of Revised Criminal Code authorizes the imposition of hard labour upon an imprisonment in default of distress, only where imprisonment with hard labour in the first instance might have been imposed in addition to a fine with imprisonment in default of distress or payment. The King v. Riley, 14 Can. Cr. Cas. 346.

Sec. 5.—Whipping.

The punishment of whipping may be imposed upon persons convicted of the following offences:—

(*a*) *Assault upon the King.*—Code sec. 80.

(*b*) *Burglary When Armed.*—Code sec. 457.

(*c*) *Carnal Knowledge of a Girl under Fourteen Years of Age.*—Code sec. 301.

(*d*) *Attempt to Have Carnal Knowledge of a Girl under Fourteen Years of Age.*—Code sec. 302.

(*e*) *Attempts to Choke, Strangle, or Drug with Intent to Commit or Assist in Committing an Indictable Offence.*—Code sec. 276.

(*f*) *Indecent Assaults upon Females.*—Code sec. 292.

(*g*) *Assaults upon Persons with Intent to Commit Sodomy or Indecent Assaults on Male Persons by Other Male Persons.*—Code sec. 293.

(*x*) *Doing, Attempting or Procuring Acts of Gross Indecency by a Male Person with Another Male Person.*—Code sec. 206.

Provisions for the Carrying into Effect of the Punishment of Whipping.—The instrument is a cat-o'-nine-tails unless the sentence prescribes some other instrument. Whipping may be three times inflicted. It shall not take place within ten days of discharge. Code sec. 1060.

Females.—Whipping shall not be inflicted on any female. Code sec. 1061.

Sec. 6.—Fines.

The amount of a fine is in the discretion of the Court, within the limits fixed by statute. Code sec. 1029.

On conviction of an indictable offence punishable by imprisonment for five years or less, a fine may be imposed in addition to or in lieu of any punishment otherwise authorized; and the sentence may direct imprisonment till the fine is paid, or for not more than five years. Code sec. 1035(1).

On conviction for an indictable offence punishable with imprisonment for more than five years, a fine may be imposed in addition to, but not in lieu of, any punishment otherwise ordered. In the latter case also imprisonment in default of payment of the fine may be directed by the sentence. Code sec. 1035(2). It should be noticed that the exercise of the power given by this section of the Code is not expressed to be subject to the provisions of any other statute.

Penalties and forfeitures, when no other mode is prescribed, are recoverable, with costs, by civil action at the suit of His Majesty or of a private party suing for His Majesty and for himself. Where no other provision is made, one moiety belongs to His Majesty, and the other to the party suing. Code sec. 1038. Actions for penalties must be brought within two years, except it be otherwise provided. Code sec. 1141.

One moiety goes to the person who sues in respect of the following offences:—

(*a*) *Uttering Uncurrent Coin.*—Sec. 567.

(*b*) *Possession of Copper Coin Unlawfully Imported or Manufactured.*—Sec. 624.

(*c*) *Unlawfully Manufacturing or Importing Copper Coin.*—Sec. 625.

(*d*) *Attempted Illegal Importation of Copper Coin.*—Sec. 626.

(*e*) *Persuading to Desert the Army or Navy, or Concealing a Deserter.*—Sec. 82.

(*f*) *Resisting Search Warrant for Deserter.*—Secs. 83 and 657.

(*g*) *Receiving Stolen Goods from Soldiers.*—Sec. 438.

(*h*) *Receiving Necessaries from Seamen.*—Sec. 439.

(*i*) *Cruelty to Animals.*—Sec. 542.

(*j*) *Keeping Cockpit.*—Sec. 543.

The Governor in Council may at any time remit any fine or forfeiture. Code sec. 1084.

The remission may be on terms as to the payment of costs or otherwise; provided that where proceedings have been instituted by private persons costs already incurred shall not be remitted. Code sec. 1085.

Sec. 7.—Recognizances and Sureties.

A person convicted summarily of an indictable offence, or by any Court for any offence not punishable with death, may be required in addition to any other sentence to enter into his own recognizances or to give security to keep the peace and be of good behaviour, for a term not exceeding two years, and to imprisonment for not more than one year, pending the entry into recognizances or giving security. Code sec. 1058.

It is noteworthy that recognizances or sureties are alternative under section 1058, and that there is power to impose either in addition to, but not in lieu of, any other punishment, contrary in both respects to the provisions enacted in each of the Consolidation Acts of 1861 (British), referred to in page 219 hereof.

A person charged before a justice with an offence punishable on summary conviction (under Part XV. of the Code), or with making threats, may, in addition to, or in lieu of, any other sentence, be ordered to enter into recognizances, or to give security to keep the peace, and be of good behaviour for a period not exceeding twelve months, and in default to imprisonment for not more than twelve months. Code sec. 748.

In this section also the power to order recognizances or security is alternative only.

Part XXI. of the Code treats of "Render by Sureties and Recognizances."

An application in Nova Scotia under Code sec. 1110 to discharge from custody a surety arrested in estreat proceedings should be made to the Judge presiding in criminal sittings and not to the Court *en banc*. Re Pippy, 14 Can. Cr. Cas. 305.

Sec. 8.—Probation of Offenders.

The Ticket of Leave Act, R.S.C. (1906), ch. 150, enacts that the Governor-General may grant to any convict in a penitentiary, gaol, or

other public or reformatory prison a license to be at large in Canada, or in a specified part thereof, and may revoke such license. Sec. 2.

The conviction and sentence remain in force despite such license, but the convict is not liable to imprisonment by reason of his sentence while the license remains in force. Sec. 3.

If a holder of a license is convicted of an indictable offence his license is forfeited forthwith. Sec. 5.

If a holder of a license is convicted of any offence punishable on summary conviction the license may be revoked. Sec. 6.

The license issued under the authority of 62-63 Vict. ch. 49, and by which a convict while undergoing a term of imprisonment in penitentiary is conditionally allowed at large, may be revoked by the Governor-General either with or without cause assigned.

The revocation by the Crown, without cause assigned, of such license works no interruption in the running of the sentence which shall terminate at the same time as if such license had never been granted. R. v. Johnson, 4 Can. Cr. Cas. 178.

If a license be revoked or forfeited the holder may be apprehended (sec. 7(1)) and recommitted to the place from which he was released by his license (sec. 7(3)), unless this be in another province, and he may be imprisoned where apprehended. Sec. 7(3).

In the event of a license being revoked or forfeited, the term to which the offender was originally sentenced must be served out in the kind of institution to which he was originally sentenced. Sec. 8.

A licensee must notify the proper officials of the place in which he resides of his place of residence, and whenever he is about to leave that place. Sec. 9.

Every male holder of a license must once in each month report himself to the Chief of Police or sheriff of the city, town, county or district in which such holder may be, and such report may be required to be made personally or by letter. Sec. 9(2).

Any person who cannot satisfy the Court that his delay in failing to notify his place of residence or to report was unavoidable, is guilty of an offence, and liable on summary conviction to forfeit his license, or to imprisonment with or without hard labour for a term not exceeding one year. Sec. 10.

Any holder failing whenever required to produce his license, or who breaks any of the other conditions of his license by any act which is not of itself punishable either upon indictment or summary conviction, is guilty of an offence, and liable upon summary conviction to imprisonment for three months with or without hard labour. Sec. 11.

Any peace officer may take into custody without warrant any convict who is the holder of such license—

(*a*) Whom he reasonably suspects of having committed any offence, or

(*b*) If it appears to such peace officer that such convict is getting his livelihood by dishonest means, and may take him before a justice to be dealt with according to law.

2. If it appears from the facts proved before the justice that there are reasonable grounds for believing that the convict so brought before him is getting his livelihood by dishonest means, such convict shall be guilty of an offence against this Act, and his license shall be forfeited.

3. Any convict so brought before a justice of the peace may be convicted of getting his livelihood by dishonest means, although he has been brought before the justice on some other charge, or not in the manner provided for in this section. Sec. 12.

Conditional Release (Suspended Sentence).—Sentence may be suspended in the discretion of the Court in any case in which an offender suffers a first conviction for an offence punishable with not more than two years' imprisonment; with the consent of counsel for the Crown in the prosecution, sentence may also be suspended after conviction for offences punishable with imprisonment for more than two years. Code sec. 1081.

The Court shall be satisfied that the offender has a fixed place of abode or regular occupation. Code sec. 1082. The offender may be apprehended, brought before the Court or a justice, committed and tried for his conduct subsequent to release. Code sec. 1083.

Where a release on suspended sentence was in respect of a conviction for keeping a disorderly house, the fact that the accused had again been brought before the same magistrate on a similar charge which, however, was not substantiated, does not give the magistrate jurisdiction to impose the sentence which had been suspended in respect of the first charge. And, semble, a proceeding under sec. 1083 to bring up for sentence an accused person who had been released on suspended sentence, can only be taken at the instance of the Crown. R. v. Siteman (1902), 6 Can. Cr. Cas. 224.

Where the jury convicted the defendant and the verdict was recorded and the offender was, by order of the Court, released on bail to appear for judgment, it is only upon motion by the Crown that the recognizance of the defendant and his bail can be estreated in Ontario or that judgment can be moved against the offender. R. v. Young (1901), 4 Can. Cr. Cas. 580 (Ont.).

A contract by the accused to indemnify a surety against liability under his recognizance is illegal; but where a deposit of money is made by the accused with the surety by way of indemnity, the accused cannot recover it back. Herman v. Jeuchner, 15 Q.B.D. 561.

Where after a summary trial the accused is convicted but is released on suspended sentence and a recognizance is taken binding the accused to keep the peace and be of good behaviour, the magistrate has

no jurisdiction to impose sentence without an information under oath charging a breach of the recognizance (Code sec. 1083). R. v. Siteman (1902), 6 Can. Cr. Cas. 224 (N.S.).

Two Years' Imprisonment.—In R. v. McLennan (No. 1) (1905), 10 Can. Cr. Cas. 1, it appears to have been considered that an offence "punishable with not more than two years' imprisonment" under the first sub-section meant an offence so punishable before the Court or magistrate actually trying the charge. It is submitted that the section refers to the maximum penalty which the law imposes for the offence, although the magistrate exercising a power of summary trial may on account of the special jurisdiction conferred on him be restricted to a sentence less than two years, and that where such maximum exceeds two years the concurrence of the Crown counsel is necessary under sub-sec. (2). See note 10 Can. Cr. Cas. 10-13.

"Court."—The "Court" in sec. 1081 means, unless the context otherwise requires, any superior Court of criminal jurisdiction, any Judge or Court exercising the "speedy trials" jurisdiction and any magistrate exercising the "summary trials" jurisdiction. Code sec. 1026.

Juveniles.—There is also the power under the "juvenile offenders" clauses (Code secs. 800-821), to dismiss the accused if the justices upon the hearing of a case against a juvenile offender under sixteen years of age, consider it inexpedient to inflict any punishment. Code sec. 813.

Costs.—Where the person convicted upon a summary trial is released upon suspended sentence and is directed to pay the informant's costs, such costs are payable forthwith unless otherwise ordered. The power under this section to award such costs to be paid "within such period and by such instalments as the Court directs" does not make it necessary to divide the costs into instalments. R. v. McLellan (No. 1) (1905), 10 Can. Cr. Cas. 1.

Previous Conviction.—The proper time for taking evidence of a previous conviction to exclude a magistrate's jurisdiction to release on suspended sentence is after the finding of guilty on the present charge and not during the hearing of the charge. If the Crown does not adduce evidence of a previous conviction, the magistrate may, on his own initiative, call for the records under his own control and custody and hold an enquiry upon the question whether the defendant had been previously convicted before him and on the questions of identity, age and antecedents of the defendant for the purpose of considering the appropriate punishment or a release on suspended sentence where the latter is permissible. Semble, if the magistrate recollects that the person convicted before him was previously convicted before him he should proceed with such an enquiry, although the Crown counsel was content to allow the accused to go on suspended sentence. The King v. Bonnevie, 10 Can. Cr. Cas. 376.

Sec. 9.—Punishment of Juvenile Offenders.

The Prisons and Reformatories Act, R.S.C. (1906) ch. 148, provides for the separation, before trial, while in custody, of young persons apparently under sixteen years from older persons in custody, and from all persons undergoing imprisonment.

By section 29 it is provided that offenders whose age does not exceed sixteen years, who are convicted summarily or otherwise, of an offence punishable by imprisonment for not more than five years, may be sentenced to imprisonment in any reformatory prison in the province in which the conviction takes place, provided that the sentence may in no case be less than two or more than five years. The prisoners in reformatories (whether sentenced to hard labour or otherwise) are liable to perform labour.

Ontario.—Part 2 of the last named Act applies to the Province of Ontario only. It is provided that any boy apparently under sixteen convicted of an offence punishable by imprisonment for a period of three months or longer (but not exceeding five years), may be sentenced to imprisonment in a certified industrial school, for a fixed term, and also to be kept there for an indefinite term, provided that the whole period of detention shall not exceed five years. Sec. 49.

It is further provided that if a boy apparently under sixteen years has been sentenced and committed to the common gaol for a period not less than fourteen days, a Judge of a superior or county Court may sentence such boy to be sent forthwith or at the expiration of his term in gaol to a certified industrial school for an indefinite term, not exceeding five years from the commencement of his imprisonment in the common gaol. Sec. 50.

Boys of thirteen years of age or under may be transferred from a reformatory or common gaol to a certified industrial school, by warrant of the Governor-General (with the consent of the Provincial Secretary). This applies whether the boy has been tried summarily or otherwise. Sec. 51.

Any boy of thirteen or under convicted either summarily or otherwise of an offence punishable by imprisonment may be sentenced to imprisonment in an industrial school for not more than five years, nor less than two years, provided that he cannot be detained beyond the age of seventeen years. Sec. 52.

Every boy sentenced or transferred to a certified industrial school shall be detained there until the end of his fixed term (unless sooner discharged by lawful authority), and (subject to the laws and regulations) for a period not to exceed five years from the commencement of his imprisonment. Sec. 53.

Any girl who at the time of her trial appears to the Court to be under the age of fourteen years, and who is convicted of any offence

for which a sentence of imprisonment for a term of one month or longer, but less than five years, may be imposed upon an adult convicted of the like offence, may be sentenced to the Industrial Refuge for Girls of Ontario, for such fixed term as the Court thinks fit, not being greater than the term of imprisonment which could be imposed upon an adult for the like offence, and may be further sentenced to an indefinite fixed term, provided that the whole term of confinement in the Industrial Refuge shall not exceed five years from the commencement of her imprisonment. Sec. 62.

Any girl apparently under the age of fourteen years who is convicted of an offence punishable by law on summary conviction, and sentenced and committed to any common gaol, for a term not less than fourteen days, may be sentenced by a Judge of a superior or county Court to be sent forthwith or at the end of her term in such gaol to the Industrial Refuge for Girls of Ontario, to be detained for an indefinite period, not exceeding in the whole five years from the commencement of her imprisonment in the common gaol. Sec. 63.

A boy in the industrial school, or a girl in the Industrial Refuge for Girls, may be bound an apprentice to an approved person, for a term not to extend beyond five years from the commencement of his or her imprisonment; and thereupon may be discharged on probation. Sec. 65.

Any child apparently under the age of fourteen years, convicted summarily or otherwise of an offence, may be committed to any home for destitute or neglected children or to the charge of any approved children's aid society. Sec. 67.

When information or complaint is made against a boy under the age of twelve years, or girl under the age of thirteen years, for an offence punishable on summary conviction or otherwise, the Court or justice shall notify the executive officer of the children's aid society, and may notify parents or friends. Sec. 68. After consultation with the officer and hearing the complaint, the Court or justice may, by order,

(*a*) Authorize the said officer to take the child, and, under the provisions of the law of Ontario, bind the child out to some suitable person until the child has attained the age of twenty-one years, or any less age; or

(*b*) Place the child out in some approved foster-home; or

(*c*) Impose a fine not exceeding ten dollars; or

(*d*) Suspend sentence for a definite or for an indefinite period; or

(*e*) If the child has been found guilty of the offence charged, or is shewn to be wilfully wayward and unmanageable, commit the child to a certified industrial school, or to the Ontario Reformatory for Boys, or to the Refuge for Girls, as the case may be, and in such cases,

the report of the said officer shall be attached to the warrant of commitment. Sec. 68.

Except in the case of children cared for in a shelter or temporary home under an Act for the Prevention of Cruelty to and the better Protection of Children, 56 Vict. ch. 45 (Ontario), in a municipality having but one children's aid society, no Protestant may be committed to the care of a Roman Catholic society or placed in a Roman Catholic family, nor any Roman Catholic children be committed to the care of a Protestant society, or placed in a Protestant family, under secs. 67, 68 and 69. Sec. 70.

Quebec.—Part III. of the Prisons and Reformatories Act, R.S.C. (1906) ch. 148, applies only to the Province of Quebec. Sec. 78.

Every person apparently under the age of sixteen years, convicted before any Court of criminal jurisdiction, or any Judge of sessions of the peace, recorder, district or police magistrate, of any offence for which he would be liable to imprisonment, may be sentenced to be detained in a certified reformatory school for a term not less than two, nor more than five years, or to be first imprisoned in a common gaol for not more than three months, and thereafter to be sent to a certified reformatory school to be detained for not less than two, and not more than five years. Sec. 79.

An offender detained in a reformatory under summary conviction may be discharged by the Lieutenant-Governor. Sec. 80.

Persons apparently under the age of sixteen years arrested on a charge of having committed any offence not capital, shall not, while awaiting trial, be detained in the common gaol, but in a certified reformatory school if there be any within three miles of such gaol, and if there be more than one such school within such distance, the person detained shall be placed in that school conducted most nearly in accordance with the religious belief to which his parents belong, or in which he has been educated. Sec. 81.

Every offender detained in a certified reformatory school who wilfully neglects and refuses to conform to the rules thereof shall be imprisoned with hard labour for a term not exceeding three months, on summary conviction before a justice of the peace, and at the end of such term of imprisonment, he shall be brought back to the reformatory school to be detained for the portion of the term to which he was originally sentenced which remained unexpired at the time he was sent to the prison. Sec. 82.

(*Note.*—The four last preceding sections seem to apply to both males and females, though they occur in Part III. of the statute under the sub-title "Reformatory Schools for Boys.")

Nova Scotia.—Part IV. of the aforesaid Act applies only to the Province of Nova Scotia. Sec. 89.

A Protestant boy apparently under the age of sixteen years convicted of an offence punishable by imprisonment may be sentenced to the Halifax Industrial School, for a term not more than five or less than one year. Sec. 90 (amended in 1908). Such boy must be instructed in reading, writing and arithmetic, and in one of the trades or occupations taught in the school. Sec. 92.

A Roman Catholic boy apparently under the age of sixteen years convicted of an offence punishable by imprisonment may be sentenced to the St. Patrick's Home at Halifax, for a term not exceeding five or less than one year. Sec. 93 (amended in 1908). Such boy must be instructed in reading, writing and arithmetic, and in one of the trades or occupations taught in the home. Sec. 96.

A boy sentenced to be detained in the home may be licensed to be at large in the province, or in such part thereof as the license may specify. Sec. 97.

A boy upon contravention of any of the conditions of his license may be remitted to the home to serve the remainder of his original sentence, with such additional term, not exceeding one year, as may seem proper. Sec. 97(4).

Any Roman Catholic girl apparently under the age of eighteen years convicted of an offence punishable by imprisonment may be sentenced to the Good Shepherd Industrial Refuge, for a term not exceeding five or less than two years (sec. 105), with the written consent of the Superintendent of the Refuge, and after provision has been made by the municipality within which the conviction has taken place for the support of the girl so sentenced (sec. 106), and each girl sentenced and detained must be instructed in reading, writing and arithmetic, and in one of the trades or occupations taught in the Refuge. Sec. 107.

Girls so sentenced may be apprenticed to approved Roman Catholic persons for a term not exceeding five years from the commencement of the girl's imprisonment, and upon such apprenticeship taking place the girl shall be discharged from the Refuge on probation. Sec. 108.

A girl sentenced to be detained in a Refuge may be licensed to be at large in the province or in any specified part thereof, and upon contravention of the conditions of the license may be remitted to the Refuge to serve the remainder of her original sentence, with such additional term as may seem proper, not exceeding one year. Sec. 112.

New Brunswick.—Part V. of the above mentioned Act applies only to the Province of New Brunswick.

Boys apparently under the age of sixteen years may be sentenced to the Industrial Home for Boys for fixed and for indefinite terms, the whole period not to exceed five years. Sec. 116. There are provisions for the transfer of boys under sixteen from the common

jails to the home (sec. 117), and from Dorchester Penitentiary (sec. 125); for the apprenticeship of boys (sec. 121); for their discharge absolutely or on probation (sec. 123), and for their recommittal. Sec. 124.

Imprisonment of Females.

There is no general statutory provision for the imprisonment of females, except for the separation from male prisoners in penitentiaries, but special and varying provisions are made concerning them in respect of certain provinces by the Prisons and Reformatories Act, R.S.C. (1906) ch. 148.

In Ontario a female, convicted of an offence punishable by imprisonment in the common gaol for two months or more, may be sentenced to the Andrew Mercer Reformatory for Females (sec. 55), or if confined to the common gaol, may be transferred to the Reformatory. Sec. 56. A female convicted of being a loose, idle or disorderly, or vagrant person, under sec. 239 of the Code, or under Part XVI. of the Code (Summary Trial for Indictable Offences), may be sentenced to the Reformatory, for any term less than two years, without a fine if the term be more than six months, in substitution for the punishments otherwise provided. Sec. 57. Females sentenced to imprisonment in common gaols, or confined therein, by a police magistrate of a city, may be committed or transferred to a House of Refuge for Females (sec. 71), and may be transferred to a House of Refuge. Sec. 72.

In Nova Scotia, every Roman Catholic female above the age of sixteen years, convicted of an offence punishable by imprisonment in a city prison or common gaol for two months or more, may be sentenced to extended or substituted imprisonment in the Good Shepherd Reformatory at Halifax, if under the age of twenty-one years until she become twenty-one, or for not less than two, or more than four years; if twenty-one years or upward, for not less than one, or more than two years. Sec. 98. A female aged more than sixteen, confined in a city prison or common gaol may be transferred to the Reformatory. Sec. 99. A female Roman Catholic, convicted of being a loose, idle or disorderly person, or vagrant, or summarily for an indictable offence, under Part XVI. of the Code, may be sentenced to the Reformatory for a term less than two years, in substitution for the punishments otherwise provided for. Sec. 100. Persons in the Reformatory may be transferred to a city prison or common gaol. Sec. 103.

In New Brunswick, every Roman Catholic girl, convicted of certain specified offences, may be sentenced to the Good Shepherd Reformatory for a term less than two years. Secs. 127, 128.

Trial of Juvenile Offenders.—The trial of persons apparently under the age of sixteen years must take place without publicity, and separate from the trials of other accused persons. Code sec. 644.

The trial of offenders whose age does not, apparently, exceed sixteen years, for indictable offences, is provided for by Part XVII. of the Code, secs. 800-821. This part does not apply in British Columbia or Prince Edward Island to any offence punishable by imprisonment for two years and upwards. Code sec. 801.

A person whose age does not, in the opinion of the justice before whom he is brought, exceed sixteen years of age, shall upon conviction before two justices of theft, or an offence punishable as theft, be committed to imprisonment in the common gaol or other place of confinement, with or without hard labour, for a term not exceeding three months, or shall pay a fine not exceeding twenty dollars, as the justices may adjudge. Code sec. 802.

The jurisdiction to try, and to sentence a juvenile for any offence within sec. 802, is given irrespective of the value of the thing stolen. Under this Part of the Code, however, which relates wholly to juvenile offenders, he has the right to elect to be tried by a jury, and, in that event, he could not be tried summarily.

The power of determining the age or apparent age of the accused is given exclusively to the justice; and a conviction will not be held bad for the omission to state that the accused is under the age of sixteen years. R. v. Quinn (1900), 36 Can. Law Jour. 644 (N.S.).

If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation. Cave v. Mountain, 1 M. & G. 257. And on a habeas corpus to which a proper commitment in execution is returned, the Court never enters into the question whether the magistrate has drawn the right conclusion from the evidence, when there was evidence. R. v. Munro (1864), 24 U.C.Q.B. 44.

Part XVII. of the Code does not enable two or more justices in Ontario to sentence to imprisonment in a reformatory in that province. Code sec. 803. Nor does Part XVI. prevent the summary conviction of offenders liable under other Parts of the Code. Code sec. 804.

Juvenile Courts.—An Act respecting Juvenile Delinquents, 7 & 8 Edw. VII. ch. 40, was assented to 20th July, 1908. It goes into force in any province, city, town or other part of a province on proclamation in the *Canada Gazette* (sec. 36). It provides for the trial of persons under sixteen years of age by Juvenile Courts specially authorized. Where such a Court exists it has exclusive jurisdiction in delinquency, except where, in the case of children apparently over fourteen years, the Juvenile Court orders that the accused shall be tried by indictment (secs. 4 and 7). Trials are summary. Sec. 5.

Sec. 13.—Punishments.

General Rules as to Punishments.—No person shall be deemed guilty or liable to punishment until duly convicted. Code sec. 1027.

Everyone 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. Code sec. 1051.

Felonies and Misdemeanours.—The distinction between felony and misdemeanour is abolished, and proceedings in respect of all indictable offences, except so far as they are herein varied, shall be conducted in the same manner. Code sec. 14.

Larceny after Previous Conviction.—See the following Code section: Stealing dogs, etc., sec. 370; stealing trees, etc., sec. 374; stealing plants, etc., sec. 375(2), sec. 376(2); stealing fence, etc., sec. 377; stealing things not otherwise provided for, sec. 386(2).

Larceny after Two Previous Convictions.—See the following Code sections: Stealing trees, etc., sec. 374; stealing plants, etc., sec. 375(2), sec. 376(2); stealing fences, etc., sec. 377; stealing things not otherwise provided for, sec. 386(2).

Punishment of Principal in the Second Degree and Accessories.—Principals in the second degree and accessories before the fact are parties to the offence; there is now no distinction. Code sec. 71.

For punishment of accessories after the fact, see murder, sec. 267; indictable offences punishable by imprisonment for life or more than fourteen years, sec. 574; other cases, sec. 575.

Degrees of Punishment.—An offender liable to different degrees or kinds of punishment may be punished as the Court before which he is convicted may decide. Code sec. 1028.

Fine or Penalty.—When a fine or penalty may be imposed, the amount thereof, subject to any specially defined limitations, shall be in the discretion of the Court passing sentence. Code sec. 1029.

Cumulative Punishment.—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. Code sec. 1055.

A prisoner convicted at the one time of two offences and sentenced on each to three months' imprisonment without specification as to the terms being concurrent or otherwise, is not entitled to a discharge on a habeas corpus after three months' imprisonment. There is no presumption that sentences passed at the one time are to be concurrent. Ex parte Bishop, 1 Can. Cr. Cas. 118 (N.B.).

When Offence Punishable under More than One Act or Law. —Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence. Code sec. 15.

When a statute makes that unlawful which was lawful before, and appoints a specific remedy, that remedy may be pursued and no other; and where an offence is not so at common law, but made an offence by Act of Parliament, an indictment will lie where there is a substantive prohibitory clause in such Act of Parliament, though there be afterwards a particular provision and a particular remedy. When a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being an indictable offence. R. v. Mason (1867), 17 U.C.C.P. 534.

In order to be a bar the issue in the second proceeding must be identical with that in the first one, although the facts may vary, and although the charges formulated may not be the same. R. v. King (1897), 1 Q.B. 214; see notes in 2 Can. Cr. Cas. 497.

Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force. Union Colliery Co. v. The Queen, 4 Can. Cr. Cas. 400 (Can.), per Sedgewick, J.

The Criminal Code of 1892 was intended to make complete and exhaustive provision as to the subjects with which it deals, in so far at all events as its provisions relate to procedure. It is explicitly called a Code by the first section of the chapter in which it is embodied and its utility as a Code will be greatly impaired if it cannot be so considered. R. v. Snelgrove (1906), 12 Can. Cr. Cas. 189. See also the Vagliano Case, [1891] 1 A.C., at p. 144.

Where a person has been acquitted by a Court of competent jurisdiction the acquittal is a bar to all further proceedings to punish him for the same matter, although a plea of *autrefois acquit* may not be allowed because of the different nature of the charges. The acquittal on the first charge became *res judicata* as between the Crown and the accused, and it was not open to the Crown to proceed on the second charge in which a conviction could only be had by the second jury

overruling the contrary verdict of the first jury. R. v. Quinn, 10 Can. Cr. Cas. 412, 11 O.L.R. 242.

Sec. 14.—Obsolete Punishments.

Outlawry in Criminal Cases.—Code sec. 1030.

Solitary Confinement and the Pillory.—Code sec. 1031.

Sec. 15.—Civil Effects of Conviction.

Forfeiture of any chattels which have moved to or caused the death of any human being, in respect of such death (Code sec. 1032), and attainder or corruption of blood, or any forfeiture or escheat (Code sec. 1033) have been abolished.

Sec. 16.—Pardon or Remission of Punishment.

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 other person than the Crown. Code sec. 1076.

The Crown may commute the sentence of death passed upon any person convicted of a capital offence to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any gaol or other place of confinement for any period less than two years, with or without hard labour. Code sec. 1077.

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 offence other than that for which the pardon was granted. Code sec. 1076(3).

When an offender has been convicted of an offence not punishable with death, and has endured the punishment adjudged, or has been convicted of an offence punishable with death and the sentence of death has been commuted, and the 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. Code sec. 1078.

When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, 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 in any case in which such justice may discharge

such person, he shall be released from all further or other criminal proceedings for the same cause. Code sec. 1079.

His Majesty's royal prerogative of mercy is not limited by the statutory provisions. Code sec. 1080.

No civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence. Code sec. 13.

This section (formerly section 534 of the Criminal Code, 1892), has been held in Quebec not to be "criminal law" legislation, but legislation dealing with civil rights and therefore *ultra vires* of the Federal Parliament. Paquet v. Lavoie (1898), 6 Can. Cr. Cas. 314, 7 Que. Q.B. 277.

To an action, before the Code, for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate charging defendant with feloniously, etc., wounding the plaintiff with intent to do him grievous bodily harm, thereby charging defendant with felony; that defendant was brought before the magistrate and committed for trial which had not yet taken place; that the subject of both the civil and criminal prosecutions was the same, and that plaintiff's civil right of action was suspended until the criminal charge was disposed of. Held, on demurrer, that the plea was good; and an order was made staying the civil action in the meantime. Taylor v. McCulloch (1885), 8 Ont. R. 309.

The former rule, excepting in the Province of Quebec, was that on grounds of public policy if it appeared on the trial of a civil action that the facts amounted to felony, the Judge was bound to stop the civil proceedings and nonsuit the plaintiff in order that public justice might first be vindicated by a criminal prosecution. Walsh v. Nattress, 19 U.C.C.P. 453; Livingstone v. Massey, 23 U.C.Q.B. 156; Williams v. Robinson, 20 U.C.C.P. 255; Pease v. McAloon, 1 Kerr (N.B.) 111. The civil remedy was held to be suspended until the defendant charged with the felony should be either acquitted or convicted thereof. Brown v. Dalby, 7 U.C.Q.B. 162.

The act of pardoning is one of pure clemency and is not the exercise of a judicial power; it is purely and essentially the exercise of a royal prerogative which is exercised by the Sovereign himself or in his dominions beyond the seas by his representative under a special delegation of power. This delegation, in the case of the Governor-General, is contained in the royal instruction, but if the King saw fit a delegation of this power could be given to any Lieutenant-Governor for matters under the legislative jurisdiction of his province. Todd's Parliamentary Government in British Colonies, page 254.

The prerogative of mercy is simply the exercise of a discretion on the part of the Sovereign to dispense with or to modify the punishments which the criminal or penal law require to be inflicted.

It is exercised by commutation or by a free or conditional pardon. Ex parte Armitage, 5 Can. Cr. Cas. 345.

Letters patent containing permanent instructions for the exercise of the duties and powers of the Governor-General of Canada were issued on the 5th October, 1878. These letters patent specially authorize and empower the Governor-General for the time being, in the name and on behalf of the Sovereign, to grant to any offender convicted of any crime in any Court, or before any Judge, justice or magistrate within the Dominion a pardon should he see occasion, or a respite of the execution of the sentence of any such offender, for such period as he may see fit, and to remit any fines, penalties or forfeitures which may become due or payable to the Crown, provided that the Governor-General should not pardon or reprieve any such offender without first receiving in capital cases the advice of the Privy Council and in other cases the advice of one at least of his ministers. The royal mercy may be extended to a person who is imprisoned for the non-payment of a penalty which belongs to a person other than the Crown. This rule was established by sec. 125 of the statute 32-33 Vict. ch. 29, the provision is reproduced in sec. 1076 of the Code. Ex parte Armitage, 5 Can. Cr. Cas. 345.

The power of commuting and remitting sentences for offences against the laws of the Province of Ontario, or offences over which the legislative authority of the province extends, which by the terms of the Act 51 Vict. ch. 5 (Ont.) is included in the powers which were vested in or exercisable by the Governors or Lieutenant-Governors of the several provinces before Confederation, and which are now by that act vested in and exercisable by the Lieutenant-Governor of this province, does not affect offences against criminal laws which are the subject of Dominion legislation, but refers only to offences within the jurisdiction of the Provincial Legislature, and in that sense the Ontario statute is *intra vires* the provincial legislation. Attorney-General for Canada v. Attorney-General for Ontario, 19 Ont. App. 31, 23 S.C.R. 458. See note 5 Can. Cr. Cas. 354.

Fines imposed under the Montreal City Charter belong to the Crown as represented by the Governor of the Province of Quebec and of the City of Montreal, and the city has no power to remit the same. Semble, the pardoning power is an exercise of the royal prerogative and unless a statute expressly limits such prerogative the same is to be exercised by the Sovereign or his representative (in Canada by the Governor-General) acting under a special delegation of power from the Sovereign, and the remission of a penalty under a provincial statute for default in payment whereof the accused is undergoing imprisonment is an exercise of the pardoning power. R. v. Armitage, 5 Can. Cr. Cas. 345.

In the matter of pardons of convicts in the penitentiaries, gaols, prisons and reformatories, the application for clemency should be prepared in the form of a petition addressed to His Excellency the Governor-General, stating the age and name of the prisoner or convict, the name of the Judge or magistrate who tried or sentenced him, crime committed and date of sentence, term of imprisonment, where incarcerated, and reasons for seeking the clemency of the Crown.

This petition should be forwarded to the Secretary of State at Ottawa or to the Departments of Justice and signed by one or more persons, with any documentary evidence or letter regarding the previous character of the prisoner. The papers are subsequently laid with the advice of the Minister of Justice before His Excellency the Governor-General, whose pleasure is communicated by the Secretary of State to the parties interested and to the warden of the penitentiary or keeper of the gaol, as the case may be.

In case of death sentence the Judge, after sentencing the prisoner, forwards, under sec. 1063 of the Code, a copy of the evidence, and his report to the Secretary of the State. Any application for the commutation of the sentence should be addressed to His Excellency the Governor-General in Council through the Secretary of State, in the form of a petition setting forth reasons for such application. This application is referred to the Minister of Justice and is submitted by him, with his recommendation to the Governor-General in Council, whose pleasure is communicated to the interested parties by the Secretary of State.

BOOK THE SECOND.

OF OFFENCES RELATING TO THE LAW OF NATIONS.

CHAPTER THE FIRST.

OF PIRACY.

SECT. I.—OF PIRACY *JURE GENTIUM*.

IT is necessary to distinguish between piracy *jure gentium* (or as it is sometimes styled, piracy at common law) (*a*) and the forms of piracy created by municipal legislation (*b*). 'Piracy *jure gentium*[1] is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty (*c*). . . . If the mariners of any ship shall violently dispossess the master, and shall afterwards carry away the ship or any of

(*a*) In the 6th edition of this work (Vol. i. p. 260 n), it was said that 'a fallacy seems to run through some of our books in saying that piracy was not felony at common law. This arose from such expressions as that it was a crime of which the common law did not take notice or cognisance, *i.e.* which was not triable by jury, the common-law mode of trial. See 2 Hale, 18, 372. 1 Hale, 355. Lord Coke says it was felony. Co. Litt. 391a. 3 Co. Inst. 112. 13 Co. Rep. 51. In 40 Ass. Pl. 25, p. 245, a case of piracy is mentioned where a Norman captain was attainted of felony and hanged. See this case stated 3 Co. Inst. 21, and 1 Hale, 100.' C. S. G. This opinion was stated by the late Sir R. S. Wright to be inaccurate (see Parl. Pap. 1878, H. L. 178, Report on Piracy Statutes). Piracy is distinguished from felony in 7 & 8 Geo. IV. c. 28, ss. 1, 2, 3.

(*b*) The enactments still unrepealed relating to piracy are: 1536, 28 Hen. VIII. c. 15 (*post*, p. 257); 1670–1, 22 & 23 Car. II. c. 11 (*post*, p. 259); 1698, 11 Will. III. c. 7 (*post*, p. 259); 1717, 4 Geo. I. c. 11, s. 7 (*post*, p. 260); 1720, 8 Geo. I. c. 24 (*post*, p. 260); 1744, 18 Geo. II. c. 30 (*post*, p. 263); 1772, 12 Geo. III. c. 20 (virt. rep. as to England and Ireland by Acts of 1827 and 1828); 1824, 5 Geo. IV. c. 113, s. 9 (*post*, p. 271); 1827, 7 & 8 Geo. IV. c. 28, ss. 1, 2, 3 (E); 1828, 9 Geo. IV. c. 54, ss. 7, 8 (I); 1837, 7 Will. IV. & 1 Vict. c. 88, ss. 2–4; 1842, 5 & 6 Vict. c. 28, s. 16 (I); 1849, 12 & 13 Vict. c. 96 (*post*, p. 269); 1850, 13 & 14 Vict. c. 26 (*post*, p. 264); 1860, 23 & 24 Vict. cc. 88, 122 (*post*, p. 269); 1878, 41 & 42 Vict. c. 73, s. 6 (*post*, p. 268); 1890, 53 & 54 Vict. c. 27, s. 2 (*post*, p. 269).

(*c*) *i.e.* committing on the sea acts of robbery and depredation which if com-

AMERICAN NOTE.

In the United States the law relating to Piracy is contained in Acts of Congress. U. S. Statt. Rev. ss. 5368–5375. Robbery on the high seas is piracy both by the laws of nations and by the Acts of Congress. U. S. *v.* Furlong, 5 Wheat. 164. As to mutiny on board ship, see U. S. *v.* Sharp, 1 Peters, C. C. 122; U. S. *v.* Bladen, ibid. 213; U. S. *v.* Gardiner, 5 Mason, 402; U. S. *v.* Kelly, 4 Wash. C. C. 528. As to running away with a ship, see U. S. *v.* Haskell, 4 Wash. C. C. 402. Robbery on the high seas directed against all mankind is piracy *jure gentium*. U. S. *v.* Smith, 5 Wheat. (U. S.), 153, 161; but under the statutes relating to this offence, persons (Southern States rebels) were held guilty of piracy who planned and carried out attacks on American vessels only. See the case of the Savannah Pirates. U. S. *v.* Baker, 5 Blatchf. (U. S.), 6. U. S. Statt. Rev. s. 5372; and U. S. *v.* Palmer, 3 Wheat. (U. S.) 610; Klintock's case, 5 Wheat. (U. S.), 144, 184; the 'Malek Adhel,' 2 How. (U. S.), 219; the 'Ambrose Light' [1885], 25 Fed. Rep. 408.

the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy' (*d*). It is equally piracy *jure gentium* if the passengers do such acts as would make the mariners pirates (*e*).

An act is not cognisable as piracy *jure gentium* if done as an act of war (*animo belligerendi*), and under the authority of a prince or state: but depredating on the high seas without such authority is piracy, even if the motive is not plunder, if the act was done wilfully and without legal authority or lawful excuse. The American view developed during the Civil War appears to deprive a community in rebellion of the right to commit belligerent acts upon the sea against the state from which it has rebelled, unless the rebellious state has received recognition of belligerent rights from some sovereign power (*f*). The accepted distinction between belligerency and piracy is the recognition of the existence of a regularly organised *de facto* government. Such recognition is regarded as an executive, and not as a judicial question (*g*).

In Republic of Bolivia *v.* Mutual Indemnity Marine Insurance Co. (*h*), Pickford, J., accepted as the popular or business meaning of piracy the definition of the late Mr. Hall (*i*): 'Though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State.' The learned judge continued: 'Several, but not all, of the definitions cited in the note on p. 260 of the same work bear out that idea. There is another passage in Hall, at p. 262, which throws some light upon the matter. Speaking of depredations committed at sea upon the public or private vessels of a state, or descents upon its territory from the sea by persons not acting under the authority of any politically organised community, notwithstanding that the objects of such persons may be professedly political, Hall said that such acts were piratical within the meaning of the term in international law, but he went on to say this:—"Sometimes they are

mitted on land would have amounted to felony. 1 Hawk. c. 37, s. 4. 2 East, P. C. 776. Mason's Case, 4 Bl. Com. 72. Others regard it as the same offence as robbery on land. Archb. Vict. Acts, 72. 2 Hale, 369. 1 Hale, 354. Coke, 3 Inst. 113, calls a pirate a 'robber on the sea.' Piracy is a maritime offence, and cannot be committed on a river, however large, far within the boundaries of a State. Republic of Bolivia *v.* Oriental Indemnity Insurance Co., *infra*.

(*d*) R. *v.* Dawson, 13 St. Tr. 454, approved Att.-Gen. of Hong Kong *v.* Kwok a-Sing, L. R. 5 P.C. 169, 199. Cf. U. S. *v.* Tully, 1 Gall. (U. S.), 247, Story, J.

(*e*) L. R. 5 P.C. 200.

(*f*) See the 'Ambrose Light' [1885], 25 Fed. Rep. 408, where the authorities and juristic opinions are collected and discussed. In that case a brigantine commissioned by rebels as a Colombian vessel of war was seized by a United States warship and brought in for condemnation as prize under the law of nations as piratical. There was not at the time any recognition of belligerency or of an existing state of war in Colombia. Held that the seizure was technically authorised by the law of nations.

(*g*) Ibid. p. 431.

(*h*) [1909] 1 K.B. 785, 791, accepted by the C.A., ibid. p. 796.

(*i*) Int. Law (5th ed.), 259.

wholly political in their objects and are directed solely against a particular state, with careful avoidance of depredation or attack upon the persons or property of the subjects of other states. In such cases, though the acts done are piratical with reference to the state attacked, they are for practical purposes not piratical with reference to other states, because they neither interfere with nor menace the safety of those states, nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction." '

The question involved in the case was whether the seizure of a steamer under the Brazilian flag carrying provisions to a Bolivian garrison on a tributary of the Amazon, was piracy within the meaning of an insurance policy. The seizure was made by rebels in an outlying Bolivian district, who claimed to have organised themselves into the Free Republic of Acre, a government not recognised by any foreign power (*j*).

To constitute piracy *jure gentium*, it is not necessary that there should be any throwing off of the allegiance of the state to which the vessel belongs: but it is sufficient if there is a taking of the ship within the jurisdiction of the admiral from the possession or control of those who are lawfully entitled to it, and a carrying away of the ship or of any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the acts had been done on land (*k*). It is immaterial whether the piratical acts are done by mariners or passengers (*l*), or persons coming from the shore (*m*).

In time of peace, any act of depredation on a ship is *prima facie* an act of piracy, but in time of war between two countries, the presumption is that depredation by the citizens of one country upon a ship of the other is an act of legitimate warfare, and it is immaterial whether the act was done by soldiers or volunteers, and whether it was commanded by the State of which they were citizens, or when done ratified by it. The *animus belligerendi* excludes the *animus furandi* which is an essential element in robbery (*n*).

Piracy *jure gentium* is justiciable in the Courts of every country (*o*). In England until 1536, it was rarely, if ever, tried according to the course of the common law by judge and jury, but was dealt with by the admiral or under his jurisdiction, according to the course of the civil law (*p*). The Offences at Sea Act, 1536 (28 Hen. VIII. c. 15), after reciting 'where traitors, pirates, thieves, robbers, murtherers, and confederatours upon the sea many times escape unpunished because the trial of their offences hath heretofore been ordered judged and determined before the admiral or his lyeutenant or commissary, after the course of the civil laws, . . . enacts

(*j*) As to piratical acts by organised rebels, see Magellan Pirates [1853], 1 Eccl. & Adm. (Spinks), 81; 13 & 14 Vict. c. 26, *post*, p. 264.

(*k*) R. *v.* Nya Abu [1886], 4 Kyshe (Straits Settlements), 169.

(*l*) Att.-Gen. for Hong Kong *v.* Kwok a-Sing, L. R. 5 P.C. 179, 200. U. S. *v.* Tully [1812], 1 Gall. (U. S.) 247, Story, J.

(*m*) U. S. *v.* Ross [1813], 1 Gall. (U. S.), 624, Story, J., seizure of a vessel in Portuguese waters by convicts from the shore.

(*n*) *Re* Tivnan, 5 B. & S. 645. This case was an attempt to obtain extradition for piracy within the jurisdiction of the United States in respect of a seizure by citizens of the Confederate States of a vessel (flying the Federal flag) in the port of Matamoras in Texas.

(*o*) Kwok a-Sing's case, *ubi sup.*

(*p*) See Select Admiralty Pleas, Selden Soc. Publ. Vol. 6.

that 'all treasons, felonies, *robberies*, murders, and confederacies, hereafter to be committed in or upon the sea, or in any other haven, river, creek, or place where the admiral or admirals have, or pretend to have, power, authority, or jurisdiction (*q*), shall be enquired, heard, determined, and judged, in such shires and places in the realm as shall be limited by the King's commission or commissions, to be directed for the same in like form and condition as if any such offence or offences had been done in or upon the land: and such commissions shall be had under the King's Great Seal directed to the admiral or admirals and his or their lieutenant deputy or deputies, and to three or four such other substantial persons as shall be named or appointed by the Lord Chancellor of England, for the time being, from time to time, and as often as need shall require, to hear and determine such offences after the common course of the laws of this land, used for treasons felonies *robberies* murders and confederacies of the same done and committed upon the land within this realm' (*r*).

This statute, though it provides for the trial of piracy according to the course of the common law, and for capital punishment, does not change the nature of the offence (*s*), nor in terms make it felony (*t*). It does not extend to offences made piracy by statute, unless the Act so provides (*u*).

In 1693, the Lords of the Council resolved to try Golding and others (*v*) for piracy, in respect of the depredations by privateers acting under commissions from James II. The King's advocate (Oldish) gave his opinion that they were not pirates, and was called before the Council to support that opinion, which he based on the views—(*a*) That James II., though he had lost his crown, had not lost his right; (*b*) that in the face of commissions *de facto* granted by James II. there could be no piracy. Oldish was removed from office, and the alleged pirates were tried and convicted by his successor, and some, if not all, were executed (*w*).

In 1696, several mariners on board a ship lying near Coruña seized the captain, he not agreeing with them; and having put him on shore, carried away the ship, and afterwards committed several piracies. This force upon the captain, and the carrying away the ship, which was explained by the use of it afterwards, was adjudged piracy (*x*). But in 1722, where the master of a vessel loaded goods on board at Rotterdam

(*q*) As to Admiralty jurisdiction, see *ante*, p. 31.

(*r*) S. 2 deals with indictment, trial and punishment. S. 3 took away benefit of clergy and sanctuary. S. 5 deals with commissions for trial within the Cinque Ports. S. 4 is a proviso legalising under conditions the taking of provisions or ship's stores in case of necessity if paid for in cash or by sufficient bill obligatory.

(*s*) See Dole *v.* New England Mutual Marine Ins. Co. [1864], 2 Clifford (U. S.), 394, 416, Clifford, J.

(*t*) It was accordingly held that a pardon for all felonies did not extend to pirates. 1 Hawk. c. 37, s. 13. 3 Co. Inst. 112. Co. Lit. 391. Moore (K.B.) 746. In 2 East, P. C. 796, it is said that the offence did not extend to corruption of blood, at least where the conviction is before the Admiralty jurisdiction; though the contrary was held by great authority upon attainder before commissioners, under the statute of Hen. VIII.

(*u*) R. & R. 5, note (*a*).

(*v*) R. *v.* Golding, 12 St. Tr. 1269.

(*w*) In R. *v.* Kidd [1701], 14 St. Tr. 147, a trial for piracy, Captain Kidd had a commission to take ships and goods of the French and to destroy pirates. But possession of the commission was held no excuse for a piratical attack on the Mocha fleet in the Indian Ocean, vessels sailing under English, Dutch and Arab colours (*t.c.*, p. 215). For a trial under Scots Law for piracy, see Green's case [1705], 14 St. Tr. 1199. This case was one of the contributory causes to the making of the Treaty of Union with Scotland.

(*x*) R. *v.* May [1696], MS. Tracy, 77; 2 East, P.C. 796.

consigned to Malaga, which he caused to be insured, and after he had run the goods on shore in England the ship was burned, when he protested both the ship and cargo as burned, with intent to defraud the owner and insurers; the judges of the common law, who assisted the judges of the Admiralty, directed an acquittal upon an indictment for piracy and stealing the goods; because being only a breach of trust and no felony, it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined (*y*).

Sect. II.—Piracy by Municipal Law.

Duty to resist Pirates.—By an Act of 1670 (22 & 23 Car. II. c. 11) penalties are imposed on the master of a ship, who, without fighting, yields up to Turkish vessels, or pirates, or sea rovers, goods or merchandise laden on board English ships of 200 tons or upwards, and mounted with sixteen or more guns (sect. 1), or English ships of less tonnage or guns (sect. 3). There is a provision in favour of the master if forced to yield up his ship by the disobedience of the crew, testified by their laying violent hands on him (sect. 7). Mariners or inferior officers in such laden vessels who decline or refuse to fight or defend their ships are to forfeit their wages and goods in the ship, and to suffer imprisonment for not more than six months with hard labour (sect. 6). The Act also contains provisions for compensating officers or seamen wounded in defence of such ship (sect. 9), and for prize-money if the attacking vessel is taken (sect. 10) (*z*).

An Act of 1698 (11 Will. III. c. 7) enacts (sect. 7) (*a*) that 'if any of His Majesty's natural-born subjects, or denizens of this kingdom shall commit any piracy or robbery or any act of hostility against other His Majesty's subjects upon the sea under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever such offender and offenders shall be deemed adjudged and taken to be pirates, felons, and robbers; and they and every one of them being duly convicted thereof, according to that Act, or the Offences at Sea Act, 1536, shall suffer such pains . . . as pirates, &c., upon the seas ought to suffer' (*b*). This Act seems to have been consequent on the case of R. *v.* Vaughan (*c*).

By sect. 8 (*d*), 'If any commander or master of any ship, or any seaman or mariner, shall, in any place where the admiral hath jurisdiction, betray his trust, and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandises; or yield them up voluntarily to any pirate; or shall bring any seducing messages from any pirate, enemy, or rebel; or consult, combine, or confederate with, or attempt or endeavour to corrupt any commander, master, officer, or mariner, to yield

(*y*) Mason's case [1722], 8 Mod. 74; 2 East, P.C. 796.

(*z*) This Act was aimed at the sea-rovers issuing from the ports of Algiers and Morocco. Their depredations were checked by the British occupation of Gibraltar. This Act is unrepealed.

(*a*) S. 8 in the common printed editions.

(*b*) For present punishment see *post*, p. 266.

(*c*) [1696] 13 St. Tr. 485, a trial for treason on the high seas (see 28 Hen. VIII. c. 15, *ante*, p. 257), under a commission from the King of France, set out *l.c.*, p. 536, which excused V. from piracy but not from treason (*l.c.*, p. 503). Under the Act of 1698, two witnesses are not needed as in most treasons.

(*d*) S. 9 in the common printed editions.

up or run away with any ship, goods, or merchandises, or turn pirate, or go over to pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship, and goods committed to his trust (*e*), or that (*sic*) shall confine his master, or make or endeavour to make a revolt in the ship, shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and being convicted thereof according to the direction of this Act, shall suffer . . . as pirates, felons, and robbers upon the seas ought to suffer' (*f*).

In an indictment for confining a captain of a ship, 'constructive' confinement will satisfy the requirements of the statute, and this will be supported by evidence that, although no force was used, the captain was restrained by the presence and gestures of the prisoners, and deprived of his lawful command, and compelled to remain in certain parts of the vessel (*g*).

Making or endeavouring to make a revolt, with a view to procure a redress of what the prisoners thought grievances, and without any intent to run away with the ship, or to commit any act of piracy, was held to be an offence within sect. 8 (*h*).

Where one count charged the prisoners with making, and another with endeavouring to make a revolt in a ship, it appeared that great complaints had been made by the sailors in the course of the voyage about the provisions and the great heat of the cabin where the men had to sleep, which on account of the fire for cooking, &c., being close to it, was unsupportable in the warm latitudes. The prisoner M. refused to go on duty. The captain in consequence ordered the crew to put M. in irons, but instead of obeying him they walked away forward. The prisoner S. had the same morning refused to go to his duty, and he and one G. went towards the captain, who was endeavouring, with the assistance of his officers, to put M. in irons. Violent language was used by both, and threats uttered against the captain, and G. rushed to a boat where whale spears were kept, with the evident intention of seizing one of them, and releasing M. by force. The captain shot G. in the act of laying hold of a spear. Abinger, C.B., said: 'By revolt I understand something like rebellion or resistance to lawful authority, and if the crew of a ship combine together to resist the captain, especially if the object be to deprive him of his authority altogether, it will in my opinion amount to making a revolt. I think upon the construction of this Act of Parliament that the resistance of one person to the authority of the captain would not be a revolt. Revolt means something more than the disobedience of one man. I think it would be straining the evidence rather too far to say that the conduct of these men amounted to a revolt; and the charge of making a revolt, if my construction of the Act be correct, will fall to the ground. The question of whether the ship was properly fitted up and found is not material; for it has been decided that, although there be real grievances to redress, yet it is not an answer to a charge of attempting to

(*e*) This last provision is similar to one in 22 & 23 Car. II., c. 11, s. 9, repealed by 9 Geo. IV. c. 31, s. 1, so far as relates to any mariner laying violent hands on his commander.

(*f*) For present punishment see *post*, p. 266.

(*g*) R. *v.* Jones, 11 Cox, 393.

(*h*) R. *v.* Hastings [1825], 1 Mood. 82.

make a revolt. If G. and the prisoners were united in some common design to prevent the captain from putting M. in irons, which on the evidence he had a sufficient justification in doing, and calling upon others of the crew to assist them in resisting the captain's authority, then I think that it was an attempt to excite a revolt' (*i*).

On an indictment upon 11 Will. III. c. 7, s. 8, it appeared that the prisoners were two of the mates and the others mariners of a merchant ship. The captain ordered a sailor to go and grease the masts, which the captain thought necessary to be done. The sailor peremptorily refused, and the captain on that ordered all hands up: he desired the mates to have the masts greased, which the men refused to do, and said that it was the duty of the boys, and that whilst there were boys on board they would not. The captain positively insisted, and the men as positively refused. He then ordered the beef for the men's dinners to be taken below, on which there was a peremptory refusal to let him have it. The captain went down and armed himself with a cutlass, came again on deck, and speaking to the steward said, 'Take that beef below, and the first man who interferes, I will cut him down.' The steward obeyed; the beef was taken down and the captain put away his cutlass, and, after staying on deck some time, went down, and believing he had done sufficient to assert his authority, he sent the beef back, and allowed the crew to have their dinners. After this the steward requested the captain to come on deck, as the men wanted to speak to him. He went on deck, was made prisoner, and confined in his cabin, the vessel put about, and brought to Plymouth by the mate and crew, and there the crew made a complaint against the captain. Williams, J., told the jury that in considering the meaning of the terms used in the statute he must tell them that confederating together and making a revolt constituted the offence charged, unless they were satisfied that there was some justifiable cause. The great question for their consideration was, whether or not there was any justification for this unquestionable confinement of the captain. Did, therefore, his conduct afford any justification for that step? He was bound to tell them that, according to the authorities, a seaman was not justified in making a revolt in a ship, or in imprisoning his captain, by reason of that captain having been unjust or unreasonable; it was not to be allowed that seamen should take the law into their own hands, because the captain had issued an unjust order, or had conducted himself in a harassing or embarrassing manner. If the rule of law was that whenever the seamen considered the captain's conduct unreasonable and rash, they could take charge of the ship, there would be an end to all maritime discipline. It was necessary, for the due maintenance of discipline, that mutiny and revolt, if not justifiable, should be punished as a crime in the merchant service as well as in the royal navy. In his opinion, in point of law, it was justifiable in one view only, namely, if the conduct of the captain had been such as to afford reasonable ground for concluding that, unless the men had imprisoned him, the crew, or some one or more of them, would have been in danger of their lives, or of suffering some grievous bodily harm from his conduct. If they thought that was made out, and

(*i*) R. *v.* M'Gregor, 1 C. & K. 429.

that the conduct of the captain was such that the lives of the crew were in danger unless he were imprisoned, then there was a justification. But if they should not come to the conclusion that there was reasonable ground for this belief, then, in point of law, they ought to find the prisoners guilty (*j*).

On an indictment under the same section, for making a revolt in a British merchant ship, it appeared that the prisoners formed part of the crew of a steamer trading between London and Holland; their register tickets were deposited with the captain, but no agreement in writing had been entered into with them previously to their sailing on the voyage during which the revolt was made, and the recorder held that the prisoners were not mariners, or seamen; because 7 & 8 Vict. c. 112, s. 2 (*k*), made any contract other than the agreement thereby required illegal, and therefore the relation of commander and mariner did not exist (*l*). Offences of the kind dealt with in the two cases last cited can now be treated as offences against discipline, under sect. 225 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

The Piracy Act, 1717 (4 Geo. I. c. 11), declares (sect. 7) 'that all persons who have committed or shall commit offences within the Act of 1698, may be tried and judged under the Offences at Sea Act, 1536,' and deprived them of the benefit of clergy (*m*).

The Piracy Act, 1721 (8 Geo. I. c. 24), enacts (sect. 1) that 'if any commander or master of any ship or vessel, or any other person or persons, shall . . . anywise trade with any pirate by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas, with any ammunition, provision, or stores of any kind; or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply, or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate, felon, or robber, on the seas, knowing him to be guilty of any such piracy, felony, or robbery, every such offender and offenders shall be deemed and adjudged guilty of piracy, felony, and robbery (*n*) . . . and he and they shall and may be inquired of, tried, heard, and adjudged of, and for all or any the matters aforesaid,' according to the Offences at Sea Act, 1536, and the Act of 1698, 'and he and they being convicted of all or any the matters aforesaid, shall suffer such pains . . . as pirates, felons, and robbers upon the sea ought to suffer.' The same section further enacts that 'in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek

(*j*) R. *v.* Rose, 2 Cox, 329. As reported, this direction is open to the objection that it did not inform the jury that the captain might lawfully use any force that was reasonably necessary to retain the command of the vessel and stop the revolt, and that the crew would not be justified in imprisoning him for using such force for that purpose; but, no doubt, the learned judge did so direct the jury.

(*k*) Repealed in 1854 (17 & 18 Vict. c. 120). Agreements with the crews of British merchant ships are now regulated by ss. 113–125 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and by the Colonial Navigation Acts of Australia, New Zealand, Canada, &c.

(*l*) R. *v.* Smith, 3 Cox, 443.

(*m*) As to acts done by slave traders which are punishable as piracy, see 5 Geo. IV. c. 113, s. 9, *post*, p. 271.

(*n*) As to present punishments, see *post*, p. 266.

whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandises belonging to such ship or vessel; the person or persons guilty thereof, shall in all respects be deemed and punished as pirates aforesaid' (*nn*).

The Act of 1721 extends to all the King's dominions in Asia, Africa, and America (sect. 10) (*o*).

The Piracy Act, 1744 (18 Geo. II. c. 30), recites that doubts had arisen whether subjects entering into the service of the King's enemies on board privateers and other ships, having commissions from France and Spain, and having by such adherence been guilty of high treason, could be deemed guilty of felony within the intent of the Act of 1698, and be triable by the Court of Admiralty by virtue of the said Act; and then enacts (sect. 1) that 'all persons, being natural-born subjects or denizens of His Majesty, who during the present or any future wars, shall commit any hostilities upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, against His Majesty's subjects, by virtue or under colour of any commission from any of His Majesty's enemies, or have been or shall be *any other ways adherent* or giving aid or comfort to His Majesty's enemies upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be tried as pirates, felons, and robbers in the said Court of Admiralty, on ship-board, or upon the land, in the same manner as persons guilty of piracy, felony, and robbery, are by the said Act (of 1698) (*p*) directed to be tried; and such persons being upon such trial convicted thereof, shall suffer such pains' (*q*) . . . 'as any other pirates, felons, and robbers ought, by virtue of the said recited Act (of 1698), or any other Act, to suffer' (*r*).

This enactment does not in terms say that the offenders shall be deemed pirates, &c., as in the Act of 1698 (*ante*, p. 259).

On an indictment framed upon this enactment the question was raised whether *adhering to the King's enemies* in hostilely cruising in their ships could be tried *as piracy* under the usual commission granted under the Act of 1536 (*ante*, p. 257). The question was reserved for consideration of the judges; and it was agreed by eight judges who were present (*s*), that the prisoner had been well tried under the commission:

(*nn*) As to present punishments, see *post*, p. 266.

(*o*) By s. 2 every vessel fitted out to trade, &c., with pirates, and also the goods shall be forfeited, half to the Crown and half to the informer. In the second edition, 32 Geo. III. c. 25, s. 12, was here inserted, but as that Act was only to continue in force during the then war with France, it seems to have expired. See 2 East, P. C. 801 n. (*a*), and Crabb's Index to the Statutes. C. S. G. 22 Geo. III. c. 25, which prohibited the ransoming any ship belonging to any subject of His Majesty, of goods on board the same, which should be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against His Majesty's subjects, was repealed in 1864 (27 & 28 Vict. c. 23, s. 1).

(*p*) *Supra*, p. 259.

(*q*) For present punishments, see *post*, p. 266.

(*r*) S. 2 contains a proviso that persons tried and convicted or acquitted under the Act shall not be liable to be indicted again in Great Britain or elsewhere for the same fact or high treason. By s. 3 the Act is not to prevent offenders not tried under its provisions from being tried within the realm for high treason under the Offences at Sea Act, 1536, *ante*, p. 257.

(*s*) Loughborough, C.B., Skynner, J. Gould, J., Willes, J., Ashhurst, J., Eyre, B., Perryn, B., and Heath, J., who met Nov. 11, 1782.

for that taking the Acts of 1698 and 1744 together, and the doubt raised in the latter, and also its enactment that in the instances therein mentioned, and also in case of any other adhering to the King's enemies, the parties might be tried as pirates by the Court of Admiralty according to that statute, it was substantially declaring that they should be *deemed pirates;* and that it was a just construction in their favour to allow them to be tried *as such* by a jury (*t*).

By the Piracy Act, 1850 (13 & 14 Vict. c. 26), s. 2, 'Whenever any of His Majesty's ships or vessels of war, or hired armed vessels or their boats, or any of the officers or crews thereof shall attach or be engaged with any persons alleged to be pirates, afloat or ashore, it shall be lawful for the High Court of Admiralty in England, and for all Courts of Admiralty in any dominions of His Majesty beyond the seas . . . to take cognisance and to determine whether the person, or any of them so attached or engaged were pirates, and to adjudge what was the total number of pirates so engaged or attached, specifying the number of pirates captured and what were the vessels or boats engaged' (*u*).

Sect. III.—Accessories and Punishment.

Accessories to Piracy.

Accessories.—Until 1700, accessories to piracy were triable only by the civil law if their offence was committed on the sea, and one who within the body of a county, knowing, received and abetted a pirate was not triable by the common law, the original offence being solely cognisable by another jurisdiction (*v*). This rule flowed from the theory that piracy not being a common-law felony, the common-law rule as to accessories did not apply, and from the common-law rules as to jurisdiction (*w*). This anomaly has been removed by legislation.

By sect. 9 (*x*) of the Act of 1698 (11 Will. III. c. 7), every person and persons whatsoever, who shall (after September 29, 1700) either on the land or upon the seas, knowingly or wittingly set forth any pirate; or aid and assist, or maintain, procure, command, counsel, or advise, any person or persons whatsoever, to do or commit any piracies or robberies upon the seas; and such person and persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons whatsoever, so as

(*t*) Evans's case, MS. Gould, J., 2 East, P. C. 798, 799. 18 Geo. II. c. 30, s. 3, provides that the Act shall not prevent any offender who shall not be tried according thereto from being tried for high treason within this realm under 28 Hen. VIII. c. 15.

(*u*) See the Magellan Pirates [1853], 1 Eccl. & Adm. (Spinks) 81. Ss. 3, 5 deal with condemnation of vessels, &c., seized, and returns to the Admiralty of adjudications with a view of assigning fitting rewards for capture.

(*v*) Admiralty case, 13 Co. Rep. 53. And a little before this case the law appears to have been so considered in the case of one Scadding, who was committed by the Court of Admiralty for aiding a pirate to escape out of prison; and, on a return to a *habeas corpus*, the prisoner was remanded, though it appeared that the fact was committed by him within the body of a county. The Court of King's Bench holding, that because Scadding's offence depended on the piracy committed by the principal, of which the temporal judges had no cognisance, and was, as it were, an accessorial offence to the first piracy which was determinable by the admiral, it was sufficient ground for remanding him. Yelv. 134. 2 East, P. C. 810.

(*w*) See Mr. R. S. Wright's Report on Piracy Acts, Parl. Pap. [1878] H. L. No. 178, p. 18.

(*x*) S. 8 in the common printed editions.

aforesaid setting forth any pirate, or aiding, assisting, maintaining, procuring, commanding, counselling, or advising, the same either on the land or upon the sea, shall be and are hereby declared, and shall be deemed and adjudged to be accessory to such piracy and robbery, done and committed. Sect. 10 (*y*) enacts, 'and further, that after any piracy or robbery is or shall be committed by any pirate or robber whatsoever, every person and persons, who, knowing that such pirate or robber has done or committed such piracy and robbery, shall, *on the land* or upon the sea, receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken; shall be, and are hereby likewise declared, deemed, and adjudged to be accessory to such piracy and robbery (*z*): and . . . that all such accessories to such piracies and robberies shall be inquired of, tried, heard, determined, and adjudged, after the common course of the laws of this land, according to the Offences at Sea Act, 1536, as the principals of such piracies and robberies may and ought to be, and no otherwise: and being thereupon attainted, shall suffer such pains . . . and in like manner, as such principals ought to suffer, according to the Offences at Sea Act, 1536, which is thereby declared to be and shall continue in full force . . .' (*a*).

The Piracy Act, 1721 (8 Geo. I. c. 24), after reciting that 'whereas there are some defects in the laws for bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy or robbery is not or cannot be apprehended and brought to justice,' enacts (sect. 3) that 'all persons whatsoever, who by the Act of 1698 are declared to be accessory or accessories to any piracy or robbery therein mentioned, are hereby declared to be principal pirates, felons, and robbers, and shall and may be inquired of, heard, determined, and adjudged, in the same manner as persons guilty of piracy and robbery may and ought to be inquired of, tried, heard, determined, and adjudged according to that statute; and being thereupon attainted and convicted, shall suffer such pains . . . and in like (*b*) manner as pirates and robbers ought by the said Act to suffer.'

Punishment.

The Offences at Sea Act, 1799 (39 Geo. III. c. 37), after reciting the Act of 1536, enacts (sect. 1) that 'all and every offence and offences committed (after May 10, 1799) upon the high seas out of the body of any county of this realm, shall be and they are hereby declared to be offences of the same nature respectively, and to be liable to the same punishments as if they had been committed upon the shore, and shall be inquired of,' &c., 'in the same manner as treasons,' &c., 'under the Offences at Sea Act, 1536' (*bb*).

(*y*) S. 9 in the common printed editions.

(*z*) As to the present punishment of accessories, see the Piracy Act, 1837, s. 4, *post*, p. 266, and the Accessories and Abettors Act, 1861, *ante*, p. 130.

(*a*) S. 7 of the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), *ante*, p. 132, appears to cover the same ground as this enactment, except, perhaps, as to piracy *jure gentium*.

(*b*) As to present punishments, see *post*, p. 266.

(*bb*) *Ante*, p. 257.

Under the Acts of 1536 (*c*), 1698 (*d*), 1717 (*e*), 1721 (*f*), and 1744 (*g*), piracy was punishable by death, and forfeiture of lands, goods, and chattels. Offenders within the Acts of 1536 and 1721 were deprived of benefit of clergy (*h*). In 1820 benefit of clergy was allowed to persons tried under the Act of 1536 for offences at sea in all cases in which benefit of clergy would have been allowed as to the offences if committed on land (*i*). By the Piracy Act, 1837 (7 Will. IV. & 1 Vict. c. 88), s. 1 (*j*), the provisions of the above stated Acts as to the punishment of the crime of piracy or of any offence in any of the said Acts declared to be piracy, or of accessories thereto respectively, were repealed, and the punishment of such offences (if tried in England) is now regulated by the following sections of the Act of 1837, as modified by the Penal Servitude Acts of 1857 and 1891 (*k*).

. . . . . .

Sect. 2 enacts, 'Whosoever, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon' (*l*).

By sect. 3, 'Whosoever shall be convicted of any offence which by any of the Acts hereinbefore referred to (*m*) amounts to the crime of piracy, and is thereby made punishable by death, shall be liable . . . to be transported (*n*) beyond the seas for the term of the natural life of such offender. . . .(*o*)'

By Sect. 4, 'In the case of every felony punishable under this Act every principal in the second degree and every accessory before the fact shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall, on conviction, be liable to be imprisoned for any term not exceeding two years' (*p*).

(*c*) 28 Hen. VIII. c. 15, s. 2, *ante*, p. 257.

(*d*) 11 Will. III. c. 7, ss. 7, 8, 9, 10, 11.

(*e*) 4 Geo. I. c. 11, s. 1, *ante*, p. 262.

(*f*) 8 Geo. I. c. 24, s. 1, *ante*, p. 262.

(*g*) 18 Geo. II. c. 30, s. 1, *ante*, p. 263.

(*h*) 28 Hen. VIII. c. 15, s. 3; 8 Geo. I. c. 24, s. 4 (rep. 1837).

(*i*) 60 Geo. III. & 1 Geo. IV. c. 90, s. 1.

(*j*) Ss. 1, 4 of the Act of 1837 were repealed as spent in 1874 (37 & 38 Vict. c. 35). See Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 11, *ante*, p. 5.

(*k*) *Ante*, pp. 209, 210.

(*l*) This sentence may be recorded (4 Geo. IV. c. 48, s. 1, *ante*, p. 266). Where the indictment charges a stabbing, cutting, or wounding, the jury may acquit of the felony, and convict of the stabbing, cutting, or wounding (14 & 15 Vict. c. 19, s. 5).

(*m*) *i.e.*, 28 Hen. VIII. c. 15; 11 Will. III. c. 7; 4 Geo. I. c. 11; 8 Geo. I. c. 24; 18 Geo. II. c. 30.

(*n*) Penal servitude substituted by 20 & 21 Vict. c. 3, s. 2, *ante*, p. 211.

(*o*) Or for any term not less than three years, or to be imprisoned with or without hard labour for not more than two years (54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212).

(*p*) This statute having repealed the punishment of piracy 'at common law,' which was before punishable by 28 Hen. VIII. c. 15, s. 3, with death without benefit of clergy, a difficulty arises as to what is now the punishment for that offence. The Offences at Sea Act, 1799 (39 Geo. III. c. 37), s. 1, *ante*, p. 265, by making all offences committed on sea of the *same nature* as if they were committed on shore, seems to have made piracy *jure gentium* a felony, which it was not at common law, or by 28 Hen. VIII. c. 15. By 60 Geo. III. & 1 Geo. IV. c. 90, any person found guilty of any capital crime or offence committed upon the sea, which, if committed upon the land would be clergyable, was entitled to the benefit of clergy in like manner as if he

By sect. 16 of the Capital Punishment (Ireland) Act, 1842 (5 & 6 Vict. c. 28), persons convicted of any offence which amounts to the crime of piracy by any Act in force in Ireland are liable to penal servitude for life.

SECT. IV.—JURISDICTION AND PROCEDURE.

Piracy has been put into the same position as treason and felony with respect to pleas of not guilty, refusal to plead (*q*), and peremptory challenge of jurors in excess of the number which the law allows (*r*).

Of the Courts by which the Offence of Piracy may be tried :

(*a*) *Trial in England.*

The offence of piracy was formerly cognisable only by the Admiralty Courts, which proceeded without a jury, after the course of the civil law and with the rules of that law as to torture and proof. The inconveniences found to attend this procedure led to the passing of the Offences at Sea Act, 1536 (28 Hen. VIII. c. 15) (*ante*, p. 257). That statute enacted, that this offence and certain other offences committed within the jurisdiction of the admiral should be tried under the King's Commission, by commissioners nominated by the Lord Chancellor, the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury as at common law, and that the course of proceeding should be according to the law of the land. Amongst the commissioners there were always some of the common-law judges (*s*). But the Act merely altered the mode of trial in the Admiralty Court; and its jurisdiction continued to rest on the same foundations as it did before that Act. It is regulated by the civil law, *et per consuetudines marinas* grounded on the law of nations, which may possibly give to that Court a jurisdiction that our common law has not (*t*).

By the Offences at Sea Act, 1844 (7 & 8 Vict. c. 2), s. 1, justices of Assize, Oyer and Terminer, and Gaol Delivery are given all the powers, which by any Act are given to the commissioners named in any commission of Oyer and Terminer, for the trying of offences committed on the high seas or in other places within the jurisdiction of the Admiralty of England (*u*). This Act has rendered it unnecessary to hold criminal

had committed such offence upon land. By 7 & 8 Geo. IV. c. 28, s. 6, clergy was abolished, and by s. 7 no person convicted of *felony* was to suffer death unless for some felony excluded from clergy, on or before the first day of that session of Parliament; and by s. 12, 'all offences prosecuted in the High Court of Admiralty shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon land.' See also the Criminal Law Consolidation Acts of 1861. By 4 & 5 Will. IV. c. 36, piracy *may* be tried at the Central Criminal Court. 'On the whole, it seems that each act of piracy *jure gentium* (or at common law) is to be treated as a felony of the same kind, and liable to the same punishment, as if the same act had been done upon land, and that the offender is triable either under a commission founded on 28 Hen. VIII. c. 15, or at the Central Criminal Court, or at the assizes.' C. S. G.

(*q*) 7 & 8 Geo. IV. c. 28, ss. 1, 2 (E); 9 Geo. IV. c. 54, ss. 7, 8 (I).

(*r*) 7 & 8 Geo. IV. c. 28, s. 3 (E).

(*s*) 28 Hen. VIII. c. 15, s. 2. Generally *two*. 4 Bl. Com. 269.

(*t*) R. *v.* Depardo, 1 Taunt. 29, Sir James Mansfield, C.J.

(*u*) See R. *v.* Dudley, 14 Q.B.D. 273, 560.

sessions of the Court of Admiralty, but does not affect the jurisdiction of the Central Criminal Court (*v*), nor the power of the Crown to issue special commissions under the Act of 1536.

It is expressly provided by sect. 6 of the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), which applies to the whole of the King's dominions (see preamble), that that Act shall not prejudice nor affect the trial in manner heretofore (August 16, 1878) in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto: and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the admiral, such offence may be tried in pursuance of this Act or in pursuance of any other Act of Parliament, law, or custom relating thereto.

(*b*) *Trial in British Possessions Abroad.*

As a general rule it is not within the province of a colonial legislature to deal directly with the offence of *piracy jure gentium*, or directly to assume jurisdiction over piratical acts done outside the territorial waters of the colony. During the nineteenth century trials for piracy in England and Ireland were very rare, but they were somewhat more frequent in British possessions adjacent to regions where the slave trade was carried on, or to Asiatic communities of piratical propensities. The extent to which the English Acts already referred to apply to British possessions varies according to the history and legislation of the particular possession, *i.e.*, with the extent to which the English law against piracy is the common law of the possession, or has been incorporated by its legislation. It would seem that the legislature of a British possession has no authority to alter the definition of piracy *jure gentium* (*w*).

By the Act of 1698 (11 Will. III. c. 7), after reciting the difficulties found in bringing to justice pirates in the East and West Indies, and the growth of piracy in these parts it is enacted (sect. 1), that all piracies, felonies, and robberies, committed on the high seas or within the jurisdiction of the admiral, might be tried and punished in any place at sea or upon the land in any of the King's islands, plantations, colonies, forts, or factories, to be appointed by the King's commission in the manner therein directed and *according to the civil law and the methods and rules of the Admiralty* (*x*).

By the Offences at Sea Act, 1806 (46 Geo. III. c. 54), it is provided that piracy, &c., within the jurisdiction of the admiral should be tried *according to the common law of this realm used for offences committed upon the land* within the realm, and not otherwise, in any British possession by the King's commission under the Great Seal of Great Britain.

By the Australian Courts Act, 1828 (9 Geo. IV. c. 83), the Supreme Courts of New South Wales and Tasmania are given jurisdiction (*inter alia*) over piracies (s. 4), which are to be dealt with as if the offence had been committed and tried in England.

(*v*) 4 & 5 Will. IV. c. 36, s. 22.

(*w*) See note of Sir S. Griffith to draft Queensland Criminal Code, p. x.

(*x*) Ss. 1–6 were repealed in 1867 (S. L. R.). For a trial under them, see R. *v.* Quelch [1704], 14 St. Tr. 1067, at Boston, Mass. And see R. *v.* Bonnet [1718], 15 St. Tr. 1231, for a trial at Vice-Admiralty Sessions at Charlestown, North Carolina.

By the Admiralty Offences Colonial Act, 1849 (12 & 13 Vict. c. 96), 'If any person within any colony (*y*) shall be charged with the commission of any . . . piracy, felony, robbery . . . or other offence, of what nature or kind soever committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in, &c., shall be brought for trial to any colony, then, and in every case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorised, empowered, and required to institute and carry on all such proceedings for bringing the person so charged for trial as aforesaid, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid *as by the law of such colony* would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed and such person had been charged with having committed the same upon any waters situate within the limits of any such colony and within the limits of the local jurisdiction of the courts of criminal justice of that colony' (*z*).

The definition of colony in sect. 5 of this Act includes all British possessions except British India and the British Islands: but was extended in 1860 (23 & 24 Vict. c. 88, s. 1) so as to include British India, subject to a right in favour of the accused in certain cases to be tried by the High Courts of Bengal, Bombay, or Madras (sect. 2).

By sect. 2 of the Act of 1849 provision was made for the trial in the colonies of offences involving homicide, where the death was on land from an injury inflicted at sea, or at sea from an injury inflicted on land. And by the Admiralty Offences Colonial Act, 1860 (23 & 24 Vict. c. 122), Colonial legislatures were empowered to include in their own legislation provisions similar to those last above stated, which were derived from 9 Geo. IV. c. 31, s. 8, and are now as to England and Ireland included in sect. 68 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100).

The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), does not give any jurisdiction to Colonial Admiralty Courts to try any person for an offence which, by the law of England, is punishable on indictment, and in substance deals only with civil jurisdiction of these Courts (sect. 2, subs. 3 (*c*)).

In a case tried at Penang in 1840 (*a*), the accused was tried with others on the Admiralty side of the Court with piracy, *i.e.* forcible capture on the high seas of a boat, the captain and crew whereof were put in bodily fear and in danger of their lives. The pleas raised were (1) that the accused was not a British subject nor a person amenable to the law of England respecting piracy, (2) that the acts alleged to be piratical, were acts of war (*b*).

(*y*) *i.e.* all 'British possessions' outside the 'British Islands' (see s. 5 and 23 & 24 Vict. c. 88).

(*z*) For instance of a trial under this Act, see R. *v.* Nya Abu [1886], 4 Kyshe (Straits Settlements) Reports, 169.

(*a*) R. *v.* Tunkoo Mahomed Saad, 2 Kyshe (Straits Settlements) Rep. 18.

(*b*) See Swetenham's Malaya as to the history of Siam and Kedah.

CANADIAN NOTES.

OF PIRACY.

By Law of Nations.—Code sec. 137.
Piratical Acts.—Code sec. 138.
Violence with Piratical Acts.—Code sec. 139.
Jurisdiction and Procedure.—Code sec. 591.
Warrant of Apprehension.—Code sec. 656.

A charge against a seaman on a British ship not a British subject, for inciting a revolt upon the ship while on the high seas, may not if taken only under Code sec. 138 be made without consent of the Governor-General, under sec. 591, obtained prior to the laying of the information. Mr. Justice Ritchie held further that if the proceedings for the offence are taken under the Merchant Shipping Act, 1894 (Imp.), sec. 686, the consent of the Governor-General is not required, and Code sec. 591 would not apply. But a different view was taken by Mr. Justice Weatherbe who held that sec. 591 applies to the procedure in Canadian Courts in respect of offences committed within the Admiralty Jurisdiction whether the proceedings are taken under the Criminal Code or the Imperial Merchant Shipping Act or the Admiralty Offence Act, 1849. R. v. Heckman, 5 Can. Cr. Cas. 242.

A sea harbour enclosed within headlands such as the harbour of Halifax is within the body of the adjacent county and criminal offences committed in such harbour even upon foreign ships are not within the Admiralty Jurisdiction except in the special cases provided by statute.

A charge of theft by foreigners upon and from any foreign ship while lying in a harbour forming part of the body of the county, may be prosecuted within the county without obtaining the leave of the Governor-General. R. v. Schwab, 12 Can. Cr. Cas. 540.

The Great Lakes at the boundary of the Province of Ontario are within the jurisdiction of the Admiralty. R. v. Sharpe, 50 O.P.R. 135.

CHAPTER THE SECOND.

OF DEALING IN SLAVES, ETC.

SECT I.—THE SLAVE TRADE ACTS.

A LIST of enactments still in force relating to the slave trade is given in note (*a*) below. Most of these Acts apply to the whole of the King's dominions.

The Slave Trade Act, 1824 (5 Geo. IV. c. 113), also described as the Slave Trade Consolidation Act (*b*), repealed all the prior Acts and enactments relating to the slave trade, except so far as they had repealed prior Acts or enactments, or had been acted upon, or were expressly confirmed by the Act. It enacts (sect. 2), that it shall not be lawful, except in such special cases as are thereinafter mentioned (*c*), to deal in slaves, or to remove, import, ship, trans-ship, &c., any persons as slaves, or to fit out, employ, &c., any vessels in order to accomplish such unlawful objects, or to lend money, &c., or to become guarantee, &c., for agents in relation to such objects, or in any other manner to engage directly or indirectly, therein, as a partner, agent, or otherwise; or to ship, &c., any money, goods, or effects, to be employed in accomplishing any of these unlawful objects; or to command, or embark on board, or contract for commanding or embarking on board, any vessel, &c., in any capacity, knowing that such vessel, &c., is employed, or intended to be employed, in such unlawful objects; or to insure or contract for insuring, any slaves or other property, employed, or intended to be employed, in accomplishing any of these unlawful objects. Pecuniary penalties and forfeitures are (by sects. 3–8) imposed upon persons offending, by engaging in such unlawful objects (*d*).

By sect. 9, 'If any subject or subjects of His Majesty, or any person

(*a*) 5 Geo. IV. c. 113, ss. 2–11, 12, 39, 40, and 47; 3 & 4 Will. IV. c. 73, s. 12; 7 Will. IV. & 1 Vict. c. 91, s. 1; 6 & 7 Vict. c. 98, ss. 1, 4; 27 & 28 Vict. c. 24, ss. 12–18; 36 & 37 Vict. c. 59, ss. 4, 5 (East Africa); 36 & 37 Vict. c. 88; 39 & 40 Vict. c. 46 (India); 42 & 43 Vict. c. 38, s. 3 (East Africa); 53 & 54 Vict. c. 27, ss. 6, 13, 16, 18. As to Pacific Islanders, see *post*, p. 283. As to trial of slave-trade offences in Consular Courts, see *post*, p. 282.

(*b*) Repealed by the Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 30, except ss. 2–11, s. 12 down to 'taken to be in full force,' ss. 39, 40, and 47.

(*c*) Certain cases were excepted from the Act of 1824. These exceptions were repealed in 1833 by 3 & 4 Will. IV. c. 73, which, after manumitting, as from Aug. 1, 1834, all slaves in the British Colonies, plantations and possessions abroad, enacts, 'The children thereafter to be born to any such person and the offspring of such children shall in like manner be free from their birth; and slavery shall be and is hereby utterly and for ever abolished and declared unlawful throughout the British colonies, plantations and possessions abroad' (s. 12). The rest of this Act was repealed in 1890 (S. L. R.). As to the effect of the repeal of the exceptions from the Act of 1824, see R. *v.* Jennings, *post*, p. 273.

(*d*) These sections do not directly create any criminal offence.

or persons residing or being within any of the dominions, forts, settlements, factories, or territories now or hereafter belonging to His Majesty, or being in His Majesty's occupation or possession, or under the government of the united company of merchants of England trading to the East Indies (*e*), shall' (after January 1, 1825), 'upon the high seas, or in any haven, river, creek, or place where the admiral has jurisdiction, knowingly and wilfully carry away, convey, or remove or aid, or assist in carrying away, conveying, or removing, any person or persons as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves, into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with as a slave or slaves; or shall (after January 1, 1825 . . . (*f*), upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain, or confine, or assist in shipping, embarking, receiving, detaining, or confining, on board any ship, vessel, or boat, any person or persons for the purpose of his, her, or their being carried away, conveyed or removed, as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves, into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with as a slave or slaves, then and in every such case the person or persons so offending shall be deemed and adjudged guilty of piracy (*g*), felony, and robbery . . .' (*h*).

By sect. 10, 'If any persons shall deal or trade in, purchase, sell, barter, or transfer, or contract for the dealing or trading in, purchase, sale, barter, or transfer of slaves, or persons intended to be dealt with as slaves, or shall . . . carry away or remove, or contract for the carrying away or removing of slaves or other persons, as or in order to their being dealt with as slaves, or shall import or bring or contract for the importing or bringing, into any place whatsoever, slaves or other persons, as or in order to their being dealt with as slaves, or shall, . . . (*i*) ship, trans-ship, embark, receive, detain, or confine on board, or contract for the shipping, trans-shipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons, for the purpose of their being carried away or removed, as or in order to their being dealt with as slaves; or shall ship, trans-ship, embark, receive, detain, or confine on board, or contract for the shipping,

(*e*) These territories are now under the Crown. Habitual dealing in slaves is punishable under s. 371 of the Indian Penal Code; isolated dealings under s. 370; and kidnapping in order to subject to slavery under s. 367. See Mayne Ind. Cr. L. (ed. 1896) p. 647. Offences under these sections, if committed by a subject of the King, or of an allied force on the high seas, or in Asia or Africa, are punishable in India under the Slave Trade Act, 1876 (39 & 40 Vict. c. 46), s. 1.

(*f*) See note (*c*), p. 271.

(*g*) As to piracy, *vide ante*, p. 255.

(*h*) The words here omitted were repealed in 1888 (S. L. R.). The section made the penalty death without benefit of clergy, with loss of lands, &c. By 7 Will. IV. & 1 Vict. c. 91, s. 1, transportation for life was substituted for the death penalty. The present punishment by the effect of the Penal Servitude Acts, 1857 and 1891, *ante*, pp. 211, 212, is penal servitude for life or not less than three years, or imprisonment with or without hard labour for not less than two years. Forfeiture of lands, goods and chattels was abolished in 1870 (33 & 34 Vict. c. 23), and the portions of 7 Will. IV. & 1 Vict. c. 91 superseded by the above-stated Acts as to punishment, were repealed in 1890 and 1893 (S. L. R.).

(*i*) See note (*c*), p. 271.

trans-shipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons, for the purpose of their being imported or brought into any place whatsoever, as or in order to their being dealt with as slaves; or shall fit out, man, navigate, equip, despatch, use, employ, let, or take to freight or on hire, or contract for the fitting out, manning, navigating, equipping, despatching, using, employing, letting, or taking to freight, or on hire, any ship, vessel, or boat, in order to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully (*j*) lend or advance, or become security for the loan or advance, or contract for the lending or advancing, or becoming security for the loan or advance, of money, goods, or effects employed or to be employed, in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully become guarantee or security, or contract for the becoming guarantee or security, for agents employed, or to be employed, in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful, or in any other manner to engage or to contract to engage, directly or indirectly therein, as a partner, agent, or otherwise; or shall knowingly and wilfully ship, trans-ship, lade, receive, or put on board, or contract for the shipping, trans-shipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods, or effects to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall take the charge or command, or navigate, or enter and embark on board, or contract for taking the charge or command, or for the navigating or entering and embarking on board of any ship, vessel, or boat, as captain, master, mate, surgeon, or super-cargo, knowing that such ship, vessel, or boat is actually employed or is, in the same voyage, or upon the same occasion, in respect of which they shall so take the charge or command, or navigate, or enter and embark, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully insure or contract for the insuring of any slaves, or any property, or other subject-matter engaged or employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall wilfully and fraudulently forge or counterfeit any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt (such receipts being required by this Act), or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or receipt as aforesaid; or shall knowingly and wilfully utter or publish the same, knowing it to

(*j*) Counts in an indictment which omitted these words were quashed as admittedly bad. R. *v.* Jennings, 1 Cox, 115, Wightman and Cresswell, JJ.

be forged or counterfeited, with intent to defraud His Majesty, or any other person or persons whatsoever, or any body politic or corporate; then and in every such case the person or persons so offending, and their procurers, counsellors, aiders, and abettors, shall be and are hereby declared to be felons, and shall be transported (*k*) beyond seas for a term not exceeding fourteen (*l*) years, or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three (*m*) years, at the discretion of the Court before whom such offender or offenders shall be tried and convicted.'

Seamen serving on Slavers.—Sect. 11. . . . 'If any person shall enter and embark on board, or contract for the entering and embarking on board of any ship, vessel, or boat, as petty officer, seaman, marine, or servant, or in any other capacity not hereinbefore specifically mentioned, knowing that such ship, vessel, or boat is actually employed, or is, in the same voyage, or upon the same occasion, in respect of which they shall so enter and embark on board, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful, then and in every such case the persons so offending, and their procurers, counsellors, aiders, and abettors, shall be and they are hereby declared to be, guilty of a misdemeanor only, and shall be punished by imprisonment for a term not exceeding two years.'

Criminal Clauses not to affect Civil and Penal Clauses.—Sect. 12. 'Provided always, that nothing in this Act contained, making piracies, felonies, robberies, and misdemeanors of the several offences aforesaid, shall be construed to repeal, annul, or alter the provisions and enactments in this Act also contained, (viz., sects. 5–8, *ante*, p. 271) imposing forfeitures and penalties, or either of them upon the same offences, or to repeal, annul, or alter the remedies given for the recovery thereof; but that the said provisions and enactments, imposing forfeitures and penalties, shall in all respects be deemed and taken to be in full force' (*n*).

Informers exempted from Penalties.—Sect. 40. 'Provided always if any person offending as a petty officer, seaman, marine, or servant, against any of the provisions of this Act, shall, within two years after the offence committed, give information on oath before any competent magistrate against any owner or part-owner, or any captain, master, mate, surgeon, or supercargo of any ship or vessel, who shall have committed any offence against this Act, and shall give evidence on oath against such owner, etc., before any magistrate or Court before whom such

(*k*) Penal servitude substituted in 1857 (20 & 21 Vict. c. 3, s. 2), *ante*, p. 211.

(*l*) Nor less than three years (54 & 55 Vict. c. 69, s. 1, *ante*, p. 211).

(*m*) The provisions as to imprisonment are not specifically repealed. By 9 & 10 Vict. c. 26, s. 1 (rep. 1895), where Courts were empowered or required to impose a sentence of transportation for over seven years, they were authorised to substitute a term of not less than seven years, or imprisonment with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1, authorises a minimum term of penal servitude of three years, or imprisonment with or without hard labour for not over two years. It is submitted that the Act of 1891 does (if the Act of 1846 had not already done it) supersede the power of imprisonment given in s. 9.

(*n*) The rest of the section is omitted as repealed in 1873 (36 & 37 Vict. c. 88, s. 30). Ss. 13–38 were repealed in 1873 (36 & 37 Vict. c. 88, s. 30). S. 39 avoids mortgages, &c., given for purposes rendered unlawful by the Act, except against *bona fide* purchasers or holders, without notice of negotiable instruments.

offender may be tried; or if such person or persons so offending shall give information to any of His Majesty's ambassadors, ministers, etc., or other agents, so that any person or persons owning such ship or vessel, or navigating or taking charge of the same, as captain, master, mate, surgeon, or supercargo, may be apprehended; such person or persons so giving information and evidence shall not be liable to any of the pains or penalties under this Act incurred in respect of his offence, and His Majesty's ambassadors, ministers, etc., or other agents are hereby required to receive any such information as aforesaid and to transmit the particulars thereof, without delay, to one of His Majesty's principal secretaries of state, and to transmit copies of the same to the commanders of His Majesty's ships or vessels, then being in the said port or place' (*o*).

In February, 1845, the 'Felicidade,' a Brazilian schooner, bound on a voyage to Africa for the purpose of bringing back a cargo of slaves, arrived off the African coast, and was observed by Her Majesty's ship 'Wasp,' stationed off the slave coast for the prevention of the slave trade, who, upon approaching the 'Felicidade,' manned two boats, and gave the command of them to S., one of his officers, with orders to board the 'Felicidade,' and if she appeared to be fitted up for the slave trade to capture her. S., in obedience to these orders, went with the two boats to the 'Felicidade.' At the time of her capture the 'Felicidade' was fitted up for the reception of a cargo of slaves, and was within sixteen miles of the shore. The next day Captain Usher placed the 'Felicidade' under the command of S., and directed him to steer a particular course in pursuit of a vessel capable of being seen from the 'Wasp,' although then invisible from the 'Felicidade.' S. accordingly steered that course, and the next morning he descried the 'Echo,' a Brazilian brigantine. He chased and overtook the 'Echo' the next night within ten miles of the African coast, when and where she surrendered. S. had at that time under his command Palmer, a midshipman, and sixteen British seamen; he ordered P. and eight of the seamen to take charge of the 'Echo' during the night. On Mr. Palmer going on board the 'Echo,' he found in her a cargo of four hundred and thirty-four slaves. During the chase and at the time of the surrender, S. wore his uniform, and at the time of the surrender and capture told Serva, the captain of the 'Echo,' he was going to take them to Her Majesty's ship the 'Wasp,' for being engaged in the slave trade. The 'Wasp' had printed instructions on board. S. had not any printed instructions on board the 'Felicidade,' and did not shew any other authority than his uniform and the British ensign. He had, however, boarded the 'Echo' several times before, and to Serva was well known as an officer in Her Majesty's navy. The next morning after the capture S. placed P. and nine British seamen under his command on board the 'Felicidade,' in order that he might take charge of her and of Serva, M. (another of the crew of the 'Felicidade'), and several others of the 'Echo's' crew. Within an hour afterwards

(*o*) Ss. 41–46, 48–82 were repealed in 1873 (36 & 37 Vict. c. 88, s. 30). S. 47 fixes a limitation of five years for indictments, information, &c., to recover penalties or forfeitures, except in case of proceedings for condemnation or forfeiture of slaves illegally imported, for which there is no time limit. This section appears not to apply to offences within ss. 9, 10, 11.

Serva, M., and some of the rest conspired together to kill all the English on board the 'Felicidade,' and take her; and in pursuance of that conspiracy rose upon P. and his men, and after a short conflict succeeded in killing them, M. having in the course of that conflict stabbed and thrown overboard P. On the trial of an indictment against Serva and others engaged with him in the transaction for the murder of Mr. Palmer, at Exeter Assizes, Platt, B., held that the 'Felicidade' was in the lawful custody of Her Majesty's officers, that all on board that vessel were within Her Majesty's Admiralty jurisdiction, and that if the prisoners plotted together to slay all the English on board and run away with the vessel, and in carrying their design into execution M. slew P., and the others were aiding and assisting in the commission of that act, they should be found guilty of murder; and upon a case reserved it was contended on the part of the prisoners that both the 'Felicidade' and 'Echo' were wrongfully taken, and that the prisoners had a right to regain their freedom by any means in their power, and consequently that no felony had been committed. It was answered on the part of the prosecution, that the 'Felicidade' and 'Echo' were lawfully taken under the Slave Trade Act, 1824 (5 Geo. IV. c. 113), and 7 & 8 Geo. IV. c. 74 (*p*), and the Portuguese and Brazilian treaties as to slave trading; and that the prisoners were in lawful custody, and the 'Felicidade' in the lawful custody of the Queen's officers; but it was held that there was a want of jurisdiction in an English Court to try the murder committed on board the 'Felicidade'; and if the lawful possession of that vessel by the British Crown, through its officers, would be sufficient to give jurisdiction, there was no evidence brought before the Court to shew that the possession was lawful (*q*).

A count stated that the prisoner, within the jurisdiction of the Central Criminal Court, did illegally and feloniously man, navigate, equip, despatch, use and employ a certain ship called the 'Augusta,' in order to accomplish a certain object, which (by 5 Geo. IV. c. 113, s. 10) was declared unlawful, viz., to deal and trade in slaves. The three following counts only varied from the first in describing the object of the several acts charged to have been done by the prisoner differently, as in the statute. It was objected that each count was bad as charging distinct felonies, the statute making it a felony to fit out, man, navigate, equip, despatch, use or employ any ship in order to accomplish any of the objects thereby declared unlawful, and each count charging the prisoner with having done all the acts before mentioned, each of which would have been of itself a felony, if done with the object stated in the Act. But the Court held that each count contained a charge of one felony only, the whole being alleged to have been done to accomplish one and the same single object, the essence of the felony consisting in using the means described in the Act to accomplish that object. It was also contended, that these counts were bad for not negativing the exceptions in the Act of circumstances, which might render the transaction lawful; but it was held that these

(*p*) Which gave municipal effect to a Slave Trade Convention with Brazil. The Act was repealed in 1873 (36 & 37 Vict. c. 88, s. 30).

(*q*) R. *v.* Serva, 2 C. & K. 53; 1 Den. 104. Denman, C.J., and Platt, B., *diss.* See also the Life of Alderson, B., p. 99.

exceptions were virtually repealed by 3 & 4 Will. IV. c. 73, s. 12, and that for this purpose sect. 10 of the Act of 1824 must be considered as if they had never existed; and as the offences in the indictment were charged to have been committed in the reign of Queen Victoria, they must necessarily have been after the passing of the repealing Act. It was further objected, that the indictment did not allege that the prisoner was a British subject, or that the offence was committed within Her Majesty's dominions; but it was held that, as the offence was stated in each count to have been committed at London, within the jurisdiction of the Central Criminal Court, and therefore *prima facie* at least within the Central Criminal Court district (*r*), the indictment did in substance allege the offence to have been committed within Her Majesty's dominions (*s*).

Upon an indictment under sect. 10 for feloniously fitting out a vessel for the purpose of dealing in slaves, it was held that the provisions of the Act were not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but applied to acts done by British subjects in furtherance of that trade in places not part of the British dominions. And in order to convict a party who is charged with having employed and loaded a vessel for the purpose of slave trading, it is not necessary to shew that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it was sufficient if there was a slave adventure, and the vessel was in any way engaged in that adventure (*t*).

Where a party residing in London was charged with having chartered a vessel and loaded goods on board, for the purpose of slave trading, it was held that slave trading papers found on board the vessel when she was seized off the coast of Africa, but not traced in any way to the knowledge of the prisoner, were not admissible in evidence against him (*u*).

The Slave Trade Act, 1843 (6 & 7 Vict. c. 98), recites sect. 2 of the Act of 1824 (*v*), and enacts (sect. 1) that 'all the provisions of the Slave Trade Act, 1824, hereinbefore recited and of this present Act shall from and after the coming into operation of this Act (August 24, 1843), be deemed to extend and apply to British subjects *wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country;* and all the several matters and things prohibited by the Slave Trade Act, 1824, or by this present Act when committed by British subjects, whether within the dominions of the British Crown or in any foreign country, . . . (*w*) shall be deemed and taken to be offences committed against the said several Acts respectively, and shall be dealt with and punished accordingly: provided nevertheless, that nothing herein contained shall repeal or alter any of the provisions of the said Act' (*x*).

(*r*) See 4 & 5 Will. IV. c. 36, s. 2, *ante*, p. 267n.

(*s*) R. *v.* Jennings, 1 Cox, 115, Wightman and Cresswell, JJ.

(*t*) R. *v.* Zulueta, 1 C. & K. 215, Maule and Wightman, JJ. But see Santos *v.* Illidge, 28 L. J. C.P. 317, 321, *post*, p. 278.

(*u*) Ibid.

(*v*) *Vide ante*, p. 271.

(*w*) The words omitted and ss. 5, 6 were repealed in 1891 (S. L. R.).

(*x*) S. 2, which abolished servitude for debt of persons called pawns or peons was repealed in 1891 (S. L. R.). S. 3 was repealed in 1873 (36 & 37 Vict. c. 88, s. 30). As to peonage, see American legislation.

Sect. 4. 'In all cases of indictment or information laid or exhibited in the Court of Queen's Bench (High Court of Justice King's Bench Division) for misdemeanors or offences committed against the said Acts (of 1824 and 1833, *ante*, pp. 271 *et seq.*), or against the present Act in any places out of the United Kingdom, and within any British colony, settlement, plantation, or territory it shall and may be lawful for Her Majesty's said Court, upon motion to be made on behalf of the prosecutor or defendant, to award a writ or writs of mandamus, requiring the chief justice or other chief judicial officer in such colony, settlement, plantation, or territory, who are hereby authorised and required accordingly, to hold a Court, with all convenient speed for the examination of witnesses and receiving other proofs concerning the matters charged in such indictments or informations respectively, and in the meantime to cause public notice to be given of the holding of such Courts, and summonses to be issued for the attendance of witnesses and of agents and counsel of the parties; and such examination as aforesaid shall be then and there openly and publicly taken in the said Court *viva voce* upon the respective oaths of the persons examined, and be reduced to writing and be sent to Her Majesty in Her Court of Queen's Bench, in manner set forth and prescribed in the East India Company Act, 1772 (13 Geo. III. c. 63); and such depositions being duly taken and returned according to the true intent and meaning of this Act, shall be allowed and read, and shall be deemed as good and competent evidence as if such witnesses had been present and sworn and examined *viva voce* at any trial for such misdemeanors and offences as aforesaid in Her Majesty's said Court of Queen's Bench, any law or usage to the contrary thereof notwithstanding' (*y*).

There is nothing in the Acts of 1824 and 1833 to prohibit a contract by a British subject for the sale of slaves lawfully held by him in a foreign country, where the possession and the sale of slaves is legal. Where, therefore the defendants, British subjects, resident and domiciled in Great Britain, being possessed of certain slaves in the Brazils, where the purchase and holding of slaves is lawful, contracted with the plaintiff, a Brazilian subject, domiciled in the Brazils, to sell them to him, to be used and employed there, and some of the slaves had been purchased by the defendants in the Brazils after the passing of the Act of 1824, but before the Act of 1843 (*z*), for the purpose of being employed, and they were employed, in certain mines there, of which the defendants were the proprietors; and the rest of the slaves were their offspring, and were in the possession of the defendants before the passing of the latter Act; it was held that the contract was valid (*a*).

The Slave Trade Act, 1873 (36 & 37 Vict. c. 88), consolidates the laws for the suppression of the slave trade, and incorporates the unrepealed provisions of the Slave Trade Act, 1824 (already stated).

By sect. 2. 'In this Act the term "*vessel*" means any vessel used in navigation. The term "*British possession*" means any plantation, territory, settlement, or place situate within His Majesty's dominions,

(*y*) See *post*, Vol. ii. p. 2249, 'Evidence.' Ss. 5, 6 were repealed in 1891 (54 & 55 Vict. c. 67, S. L. R.), and s. 7 in 1874 (37 & 38 Vict. c. 96, S. L. R.).

(*z*) See s. 1 of that Act, *supra*.

(*a*) Santos *v.* Illidge, 8 C. B. (N. S.) 861 (Ex.): 28 L. J. C.P. 313.

and not forming part of the United Kingdom. The term "*Governor*" includes the officer for the time being administering the government of any colony, and where there is a local governor or lieutenant-governor under a governor-general, means the local governor or lieutenant-governor: The term "*foreign state*" includes any foreign nation, people, tribe, sovereign, prince, chief, or headman: The term "*vessel of a foreign state*" means a vessel which is justly entitled to claim the protection of the flag of a foreign state, or which would be so entitled if she did not lose such protection by being engaged in the slave trade: The term "*treaty*" includes any convention, agreement, engagement, or arrangement: The term "*slave trade*," when used in relation to any particular treaty, does not include anything declared by such treaty not to be comprised in the term or in such treaty: The term "*Vice-Admiralty Court*" does not include any Vice-Admiralty Court which for the time being has under its commission a limited jurisdiction only in matters relating to the slave trade: The term "*British Slave Court*" means the High Court of Admiralty of England, every Vice-Admiralty Court in [His] Majesty's dominions out of the United Kingdom, and every East African Court for the time being within the meaning of the Slave Trade (East African Courts) Act, 1873 (36 & 37 Vict. c. 59): The term "*Slave Court*" means every British Slave Court, every mixed commission or Court established under any existing slave trade treaty, and the Court of any foreign state having jurisdiction to try and condemn a vessel engaged in the slave trade: The term "*existing slave trade treaty*" means a treaty made by or on behalf of [His] Majesty or his royal predecessors with any foreign state for the more effectual suppression of the slave trade and in force at the passing of this Act.'

Sect. 3 provides for the seizure of ships suspected (*b*) of being engaged in or fitted out for the slave trade, and for the seizure of vessels, slaves, persons, goods, and effects which may be forfeited under the above provisions. Sect. 4 and Schedule 1 provide for presumption that a vessel is engaged in the slave trade from the presence of certain specified particulars in its equipment. But the presumption does not extend to vessels of a foreign state, except so far as is consistent with the treaty made with such state. Sects. 5–8 provide the tribunal which is to try the right of seizure. Sects. 9 and 10 provide for the disposal of vessels and slaves which have been seized. Sects. 11–16 relate to bounties (*c*). By sect. 17 persons authorised to make seizures are to have the benefit of the protection granted to persons acting under the Imperial Customs Acts. By sect. 18 the pendency of proceedings under the Act in certain cases is made a bar to other legal proceedings. Sect. 19–21 apply to proceedings in the High Court of Justice in England (Admiralty Division) with respect to costs (*d*).

(*b*) As to reasonable suspicion see R. *v.* Casaca, 5 App. Cas. 48.

(*c*) See also the Naval Prize Act, 1864 (27 & 28 Vict. c. 24), ss. 12–18.

(*d*) S. 20 is repealed as to costs which can be taxed in a British possession, as from the commencement of the Colonial Courts of Admiralty Act, 1890, in the possession, and as to Courts out of the King's dominion as from the commencement of an order applying the Act of 1890 to the Court (53 & 54 Vict. c. 27, s. 18). See Index to Statutory Rules and Orders (ed. 1907), tit. 'Foreign Jurisdiction.'

By sect. 22, 'Any person who wilfully gives false evidence in any proceeding taken in pursuance of this Act in any Slave Court shall be guilty of an offence against this Act, and shall be liable to the like penalty as if he had been guilty of perjury, or in a British possession, of the offence, by whatever name called which if committed in England would be perjury.'

By sect. 23 the registrar of a British Slave Court is to make returns of cases adjudged in such Court (*e*).

By sect. 24, 'This Act shall be construed as one with the enactments of the Slave Trade Act, 1824 (*f*), and any enactments amending the same (*g*), so far as they are in force at the time of the passing of this Act, and are not repealed by this Act; and the expression "this Act," when used in this Act, shall include those enactments.'

By sect. 25, 'All pecuniary forfeitures and penalties imposed by the said enactments, with which this Act is to be construed as one, may be sued for, prosecuted, and recovered in any Court of record or of Vice-Admiralty in any part of His Majesty's dominions wherein the offence was committed, or where the offender may be, in like manner as any penalty or forfeiture incurred in the United Kingdom, under any Act for the time being in force relating to His Majesty's customs, or (in the case of the High Court of Admiralty, or of a Court of Vice-Admiralty), in like manner as any vessel seized in pursuance of this Act. Such pecuniary penalties and forfeitures shall, subject to the express provisions of the said enactments, be paid and applied in like manner as the net proceeds of a vessel seized otherwise than by the commander or officer of one of His Majesty's ships, or of the cruiser of a foreign state.'

Trial of Offences against the Act.—By sect. 26, 'Any offence against this Act, or the said enactments with which this Act is to be construed as one, or otherwise in connection with the slave trade, shall for all purposes of and incidental to the trial and punishment of a person guilty of such offence, and all proceedings and matters preliminary and incidental to and consequential on such trial and punishment, and for all purposes of and incidental to the jurisdiction of any Court, constable, and officer with reference to such offence, be deemed to have been committed, either in the place in which the offence was committed or in the county of Middlesex, or in any place in which the person guilty of the offence may for the time being be, either in His Majesty's dominions, or in any foreign port or place in which His Majesty has jurisdiction; and the offence may be described in any indictment or other document relating thereto, as having being committed at the place where it was wholly or partly committed, or as having been committed on the high seas, or out of His Majesty's dominions, and the venue or local description in the margin may be that of the place in which the trial is held.

'Where any such offence is commenced at one place and completed at another, the place at which such offence is to be deemed to have been committed shall be either the place where the offence was commenced or the place where the offence was completed.

(*e*) See 53 & 54 Vict. c. 27, s. 18. No regulations have yet been made as to returns by such registrars.

(*f*) *Ante*, p. 271.

(*g*) *i.e.* the Acts of 1833 and 1843, *supra*.

'Where a person being in one place is accessory to or aids or abets in any such offence committed in another place, the place at which such offence is to be deemed to have been committed shall be either the place in which the offence was actually committed or the place where the offender was at the time of his being so accessory aiding or abetting.

'Where it appears to any Court, or the judge of any Court having jurisdiction to try any such offence, that the removal of an offender charged with such offence to some other place in His Majesty's dominions for trial would be conducive to the interest of justice, such Court or judge may, by warrant or instrument in the nature of a warrant, direct such removal, and such offender may be removed and tried accordingly. And *sect.* 268 *of the Merchant Shipping Act*, 1854 (*h*), shall apply to the removal of an offender under this section in the same mannner as if the term "consular officer" (*i*), in that section included the Court or judge making such warrant or instrument.'

By sect. 27, offences against the Act or the incorporated enactments, or otherwise in connection with the slave trade, whether committed on the high seas or on land, or partly on the high seas and partly on land are to be deemed to be included as extradition crimes in the first schedule of the Extradition Act, 1870 (33 & 34 Vict. c. 52), and that Act and any Act amending it are to be construed accordingly.

By sect. 28 the Act is applied to all cases of vessels, slaves, goods, and effects seized and adjudicated upon by any Slave Court, whether before or after the passing of the Act (*j*). Sect. 29 extends the Act to future treaties with any foreign state in relation to the slave trade if an Order in Council be obtained for that purpose (*k*).

The Slave Trade (East African Courts) Act, 1873 (*l*) (36 & 37 Vict. c. 59),

(*h*) *i.e.* 17 & 18 Vict. c. 104, s. 268, repealed in 1894 and replaced by s. 689 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which combines s. 268 with 45 & 46 Vict. c. 55, s. 9. The effect of the repeal is to substitute the new for the former enactment. See 52 & 53 Vict. c. 63, s. 38, *ante*, p. 5.

(*i*) *i.e.* 'British Consular officer' (57 & 58 Vict. c. 60, s. 689), including Consul General, Consul, Vice-Consul, Consular Agent, or any person for the time being authorised to discharge the duties of Consul General or Vice-Consul. 52 & 53 Vict. c. 63, s. 12 (20).

(*j*) A similar provision is made by 36 & 37 Vict. c. 59, s. 7, and that enactment is by 42 & 43 Vict. c. 38, s. 3, extended to treaties with the Government of Egypt.

(*k*) The Orders in Council in force are as follows:—

Date of Order in Council.	Treaty to which Act applied.
May 9, 1892	Brussels General Act of July 2, 1890.
Sept. 9, 1884	Abyssinia Treaty of June 3, 1884.
Dec. 30, 1878	Egypt " " Aug. 4, 1877.
June 28, 1880	Germany " " March 29, 1879.
April 3, 1886	Italy " " Dec. 21, 1885.
Nov. 28, 1889	Italy " " Sept. 14, 1889.
Nov. 6, 1883	Johanna " " Oct. 10, 1882.
Nov. 6, 1883	Mohilla " " Oct. 24, 1882.
Aug. 18, 1882	Persia " " March 2, 1882.
May 9, 1892	Spain " " July 2, 1890.
Aug. 26, 1881	Turkey " " Jan. 25, 1880.
Aug. 23, 1883	Turkey " " March 3, 1883.

(*l*) This Act applies retrospectively to cases already adjudicated (s. 6). S. 3 gives jurisdiction where the vessel seized is British or is seized under an existing treaty or is not shewn to be entitled to claim the protection of the flag of any foreign state: and in the case of a British vessel, whether it is brought in by a British ship or by the commander of a foreign state party to the treaty (42 & 43 Vict. c. 38, s. 4).

as amended by the Slave Trade (East African Courts) Act, 1879 (42 & 43 Vict. c. 38), regulates and extends the jurisdiction in matters connected with the slave trade of the Vice-Admiralty Court at Aden, and of His Majesty's consular officers within the dominions of the sovereigns of Zanzibar (*m*), Muscat (*n*), and Madagascar (*o*), upon whom jurisdiction had been, or should be, conferred by Order in Council in relation to vessels captured on suspicion of being engaged in the slave trade or otherwise in relation to that trade. The Acts apply to existing and future treaties with the powers named or with Egypt (*p*), or any other foreign nation, people, tribe, sovereign, prince, chief, or headman in Arabia or East Africa, or the coasts of the Persian Gulf (sect. 7).

By the Slave Trade Act, 1876 (39 & 40 Vict. c. 46), s. 1, it is provided that a subject of the King, or of any Prince or State in India in alliance with the King, may be dealt with and punished in any place in British India where he is found for committing or abetting offences against sects. 367, 370, 371 of the Indian Penal Code (Act XLV. of 1860) (*q*), or any subsequent amendment of these sections (*r*), committed upon the high seas or in any part of Asia or Africa, specified in the Order in Council. By sect. 3, High Courts in India are given, for the purpose of obtaining evidence for the trial of such cases, the powers given to the Court of Queen's Bench by sect. 4 of the Slave Trade Act, 1843 (*s*) as to British possessions where a witness may be, and as to consular officers in the specified parts of Asia or Africa the powers given by sect. 330 of the Indian Criminal Procedure Code, Act X. of 1872 (*t*).

By Order in Council of April 30, 1877 (*u*), the above Act was applied to certain portions of Asia and Africa, viz., the territories of the Khan of Khelat, and of the Sultan of Muscat in Mekran and Arabia, the coasts of Beloochistan, and of the Bunder Abbas district, and the shores of the Persian Gulf, the coast of Arabia from Ras Mussendom to Cape Bab el Mandeb, the territories of certain specified tribes near Aden, the coast of Africa from Ras Sejarme to Delagoa Bay, the territories of the Sultan of Zanzibar, and the sea and islands within 10 degrees of latitude or longitude from such coasts and shores respectively (*v*).

By the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 2, subs. 3 (*b*), a Colonial Court of Admiralty has under the Slave Trade Act, 1873, and any enactment relating to the slave trade (*w*) the jurisdiction

(*m*) Now a British Protectorate. See Zanzibar Orders in Council, 1906, May 11 and Dec. 21. Stat. R. & O. 1906, pp. 193, 214.

(*n*) For the treaties see 6 Hertslet, 578, 7 do. 818, 9 do. 577, 18 do. 927: and see Muscat Order in Council, Nov. 4, 1867. St. R. & O. Revised (ed. 1904), vol. v. tit. 'Foreign Jurisdiction.'

(*o*) Now part of the dominions of the French Republic.

(*p*) 42 & 43 Vict. c. 38, s. 3.

(*q*) Mayne, Ind. Cr. L. (ed. 1896).

(*r*) If applied by Order in Council subject to a veto by Parliament, s. 2.

(*s*) *Ante*, p. 278.

(*t*) Superseded and replaced by s. 503 of the Indian Criminal Procedure Code of 1898.

(*u*) Printed in St. R. & O. Revised (ed. 1904), vol. xi. tit. 'Slave Trade,' 84.

(*v*) Ss. 4 & 6 of the Act of 1876 were repealed in 1890 (53 & 54 Vict. c. 37, s. 18), and s. 4 re-enacted as s. 17 of that Act.

(*w*) As to making rules as to practice, procedure, costs and returns, and appeals, in slave-trade matters in the East African Courts see s. 13 (1), (3), and other Courts of Admiralty or Vice-Admiralty, s. 13 (2). For reference to the rules made see Index to Statutory Rules and Orders (ed. 1907), pp. 100, 101.

thereby conferred in a Vice-Admiralty Court, but by subs. 3 has not jurisdiction under the Act of 1890 to try or punish a person for an offence which, according to the law of England, is punishable on indictment. The Act may be applied by Order in Council to Courts under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37) (*x*).

The criminal jurisdiction of Colonial Courts with reference to the slave trade offences arising outside the land and sea limits of the Colony depends on the Acts of 1824 and 1873, *supra*.

The Act of 1890, c. 27, s. 9, authorises the King by commission under the Great Seal to establish Vice-Admiralty Courts (*y*) in any British possession. In British India and Colonies having a representative legislature, the Courts thus created may not exercise jurisdiction, except for certain purposes relating to prize, the royal navy, the slave trade, to the Pacific Islanders Protection Acts, 1872 and 1875, the Foreign Enlistment Act, 1870, or to matters on which questions arise relating to treaties or conventions with foreign countries, or to international law.

Sect. II.—The Pacific Islanders Protection Acts.

By sect. 9 of the Pacific Islanders Protection Act, 1872 (*z*) (sometimes described as the Kidnapping Act), certain offences by British subjects in the nature of kidnapping or enslaving 'natives of islands in the Pacific Ocean, not being within the King's dominions nor within the jurisdiction of any civilised power,' are declared felony. The Supreme Courts of the Australian States (*a*) and the Dominion of New Zealand, and Fiji (*b*) are empowered to try the offences and to inflict, at the discretion of the Court, the highest punishment short of death, or any less punishment for felony awarded by the law of the colony where the trial takes place. Persons who aid, abet, counsel, or procure the commission of such offences may be tried and punished as principal offenders (sect. 10). In indictments for such offences the offence may be described as committed at the place where it was wholly or partly committed, or may be averred generally as committed within the King's dominions, and the venue or local description in the margin of the indictment may be that of the place where the trial is held (sect. 11) (*c*).

The Act contained provisions (sects. 3–5) as to licences authorising the carrying of native labourers, amended in 1875 (38 & 39 Vict. c. 51, s. 2), which are now ineffective so far as concerns Australia, by the stoppage of Polynesian immigration.

(*x*) *e.g.* in Cyprus (1893), China and Corea (1904), Ottoman Empire (1905), Persian Coast and Islands (1901), Siam (1906), Zanzibar (1906), Western Pacific (1903).

(*y*) As to criminal jurisdiction of the Admiral or Vice-Admiral, *vide ante*, pp. 31, 267.

(*z*) 35 & 36 Vict. c. 19. See 2 Steph. Hist. Cr. L. 58, and Quick & Garran, Australian Commonwealth Constitution, p. 637.

(*a*) By s. 22. This power does not affect the jurisdiction vested in the Supreme Courts of New South Wales and Tasmania under the Australian Courts Act, 1828 (9 Geo. IV. c. 83).

(*b*) Added by the Act of 1875 (38 & 39 Vict. c. 51) s. 8.

(*c*) Ss. 12–15 deal with the obtaining of evidence. Ss. 16, 17 give power to seize suspected British vessels. The vessels can be adjudicated upon by the Admiralty Courts in England or Colonial Vice-Admiralty Courts (38 & 39 Vict. c. 51, ss. 4, 5; 53 & 54 Vict. c. 27, s. 9).

The Pacific Islanders Protection Act, 1875 (38 & 39 Vict. c. 51), authorises His Majesty to exercise jurisdiction over British subjects in islands and places in the Pacific Ocean not within the King's dominions, and by Order in Council to create a Court of justice with criminal jurisdiction over British subjects within such islands and places, with power to take cognisance of all crimes and offences committed by British subjects 'within any of the said islands and places, or in any haven, river, creek, or place within the jurisdiction of the Admiralty' (sect. 6) (*d*) . . . and to vest such jurisdiction or any part thereof in a designated Court of a British Colony, and provide for the transmission of such offenders to the colony for trial and punishment, and for the admission in evidence of depositions taken in such islands and places.

The Acts of 1872 and 1875 took effect in the Australasian Colonies on proclamation by the Governors (35 & 36 Vict. c. 19, s. 21 (rep.); 38 & 39 Vict. c. 51, s. 10).

Under the above Acts and the British Settlements Act, 1887 (50 & 51 Vict. c. 54), and the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), an Order in Council was made, March 15, 1893, by sect. 13 whereof jurisdiction as to all matters and questions arising under the Pacific Islanders Protection Acts, 1872 and 1875, is subject to the provisions of the Order vested in and exercisable by the Court of the High Commissioner for the Western Pacific (*e*), which consists of the High Commissioner, the Chief Justices and other judges of the Supreme Court of Fiji, and the deputy commissioners (*f*). The Order contains provisions (*g*) as to procedure and jurisdiction, which include adaptations of the Admiralty Offences Colonial Acts of 1849 and 1860 (*h*).

On an indictment tried in Queensland for an offence against sect. 9 of the Act of 1872, the question arose whether the island of Malayta was part of the dominions of the British Crown or within the jurisdiction of any civilised power. The judge, on reference to the Pacific Order in Council of 1893, decided that it was part of the law, and that it applied to Malayta with other islands as not being within the jurisdiction or protectorate of any civilised power (*i*). In the same case it was held that if the Crown made a *prima facie* case of suspicion, the burden lay on the accused to prove that the natives were taken from their islands with their own consent.

(*d*) Admiralty jurisdiction might also be conferred. But see 53 & 54 Vict. c. 27, ss. 16, 18.

(*e*) See the Pacific Orders in Council of 1893, 1897, 1903, and 2nd Nov. 1907, and 26th Sep. 1908. St. R. & O. Revised (ed. 1904), vol. v. tit. 'Foreign Jurisdiction.' St. R. & O. Revised 1907, No. 864: St. R. & O. 1908 (No. 780). The orders embrace the following British protectorates: Tonga or Friendly Islands, Union Group, Ellice and Gilbert Islands, and Southern Solomon's; and (jointly with France) the New Hebrides, including Banks Islands and Torres Islands.

(*f*) Arts. 8, 112.

(*g*) Arts. 60 84.

(*h*) *Ante*, p. 269.

(*i*) R. *v.* Vos [1895], 6 Queensland L. J. 215.

CHAPTER THE THIRD.

OF SERVING FOREIGN STATES AND BREACHES OF NEUTRALITY.

A. Common Law and Earlier Statutes.

According to the old authorities the King is entitled to call on all the lieges to defend the realm and to prevent their withdrawal from the realm (*a*); and disobedience to the King's letter to a subject commanding him to return from beyond the seas, or to the King's writ of *ne exeat regno*, commanding a subject to stay at home, is a high misprision and contempt (*b*). And it is also a high offence to refuse to assist the King for the good of the state, either in councils, by advice, if called upon, or in war by personal service for the defence of the realm against rebellion or invasion (*c*); and all persons under the degree of nobility who are fifteen years of age and able to travel are liable to punishment for neglecting to join the *posse comitatus* (*d*).

Entering into the service of a foreign state without the consent of the King, or contracting with a foreign state any engagement which subjects the party to an influence or control inconsistent with the allegiance due to our own sovereign, is said to be a misdemeanor indictable at common law (*e*), and where the foreign state is at war with Great Britain is treason (*f*). Indeed it is considered as so high an offence to prefer the interests of a foreign state to that of our own, that any act is said to be criminal which may but incline a man to do so; as to receive a pension from a foreign prince without the leave of the King (*g*).

Early Statutes.

By an Act of 1605 (3 Jac. I. c. 4, s. 18) (*h*), it was made felony to go out of the realm to serve foreign states without first taking the oath of allegiance and entering into a bond against reconciliation with the Pope or plots against the King. The oath prescribed by the Act of 1605 was

(*a*) The King may command under his privy seal or privy signet, that one go not out of the realm as appeareth by F. N. B. 85. Lane's case [1587], 2 Co. Rep. 16, 17b. Earl of Devonshire's case, 11 Co. Rep. 92a.

(*b*) 1 East, P. C. 81; 4 Bl. Com. 122; Beames, *Ne Exeat*. And if the subject neglects to return from beyond the seas, when commanded, his land shall be seized till he does return, 1 Hawk. c. 22, s. 4.

(*c*) 1 Hawk. c. 22, s. 2. See Manual of Military Law, c. ix. The power did not extend to compel a man to leave the realm on military service. Imprisonment for this purpose was declared illegal by 16 Car. I. c. 28. See case of soldiers, 6 Co. Rep. 27a.

(*d*) Neglect to join the *posse comitatus*, if required by the sheriffs or the justices, is a misdemeanor. 2 Hen. V. stat. 1, c. 8. And as to arrest of felons, see 50 & 51 Vict. c. 55, s. 8 (1). The *posse comitatus* is now summoned, if at all, only for the arrest of felons or suppression of riots (*post*, p. 431.

(*e*) 1 East, P. C. 81; 4 Bl. Com. 122.

(*f*) R. *v.* Lynch [1903], 1 K.B. 744.

(*g*) 3 Co. Inst. 144; 1 Hawk. c. 22, s. 3; 4 Bl. Com. 121.

(*h*) Repealed in 1846 (9 & 10 Vict. c. 59).

modified in 1688 (1 Will. & M. st. 1, c. 8). Under the Act of 1605 it was considered, that if a party went out of the realm with intent to serve a foreign state, although there was no service in fact; or if a party did actually so serve, though he did not go over for that purpose, but upon some other occasion, it was within the statute (*i*).

By Acts of 1736 (9 Geo. II. c. 30), and 1756 (29 Geo. II. c. 17), it was made felony without benefit of clergy to enlist, or procure any person to go abroad to enlist, as a soldier in the service of any foreign prince, state, or potentate. These Acts were directed against the enlistment by foreign powers of Catholics or Jacobites (*i*).

Of Breaches of Neutrality.

It appears not to have been an offence at common law for British subjects to enter into the service of belligerent powers at peace with Great Britain, unless the act involved a breach of duty to the King (*j*).

In the United States legislation was passed in 1794 and 1818 to prevent aid by American citizens to foreign belligerents.

Act of 1819.—In 1819 was passed an Act (59 Geo. III. c. 69) framed on the United States Act of 1818. The preamble recites that, 'The enlistment or engagement of His Majesty's subjects to serve in war in foreign service, without His Majesty's licence, and the fitting out or arming of vessels by His Majesty's subjects, without His Majesty's licence, for warlike operations in or against the dominions of any Foreign Prince, State, potentate, *or persons exercising or assuming to exercise the powers of Government in or over any Foreign Country, Colony, Province, or part of any Province* (*k*), or against the ships, goods, or merchandise of any Foreign Prince, potentate, or persons as aforesaid, or their subjects, may be prejudicial to and tend to endanger the peace and welfare of this Kingdom'; and that 'the laws in force are not sufficiently effectual for preventing the same.'

In R. *v.* Jones (*l*), on an indictment (under 59 Geo. III. c. 69), for engaging and procuring at Liverpool men to enlist as sailors in the Confederate service, it appeared that the men had been induced by the defendants to sign articles at Liverpool to serve in the 'Japan' on a voyage to China, and they embarked on board her, and she sailed to the British Channel, and anchored off Brest, and the next day a captain of the Confederate navy enlisted the men in that service. Cockburn, C.J., held that the question was, whether the defendants procured the sailors to embark at Liverpool for the purpose of their being employed in the service of the Confederate States. If they procured the sailors to embark on board the 'Japan' and sail to a foreign country, to be there enlisted in the Confederate service, they were guilty, and it was sufficient if that was the intention of the defendants, although the men themselves did not go with that intention.

(*i*) 3 Co. Inst. 80; 1 East, P. C. 82. Cf. the repealed Irish Acts, 11 Geo. II. c. 7, 19 Geo. II. c. 7. See 2 Stephen Hist. Cr. L. 257, where the early statutes are collected.

(*j*) *Vide supra*, p. 285.

(*k*) The first effect, if not the object, of this Act was to prevent British subjects from engaging in the revolt of the Spanish American colonies. The words in italics were clearly intended to have this effect. See 40 Parl. Deb. (1st series), 1084, 1091. The 'Salvador' [1870], L. R. 3 P.C. 218, 231.

(*l*) 4 F. & F. 25.

In R. *v.* Rumble (*m*), the indictment (under 59 Geo. III. c. 69) contained counts for causing, &c., men to enlist in the Confederate service as sailors, &c., and for counselling men here to enlist in that service abroad, and for assisting the equipment of a vessel for that service. An old iron steam gunboat dismantled of all her guns and warlike equipments, and stripped of her armour-plates, masts, spars, and sails, and with only her engines and boilers in her, was sold by the Government to a firm, who bought her with a view to her being engaged in the Confederate service. Leave was obtained from the Admiralty to have the vessel docked and repaired at Sheerness, and the defendant, who was one of the dockyard officials, had rendered every assistance. There were no warlike equipments done, but mere repairs or fittings as a mercantile vessel. The defendant had held himself out as engaging men on board the vessel for a trial trip previously to her going on a voyage to China, and had engaged men, or sent them on board to be engaged, as stokers, firemen, or engineers; but none of the men had any other idea than that the vessel was destined for China. The vessel went to Calais, and there the Confederate flag was hoisted, and officers came on board and took the command of her as a Confederate vessel, and the men were invited to enlist in the Confederate service, but most of them declined. The defendant was on board whilst the Confederate flag was flying, in company with the officers, and when he came back to Sheerness he continued to interest himself in sending men over for the service of the vessel, though only in connection with the locomotive power. The jury were directed—1. That the main question was, whether the defendant was a party to the engagement of the men with a view to enlistment in the Confederate service. 2. That the acts of the defendant after he must have been aware of the destination of the vessel, though not the subject-matter of the indictment, might be taken into consideration as throwing light upon the intention with which he did the acts in the earlier part of the transaction, which were the subject-matter of the indictment. 3. That the trifling repairs done to the engines, &c., did not amount to an equipment. 4. That if the defendant procured the men to enter into engagements nominally for a trial trip, but with the ulterior purpose on his part of getting them into a position in which they might be induced to enlist in the Confederate service, the defendant was guilty, but if his object in engaging the men was simply that the vessel should go out on a trial trip and come back, he was not guilty. 5. That the term 'sailors' in the statute included persons engaged as stokers, firemen, and engineers, for the purpose of navigating the vessel. 6. That there must be a hiring or enlistment in the United Kingdom to bring the case within the statute. 7. That such an offence must have been committed in England, or the offence of counselling its commission was not proved (*n*).

The building in pursuance of a contract, with intention to sell and deliver to a belligerent power, the hull of a vessel suitable for war, but unarmed and not equipped, or fitted out with anything which enables her to cruise or commit hostilities, or do any warlike act whatever, was not a violation of 59 Geo. III. c 69. The equipment forbidden by that

(*m*) 4 F. & F. 175.

(*n*) See R. *v.* Corbett, 4 F. & F. 555.

Act was an equipment of such warlike character as enables a ship on leaving a port of this kingdom to cruise or commit hostilities. (Per Pollock, C.B., and Bramwell, B.) If the character of equipment is doubtful, it may be explained by evidence of the intent of the parties. The Act includes a case where the equipment is such that, although the ship when it leaves a port in this kingdom is not in a condition at once to commit hostilities, it is yet capable of being used for war, and the intent is clear that it is to be used for war. (Per Channell, B.) Any act of equipping, furnishing, or fitting out done to the hull or vessel, of whatever nature or character that act may be if done with the prohibited intent, is within, the statute. (Per Pigott, B.) On the trial of an information respecting the seizure of a vessel in a port at Liverpool for an alleged violation of the Act for equipping her for the service of a belligerent state, Bramwell, B., was of opinion, that a right direction would be, that if the jury were satisfied that the parties concerned were equipping, or arming, or attempting to equip or arm, the ship claimed, with intent that it should be employed in the service of a foreign power to cruise or commit hostilities against others as alleged, they should find for the Crown; but such equipment or attempted equipment must be of a warlike character, so that by means of it the ship was in a condition more or less effective to cruise or commit hostilities; otherwise they must find for the claimants. Channell, B., was of opinion that the questions left to the jury should have been—1. Was there an intent, on the part of any one having a controlling power over the vessel, that she should be employed in the service of the Confederate States, to cruise or commit hostilities against the United States? 2. If so, was she equipped, fitted out, or furnished in a British port in order to be employed to cruise, &c.? 3. If not equipped, was there any attempt to equip her in a British port in order that she should be so employed? 4. Or did any one knowingly assist, &c., in such equipment in a British port? Pigott, B., said that the jury should have been directed to see—1. Whether the equippers or the purchasers had the prohibited intent; and, 2. Whether with such intent they had done any act towards equipping, furnishing, or fitting out the ship, beyond the mere work of building the hull of the vessel, or had attempted to do so (*o*).

B. The Foreign Enlistment Act, 1870.

In consequence of the defects in the Act of 1819, revealed by the decision in Attorney-General *v.* Sillem (*ubi sup.*), and of the report of a Royal Commission in 1867 (*p*), that Act was repealed on the outbreak of the Franco-German War in 1870, and was replaced by the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90) now in force. The preamble of that Act recites 'that it is expedient to make provision for the regulation of the conduct of His Majesty's subjects during the existence of hostilities between foreign states with which His Majesty is at peace.' The Act of 1870 extends to 'all the dominions of the King, including the adjacent territorial waters' (sect. 2) (*q*), and has been held to apply

(*o*) A.-G. *v.* Sillem, 2 H. & C. 431: 33 L. J. Ex. 92.

(*p*) Parl. Pap. (1867–8) c. 4027.

(*q*) See Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), *ante*, p. 41.

to British subjects everywhere, whether within the King's dominions or not (*r*), and to foreign subjects within the King's dominions (*s*). It came into operation in the United Kingdom immediately on its passing (August 9, 1870), 'and shall be proclaimed in every British possession by the Governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation' (sect. 3).

An indictment alleging that certain offences against the Act had been committed within the limits of Her Majesty's dominions and after the coming into operation of the Act, sufficiently avers the Act to have been in force in that part of Her Majesty's dominions in which the offences were alleged to have been committed. But proof must be given where necessary of proclamation in a British possession, *e.g.*, in one acquired after August 9, 1870 (*t*).

Illegal Enlistment.—By sect. 4, 'if any person (*u*), without the licence of His Majesty (*v*), being a British subject, within or without His Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with His Majesty (*vv*), and in this Act referred to as a friendly state, or, whether a British subject or not, within His Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid—

'He shall be guilty of an offence against this Act, and shall be punishable' as stated *post*, p. 292.

Sect. 5. 'If any person, without the licence of His Majesty, being a British subject, quits or goes on board any ship with a view of quitting His Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within His Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting His Majesty's dominions with the like intent, he shall be guilty of an offence against this Act, and shall be punishable' as stated *post*, p. 292.

Sect. 6. 'If any person induces any other person to quit His Majesty's dominions or to embark on any ship within His Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, he shall be guilty of an offence against this Act, and shall be punishable' as stated *post*, p. 292.

Sect. 7. 'If the master or owner of any ship, without the licence of His Majesty, knowingly either takes on board, or engages to take on

(*r*) R. *v.* Jameson [1896], 2 Q.B. 425, 430.

(*s*) R. *v.* Jameson, *ubi sup.* R. *v.* Sandoval, 10 Cox, 206.

(*t*) R. *v.* Jameson, *ubi sup.*

(*u*) It was held in King of Two Sicilies *v.* Willcox, 1 Sim. (N. S.) 334, 19 L. J. Ch. 488, that a corporation could not be indicted under the Act of 1819. It is submitted that corporations are within the Act of 1870, *vide ante*, pp. 3, 102.

(*v*) See s. 15, *post*, p. 293.

(*vv*) See Burton *v.* Pinkerton, L. R. 2 Ex. 340.

board or has on board such ship within His Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons ; that is to say—

(1) ' Any person who, being a British subject within or without the dominions of His Majesty, has, without the licence of His Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state ;

(2) ' Any person, being a British subject, who, without the licence of His Majesty, is about to quit His Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state ;

(3) ' Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state ;

' Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue ; that is to say,

(1) ' The offender shall be punishable ' as stated *post*, p. 292.

(2) ' Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace ; ' and

(3) ' All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.'

Illegal Shipbuilding and Illegal Operations.—Sect. 8. ' If any person within His Majesty's dominions, without the licence of His Majesty, does any of the following acts ; that is to say—

(1) ' Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state : or

(2) ' Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state : or

(3) ' Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state : or

(4) ' Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state ;

' Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue :

(1) ' The offender shall be punishable ' as stated *post*, p. 292.

(2) 'The ship in respect of which any such offence is committed, and her equipment shall be forfeited to His Majesty' (*w*):

'Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following: (that is to say).

(1) 'If forthwith upon a proclamation of neutrality being issued by His Majesty he gives notice to the Secretary of State, that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State:

(2) 'If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the licence of His Majesty until the termination of such war as aforesaid.'

Sect. 9. 'Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.'

Sect. 10. 'If any person within the dominions of His Majesty, and without the licence of His Majesty,—

'By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of His Majesty was a ship in the military or naval service of any foreign state at war with any friendly state,—such person shall be guilty of an offence against this Act, and shall be punishable' as stated *post*, p. 292.

Sect. 11. 'If any person within the limits of His Majesty's dominions, and without the licence of His Majesty,—

'Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

(1) 'Every person engaged in such preparation or fitting out, or

(*w*) Under this provision, in the 'Gauntlet,' L. R. 4 P.C. 184, a British steam tug was forfeited to the Crown for towing a prize taken by the French from the Germans from British territorial waters into French territorial waters. The judicial committee held that the engagement of the tug for the purposes above stated, amounted to despatching a ship for the purpose of taking part in the naval service of a belligerent.

assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable' as stated *infra*.

(2) 'All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to His Majesty.'

The offence created by this section is constituted by the purchase of guns and ammunition in this country and their shipment for a foreign port for the purpose of there being put on board a ship, with the knowledge of the purchaser and shipper that they are to be used in a hostile demonstration against such state, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port belonging to the King's dominions (*x*).

Where an expedition in contravention of this section is prepared by any person within the King's dominions, any British subject who assists in the preparation is guilty of an offence against the Act, even if his assistance is rendered from a place without the King's dominions (*y*).

Sect. 12. 'Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.'

Punishment.—Each of the sects. 4, 5, 6, 7, 8, 10, and 11 provides that an offence under the section shall be 'punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.'

By sect. 13, 'The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.'

Legal Procedure.—Sect. 16. 'Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within His Majesty's dominions in which the person who committed such offence may be' (*z*).

Sect. 17. 'Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within His Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.'

Sect. 18. 'The following authorities, that is to say, in the United Kingdom, any judge of a superior Court, in any other place within the jurisdiction of any British Court of justice, such Court or, if there are more Courts than one, the Court having the highest criminal jurisdiction in that place, may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender

(*x*) R. *v.* Sandoval, 16 Cox, 206. S. 11 applies to foreigners as well as to British subjects. See R. *v.* Sandoval, *ubi sup.*

(*y*) R. *v.* Jameson [1896], 2 Q.B. 425.

(*z*) Under the Act of 1819 offences committed out of the United Kingdom were triable only in the Court of K.B. at Westminster (59 Geo. III. c. 69, s. 3).

charged with an offence against this Act shall be removed to some other place in His Majesty's dominions for trial, in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

'Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

'Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.'

Sect. 19 directs how proceedings are to be taken for the condemnation and forfeiture of a ship, &c., for offences against the Act.

Sect. 20. 'Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any Court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.'

Sect. 14 provides for the restoration of illegal prizes brought into British ports.

Sect. 15 provides that for the purposes of this Act a licence by His Majesty shall be under the sign manual of His Majesty or be signified by Order in Council or by proclamation of His Majesty.

Sects. 21–26, and the following sections, enact that the Secretary of State and certain other persons, including the Lord-Lieutenant of Ireland and the Governors or Lieutenant-Governors of Man, the Channel Islands, and British possessions (sect. 26), may seize or detain any ship liable to be seized or detained in pursuance of this Act, and give them certain powers for such purpose. If there is no reasonable and probable cause for the detention, the High Court Admiralty Division may release the ship and order indemnity to the owner (sect. 23) (*a*).

Sect. 27 gives an appeal from decisions of a Court of Admiralty under the Act or in other Admiralty cases.

Sect. 28 gives an indemnity to officers and local authorities in respect of the seizure and detention of ships.

(*a*) In the 'International' [1871], L. R. 3 Adm. & Ecc. 321, release was ordered of a British ship, which during the Franco-German war was laying a submarine telegraph cable, under contract with the French Government, on the ground that the task on which the ship was engaged was not military or naval service within the Act, as the cable was not being laid expressly for furtherance of military operations.

Sect. 29. 'The Secretary of State shall not, nor shall the chief (*b*) executive authority be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness, except at his own request, in any Court of justice in respect of the circumstances which led to the issue of the warrant.'

Interpretation.—Sect. 30. 'In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

'"FOREIGN STATE" includes any foreign prince, colony, province or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people (*c*):

'"MILITARY SERVICE" shall include military telegraphy (*d*) and any other employment whatever, in or in connection with any military operation:

'"NAVAL SERVICE" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque:

'"UNITED KINGDOM" includes the Isle of Man, the Channel Islands, and other adjacent islands:

'"BRITISH POSSESSION" means any territory, colony, or place being part of His Majesty's dominions, and not part of the United Kingdom, as defined by this Act:

'"THE SECRETARY OF STATE" shall mean any one of Her Majesty's Principal Secretaries of State:

'"THE GOVERNOR" shall as respects India mean the Governor General or the Governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor General of the whole possession or the Governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a governor shall be included under the term "Governor":

'"COURT OF ADMIRALTY" shall mean the High Court of Admiralty of England or Ireland (*e*), the Court of Session of Scotland, or any Vice-Admiralty Court within His Majesty's dominions:

'"SHIP" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water:

'"BUILDING" in relation to a ship shall include the doing any act

(*b*) See s. 26, *ante*, p. 293.

(*c*) This contemplates the case of states in a condition of civil war.

(*d*) See the 'International,' L. R. 3 Adm. & Eccl. 321.

(*e*) These Courts are now merged in the High Court of Justice in England and Ireland.

towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly :

' " EQUIPPING " in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipment shall be construed accordingly :

' " SHIP AND EQUIPMENT " shall include a ship and everything in or belonging to a ship :

' " MASTER " shall include any person having the charge or command of a ship.'

It must be noted that most of these definitions contain the word ' include,' and do not restrict the words used in the prohibitory sections to the matters specifically mentioned in the definition (*f*).

Sect. 32. ' Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state (*g*), or give to any British Court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign state any jurisdiction which it would not have had if this Act had not passed ' (*h*).

Sect. 33. ' Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or licence as is for the time being required by law in the case of subjects of His Majesty entering into the military service of princes, states, or potentates in Asia ' (*i*).

It was held that the Act of 1819 created an offence against the State, and the Court (of Queen's Bench) refused to grant a criminal information for such offence on the application of a private prosecutor, leaving the case to be dealt with like other public offences (*j*).

(*f*) The ' Gauntlet,' L. R. 4 P. C. 184, 192.

(*g*) See the definition, *supra*, p. 294.

(*h*) See Dobree *v.* Napier, 2 Bing. (N. C.) 781.

(*i*) This section is taken from 59 Geo. III. c. 69, s. 12, with the omission of references to Indian governors.

(*j*) *Ex parte* Crawshaw, 8 Cox, 356. But see R. *v.* Granatelli, 7 St. Tr. (N. S.) 759.

CHAPTER THE FOURTH.

PUBLICATIONS CALCULATED TO INTERFERE WITH PEACEFUL RELATIONS WITH FOREIGN STATES.

Upon the ground that malicious and scurrilous reflections upon foreign sovereigns or their representatives may tend to involve this country in disputes, animosities, and warfare, it has been held that publications tending to degrade and defame such persons are indictable. Thus an information was filed, by the command of the Crown, for a libel on the French ambassador at the British court, consisting principally of angry reflections on his public conduct and fitness, and charging him with ignorance in his official capacity, and with having used stratagems to supplant and depreciate the defendant at the court of Versailles (*a*). Lord George Gordon was found guilty upon an information for having published severe reflections upon the Queen of France, in which she was represented as the leader of a faction, and on the French ambassador in London. Ashhurst, J., in passing sentence, said that the object of the publication being to rekindle animosities between England and France by the personal abuse of the sovereign of one of them, it was highly necessary to repress an offence of so dangerous a nature: and that such libels might be supposed to have been made with the connivance of the state where they were published, unless the authors were subjected to punishment (*b*). A defendant was found guilty upon an information charging him with having published the following libel: 'The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without freight' (*c*). And where the defendant was charged by an information with a libel upon Napoleon Buonaparte, Ellenborough, C.J., said to the jury: 'I lay it down as law, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly when it has a tendency to interrupt the pacific relations between the two countries' (*d*).

(*a*) R. *v.* D'Eon [1764], 1 W. Bl. 510; 3 Burr. 1516.

(*b*) R. *v.* Lord George Gordon [1787], 22 St. Tr. 177.

(*c*) R. *v.* Vint [1801], 27 St. Tr. 627.

(*d*) R. *v.* Peltier [1803], 28 St. Tr. 527. Holt on Libel, 78; 2 Starkie on Libel, 218. The defendant was convicted, but was never called upon to receive judgment. At the time of the prosecution there was peace between England and France. Soon after the trial war broke out again.

In R. *v.* Most (*e*) the defendant was convicted upon an indictment containing counts for libels on the sovereigns of Europe, published in a newspaper, encouraging assassination, and intended to create discord between the Queen and the said sovereigns. A case was stated on the sufficiency of this and other counts in the indictment. The conviction was affirmed with reference to counts charging incitement to assassination (*f*). Coleridge, L.C.J., said: 'This is not the less an endeavour to persuade, or an encouragement, to murder either named individuals or unnamed individuals because it is under another aspect of the law a seditious and scandalous libel' (*g*).

In R. *v.* Antonelli (*h*), Phillimore, J., said: 'Libels which bring persons into hatred or contempt may apply to persons outside the dominions of the King, because they are liable to bring the peaceful relations between states to an end. So Lord George Gordon was tried and punished for libelling Marie Antoinette, Queen of France' (*i*). But he added: 'Seditious libels are such as tend to disturb the government of this country, and in my opinion a document published here, which was calculated to disturb the government of some foreign country, is not a seditious libel, nor punishable as a libel at all. . . . To hold otherwise would be to hold that all the strong language used against the government of Turkey at the time of the Bulgarian rebellion was seditious libel, and it would make many of our great statesmen guilty of seditious libel, and those persons also who espoused the cause of Italian liberty.'

(*e*) [1881] 7 Q.B.D. 244.
(*f*) *Vide post*, p. 835.
(*g*) 9 Q.B.D. 253.
(*h*) [1905] 70 J. P. 4.
(*i*) *Ante*, p. 297.

CANADIAN NOTES.

Libel on Foreign Sovereign.—Code sec. 135.

CHAPTER THE FIFTH.

VIOLATION OF DIPLOMATIC PRIVILEGES.

By the Diplomatic Privileges Act, 1708 (7 Anne, c. 12 (*a*)), s. 3, ' . . . all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador or other public minister of any foreign prince or state, authorised and received as such by Her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void to all intents and purposes whatsoever.'

By sect. 4, ' . . . In case any person or persons shall presume to sue forth or prosecute any such writ or process, such person and persons and all attorneys and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted by the confession of the party or by the oath of one or more credible witness or witnesses before the Lord Chancellor or Lord Keeper of the Great Seal, the Chief Justice of the Court of Queen's Bench, the Chief Justice of the Court of Common Pleas, for the time being, or any two of them, shall be deemed violaters of the laws of nations and disturbers of the public repose, and shall suffer such pains, penalties, and corporal punishments as the said Lord Chancellor, Lord Keeper and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted.'

Sect. 5 excludes from the benefit of the Act any merchant or other trader within the bankruptcy statutes who 'shall put himself into the service of any such ambassador or public minister.' And sect. 6 prohibits proceedings for arresting the *servant* of an ambassador, unless the name of the servant is first registered in the office of one of the principal secretaries of state, and by him transmitted to the sheriffs of London and Middlesex.

There is no recorded case of a prosecution for breach of this Act: and consequently it has not been determined whether the expressions 'writ or process' are limited to civil proceedings or extend to criminal process. The Act is regarded as declaratory of the common law with reference to the privilege of diplomatic officers (*b*) and their suites. The immunity

(*a*) This statute, sometimes described as the Act of Apology, was passed in consequence of the arrest on civil process of the ambassador of Peter the Great to the Court of St. James'. See Phillimore Int. Law (2nd ed.), vol. ii. p. 228; Halleck Int. Law (4th ed.), vol. i. p. 362; Hall Int. Law (5th ed.) 172; Law Magazine (4th series), vol. xx. p. 43. There is in force in the United States a statute based on the Act of Anne: U. S. Rev. Statt. ss. 4062–4065, originally framed in 1790. See U. S. *v.* Ortega [1826], 11 Wheaton U. S. 467.

(*b*) The privilege is usually rested on the fiction of exterritoriality. See Musurus *v.* Gadban [1894], 1 Q.B. 533; [1894] 2 Q.B. 352. It is not limited to subjects of the nation sending the ambassador. Macartney *v.* Garbutt, 24 Q.B.D. 368.

recognised does not extend to consuls (*c*). Apart from this Act it seems to be accepted that diplomatic officers and their suites are, as a matter of amity if not of strict international law, privileged against prosecution for any breach of the criminal law of England (*d*), and such immunity has been claimed in respect of breaches of the law as to driving motor-cars, public health, and of a claim by coroners to hold inquests on persons dying in an embassy, or on diplomatic officials supposed to have committed suicide. The immunity is the privilege of the sovereign or state which accredits the officer, and might, it would seem, be waived by the sovereign (*d*).

(*c*) Viveash *v.* Becker, 3 M. & S. 284.

(*d*) Provisional arrest in extreme cases may be justified; or the offender may be handed his passports, or a request may be made for his recall for trial in his own country. Hall Int. Law (5th ed.) 172.

BOOK THE THIRD.

OF OFFENCES AGAINST THE SECURITY OF THE STATE.

PRELIMINARY.

THE offences of treason and treason-felony are not within the scope of this work (*a*), and attempts to interfere with government by tumultuous petitions and meetings to over-awe Parliament are dealt with under the title 'Riot' (*aa*).

CHAPTER THE FIRST.

OF SEDITION.

A. GENERAL DEFINITION OF THE OFFENCE.

SEDITION consists in acts, words, or writings intended or calculated, under the circumstances of the time (*b*), to disturb the tranquillity of the State, by creating ill-will, discontent, disaffection, hatred, or contempt towards the person of the King, or towards the Constitution or Parliament (*bb*), or the Government, or the established institutions of the country (*c*), or by exciting ill-will between different classes of the King's subjects (*d*), or encouraging any class of them to endeavour to disobey, defy, or subvert the laws (*e*) or resist their execution, or to create tumults or riots, or to do any act of violence or outrage or endangering the public peace (*f*).

When the offence is committed by means of writing, or print, or pictures (*g*), it is termed seditious libel.

The offence is a misdemeanor indictable at common law (*h*).

As to seditious conspiracy, *vide ante*, Book I., Chapter VI., and *post*, p. 332.

(*a*) See Archb. Cr. Pl. (23rd ed.), 928 *et seq.*

(*aa*) *Post*, Bk. vi. c. i., p. 409.

(*b*) R. *v.* Fussell [1848], 6 St. Tr. (N. S.) 723.

(*bb*) By vilifying or degrading them, see Holt, Libel, 86. R. *v.* Burdett, 4 B. & Ald. 95.

(*c*) R. *v.* Fussell, *ubi sup.*

(*d*) R. *v.* Burns, 16 Cox, 355, Cave, J., *post*, p. 302, and see 60 Geo. III. & 1 Geo. IV. c. 8, s. 1, *post*, p. 310.

(*e*) R. *v.* Collins, 9 C. & P. 456; 3 St. Tr. (N.S.) 1149. R. *v.* Grant, 7 St. Tr. (N.S.) 507. Steph. Dig. Cr. L. (6th ed.) art. 98. Odgers on Libel (4th ed.) 487.

(*f*) See R. *v.* Burdett [1820], 1 St. Tr. (N. S.) 1; 3 B. & Ald. 717; 4 B. & Ald. 95, 314. R. *v.* Cobbett [1831], 2 St. Tr. (N. S.) 789. R. *v.* Lovett, 9 C. & P. 462. R. *v.* Sullivan, 11 Cox, 44, 51. R. *v.* Jones [1848], 6 St. Tr. (N. S.) 783 (Chartists); and see per Crampton, J., R. *v.* O'Brien [1848], 6 St. Tr. (N. S.) 591n., and 6th Report, Criminal Law Commissioners (1841), p. 17, cited 6 St. Tr. (N. S.) 727.

(*g*) R. *v.* Sullivan, 11 Cox, 44, 51 (Ir.).

(*h*) R. *v.* Stroud, 3 St. Tr. 235.

In the case of a seditious libel it is doubtful whether at common law the offence is complete when the libel is composed, or whether it must be shewn that it was also published (*i*).

Seditious publications are not justified or excused by proof of the truth of the statements made (*i*).

According to the older authorities it is seditious wantonly to defame or indecorously to calumniate that economy, order, and constitution of things which make up the general system of the law and government of the country (*j*); and more particularly to degrade or calumniate the person and character of the sovereign (*k*), or the administration of his government by his officers and ministers of state (*l*), or the administration of justice by his judges (*m*), or the proceedings of either House of Parliament (*n*).

The present view of the law is best stated in R. *v.* Burns (*o*). In that case the defendants were charged in one count 'that they at Trafalgar Square with great numbers of other persons assembled and met together, and that they being wicked, malicious, and seditious persons, wickedly, maliciously, and seditiously contriving and intending the peace of our said lady the Queen, and of this realm, and of the liege subjects of our said lady the Queen, to disquiet and disturb, and the liege subjects of our said lady the Queen, to incite and to move to contempt, hatred, and dislike of the government established by law within this realm, and to incite and to move and persuade great numbers of the liege subjects of our said lady the Queen, to insurrections, riots, tumults, and breaches of the peace, and to stir up jealousies, hatred, and ill-will between different classes of the said liege subjects, and to prevent by force and arms the execution of the laws of this realm and the preservation of the public peace, on the day and in the year aforesaid, in the presence and hearing of divers of the liege subjects of our lady the Queen, to wit, the persons assembled together as aforesaid in Trafalgar Square as aforesaid and within the jurisdiction of the said Court, in a certain speech and discourse by him the said John Burns, then addressed to the said liege subjects so then assembled together as aforesaid, unlawfully, wickedly, maliciously, and seditiously, openly, and publicly did publish, utter, pronounce, and declare, and cause to be published, uttered, pronounced, and declared, with a loud voice of and concerning the government as established by law within this realm, and of and concerning the Commons House of Parliament, and the members thereof, and of and concerning divers liege subjects of our said lady the Queen, whose names are to the jurors aforesaid unknown, amongst other words and matters, the false, wicked, seditious, and inflammatory words and matter following, that is to say: [The words complained of were here set out] against the peace of our lady the Queen, her crown and dignity.'

(*i*) R. *v.* Burdett, 1 St. Tr. (N.S.) 1, 122, 138. R. *v.* Duffy, 2 Cox, 45. As to evidence after verdict in mitigation, see R. *v.* Burdett.

(*j*) Holt, Libel, 82.

(*k*) *Post*, p. 311.

(*l*) R. *v.* Lambert & Perry, 2 Camp. 398, 31 St. Tr. 335, *post*, p. 313.

(*m*) *Ante*, p. 154, *post*, p. 537. Odgers on Libel (4th ed.), 484.

(*n*) *Post*, p. 313.

(*o*) [1886], 16 Cox, 355. The first-named defendant became in 1906 President of the Local Government Board and a member of the Privy Council.

Another count charged the defendants with a conspiracy to speak seditious words and incite to sedition.

Cave, J., in charging the jury, said: 'It is now my duty to explain to you the rules of law which ought to govern you in considering this case, and also to summarise shortly for your benefit the evidence which has been given, so that you may have the less difficulty in applying the principles of the law to that evidence. There is undoubtedly no question at law of the right of meeting in public, and the right of free discussion is also perfectly unlimited, with the exception, of course, that it must not be used for the purpose of inciting to a breach of the peace or to a violation of the law. The law upon the question of what is seditious and what is not is to be found stated very clearly in a book by Stephen, J., who has undoubtedly a greater knowledge of criminal law than any other judge who sits upon the bench, and what he has said upon the subject of sedition was submitted to the other judges, who some time back were engaged with him in drafting a criminal code, and upon their report the commissioners say that his statement of law appears to them to be stated accurately as it exists at present. So that that statement has not only the authority of Stephen, J., but also the authority of the judges who were associated with him in preparing the criminal code. This is what he says on seditious words and libels: "Every one commits a misdemeanor who publishes verbally or otherwise words or any document with a seditious intention. If the matter so published consists of words spoken, the offence is called the speaking of seditious words." That is what we have to deal with to-day. "If the matter so published is contained in anything capable of being a libel the offence is called the publication of seditious libel" (*p*). The next question that one asks is this: There are two offences, one is the offence of speaking seditious words, and the other offence is the publication of a seditious libel. It is obviously important to know what is meant by the word "sedition," and Stephen, J., proceeds in a subsequent article to give a definition of it. He says: "A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs, or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State as by law established, or to raise discontent or disaffection amongst Her Majesty's subjects or to promote feelings of ill-will and hostility between different classes of such subjects." Stephen, J., goes on to point out what sort of intention is not seditious. "An intention to shew that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State as by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious

(*p*) Stephen, Dig. of Crim. Law (6th ed.), Arts. 96–98.

intention" (*q*). So there he gives in these two classes what is and what is not sedition. Now, the seditious intentions which it is alleged existed in the minds of the prisoners in this case are: First, an intention to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of some matter in Church or State as by law established; and secondly, to promote feelings of hostility between different classes of Her Majesty's subjects. This is necessarily somewhat vague and general, particularly the second portion, which says it is a seditious intention to intend to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects. I should rather prefer to say, that the intention to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention according to circumstances, and of those circumstances, the jury are the judges; and I put this question to the Attorney-General in the course of the case: "Suppose a man were to write a letter to the papers attacking bakers and butchers generally with reference to the high prices of bread or meat, and imputing to them that they were in a conspiracy to keep up high prices,—would that be a seditious libel, being written and not spoken?" To which the Attorney-General gave me the only answer which it was clearly possible to give under the circumstances: "That must depend upon the circumstances." I, sitting here as a judge, cannot go nearer than that. Any intention to excite ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention; whether in a particular case this is a seditious intention or not, the jury must judge and decide in their own minds, taking into consideration the whole of the circumstances of the case. You may not unnaturally say that that is a somewhat vague statement of the law, and ask by what principle shall we be governed in deciding when an intention to excite ill-will and hostility is seditious, and when it is not. For your guidance, I will read to you what was said by Fitzgerald, J., in the case of R. *v.* Sullivan (*r*), which was a prosecution for a seditious libel, the only difference between the two cases being, of course, that while seditious speeches are spoken a seditious libel is written, but in each of them the adjective "seditious" occurs, and what is a seditious intention in one case will equally be a seditious intention in the other. He said: "As such prosecutions are unusual, I think it necessary in the first instance to define sedition and point out what is a seditious libel. Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval." It has been said very truly that there is no such offence as sedition itself, but it takes the form of seditious language either written or spoken, and it is in that sense of course that the learned judge's words are intended to be understood. "Sedition itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection, and to stir up opposition to the government, and bring the

(*q*) Stephen, Dig. Crim. Law (6th ed.), Art. 98.

(*r*) 11 Cox, 44 (Ir.).

administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as seditious all those practices which have for their object to excite discontent or disaffection, to create public disturbances, or to lead to civil war; to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder." Then a little further on he says: "Words may be of a seditious character, but they might arise from sudden heat, be heard only by a few, create no lasting impression, and differ in malignity and permanent effects from writings. Sir Michael Foster said of the latter (*s*): 'Seditious writings are permanent things, and if published they scatter the poison far and wide. They are acts of deliberation, capable of satisfactory proof, and not ordinarily liable to misconstruction; at least they are submitted to the judgment of the Court naked and undisguised, as they came out of the author's hands.' That points to the nature of the distinction between seditious writings and words, and also points to the difference in the effect which they have, and the extent to which that effect goes, though of course in regard to seditious words, there may be a very great distinction between words uttered to two or three companions in social intercourse, and words uttered to a large multitude." That language the learned judge spoke when he was charging the grand jury upon the subject. When he came to sum up the case to the jury who were actually trying it, after a true bill had been found, he said, and perhaps this is more apposite in shewing the spirit in which you ought to deal with the present case so far as you can: "I invite you to deal with the case, which is a grave and important case, in a fair, free, and liberal spirit. In dealing with the articles you should not pause upon an objectionable sentence here, or a strong word there. It is not mere strong language, such as 'desecrated a court of justice,' or tall language, or turgid language that should influence you. You should, I repeat, deal with the articles in a free, fair, and liberal manner. You should recollect that to public political articles great latitude is given (*t*). Dealing as they do with the affairs of the day, such articles if written in a fair spirit, and *bona fide*, often result in the production of great public good. Therefore I advise and recommend you to deal with these publications in a spirit of freedom, and not to view them with an eye of narrow criticism. Again, I say you should not look merely to a strong word or a strong phrase, but to the whole article, and so regarding each article, you should recollect that you are the guardians of the liberty of the press, and that whilst you will check its abuse, you will preserve its freedom. You will recollect how valuable a blessing the liberty of the press is to all of us,

(*s*) The Editors have been unable to trace this quotation.

(*t*) See R. *v.* Burdett, 1 St. Tr. (N. S.) 1, where the jury were told to consider whether a written address to the electors of Warwickshire relating to the Peterloo meeting at Manchester contained a sober address to the reason of mankind as to the conduct of the military in suppressing a riot, or was an appeal to their passions inciting them to violence and outrage. In R. *v.* Collins (9 C. & P. 456), 3 St. Tr. (N. S.) 1149, Littledale, J., in dealing with a placard containing resolutions of a body known as the General Convention told the jury that the question was whether the resolutions were a calm discussion of the conduct of the police in repressing a riot in the Bull Ring at Birmingham or were meant to incite to the use of physical force.

and sure I am, that that liberty will meet no injury, suffer no diminution at your hands. Viewing the case in a free, bold, manly, and generous spirit toward the defendant, if you come to the conclusion that the publications indicted are not seditious libels, or were not published in the sense imputed to them, you are bound, and I ask you in the name of free discussion, to find a verdict for the defendant. I need not remind you of the worn-out topic to extend to the defendant the benefit of the doubt. If on the other hand, on the whole spirit and import of these articles, you are obliged to come to the conclusions that they are seditious libels, and that their necessary consequences are to excite contempt of Her Majesty's Government, or to bring the administration of the law into contempt and impair its functions,—if you come to that conclusion either as to the articles or prints, or any of them, then it becomes your duty honestly and fearlessly to find a verdict of conviction upon such counts as you believe are proved." Now, that language was used, as I have said, in reference to a seditious libel, but changing the language so as to apply it to a speech, the principles thus laid down are clearly applicable to the case which you have now got before you. And,—although as a judge I can tell you no more than that the intention to incite ill-will amongst the different classes of Her Majesty's subjects may be seditious, and that it is for you to decide,—I confess I should, if I were sitting amongst you as a juryman, go on to say something of this kind which you would or would not listen to, according as you found it to be quite in reason. It is not a matter of law which you are bound to take from me, but it is merely a matter which you would say to each other; if you think that these defendants, from the whole matter laid before you, had a seditious intention to incite the people to violence, to create public disturbances and disorder, then undoubtedly you ought to find them guilty. If from any sinister motive, as, for instance, notoriety, or for the purpose of personal gain, they desired to bring the people into conflict with the authorities, or to incite them tumultuously and disorderly to damage the property of any unoffending citizen, you ought undoubtedly to find them guilty. On the other hand, if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed,—if they had a real *bona fide* desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment. Some persons are more led on, more open to excitement than others, and one of the defendants, Burns, even when he was defending himself before you, so prone was he to feeling strongly what he does feel, could not refrain from saying that he was unable to see misery and degradation without being moved to strong language and strong action. I mention that to you to shew you the kind of man he is, and for the purpose of seeing (if you come to the conclusion that he was honestly endeavouring to call the attention of the authorities to this misery, and honestly endeavouring to keep within the limits of the law and the constitution) that you should not be too strong to mark if he made use of an ill-considered, or too strong an expression. Now, I come to the particular charge which is made against these men. It

divides itself roughly into two heads. There is, first, the charge that they uttered certain words upon the occasion of this demonstration, and that is separated into nine counts, and then there comes a general charge which involves the whole of them, namely, that they agreed together before they went to this meeting that they would make speeches with the intention of exciting the people to disorder. I am unable to agree entirely with the Attorney-General when he says that the real charge is that, though these men did not incite or contemplate disorder, yet as it was the natural consequence of the words they used, they are responsible for it. In order to make out the offence of speaking seditious words, there must be a criminal intent upon the part of the accused, they must be words spoken with a seditious intent, and although it is a good working rule, to say that a man must be taken to intend the natural consequence of his acts, and it is very proper to ask a jury to infer, if there is nothing to shew the contrary, that he did intend the natural consequences of his acts, yet, if it is shewn from other circumstances, that he did not actually intend them, I do not see how you can ask a jury to act upon what has then become a legal fiction. I am glad to say that with regard to this matter, I have the authority again of Stephen, J., who, in his "History of the Criminal Law," has dealt with this very point; he deals with it in reference to the question of seditious libel. He says (*u*): "To make the criminality of an act dependent upon the intention with which it is done, is advisable in those cases only in which the intent essential to the crime is capable of being clearly defined and readily inferred from the facts. Wounding, with intent to do grievous bodily harm, breaking into a house with intent to commit a felony, abduction with intent to marry or defile, are instances of such offences. Even in these cases, however, the introduction of the term 'intent' occasionally led either to a failure of justice or to the employment of something approaching to a legal fiction in order to avoid it. The maxim that a man intends the natural consequences of his acts is usually true, but it may be used as a way of saying that, because reckless indifference to probable consequences is morally as bad as an intention to produce those consequences, the two things ought to be called by the same name, and this is at least an approach to a legal fiction. It is one thing to write with a distinct intention to produce disturbances, and another to write violently and recklessly matter likely to produce disturbances" (*uu*). Now, if you apply that last sentence to the speaking of words, of course it is precisely applicable to the case now before you. It is one thing to speak with the distinct intention to produce disturbances, and another thing to speak recklessly and violently of what is likely to produce disturbances. I must, however, notwithstanding what I have said upon that subject, go on to tell you that it is not at all necessary to the offence of uttering seditious words that an actual riot should follow, that there should be an actual disturbance of the public peace; it is the uttering with the intent which is the

(*u*) Vol. ii. p. 359.

(*uu*) See R. *v.* Cobbett [1831], 2 St. Tr. (N. S.) 789, where Tenterden, C.J., ruled that the question for the jury was whether the natural tendency of an article in the *Weekly Register* was to manifest the design alleged in the indictment, viz. to create discontent and incite to violence with reference to firing stacks and breaking threshing machines.

offence, not the consequences which follow, and which have really nothing to do with the offence. A man cannot escape from the consequences of uttering words with the intent to excite people to violence solely because the persons to whom they are addressed may be too wise or too temperate to be seduced into that violence. That has, however, no important bearing in this case. If you come to the conclusion that language was used by the defendants or any of them upon the occasion of that meeting in Trafalgar Square, and that it was their intention to excite the people to violence, to a breach of the law, why then that would undoubtedly be the uttering of seditious words. And I apprehend that the Attorney-General was anxious to fortify himself with this, that the actual disturbances were the natural consequence of what was said, and for perhaps more than one reason. In the first place the Government undoubtedly declined to prosecute on the assumption that the defendants had actually incited to the particular disturbances, and although that as I have said is not at all necessary or essential to the procuring of a conviction, yet undoubtedly that is the moral justification, so to say, the grounds upon which the Government do place the action which they take, and therefore if they can shew, or if you are satisfied that these disturbances, although not contemplated by the defendants, were the natural consequence of their acts, although that has nothing at all to do with the charge which we are engaged in investigating, yet it does affect in some way the position which the Government desire to take up. There is another point, however, which does affect the question which you have to try, and it is this, as to the language used by the defendant, Was it used with the intention to produce violence? As something no doubt may be gathered from the effect which was actually produced, there does come a point when one must say, "This was so violent and reckless that it is impossible to conceive that the man who uttered this did not intend the consequence which must ensue from it." Again, there is another passage of Stephen, J.'s, book, where he says (*v*): "If a meeting is held for the purpose of speaking seditious words to those who may attend it, those who take part in that design are guilty of a seditious conspiracy." Now in order to have a conspiracy you must have an agreement formed beforehand between the parties in that conspiracy, that they will hold or have a meeting, and that the words there spoken shall be words of sedition. As I have said, I do not see any evidence that at all points to any such conspiracy, and I certainly should recommend you strongly not to pay any further attention to that part of the case. But the Attorney-General says, and very properly, although there may have been no previous conspiracy, yet when people do go to a meeting there are circumstances under which a man may be responsible not only for what he says, but also for what some one else says. Now what are those circumstances? Stephen, J., says: "If at a meeting lawfully convened seditious words are spoken, of such a nature as are likely to produce a breach of the peace, that meeting may become unlawful, and all those who speak the words undoubtedly are guilty of uttering seditious words, and those who do anything to help those who speak to produce upon the hearers the natural

(*v*) Hist. Crim. Law, ii. 386.

effect of the words spoken." You must do something more than stand by and say nothing; if you express approval of the statements of speakers who utter seditious language that equally will do; if you make a speech calculated to help that part of the speech made by some one else, and which excited to disorder; if you do anything to help that part of the effect upon the hearers, then undoubtedly you will be guilty of uttering seditious words just as if you spoke them yourself. But there must be something of that kind. If one man uses seditious words at a meeting, those who stand by and do nothing, although they do not reprobate them, are not guilty of uttering seditious words. Those even who make a speech themselves are not guilty of uttering seditious words unless you can gather from the language they use that they are endeavouring to assist the other man in carrying out that portion of his speech, and by that course endeavouring to assist him in causing his words, which excite to disorder, to produce their natural effect upon the people.' [The learned judge then reviewed the evidence given on the part of the prosecution and the defence, and pointed out that there was considerable difficulty in separating and apportioning the different elements which contributed to the riots, that public meetings and public discussions always attracted together numbers of rough persons, members of criminal classes, and other persons not dishonest, but noisy and disorderly, and who would take advantage of the absence of the police to break windows and street lamps, and do other mischief of that kind, and that it was impossible to say that any disorder that arose was necessarily due to speeches made by persons who were themselves orderly, because of the presence of the disorderly elements of the crowd who had collected together, and, in conclusion, said:] 'I must now leave you to apply the principles of law I have laid down to the facts which have been laid before you. I have to remind you of what you are asked to say. What you are asked to decide on is whether the prisoners—all of them, or some of them, and if some of them, which of them—did upon this occasion, in Trafalgar Square, incite the people whom they were addressing to redress their grievance by violence. Did they intentionally incite ill-will between different classes in such a way as to be likely to lead to a disturbance of the public peace? I have already told you that you must take a broad and even a generous view of the whole of the case presented to you. You must not attach too much importance to isolated phrases, but you must look at the general gist of the matter. You must consider the object which took them there, the way they set about attaining it, and you must also consider to some extent, as throwing some light upon your decision, whether the riots which actually took place were the natural consequences of speeches delivered on that occasion. I cannot conclude without expressing my sense of the extreme folly of those who seek to incite the people to violence. And for this reason: There has been no period of history where violence was so practically useless. The Government being in the hands of the people, none can hope to carry out by force views which he might be able to effect by prudence and consistency, and by legal and legitimate means. And therefore, to incite people to use force is to expose foolish men, and men who do not see the danger they run, to

a conflict with the authorities, with the certainty that they will have to pay with grievous loss of life' (*w*).

Trial and Punishment.—Sedition is not triable at quarter sessions (*x*). Seditious libel may be tried in the county in which it was composed, if composed for publication, or in the county where it is published (*y*). At common law the punishment of sedition is by fine, or imprisonment without hard labour, or both (*z*), with or without recognisances, with sureties for good behaviour (*a*). There is no statutory limit to the term of imprisonment or the amount of the fine. Persons sentenced to imprisonment for sedition or seditious libel are to be treated as offenders of the first division (*b*). By the Criminal Libel Act, 1820 (*c*) (60 Geo. III. & 1 Geo. IV. c. 8), provisions are made as to seditious libels 'tending to bring into hatred or contempt the person or government of His Majesty, or the government or constitution of the United Kingdom as by law established, or either House of Parliament, or to excite His Majesty's subjects to attempt the alteration of any matter in Church or State as by law established otherwise than by lawful means' (sect. 1). 'Any person legally convicted of having composed, printed, or published any such seditious libel, as aforesaid, and shall, after being so convicted, offend a second time, and be thereof legally convicted before any Commission of Oyer and Terminer or Gaol Delivery, or in the King's Bench Division of the High Court of Justice, may, on such second conviction, be adjudged at the discretion of the Court to suffer such punishment as may now (December 30, 1820) by law be inflicted in cases of high misdemeanors' . . . (sect. 4) (*d*). Power is given in case of verdict or judgment by default for the Court in which the verdict is taken or in which the judgment is had, to order search for and seizure of all copies of the libel in the possession of the defendant, or of any other person sworn to have copies in his possession for the use of the defendant. The order for search may be executed by a justice or constable (sect. 2). Copies seized under the order are disposed of after final judgment as the Court may order, but returned if judgment is arrested or on error revised (sect. 3).

No form of sedition can be justified at common law or under the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 6, by proof of the truth of the matters published (*e*), the gist of the offence being in the intent to do one or other of the matters stated in the definition (*f*).

It seems to be unnecessary to use the words 'seditious' or 'seditiously' in the indictment if the offence charged is by other words specifically indicated (*g*). Seditious libel seems to be within sect. 7 of the Libel Act,

(*w*) The jury returned a verdict of not guilty.

(*x*) 5 & 6 Vict. c. 38, s. 1, 'offences against the king's title, prerogative, person, or government.' *Post*, Bk. xii. c. i.

(*y*) R. *v.* Burdett, 1 St. Tr. (N. S.) 1, 154, and see *ante*, p. 52.

(*z*) R. *v.* Stroud, 3 St. Tr. 235.

(*a*) *Ex parte* Seymour *v.* Davitt, 15 Cox, 242.

(*b*) 40 & 41 Vict. c. 21, s. 40, as amended by 61 & 62 Vict. c. 41, s. 6, *vide ante*, p. 213.

(*c*) For returns as to prosecutions between 1821 and 1834, see 1 St. Tr. (N. S.) 1385.

(*d*) The power to banish an offender on second conviction was repealed in 1830 (11 Geo. IV. & 1 Will. IV. c. 73, s. 1). As to certificates of conviction see 60 Geo. III. & 1 Geo. IV. c. 8, s. 7, *post*, Bk. xiii. 'Evidence.'

(*e*) R. *v.* Duffy, 6 St. Tr. (N. S.) 303; 2 Cox, 45. *Ex parte* O'Brien, 15 Cox, 180. R. *v.* Franklin [1731], 17 St. Tr. 626.

(*f*) *Ante*, p. 301.

(*g*) R. *v.* McHugh [1901], 2 Ir. Rep. 569.

1843, enabling the defendant to displace a presumptive case of publication by his authority (*h*), and is within the rules applying to privileged communications in the case of defamatory libel (*i*). Fair comment on public matters has been held not a defence (*j*). *Bona fide* belief in the truth of the matters stated may mitigate punishment but is no defence (*k*). Under Fox's Act (*l*) the jury are entitled to return a general or special verdict, as they choose.

B. *Publications against the King.*

Common Law.—Bare words, not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason (*m*), though words may expound an overt act, and shew with what intent it was done (*n*). Generally speaking, any words, acts, or writing in respect of the public acts or private conduct (*o*) of the King which tend to vilify or disgrace the King, or to lessen him in the esteem of his subjects, or any denial of his right to the crown, even in common and unadvised discourse, may be punished as sedition (*p*).

Statute.—By the Succession to the Crown Act, 1707 (*q*), it is declared treason to write or print against the Succession of the Crown as established by the Acts of Settlement (*r*) and of Union with Scotland (*s*).

In R. *v.* Lambert (*t*), the defendant was charged with having published a libel to the following effect: 'What a crowd of blessings rush upon one's mind, that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular.' Lord Ellenborough, C.J., in summing up the case to the jury, said, that the first sentence of this passage would easily admit of an innocent interpretation; that the fair meaning of the expression 'change of system' was a change of political system,—not a change in the frame of the established government, but in the measures of policy which had been for some time pursued; and that by total change of system was certainly not meant *subversion* or *demolition*, the descent of the crown to the successor of His Majesty being mentioned

(*h*) *Post*, p. 1040: R. *v.* Bradlaugh, 15 Cox, 218. As to this section see R. *v.* Holbrook, 3 Q.B.D. 60; 4 Q.B.D. 42.

(*i*) R. *v.* Gray, 10 Cox, 184 (Ir.). 1 Will. & M. sess. 2, c. 2; 3 & 4 Vict. c. 84 (Parliament); 51 & 52 Vict. c. 64, ss. 3, 4 (Newspapers); *post*, pp. 1047, 1049.

(*j*) R. *v.* McHugh, *ubi sup.*

(*k*) R. *v.* Burdett, 1 St. Tr. (N. S.) 1.

(*l*) 32 Geo. III. c. 60, ss. 1, 3.

(*m*) 1 East, P. C. 117.

(*n*) Crohagan's case, Cro. Car. 332.

(*o*) St. John's case, Noy, 105.

(*p*) Shebbeare's case, Holt on Libel, 88; 3 T. R. 430n. R. *v.* Clerk, 1 Barnard. (K.B.), 304; 1 Hawk. c. 6. R. *v.* Wilkes, 4 Burr. 2527; 19 St. Tr. 1075. 4 Bl. Com. 123; Odgers on Libel (4th ed.), 482. The old statutes *de scandalis magnatum*, 3 Edw. I. c. 34; 2 Rich. II. st. 1, c. 5; 12 Rich. II. c. 11, prohibited telling or publishing any false news or tales whereby discord or occasion of discord or slander might grow between the King and the people. They were repealed in 1887 (52 & 53 Vict. c. 59). It is said to have been resolved by all the judges that all writers of false news are indictable and punishable (4 Read. St. L. Dig. L. L. 23). See Odgers on Libel (4th ed.), 430.

(*q*) 6 Anne, c. 41 (c. 7 in Ruffhead's edition); and see other statutes for the purpose of guarding the King's character and title, cited in 2 Starkie on Libel, 171, 2nd ed.

(*r*) 1 & 2 Will. & M. sess. 2, c. 2; 12 & 13 Will. III. c. 2.

(*s*) 6 Anne, c. 11.

(*t*) 2 Camp. 398; 31 St. Tr. 340.

immediately after. He proceeded: 'If a person who admits the wisdom and virtues of His Majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade His Majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step further, and say or insinuate that His Majesty acts from any partial or corrupt view or with an intention to favour or oppress any individual or class of men, and it would become most libellous.' Upon the second sentence, after stating that it was more equivocal, and telling the jury that they must determine what was the fair import of the words employed, not in the more lenient or severe sense, but in the sense fairly belonging to them, and which they were intended to convey, Lord Ellenborough proceeded: 'Now do these words mean, that His Majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the passage only means that His Majesty, during his reign, or any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations, or the system of our internal policy; if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel.' And again, towards the conclusion of his address, his Lordship said: 'The question of intention is for your consideration. You will not distort the words, but give them their application and meaning as they impress your minds. What appears to me most material is the substantive paragraph itself (*u*); and if you consider it as meant to represent that the reign of His Majesty is the only thing interposed between the subjects of this country and the possession of great blessings which are likely to be enjoyed in the reign of his successor, and thus to render His Majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If on the contrary you do not see that it means distinctly, according to your reasoning, to impute any purposed maladministration to His Majesty, or those acting under him, but may be fairly construed as an expression of regret that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men.'

Falsely publishing that King George III. was labouring under mental derangement was held to be an offence on the ground that it tended to unsettle and agitate the public mind, and to lower the respect due to the King (*v*).

As to libel by defaming a deceased sovereign, see R. *v.* Hunt (*w*).

(*u*) This libel was published in a newspaper; and it had been allowed to the defendant to have read in evidence an extract from the same paper connected with the subject of the passage claimed as libellous, although disjoined from it by extraneous matter, and printed in a different character.

(*v*) R. *v.* Harvey, 2 B. & C. 257; 2 St. Tr. (N. S.) 1. Malice will be implied from such wilful defaming without excuse.

(*w*) 2 St. Tr. (N. S.) 69, where the indictment was for the publication of Byron's 'Vision of Judgment'; see *post*, p. 1026.

C. *Publications against the Constitution.*

By an Act of 1662 (13 Car. II. st. 1, c. 1), s. 3, the penalties of *praemunire* are incurred by persons who maliciously and advisedly, by writing, printing, preaching, or express words, declare that Parliament has legislative authority without the King. And by an Act of 1707 (6 Anne, c. 41), s. 2, a like penalty is incurred by persons who maliciously or advisedly by preaching, teaching, or express words, maintain or affirm that any person has title to the crown otherwise than in accordance with the Act of Settlement. Prosecutions under these Acts are narrowly limited (*x*), and are, in fact, never undertaken.

Apart from these Acts, under the law of sedition as now interpreted there is perfect liberty to deride the constitution or to advocate its alteration, provided that the advocacy is not calculated or intended to produce civil commotion or insurrection (*y*).

The following rulings are here retained as giving a view of the law once held, but now unlikely to be adopted (*z*). It appears to have been adjudged, that though no indictment lay for saying that the laws of the realm were not the laws of God, because true it is that they are not the laws of God; yet that it would be otherwise to say that the laws of the realm are contrary to the laws of God (*z*). And a defendant was convicted on an information charging him with having published, concerning the government of England and the traitors who adjudged King Charles the First to death, that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion (*a*). In another case a person was convicted for publishing a libel, in which it was suggested that the revolution was an unjust and unconstitutional proceeding, and that the limitation established by the Act of Settlement was illegal, and that the revolution and settlement of the crown as by law established had been attended with fatal and pernicious consequences to the subjects of the kingdom (*b*).

D. *Publications against Parliament.*

Both Houses of Parliament have and exercise the power of treating libels against them as breaches of their privileges, and vindicating them in the nature of contempts: and more cases of such libels are to be met with in their journals than in the proceedings of the Courts of law (*c*).

(*x*) 13 Car. II. st. 1, c. 1, s. 1, prosecution to be within six months and by order of King or Privy Council (s. 4). 6 Anne, c. 41 prosecution within three days; two credible witnesses.) Sacheverell's case [1709], 15 St. Tr. 1.

(*y*) See R. *v.* Burns, *ante*, p. 302. But see the Criminal Libel Act, 1820, *ante*, p. 310.

(*z*) See Odgers, Libel (4th ed.), 488.

(*a*) R. *v.* Harrison [1677], 3 Keb. 841; Vent. 324; Dig. L. L. 66. Dr. Odgers, *l. c.* 488, suggests that the case was decided under 13 Car. II. st. 1, c. 1, *supra*. A treatise upon hereditary right was held criminal, though it contained no reflection upon any part of the then government. R. *v.* Bedford [1713], Gilb. 297; 2 Str. 789 cit.

(*b*) R. *v.* Nutt [1754], Dig. L. L. 126, and see Dr. Shebbeare's case, 3 T. R. 430n.; Holt on Libel, 88; and R. *v.* Paine [1792], 22 St. Tr. 358; Holt on Libel, 88, 89; 2 Starkie on Libel, 164.

(*c*) They are collected in May, Parl. Pr. (11th ed.), pp. 76 *et seq.* The extent to which these powers are possessed by colonial legislatures is considered in Odgers on Libel (4th ed.), 492.

But publications reflecting upon the members or proceedings of the Houses of Parliament are also punishable by the ordinary Courts (*d*). In R. *v.* Stockdale (*e*), the Attorney-General in his speech to the jury, after stating the address of the House of Commons to the King, praying that His Majesty would direct the information to be filed, proceeded thus: 'I state it as a measure which they have taken, thinking it in their wisdom, as every one must think it, to be the fittest to bring before a jury of their country an offender against themselves, avoiding thereby, what sometimes indeed is unavoidable, but which they wish to avoid whenever it can be done with propriety, the acting both as judges and accusers, which they must necessarily have done, had they resorted to their own powers, which are great and extensive, for the purposes of vindicating themselves against insult and contempt, but which in the present instance they have wisely forborne to exercise, thinking it better to leave the offender to be dealt with by a fair and impartial jury.'

E. *Publications against the Government.*

The measures of the King and his advisers, and the proceedings and policy of his government, may be criticised within due limits without incurring the penalties of sedition. Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper go beyond that limit, and be calculated to excite tumult, it is a libel (*f*). This right extends to the press (*g*).

But the discussion of political measures cannot lawfully be made a cloak for an attack upon private character. Libels on persons employed in a public capacity may tend to scandalise the government by reflecting on those who are entrusted with the administration of public affairs; for they not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned to acts of revenge, but also have a direct tendency to incline the people to faction and sedition (*h*). And if a publication has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel (*i*).

(*d*) In R. *v.* Rayner, 2 Barnard. (K.B.), 293, the defendant was convicted of printing a scandalous libel on the Lords and Commons. And see R. *v.* Owen [1752], 18 St. Tr. 1203; MS. Dig. L. L. 67. In R. *v.* Stockdale [1788], 22 St. Tr. 238, an information was filed by the Attorney-General for a libel upon the House of Commons. A prosecution was also instituted in R. *v.* Reeves [1796], in consequence of a resolution of the House of Commons, declaring a pamphlet, published by the defendant, to be a libel. In the pamphlet, which was called 'Thoughts on the English Government,' there was this passage amongst others which the House deemed libellous—'That the King's government might go on if the Lords and Commons were lopped off.' In all these cases the jury acquitted the defendants.

(*e*) 22 St. Tr. 238, 247.

(*f*) R. *v.* Collins, 9 C. & P. 456; 3 St. Tr. (N. S.) 1149, Littledale, J. See the opinion expressed by the Attorney-General in R. *v.* Lambert & Perry [1793], 22 St. Tr. 953, 990, *ante*, p. 311.

(*g*) R. *v.* Sullivan, 11 Cox, 50, 54, Fitzgerald, J.

(*h*) 1 Hawk. c. 73, s. 7. Bac. Abr. tit. 'Libel' (A) 2. R. *v.* Franklin, 17 St. Tr. 626.

(*i*) R. *v.* Lovett, 9 C. & P. 462, Littledale, J.

According to certain rulings, it is seditious to publish any matter tending to possess the people with an ill opinion of the government. In R. *v.* Tuchin (*j*), Holt, C.J., said: 'This is a very strange doctrine to say that it is not a libel reflecting on the government, endeavouring to possess the people that the government is maladministered by corrupt persons that are employed in such stations, either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If men should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished' (*j*).

This decision, if taken literally, is inconsistent with liberty of political opinion (*k*). And in R. *v.* Cobbett (*l*), where the defendant was charged with publishing a libel upon the administration of the Irish government, and upon the public conduct and character of the Lord Lieutenant and Lord Chancellor of Ireland, Ellenborough, C.J., in his address to the jury, said: 'It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime; it has ever been considered as a crime, whether wrapt in one form or another. The case of R. *v.* Tuchin, decided in the time of Lord Chief Justice Holt, has removed all ambiguity from this question; and, although at the period when that case was decided great political contentions existed, the matter was not again brought before the judges of the Court by any application for a new trial.' And afterwards his Lordship said: 'It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. But, gentlemen, we must confine ourselves within limits. If in so doing individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation.'

(*j*) [1704] 14 St. Tr. 1095; cas. *temp.* Holt, 424.

(*k*) See Odgers on Libel (4th ed.), 486.

(*l*) [1804] 29 St. Tr. 1; Holt on Libel, 114, 115. And see 2 Starkie on Libel, 193, where see in the note other cases referred to.

CANADIAN NOTES.

OF SEDITION.

Definition.—Code sec. 132.
Seditious Intention.—Code sec. 133.
Punishment.—Code sec. 134.
Publishing False News.—Code sec. 136.

The publication of a placard stating that settlers from the United States are not wanted in Canada is an injury to the public interest and under sec. 136 of the Code the person wilfully and knowingly publishing such false statement is properly convicted of spreading false news. R. v. Hoaglin, 12 Can. Cr. Cas. 226.

CHAPTER THE SECOND.

OF WRONGFULLY OBTAINING OR DISCLOSING PUBLIC SECRETS.

THE Official Secrets Act, 1889 (*a*) (52 & 53 Vict. c. 52), deals with two classes of offence: (1) what is called *espionnage*, in obtaining secret information; (2) breach of official trust by persons in the service of the State.

The Act provides as follows :—

Sect. 1.—' (1) (*a.*) Where a person for the purpose of wrongfully obtaining information—

(i.) enters or is in any part of a place belonging to His Majesty the King, being a fortress, arsenal, factory, dockyard, camp, ship, office, or other like place, in which part he is not entitled to be ; or

(ii.) when lawfully or unlawfully in any such place as aforesaid, either obtains any document, sketch, plan, model, or knowledge of anything which he is not entitled to obtain, or takes without lawful authority any sketch or plan ; or

(iii.) when outside any fortress, arsenal, factory, dockyard, or camp belonging to His Majesty the King, takes or attempts to take without authority given by or on behalf of His Majesty, any sketch or plan of that fortress, arsenal, factory, dockyard, or camp ; or

(*b.*) where a person knowingly having possession of, or control over any such document, sketch, plan, model, or knowledge as has been obtained or taken by means of any act which constitutes an offence against this Act at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interest of the State, to be communicated at that time ; or

(*c.*) where a person after having been entrusted in confidence by some officer under His Majesty the King with any document, sketch, plan, model, or information relating to any such place as aforesaid, or to the naval or military affairs of His Majesty, wilfully and in breach of such confidence communicates the same when, in the interest of the State, it ought not to be communicated ;

he shall be guilty of a misdemeanor, and on conviction be liable to

(*a*) This Act was passed in consequence of the communication to the Press by a Government clerk of the secret clauses of the Anglo-Russian agreement. See R. *v.* Guernsey, 1 F. & F. 394; 337 Hansard Parl. Deb. 321. A bill to extend the application of the Act was introduced in 1908, but was not passed.

imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine, or to both imprisonment and a fine.

'(2) Where a person having possession of any document, sketch, plan, model, or information relating to any fortress, arsenal, factory, dockyard, camp, ship, office, or other like place belonging to His Majesty, or to any naval or military affairs of His Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person to whom he knows the same ought not, in the interest of the State, to be communicated at that time, he shall be guilty of a misdemeanor, and be liable to the same punishment as if he committed an offence under the foregoing provisions of this section.

'(3) Where a person commits any act declared by this section to be a misdemeanor, he shall, if he intended to communicate to a foreign State any information, document, sketch, plan, model, or knowledge obtained or taken by him, or entrusted to him as aforesaid, or if he communicates the same to any agent of a foreign State, be guilty of felony, and on conviction be liable at the discretion of the Court to penal servitude for life, or for any term not less than five years (*b*), or to imprisonment for any term not exceeding two years, with or without hard labour.'

Breach of Official Trust.—By sect. 2, '(1) Where a person by means of his holding or having held an office under His Majesty the King, has lawfully or unlawfully either obtained possession of or control over any document, sketch, plan, or model, or acquired any information, and at any time corruptly or contrary to his official duty communicates or attempts to communicate that document, sketch, plan, model, or information to any person to whom the same ought not, in the interests of the State, otherwise in the public interest, to be communicated at that time, he shall be guilty of a breach of official trust.

'(2) A person guilty of a breach of official trust shall—

(*a.*) if the communication was made or attempted to be made to a foreign State, be guilty of felony, and on conviction be liable at the discretion of the Court to penal servitude for life, or for any term not less than five years (*b*), or to imprisonment for any term not exceeding two years, with or without hard labour; and

(*b.*) in any other case be guilty of a misdemeanor, and on conviction be liable to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine, or to both imprisonment and a fine.

'(3) This section shall apply to a person holding a contract with any department of the government of the United Kingdom, or with the holder of any office under His Majesty the King as such holder, where such contract involves an obligation of secrecy, and to any person employed by any person or body of persons holding such a contract, who is under a like obligation of secrecy, as if the person holding the contract and the person so employed were respectively holders of an office under His Majesty the King.'

By sect. 3, 'Any person who incites or counsels, or attempts to

(*b*) Now not less than three years; see 54 & 55 Vict. c. 69, s. 1, *ante*, p. 211.

procure, another person to commit an offence under this Act, shall be guilty of a misdemeanor, and on conviction be liable to the same punishment as if he had committed the offence' (*Vide ante*, Chapter V.).

By sect. 4, '*The expenses of the prosecution of a misdemeanor under this Act shall be defrayed in like manner as in the case of a felony*' (*c*).

By sect. 5, 'If by any law made before or after the passing of this Act by the legislature of any British possession provisions are made which appear to His Majesty the King to be of the like effect as those contained in this Act, His Majesty may, by Order in Council, suspend the operation within such British possession of this Act, or of any part thereof, so long as such law continues in force there, and no longer, and such order shall have effect as if it were enacted in this Act:

Provided that the suspension of this Act, or of any part thereof, in any British possession shall not extend to the holder of an office under His Majesty the King who is not appointed to that office by the Government of that possession.

'The expression "British possession" means any part of His Majesty's dominions not within the United Kingdom' (*d*).

By sect. 6, '(1) This Act shall apply to all acts made offences by this Act when committed in any part of His Majesty's dominions or when committed by British officers or subjects elsewhere.

'(2) An offence under this Act, if alleged to have been committed out of the United Kingdom, may be inquired of, heard, and determined, in any competent British Court in the place where the offence was committed, or in His Majesty's High Court of Justice in England or the Central Criminal Court, and the Criminal Jurisdiction Act, 1802 (42 Geo. III. c. 85) (*e*), shall apply in like manner as if the offence were mentioned in that Act, and the Central Criminal Court as well as the High Court possessed the jurisdiction given by that Act to the Court of King's Bench.

'(3) An offence under this Act shall not be tried by any Court of general or quarter sessions, nor by the Sheriff Court in Scotland, nor by any Court out of the United Kingdom which has not jurisdiction to try crimes which involve the greatest punishment allowed by law' (*f*).

By sect. 7, '(1) A prosecution for an offence against this Act shall not be instituted except by or with the consent of the Attorney-General.

'(2) In this section the expression "Attorney-General" means the Attorney or Solicitor General for England; and as respects Scotland, means the Lord Advocate; and as respects Ireland, means the Attorney or Solicitor General for Ireland; and if the prosecution is instituted in any Court out of the United Kingdom, means the person who in that Court is Attorney-General, or exercises the like functions as the Attorney-General in England.'

By sect. 8, 'In this Act, unless the context otherwise requires—

'Any reference to a place belonging to His Majesty the King includes a place belonging to any department of the Government of the United

(*c*) S. 4 is repealed as to England by 8 Edw. VII. c. 15, s. 9, *post*, Bk. xii. c. v.

(*d*) Orders in Council were made in 1890 as to Jersey and the Isle of Man.

(*e*) *Vide post*, Bk. xiii. c. iv.

(*f*) Subs. 4 excludes the application of the Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 Vict. c. 20).

Kingdom or of any of His Majesty's possessions, whether the place is or is not actually vested in His Majesty;

'Expressions referring to communications include any communication, whether in whole or in part, and whether the document, sketch, plan, model, or information itself or the substance or effect thereof only be communicated;

'The expression "document" includes part of a document;

'The expression "model" includes design, pattern, and specimen;

'The expression "sketch" includes any photograph or other mode of representation of any place or thing;

'The expression "office under His Majesty the King" includes any office or employment in or under any department of the Government of the United Kingdom, and so far as regards any document, sketch, plan, model, or information relating to the naval or military affairs of His Majesty, includes any office or employment in or under any department of the Government of any of His Majesty's possessions.'

By sect. 9, 'This Act shall not exempt any person from any proceeding for an offence which is punishable at common law, or by military or naval law, or under any Act of Parliament other than this Act, so, however, that no person be punished twice for the same offence' (*g*).

The Census Act, 1900 (63 & 64 Vict. c. 4), and the Census (Inland) Act, 1900 (63 & 64 Vict. c. 6), each contain the following clause (*h*)—

> 'If any person employed in taking the census communicates without lawful authority any information acquired in the course of his employment, he shall be guilty of a breach of official trust within the meaning of the Official Secrets Act, 1889 (*i*), and that Act shall apply accordingly.'

There are few recorded instances of prosecution under the Act of 1889 (*j*).

(*g*) Cf. Interpretation Act, 1889, s. 33, *ante*, p. 4.

(*h*) c. 4, s. 11 (3): c. 5, s. 7 (3).

(*i*) In s. 2, *ante*, p. 318.

(*j*) See R. *v.* Stuart, 63 J.P. 712, an indictment for inciting to disclose official secrets.

CANADIAN NOTES.

Wrongfully Obtaining or Publishing Public Secrets.—Code sec. 85.
Breach of Official Trust—Code sec. 86.
Prosecution.—Code sec. 592.

CHAPTER THE THIRD.

OF SEDUCING SOLDIERS AND SAILORS TO MUTINY.

THE Incitement to Mutiny Act, 1797 (37 Geo. III. c. 70), was passed in consequence of the attempts of evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, to seduce soldiers and sailors from their duty and allegiance to the Crown. It enacts (sect. 1) that 'any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony . . .' (*a*). By sect. 3, 'any person who shall be tried and acquitted or convicted of any offence against this Act shall not be liable to be indicted, prosecuted or tried again for the same offence or fact as high treason or misprision of high treason; and that nothing in this Act contained shall be construed to extend to prevent any persons guilty of any offence against the Act, and who shall not be tried for the same as an offence against this Act from being tried for the same as high treason, or misprision of high treason, in such manner as if this Act had not been made' (*b*). By sect. 2, 'any offence committed against this Act, whether committed on the high seas or within that part of Great Britain called England, shall, and may, be prosecuted and tried before any Court of Oyer and Terminer, or Gaol Delivery, for any county in that part of Great Britain called England (*c*), in such manner and form as if the said offence had been therein committed' (*d*).

The Punishment of Offences Act, 1837 (7 Will. IV. & 1 Vict. c. 91), s. 1, after reciting the above Act, provides that 'if any person shall' (after the 1st of October, 1837) 'be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported (*e*) beyond the seas for the term of the natural life of such person. . . . Mutiny appears to mean 'collective insubordination' (*f*).

A sailor in a sick hospital, where he had been for thirty days, and

(*a*) For present punishment, *vide infra*.
(*b*) *Vide ante*, p. 4.
(*c*) The Act does not apply to Ireland.
(*d*) *Vide ante*, p. 31.
(*e*) Now penal servitude for life or not less than three years, or imprisonment with or without hard labour for not more than two years (20 & 21 Vict. c. 3, s. 2; 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212). Other provisions of 7 Will. IV. and 1 Vict. c. 91, as to minimum term of transportation, and as to imprisonment, hard labour and solitary confinement, are superseded and repealed.
(*f*) See Manual of Military Law (ed. 1903), p. 20.

who therefore was not entitled to pay, nor liable for what he then did to answer before a court-martial, is nevertheless a person serving in His Majesty's forces by sea within this statute, so as to make the seducing him an offence within its provisions (*g*).

An indictment upon this statute need not set out *the means* used for seducing the soldier from his duty and allegiance; and it need not aver that the prisoner *knew* the person endeavoured to be seduced *to be a soldier*. It seems also that a double act, namely, that the prisoner endeavoured to incite a soldier to commit mutiny, and also to commit traitorous and mutinous practices, may be charged in one count of the indictment (*h*).

The Act of 1797 mainly concerns civilians. Mutiny, &c., by persons in the army or navy is punished under other Acts.

By the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), it is made a capital offence (i.) for persons subject to the Act to join in mutiny with violence, or treacherously to fail to do his best to suppress such mutiny (sect. 10) or to be ringleader in mutiny (sect. 11) without violence; (ii.) for any person on board a King's ship whether otherwise subject to the Act or not, to endeavour to seduce from his allegiance to His Majesty any person subject to the Act (sects. 12–13); (iii.) for any person, subject to the Act, to endeavour to incite any other person, subject to the Act, to commit any act of mutiny (sect. 12).

The punishment of penal servitude may be awarded—

(1) For failing from cowardice to use utmost effects to suppress mutiny with violence (sect. 10).

(2) To join in any mutiny without violence, or to fail to do their utmost to support it (sect. 11).

(3) To make, or endeavour to make, a mutinous assembly (sect. 14).

(4) Wilfully to conceal any traitorous or mutinous practice (sect. 15).

By sect. 7 of the Army Act (*i*), persons subject to military law (*j*), who cause, or conspire to cause, mutiny in any forces belonging to the regular, reserve, or auxiliary forces, or navy, are liable on conviction by court-martial to suffer death (*k*).

(*g*) R. *v.* Tierney [1804], R. & R. 74.

(*h*) R. *v.* Fuller, 2 Leach, 790; 1 East, P. C. 92; 1 B. & P. 180.

(*i*) 44 & 45 Vict. c. 58, continued annually by the Army Annual Act.

(*j*) See Official Manual of Military Law (ed. 1903).

(*k*) Sect. 153. Persons inducing soldiers to desert are liable to summary conviction. See also 45 & 46 Vict. c. 49, s. 25 (militia); 45 & 46 Vict. c. 48, s. 17 (reserve forces); 7 Edw. VII. c. 9, s. 28 (territorial forces).

CANADIAN NOTES.

Of Seducing Soldiers and Sailors to Mutiny.—Code sec. 81.

Indictment.—Overt acts must be stated. Code sec. 847. The Court may not amend so as to add to the overt acts stated. Code sec. 847(2).

Evidence.—None shall be admitted of overt acts not stated in the indictment. Code sec. 847.

CHAPTER THE FOURTH.

OF AIDING THE ESCAPE OF PRISONERS OF WAR (*a*).

THE Prisoners of War Escape Act, 1812 (52 Geo. III. c. 156), enacts, sect. 1, that 'every person who shall (after 29 July, 1812) knowingly and wilfully aid or assist any alien enemy of His Majesty, being a prisoner of war in His Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in His Majesty's dominions or any part thereof on his parole, to escape from such prison or other place of confinement, or from His Majesty's dominions, if at large upon parole, shall upon being convicted thereof be adjudged guilty of felony, and be liable to be transported as a felon for life, or for such term of fourteen or seven years as the Court before whom such person shall be convicted shall adjudge' (*b*).

Sect. 2. 'Provided always that . . . every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of His Majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of His Majesty's dominions, shall be deemed guilty of aiding the escape of such person under the provisions of this Act.'

Sect. 3. 'If any person or persons owing allegiance to His Majesty, after any such prisoner as aforesaid hath quitted the coast of any part of His Majesty's dominions in such his escape as aforesaid, shall knowingly and wilfully upon the high seas aid or assist such prisoner in his escape to or towards any other dominions or place, such person shall also be adjudged guilty of felony, and be liable to be transported as aforesaid;' and such offences committed upon the high seas, and not within the body of any county, may be tried in any county within the realm (*c*). Before this Act, upon an indictment for misdemeanor in unlawfully aiding and assisting a prisoner at war to escape, where it appeared that such prisoner was acting in concert with those under whose charge he was placed, in order to effect the detection of the defendant, who was supposed to have been instrumental in the escapes of other prisoners, and the prisoner in question neither escaped nor intended to escape: it was held that the offence was not complete, and that a conviction for such offence was therefore wrong (*d*).

(*a*) This subject was in the last edition classified with offences against justice.

(*b*) Now penal servitude for life or for not less than three years, or imprisonment with or without hard labour for not over two years (*vide ante*, pp. 211, 212). As to punishment of accessories, *vide ante*, p. 130.

(*c*) By s. 4, the Act is not to prevent offenders from being prosecuted, as they might have been if the Act had not been passed; but no person prosecuted otherwise than under the provisions of the Act is to be liable to be prosecuted for the same offence under the Act; and no person prosecuted under the Act is, for the same offence, to be otherwise prosecuted: *vide ante*, p. 4.

(*d*) R. *v.* Martin [1811], R. & R. 196.

CANADIAN NOTES.

Of Aiding Escape of Prisoners of War.—Code sec. 186.

CHAPTER THE FIFTH.

OF UNLAWFUL OATHS, COMBINATIONS, AND CONFEDERACIES.

SECT. I.—OF VOLUNTARY OATHS.

THIS section would perhaps be more properly associated with official misconduct, but is here included as being of use for comparison with the subsequent sections relating to 'unlawful oaths.'

Voluntary Oaths.—Coke says (3 Inst. 165): 'oaths that have no warrant by law are rather *nova tormenta quam sacramenta:* and it is a high contempt to minister an oath without warrant of law, to be punished by fine and imprisonment.' In Bramat *v.* Fire Insurance Co. (*a*), Kenyon, C.J., said: 'he did not know but that a magistrate subjects himself to a criminal information by taking a voluntary extra-judicial affidavit.' In R. *v.* Eadon (*b*), in speaking of the Unlawful Oaths Act, 1797, Le Blanc, J., said: 'That which always was before a crime or misdemeanor, the administering even an idle oath by a person not having authority to administer an oath, was by that Act made more penal.'

The Statutory Declarations Act, 1835 (5 & 6 Will. IV c. 62), s. 13, after reciting that 'a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace, or other person by whom such oaths or affidavits have been administered or received,' and that 'doubts have arisen whether or not such proceeding is illegal, for the more effectual suppression of such practice and removing such doubts,' enacts, 'that from and after the commencement of this Act, it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: provided always, that 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 offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation

(*a*) [1800] K.B. Burn's Justice, by Chetwynd, vol. iii. 529. And see 4 Bl. Com. 137, and R. *v.* Edgar, 33 St. Tr. 151n.

(*b*) [1813] 31 St. Tr. 1069.

which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively' (*c*).

The first count of an indictment upon the above enactment charged that the defendant, being a justice of the peace, did unlawfully administer to and receive from J. H. a certain voluntary oath touching certain matters and things whereof the defendant had not jurisdiction or cognisance by any statute. The second and third counts slightly varied, and the fourth count negatived the proviso in sect. 13. There were other counts charging the defendant with administering oaths to two other persons. The defendant had made a complaint to the bishop against two clergymen. The defendant obtained statements from the three persons mentioned in the indictment, and swore them before himself, as a justice of the peace, to the truth of the statements. It appeared that the defendant was ignorant of the statute rendering the administering voluntary oaths illegal. It was contended that the enacting part of the statute must be construed with reference to the preamble. Coleridge, J., in summing up, said, he was of opinion that the enacting part of the statute was not governed by the preamble; that he considered the enacting part of the section and the proviso preserved to justices of the peace all the jurisdiction they had, as well at the common law as by statute, to administer oaths; and that the inquiry before the bishop was clearly a matter in respect of which the defendant had no jurisdiction, either at common law or by statute. He directed the jury, that, if they were satisfied the defendant did administer the oaths, they should find him guilty. The jury found the defendant 'guilty of *inadvertently* administering an oath or oaths'; and Coleridge, J., held that that was a verdict of guilty (*d*). But the judgment was afterwards arrested by the Court of Queen's Bench upon the ground that the indictment was bad since it did not in any count shew what the nature of the oath was. There ought to have been a distinct allegation of the subject-matter of the oath, shewing affirmatively that it was out of the jurisdiction of the magistrate. The question was matter of law for the Court, and though, in the opinion of the majority of the Court, it was not necessary to set out the whole of the oath (*e*), still the facts should have been so stated as to enable the Court to form its opinion upon the question whether the oath was within the jurisdiction of the magistrate or not.

The indictment in this case could be justified as being for a *wilful*

(*c*) As to when a justice may administer an oath outside the county, &c., for which he is commissioned, see Paley (8th ed.), 18–24. A distinction seems to be drawn between voluntary or ministerial and coercive or judicial proceedings. 2 Hawk. c. 47; 2 Hale, 51. Helier *v.* Hundred of Benhorse, Cro. Car. 211; W. Jones, 239. And see R. *v.* All Saints, Southampton, 7 B. & C. 788. Bosanquet *v.* Woodford, 5 Q.B. 310.

(*d*) R. *v.* Nott, 4 Q.B. 768. It was argued that the defendant on the finding of the jury had been guilty of no offence. Denman, C.J., said: 'If the statute in terms create an offence, all persons are bound to know it. But if a statute enacts something, without in terms making it an offence, and you would convict a person of misdemeanor in having disobeyed such an enactment, are you not bound to shew that the disobedience was wilful, and in the nature of a contempt?' But no opinion was pronounced on this point.

(*e*) The Acts of 1797 and 1812 contain express provisions on this point (see *post*, p. 330). It would therefore be prudent to set out the whole oath, if practicable, in some counts.

disobedience of the command of a statute as a matter of public concern (*f*).

Sect. II.—Oaths to Commit Treason, Felony, &c.

The Unlawful Oaths Act, 1797 (37 Geo. III. c. 123), recites that 'wicked and evil disposed persons have of late attempted to seduce persons serving in His Majesty's forces by sea and land and others of His Majesty's subjects from their duty and allegiance to His Majesty, and to incite them to acts of mutiny (*g*) and sedition, and have endeavoured to give effect to their wicked and traitorous proceedings by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered' (*h*). From this preamble it appears as if the statute were mainly directed against combinations for purposes of mutiny (*h*) and sedition: but in the enacting part, after dealing with offences of that description, it goes on in much more extensive terms, and embraces other more general objects. Sect. 1 enacts, 'that any person or persons who shall in any manner or form whatsoever administer or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace, or to be of any association, society or confederacy formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons or to or by any other person or persons, or the import of any such oath or engagement, shall on conviction thereof by due course of law be adjudged guilty of felony, and may be transported for any term of years not exceeding seven (*i*) years; and every person who shall *take* any such oath or engagement, not being compelled thereto, shall on conviction thereof by due course of law be adjudged guilty of felony, and may be transported for any term of years not exceeding seven (*i*) years.'

The question was raised whether this Act applied to the unlawful administering of an oath by an associated body of men to a person, purporting to bind him not to reveal or discover an unlawful combination or conspiracy of persons, nor any illegal act done by them (*j*), the object of the association being a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. It was contended

(*f*) R. *v.* Price, 11 A. & E. 727, 738, Denman, C.J., *vide ante*, p. 12.

(*g*) *Vide* 37 Geo. III. c. 70, *ante*, p. 321.

(*h*) The recitals in the preamble refer to the mutinies at Spithead and the Nore in 1797. See Annual Register, 1797, p. 209.

(*i*) Now penal servitude for not more than seven nor less than three years or imprisonment with or without hard labour for not more than two years (54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212).

(*j*) The oath was, 'You shall be true to every journeyman shearman, and not to hurt any of them, and you shall not divulge any of their secrets; so help you God.'

that the words of the statute, however large in themselves, must be confined to the object stated in the preamble; and could not have been intended to reach a case where it was plain that the fact arose entirely out of a private dispute between persons engaged in the same trade, and was confined in its object to that alone; and that the general words therefore must be construed with relation to the antecedent offences, which are confined in their objects to mutiny and sedition. But the Court, though they did not upon the particular circumstances feel themselves called upon to give an express decision, appear to have entertained no doubt but that the case was within the statute (*k*).

Sixteen persons, with their faces blackened, met at a house at night, having guns with them, and intending to go out for the purpose of night poaching, and were all sworn not to betray their companions. It was objected that this oath was not within the statute, as it was not for a mutinous or seditious object, and that the statute only prohibited those oaths of secrecy which related to some illegal act, and that the word 'illegal' imported a criminal act, and not a mere civil trespass, whereas it was a mere civil trespass which was contemplated at the time when the oath was administered. It was held that the oath was within the statute; and as to the assembly itself, and its object, it was impossible that a meeting to go out with faces thus disguised, at night, and under such circumstances, could be other than an unlawful assembly: in which case, the oath to keep it secret was an oath prohibited by the statute (*l*). An oath administered to the members of a trades' union, binding them not to make buttons for less than the lodge prices, and not to divulge the secrets of the lodge, was held to be an oath within the statute; because to administer an oath or engagement not to reveal the secrets of any association is within the Act of 1797, as explained by subsequent statutes, not because it had reference to any matter respecting wages, but on the ground that every association of that kind, bound together by an oath, not to disclose the proceedings of that society, was for that reason an unlawful combination within the statutes (*m*).

An oath not to reveal what they saw or heard administered by members of an association, formed for the purpose of raising wages by a general strike on the part of its members, and for other purposes in furtherance of that design, was held to be within the Act of 1797 (*n*).

In R. *v.* Eadon (*o*), the prisoner was indicted under the Act of 1797 for administering to R. H. an oath taken by R. H. and intended to bind him to be of an association, society, and confederacy formed to disturb the public peace. The second count stated the oath to be intended to bind R. H. not to give evidence against any associate or confederate in such association. In other counts the word 'engagement' was

(*k*) R. *v.* Marks, 3 East, 157. Lawrence, J., said: 'It is true that the preamble and the first part of the enacting clause are confined in their objects to cases of mutiny and sedition; but it is nothing unusual in Acts of Parliament for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggests the necessity of the law.'

(*l*) R. *v.* Brodribb, 6 C. & P. 571, Holroyd, J.

(*m*) R. *v.* Ball, 6 C. & P. 563, Williams, J.

(*n*) R. *v.* Lovelass, 1 M. & Rob. 349, Williams, J. See R. *v.* Dixon, 6 C. & P. 601, Bosanquet, J.

(*o*) [1813] 31 St. Tr. 1064.

substituted for 'oath.' The oath or engagement in question related to the Luddites, an organisation arising out of disputes in the stocking and lace trades, which broke the new machinery then coming into use in the stocking, lace, cotton, and woollen manufactures, and committed other acts of violence and destruction.

The evidence (*p*) proved the administering and taking of the oath, and the only question was whether R. H. took it in joke or in earnest. Le Blanc, J., ruled that if it was proved that the prisoner administered the oath without any mental reservation, and with the intention that it should be obligatory, the prisoner would be guilty, even if R. H. had merely taken the oath for the purpose of deluding the prisoner, and without meaning to bind his conscience (*q*).

The Unlawful Oaths Act, 1812 (52 Geo. III. c. 104), passed to render the Act of 1797 more effectual in respect to oaths of a particular nature, enacts (sect. 1), that 'every person, who shall in any manner or form whatsoever administer or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason (*r*) or murder, or any felony punishable by law with death, shall on conviction thereof by due course of law, be adjudged guilty of felony . . . (*s*), and every person who shall *take* any such oath or engagement, not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and shall be transported as a felon for the term of his natural life (*t*), or for such term of years as the Court before which the said offender or offenders shall be tried shall adjudge.'

Persons taking the oaths mentioned in either of these Acts by compulsion must make a full disclosure of the fact, and the circumstances attending it, within a limited time, in order to be justified or excused. The Act of 1797 (sect. 2) enacts, that 'compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall, within *four days* after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she shall know touching the same, and the person or persons by whom and in whose presence and when and where such oath or engagement was administered or taken, by information on oath before one of His Majesty's justices of the peace or one of His Majesty's principal secretaries of state or His Majesty's privy council, or in case the person taking such oath or engagement shall be in actual service in His Majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer.' The Act of 1812

(*p*) Ibid. pp. 1068, 1073.

(*q*) See also R. *v.* Baines [1813], 31 St. Tr. 1074.

(*r*) See R. *v.* Edgar [1817], 33 St. Tr. 145. R. *v.* M'Kinley [1817], 33 St. Tr. 275; for trials in Scotland under this Act for administering oaths to commit treason. The oaths were in aid of a combination for adult male suffrage and annual Parliaments.

(*s*) The punishment of death originally imposed for this offence was abolished in 1837 by 7 Will. IV. & 1 Vict. c. 91, s. 1. The punishment is now penal servitude for life, or for not less than three years, or imprisonment, with or without hard labour, for not more than two years (7 Will. IV. & 1 Vict. c. 91, s. 2; 54 & 55 Vict. c. 69, s. 1 (1), (2), *ante*, pp. 211, 212).

(*t*) Now penal servitude for not more than seven nor less than three years, or imprisonment (54 & 55 Vict. c. 69, s. 1 (1), (2), *ante*, pp. 211, 212).

(sect. 2) contains a similar enactment as to oaths or engagements within that Act, except that the words '*fourteen days*' are substituted for 'four days.'

By sect. 5 of the Act of 1797, 'any engagement or obligation whatsoever in the nature of an oath,' and by sect. 6 of the Act of 1812, any engagement or obligation whatsoever in the nature of an oath purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, 'shall be deemed an oath within the intent and meaning of' those Acts, 'in whatever form or manner the same shall be administered or taken: and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.'

If the oath administered was intended to make the party believe himself under an engagement, it is equally within the Acts, whether the book made use of be a testament or not (*u*). So the precise form of the oath is immaterial; it is an oath within the meaning of the Acts, if it was understood by the party tendering, and by the party taking it, as having the force and obligation of an oath (*v*).

Accessories, Aiders and Abettors.—The Act of 1797 enacts (sect. 3), that persons aiding and assisting at, or present and consenting to, the administering or taking of any oath or engagement before mentioned in that Act; and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such; although the person or persons who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted. By the Act of 1812 (sect. 4), 'persons aiding and assisting at the administration of any such oath or engagement as aforesaid, and persons causing any such oath or engagement to be administered, though not present at the administering thereof, shall be deemed principal offenders, and on conviction thereof by due course of law shall be adjudged guilty of felony . . . (*w*) although the persons or person who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted' (*x*).

Both statutes provide that it shall not be necessary to set forth in the indictment 'the words of the oath or engagement;' and that 'it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof' (*y*). In an indictment on the Act of 1797, the fourth count charged that the defendants administered to J. H. an oath 'intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace for any act or expression of his or theirs done or made collectively or individually, in or out of that or other similar societies, in pursuance of the

(*u*) R. *v.* Brodribb, 6 C. & P. 571, Holroyd, J., where an account book, called *The Young Man's Best Companion*, was used.

(*v*) R. *v.* Lovelass, 1 M. & Rob. 349, Williams, J.

(*w*) Death penalty abolished by 7 Will. IV. & 1 Vict. c. 91, s. 1. See note (*s*), *ante*, p. 329.

(*x*) As to accessories, *vide ante*, pp. 104 *et seq.*

(*y*) 37 Geo. III. c. 123, s. 4; 52 Geo. III. c. 104, s. 5.

spirit of that obligation'; and the eighth count stated the oath to be 'intended to bind the said J. H. not to give evidence against any associate in certain associations and societies of persons formed for seditious purposes'; and the other counts stated the objects of the oath administered, and the objects of the society, differently and more generally adapted to several prohibitory parts of the statute. Upon objection taken at the trial to the generality of the statements in the indictment, Lord Alvanley was of opinion that the Act intended that it should be sufficient to allege and prove what the object of the oath and engagement was, without stating any words at all; and that the offence being described in the words of the Act, was well described; but that supposing the objection made to the generality of the counts was good, which he did not admit, yet that in the fourth and eighth a material part of the oath or engagement was set forth according to the terms of the Act. The point was submitted to the judges, who, without giving any opinion against the other counts, all agreed that the fourth and eighth counts were good (*z*).

If the indictment states the oath to have been not to inform or give evidence against any person belonging to a confederacy of persons associated together to do 'a certain illegal act,' it is sufficient without going on to state what the illegal act was: for the offence is not the illegal act, but the administration of the oath, which preceded it, and all that the rules of pleading require is that the offence—that is the oath itself—should be sufficiently described (*a*). Where an indictment charged that the prisoner administered 'a certain oath' to J. P. and fifteen others, naming them, and it was proved that the sixteen were all sworn in the same manner, on the same book, two or three at a time, at the same meeting, it was held that this was sufficient, for it was the same act of administering. Or it might be taken to be a complete transaction with respect to each person sworn; and the charge would be substantiated by evidence of the prisoner having sworn any one of the party, in the same way as a man may be convicted of larceny on proof of stealing one out of several articles named in an indictment (*b*).

Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered it, said that he held a paper in his hand at the time when he administered the oath, from which paper it was *supposed* that he read the words; it was held that parol evidence of what he in fact said was sufficient, without giving him notice to produce such paper (*c*). And where the oath on the face of it did not purport to be for a seditious purpose, though it was objected that no parol evidence could be given to shew that the '*brotherhood*' mentioned in it was of a seditious nature, it was held that declarations made at the time by the party administering such oath were admissible to prove the real object of it (*d*).

Both Acts provide that offences committed on the high seas, or out of the realm, or in England, shall and may be prosecuted, tried, and determined before any Court of Oyer and Terminer or Gaol Delivery for any

(*z*) R. *v.* Moors, 6 East, 419, note (*b*).
(*a*) R. *v.* Brodribb, 6 C. & P. 571, Holroyd, J.
(*b*) Ibid.
(*c*) R. *v.* Moors, 6 East, 421.
(*d*) Id. ibid.

county in England in such manner and form as if such offence had been therein committed (*e*).

Both Acts also provide that 'any person who shall be tried and acquitted or convicted of any offence against' the Acts, 'shall not be liable to be prosecuted again for the same offence or fact as high treason, or misprision of high treason; and that nothing in the' Acts 'contained shall be construed to extend to prevent any person guilty of any offence against' the Acts, 'and who shall not be tried for the same as an offence against' the Acts, 'from being tried for the same, as high treason, or misprision of high treason, in such manner as if' those Acts 'had not been made' (*f*).

Neither Act extends to Ireland; but very similar provisions are made by the Unlawful Oaths (Ireland) Acts of 1810 (50 Geo. III. c. 102, ss. 1–4) and 1823 (4 Geo. IV. c. 87).

Sect. III.—Of Combinations against Public Tranquillity and the Government.

The offences included in this section are closely allied to treason and sedition, but might also be described as conspiracies (*ff*), and the meetings of the societies at which the statutes are aimed could be dealt with as unlawful assemblies (*g*).

The Unlawful Societies Act, 1799 (39 Geo. III. c. 79) (*h*), after reciting that a traitorous conspiracy had long been carried on in conjunction with the persons from time to time exercising the power of government in France to overturn the laws, constitution, and government, and every existing establishment, civil and ecclesiastical, both in Great Britain and Ireland, and to dissolve the conjunction of the two kingdoms, and that in pursuance of such design divers societies had been instituted in this kingdom and in Ireland, of a new and dangerous nature, inconsistent with public tranquillity and with the existence of regular government, particularly certain societies calling themselves '*Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen*, and *The London Corresponding Society*,' and that the members of many such societies had taken unlawful oaths and engagements of fidelity and secrecy, &c., and that it was expedient and necessary that all such societies, and all societies of the like nature, should be utterly suppressed and prohibited, as unlawful combinations and confederacies, highly dangerous to the peace and tranquillity of these kingdoms, and to the constitution of the government thereof, as by law

(*e*) 37 Geo. III. c. 123, s. 6; 52 Geo. III. c. 104, s. 7.

(*f*) 37 Geo. III. c. 123, s. 7; 52 Geo. III. c. 104, s. 8.

(*ff*) *Vide ante*, pp. 146, *et seq.*

(*g*) See R. *v.* Ball, 6 C. & P. 563. R. *v.* Dixon, 6 C. & P. 601. Cf. R. *v.* O'Connell, 2 St. Tr. (N. S.) 629.

(*h*) Sec. 4, s. 11, from 'save' to the end of that section, and ss. 12 & 39 of this Act were repealed in 1871 (34 & 35 Vict. c. 116). The Act of 1799 was repealed in part in 1869 (32 & 33 Vict. c. 24), viz., ss. 15 to 33, both inclusive, and so much of ss. 34 to 39 as relates to the above-mentioned sections. But ss. 28, 29, 31, 34, 35 and 36 are re-enacted in the second schedule of 32 & 33 Vict. c. 42. By 9 & 10 Vict. c. 33, s. 1, also re-enacted in that schedule, 'No person shall be prosecuted or sued for any penalty imposed by the Act of 1799 unless such prosecution shall be commenced or such action shall be brought within three calendar months next after such penalty shall have been incurred.' As to the recovery and application of these penalties see the above schedule.

established, enacts (sect. 1), 'That all the said societies of *United Englishmen, United Scotsmen, United Irishmen*, and *United Britons*, and the said society commonly called the *London Corresponding Society*, and all other societies called *Corresponding Societies*, of any other city, town, or place, shall be, and the same are hereby utterly suppressed and prohibited, as being unlawful combinations and confederacies against the government of our sovereign lord the King, and against the peace and security of His Majesty's liege subjects.'

Sect. 2. '. . . All and every the said societies, and also every other society now established or hereafter to be established, the members whereof shall, according to the rules thereof or to any provision or agreement for that purpose, be required or admitted to take any oath or engagement which shall be an unlawful oath or engagement within the intent or meaning of the Unlawful Oaths Act, 1797 (*i*), or to take any oath not required nor authorised by law; and every society the members whereof or any of them shall take or in any manner bind themselves by any such oath or engagement, on becoming or in consequence of being members of such society; and every society the members whereof shall take, subscribe or assent to any test or declaration not required by law, or not authorised in manner hereinafter mentioned; and every society of which the names of the members or any of them shall be kept secret from the society at large, or which shall have any committee or select body so chosen or appointed that the members constituting the same shall not be known by the society at large to be members of such committee or select body, or which shall have any president, treasurer, secretary, delegate or other officer, so chosen or appointed that the election or appointment of such persons to such offices shall not be known to the society at large, or of which the names of all the members and of all committees or select bodies of members and of all presidents, treasurers, secretaries, delegates and other officers, shall not be entered in a book or books to be kept for that purpose, and to be open to the inspection of all the members of such society; and every society which shall be composed of different divisions or branches, or of different parts acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, secretary, treasurer, delegate or other officer, elected or appointed by or for such part, or to act as an officer for such part, shall be deemed and taken to be unlawful *combinations and confederacies* (*j*): every person who . . . shall directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, treasurer, secretary, delegate or other officer, or member thereof as such, or who shall, by contribution of money or otherwise, aid, abet or support such society, or any members or officers thereof as such, shall be deemed guilty of an unlawful combination and confederacy.'

By sect. 13, '. . . If any person shall knowingly permit any meeting of any society hereby declared to be an unlawful combination or confederacy,

(*i*) 37 Geo. III. c. 123, *ante*, p. 327.

(*j*) By s. 27 of the Act of 1817, this enactment is not to extend to meetings of Quakers, or to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter shall be discussed.

or of any division, branch or committee of such society, to be held in his or her house or apartment, such person shall, for the first offence forfeit the sum of £5, and shall, for any offence committed after the date of his or her conviction for such first offence, be deemed guilty of an unlawful combination or confederacy in breach of this Act.'

By sect. 8, 'Every person who . . . after the passing of this Act (July 12, 1799) shall, in breach of the provisions thereof, be guilty of any such unlawful confederacy as in this Act is described, shall and may be proceeded against . . . by indictment to be preferred in the county, riding, division, city, town, or place in England, wherever such offence shall be committed . . . and every person convicted of any such offence upon indictment in due course of law shall and may be transported for the term of seven years in the manner provided by law for the transportation of offenders, or imprisoned for any time not exceeding two years, as the Court before whom such offender shall be tried shall think fit . . . ' (*k*).

The Act of 1799 does not extend to declarations approved by two justices, and registered with the clerk of the peace; but such approbation shall only remain valid till the next general session, unless the same shall be confirmed by the major part of the justices at such general session (*l*). And it does not extend to the meetings of societies, or lodges of Freemasons, which, before the passing of the Act, had been usually held, under the denomination of 'Lodges of Freemasons,' and in conformity to the rules prevailing among such societies (*m*); provided that there be a certificate of two of the members upon oath, that such society or lodge had been usually held under such denomination, and in conformity to such rules; the certificate duly attested, &c., being, within two months after the passing of the Act, deposited with the clerk of the peace, with whom also the name or denomination of the society or lodge, and the usual place and time of meeting, and the names and descriptions of the members are to be registered yearly (*n*). The clerk of the peace is required to enrol such certificate and registry, and to lay the same once in every year before the general session of the justices; and the justices may, upon complaint upon oath, that the continuance of the meetings of any such lodge or society is likely to be injurious to the public peace and good order, direct them to be discontinued; and any such meeting, held notwithstanding such order of discontinuance, and before the same shall, by the like authority, be revoked, shall be deemed *an unlawful combination and confederacy* under the provisions of the Act (*o*).

(*k*) The omitted portions relate to summary convictions on which the justices may mitigate the maximum punishment—three months' imprisonment or a fine of £20. S. 9.

(*l*) S. 4 was repealed in 1871 (34 & 35 Vict. c. 116. S. L. R.).

(*m*) S. 5.

(*n*) S. 6.

(*o*) S. 7. By the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 32 (1), 'a registered friendly society or branch or a meeting of a registered society or branch shall not be affected by any of the provisions of the Unlawful Societies Act, 1799, or of the Seditious Meetings Act, 1817, if in the society or branch or at the meeting no business is transacted other than that which directly and immediately relates to the objects of the society or branch as declared in the registered rules thereof, but the society or branch and all officers thereof shall on request in writing by two justices of the peace give to such justices full information of the nature, objects, proceedings and practices of the society or branch.

(2) If the society or branch when so required fails to give such information as

By sect. 10 it is provided, that any person who shall be convicted or acquitted by any justice, upon a summary prosecution, shall not afterwards be prosecuted by indictment, or otherwise, for the same offence; and in like manner that any person convicted, or acquitted, upon an indictment, shall not afterwards be prosecuted before any justice in a summary way.

By sect. 11, the Act is not to 'extend to prevent any prosecution, by indictment or otherwise for anything which shall be an offence within the intent and meaning of this Act, and which might have been so prosecuted if the Act had not been made, unless the offender shall have been prosecuted for such offence under the Act, and convicted or acquitted of such offence' (*p*).

By the Seditious Meetings Act, 1817 (57 Geo. III. c. 19), s. 25, 'All and every [the said societies or clubs (*q*), and also all and every other] society or club now established or hereafter to be established, the members whereof shall be required or admitted to take any oath or engagement which shall be an unlawful engagement within the meaning of the Unlawful Oaths Act, 1797 (*r*), or within the meaning of the Unlawful Oaths Act, 1812 (*s*), or to take any oath not required or authorised by law; and every society or club, the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement on becoming or in order to become or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to, or shall take, subscribe, or assent to any test or declaration not required or authorised by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise, either on becoming or in order to become or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer, or communicate with any other society, or club, or with any committee, delegate or delegates representative or representatives, missionary or missionaries, of such other society or club, or with any committee, &c., of such other society or club, or to induce or persuade any person or persons to become members thereof, shall be deemed and taken to be *unlawful combinations and confederacies*, within the meaning of the Unlawful Societies Act, 1799 (*t*), and shall and may be prosecuted, proceeded against, and punished, according to the provisions of the said Act; and every person who, from and after the passing of this Act (March 31, 1817), shall become a member of any such society or club, or who, after the passing of this Act, shall act as a member thereof, and every person who, from and after the passing of this Act, shall directly or indirectly maintain correspondence or intercourse with any such society or club,

aforesaid, the provisions of those Acts shall, so far as applicable, be in force in respect of the society or branch.' This enactment incorporates the substance of 38 & 39 Vict. c. 60, s. 15, and 39 & 40 Vict. c. 32, s. 6.

(*p*) The rest of s. 11 was repealed in 1871 (34 & 35 Vict. c. 116).

(*q*) The clubs meant were referred to in s. 24, which was repealed in 1890 (S. L. R.).

(*r*) 37 Geo. III. c. 123, *ante*, p. 327.

(*s*) 52 Geo. III. c. 104, *ante*, p. 329.

(*t*) 37 Geo. III. c. 79, *ante*, pp. 332 *et seq.*

or with any committee or delegate, representative or missionary, or with any officer or member thereof as such, or who shall, by contribution of money or otherwise, aid, abet, or support such society or club, or any members or officers thereof as such, shall be deemed guilty of an unlawful combination and confederacy within the intent and meaning of the Unlawful Societies Act, 1799, and shall and may be proceeded against, prosecuted, and punished, according to the provisions of the said Act, with regard to the prosecution and punishment of unlawful combinations and confederacies' (*u*).

By sect. 26, nothing contained in this Act is to extend to lodges of Freemasons, complying with the regulations of the Unlawful Societies Act, 1799 (*v*), nor to any declaration approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices at a general session, or at a general quarter sessions of the peace, pursuant to the regulations in the Act of 1799 (*v*); nor to meetings of *Quakers;* nor 'to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business whatsoever shall be treated of or discussed.'

By sect. 28, 'If any person shall knowingly permit any meeting of any society or club hereby declared to be an unlawful combination or confederacy, or of any division, branch, or committee of such society or club, to be held in any house or apartment, building or other place, to him or her belonging, or in his or her possession or occupation, such person shall for the first offence forfeit the sum of £5 (*w*), and shall, for any such offence committed after the date of his or her conviction for such first offence, be deemed guilty of an *unlawful combination and confederacy* in breach of this Act' (*x*).

By sect. 29, any two or more justices, upon evidence on oath that any such meeting, or any meeting for any seditious purpose, has been held at any house, &c., licensed for the sale of liquors, with the knowledge and consent of the persons keeping such house, &c., may adjudge the licence to be forfeited (*y*).

By sect. 35, nothing contained in the Act 'shall be deemed to take away, or abridge, any provision already made by the law of the realm, or of any part thereof, for the suppression or punishment of any offence whatsoever described in the Act' (*z*).

By sect. 36, '. . . No person who shall be prosecuted and convicted, or acquitted, of any offence against this Act, shall be subject or liable to be again prosecuted for the same offence . . .' (*a*).

By sect. 37, where any proceeding or prosecution shall be instituted for any offence against the Act of 1799 (*b*), or this Act, either by action or information, before any justice or justices, or otherwise, the Attorney-

(*u*) *Ante*, p. 332.
(*v*) *Ante*, p. 332.
(*w*) Ss. 30, 31 regulate the recovery of fines, penalties or forfeitures. Those not exceeding £20 are recoverable in a Court of Summary Jurisdiction. Ss. 32, 33 were repealed in 1893 (56 & 57 Vict. c. 61).
(*x*) 39 Geo. III. c. 79, s. 13 is nearly similar.
(*y*) 39 Geo. III. c. 79, s. 14 does not contain the words 'with the knowledge and consent of the person keeping such house.'
(*z*) *Vide ante*, p. 4.
(*a*) *Vide ante*, p. 4.
(*b*) *Ante*, p. 332.

General in England, or the Lord-Advocate in Scotland, may order them to be stayed; and, in case of any judgment or conviction, one of His Majesty's principal secretaries of state may, by an order under his hand, stay the execution of such judgment or conviction, or mitigate, or remit, any fine or forfeiture, or any part thereof (*c*).

The mutual promises and engagements of societies are lawful, unless they are clearly prohibited by law; and it lies on the party who alleges that such promises and engagements are illegal to prove that they are so. Where, therefore, it appeared from the rules of a lodge of Oddfellows that the members entered into an engagement to abide by the rules, and one of the rules was to keep the secrets of the society; but all secrets had been abolished; and the rules had not been enrolled: Erle, J., held that there was nothing to shew that the engagement was illegal; the subjects of this realm might enter into any engagement they pleased, unless prohibited by law, and the party objecting to the legality of an engagement must shew that it is illegal (*d*).

By 9 & 10 Vict. c. 33, it was enacted (sect. 1) that it should not be lawful for any person or persons to commence, enter, prosecute, or file, or cause or procure to be entered, prosecuted, or filed, any action, bill, plaint, or information in any of Her Majesty's Courts, or before any justice or justices of the peace, against any person for the recovery of any fine or forfeiture under the Acts of 1799 and 1817, except in the name of the Attorney-General or Solicitor-General in England (*e*).

(*c*) S. 38 (damage by riot) was repealed as to England in 1827 (7 & 8 Geo. IV. c. 27, s. 1). The Act does not extend to Ireland (s. 39). Many sections of 36 Geo. III. c. 8, were intended to remedy the evil occasioned by persons who, under pretence of delivering lectures and discourses on public grievances, delivered lectures and discourses, and held debates, tending to stir up hatred and contempt of the King's person and government, and of the constitution: but this statute was limited to a duration of three years from the passing of the Act, and until the end of the then session of Parliament, and was repealed in 1869 (32 & 33 Vict. c. 24).

(*d*) R. *v.* Rouse, 4 Cox, 7.

(*e*) This enactment was repealed in 1869 (32 & 33 Vict. c. 24, s. 1), so far as it related to any proceedings under the sections of the Act of 1799 which are included in the repeal schedule of the Act of 1869, but is re-enacted in that schedule as to the portion of the 1799 Act there set forth. See note (*h*), *ante*, p. 332.

CANADIAN NOTES.

OF UNLAWFUL OATHS, ETC.

To Commit Crime.—Code sec. 129.
To Commit Treason, etc.—Code sec. 130.
Declaration After Compulsion.—Code sec. 131.

BOOK THE FOURTH.

OF OFFENCES RELATING TO THE RIGHTS AND REVENUES OF THE CROWN.

CHAPTER THE FIRST.

OF OFFENCES RELATING TO PRECIOUS METALS AND TREASURE TROVE.

A. *Precious Metals.*

Mines.—By its prerogative, the Crown has at common law a right of property in all mines of gold or silver (*thesauri de terra*) opened within the King's dominions, whether in lands of the Crown or of a subject (*a*). The prerogative was held to extend to mines of baser metal in which gold or silver was mixed, until the law was altered (*b*). By virtue of this prerogative, gold and silver mines, until aptly severed from the title of the Crown and vested in a subject, are not regarded as *partes soli*, or as incidents of the land where they are found (*c*), and do not pass out of the Crown except by apt and express words of grant (*d*). The severance of the minerals from the soil is not larceny, and the remedy for mining for gold or silver without royal licence is not by indictment or criminal information, but by English information for intrusion upon the rights of the Crown (*e*). Non-disclosure of gold or silver mines is said to be a concealment from the King (*f*), and punishable (*g*).

B. *Treasure Trove.*

By its prerogative the Crown is entitled to all treasure trove (*thesaurus in terra*), *i.e.*, 'gold or silver in coin or plate or bullion,' 'found concealed in a house, or in the earth, or other private place, the owner thereof being unknown' (*h*). The royal right attaches on the hiding of the treasure, and not where it was casually lost or deliberately abandoned by being thrown into the sea or into a public place (*i*), in which case

(*a*) Case of Mines [1568], Plowd. 310. Case of Saltpetre, 12 Co. Rep. 12. Att.-Gen. *v.* Morgan [1891], 1 Ch. 432, 455, Lindley, L.J. Chit. Prerog. Crown, 145. 4 Bl. Com. 121.

(*b*) 1 Will. & M. c. 30; 5 Will. & M. c. 6. Att.-Gen. *v.* Morgan [1891], 1 Ch. 432.

(*c*) Att.-Gen. of British Columbia *v.* Att.-Gen. of Canada [1889], 14 A.C. 295, 302.

(*d*) Woolley *v.* Att.-Gen. of Victoria [1876], 2 A.C. 163.

(*e*) Plowd. 310.

(*f*) Plowd. 317.

(*g*) Ibid. 320.

(*h*) Chit. Prerog. Crown, 153; 3 Co. Inst. 132; Cap. It. 1 Statt. Realm, 233; Staundf. 39. Att.-Gen. *v.* British Museum Trustees [1903], 2 Ch. 598, 608, Farwell, J.

(*i*) Ibid.

the finder is entitled to the property as against every one but the owner (*j*). In the case of Saltpetre (*k*), it is said that 'the King may dig in the land of a subject for treasure trove, for he hath the property.' This prerogative, described as one of the flowers of the Crown, may be devested by express grant to a subject (*l*). Until the Crown has acquired possession of treasure trove it is not the subject of larceny (*m*).

It is the duty of every person who finds, or knows of the finding of hidden treasure, to give notice to the coroner of the district within which it is found, who thereupon must hold an inquiry as to who were the finders and who is suspected thereof (*n*). Wilful and knowing concealment from the King of the finding of hidden treasure is a misdemeanor, now punishable by fine (or) imprisonment, or both (*nn*), which has been described as a form of misprision of felony (*o*). The offender may be proceeded against on the coroner's inquisition (*p*), or on indictment (*q*), or on both (*r*). It is not necessary in the indictment to aver that an inquisition was taken before the coroner or office found as to the title of the Crown (*s*). Indeed, the title of the Crown is independent of the findings of the inquest, and the coroner has no jurisdiction to inquire into the title to treasure as between Crown and subject (*t*). It is not necessary to prove that the concealment was fraudulent (*u*). Where B. found hidden treasure of gold, and believing it to be brass, offered to sell it to T. and others, who, knowing that it had been found, and was gold, bought it as brass and resold it as gold, and told lies to conceal the transaction, it was held that T. and the others were guilty of concealing treasure trove (*v*).

C. *Bullion and Plate.*

Bullion properly means gold or silver in the mass or lump, as distinguished from coin or manufactured articles. The term is, however, sometimes applied to coin or gold or silver wares and manufactures considered simply with reference to the value of the raw material (*w*).

(*j*) See *post*, Vol. ii. p. 1291, 'Larceny.'

(*k*) 12 Co. Rep. 13.

(*l*) Att.-Gen. *v.* British Museum Trustees [1903], 2 Ch. at p. 614, Farwell, J.

(*m*) 3 Co. Inst. 108; 1 Hale, 510; 1 Hawk. c. 19, s. 38.

(*n*) 50 & 51 Vict. c. 71, s. 36. Att.-Gen. *v.* Moore [1893], 1 Ch. 676.

(*nn*) Where in ploughing a field B. turned up certain pieces of old gold, and sold them to T. for old brass at sixpence a pound, saying where he had found them, and T. went to W., and they ascertained it was gold, and T. sent W. to London, and he sold it for gold; they were held to be properly convicted of the misdemeanor of *concealing treasure trove*, although B. was wholly innocent; and it was also held that it is not necessary in an indictment for this offence to allege that the prisoners concealed the treasure fraudulently; but it is enough to allege that they did it 'unlawfully, wilfully, and knowingly.' R. *v.* Thomas, L. & C. 313; 33 L. J. M. C. 22. It is not necessary in an indictment for concealing treasure trove to allege an inquisition before the coroner or to shew the title of the Crown by office found. R. *v.* Toole, Ir. Rep. 2 C. L. 36; 11 Cox, 75 (I). See Att.-Gen. *v.* Moore [1893], 1 Ch. 676. In R. *v.* Thomas the old authorities are discussed.

(*o*) 3 Co. Inst. 133; 4 Bl. Com. 121.

(*p*) See R. *v.* Thomas, L. & C. 313, 315; 33 L. J. M. C. 22, for the form of inquisition.

(*q*) R. *v.* Toole [1867], 11 Cox, 75.

(*r*) R. *v.* Thomas, *ubi sup.*

(*s*) R. *v.* Toole, *ubi sup.* Chit. Prerog. Crown, 259.

(*t*) Att.-Gen. *v.* Moore [1893], 1 Ch. 676.

(*u*) R. *v.* Thomas, *ubi sup.*

(*v*) Ibid.

(*w*) Murray Oxford Dict. *s. v.* Bullion; 1 Hawk. c. 18, s. 1.

1. The melting down of coin was contrary to a series of enactments (*x*), which were repealed in 1819 (59 Geo. III. c. 49, s. 11). With a view more effectually to prevent the clipping, diminishing, or impairing coin of the realm, power was given for making entry to search for bullion, and to punish persons found in possession of bullion unless they could prove it to be lawful silver, and not before melting either coin or clippings (*y*).

2. The counterfeiting, exportation, and dealing with bullion were dealt with by statutes, all now repealed (*z*).

3. Frauds with respect to making, working, putting to sale, exchanging, selling, importing (*a*), or exporting gold or silver wares are regulated by a series of enactments (*b*), with the aim of securing the fineness required by the statutory standards and authenticated by the marks of the Goldsmiths Company. In the legislation now in force, which ranges from 1423 to 1907, such wares are usually described as gold or silver plate (*c*). Of the offences created by the statutes, except as to counterfeiting or transposing assay marks (*d*), many are outside the scope of this treatise, being usually penalties or forfeitures of specified sums or of the offending wares: and the residue fall within the class of frauds and cheats in trade, and do not affect the coin of the realm (*e*).

It has been held that knowingly exposing for sale and selling wrought gold under the sterling alloy as gold of the true standard, though indictable in *goldsmiths*, is a private imposition only in a *common person*, and the party injured is left to his civil remedy (*f*).

Offenders fraudulently affixing public and authentic marks on such wares of a value inferior to that indicated by the marks would seem to be indictable at common law as for a cheat, as well as incurring the penalties imposed by the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28) (*post*, Vol. ii. p. 1591). F., a working goldsmith, was indicted for falsifying plate, by putting in too much copper, and then corrupting one of the assay master's servants to help him to the proper assay marks, with which he stamped his plate, and sold it to the goldsmiths; and being convicted, he was fined £100 and adjudged to stand three times in the pillory; and was also forejudged of his trade that he should not use that trade again as a master workman (*g*).

(*x*) *e.g.*, 17 Edw. IV. c. 1. This Act is repealed *in toto* as to England (in 1863) (S. L. R.), and as to Ireland in 1872 (S. L. R.): 14 Car. II. c. 31.

(*y*) 6 & 7 Will. III. c. 17, s. 8. This Act was expressly repealed in 1867 (S. L. R.), having, it would seem, already been virtually repealed in 1819 (59 Geo. III. c. 49, s. 12).

(*z*) See 1 East, P.C. 194; 1 Hawk. c. 18, ss. 1–14.

(*a*) See 5 & 6 Vict. c. 47, s. 59; 39 & 40 Vict. c. 36, s. 49.

(*b*) For a list of these enactments, see Official Index to the Statutes (ed. 1907), tit. 'Plate.' The earlier Acts are collected in 1 East, P.C. pp. 188–194. The date of repeal of such as are not now in force is stated in the Chronological Table prefixed to the Official Index to the Statutes. For a discussion of certain of the Acts, see Goldsmiths Co. *v.* Wyatt [1907], 1 K.B. 95. The earliest Act (28 Edw. I. stat. 3, c. 20) was repealed in 1856 (19 & 20 Vict. c. 64).

(*c*) See Goldsmiths Co. *v.* Wyatt [1907], 1 K.B. 95 (C. A.).

(*d*) See *post*, tit. 'Forgery,' Vol. ii. p. 1714.

(*e*) *Post*, p. 343 *et seq.*

(*f*) R. *v.* Bower, 1 Cowp. 323.

(*g*) R. *v.* Fabian [1664], Kel. (J.), 39; 1 East, P.C. 194. This judgment must have been at common law.

CANADIAN NOTES.

Of Offences with Relation to Precious Metals, etc.—See Code sec. 424; 8 & 9 Edw. VII. ch. 9.

Holder of Lease of Gold or Silver Mine Defrauding His Majesty or the Owner of the Mine.—Code sec. 424; 8 & 9 Edw. VII. ch. 9.

Unlawful Purchase or Sale of Quartz, Gold or Silver.—Code sec. 424; 8 & 9 Edw. VII. ch. 9.

In any indictment for any offence mentioned in sec. 424 it shall be sufficient to lay the property in His Majesty or in any person or corporation, in different counts in such indictment. Code sec. 866.

Upon a prosecution for any offence under sec. 424 any variance when the property is laid in a person or corporation, between the statement in the indictment and the evidence adduced, may be amended at the trial. If no owner is proved, the indictment may be amended by laying the property in His Majesty. Code sec. 893.

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. Sec. 637.

The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part XV. Code sec. 637.

CHAPTER THE SECOND.

OF OFFENCES WITH RESPECT TO COIN.

Most offences with respect to British or foreign coin committed in the United Kingdom are punishable under the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99) (*a*). By the Coinage Colonial Offences Act, 1853 (16 & 17 Vict. c. 48), the provisions of the United Kingdom Acts, 2 & 3 Will. IV. c. 34, and 7 Will. IV. & 1 Vict. c. 90, as to coinage offences are to extend to and be in force in all British colonies and possessions abroad, except so far as by the law in force on August 4, 1853, in the colony, or by subsequent local legislation, provision was or should thereafter be made for the punishment of offences relating to the coin or the repeal of all or any of the extended enactments.

Sect. I.—Definitions and General Provisions.

King's Money.—The coin or money of this kingdom consists properly of what is called *sterling* money, made of gold or silver only, with a certain alloy, coined and issued by the King's authority: and such money is supposed to be referred to by any statute naming 'money' generally (*b*).

By the Coinage Act, 1870 (33 & 34 Vict. c. 10, s. 5), no piece of gold, silver, copper, or bronze, or of any metal or mixed metal of any value whatever, shall be made or issued except by the mint as a coin or a token for money, or as purporting that the holder thereof is entitled to demand any value denoted thereon. Every person who acts in contravention of this section is liable on summary conviction to a penalty not exceeding twenty pounds.

The weight, alloy, impression, and denomination of the coin of the realm was for many centuries settled by indenture between the King and the master of the mint. The standard of coins is now regulated by the Coinage Acts, 1870 (33 & 34 Vict. c. 10), 1889 (52 & 53 Vict. c. 58), 1891, and 1893. Proclamation is not essential to give currency to coin; but the currency of any given pattern or denomination of coin is regulated by proclamation of the King. The proclamations have since 1870 been issued under sect. 11 of the Coinage Act, 1870. These proclamations

(*a*) This superseded 2 & 3 Will. IV. c. 34, which was repealed by 24 & 25 Vict. c. 95, s. 1. Prior to 1832 counterfeiting the King's money was punishable by a series of statutes, beginning with the Treason Act, 1351 (25 Edw. III. st. 5, c. 2), under most of which the offence was treated as treason, as it affected the prerogative of the Crown with reference to the coining and legalisation of money. 1 East, P.C. 147; 1 Hale, cc. 17, 18, 19, 20.

(*b*) 1 East, P.C. 147; 1 Hale, cc. 17, 18, 19, 20. Coin of brass, &c., was not within the definition. 1 Hawk. c. 17, s. 57.

have effect as if enacted in the statute (sect. 11). They need not be proved (*c*), but are printed as statutory rules and orders and can be proved by an official edition or print. In prosecutions for coining, it may be of use in case of any new coin with a new impression, not yet familiar to the people, to produce the relevant proclamation or one of the officers of the mint cognisant of the fact, or the stamps used, or the like evidence. But in general, whether the coin is the King's current coin or not is a mere question of fact which may be found upon evidence of common usage or notoriety (*d*). Any coin, once legally made and issued by the King's authority, continues to be the current coin of the kingdom until decried or recalled, notwithstanding any change in the authority by which it was constituted (*e*). His Majesty in council may direct the establishment of any branch of the mint in any British possession, and make the coins issued by it a legal tender (*f*). His Majesty in council may direct that foreign coins may be a legal tender in any part of his dominions (*g*).

The Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), which applies to the whole of the United Kingdom (*h*), contains the following definitions, sect. 1: that, 'In the interpretation of and for the purposes of this Act, the expression—

"**The King's current gold or silver coin,**" shall include any gold or silver coin coined in any of His Majesty's mints, *or* (*i*) lawfully current, *by virtue of any proclamation or otherwise* (*ii*), in any part of His Majesty's dominions, whether within the United Kingdom or otherwise; and the expression—

"**The King's copper coin,**" shall include any copper coin and any coin of bronze or mixed metal coined in any of His Majesty's mints, *or* lawfully current, *by virtue of any proclamation or otherwise*, in any part of His Majesty's said dominions; and the expression—

"**False or counterfeit coin** resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin," shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the King's current coin of a higher denomination; *and the expression—*

"**The King's current coin**" *shall include any coin coined in any of*

(*c*) 1 East, P.C. 142, where see some old cases in which proclamation by the writ of proclamation under the great seal, or a remembrance thereof, is considered to be necessary to prove a coin current.

(*d*) 1 East, P.C. 149.

(*e*) 1 East, P.C. 148. Coin is now decried or recalled by proclamation under the Coinage Act, 1870. Proclamation has for centuries been the recognised mode of decrying coin. But decrial has also been effected by Act of Parliament, as by 9 Will. III. c. 2, and 6 Geo. II. c. 26.

(*f*) Such branches are established in Australia (Sydney, Melbourne and Perth), South Africa, and Canada.

(*g*) 33 Vict. c. 10, s. 11 (7). This power has not been exercised as to the United Kingdom. As to other parts of the Empire, see Chaloner's Colonial Currency, 1893, and St. R. & O. (rev. ed. 1904), under the titles 'Coin, Colonies,' and of the particular colonies.

(*h*) Sect. 43. It came into force on Nov. 1, 1861.

(*i*) The word '*or*' in this and the subsequent definitions was substituted for the word 'and' used in 2 & 3 Will. IV. c. 34, s. 21, and the words 'in virtue of any proclamation or otherwise' were added, so as to bring all coin lawfully current within the British Empire within the scope of the Act.

(*ii*) *e.g.*, By Colonial Act or Ordinance.

His Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal (*j*).

Possession.—And where 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 shall be so had for his own use or benefit or for that of any other person' (*k*).

Right to test Suspected Coin.—By sect. 26, 'Where any coin shall be tendered *as the King's current gold or silver coin* to any person who shall suspect the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break, *bend*, or deface such coin; and if any coin so cut, broken, *bent*, or defaced shall appear 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 shall be of due weight, and shall appear to be lawful coin, the person cutting, breaking, *bending*, or defacing the same is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise whether the coin so cut, broken, *bent*, or defaced be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who is hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of His Majesty's Exchequer, and their deputies and clerks, and the receivers general of every branch of His Majesty's revenue, are hereby required to cut, break, or deface, or cause to be cut, broken, or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of His Majesty's revenue' (*l*).

Seizure of Suspected or Counterfeit Coin and Coining Tools.—By sect. 27, 'If any person shall find or discover in any place whatever, 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 of the King's current gold, silver, or copper coin, or any coin of any foreign prince, state, or country, or any

(*j*) The definition of current coin was new in 1861. The word include 'used' in this and the preceding definitions is not a word of limitation, but of extension. It has, therefore, been held that a genuine sovereign has been made false and counterfeit which had been fraudulently filed at the edges, thereby reducing its weight by one twenty-fourth, and by destroying the old milling, in place whereof a new milling of the edges had been made, so as to make the coin look like a current coin. R. *v.* Hermann, 4 Q.B.D. 284, Coleridge, C.J., and Pollock and Huddleston, BB. (diss. Lush and Stephens, JJ.).

(*k*) Framed on 2 & 3 Will. IV. c. 34, s. 21, and 22 & 23 Vict. c. 30. The words 'knowingly and wilfully,' &c. (italicised above), were inserted to remove the doubts raised as to the meaning of 2 & 3 Will. IV. c. 34, s. 21, in R. *v.* Rogers, 2 Mood. 85; R. *v.* Gerrish, 2 M. & Rob. 219; and R. *v.* Williams, 1 C. & M. 259.

(*l*) Coin which is light, or has been called in by proclamation, is defaced under 33 & 34 Vict. c. 10, s. 7.

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 shall have been produced or obtained by diminishing or lightening any of the King's current gold or silver coin*, it shall be lawful for the person so finding or discovering, and he is hereby required, to seize the same, and to carry the same forthwith, before some justice of the peace; and where it shall be proved, on the oath of a credible witness, before any justice of the peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the King's current gold, silver, or copper coin, or any such foreign or other coin as in this Act before mentioned, 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, it shall be lawful for any justice of the peace, by warrant under his hand, to 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, shall be found in any place so searched, to cause the same to be seized and carried forthwith before some justice of the peace; and whensoever 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, shall in any case whatsoever be seized and carried before a justice of the peace, he shall, *if necessary*, cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this 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 shall have been produced in evidence, or when they shall have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of His Majesty's Mint, or to the *solicitors of His Majesty's Treasury* (*m*), or any person authorized by them to receive the same' (*n*).

Proof of Coin being Counterfeit.—By sect. 29, 'Where upon the trial of any person charged with any offence against this Act it shall be 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 His

(*m*) See 8 Edw. VII. c. 3, s. 2 (5).

(*n*) Framed on 2 & 3 Will. IV. c. 34, s. 14; 37 Geo. III. c. 126, s. 7; and 43 Geo. III. c. 139, s. 7. The parts in *italics* are introduced in order to provide for the seizure of filings of coin, gold or silver dust, and machines mentioned in the preceding clauses of the Act. As to the words 'without lawful authority or excuse,' see R. v. Harvey, L. R. 1 C. C. R. 284.

Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness' (*o*).

Where the Offence is Complete.—By sect. 30, 'Every offence of falsely making or counterfeiting any coin, *or of buying, selling, receiving, paying, 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, uttered, or put off*, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected' (*p*).

Power to apprehend Persons found committing Offences.—Sect. 31. 'It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law' (*q*).

Misdemeanors, Fine, &c.—Sect. 38. 'Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the Court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorised, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act the Court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorised; provided that no person shall be imprisoned under this clause, for not finding sureties for any period exceeding one year' (*r*). The offender may also be dealt with under the Probation of Offenders Act, 1907 (*s*).

The provisions of sects. 39 and 40 as to hard labour and solitary confinement have been superseded by other legislation (*t*), and repealed in 1893 (S. L. R.). Sect. 42, which related to the payment of the costs in England, was repealed in 1908 (*u*).

(*o*) Taken from 2 Will. IV. c. 34, s. 17, *vide ante*, p. 343.

(*p*) Taken from 2 & 3 Will. IV. c. 34, s. 3, which was limited in terms to making or counterfeiting gold or silver coin, and it was held not to apply to selling counterfeit coin. The words in *italics* have, therefore, been added in order to include all cases of 'buying, selling,' &c. See R. *v.* Bradford, 2 Crawf. & Dix, Ir. Circ. Rep. 41.

(*q*) This clause is clearly unnecessary, so 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 had 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.

The words, 'or officer of police,' were introduced in the House of Commons quite unnecessarily, as without doubt every officer of police is a peace officer; and they render this clause inconsistent with other clauses in some of the other Acts. C. S. G.

Sect. 41 provides for summary proceedings.

(*r*) This section was new in 1861.

(*s*) *Ante*, p. 227.

(*t*) *Ante*, pp. 212, 213; *post*, p. 348.

(*u*) By 8 Edw. VII. c. 15, *q.v. post*, Bk. xii. c. v. For the earlier practice as to costs in such cases see the 6th ed. of this work, Vol. i. p. 428, and Archb. Cr. Pl. (23rd ed.), 246.

SECT. II.—PUNISHMENT AND VENUE.

General Rule.—The punishment of offences relating to the coin is, as to the maximum term of penal servitude, fixed by the enactment defining each offence, and if no maximum is fixed by the statute the maximum term is five years. By the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 1, the minimum term of penal servitude is fixed at three years (*v*); and in lieu of penal servitude the Court may in its discretion (unless an Act passed since August 5, 1891, otherwise provides) award imprisonment for any term not exceeding two years, with or without hard labour. Principals in the second degree and accessories before the fact to felonies within the Act are punishable as principal offenders; and accessories after the fact are liable to imprisonment, with or without hard labour, for any term not exceeding two years (*w*). The provisions of the Coinage Offences Act, 1861, as to punishment superseded by this section were repealed by the Statute Law Revision Acts of 1892 and 1893, and are omitted from the text of this work (*x*).

Accessories and Accomplices.—Accomplices in offences concerning the coin which amount to felony, follow the general rule applicable to felony. If two agree to counterfeit, and one does it in consequence of that agreement, both are guilty. If one counterfeits, and another by agreement beforehand afterwards puts it off; the latter is a principal. So if he puts it off afterwards, knowing that the other coined it; or if he furnished the coiner with tools, or materials for coining (*y*).

Proof that a man occasionally visited coiners; that the rattling of money was occasionally heard with them; that he was seen counting something as if it was money when he left them; that, on coming to the lodgings just after their apprehension, he endeavoured to escape, and was found to have bad money about him; is not sufficient evidence to implicate him, as counselling, procuring, aiding, and abetting the coining (*z*).

Venue.—By sect. 28, '*Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other 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 where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this Act, 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 counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction' (*a*).

(*v*) *Ante*, pp. 211, 212. The Act of 1861 contained a minimum term of three years, raised to five in 1864 (27 & 28 Vict. c. 47, s. 2), but restored to three by the Act of 1891.

(*w*) 24 & 25 Vict. c. 99, s. 35, taken from 2 & 3 Will. IV. c. 34, s. 18; *vide ante*, p. 212.

(*x*) The parts repealed include not only portions of the section defining offences, but also s. 39 (hard labour) and s. 40 (solitary confinement).

(*y*) 1 East, P.C. 186.

(*z*) R. *v.* Isaacs, Hil. T. 1813. MS. Bayley, J.

(*a*) Taken from 2 Will. IV. c. 34, s. 15, except the words in italics, which were new in 1861, introduced to remove a doubt which had arisen whether a person tendering, &c., coin in one jurisdiction, and afterwards tendering, &c., coin in another jurisdiction, within s. 10, could be tried in either. As

Offences in Admiralty Jurisdiction.—By sect. 36, 'All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place; and in any indictment for any such offence, or for being accessory to any such offence, the venue in the margin shall be the same as if such offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas"; . . . provided that nothing herein contained shall alter or affect any of the laws relating to the government of His Majesty's land or naval forces' (*b*).

Sect. III.—Of Counterfeiting Coin.

A. *British Coin.*

King's Gold and Silver Coin.—Sect. 2. 'Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, shall in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*c*).

Colouring Coin or Pieces of Metal with Intent to make them pass for British Gold or Silver Coin.—Sect. 3. 'Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour *or appearance* of gold or of silver, *or by any means whatsoever*, wash, case over, or colour any coin whatsoever resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour *or appearance* of gold or of silver, *or by any means whatsoever*, wash, case over, or colour 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 of the King's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour *or appearance* of gold, *or by any means whatsoever*, wash, case over, or colour any of the King's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the King's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the

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.

(*b*) See *ante*, p. 31 *et seq.*

(*c*) Taken from 2 & 3 Will. IV. c. 34, s. 3. See the interpretation clause, *ante*, p. 344, and as to punishment, *ante*, p. 348.

colour *or appearance* of gold or silver, *or by any means whatsoever*, wash, case over, or colour any of the King's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the King's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, . . . to be kept in penal servitude for life . . .' (*d*).

Counterfeiting the King's Copper Coin.—Sect. 14. 'Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the King's current copper coin . . . shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . .' (*e*).

The counterfeiting of copper coin was only a misdemeanor at common law (*f*), such coin not being the King's money within the Statute of Treasons (*g*). It was first made felony in 1771 (*h*).

Selling Medals resembling Current Coin.—By the Counterfeit Medal Act, 1883 (46 & 47 Vict. c. 45), s. 2, 'If any person without due authority or excuse (the proof whereof shall lie on the person accused) makes or has in his possession for sale, or offers for sale, or sells, any medal, cast, coin, or any other like thing, made wholly or partially of metal or any metallic combination and resembling in size, figure, and colour any of the King's current gold or silver coin, or having thereon a device resembling any device on any of the King's current gold or silver coin, or being so formed that it can by gilding, silvering, colouring, washing, or other like process, be so dealt with as to resemble any of the King's current gold or silver coin, he shall be guilty in England and Ireland of a misdemeanor, and in Scotland of a crime and offence, and on being convicted shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour.' By sect. 3 '"The King's current gold or silver coin" includes any gold or silver coin coined in or for any of His Majesty's mints, or lawfully current by virtue of any proclamation or otherwise

(*d*) Taken from 2 & 3 Will. IV. c. 34, s. 4, with the addition of the words in italics. The words omitted are repealed. For other punishments *vide ante*, p. 348 *et seq.* The words 'by any means whatsoever,' were introduced in order to include every process by which false metal can be made to appear like gold or silver, whether such appearance be produced by galvanism or otherwise howsoever. The order of the words in the former section was 'wash, colour, or case over,' and it was advisedly altered. On an indictment under 8 & 9 Will. III. c. 26, s. 4 (rep.), the use of aqua fortis to draw to the surface of base metals the silver latent therein was held to be colouring with silver. R. *v.* Lavey, 1 Leach, 153; 1 East, P.C. 106. And on another indictment on the same statute where blanks (made of an alloy of brass and silver) had to be taken out of a wash and rubbed to give them the appearance of silver, the preparing and steeping them in the wash was held to be colouring. R. *v.* Case, 1 Leach, 154n.; 1 East, P.C. 106. Certain differences of opinion among the judges in this case appear to have led to the substitution for the words 'materials producing the colour' in the Act of William III. of the words 'materials capable of producing the colour, &c.,' in 2 & 3 Will. IV. c. 34, s. 4, and in the present enactment. In R. *v.* Turner, 2 Mood. 42, an indictment containing the words 'capable, &c.' it was proved that the accused was found gilding sixpences with gold. It was contended that the words 'capable, &c.' excluded gold and applied only to imitation substances. But a verdict of guilty was given and was sustained by the majority of the consulted judges.

(*e*) Taken from 2 Will. IV. c. 34, s. 12.

(*f*) It is so recited in 15 & 16 Geo. II. c. 28, s. 6.

(*g*) *Ante*, p. 343, note (*a*).

(*h*) 11 Geo. III. c. 40.

in any part of His Majesty's dominions, whether within the United Kingdom or otherwise.'

Counterfeit Coin by Officers in the Mint.—Not only those who counterfeit the King's coin without his authority, but even persons employed in the mint or its branches are within the Coinage Offences Act, 1861, if for their own lucre they make the money of baser alloy, or lighter than they are authorised and bound by law to do: for they can only justify coining at all under the Coinage Acts and proclamations, and the terms of their appointment; and if they have not pursued that authority, it is the same as if they had none. But mere mistake in weight or alloy will not make them guilty; the act must be wilful, corrupt, and fraudulent (*i*).

What is Counterfeiting.—To be counterfeit within the statute, the coin must resemble or be apparently intended to resemble or pass for a genuine coin (*j*), but this resemblance is a matter of fact of which the jury are to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world (*k*). Thus a counterfeiting with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin (*l*).

By sect. 30 of the Act of 1861 (*ante*, p. 347), the offence is complete even if the counterfeiting is not finished or perfected nor the coin in a fit state to be uttered (*m*). It is laid down by old authorities that if there is a counterfeiting in fraud of the King, the offence is complete before any uttering, or attempt to utter (*n*).

On an indictment for uttering a counterfeit half-sovereign, the coin uttered was a Prince of Wales's medal; and though on one side it bore some resemblance to a good half-sovereign, having Queen Victoria's head and the usual inscription, on the other side was the plume of the Prince of Wales, with the words 'Prince of Wales's model half-sovereign.' It was held that it was a question for the jury whether the coin was intended by the maker to pass as a counterfeit coin, or was merely designed for a plaything, a card-marker, &c. (*o*).

There is a sufficient counterfeiting where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time* (*p*).

(*i*) 1 East, P.C. 166. 1 Hale, 213. 1 Hawk. c. 17, s. 55. 3 Co. Inst. 16, 17. 4 Bl. Com. 84.

(*j*) 1 Hawk. c. 17, s. 81.

(*k*) 1 Hale, 178, 184, 211, 215.

(*l*) 1 East, P.C. 164, citing 1 MS. Sum. 50, and R. *v.* Ridgeley, 1 East, P.C. 171; 1 Leach, 189, Old Bailey, Dec. 1778.

(*m*) This section altered the law as laid down under the Treason Act, 1351 (R. *v.* Harris, 1 Leach, 135), and before 2 & 3 Will. IV. c. 34 (R. *v.* Varley, 1 Leach, 76; 1 East, P.C. 164; 2 W. Bl. 682).

(*n*) 3 Co. Inst. 61; 1 Hale, 215, 228; 1 Hawk. c. 17, s. 55; 1 East, P.C. 165.

(*o*) R. *v.* Byrne, 6 Cox, 475 (Ir.), Crampton, J.

(*p*) In R. *v.* Wilson [1783], 1 Leach, 285, the shillings produced in evidence were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their colour, size, and shape; and the Master of the Mint proved that they were bad, but that they were very like those shillings the impressions on which had been worn away by time, and might very probably be taken by persons having less skill than himself for good shillings. The Court were of opinion that *a blank* that is smoothed and made like a piece of legal coin, the impression of which is worn

B. *Foreign Coin.*

Counterfeit Foreign Gold and Silver Coin.—Sect. 18 (*q*). 'Whosoever shall make or counterfeit any kind of coin, not being the King's 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, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . .' (*r*).

Counterfeit Foreign Coin other than Gold and Silver Coin.—Sect. 22 (*s*). 'Whosoever shall falsely make or counterfeit any kind of coin, not being the King's 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, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable . . . for the first offence to be imprisoned for any term not exceeding one year, and for the second offence, to be kept in penal servitude for any term not exceeding seven years . . .' (*t*).

SECT. IV.—IMPAIRING AND DEFACING CURRENT COIN.

Impairing Gold or Silver Coin, with intent.—Sect. 4 (*u*) enacts that, 'Whosoever shall impair, diminish, or lighten any of the King's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened *may* pass for the King's current gold or silver coin, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*v*).

Unlawful Possession of Filings or Clippings of Gold or Silver Coin.—Sect. 5 (*w*). 'Whoever shall unlawfully have in his custody or possession

out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin which has been defaced by time, and yet passed in circulation. In R. *v.* Walsh, 1 Leach, 364, 1 East, P.C. 164, the counsel for the prisoners having objected, upon the fact of no impression of any sort or kind being discernible upon the shillings produced in evidence, that they were not counterfeited to *the likeness and similitude of the good and legal coin of the realm*, the judges were of opinion, that it was a question of fact whether the counterfeit monies were of the likeness and similitude of the lawful current silver coin called a shilling. And the jury having so found it, the want of an impression was immaterial; because, from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected; the counterfeit therefore was perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression: and in the deception the offence consists.

(*q*) Framed from 37 Geo. III. c. 126, s. 2. See the interpretation clause, *ante*, p. 343.

(*r*) For other punishments, *vide ante*, p. 348 *et seq.* The words omitted are repealed.

(*s*) Framed from 43 Geo. III. c. 139, s. 3. See s. 37 for the form of indictment for a second offence, &c., *post*, p. 360.

(*t*) For other punishments, *vide ante*, p. 348 *et seq.* The words omitted are repealed.

(*u*) Taken from 2 & 3 Will. IV. c. 34, s. 5, the words of which were 'with intent to *make* the coin pass,' &c., which intent never existed; for the coin was not impaired in order to *make* it pass, but in order to obtain some metal from the coin, and that it *might* nevertheless pass in circulation. The words in *italics* have therefore been substituted for those of the former enactment. C. S. G.

(*v*) For other punishments, *vide ante*, p. 348.

(*w*) This section was new in 1861.

any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the King's current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . ' (*x*).

Defacing Coin by Stamping Words thereon.—Sect. 16. ' Whosoever shall deface any of the King's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour ' (*y*).

Tender of Coin so Defaced not Legal.—Sect. 17. ' No tender or payment in money made in any gold, silver, or copper coin so defaced by stamping as in the last preceding section mentioned shall be allowed to be a legal tender ; and whosoever shall tender, utter, or put off any coin so defaced shall, on conviction thereof before two justices, be liable to forfeit and pay any sum not exceeding forty shillings ; Provided that it shall not be lawful for any person to proceed for any such last-mentioned penalty without the consent, in England or Ireland, of His Majesty's Attorney-General for England or Ireland respectively, or in Scotland of the Lord Advocate ' (*z*).

Sect. V.—Of Importation of Counterfeit Coin.

Counterfeit British Coin.—By 24 & 25 Vict. c. 99, s. 7 (*a*), ' Whosoever, *without lawful authority or excuse* (*the proof whereof shall lie on the party*

(*x*) For other punishments, *vide ante*, p. 348.

(*y*) Taken from 16 & 17 Vict. c. 102, s. 1, which contained the words ' or shall use any machine or instrument for the purpose of bending the same,' but it was considered that this provision was much too comprehensive, and therefore it was omitted. C. S. G.

(*z*) Taken from 16 & 17 Vict. c. 102, s. 2.

(*a*) Taken from 2 & 3 Will. IV. c. 34, s. 6, with the alterations and additions italicised. As to the first words in italics, see s. 6, *post*, p. 364. The words ' or receive ' were added to cover cases where the evidence was insufficient to prove that the receiver had imported the coin. The section appears to apply to importation from any place beyond seas within or without the King's dominions. Under 1 & 2 Ph. & M. c. 11 (rep.) it was held that the words ' false or counterfeit coin or money being current within this realm,' referred to gold and silver coin of foreign realms, current here by the sufferance and consent of the Crown, which must be by proclamation, or by writ under the great seal. And the money, the bringing in of which was prohibited by 25 Edw. III. st. 5, c. 2, and 1 & 2 Ph. & M. c. 11 (repp.), must be brought from some foreign place out of the King's dominions into some place within the same (1 East, P.C. 175), and not from Ireland or some other place subject to the Crown of England, for though to some purposes they are distinct from England, yet as the counterfeiting was punishable there as much as in England, the bringing money from such places was not within those Acts (1 Hawk. c. 17, s. 87). It may be observed also that these Acts were confined to the *importer* (using the word ' bring '), and did not extend to a *receiver* at second hand ; and such importer must also have been averred and proved to have known that the money was counterfeit. 1 Hale, 227, 228, 317 ; 1 Hawk. c. 17, ss. 86, 88 ; 1 East, P.C. c. 4. It seems not to have been necessary under 25 Edw. III. s. 5, c. 2, to prove that false money was actually paid away or

accused), shall import *or receive* into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . ' (*b*).

By 16 & 17 Vict. c. 48, s. 2, ' If any person shall import into any of His Majesty's Colonies or possessions abroad any false or counterfeit coin resembling or apparently intended to resemble or pass for any of His Majesty's current gold or silver coin coined in any of His Majesty's Mints, whether in the United Kingdom or elsewhere, knowing the same to be false or counterfeit, he shall be liable . . . to be transported for life ' (*c*).

By the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 150–151, the importation of base or counterfeit coin (by sea or land carriage) into Mauritius and the British possessions in America is absolutely prohibited.

By the Revenue Act, 1889 (52 & 53 Vict. c. 42), imitation coin is included in the table of goods prohibited and restricted under the Customs Consolidation Act, 1876 (*vide post*, p. 374).

Importing Foreign Counterfeit Gold or Silver Coin.—By sect. 19 (*d*), ' Whosoever, *without lawful authority or excuse* (*the proof whereof shall lie on the party accused*), shall bring *or receive* into the United Kingdom (*e*) any such (*f*) 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, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . ' (*g*).

By sect. 2 of the Customs Amendment Act, 1886 (49 & 50 Vict. c. 41), power is given to His Majesty to make and revoke proclamations prohibiting the importation into the United Kingdom of coins coined in a foreign country specified in the proclamation. Such coins during the currency of the proclamation are treated as prohibited goods within the

merchandised with. 1 Hawk. c. 17, s. 89. Coke and Hale seem to have thought differently. 3 Co. Inst. 18; 1 Hale, 229. But see 1 East, P.C. 175, 176, where it is said that though the best trial and proof of an intent may be by the act done, yet it may also be evinced by a variety of circumstances, of which the jury are to judge.

(*b*) For other punishments, *vide ante*, p. 348.

(*c*) This enactment applies to a colony only so far as provision is not made by local legislation (ss. 3, 4).

(*d*) Framed on 37 Geo. III. c. 126, s. 3, omitting the words 'with intent to utter the same,' which were in the former statute. From the words of the present Act (s. 19), an importation of counterfeit foreign coin, with a knowledge that it is counterfeit, is clearly sufficient, without any actual uttering. It seems that 37 Geo. III. c. 126, did not provide for the case of a person collecting the base money therein mentioned from the vendors of it in this country, with intent to utter it within the realm, or the dominions of the realm. See 1 East, P.C. 177. ' Bringing ' over counterfeit foreign coin was treason within 1 & 2 Ph. & M. c. 11 (rep.). 1 Hawk. c. 17, s. 89. The Act of 1861 has neither the words ' to merchandise or make payment,' which were in 25 Edw. III. st. 5, c. 2, nor the words ' to the intent to utter or make payment with the same,' which were in 1 & 2 Ph. & M. c. 11. The crime, therefore, seems now to consist in importing counterfeit coin knowing it to be counterfeit. C. S. G.

(*e*) See note to s. 6, *post*, p. 364.

(*f*) See s. 18, *ante*, p. 352.

(*g*) For other punishments, *vide ante*, p. 348.

Customs Consolidation Act, 1876 (*h*). Under this enactment a proclamation has been issued prohibiting the importation into the United Kingdom of all coins coined in a foreign country other than gold or silver (March 27, 1887. St. R. & O. Revised (ed. 1904), Vol. II. tit. 'Coin,' 49).

Sect. VI.—Of Exporting Counterfeit Current Coin.

By sect. 8, 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the King's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . ' (*i*).

The definition of current coin includes the coin of British possessions and protectorates as well as coin of the realm (*j*).

Sect. VII.—Of Uttering, Tendering, &c., Counterfeit Coin.

A. *Common Law and Former Statutes.*

Formerly the putting off counterfeit money might amount to *treason*. Thus if A. counterfeited current gold or silver coin, and by agreement before that counterfeiting B. was to put off and vend the counterfeit money, B. was an aider and abettor to such counterfeiting, and consequently liable as a principal traitor (*k*). In the case of copper coin, B. acting a similar part was an accessory before the fact to the felony, within 11 Geo. III. c. 40 (*l*). And if B., knowing that A. had counterfeited coin, put off this false coin for him 'after the fact,' without any such agreement precedent to the counterfeiting, he seems to have been liable as an accessory after the fact to A., because he maintains him (*m*). According to Coke (*n*), if money, false or clipped, were found in the hands of any suspicious person, he might be imprisoned until he proved his warrant *per statutum de moneta* (20 Edw. I. stats. 4, 5, 6 (rep.)).

If A. counterfeited the King's money, and B. knowing the money to be counterfeited uttered the same for his own benefit, B. was not guilty of treason, nor misprision of treason. But he was liable at common law to be punished as for a cheat (*o*). The defendant was indicted for

(*h*) *Post*, p. 374.

(*i*) This section was new in 1861.

(*j*) See the interpretation clause, *ante*, p. 344.

(*k*) 1 Hale, 214.

(*l*) 1 East, P.C. 178.

(*m*) 1 Hale, 214. Concealment by B. of counterfeiting by A. was misprision of treason. Hale, 214.

(*n*) 3 Inst. 18.

(*o*) 1 East, P.C. 179; 1 Hale, 214; 1 Hawk. c. 17, s. 56. The offence was punishable under 15 Geo. II. c. 28 (rep.). See precedents of indictments for a misdemeanor at common law in uttering a counterfeit half-guinea: Cro. Circ. Comp. 315 (7th ed.); 2 Chit. Cr. L. 116. See also a precedent of an indictment for a misdemeanor at common law, against a man for uttering a counterfeit sixpence, and having another found in his custody: Cro. Circ. Comp. 315 (7th ed.); 2 Chit. Cr. L. 117. The uttering of false money, knowing it to be false, is mentioned as a misdemeanor in

'unlawfully uttering and tendering in payment to T. H. ten counterfeit halfpence, knowing them to be counterfeit.' One count laid the offence as contrary to the statute, a second count laid the offence generally. He was convicted on the second count. It was admitted that no statute applied to the case of counterfeit copper coin, and on a case reserved all the judges held the offence not to be indictable (*p*).

Possession of counterfeit coin of the realm with intent to utter it is not an offence at common law (*q*). But the unlawful procuring of counterfeit coin with *intent to circulate* it, though no act of uttering be proved, is a misdemeanor at common law (*r*), and the possession of counterfeit coin under suspicious circumstances, and without any circumstances to induce a belief that the defendant was the maker, was held to be evidence of unlawful procuring with intent to utter (*s*). Upon the argument in R. *v.* Fuller (*s*), Thomson, C.B., mentioned a case where he had directed an acquittal, because from certain powder found upon the prisoner, there was a presumption that he was the maker of the coin.

B. *Of Uttering or Possessing Counterfeit British Coin.*

Uttering Counterfeit Gold or Silver Current Coin.—By sect. 9, 'Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour . . .' (*t*).

the recital to 15 Geo. II. c. 28, s. 2 (rep.). There is also a precedent for a misdemeanor at common law, in uttering, and causing to be uttered as good, guineas which had been filed or diminished; Cro. Circ. Comp. 317 (7th ed.), and 2 Chit. Cr. L. 116; and also a precedent for a misdemeanor at common law in selling counterfeit Dutch guilders; Cro. Circ. Comp. 313 (7th ed.); 2 Chit. Cr. L. 119, 120.

(*p*) R. *v.* Cirwan [1794], MS. Jud.; 1 East, P.C. 182; 2 Leach, 834, note (*a*).

(*q*) R. *v.* Heath [1810], R. & R. 184. R. *v.* Stewart [1814], R. & R. 288 (silver coin). R. *v.* Cirwan [1794], 2 Leach, 834n. (copper coin).

(*r*) R. *v.* Fuller [1816], R. & R. 308, and MS. Bayley, J. In R. *v.* Brown, 1 Lew. 42, upon an indictment for procuring counterfeit money with intent to utter it, the uttering the money, knowing it to be counterfeit, was held evidence that it was procured with that intent. Holroyd, J., there seemed to consider a procurement elsewhere, with intent to utter, a continuing procurement in the county where the uttering took place.

(*s*) R. *v.* Fuller [1816], R. & R. 308. The possession in this case was under particularly suspicious circumstances; on the prisoner were found two parcels, each containing twenty shillings, wrapped up with soft paper to prevent their rubbing. In the marginal note to R. *v.* Parker, 1 Leach, 41, it is stated that having the possession of counterfeit money with intention to pay it away as and for good money, is an indictable offence at common law. This may be criminal in some cases of such possession, as we have seen above; but, *quære*, if the point, as stated in the marginal note, was actually decided in Parker's case. See also R. *v.* Jarvis, Dears. 552, *post*, p. 362.

(*t*) Taken from 2 Will. IV. c. 34, s. 7. For other punishments, *vide ante*, p. 348. Under 8 & 9 Will. III. c. 26, s. 6 (rep.), which had the words 'take, receive, pay, or put off,' it was necessary to prove actual passing of the money. R. *v.* Wooldridge, 1 Leach, 307; 1 East, P.C. 179. The word 'tender' in the present Act obviates the need of proving actual passing. C. S. G. Under 2 & 3 Will. IV. c. 34, s. 7 (rep.), it was held that a charge of uttering and putting off was proved by evidence that the prisoner had entered a shop, and had asked for tea and sugar, and had in payment placed on the counter a counterfeit shilling, but on being told that it was bad, had left the shop and left the coin behind. R. *v.* Welch, 2 Den. 78. Cf. R. *v.* Ion, ibid. 475.

The words 'tender, utter, or put off,' being in the disjunctive, appear to apply to the uttering of counterfeit money though not tendered in payment, but passed by the common trick of *ringing the changes* (*u*).

Uttering Counterfeit Gold or Silver Current Coin accompanied by Possession of other such Coin, or followed by a Second Uttering of other such Coin.—Sect. 10. 'Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his *custody or* possession, besides the false or counterfeit coin so tendered, uttered, or put off, *any other* piece of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off *any false or counterfeit coin* resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . ' (*v*).

Where one of two persons utters base coin, and other base coin is found on the other, they are jointly guilty of the aggravated offence under this section, if they are acting in concert, and the one knows of the possession of the base coin by the other; for by the interpretation clause the having any coin in possession includes 'the knowing and wilfully having it in the actual custody or possession of any other person'; and as it is clear that under that clause a man may have possession of coin in a house or other place, though he is far away, so the possession of coin by one man may be the possession of another within that clause, though they are at a great distance from each other (*w*).

Having Three or More Pieces of Counterfeit Gold or Silver Coin in Possession, &c., with Intent, &c.—Sect. 11. 'Whosoever shall have in

(*u*) See R. *v.* Franks, 2 Leach, 644, decided on 15 Geo. II. c. 28, s. 2 (rep.), which had the words 'utter *or* tender in payment.' In that case the prosecutor having bargained for the purchase of sixpennyworth of fruit from the defendant, a street vendor, handed to the defendant a good shilling to change. The defendant put the shilling into his mouth as if to bite it, and returned a shilling to the prosecutor, saying that it was bad. The prosecutor having handed him a second and a third shilling, the defendant practised the same trick as to each.

(*v*) Taken from 2 Will. IV. c. 34, s. 7. The words 'any other piece' are substituted for 'one or more piece or pieces,' and the words 'any false or counterfeit coin' for 'any more or other false or counterfeit coin.' The words omitted are repealed. To warrant the punishment imposed by this section, the utterings should be charged in the same count of the indictment. See R. *v.* Martin [1801], *coram* Graham, B., decided by the judges on 15 Geo. II. c. 28 (rep.). 2 Leach, 923; 1 East, P.C. xviii.; MS. Bayley, J. Convictions for separate utterings on the same day, charged in separate counts of the indictment, do not seem to warrant such punishment. See R. *v.* Tandy, 2 Leach, 833. 1 East, P.C. 182, 184; decided on 15 Geo. II. c. 28 (rep.). Eyre, C.J., Buller, J., and Heath, J., were absent when this opinion was given, viz., Hil. T. 1799. The judges also thought it advisable to give judgment of imprisonment for six months singly, and not on each of the counts. And see R. *v.* Smith, 2 Leach, 856; 1 East, P.C. 183; and R. *v.* Robinson, 1 Mood. 413, decided on 2 & 3 Will. IV. c. 34, s. 7 (rep.).

(*w*) R. *v.* Greenwood, 2 Den. 453, overruling R. *v.* Hayes, 1 Cox, 362; 2 Cox, 68; and R. *v.* West, 2 Cox, 237.

his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same *or any of them*, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .' (*x*).

Uttering after a Previous Conviction.—Sect. 12 (*y*). 'Whosoever having been convicted (*z*), *either before or after the passing of this Act*, of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, *or of any felony or high crime and offence against this or any former Act relating to the coin*, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*a*).

Sect. 13. 'Whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the King's 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 colour the current coin as or for which the same shall be 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 shall be so tendered, uttered, or put off, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour . . . ' (*b*).

The prisoner was indicted under this section for uttering a medal resembling in size, figure, and colour, a half-sovereign. The medal was made of metal, and of the same diameter as a half-sovereign, and somewhat similar in colour. On the obverse there was the head of Queen Victoria, similar to that on a half-sovereign; but the legend was entirely different from that on the half-sovereign, being 'Victoria, Queen of Great Britain,'

(*x*) Framed from 2 & 3 Will. IV. c. 34, ss. 7, 8, with the addition of the words in italics. For other punishments, see *ante*, p. 348. Possession of counterfeit coin, with intent to utter, is not an offence at common law. R. *v.* Stewart, R. & R. 288. R. *v.* Heath, R. & R. 184, denying R. *v.* Sutton, cas. *temp.* Hardw. 370.

(*y*) Taken from 2 Will. IV. c. 34, ss. 7, 8: but those sections only applied to offences committed after a conviction for a misdemeanor: but it was expedient to extend the clause to convictions after a previous conviction for felony; for such previous conviction rendered the offender deserving of at least as high a punishment as if he had been previously convicted of any misdemeanor mentioned in any of the three preceding sections, and it sometimes happened that it was easier to prove a previous conviction for felony than for such a misdemeanor; as the former might have taken place in the same county where the subsequent offence was committed, but not the latter. As to the effect of s. 12 see R. *v.* Lee, 72 J. P. 253.

(*z*) *i.e.*, found guilty by verdict or confession, though not sentenced. R. *v.* Blaby [1894]. 1 Q.B. 170.

(*a*) For other punishments, *vide ante*, p. 348.

(*b*) This section was new law in 1861, and intended to meet cases of uttering coin other than British current coin or medals as and for the current coin of the realm. In order to bring a case within this section, the coin or medal uttered must be of less *value* than the coin for which it was uttered, and must have been uttered with intent to defraud.

instead of 'Victoria Dei Gratia.' The medal was querled, but the querling was round and not square. The medal was of less value than a half-sovereign. The coin was lost before a full description of it was given, and it was never shewn to the jury. It was objected that 'figure' in the indictment meant the impression on the medal, and that such impression must be similar to the impression on the genuine coin for which it was uttered, and that there was no evidence that the medal resembled the half-sovereign in size, figure, and colour. It was answered that 'figure' meant the general shape and outline of the medal, and that there was evidence for the jury; and the jury having convicted, it was held, on a case reserved, that there was some evidence that the medal, in size, figure, and colour resembled a half-sovereign (*c*).

Uttering Counterfeit Copper Coin.—Sect. 15. 'Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same *or any of them*, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour . . .' (*d*).

Form of Indictment.—The word 'knowing' in indictments for uttering coin sufficiently applies to the time and place of uttering, and no addition of time or place is necessary. The word 'knowing' refers to the prisoner, and not to the person to whom the coin was uttered, although that person's name immediately precedes the word 'knowing.'

If the names of the persons to whom the coin was uttered 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 (*e*).

It is sufficient, in an indictment for a felony for uttering counterfeit coin after a previous conviction, to state that the prisoner was in due form of law tried and convicted by a jury (*f*).

(*c*) R. *v.* Robinson [1837], L. & C. 604.

(*d*) Taken from 2 & 3 Will. IV. c. 34, s. 12. The words omitted are repealed.

(*e*) See 1 East, P.C. 180, citing a case from MS. Tracy, of a woman who was indicted at the Old Bailey, 1702, for putting off ten pieces of counterfeit gilt money like guineas, to divers persons unknown; Holt, C.J., said, that the names of the persons ought to be mentioned and laid severally; yet he tried the prisoner, and she was convicted. Probably the names of the persons to whom the money was put off could not be ascertained.

(*f*) 24 & 25 Vict. c. 99, s. 37. R. *v.* Blaby [1894], 1 Q.B. 170. R. *v.* Page [1841], Coleridge, J., MSS. C. S. G., and 2 Mood. 219. In the latter case the indictment, which was under 2 & 3 Will. IV. c. 34, s. 7, for uttering counterfeit money after a previous conviction, alleged that the prisoner, 'together with one T. P., was in due form of law tried and convicted' by a jury upon an indictment against them, for that they did unlawfully utter a shilling 'to A. W., knowing the same to be false,' and thereupon it was considered that the prisoner should be imprisoned for two years; and that the prisoner afterwards feloniously did utter a half-crown 'to T. H., knowing the same to be false.' The copy of the record of the former trial stated the conviction of the prisoner and the acquittal of T. P. It was objected, 1st. That the

It is no objection that an indictment for felony, for uttering counterfeit coin after a previous conviction, states that the prisoner, together with another person, was tried and convicted; and the record of the former trial shews the conviction of the prisoner and the acquittal of the other person.

Sect. 37. 'Where any person shall have been convicted (*g*) of any offence against this Act, or any former Act (*h*) relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; . . . (*hh*) and 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 (*i*), 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: provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in

indictment was bad for want of an addition of time and place to the allegation of knowledge, which was to be found neither in the recital of the former indictment, nor in the substantive charge on the face of the present indictment; but the learned judge thought that the former indictment was good, being in the words of the statute and after verdict; and that 'knowing' in the present indictment, being a participle in the present tense, must import knowledge at the time of the uttering. 2ndly. That the word 'knowing' did not refer to the prisoner, but to A. W. and T. H.; but Coleridge, J., thought that 'knowing' did refer to the prisoner, as all that was alleged to be done was alleged to be done by him. 3rdly. That the indictment did not state any former conviction, because neither the plea nor the verdict of the jury was recited; but the learned judge thought that the allegation that he had been in due course of law tried and convicted, together with a statement of the judgment, was sufficient. 4thly. That the recital of the former record shewed a conviction of the prisoner and T. P., whereas the record produced shewed that the prisoner alone had been convicted and T. P. acquitted, and therefore there was a variance; the learned judge overruled this objection also, but entertaining some doubt upon the point, he reserved the case for the opinion of the judges, who held the conviction right. Coleridge, J., stated the other points to the judges, that the prisoner might have the benefit of them, if he had been wrong in overruling them.

(*g*) *i.e.*, by verdict or plea of guilty, even if no sentence was pronounced. R. *v.* Blaby [1894], 1 Q.B. 170.

(*h*) The questions discussed in former editions as to offences under statutes prior to 1861, are now by lapse of time rendered of no importance. See R. *v.* Montrion, 9 Cox, 27. Anon., 9 Cox, 28. Byles, J. As to effect of repealing clauses on offences committed before the repeal operates, *vide ante*, pp. 6, 7. And see Greaves Crim. L. Cons. Acts (2nd ed.), 199.

(*hh*) For words here omitted, *vide post*, p. 363.

(*i*) Under 7 & 8 Geo. IV. c. 28, s. 2 (E), or 9 Geo. IV. c. 54, s. 8 (I).

answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence' (*j*).

Where the indictment charged a felonious uttering after a previous conviction, the jury found the prisoner guilty of the uttering but not guilty of the previous conviction, it was held that this was a verdict of not guilty of the felony charged, and that the prisoner could not be convicted of the misdemeanor of uttering upon that indictment (*k*).

Evidence.—As to evidence of what is a current coin (*l*), and coin being counterfeit, and of possession, see *ante*, p. 344.

For the purpose of proving the uttering, &c., to have been done *knowingly*, it is the practice to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. This is in conformity with the practice upon indictments for disposing of and putting away forged bank notes, knowing them to be forged (*m*); upon one of which the counsel for the prisoners, objecting to such evidence, contended that it would not be allowed upon an indictment for uttering bad money; and stated that the proof in such case was always exclusively confined to the particular uttering charged in the indictment. But Thomson, B., said, that he by no means agreed in the conclusion of the prisoners' counsel, that the prosecutor could not give evidence of another uttering on the same day to prove the *guilty knowledge*. 'Such other uttering,' he observed, 'cannot be punished until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money he uttered was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a common utterer (*n*): but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other

(*j*) Under 2 & 3 Will. IV. c. 34 (rep.), it was necessary in an indictment for a subsequent offence, to set out at length the previous indictment, &c., and to give in evidence a copy of that indictment, &c. This was found objectionable, and therefore the present enactment provided for a short statement in the indictment, and for a certificate containing the substance and effect of the former indictment, &c.; it provides for the proceedings on the arraignment, and in the same manner as on an indictment for larceny after a previous conviction for felony. The words 'after charging the 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. C. S. G. This section is virtually superseded by 34 & 35 Vict. c. 112, s. 9, *post*, Bk. xii. c. iii. For present procedure as to offences after previous convictions, see *post*, Bk. xii. c. iii.

(*k*) R. *v.* Thomas, L. R. 2 C. C. R. 141. The prisoner was in fact charged with and tried for a felony, and the jury found him guilty of a misdemeanor only.

(*l*) In R. *v.* Connell, 1 C. & K. 190, a modern fourpenny piece was held to be sufficiently described as a 'groat,' although the value of the coin originally denominated a 'groat' had greatly changed since such coins were placed in currency, *temp.* Edward III.

(*m*) R. *v.* Whiley, 2 Leach, 983; 1 B. & P. (N. R.) 92. R. *v.* Tattershall [1801], 2 Leach, 985, cit. R. *v.* Ball, 1 Camp. 325; 2 Leach, 987n.; and other cases, *post*, Bk. xiii. c. ii. 'Evidence.'

(*n*) That is, within 15 Geo. II. c. 28 (rep.)

charge of uttering, to shew that he uttered the money with a knowledge of its being bad' (*o*). So, upon an indictment for uttering a counterfeit shilling, the fact of five other counterfeit shillings having been found in the prisoner's possession five days afterwards, has been held admissible in order to shew guilty knowledge (*p*).

In order to prove guilty knowledge, both previous and subsequent utterings of the same and of different kinds of coin are admissible. On an indictment for uttering a counterfeit half-crown on the 12th of December, that uttering was proved, and the uttering of another counterfeit half-crown on the 11th of December, and evidence was admitted of an uttering of a counterfeit shilling on the 4th of January, although it was objected that a subsequent uttering of a different species of counterfeit coin was not admissible to shew guilty knowledge at a prior time; and it was held that this evidence was properly received. In order to shew guilty knowledge, it would not be sufficient merely to prove some other dishonest act; but here the uttering of the bad silver was so connected with the offence charged, as to make the evidence of it admissible, although the coin was of a different denomination; and the difference of the denomination goes to the weight of the evidence, but does not affect its admissibility (*q*).

On an indictment on 2 Will. IV. c. 34, s. 8, for having in possession counterfeit crowns and half-crowns with intent to utter the same, it appeared that there were found in different pockets of the prisoner's dress four counterfeit crowns, all electro-plated, of the same date and same mould, each wrapped in a separate piece of paper: thirteen counterfeit half-crowns, all electro-plated, of the same date and the same mould, each wrapped in a separate piece of paper; and fourteen counterfeit shillings, all electro-plated, of the same date and the same mould. The prisoner said that they had been given him while gambling, and that he did not know that they were counterfeit: and it was held that there was sufficient evidence to go to the jury that he knew that the coin was counterfeit, and intended to utter it (*r*).

Intent.—The gist of the offence, as now defined, lies in the knowledge that the coin is counterfeit. Except in sect. 13, intent to defraud is not a part of the definition of the said offence, and it is no longer essential to prove that the uttering was done with intent to defraud the party receiving the money, or with intent that that party should pass it as the agent of the utterer. But to warrant a conviction there must be some indication of a dishonest purpose (*s*) or *mens rea* (*t*).

(*o*) R. *v.* Whiley, 2 Leach, 983.

(*p*) R. *v.* Harrison, 2 Lew. 118, Taunton, J., and Alderson, B.

(*q*) R. *v.* Foster, Dears. 456.

(*r*) R. *v.* Jarvis, Dears. 552.

(*s*) Upon an indictment on 2 Will. IV. c. 34, s. 7 (rep.), against husband and wife for uttering a counterfeit half-crown, it appeared that a woman asked the female prisoner to give her something, as her children were without food, and the male prisoner gave her twopence, and told her that his wife would give her something more, on which she gave the woman the bad half-crown in question, telling her to get what she could for her children: it was held that, although in the statute there are no words with respect to defrauding, yet in the proof it is necessary to go beyond the mere words of the statute, and to shew an intention to defraud some person. There might be cases of a party giving a person a piece of counterfeit money, and at the same time telling the person that it was bad, and yet he would still be liable to be convicted on an indictment like the present, if a case

Evidence of Previous Conviction.—By 24 & 25 Vict. c. 99, s. 37, ' . . . and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the Clerk of the Court or other officer having or purporting to have the custody of the records of the Court where the offender was first convicted, 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 the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the Court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken . . . ' (*u*).

It is clear from the terms of the enactment that the certificate is admissible without further proof if it appears to be in proper form (*v*).

If the prisoner, whether by himself or his counsel, attempts to prove a good character for honesty, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the Crown, the prosecution may give the previous conviction in evidence against the prisoner (*w*). If, however, a witness for the prosecution were asked by the prisoner's counsel some question, which has no reference to character, and he happened to say something favourable to the prisoner's character, the prisoner would not be said to give evidence as to his character, and the previous conviction ought not to be admitted (*x*).

C. *Of Uttering, Tendering, &c., Foreign Counterfeit Coin, &c.*

By 24 & 25 Vict. c. 99, s. 20, ' Whosoever shall tender, utter, or put 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 (*y*), knowing the same to be false or counterfeit, shall, in

falling within the mere words of the statute were sufficient. R. *v.* Page, 8 C. & P. 122. ' 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.' C. S. G. But where on an indictment for uttering counterfeit coin, it appeared that the prisoner had given the coin to a girl with whom he had had connection, Denman, C.J., and Coltman, J., held that if the prisoner gave the coin to the girl under the circumstances proved, knowing it to be counterfeit, he was guilty of the offence charged; that the preceding decision was not in point, as that was a case of charity; but that there were great doubts as to the correctness of that ruling. Anon., 1 Cox, 250. And in R. *v.* Ion, 2 Den. 484, it was said by Alderson, B., that R. *v.* Page is overruled, and that ' the intent is inferred by law,' in like manner as ' if a forged instrument is put away in order to get money or credit, that amounts to an uttering.'

(*t*) *Vide ante*, Bk. i. c. iv. p. 101.

(*u*) As to alternative modes of proof, see *post*, Bk. xii. c. iii. and Bk. xiii.

(*v*) In R. *v.* Whale, 1 Cox, 69; R. *v.* Stone, ibid. 70, Cresswell, J., is reported as having held that, where a certificate was produced purporting to be signed by a clerk of the peace, there must be some evidence in addition that the certificate is genuine and comes from the proper custody, as by proof of the handwriting, or that the document came from the office of the clerk of the peace. These cases are very probably misreported, as it is quite clear that no such evidence is required, and the universal practice has been to the contrary. C. S. G.

(*w*) R. *v.* Shrimpton, 2 Den. 319. R. *v.* Gadbury, 8 C. & P. 676.

(*x*) R. *v.* Shrimpton, *ubi sup.*, Campbell, C.J.

(*y*) See s. 18, *ante*, p. 352.

England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding six months, with or without hard labour' (*z*).

Sect. 21. 'Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit 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, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, [and with or without solitary confinement (*a*);] and whosoever, having been so convicted of a second offence, shall afterwards commit 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, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*b*).

SECT. VIII.—OF BUYING, SELLING, RECEIVING, OR PAYING FOR COUNTERFEIT COIN AT A LOWER RATE THAN ITS DENOMINATION IMPORTS.

Gold or Silver Coin.—By sect. 6, 'Whosoever, *without lawful authority or excuse* (*the proof whereof shall lie on the party accused*), shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin at or for a lower rate or value than the same imports or *was apparently intended to import*, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*c*); *and in any indictment for any such offence as in this section aforesaid it shall be sufficient to allege that the party 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 or 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*' (*d*).

(*z*) Framed from 37 Geo. III. c. 126, s. 4, with such alterations in its terms as to make it correspond with the rest of this Act.

(*a*) As to solitary confinement, see *ante*, p. 214.

(*b*) Framed from 37 Geo. III. c. 126, s. 4. As to other punishments, *vide ante*, p. 348. As to the indictment and proceedings, see s. 37, *ante*, p. 360. Having in custody a greater number than five pieces of counterfeit foreign coin, whether current here or not, makes the party liable to punishment by proceedings before a justice of the peace, under s. 23 of the statute.

(*c*) As to omitted parts and substituted punishments, see *ante*, p. 348.

(*d*) Taken from 2 Will. IV. c. 34, s. 6, with the additions and substitutions italicised. The words 'without lawful authority,' &c., were introduced in order to protect officers and others who are authorised to buy or procure false coin in order to detect coiners. In the repealed enactment there was no qualification. The words 'apparently intended to import' are substituted for 'or was coined, or counterfeited for.' The last part of the section renders it unnecessary to allege the sum for which the coin was bought, &c., and consequently

Copper Coin.—By sect. 14, 'Whosoever . . . (*e*) shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current copper coin, at or for a lower rate or value than the same imports *or was apparently intended to import*, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . .' (*f*).

The mere vending of the coin was not considered to come within 8 & 9 Will. III. c. 26, s. 6 (rep.), unless it were done at a lower value than the coin imported (*g*). The mode of stating the lower value in indictments under the present enactments is regulated by the latter part of sect. 13 of the Act of 1861.

If the names of the persons to whom the money was put off can be ascertained, they ought to be laid in the indictment; but if they cannot be ascertained the same rule applies as in stealing the property of persons unknown (*h*).

Sect. IX.—Of the Making, Mending, or Having in Possession any Instruments for Coining.

In R. *v.* Sutton (2 Str. 1074; cas. *temp.* Hardw. 370), it was said that the possession of tools for coining with intent to use them was a misdemeanor at common law. But in R. *v.* Heath (*i*) this decision was said to be untenable.

By 24 & 25 Vict. c. 99, s. 24, 'Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon (*j*), counter-puncheon, matrix, stamp, die, pattern, or mould (*k*), in or upon which there shall be

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, &c., at some lower rate or value than it imports. Under 2 & 3 Will. IV. c. 34, s. 7, it was necessary to aver and prove the sum for which the coin was bought, &c. R. *v.* Joyce, Carr. Supp. 184. R. *v.* Hedges, 3 C. & P. 410.

(*e*) For the portion of this section which relates to counterfeiting copper coin, see *ante*, p. 350. And for the portion relating to coining tools, see *post*, p. 367.

(*f*) Taken from part of 2 Will. IV. c. 34, s. 12. As to other punishments, see *ante*, p. 348. As to the words in *italics*, see remarks on s. 6, *ante*, p. 364.

(*g*) 1 East, P.C. 180.

(*h*) Ibid.

(*i*) [1810] R & R. 184.

(*j*) It is enough if the puncheon, &c., will impress a resemblance, whether exact or not, to the genuine coin such as would impose upon the world. R. *v.* Ridgelay [1778], 1 Leach, 189. Cf. the cases mentioned by Hale (1 P.C. 184), that the omitting the inscription on the true seal of state would not take the case out of the statute. See R. *v.* Robinson, 2 Rolle Rep. 50; 1 East, P.C. 86.

(*k*) Mould was specifically mentioned in one clause of 8 & 9 Will. III. c. 26, s. 1, and was held to fall within the words 'or other tool or instrument hereinbefore mentioned' used in a later clause. R. *v.* Lennard [1772], 1 Leach, 90; 2 W. Bl. 807; 1 East, P.C. 170. Upon the form of the indictment the question was raised, whether the mould which was found in the prisoner's custody, it having only the resemblance of a shilling *inverted*, viz., the convex parts of the shilling being concave in the mould, and *vice versa*, the head or profile being turned the contrary way of the coin, and all the letters of the inscription reversed, was not properly an instrument which *would make and impress* the resemblance, stamp, &c., rather than an instrument on which the same *were made and impressed*, as laid in this indictment, the statute seeming to distinguish between such as *will*

made or impressed, or which will make or impress, or which shall be *adapted and* intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the King's current gold or silver coin, *or of any coin of any foreign prince, state, or country* (*l*), or any part or parts (*m*) of both or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging *or other* tool, collar (*n*), 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 shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage (*o*), 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, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*p*).

Conveying Tools or Monies out of the Mint without Authority.—Sect. 25. 'Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly convey out of any of His Majesty's mints 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 matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*q*).

make and impress the similitude, &c., as the matrix, die, and mould; and such on which the same is *made and impressed*, as a puncheon, or counter-puncheon, or pattern. But a great majority of the judges were of opinion that this evidence sufficiently maintained the indictment; because *the stamp* of the current coin was certainly impressed on the mould in order to form the cavities thereof. They agreed, however, that the indictment would have been more accurate had it charged that 'he had in his custody a mould that *would make and impress* the similitude,' &c., and in this opinion some, who otherwise doubted, acquiesced. In R. *v.* Macmillan, 1 Cox, 41, Maule, J., seems to have ruled that a mould must be something with which a coin can be made, and to have directed an acquittal where a mould having a perfect impression of one side of a shilling, had no channel through which the metal could run.

(*l*) These words provide for foreign coin not dealt with by 8 & 9 Will. III. c. 20. R. *v.* Bell, 1 East, P.C. 169; Fost. 430.

(*m*) These words, which were in 2 & 3 Will. IV. c. 34, s. 10, were held to apply to cases where several moulds were used to make one side of a coin. R. *v.* Richmond, 1 C. & K. 240, Rolfe, B. In R. *v.* Macmillan, 1 Cox, 41, Maule, J., held that the words 'part or parts' refer to the impression, and not to the mould itself.

(*n*) 8 & 9 Will. III. c. 26, applied to collars and instruments newly invented after its passing. R. *v.* Moore, 1 Mood. 122.

(*o*) Presses, &c., were tools or instruments within 8 & 9 Will. III. c. 26. R. *v.* Bell, Fost. 430.

(*p*) Framed from 2 & 3 Will. IV. c. 34, s. 10, and extended to tools for counterfeiting foreign coin, and to tools and machines other than those specified in the former enactment, including tools for cutting blanks out of mixed metals. For other punishments, see *ante*, p. 348.

(*q*) Taken from 2 & 3 Will. IV. c. 34, s. 11. As to other punishments, see *ante*, p. 348.

Making or having Tools for Coining Copper.—Sect. 14. '. . . Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the King's current copper coin . . . shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . .' (*r*).

Lawful Authority or Excuse.—It has been decided upon sect. 24 that the word 'excuse' includes authority, and that it is unnecessary to allege or prove any intent. The felony is knowingly to have possession of a die, and the guilty knowledge required is that of being in possession of the die, contrary to the provisions of the Act of Parliament, that is, without lawful authority or excuse. A guilty intention to use the dies is not necessary (*s*).

Where two galvanic batteries were found in the prisoner's house, with white metal and other things plainly indicating that they had been used for coining, and it was proved that counterfeit coin is electro-plated before it is put in circulation, and that that is generally done by the aid of galvanic batteries, it was held that the batteries were machines within the meaning of this section (*t*).

Innocent Agent.—Where a die calculated to make shillings is made by an innocent agent, the party procuring him to make such die is the principal. The prisoner was indicted under 2 & 3 Will. IV. c. 34, s. 10 (repealed and replaced by 24 & 25 Vict. c. 99, s. 24), for feloniously making a die which would impress the resemblance of the obverse side of a shilling. The prisoner applied to a die-sinker to sink four dies for counters for two whist clubs, stating that it was their practice to play with counters with one side resembling coins. The dies were to be obverse in the one case head of Queen Victoria, as in the shilling; in the other the shilling as in coin, with wreath, &c. Reverses the names of the clubs. The die-sinker was directed to execute the prisoner's order. The prisoner afterwards desired to have the two obverses finished first, and they were so. When they were finished, they formed a die for the coining of a shilling. For the prisoner, it was objected that he could not be convicted, as he had not himself done anything in the making of the die, and that he was not answerable in this form of charge for the act of the die-sinker; that the die-sinker having acted under the instructions of the Mint, no felony whatever had been committed, and that the prisoner should have been indicted for a misdemeanor in inciting the die-sinker to commit a felony. But, upon a case reserved, all the judges present (except Cresswell) thought the die-sinker an innocent agent, and held the conviction good (*u*).

Evidence.—On an indictment for having in possession a die made of

(*r*) Taken from part of 2 & 3 Will. IV. c. 34, s. 12. As to other punishments, see *ante*, p. 348.

(*s*) R. *v.* Harvey, L. R. 1 C. C. R. 284; 46 L. J. M. C. 63. Cf. Dickins *v.* Gill [1896], 2 Q.B. 310, decided on s. 7 of the Post Office Protection Act, 1884 (47 & 48 Vict. c. 76, re-enacted as 8 Edw. VII. c. 48, s. 6 (5)).

(*t*) R. *v.* Gover, 9 Cox, 282, The Common Serjeant, after consulting Keating, J.

(*u*) R. *v.* Bannen [1844], 2 Mood. 309. As to innocent agents, *vide ante*, p. 104.

iron and steel, a witness who saw the die said it was made of iron ; another witness, who had not seen it, said that dies were usually made of steel, and that iron dies would not stand. It was held that this evidence would support the indictment, for it was immaterial to the offence of what the die was made, and proof of a die either of iron or steel, or both, would satisfy charge (*v*).

The degree of resemblance to the real coin which the tools or instrument must be capable of impressing in order to bring the case within sect. 24, must be governed by considerations similar to those which have been stated with respect to the counterfeit coin itself (*w*). Whether the instrument in question be adapted and intended to impress the figure, stamp, resemblance, or similitude of the coin current is a question for the jury ; and it is clear, that the offence is not confined to ' an *exact imitation* of the original and proper effigies of the coin ' (*x*).

An indictment alleged in one count that a prisoner feloniously had in his possession a mould ' upon which was impressed the figure and apparent resemblance of one of the sides (that is to say) the obverse side of the King's current coin called a shilling,' and in another count the substituted word ' reverse ' for ' obverse.' The moulds when produced appeared not to have a complete impression of the obverse and reverse sides of a shilling, but only the outside rim, and a slight portion of the other parts of the impression ; the entire impressions, however, appeared to have been upon them at one time, but part had been obliterated. It was held, that if the jury believed that no more than part of the impression was impressed upon the moulds while the prisoner was in possession of them, he ought to be acquitted (*y*). But where an indictment charged that the prisoner made a mould, which was intended to impress the resemblance of the obverse side of a shilling, it was held sufficient to prove that the prisoner made a mould, which would make a part of the impression. One count charged the prisoner with making a mould, ' which said mould was intended to make and impress the figure and apparent resemblance ' of the obverse side, and another the reverse side, of a shilling ; the evidence being the same as in the former case ; it was held, that the term ' intended ' did not mean in a state to make an entire impression, and therefore if the prisoner had only begun to make, the intention to make the whole might be inferred, though only part was actually made, and consequently that the evidence was sufficient (*z*).

An indictment charging that the prisoner had in his possession a mould ' upon which was made and impressed the figure ' of one of the sides of a coin was held bad for not shewing that the figure was on the mould at the time when the prisoner had it in his possession. The words ' then and there ' should be introduced before the word ' made ' (*a*).

(*v*) R. *v.* Oxford [1819], R. & R. 382, and MS. Bayley, J. R. *v.* Phillips [1818], R. & R. 369. In proceedings under 8 & 9 Will. III. c. 26, it was not necessary to prove that coin was actually made with the instrument. R. *v.* Ridgelay, 1 East, P.C. 172.

(*w*) See 1 East, P.C. 171, and *ante*, p. 351.

(*x*) 1 East, P.C. 171.

(*y*) R. *v.* Foster, 7 C. & P. 494, Patteson, J.

(*z*) R. *v.* Foster, 7 C. & P. 495, Patteson, J.

(*a*) R. *v.* Richmond, 1 C. & K. 240, Rolfe, B.

W. and two other men and two women were indicted for having in their possession a mould impressed with one side of a half-crown. W. had occupied a house for a month, and the police one night went to the house and found the other prisoners there. The men attacked the police, whilst the women snatched up something which they threw into the fire. The police preserved part of this, which proved to be fragments of a plaster of Paris mould of a half-crown, *parts of which were still wet.* A quantity of plaster of Paris was found in a cupboard up stairs, with several bottles of liquid. In a cupboard down stairs an iron ladle, such as might have been used for melting metal, was found; on the hearth in one of the rooms up stairs was found a small portion of white metal and some fragments of plaster of Paris moulds. Thirteen days before W. had passed a bad half-crown; but there was no evidence to shew that it was made in the mould found in the house. The jury found that W. knew that the mould was in the house. It was held that W. was rightly convicted, as the mould was found in the house of which he was the master, and that the evidence of the uttering of the half-crown by him was rightly admitted to establish the scienter (*b*).

On an indictment against husband, wife, and boy aged ten years, for having in possession a mould on which was impressed the obverse side of a shilling, it appeared that the boy was apprehended whilst passing a counterfeit half-crown, and on the officer going to the house where he said he resided the husband was found in an upper room. In the lower room the mould and various coining implements were found, and whilst the officer was searching the wife came in, and soon afterwards broke up a mould used in casting counterfeit shillings; on her counterfeit money was found, but none on her husband. Talfourd, J., held that as the husband occupied the room in which the mould was found, *prima facie* he must be presumed to be in possession of what the room contained; but that presumption might be rebutted, and the jury must consider all the circumstances, and see whether they satisfied them that the trade was carried on there with his sanction. If they were satisfied that the husband was in possession of the mould, they ought to acquit the wife, as she could not in law be said to have any possession separate from her husband; but if they thought that the criminality was on her part alone, and that he was entirely guiltless of any participation in her conduct, she might be convicted. If they thought she broke the mould to screen him from detection, that would not affect the case. Either husband or wife might be convicted on this evidence, but not both. As to the boy, it would be going too far to say that he was a joint possessor with either of his parents (*c*).

The counterfeiting of foreign coin was then a felony under 37 Geo. III. c. 126, s. 2, repealed and now represented by 24 & 25 Vict. c. 99, s. 18, *ante*, p. 352.

Procuring Dies with Intent to Counterfeit Foreign Coin.—An indictment (*d*) contained one count charging the prisoner with unlawfully causing to be made two dies, one of the obverse side, the other of the reverse

(*b*) R. *v.* Weeks, L. & C. 18.
(*c*) R. *v.* Boober, 4 Cox, 272.
(*d*) Under 37 Geo. III. c. 126 (rep.).

side of a silver half-dollar of Peru, with intent feloniously to make counterfeit Peruvian half-dollars, another count charging him with attempting feloniously to coin by making the dies, with intent to use them in coining such counterfeit coins. From the evidence it appeared that the prisoner, without any authority or licence so to do, caused to be made by one Jackson, a die-sinker (who, though he executed the order, gave notice to the police, and committed no offence against the law), the necessary dies for making a counterfeit dollar of Peru. The dies, though suitable and necessary for making such counterfeit coin, could not alone produce it; a press, copper blanks, galvanic battery, and a preparation of silver being also necessary for that purpose. The prisoner had procured galvanic batteries, and had been in negotiation for the purchase of a press and copper blanks for the aforesaid purpose; but he had not actually procured either press, blanks, or preparation of silver. There was no doubt that the prisoner intended to use the whole apparatus when procured in making counterfeit Peruvian dollars, and the only doubt was whether he intended to coin in Peru only, or in this country also; and it was contended that, if he only intended to make the coin in Peru, no offence had been committed; and even if he did intend to coin in this country, that intention, though coupled with the act of causing the dies to be made in pursuance of such intention, fell short of an attempt to commit a felony. The jury found that the intention of the prisoner was to cause to be made and procure the dies and other apparatus in order therewith to coin counterfeit Peruvian half-dollars, and to make a few only of the counterfeit coin in England by way of trying whether the apparatus would answer before sending it out to Peru, to be there used in making the counterfeit coin, and convicted the prisoner; and upon a case reserved, it was held that the conviction was right. Jervis, C.J., said: 'This is not an indictment for an attempt to commit statutable offence; as was the case in R. *v.* Williams (*e*), where the charge was an attempt to administer poison. Here there is no direct attempt to coin, but the indictment is founded on a criminal intent coupled with an act immediately connected with the offence. . . . Nobody can doubt that the prisoner was in possession of machinery necessarily connected with the offence, for the express purpose of committing it, and which was obtained, and could be obtained, for no other purpose.' And Wightman, J., said: 'No doubt the act was done with intent to commit a felony, and was sufficient to support such an indictment as the present. It is an act immediately connected with the offence, and the prisoner could have no other object than to commit the offence' (*f*).

(*e*) 1 Den. 39; 1 C. & K. 589.

(*f*) R. *v.* Roberts, Dears. 539, Jervis, C.J., Parke, B., Wightman, Cresswell, and Wilkes, JJ. The Court seem to have been clear that making a few specimens to ascertain whether they would answer the purpose would have been a felony within the statute; and that even making a few specimens to put in a cabinet would also be within the statute. And see R. *v.* Harvey, L. R. 1 C. C. R. 284, *ante*, p. 367.

CANADIAN NOTES.

OF AND RELATING TO COIN.

Sec. 1—Definition and General Provisions.

Definition.—Code secs. 546, 547.

Completion of offence.—Code sec. 548.

Knowledge and Intent.—Code sec. 549.

In the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having passed other counterfeit money or bills at about the same time, or that he had many such in his possession, which circumstances tend strongly to shew that he was not acting innocently and had not taken the money casually, but that he was employed in fraudulently putting it off. R. v. Brown (1861), 21 U.C.Q.B. 330, per Robinson, C.J.

Possession, Meaning of.—Code sec. 5.

Sec. 2.—Punishment.

Code sec. 552.

Punishment for Second Offence.—Code sec. 568.

Secs. 851 and 963 as to the procedure where a previous conviction is charged seems to imply that the second offence must have been committed subsequently to the first conviction.

As to certificates of previous convictions. See Code sec. 982.

A conviction for an offence charged as a second offence, which second offence was committed prior to the date of the conviction of the first offence was bad at common law. Ex parte Miller, 2 Pugs. 485; Ex parte McCoy, 7 Can. Cr. Cas. 487.

Evidence on Trial.—Code sec. 980.

Sec. 3.—Counterfeiting Coin.

Definition.—Code sec. 2(8).

Importing.—Code sec. 554.

Seizure and Forfeiture by Justices.—Code sec. 623.

Knowledge.—Code sec. 624.

Recovery of Penalty.—Code sec. 625.

Seizure and Forfeiture by Customs Officers.—Code sec. 626.
Counterfeiting.—Code sec. 562.

Sec. 4.—Impairing and Defacing Current Coin.

Clipping Gold and Silver Coin.—Code sec. 558.
Unlawful Possession of Clippings.—Code sec. 560.
Defacing Current Coin.—Code sec. 559.

No proceeding or prosecution for the offence of uttering any coin defaced by having stamped thereon any names or words, shall be taken without the consent of the Attorney-General. Code sec. 598.

Sec. 5.—Of Importation of Counterfeit Gold and Silver Coin.

Gold or Silver Coin.—Code sec. 563.

On a charge of having counterfeit coins in possession, proof that the accused also had in his possession "trade dollars" which, although genuine, were not worth their stamped value, is not admissible as shewing intent to put off the counterfeit coin. R. v. Benham, 4 Can. Cr. Cas. 63.

Copper Coin.—Code sec. 554.

Sec. 6.—Exporting Counterfeit Current Coin.

Exporting.—Code sec. 555.

Sec. 7.—Of Uttering, Tendering, etc.

Possessing with Intent to Utter.—Code sec. 561.

Where an indictment for having possession of counterfeit coin with intent to utter same was, on demurrer, held bad for not alleging that the counterfeit coin "resembled some gold or silver coin then actually current," the order made was that the indictment be quashed, so that another indictment might be preferred, not that the defendants be discharged. R. v. Tierney, 29 U.C.Q.B. 181.

Uttering Counterfeit Coin.—Code sec. 564.
Uttering Light Coin.—Code sec. 565.
Uttering Defaced Coin.—Code sec. 566.
Uttering Uncurrent Coin.—Code sec. 567.

Sec. 8.—Of Buying, Selling, etc.

Gold or Silver Coin.—Code sec. 553.
Advertising Counterfeit Money.—Code sec. 569.
Evidence of Fraudulent Scheme.—Code sec. 981.

This section covers not only the case of counterfeit money, *i.e.*, false tokens purporting to be bank notes, etc., but false tokens purporting to be counterfeit tokens.

The words "what purports to be" in sec. 569 (formerly 51 Vict. (Can.), ch. 40) import what appears on the face of the instrument;

and therefore what was said to the prisoner, or what he thought or believed, would not be of any moment. Per Rose, J., R. v. Attwood (1891), 20 Ont. R. 574, 578.

When a person exhibits to another bank notes representing them as counterfeit, when in fact they are not so, the offer to purchase such notes cannot be an offence under the Act, as the prisoner was offering to purchase that which the party had to sell, which were not counterfeit tokens of value. Per MacMahon, J., R. v. Attwood (1891), 20 Ont. R. 574, 581.

In the last named case, the defendant was prosecuted for offering to purchase bank notes which were shewn to him as counterfeit, but were in fact genuine bank notes unsigned.

Doubt was also expressed in the Attwood Case as to whether the section applies to counterfeit tokens not *in esse*, MacMahon, J., saying that it may be that the clause of the statute would require to be amended in order to reach a person offering to purchase such.

A paper which is a spurious imitation of a government treasury note is a counterfeit, or what purports to be a counterfeit, token of value although there is no original of its description. R. v. Corey (1895), 1 Can. Cr. Cas. 161 (N.B.).

As to evidence of admissions made by the accused, see note to sec. 685.

Although the taking possession of or using a counterfeit token of value is an offence under sec. 569(*d*), if such counterfeit be also a forged bank note the prosecution may be under Code sec. 550 for the offence of having a forged bank note in possession knowing it to be forged. R. v. Tutty (1905), 9 Can. Cr. Cas. 544, 38 N.S.R. 136.

Sec. 9.—Of the Making, etc.

Making or Possessing Implements for Counterfeiting.—Code sec. 556.

Search Warrant.—Code secs. 629 and 632(2).

Sec. 10.—Supplementary.

Bank Notes.—Code sec. 550.

Meaning of "Possession or Custody."—Code sec. 5.

Bank or Government Securities.—Code sec. 551.

Conveying Tools from Mint into Canada.—Code sec. 557.

CHAPTER THE THIRD.

OFFENCES AGAINST THE REVENUE LAWS

A.—Customs.

Conspiracy to defraud the Crown of customs duties is a misdemeanor indictable at common law (*a*).

There has been much legislation passed from time to time in order to prevent smuggling (*b*) and other acts tending to defeat the due collection of certain duties, which gave to revenue officers extraordinary powers and protections, and punished persons endeavouring to resist or evade the Customs law (*c*).

The earlier Acts have been superseded and their substance re-enacted in the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36). That Act contains much relating to the forfeiture of vessels engaged in illegal traffic, and of uncustomed goods, which does not come within the scope of this treatise. But it is necessary to notice the enactments relating to the right to seize vessels suspected of being employed for smuggling and to search for and seize uncustomed goods, and also the indictable offences created by the statute. The Act applies to the United Kingdom, to the Isle of Man (sect. 277), and to the Channel Islands (sect. 289).

By sect. 151, 'The Customs Acts shall extend to and be of full force and effect in the several British possessions abroad, except where otherwise expressly provided for by the said Acts, or limited by express reference to the United Kingdom or the Channel Islands, and except also as to any such possessions as shall by local Act or ordinance have provided, or may hereafter, with the sanction and approbation of His Majesty, make *entire* provision for the management and regulation of the customs of any such possession, or make in like manner express provisions in lieu or variation of any of the clauses of the said Act (*sic*), for the purposes of such possession' (*d*).

False Declarations.—By sect. 168, 'If any person shall in any matter relating to the Customs or under the control or management of the

(*a*) R. *v.* Thompson, 16 Q.B. 832.

(*b*) *i.e.*, bringing on shore or carrying from the shore goods, wares, or merchandise on which duty has not been paid, or the importation or exportation whereof is prohibited (*vide post*, p. 374). See 1 Hawk. c. 48, s. 1; 4 Bl. Com. 155; Bac. Abr. 'Smuggling.'

(*c*) This legislation was cumulative upon, or alternative to, the common law remedies by indictment. See the precedents of indictments for misdemeanors, in assaulting and obstructing officers of excise and customs, acting in the due execution of their offices. 4 Wentw. 385 *et seq.* 2 Chit. Cr. L. 127 *et seq.* And see R. *v.* Brady, 1 B. & P. 187, where it was admitted that the offence charged was indictable at common law.

(*d*) Laws, by-laws, and usages, &c., of a British possession contrary to the Acts, are declared void (s. 161).

Commissioners of Customs, make and subscribe, or cause to be made and subscribed, any false declaration, or make or sign any declaration certificate or other instrument required to be verified by signature only, the same being false in any particular, or if any person shall make or sign any declaration made for the consideration of the Commissioners of Customs on any application presented to them, the same being untrue in any particular, or if any person required by this or any other Act relating to the Customs to answer questions put to him by the officers of Customs shall not truly answer such questions, or if any person shall counterfeit falsify or wilfully use when counterfeited or falsified, any document required by this or any Act relating to the Customs or by or under the directions of the Commissioners of Customs, or any instrument used in the transaction of any business or matter relating to the Customs, or shall alter any document or instrument after the same has been officially issued, or counterfeit the seal signature initials or other mark of or used by any officer of the Customs for the verification of any such document or instrument, or for the security of goods, or any other purpose in the conduct of business relating to the Customs or under the control or management of the Commissioners of Customs or their officers, every person so offending shall for every such offence forfeit the penalty of one hundred pounds' (*e*).

Smuggling.—By sect. 179, 'If any ship or boat shall be found or discovered to have been within any port bay harbour river or creek of the United Kingdom or the Channel Islands, or within three leagues of the coast thereof if belonging wholly or in part to British subjects, or having half the persons on board subjects of His Majesty, or within one league if not British, have false bulk heads false bows double sides or bottom, or any secret or disguised place adapted for concealing goods, or any hole tube pipe or device adapted for running goods, or having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner any spirits tobacco snuff or packages of any size and character in which they are prohibited to be imported into the United Kingdom or the Channel Islands, or any spirits or tobacco or snuff imported contrary to the Customs Acts, or any tobacco stalks; tobacco stalk flour, or snuff work, or which (*sic*) shall be found or discovered to have been within three leagues of any part of the coast of the United Kingdom from which any part of the lading of such ship or boat shall be or have been thrown overboard, or on board which any goods shall be or have been staved or destroyed to prevent seizure,' the ship, boat, spirits, &c., shall be forfeited (*f*), and 'every person who shall be found or discovered to have been on board any ship or boat liable to forfeiture as aforesaid, within three leagues of the coast if a British subject, and within one league if a foreigner (*g*), or on board any vessel in His Majesty's service, or on board

(*e*) As to recovery of penalties, see 42 & 43 Vict. c. 21, s. 11, *post*, p. 383.

(*f*) By 53 & 54 Vict. c. 56, s. 1, ships or boats of 250 tons burden and upwards are excepted from forfeiture, and by ss. 2, 3, provisions are made for dealing with larger vessels by fining a responsible officer of the vessel, or in serious cases of condemning the vessel in a sum not exceeding £500. The ship may be detained till the fines are paid or secured.

(*g*) See Territorial Waters Jurisdiction Act, 1878, *ante*, p. 41.

any foreign post office packet employed in carrying mails between any foreign country and the United Kingdom having on board any spirits or tobacco in such packages as aforesaid or any tobacco stalks, tobacco stalk flour or snuff work, shall forfeit a sum not exceeding £100; and every such person may be detained and taken before any justice, to be dealt with as hereinafter directed: Provided, that no person shall be detained whilst actually on board any vessel in the service of a foreign state or country' (*h*). 'And provided also that no person shall be liable to conviction under this section unless there shall be reasonable cause to believe that such person was concerned in or privy to the illegal act or thing proved to have been committed' (*i*).

Sect. 180 provides for the forfeiture of any ships or boats belonging wholly or in part to His Majesty's subjects or having half the persons on board His Majesty's subjects if they do not bring to on signal by a vessel or boat in His Majesty's service or in the service of the revenue and on chase throw overboard stave or destroy any part of the lading to prevent seizure. All persons escaping from such ship or boat during chase are to be deemed subjects of His Majesty unless the contrary is proved.

Search and Seizure of Smuggling Vessels, &c.—By sect. 181, 'If any ship or boat liable to seizure or examination under the Customs Acts shall not bring to when required so to do, the master of such ship or boat shall forfeit the sum of £20; and on being chased by any vessel or boat in His Majesty's navy having the proper pendant and ensign of His Majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master (see sect. 284), or other person having the charge or command of such vessel or boat in His Majesty's navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into such ship or boat, and such captain, master, or other person acting in his aid or by his direction shall be and is hereby indemnified and discharged from any indictment penalty action or other proceeding for so doing.'

By sect. 182, 'Any officer of Customs or other person duly employed for the prevention of smuggling may go on board any ship or boat which shall be within the limits of any port of the United Kingdom or the Channel Islands, and rummage and search the cabin and all other parts of such ship or boat for prohibited or uncustomed goods, and remain on board such ship or boat so long as she shall continue within the limits of such port.'

By sect. 12 of the Customs, &c., Act, 1881 (44 & 45 Vict. c. 12) (*j*), 'Any officer of Customs or other persons duly employed in the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or any person who shall have landed from any ship or boat, provided such officer or other person duly employed as aforesaid shall have good reason

(*h*) See The Mail Ships Acts, 1891 (54 & 55 Vict. c. 31), and 1902 (2 Edw. VII. c. 36).

(*i*) Proviso added by 50 Vict. sess. 2, c. 7, s. 1.

(*j*) Substituted by 44 & 45 Vict. c. 12, s. 13, for s. 184 of the Act of 1876.

to suppose that such person is carrying or has any uncustomed or prohibited goods about his person.

A person shall be guilty of an offence—

1. If he staves breaks or destroys any goods to prevent the seizure thereof by an officer of Customs or other person authorised to seize the same.
2. If he rescues or staves breaks or destroys to prevent the securing thereof any goods seized by an officer of Customs or any other person authorised to seize the same.
3. If he rescues any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts.
4. If he prevents the apprehension of any such person.
5. If he assaults or obstructs any officer of Customs or any officer of the army, navy, marines, coastguard, or other person duly employed for the prevention of smuggling, going or returning from on board any ship within the limits of any port in the United Kingdom or the Channel Islands, or in searching such a ship or boat, or in searching a person who has landed from any such ship or boat, or in seizing any goods liable to forfeiture under the Customs Acts, or otherwise acting in the execution of his duty.
6. If he attempts or endeavours to commit, or aids, abets, or assists in the commission of any of the offences mentioned in this section.

And a person so offending, shall, for each offence, forfeit a penalty not exceeding £100 (*k*), and he may either be detained or proceeded against by information and summons.

By sect. 185 of the Act of 1876, 'Before any person shall be searched he may require to be taken with all reasonable despatch before a justice, or before the collector or other superior officer of Customs, who shall, if he see no reasonable cause for search, discharge such person, but if otherwise, direct that he be searched, and if a female she shall not be searched by any other than a female; but if any officer shall without reasonable ground cause any person to be searched, such officer shall forfeit and pay a sum not exceeding ten pounds. If any passenger or other person on board any such ship or boat, or who may have landed from any such ship or boat, shall, upon being questioned by any officer of Customs or other person duly employed for the prevention of smuggling whether he has any foreign goods upon his person or in his possession or in his baggage, deny the same, and any such goods shall after such denial be discovered to be or to have been upon his person or in his possession or in his baggage, such goods shall be forfeited, and such person shall forfeit one hundred pounds, or treble the value of such goods, at the election of the Commissioners of Customs.'

Prohibited and Restricted Goods.—Sec. 186. 'Every person who shall import or bring, or be concerned in importing or bringing into the United Kingdom any prohibited goods or any goods the importation of which is restricted (*l*), contrary to such prohibition or restriction,

(*k*) Recoverable under 42 & 43 Vict. c. 21, s. 11, *post*, p. 383.

(*l*) Prohibited and restricted goods are enumerated in ss. 42–45 of the Act of 1876. The following additions have been made to the text: 'Imitation coin,' 52 & 53 Vict.

whether the same be unshipped or not; or shall unship or assist or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured; or shall deliver, remove or withdraw from any ship, quay, wharf, or other place previous to the examination thereof by the proper officer of Customs, unless under the care or authority of such officer, any goods imported into the United Kingdom or any goods entered to be warehoused after the landing thereof, so that no sufficient account is taken thereof by the proper officer, or so that the same are not duly warehoused; or shall carry into the warehouse any goods entered to be warehoused or to be rewarehoused, except with the authority or under the care of the proper officer of the Customs, and in such manner, by such persons, within such time, and by such roads or ways as such officer shall direct; or shall assist or be otherwise concerned in the illegal removal or withdrawal of any goods from any warehouse (sect. 284) or place of security in which they shall have been deposited; or shall knowingly harbour, keep, or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods, or any goods which shall have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited; or shall knowingly acquire possession of any such goods; or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud His Majesty of any duties due thereon, or to evade any prohibition or restriction of or application to such goods; or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs, or of the laws and restrictions of the Customs relating to the importation, unshipping, landing, and delivery of goods, or otherwise contrary to the Customs Acts; shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons' (*m*).

Assembling for Smuggling, and Use of Offensive Weapons.—By the Customs Act, 1879 (42 & 43 Vict. c. 21), s. 10 (*n*), 'All persons to the number of three or more who shall assemble for the purpose of unshipping, landing, running, carrying, concealing, or having so assembled shall unship, land, run, carry, convey, or conceal any spirits, tobacco, or any prohibited, restricted, or uncustomed goods, shall each forfeit a penalty not exceeding £500 nor less than £100.'

By sect. 189 of the Act of 1876, 'every person who shall by any means

c. 42, s. 2; 'certain foreign coin,' 49 & 50 Vict. c. 41, s. 2; 42 & 43 Vict. c. 21, s. 5. And see 50 & 51 Vict. c. 78; 59 & 60 Vict. c. 28, ss. 4, 5, 6; 60 & 61 Vict. c. 63, s. 1; 61 & 62 Vict. c. 46, s. 1; 3 Edw. VII. c. 21, s. 1; 6 Edw. VII. c. 20, s. 6; 7 Edw. VII. c. 21, s. 5; 8 Edw. VII. c. 42, s. 5.

(*m*) The penalties of this section are by s. 6 of the Revenue Act, 1889 (52 & 53 Vict. c. 42), extended to the separation of dutiable goods from other matter, where the dutiable goods have been taken to a warehouse as unfit for consumption, by reason of their being mixed with any other matter.

(*n*) Substituted by 42 & 43 Vict. c. 21, s. 14 and sched. for s. 188 of the Act of 1876.

procure or hire or shall depute or authorise any other person to procure or hire, any person or persons to assemble for the purpose of being concerned in the landing or unshipping or carrying conveying or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured, shall be imprisoned for any term not exceeding twelve months; and if any person engaged in the commission of any of the above offences be armed with firearms or other offensive weapons, or whether so armed or not be disguised in any way, or being so armed or disguised, shall be found with any goods liable to forfeiture under the Customs Acts, within five miles of the seacoast or of any tidal river, shall be imprisoned with or without hard labour for any term not exceeding three years' (*o*).

Assembling.—In a case under 19 Geo. II. c. 34 (rep.), it was held that the *assembling* must be *deliberate*, and for the purpose of committing the offence described in the statute. So that where a set of drunken men came from an alehouse, and hastily set themselves to carry away some Geneva which had been seized by the excise officers, it was thought very questionable whether the object which the Legislature had in view could be extended to such a case; and the Court said, that the words of the statute manifestly alluded to the circumstance of great multitudes of persons coming down upon the beach of the sea for the purpose of escorting uncustomed goods to the places designed for their reception (*p*).

Offensive Weapons.—The term 'weapon' would seem to include any instrument of metal or wood, or any club, stone, or other thing which is had for the purpose of effecting an injury on the person, according to the doctrine of the Roman law, *Teli appellatione et ferrum, et fustis, et lapis, et denique omne quod nocendi causa habetur, significatur* (*q*).

It was held that to bring offenders within the penalties of 19 Geo. II. c. 34 (rep.), for offences committed by persons, to the number of three or more, armed with firearms, or other offensive weapons, it was necessary that the offenders should be armed with *offensive* (*r*) weapons. It seems to have been held that a person catching up a *hatchet* accidentally, during the hurry and heat of an affray, was not armed with an offensive weapon

(*o*) The intention of these two sections probably is that three or more persons assembling are to be liable to a penalty, and persons procuring them to assemble are to be liable to twelve months' imprisonment; but if persons assemble armed, or procure others to assemble armed, they are to be liable to three years' imprisonment. The sections are difficult to construe. See Stephen's Digest (6th ed.), art. 81. The term of three years does not seem to have been altered by 54 & 55 Vict. c. 69, s. 1, *ante*, p. 212. In R. *v.* Dean, 12 M. & W. 39, two persons were separately convicted of unshipping goods against 3 & 4 Will. IV. c. 53, s. 44, by which '*every* person concerned in the unshipping of goods, the duties of which have not been paid, was liable to forfeit either the treble value thereof, or to a penalty of £100, and it was held that each was liable to the penalties imposed by the clause. Alderson, B., said (p. 44): 'We must look at the statute to see whether it was intended that *every person* offending should be punished, or merely that every offence should be punished. The question is whether an offence that is committed by several persons is to be visited by a penalty.'

(*p*) R. *v.* Hutchinson, 1 Leach, 343. The Court offered the Attorney-General a special verdict upon this case: but he declined to take it, and the prisoners were acquitted. This construction of the statute as to the assembling being *deliberate*, and for the purpose of committing the offence, is stated to have been adopted by Willes, J., and Hotham, B., in R. *v.* Spice, and by Heath, J., in R. *v.* Gray (both in 1785). 1 Leach, 343, note (*a*).

(*q*) Heinecc. Antiq. Tit. 1, s. 9.

(*r*) R. *v.* Hutchinson, 1 Leach, 342.

within the meaning of that Act (*s*); and that *large sticks* about three feet long, with large knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were not offensive weapons; and that, from the preamble of that Act, the weapons must be such as the law calls dangerous (*t*). But in a subsequent case, the Court said, that although it was difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to say that nothing but guns, pistols, daggers, and instruments of war, should be so considered; and that bludgeons properly so called, clubs, and anything that was not in common use for any other purpose but a weapon, were clearly offensive weapons within the meaning of the Legislature (*u*). Upon 9 Geo. II. c. 35, s. 10 (rep.), where the same words, 'armed with firearms, or other offensive arms or weapons,' occurred, it was held that a person armed only with a *common whip* was not within the meaning of the Act; though he aided and assisted other persons who were armed with firearms and weapons which were clearly offensive (*v*). But the correct rule seems to be that laid down by Lord Mansfield in a case under 19 Geo. II. c. 34 (rep.), viz., that where a person was assembled together with others who were armed, and was active, it was not necessary that such individual should be armed (*w*).

Where a number of persons were assembled for the purpose of landing smuggled goods, and they were, as is usual on such occasions, divided into two different parties, one called the company, who had bats in their hands for the purpose of carrying tubs of spirits (which bats were hop-poles about seven feet in length), and the other, called the protecting party, who were armed with muskets; and the prisoner was one of the company, and carried a bat, but he did not strike any one with it, but some of the men with bats struck some of the preventive men; as the bats might be used for offensive purposes, it was left to the jury to say whether the bats were offensive weapons or not (*x*).

Upon 7 Geo. II. c. 21 (rep.), by which any person who should, with an offensive weapon or instrument, assault with intent to rob, was made guilty of felony, it was decided that the words, 'offensive weapon or instrument,' would apply to a stick, though not of extraordinary size, and though it might in general have been used as a walking-stick. An indictment was for assaulting with an offensive weapon, viz., a stick, with intent to rob; and it appeared that the stick was like a common walking-stick, about a yard long, and not very thick, but that the prisoner, when he came up to the prosecutor, struck him violently on the head with it, so as to cut his head and make it bleed; and two of the prisoner's comrades afterwards came up and beat the prosecutor on the head with similar sticks. Holroyd, J., told the jury, that as the prisoner had used the stick as a weapon of offence, he thought it ought to be considered as an offensive weapon; and the jury having convicted the prisoner, the judges

(*s*) R. *v.* Rose, 1 Leach, 342, note (*a*).

(*t*) R. *v.* Ince, 1 Leach, 342, note (*a*).

(*u*) R. *v.* Cosan, 1 Leach, 342, 343, note (*a*). It was contended, upon the authority of R. *v.* Ince, that very large club sticks, such as people ride with, to defend themselves, are not offensive weapons.

(*v*) R. *v.* Fletcher, 1 Leach, 23.

(*w*) R. *v.* Franklin, 1 Leach, 255; Cald. 244. See R. *v.* Smith, R. & R. 368, *post*, Vol. ii. p. 1341.

(*x*) R. *v.* Noakes, 5 C. & P. 326, Littledale, J., Alderson, J., Bolland, B.

agreed with Holroyd, J., and held the conviction right (*y*). And in a case on the Night Poaching Act, 1828 (9 Geo. IV. c. 69), s. 9, it was held to be a question for the jury whether the prisoner had taken out a stick, large enough to be called a bludgeon, which he, being lame, was in the habit of using as a crutch, with intent to use it as an offensive weapon, or merely for the purpose to which he usually applied it (*z*). From a case upon the same repealed statute (7 Geo. II. c. 21), where the indictment was for assaulting with a certain offensive weapon called a wooden staff, and the evidence proved a violent blow with a great stone, as it was held that the conviction of the prisoner was proper, it appears to follow that both a wooden staff and a great stone were considered as offensive weapons within the meaning of that statute (*a*).

Signalling in Aid of Smugglers.—By sect. 190 of the Act of 1876, 'No person shall, after sunset or before sunrise, between the twenty-first day of September and the first day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time of the year, make, aid, or assist in making any signal in or on board or from any ship or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person so on board of such ship or boat be or not within distance to notice any such signal; and if any person, contrary to the Customs Acts, shall make or cause to be made, or aid or assist in making, any such signal, he shall be guilty of a misdemeanor, and may be stopped arrested detained and conveyed before any justice, who, if he see cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of law; and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast; and the offender, being duly convicted, shall, by order of the Court before whom he shall be convicted, either forfeit the penalty of one hundred pounds, or, at the discretion of such Court, be committed to a gaol or house of correction, there to be kept to hard labour for any term not exceeding one year' (*b*).

(*y*) R. *v.* Johnson [1822], R. & R. 492.

(*z*) R. *v.* Palmer, 1 M. & Rob. 70, Taunton, J. *Vide post*, Vol. ii. p. 1342.

(*a*) R. *v.* Sherwin [1785], 1 East, P. C. 421. The ground upon which the judges held in this case, that the evidence was sufficient to maintain the charge in the indictment, and the weapon proved, produce the same sort of mischief, viz., by blows and bruises; and that the description would have been sufficient in an indictment for murder.

(*b*) In R. *v.* Brown, M. & M. 163, where an indictment upon 6 Geo. IV. c. 108, s. 52 (rep.), which was similar to s. 190 of the Act of 1876, stated that the defendants between sunset on March 8 and sunrise on March 9, that is to say, on the morning of the said March 9, about three o'clock, did make certain lights, &c. It was proved that the lights were made on the morning of March 9, and it was objected that the indictment did not state the offence to have been committed between Sept. 21 and April 1, and that the allegation that the offence was committed on March 9 was not sufficient, because the prosecutor was not bound to the day laid, but might prove the offence to have taken place on any other day; that the time was of the essence of the offence, and therefore it ought to have formed a distinct and substantive averment in the words of the Act; but it was held that the day having been proved as laid, the objection could only properly be made in arrest of judgment, and even then it was no valid objection; for judicial notice must be taken that the day averred in the indictment is, in fact, within the period mentioned in the statute, and therefore the indictment was good. Littledale, J., after consulting Gaselee, J., and see R. *v.* Martin, *ante*, p. 357.

By sect. 191, 'If any person be charged with having made or caused to be made, or for aiding or assisting in making, any such signal as aforesaid, the burden of proof that such signal so charged as having been made with intent and for the purpose of giving such notice as aforesaid was not made with such intent and for such purpose shall be upon the defendant against whom such charge is made.'

By sect. 192, 'Any person whatsoever may prevent any signal being made as aforesaid, and may go upon any lands for that purpose, without being liable to any indictment suit or action for the same.'

Shooting at Preventive Vessels.—By sect. 193, 'If any person shall maliciously shoot at any vessel or boat belonging to His Majesty's navy, or in the service of the revenue, or shall maliciously shoot at, maim, or wound any officer of the army navy marines or coastguard, being duly employed in the prevention of smuggling and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty, every person so offending, and every person aiding abetting or assisting therein, shall, upon conviction, be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to penal servitude for any term not less than five years (*c*), or to be imprisoned for any term not exceeding three years' (*d*).

Upon the similar section in 52 Geo. III. c. 143, s. 11 (rep.) (*e*), it was held that where a custom-house vessel had chased a smuggler and fired into her without hoisting the pendant and ensign then required (by 56 Geo. III. c. 104, s. 8), the returning such fire was not malicious. The indictment was for shooting at a vessel in the service of the customs on the high seas within one hundred leagues of the coast of Great Britain; and also for maliciously shooting at an officer of the customs, &c. The revenue vessel had chased a smuggler within the limits; the smuggler did not bring to upon being chased and a signal-gun fired; whereupon the revenue vessel fired at the smuggler, and the smuggler returned the fire, and they had a regular engagement, in which one of the custom-house officers was severely wounded. In order to prove the right to fire at the smuggler, reference was made to 56 Geo. III. c. 104, s. 8, which, in the case of ships employed by the Treasury, Admiralty, Customs, or Excise to prevent smuggling, gave the power of firing at the smuggler, if the ship had a pendant and ensign hoisted of such description as His Majesty by any order in council, or by royal proclamation under the Great Seal, should direct. There had been no proclamation, nor was any order in council proved; though, after the trial, an order in council was discovered, which required certain particulars in the pendant and ensign which this ship's pendant and ensign had not. Upon a case reserved, eleven judges (Best, J., being absent) were clear that, as the custom-house vessel had not complied with what was required to make her shooting legal, the smuggler's firing was not in law malicious (*f*).

(*c*) Apparently this means 'for life, or not less than.' The minimum term is now three years. 54 & 55 Vict. c. 69, s. 1, *ante*, p. 211.

(*d*) *Quære* whether the maximum term of imprisonment is altered by 54 & 55 Vict. c. 69, s. 1, *ante*, p. 212.

(*e*) The Hovering Act.

(*f*) R. *v.* Reynolds, Mich. T. 1821, R. & R. 465, and MS. Bayley, J.

By sect. 195, 'Every person who shall cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any vessel boat buoy anchor chain rope or mast in the charge of or used by any person for the prevention of smuggling, or in or for the use of the service of the customs, shall for every such offence forfeit the sum of £10.'

By sect. 196, officers of the army, navy, marines, or coastguard on full pay and duly employed for the prevention of smuggling and officers of customs and any person acting in their aid, when on duty, may patrol and pass freely along and over the coasts, and railways, and creeks and inlets of the sea, except in gardens and pleasure grounds.

Detention of Crew of Smugglers.—By sect. 198, 'Where any person, being part of the crew of any ship in His Majesty's employment or service, shall have been detained under the Customs Acts, such person, upon notice thereof to the commanding officer of the ship, shall be placed in security by such commanding officer on board such ship or vessel, until required to be brought before a justice to be dealt with according to law, for which purpose such commanding officer shall deliver him to the detaining officer.'

By sect. 199, 'If any person liable to be detained under the Customs Acts shall not be detained at the time of committing the offence, or being detained shall escape, he may afterwards be detained at any place in the United Kingdom within three years from the time such offence was committed, and if detained may be taken before any justice to be dealt with as if he had been detained at the time of committing such offence, or if not so detained may be proceeded against by information and summons.'

Taking up Floating Spirits.—By sect. 200, 'If any person not being an officer of the navy, customs, or excise shall intermeddle with or take up any spirits being in casks of less content than nine (*g*) gallons found floating upon or sunk in the sea, such spirits shall be forfeited, together with any vessel or boat in which they may be found; but if any person shall give information to any such officer so that seizure of such spirits may be made, he shall be entitled to such reward as the Commissioners of Customs may direct.'

Offer of Prohibited Goods.—By sect. 201, 'If any person shall offer for sale any goods under pretence that the same are prohibited, or have been unshipped and run ashore without payment of duties, all such goods (although not liable to any duties or prohibited) shall be forfeited, and every person so offering the same for sale shall forfeit treble the value of such goods.'

Seizure of Vessels or Vehicles in Use for Smuggling.—By sect. 202, 'All ships boats carriages, or other conveyances, together with all horses and other animals and things made use of in the importation landing removal or conveyance of any uncustomed prohibited restricted or other goods liable to forfeiture under the Customs Acts shall be forfeited, and all ships boats goods carriages or other conveyances, together with

(*g*) Substituted by s. 4 of the Finance Act, 1896 (59 & 60 Vict. c. 28), for 'twenty,' the quantity originally specified in the section.

all horses and other animals and things liable to forfeiture, and all persons liable to be detained for any offence under the Customs Acts, or any other Act whereby officers of customs are authorised to seize or detain persons, goods, or other things, shall or may be seized or detained in any place either upon land or water by any of the following persons, being duly employed for the prevention of smuggling, that is to say, any officer of His Majesty's army navy marines coastguard customs, or excise, or by any person having authority from the Commissioners of Customs or Inland Revenue to seize, or by any constable or police officer of any county city or borough in the United Kingdom so employed with the sanction of the magistrates having jurisdiction therein, or under or by virtue of any Act in relation thereto, and all ships boats goods carriages or other conveyances, together with all horses and other animals and things so seized, shall forthwith be delivered into the care of the collector or other proper officer of customs at the nearest custom-house; and the forfeiture of any ship boat carriage animal or other things shall be deemed to include the tackle, apparel, and furniture thereof, and the forfeiture of any goods shall be deemed to include the package in which the same are found and all the contents thereof.'

Stopping and Searching Vehicles.—Sect. 203. 'Any officers of customs excise coastguard constabulary police or other person duly employed for the prevention of smuggling, may upon reasonable suspicion or probable cause stop and examine any cart waggon or other conveyance, to ascertain whether any smuggled goods are contained therein; and if none shall be found the officer or other person shall not on account of such stoppage and examination be liable to any prosecution or action at law on account thereof; and any person driving or conducting such cart, waggon, or other conveyance refusing to stop or allow such examination when required in the King's name, shall forfeit not less than twenty nor more than one hundred pounds.'

Writs of Assistance.—Sect. 204. 'All writs of assistance issued from the Court of Exchequer or other proper Court (*h*) shall continue in force during the reign for which they were granted and for six months afterwards, and any officer of customs, or person acting under the direction of the Commissioners of Customs, having such writ of assistance or any warrant issued by a justice of the peace may, in the daytime, enter into and search (*i*) any house shop cellar warehouse room or other place, and in case of resistance, break open doors chests trunks and other packages, and seize and bring away any uncustomed or prohibited goods, and put and secure the same in the King's warehouse; and may take with him any constable or police officer, who may act as well without as within the limits of the district or place for which he shall have been sworn or appointed.'

Search of Houses, &c.—Sect. 205. 'If any officer of customs shall have

(*h*) Now from the Revenue side of the High Court of Justice (K.B.D.). See Exchequer Rules, 1860, r. 126. As to the writ of assistance in other branches of the High Court, see Wyman *v.* Knight, 39 Ch. D. 165.

(*i*) The power to search was introduced in consequence of R. *v.* Watts, 1 B. & Ad. 166, where it was doubted whether that power existed under 6 Geo. IV. c. 108, s. 40 (rep.), and where it was also doubted whether the ordinary writ of assistance was not too general.

reasonable cause to suspect that any uncustomed or prohibited goods are harboured kept or concealed in any house or other place either in the United Kingdom or the Channel Islands, and it shall be made to appear by information on oath before any justice of the peace in the United Kingdom or the Channel Islands, it shall be lawful for such justice, by special warrant under his hand, to authorise such officer to enter and search such house or other place, and to seize and carry away any such uncustomed or prohibited goods as may be found therein; and it shall be lawful for such officer, and he is hereby authorised, in case of resistance, to break open any door, and to force and remove any other impediment or obstruction to such entry search or seizure as aforesaid: and such officer may, if he see fit, avail himself of the service of any constable or police officer to aid and assist in the execution of such warrant, and any constable or other police officer is hereby required when so called upon, to aid and assist accordingly.'

Stoppage and Seizure of Goods.—By sect. 206, 'If any such goods liable to duties of customs, or prohibited to be imported, or in any way restricted, shall be stopped or taken by any police officer on suspicion that the same had been feloniously stolen, he may carry the same to the police office to which the offender if detained is taken, there to remain until and in order to be produced at the trial of such offender, and in such case the officer is required to give notice in writing to the Commissioners of Customs of such stoppage or detention, with the particulars of the goods, but immediately after such stoppage, if the offender be not detained, or if detained immediately after the trial of such offender, such officer shall convey to and deposit the goods in the nearest customs warehouse, to be proceeded against according to law; and if any police officer so detaining any such goods shall neglect to convey the same to such warehouse, or to give the notice hereinbefore prescribed, he shall forfeit a sum not exceeding twenty pounds.'

By sect. 207, 'Whenever any seizure shall be made, unless in the possession or in the presence of the offender, master, or owner as forfeited under the Customs Acts or under any Act by which customs officers are empowered to make seizures, the seizing officer shall give notice in writing of such seizure and of the grounds thereof to the master or owner of the things seized, if known, either by delivering the same to him personally or by letter addressed to him and transmitted by post to or delivered at his last known place of abode or business, if known; and all seizures made under the Customs Acts or under any Act by which customs officers are empowered to make seizures shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Commissioners of Customs may direct, unless the person from whom such seizure shall have been made, or the master or owner thereof, or some person authorised by him, shall, within one calendar month from the day of seizure, give notice in writing, if in London, to the person seizing the same, or to the secretary or solicitor for the customs, and if elsewhere, to the person seizing the same, or to the collector or other chief officer of the customs at the nearest port, that he claims the things so seized or intends to claim them, whereupon proceedings shall be taken for the forfeiture and condemnation thereof

either by information filed in . . . the High Court of Justice in England (*j*) on the Revenue side, or exhibited before any justice of the peace; but if any things so seized shall be of a perishable nature, or consist of horses or other animals, the same may by direction of the Commissioners of Customs be sold, and the proceeds thereof retained to abide the result of any claim that may legally be made in respect thereof.'

By sect. 208, 'All seizures whatsoever which shall have been made and condemned under the Customs Acts or any other Act by which seizures are authorised to be made by officers of customs shall be disposed of in such manner as the Commissioners of Customs may direct.'

By sect. 209, 'When any seizure shall have been made or any fine or penalty incurred or inflicted, or any person committed to prison for any offence under the Customs Acts, the Commissioners of the Treasury or Customs may direct the restoration of such seizure, whether condemnation shall have taken place or not, or waive proceedings, or mitigate or remit such fine or penalty, or release from confinement either before or after conviction such person on any terms and conditions as they shall see fit.'

Bribes.—Sect. 217, after imposing penalties on officials who make collusive seizures or take bribes, enacts that, 'Every person who shall give or offer, or promise to give or procure to be given, any bribe recompense or reward to, or shall make any collusive agreement with any such officer or person as aforesaid, to induce him in any way to neglect his duty, or to do, conceal or connive at any act whereby any of the provisions of any Act of Parliament relating to the Customs may be evaded, shall forfeit the sum of £200' (*k*).

By sect. 11 of the Customs, &c., Act, 1879 (42 & 43 Vict. c. 21) (*l*), 'All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts, and the liability to forfeiture of any goods seized under the authority thereof, may be sued for prosecuted determined and recovered by action information or other appropriate proceeding in the High Court of Justice in England' . . . 'in the name of the Attorney-General for England' . . . 'or of some officer of customs or excise, or by information

(*j*) King's Bench Division.

(*k*) In R. *v.* Everett, 8 B. & C. 114; 2 M. & R. 35, a case under 6 Geo. IV. c. 108, s. 34 (rep.), a count alleged that certain spirituous liquors were about to be imported, in respect of which certain duties would be payable, and that R. H. was a person employed in the service of the customs of our Lord the King, and that it was the duty of R. H., as such person so employed in the service of the customs as aforesaid, to arrest and detain all such goods and merchandise as should within his knowledge be imported which, upon such importation thereof, would become forfeited; and that the defendant unlawfully solicited R. H. to forbear an arrest and detain the said goods; it was objected, in arrest of judgment, that as the law did not cast upon all persons in the service of the customs the duty of making seizures, and the count did not shew that H. was a person coming within any of the three classes described in 6 Geo. IV. c. 108, the count was bad: and the Court held that the allegation that it was H.'s duty to seize the goods, which upon importation were forfeited, was an allegation of matter of law. That being so, the facts from which that duty arose ought to have been stated in the count. If, indeed, it could be said to be the duty of every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it clearly was not the duty of every such person, and therefore the indictment was bad. As to proof of character of the official, see now s. 261 of the Act of 1876, *post*, p. 386.

(*l*) Substituted by 42 & 43 Vict. c. 21, s. 14 and sched. for s. 218 of the Customs Consolidation Act, 1876.

in the name of some officer of customs or excise, before one or more justices of the peace in the United Kingdom' . . . 'provided always that 2 & 3 Vict. c. 71, s. 44 (*m*), shall not apply to any offence against the Customs laws: and provided that in any proceedings for any penalty or forfeiture under the Customs Acts the fact that the duties of customs have been secured by bond or otherwise shall not be pleaded or made use of in answer to or in stay of any such proceedings.'

By sect. 53 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), 'The Summary Jurisdiction Acts shall, notwithstanding any special provisions to the contrary contained in any of the statutes relating to His Majesty's Revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, apply to all informations, complaints, and other proceedings before a Court of Summary Jurisdiction under or by virtue of any of the said statutes' (*n*).

Offences on the Water.—By sect. 229 of the Act of 1876, 'Where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall for the purposes of the Customs Acts be deemed and taken to be an offence committed on the high seas; and for the purpose of giving jurisdiction under such Acts every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place on land where the offender or person complained against may be or be brought' (*o*).

Sect. 230, as amended in 1883 (46 & 47 Vict. c. 55, s. 8), provides that where the attendance of a justice of the county where the offence was committed cannot conveniently be obtained, resort may be had to a justice of a neighbouring or adjoining county, or neighbouring or adjoining borough having separate magisterial jurisdiction, and geographically situate within the county where the offence was committed.

Imprisonment.—By sect. 12 of the Customs Act, 1879 (42 & 43 Vict. c. 21) (*oo*), 'When any verdict shall pass or conviction be had against any person for any offence against the Customs Acts, and he shall have been adjudged to pay a penalty of one hundred pounds or upwards, the presiding justice may, if for a first offence, commit the offender to one of His Majesty's prisons for not less than six nor more than nine months, and if for a subsequent offence, may order that the offender shall, in lieu of payment of the penalty, be imprisoned, . . . with or without hard labour, for a period of not less than six nor more than twelve months.'

By the proviso to sect. 53 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), where the sum adjudged by conviction under or by virtue of any of the said statutes (relating to inland revenue or customs) 'to be paid exceeds £50, the period of imprisonment imposed by a Court of Summary Jurisdiction in respect of the non-payment of such sum,

(*m*) This enactment relating to the metropolitan police district was repealed in 1884 (47 & 48 Vict. c. 43, s. 4).

(*n*) This enactment overrides 11 & 12 Vict. c. 42, s. 35.

(*o*) As to the attendance on emergency of justices of adjoining counties or boroughs see 39 & 40 Vict. c. 36, s. 230; 46 & 47 Vict. c. 55, s. 8.

(*oo*) Substituted for, and to be read as s. 237 of the Act of 1876. See 42 & 43 Vict. c. 21, s. 14.

or in respect of the default of a sufficient distress to satisfy such sum, may exceed three months but shall not exceed six months.'

Proceedings for Forfeitures.—By sect. 255 of the Act of 1876, 'All indictments or suits for any offences or the recovery of any penalties or forfeitures under the Customs Acts shall, except in the cases where summary jurisdiction is given to justices, be preferred or commenced in the name of His Majesty's Attorney-General for England or Ireland, or of the Lord Advocate of Scotland, or of some officer of customs or inland revenue.'

By sect. 256, 'In any prosecution for recovery of any fine, penalty, or forfeiture incurred under the Customs Acts, His Majesty's Attorney General for England, His Majesty's Attorney-General for Ireland, or the Lord Advocate of Scotland, if satisfied that such fine, penalty, or forfeiture was incurred without any intention of fraud or that it may be inexpedient to proceed in the said prosecution, may enter a *nolle prosequi* or otherwise on such information.'

Limitation of Time.—By sect. 257, 'All suits indictments or informations brought or exhibited for any offence against the Customs Acts in any Court or before any justice, shall be brought or exhibited within three years next after the date of the offence committed' (*q*).

Venue.—By sect. 258, 'Any indictment prosecution or information which may be instituted or brought under the direction of the Commissioners of Customs for offences against the Customs Acts shall and may be inquired of examined tried and determined in any county of England when the offence is committed in England, and in any county in Scotland when the offence is committed in Scotland, and in any county in Ireland when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried' (*r*).

Costs.—By sect. 5 of the Customs, &c., Act, 1877 (40 & 41 Vict. c. 13), 'In all informations, prosecutions, suits, or proceedings at the suit of the Crown under the Customs Acts, the same rule as to costs shall be observed as in suits and proceedings between subject and subject.

Presumption and Evidence.—By sect. 259 of the Act of 1876, 'If in any prosecution in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under the Customs Acts, any disputes shall arise whether the duties of customs have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution (*s*), and where any such proceedings are had in the . . . High Court

(*q*) See R. *v.* Thompson, 16 Q.B. 832; 20 L. J. M. C. 13.

(*r*) Upon 9 Geo. II. c. 35, s. 26 (rep.), which enacted that an assault committed upon any of the officers of the customs and excise should be tried in any county in England, in such manner and form as if the offence had been therein committed, it was decided that the provision extended only to revenue officers, *qua* officers: and a defendant having been found guilty, on an indictment, of a *common assault* on the prosecutor, who was an excise officer, the Court of King's Bench arrested the judgment, though the prosecutor was described to be an excise officer, the offence being laid in Surrey, and the venue in Middlesex. R. *v.* Cartwright, 4 T. R. 490.

(*s*) Where the proceedings are criminal, the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), applies. See *post*, Bk. xiii. c. v.

of Justice on the Revenue side, the defendant shall be competent and compellable to give evidence.'

By sect. 260, 'The averment that the Commissioners of Customs or Inland Revenue have directed or elected that any information or proceedings under the Customs Acts shall be instituted, or that any ship or boat is foreign or belonging wholly or in part to His Majesty's subjects, or that any person detained or found on board any ship or boat liable to seizure is or is not a subject of His Majesty, or that any goods thrown overboard, staved, or destroyed, were so thrown overboard, staved, or destroyed to prevent seizure, or that any goods thrown overboard, staved, or destroyed during chase by any ship or boat in His Majesty's service or in the service of the Revenue, were so thrown overboard, staved, or destroyed to avoid seizure, or that any person is an officer of customs or excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such port in any information or proceedings shall be deemed to be sufficient, unless the defendant in any such case shall prove to the contrary.'

By sect. 261, 'If upon any trial a question shall arise whether any person is an officer of the army, navy, marines, or coastguard duly employed for the prevention of smuggling, or an officer of customs or excise, his own evidence thereof, or other evidence of his having acted as such, shall be deemed sufficient, without production of his commission or deputation; and every such officer and any person acting in his aid or assistance shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information.'

By sect. 262, 'Upon the trial of any issue, or upon any judicial hearing or investigation touching any seizure, penalty, or forfeiture, or other proceeding under the Customs Acts, or any Act relating to the excise, or incident thereto, where it may be necessary to give proof of any order issued by the Treasury, or by the Commissioners of Customs or Inland Revenue respectively, the order, or any letter or instructions referring thereto, which shall have been officially received by any officer of customs or excise for his government, and under which he shall have acted as such officer, shall be admitted and taken as sufficient evidence and proof of such order.'

By sect. 263, 'Condemnation by any justice under the Customs laws may be proved in any Court of justice, or before any competent tribunal, by the production of a certificate of such condemnation purporting to be signed by such justice, or an examined copy of the record of such condemnation certified by the clerk to such justice.'

Definitions.—Sect. 284. 'For the purposes of this or any other Act relating to the Customs and in construing the same, the following terms, when not inconsistent with the context or subject matter, shall have the several meanings, and include the several matters and things hereinafter prescribed and assigned to them; that is to say:

'"*Attorney-General*" shall include solicitor-general, attorney-general in the Isle of Man, procureur, or other chief law officer of the Crown in any of His Majesty's possessions abroad, where there is no attorney-general.

'"*British possession*" shall mean and include colony, plantation, island, territory, or settlement belonging to His Majesty.

'"*County*" shall mean and include any city, county of a city, county of a town, borough, or other magisterial jurisdiction where such construction is not inconsistent with the context.

'"*Customs Acts*" shall mean and include this and all or any other Acts or Act relating to the Customs.

'"*Drawback*" shall include bounty.

. . . . . .

'"*His* Majesty" shall mean *His* Majesty, *his* heirs and successors.

'"*Importer*" shall mean, include, and apply to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof until the same are duly delivered out of the charge of the officers of customs.

'"*Justice*" shall mean and include justice of the peace, county court judge, recorder, sheriff depute, governor, deputy-governor, lieutenant-governor, bailiff, chief magistrate, deemster, jurat, and any other magistrate in the United Kingdom and the Channel Islands.

'"*Master*" shall mean the person having or taking the charge or command of any ship.

'"*Official import lists and official export lists*" shall mean any lists which are now or shall from time to time be issued under the authority of the Commissioners of the Treasury or Customs prescribing the denominations, descriptions, and quantity by tale, weight, measure, value, or otherwise, by which articles of merchandise shall be required to be entered on their importation into or exportation from the United Kingdom.

'"*Proper officer of Inland Revenue*," in the fourth section of the Act of the thirty-seventh and thirty-eighth years of Her Majesty's reign, shall mean "proper officer of customs" (*t*).

'"*King's warehouse*" shall mean any place provided by the Crown or approved by the Commissioners of Customs for the deposit of goods for security thereof and of the duties due thereon.

'"*Warehouse*" shall mean any place in which goods entered to be warehoused may be lodged, kept, and secured.'

B.—Excise.

Most of the penalties and forfeitures imposed by the many statutes relating to the excise are recoverable by information in the High Court or by proceedings before a Court of Summary Jurisdiction (*u*), or relate to forgery of licences, permits, and other documents (*v*), or to perjury or false declarations (*w*).

The powers of search, arrest, detention, &c., under the Excise laws

(*t*) 37 & 38 Vict. c. 46.

(*u*) See Highmore's Excise Laws (2nd ed.), 1899.

(*v*) See 2 & 3 Will. IV. c. 16, ss. 3, 4, 13; 11 & 12 Vict. c. 121, s. 18; 26 Vict. c. 7, s. 7, *post*, Vol. ii. p. 1721, 'Forgery.'

(*w*) 1 & 2 Will. IV. c. 4, ss. 1, 4; 7 & 8 Geo. IV. c. 53, s. 31; 32 & 33 Vict. c. 14, s. 25, *post*, p. 451 *et seq.*, 'Perjury.'

and the Customs Acts may be exercised interchangeably by officers of either department and most of the excise is now under the management of the Customs Department (*x*).

The Excise Management Act, 1827 (7 & 8 Geo. IV. c. 53), by sect. 40 enacts that, 'if any person, armed with any offensive weapon whatsoever, shall with force or violence assault or resist any officer of excise, or any person employed in the revenue of excise (*y*), or any person acting in the aid or assistance of such officer or person so employed, who, in the execution of his office or duty, shall search for, take, or seize, or shall endeavour or offer to search for, take, or seize, any goods or commodities forfeited under or by virtue of this Act, or any other Act or Acts of Parliament, relating to the revenue of excise or customs, or who shall search for, take, or seize, or shall endeavour or offer to search for, take, or seize any vessel, boat, cart, carriage, or other conveyance, or any horse, cattle, or other thing used in the removal of any such goods or commodities, or who shall arrest, or endeavour or offer to arrest, any person carrying, removing, or concealing the same, or employed or concerned therein, and liable to such arrest, then and in every such case, it shall be lawful for every such officer and person so employed, and person acting in such aid and assistance as aforesaid, who shall be so assaulted or resisted, to oppose force to force, and by the same means and methods by which he is so assaulted or resisted, or by any other means or methods, to oppose such force and violence, and to execute his office or duty, and if any person so assaulting or resisting such officer as aforesaid, or any person so employed, or any person acting in such aid and assistance as aforesaid, shall in so doing be wounded, maimed, or killed, and the said officer or person so employed, or person acting in such aid and assistance as aforesaid, shall be sued or prosecuted for any such wounding, maiming, or killing, it shall be lawful for every such officer, or person so employed, or person acting in such aid and assistance, to plead the general issue, and give this Act and the special matter in evidence in his defence; and it shall be lawful for any justice or justices of the peace, or other magistrate or magistrates before whom any such officer or person so employed, or person acting in such aid and assistance as aforesaid, shall be brought for, or on account of, any such wounding, maiming, or killing as aforesaid, and every such justice of the peace and magistrate is hereby directed and required to admit to bail every such officer, and every person so employed, and every person acting in such aid and assistance as aforesaid, any law, usage, or custom to the contrary thereof in anywise notwithstanding' (*z*).

Venue.—By sect. 43, for the better and more impartial trial of any indictment or information for any such violent assault as aforesaid, 'every such offence shall and may be inquired of, examined, tried, and determined in any county in England, if such offence shall have

(*x*) 7 & 8 Geo. IV. c. 53, s. 38; and see Highmore Excise Laws, i. 28.

(*y*) 39 & 40 Vict. c. 36, s. 189, *ante*, p. 375, and the cases on former Customs Acts in similar terms, collected *ante*, p. 376.

(*z*) By s. 41, persons against whom indictments or informations have been found or filed for such assaults, are to be bound with two sureties to answer the same, and in default to be committed: by s. 42, if any offender be in prison for want of bail, a copy of the indictment or information may be delivered to the gaoler with a notice of trial and proceedings had thereon.

been committed in England or in any of the islands thereof, or in any county in Scotland, if the same shall have been committed in Scotland or in any of the islands thereof, or in any county in Ireland, if the same shall have been committed in Ireland or in any of the islands thereof, in such manner and form as if the same offence had been committed in such county respectively (*a*); and that whenever any person shall be convicted of any such violent assault or resistance as aforesaid, it shall be lawful for the Court before which any such offender shall be convicted, or which by law is authorised to pass sentence upon any such offender, to award and order (if such Court shall think fit) sentence of imprisonment, with hard labour, for any term not exceeding the term of three years, either in addition to, or in lieu of, any other punishment or penalty which may by law be inflicted or imposed upon any such offender; and every such offender shall thereupon suffer such sentence in such place, and for such term as aforesaid, as such Court shall think fit to direct' (*b*).

Forcible opposition to the execution of the Spirits Act, 1880 (43 & 44 Vict. c. 24), is punishable under sect. 150 of that Act.

C.—Assessed Taxes.

Obstruction of officers of inland revenue or persons acting in their aid in collecting taxes is now ordinarily punishable under sect. 11 of the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21) (*c*).

The following decisions upon Acts now repealed relate to assaults on revenue officials engaged in the collection of assessed taxes.

In R. *v.* Ford (*d*), upon an indictment charging the defendants with assaulting J. S., then being in lawful possession of goods seized for £6 15*s.* 6*d.*, arrears of assessed taxes, and in another count with a common assault, it appeared that the goods of one F. had been distrained on his premises for taxes due from him, and J. S. had been left in possession. In order to shew that the taxes had been regularly demanded before putting in the distress, it was proved that the collector had gone to F.'s house on January 23, and F. not being at home, had demanded the taxes of a female who was there, and said that he had called often before, and would distrain on the following day if they were not paid. The woman answered that F. had been told before of the collector's coming for taxes, but said he could not pay; the collector left a message with the woman, requesting F. to call on him, which F. afterwards did, and stated that he was very poor and could not pay. It was objected that this was not sufficient evidence of a demand and refusal within the terms of 43 Geo. III. c. 99, s. 33 (*e*); but Denman, C.J., held that it

(*a*) This provision would probably be held to extend only to assaults upon officers when in the execution of their duty. If, therefore, upon an indictment containing counts for assaulting an officer in the execution of his duty, and for a common assault, the jury were to acquit on all the counts except on that for the common assault, the judgment would be arrested if the venue were laid in any county except that in which the assault was committed. R. *v.* Cartwright, 4 T. R. 490.

(*b*) Ss. 40, 41, and 43 have not been repealed by subsequent legislation with reference to the excise.

(*c*) 24 & 25 Vict. c. 100, s. 38, does not contain the provisions inserted in prior Acts as to assaults on revenue officers.

(*d*) 2 A. & E. 588.

(*e*) Repealed in 1880 and replaced by s. 86 of the Taxes Management Act (43 & 44 Vict. c. 19).

was not necessary to shew a refusal given by the householder himself, or to the collector personally; but that it was sufficient, if the circumstances shewed that the householder, from poverty or otherwise, would not pay, and if the party meeting with the refusal was one authorised to act for him: and he left it to the jury to say whether they were satisfied that there had been a refusal. He also held that upon the second count, which mentioned no sum, there might be a verdict against the defendants, if the prosecutor was lawfully in possession for any amount. A motion for a new trial was refused; the Court holding that by the statute a distress was to be taken only if there had been a demand and refusal of the taxes, but nothing was said to apply that provision to particular individuals, or particular sums; and that it was sufficient if there had been a demand of the taxes, which the party had understood, and he had not objected to the amount, but had refused to pay (*f*).

In R. *v.* Clark (*g*), C. and A. were indicted for assaulting G., a peace officer, in the execution of his duty, and for a common assault. T., a collector of land-tax, had applied on October 28 to C. for arrears of land-tax due from him, which had been repeatedly demanded before; C. said, 'I suppose if I do not pay it, you are going to distrain?' T. replied that he probably should. C. answered, 'If you put your hand upon anything, I will split your skull.' On November 29 following, T. went to C.'s house, with B., G., and a third constable: he desired the two last to remain outside, and to be on the alert, lest there should be a row; he and B. entered a room, and again demanded the arrears; as soon as the demand was made C. quitted the room, and directly afterwards he was heard to fasten the house door; upon this, B., by T.'s order, unfastened the door, and brought in G. and the other constable. C. soon afterwards returned into the room, with bank-notes in his hand, accompanied by ten or twelve men, among whom was A. C. asked what G. did there; and B. answered that G. was there to aid and assist if required: upon this C. said, 'I will not pay the taxes till the thief-catcher has left the room.' G. refused to depart, upon which C. desired A. to put him out, saying that he would be answerable; A. then attempted to force G. out of the room, and, in so doing, committed the assault in question. C. afterwards paid the taxes with the notes in his hand. It was left to the jury to say, whether T. introduced G. for the purpose of keeping the peace, and if they thought he did so, they were directed to find a verdict of guilty: the jury found in the affirmative of the question left, and convicted both defendants. Upon a motion for a new trial, it was contended that the collector had no right to take a constable with him; that it ought to have been shewn that the collector had a warrant to distrain, or the book of assessments with him; but it was held that it was not necessary that the collector should have either the warrant or the book of assessments with him; and although the statute was applicable only to cases where a house or chest was to be broken open, and therefore the collector had no right to take B. or any other person with him for the purpose of demanding the money; yet as the collector had good ground, from what had passed at

(*f*) As to the first count, Denman, C.J., held the variance between the sum stated and the sum proved, fatal.

(*g*) 3 A. & E. 287.

that time and on the previous occasion, to apprehend violence, he was perfectly justified in introducing G. and the other constable to keep the peace, and that G. was justified in remaining to prevent violence, and consequently was assaulted whilst in the execution of his duty. And although the collector had no right to take B. into the house on either occasion, yet, as no objection was made to his presence, it did not vary the case (*h*).

The other offences against the Acts relating to the Income Tax or Land Tax which are indictable are in the nature of *forgery*, *perjury*, or false declarations.

Income Tax.—Forgery of receipts or certificates given under the Income Tax Act, 1842, or assisting in such forgery, or issuing such documents with intent to defraud the Crown or any corporation or person, is felony punishable by penal servitude from three to fourteen years, or imprisonment with or without hard labour for not over two years (*i*).

Wilfully and corruptly giving false evidence on oath or affirmation, in an affidavit, deposition, or affirmation authorised by the Income Tax Act, 1842, is punishable as perjury, and may be tried in any county in which the affidavit, &c., is exhibited to the Income Tax Commissioners (*j*).

Land Tax.—The forgery of land tax redemption certificates is felony (*k*) punishable by penal servitude for life, or not less than three years, or by imprisonment with or without hard labour for not more than two years (*l*).

Perjury in matters under the Land Tax Acts is punishable under 42 Geo. III. c. 116, s. 193.

Death Duties.—Perjury with reference to death duties is punishable under 48 Geo. III. c. 149, s. 37 (E), and 56 Geo. III. c. 156, s. 131 (I).

(*h*) The case turned to some extent on 38 Geo. III. c. 5, s. 17, which was repealed in 1898, as superseded by *s.* 86 of the Taxes Management Act, 1880.

(*i*) 5 & 6 Vict. c. 35, s. 181; 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212.

(*j*) 5 & 6 Vict. c. 35, s. 180.

(*k*) 52 Geo. III. c. 143, s. 6.

(*l*) By the joint effect of 24 & 25 Vict. c. 98, s. 48, *post*, Vol. ii. p. 1680, 'Forgery,' and 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The specific provisions of 52 Geo. III. c. 143, s. 6, as to punishment, were repealed in 1890 (S. L. R.).

CANADIAN NOTES.

OFFENCES AGAINST THE REVENUE LAWS.

See Dominion Customs Act. R.S.C. (1906) *ch.* 48.

A.—Customs.

False Declarations.

Entering place other than port of landing. R.S.C. ch. 48, sec. 186.

Goods imported not at port of entry. R.S.C. ch. 48, sec. 187.

Making untrue report, etc. R.S.C. ch. 48, secs. 188, 253.

Landing goods before due entry is made. R.S.C. ch. 48, sec. 189.

Goods found on board not included in report. R.S.C. ch. 48, sec. 190.

Breaking bulk. R.S.C. ch. 48, sec. 191.

Goods imported by night except under permit. R.S.C. ch. 48, sec. 192.

Vehicle containing goods. R.S.C. ch. 48, sec. 193.

Conductor of train making untrue report. R.S.C. ch. 48, sec. 194.

Forfeiture of goods and cars for unlawful importation by railway. R.S.C. ch. 48, sec. 195.

Forfeiture of goods not corresponding with report. R.S.C. ch. 48, sec. 199.

Forfeiture of goods not corresponding with invoice. R.S.C. ch. 48, sec. 200.

Forfeiture of goods not mentioned in invoice or declaration. R.S.C. ch. 48, sec. 201.

Forfeiture of prohibited goods. R.S.C. ch. 48, sec. 202.

Forfeiture of medicinal preparations not properly marked. R.S.C. ch. 48, sec. 203.

Possession of wreck without report or payment of duty, forfeiture of, etc. R.S.C. ch. 48, sec. 204.

Removing or altering wreck before warehoused. R.S.C. ch. 48, sec. 205.

Making false invoice of goods. R.S.C. ch. 48, secs. 206, 253.

Possession of blank invoice certificates. R.S.C. ch. 48, sec. 207.

Person sending in false invoices cannot recover price of goods. R.S.C. ch. 48, sec. 208.

Forfeiture for false statements in declaration. R.S.C. ch. 48, sec. 209.

Smuggling.

Seizure of vessels for fraudulent importation of goods. R.S.C. ch. 48, sec. 196.

Procuring persons to assist in smuggling. R.S.C. ch. 48, sec. 197.

Forfeiture of smuggled goods. R.S.C. ch. 48, sec. 198.

Smuggling goods into Canada. R.S.C. ch. 48, sec. 206.

Seizure of goods and ship found hovering near coast with intent to smuggle. R.S.C. ch. 48, sec. 210.

Seizure of prohibited or smuggled goods found in any vessel or vehicle. R.S.C. ch. 48, sec. 211.

Placing dutiable goods in building upon the boundary line. R.S.C. ch. 48, sec. 212.

Forfeiture of goods found in building upon boundary line. R.S.C. ch. 48, sec. 213.

Seizure of goods found concealed on board vessel. R.S.C. ch. 48, sec. 214.

Persons smuggling goods in company. R.S.C. ch. 48, sec. 215.

Being on board of smuggling vessel. R.S.C. ch. 48, sec. 216.

Resisting search of person. R.S.C. ch. 48, sec. 217.

Forfeiture and penalty for concealing prohibited or dutiable goods on person. R.S.C. ch. 48, sec. 218.

Keeping or selling, etc., goods unlawfully imported. R.S.C. ch. 48, sec. 219.

Altering or defacing marks of customs on goods. R.S.C. ch. 48, sec. 220.

Warehouses and Warehousing.

Unlawful removal of goods from customs warehouse. R.S.C. ch. 48, sec. 221.

Not warehousing or ex-warehousing goods entered therefor. R.S.C. ch. 48, sec. 222.

Stores of ship relanded and sold in Canada. R.S.C. ch. 48, sec. 223.

Goods ex-warehoused upon entry not corresponding shall be forfeited. R.S.C. ch. 48, sec. 224.

Goods ex-warehoused upon entry not corresponding with report inwards or not properly describing the goods. R.S.C. ch. 48, sec. 225.

Cancelling or removing warehoused goods. R.S.C. ch. 48, sec. 226.

Obtaining access to goods in bonded car. R.S.C. ch. 48, sec. 227.

Obtaining fraudulent access to warehouse. R.S.C. ch. 48, sec. 228.

Opening and unpacking goods under control of customs. R.S.C. ch. 48, sec. 229.

Refusing to return goods to customs. R.S.C. ch. 48, sec. 230.

Unlawful warehousing of goods. R.S.C. ch. 48, sec. 231.

Appraisement.

Refusing to act as appraiser. R.S.C. ch. 48, sec. 232.

Refusing to attend and answer interrogatories. R.S.C. ch. 48, sec. 233.

False swearing of owner. R.S.C. ch. 48, sec. 234.

Non-payment of Duty.

Selling goods without payment of duty. R.S.C. ch. 48, secs. 235, 236.

Entry Outwards and Exportation.

Entering goods outward and not exporting. R.S.C. ch. 48, sec. 237.

Re-landing, or failing to perform obligation to export. R.S.C. ch. 48, sec. 238.

Carrying goods out of limits of port of outward entry before entry. R.S.C. ch. 48, sec. 239.

Others than owners making entry outwards. R.S.C. ch. 48, sec. 240.

Failure to make report and entry of goods shipped in Canada. R.S.C. ch. 48, sec. 241.

Seizure of prohibited goods carried coastwise. R.S.C. ch. 48, sec. 242.

Making false entry. R.S.C. ch. 48, sec. 253.

Contravening any provision as to exportation. R.S.C. ch. 48, secs. 243, 245.

Contravening provisions as to goods in transit. R.S.C. ch. 48, secs. 244, 245.

Vessel leaving without a clearance. R.S.C. ch. 48, sec. 246.

Contravention of Government Regulations.

Generally as to contravention. R.S.C. ch. 48, sec. 247.

Where vessel is of value of $400. R.S.C. ch. 48, sec. 248.

Breach of Duty by Customs Officer.

Penalty for illegal search of person. R.S.C. ch. 48, sec. 249.

Neglecting to convey goods seized to custom house. R.S.C. ch. 48, sec. 250.

Collector allowing payment of duty to be avoided or deferred. R.S.C. ch. 48, sec. 251.

Collusive seizure in release, accepting bribes, etc. R.S.C. ch. 48, sec. 252.

Falsification of Documents.

Counterfeiting, falsifying, or forging, or using counterfeited documents. R.S.C. ch. 48, sec. 254.

Refusal to Answer Questions.

Additional penalty for. R.S.C. ch. 48, sec. 255.

Refusal to maintain or accommodate customs officer on ship. R.S.C. ch. 48, sec. 256.

Refusal to produce invoice, etc. R.S.C. ch. 48, sec. 257.

Goods.

Theft of goods under seizure. R.S.C. ch. 48, sec. 258.

Offering goods for sale as prohibited or smuggled. R.S.C. ch. 48, sec. 260.

Vessels.

Refusal of vessels to stop when required in King's name. R.S.C. ch. 48, sec. 259.

Powers and Duties of Officers.

Generally. R.S.C. ch. 48, sec. 146.

May search and detain vessels and seize goods. R.S.C. ch. 48, sec. 147.

May enter building and seize goods during day-time. R.S.C. ch. 48, sec. 148.

As to building on boundary line. R.S.C. ch. 48, sec. 149.

May board vessels and have access to all parts thereof. R.S.C. ch. 48, sec. 150.

May station officers thereon. R.S.C. ch. 48, sec. 151.

May call in aid to seize goods, etc. R.S.C. ch. 48, sec. 152.

May examine vessels hovering near coast. R.S.C. ch. 48, sec. 154.

Search of Person.

On reasonable suspicion. R.S.C. ch. 48, sec. 155.

Before justice of the peace. R.S.C. ch. 48, sec. 156.

Of females. R.S.C. ch. 48, sec. 156.

Reasonable despatch to be used. R.S.C. ch. 48, sec. 157.

Writs of Assistance.

Issue of. R.S.C. ch. 48, secs. 158, 159.

Powers of officer under. R.S.C. ch. 48, sec. 152.

Proceedings upon Seizure or Alleged Penalty or Forfeiture Incurred.

Report of officer to commissioner of customs. R.S.C. ch. 48, sec. 174.

Commissioner to notify owner or claimant. R.S.C. ch. 48, sec. 175.

Commissioner to report to Minister. R.S.C. ch. 48, sec. 176.

Decision of Minister in the matter. R.S.C. ch. 48, sec. 177.

Decision of Minister is final when. R.S.C. ch. 48, sec. 178.

Minister may refer matter to Court. R.S.C. ch. 48, sec. 179.

Hearing by Court. R.S.C. ch. 48, secs. 180, 181.

Where claim is not over $100.00. R.S.C. ch. 48, sec. 182.

Procedure in Court.

Production and delivery of books, invoices, etc. R.S.C. ch. 48, secs. 183, 184, 185.

Action may proceed in Exchequer Court or other Superior Court. R.S.C. ch. 48, sec. 265.

Proceedings to be by Attorney-General or officer of customs. R.S.C. ch. 48, sec. 266.

In Quebec. R.S.C. ch. 48, sec. 267.

Procedure shall be according to practice of Court. R.S.C. ch. 48, sec. 268.

Venue. R.S.C. ch. 48, sec. 269.

Arrest of defendant if leaving province. R.S.C. ch. 48, secs. 270, 274.

Averments in pleadings. R.S.C. ch. 48, sec. 271.

Disposal of costs and how levied. R.S.C. ch. 48, sec. 272.

Nolle prosequi may be entered by Attorney-General. R.S.C. ch. 48, sec. 273.

Judgment of Court. R.S.C. ch. 48, secs. 275, 276.

Claims, filing of, etc. R.S.C. ch. 48, sec. 277.

Claimant to give security. R.S.C. ch. 48, sec. 278.

Limitation of actions. R.S.C. ch. 48, sec. 279.

Seizure to be commencement of action. R.S.C. ch. 48, sec. 280.

Appeals.

From convictions by justices of peace. R.S.C. ch. 48, sec. 281.

From Exchequer or Superior Court. R.S.C. ch. 48, sec. 282.

From Circuit Court in Quebec. R.S.C. ch. 48, sec. 283.

No security on appeal need be given by Attorney-General. R.S.C. ch. 48, sec. 284.

Restoration of goods not prevented by appeal if security is given. R.S.C. ch. 48, sec. 285.

Procedure, Evidence.

Certified copies and extracts of invoices to be evidence. R.S.C. ch. 48, sec. 261.

Certified copies of official papers to be evidence. R.S.C. ch. 48, sec. 262.

Existence of two different sets of invoices of goods is *primâ facie* evidence of fraud. R.S.C. ch. 48, sec. 263.

Burden of proof. R.S.C. ch. 48, sec. 264.

Procedure in Court.

Procedure for contravention of regulations. R.S.C. ch. 48, sec. 285.

Disposition of Articles Seized.

To be placed temporarily in custody of nearest collector of customs. R.S.C. ch. 48, sec. 166.

To be condemned unless notice of claim given within one month. R.S.C. ch. 48, sec. 167.

Proceedings for condemnation independent of notice. R.S.C. ch. 48, sec. 168.

Goods seized to be taken to nearest customs house. R.S.C. ch. 48, sec. 169.

Goods stopped on suspicion of being stolen to be taken to nearest customs house. R.S.C. ch. 48, sec. 170.

Delivery of goods seized upon deposit of security. R.S.C. ch. 48, sec. 171.

Deposit of money to be made to cover penalty and costs. R.S.C. ch. 48, secs. 171, 172.

Limitation of time for claim. R.S.C. ch. 48, sec. 172.

Animals or perishable goods may be sold as if condemned. R.S.C. ch. 48, sec. 173.

Protection of Officers of Customs.

No action to be commenced against customs officer while proceeding pending in respect of the Customs Act. R.S.C. ch. 48, sec. 160.

Defendant officer may tender amends and plead tender in bar to action. R.S.C. ch. 48, sec. 161.

Limitation of time for action against customs officer. R.S.C. ch. 48, sec. 162.

Discretion of Court in action against customs officer. R.S.C. ch. 48, sec. 163.

No action against Crown or customs officer pending forfeiture proceedings. R.S.C. ch. 48, sec. 164.

No action for search or detention if reasonable cause therefor. R.S.C. ch. 48, sec. 165.

BOOK THE FIFTH.

OF OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP.

CHAPTER THE FIRST.

OF BLASPHEMY.

At common law it is an indictable misdemeanor (*a*), punishable by fine and (or) imprisonment (*b*), to speak or otherwise publish any matter blaspheming God, *e.g.*, by denying His existence or providence, or contumeliously reproaching Jesus Christ, or vilifying or bringing into disbelief or contempt or ridicule (*c*) Christianity in general (*d*), or any doctrine of the Christian religion, or the Bible (*e*), or the Book of Common Prayer (*f*).

Christian Religion.—Upon the trial of an information in the Court of King's Bench, for uttering expressions grossly blasphemous, Hale, C.J., said, that 'such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in this Court: for to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved; and Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law' (*g*).

Where the defendant had been convicted for publishing blasphemous libels, in which the miracles of our Saviour were turned into ridicule and contempt, and His life and conversation calumniated, it was moved in arrest of judgment that this was not an offence within the cognisance of the temporal courts at common law; but the Court would not suffer the point to be argued, saying that the Christian religion, as established

(*a*) The offence does not seem to have been dealt with by the common-law Courts until after the abolition of the Courts of Star Chamber and High Commission. See Traske's case (Com. Stell.), Hob. 382. Atwood's case, Cro. Jac. 421. R. *v.* Curl, 2 Str. 790; 1 Hawk. c. 5.

(*b*) At the discretion of the Court. The older authorities say that infamous corporeal punishment might be imposed for blasphemy. Offenders were at one time put in the pillory. R. *v.* Annet, 1 W. Bl. 395; 3 Burn Eccl. Law (9th ed.), 386. And see 2 Rolle Abr. 78. They could be put under recognisances to be of good behaviour for life; *vide* R. *v.* Annet.

(*c*) R. *v.* Richard Carlile, 1 St. Tr. (N. S.) 1388, Abbott, C.J. R. *v.* Mary Carlile, 1 St. Tr. (N. S.) 1033.

(*d*) R. *v.* Woolston, Fitzgibbon, 66.

(*e*) Whether the Old or the New Testament. R. *v.* Hetherington [1840], 4 St. Tr. (N. S.) 563; 5 Jur. 529.

(*f*) In 1817 W. Hone was tried for publishing parodies on the Catechism, the Litany, and the Athanasian Creed, and acquitted. See Odgers on Libel (4th ed.), 451.

(*g*) R. *v.* Taylor, Ventr. 293; 3 Keb. 607, 621. See the information in Tremayne, 226.

in this kingdom, is part of the law; and, therefore, that whatever derided Christianity derided the law, and consequently must be an offence against the law (*h*).

The accuracy of these *dicta*, and of the old authorities upon which they are based, was challenged *arguendo*, in R. *v.* Hetherington (*i*), and to some extent questioned in R. *v.* Ramsay (*j*), but Hale's conclusion has been accepted as the law in many cases (*k*).

On the trial of a criminal information against the defendant for publishing a false, malicious, and scandalous libel upon a religious order, professing the Roman Catholic faith, called the Scorton Nunnery, Alderson, B., said, 'a person may, without being liable to prosecution for it, attack Judaism or Mahomedanism, or even any sect of the Christian religion (save the established religion of the country), and the only reason why the latter is in a different situation from the other is, because it is *the form established by law*, and is therefore a part of the constitution of the country. In like manner and for the same reason any general attack on *Christianity* (*l*) is the subject of a criminal prosecution, because Christianity is the established religion of the country. The defendant here has a right to entertain his opinions, to express them, to discuss the subject of the Roman Catholic religion, and its institutions'; but he ruled that there was no right in so doing to attack the characters of individuals (*m*).

By Statute.—Some provisions have also been made upon this subject by statutes. 1 Edw. VI. c. 1 (*n*), enacts, that persons reviling the Sacrament of the Lord's Supper by contemptuous words or otherwise, shall suffer imprisonment. 1 Eliz. c. 2 (*o*), enacts, that if any *minister* shall speak anything in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second (2 & 3 Edw. VI. c. 1, s. 3); and if he be beneficed, shall for the first offence be imprisoned six months and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks; for the second, 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. This Act (1 Edw. VI. c. 1) was at the Restoration applied to the Prayer Book of 1662 (14 Car. II. c. 4, s. 1).

The Toleration Act, 1688 (1 Will. and M. c. 18), s. 17, enacted, that whosoever should deny in his preaching or writing the doctrine of the Blessed Trinity, should lose all benefit of the Act for granting toleration.

(*h*) R. *v.* Woolston, Barnard, 162; 2 Str. 834; Fitzgib. 64.

(*i*) 4 St. Tr. (N. S.) 577; 5 J. P. 496.

(*j*) 15 Cox, 231, Coleridge, C.J.

(*k*) R. *v.* Williams [1797], 26 St. Tr. 656. R. *v.* Richard Carlile, 4 St. Tr. (N. S.) 1423, Abbott, C.J. R. *v.* Tunbridge, 1 St. Tr. (N. S.) 1369n, Bayley, J.

(*l*) See R. *v.* Woolston, Fitzgibbon, 66.

(*m*) R. *v.* Gathercole, 2 Lew. 237, 254.

(*n*) Rep. 1 Mary, c. 2, but revived 1 Eliz. c. 1.

(*o*) Partly repealed 7 & 8 Vict. c. 102; 9 & 10 Vict. c. 59; but not so as to affect the provisions here mentioned.

This section was repealed in 1813 by 53 Geo. III. c. 160: but while it was in force it was considered as operating to deprive the offender of the benefit of the Toleration Act, leaving the punishment of the offence as for a misdemeanor at common law (*p*). An Act of 1698 (9 Will. III. c. 35 (9 & 10 Will. III. c. 32 (Ruffhead)), entitled 'an Act for the more effectual suppressing of blasphemy and profaneness') enacts, that if any person, educated in or having made profession of the Christian religion, shall, by writing, printing, teaching, or advised speaking, [*deny any one of the Persons in the Holy Trinity to be God* (*q*), *or*] should assert or maintain there are more gods than one, or should deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he should, on lawful conviction on indictment or information in any of His Majesty's Courts at Westminster, at the assizes, by the oath of two or more credible witnesses, upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and should suffer three years' imprisonment without bail (*r*). The statute does not abrogate the common law, but is cumulative (*s*). Thus in R. *v.* Richard Carlile (*t*), made in arrest of judgment on an information for a blasphemous libel, on the ground that this statute had put an end to the common law offence: in summing up to the jury, Abbott, C. J., said: 'If the whole Act of Will. III. had been repealed, the common law would still have remained'; and on a motion made the Court were clear that it had not. On few branches of the law has there been more change in the policy of prosecution, and the views of the judges, than in that relating to blasphemy. Prosecutions were numerous early in the nineteenth century (*u*). Since 1837 they have been few. There is one reported in 1857 (*v*). The latest of any importance were in 1882 (*w*) and 1908 (*x*). The opinions of the judges have also changed with respect to the essential elements of the offence: and the gist of the offence is not now considered to be in holding an opinion (*y*) contrary to the general tenets of Christianity, or the particular doctrines of the Church of England, which may be heretical, but in the mode of expressing it (*z*). In R. *v.* Woolston (*a*),

(*p*) R. *v.* Williams [1797], 26 St. Tr. 563, Kenyon, C.J. Holt on Libel, 66.

(*q*) The words in italics were repealed in 1813 (53 Geo. III. c. 160, s. 2). See R. *v.* Waddington, 1 B. & C. 26; 1 St. Tr. (N. S.) 1339. For a prosecution on the repealed words, see R. *v.* Elwell [1726], Odgers on Libel (4th ed.), 449.

(*r*) But the delinquent publicly renouncing his error in open Court, within four months after the first conviction, is to be discharged for that once from all disabilities.

(*s*) R. *v.* Woolston, Barnard, 162; 2 St. Tr. 834; Fitzgib. 64. R. *v.* Williams, 26 St. Tr. 563. R. *v.* Eaton, 31 St. Tr. 927.

(*t*) 1 St. Tr. (N. S.) 1387. Cf. R. *v.* Waddington, 1 B. & C. 26; 1 St. Tr. (N. S.) 1342.

(*u*) There were seventy-three convictions between 1821 and 1834. See the statistics collected, 1 St. Tr. (N. S.) 1385, and list of decisions 1 St. Tr. (N. S.) 1039n. See also Att.-Gen. *v.* Pearson, 3 Mer. 353, 379, 398, 405, 407. One was in respect of the publication of Shelley's 'Queen Mab.' R. *v.* Moxon [1841], 4 St. Tr. (N. S.) 693, which resulted in a conviction, not followed by judgment. As to the motives for the prosecution and the value of the case as an authority, see R. *v.* Hicklin, L. R. 3 Q. B. 372, Blackburn, J.

(*v*) R. *v.* Pooley, 8 St. Tr. (N. S.) 1089. See Steph. Dig. Cr. Law (6th ed.); 2 Steph. Hist. Cr. L. 475.

(*w*) R. *v.* Ramsay, 15 Cox, 231, Coleridge, L.C.J.

(*x*) R. *v.* Boulter [1908], 72 J. P. 181, Phillimore, J.

(*y*) See Odgers on Libel (4th ed.), 448, quoting Evans *v.* Chamberlain of London [1767], Lord Mansfield.

(*z*) Shore *v.* Wilson, 9 Cl. & F. 353. But see Cowan *v.* Milburn, L. R. 2 Ex. 280.

(*a*) Fitzgibbon, 66.

an indictment for publishing a blasphemous book, it was moved in arrest of judgment, that as the intent of the book was only to shew that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of His being the Messiah; to which the Court said, that the attacking Christianity in the way in which it was attacked in this publication was destroying the very foundation of it; and that, though there were professions in the book that its design was to establish Christianity upon a true bottom by considering these narrations in Scripture as emblematical and prophetical, yet that such professions were not to be credited, and that the rule is *allegatio contra factum non est admittenda*. But the Court also said, that though to write against Christianity *in general* is clearly an offence at common law, they laid stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points; and, in delivering the judgment of the Court, Raymond, C.J., said: 'I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity itself is struck at.'

It is said by Blackstone (*b*) that 'contumely and contempt are what no establishment can tolerate: but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship.' In Starkie on Libel (1st ed.), 496, 497, it is said that 'it may not be going too far to infer, from the principles and decisions, that no author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such case the broad boundary between right and wrong; and that if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes amenable to justice' (*c*). In R. *v.* Mary Carlile (*d*), Best, J., ruled that the jury must inquire whether the alleged libel was a temperate discussion of the truth of Christianity or an attempt to vilify and degrade it, to excite prejudice and not to convince.

In R. *v.* Richard Carlile (*e*), the Court appears to have considered that a fair, reasonable, open, and temperate discussion of the religion of this country was not blasphemy.

It is a question for the jury whether or not the words amount to a blasphemous libel. The wilful intention to insult and mislead others by means of licentious and contumelious abuse offered to sacred subjects

(*b*) 4 Com. 51.

(*c*) See 2nd edition, vol. 2, 146-7.

(*d*) [1821] 1 St. Tr. (N. S.) 1033. The prosecution was in respect of a pamphlet, in which the morality of the Old and New Testaments were contrasted, and the former was declared to be 'full of contradictions and wickedness.'

(*e*) [1819] (second trial), 1 St. Tr. (N. S.) 1387, 1390n. As to first trial, see 4 St. Tr. (N. S.) 1423. See also authorities collected L. T. Journal, July 22, 1882.

or by wilful misrepresentations or wilful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention in law as well as morals—a state of apathy and indifference to the interests of society—is the broad boundary between right and wrong (*f*). 'To asperse the truth of Christianity cannot *per se* be sufficient to sustain a criminal prosecution for blasphemy. To maintain that merely because the truth of Christianity is denied without more, therefore the person denying it may be indicted for blasphemous libel is, I venture to think, absolutely untrue. It is a view of the law which cannot be historically justified. Parliament, the supreme authority as to old law, has passed Acts which render the *dicta* of the judges in former times no longer applicable. And it is no disparagement to their authority to say that observations which were made under one state of the law are no longer applicable under a different state of things. As I observed before, I put it as a *reductio ad absurdum* that if it was enough to say that "Christianity was part of the law of the land," then there could be no discussion on any part of the law of the land, and it would be impossible, for example, to discuss in a grave argumentative way the question of a monarchical form of government, as Harrington discussed it in his "Oceana," without being liable to be indicted for a seditious libel. I was not aware that what I then put as a *reductio ad absurdum* had been judicially held, and that a man had actually been convicted of a seditious libel (R. *v.* Bedford, Gilbert's Rep. K.B. 297) (*g*), for discussing such a question, his work containing, as the report states, no reflection upon the existing government. No judge or jury in our day would convict a man of seditious libel in such a case,—it would be regarded as monstrous. I have no doubt therefore that the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy. . . . Whatever the older cases may have been, the fact remains that Parliament has altered the law as to religion. It is no longer the law that none but believers in Christianity can hold office in the State. The state of things is no longer the same as when the older judgments were pronounced,—judgments, however, which have been strained, I think, beyond what they will justly warrant. . . . The defendants have admitted that these publications were intended to be attacks on Christianity and on the Hebrew Scriptures, and have cited a number of passages from approved writers which they say are to the same effect. That may be so . . . and I lay it down as law that if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy. But no one can fail to see the difference between the works of the writers who have been quoted and the language used in the publications now before us, and I am obliged to say that it is different not only in degree but in kind and nature. There is a grave and earnest tone, a reverent, perhaps I might even say a religious, spirit about the very attacks on Christianity itself which we find in the authors

(*f*) R. *v.* Bradlaugh, 15 Cox, 217, Coleridge, C.J.

(*g*) 1713. The defendant was a clergyman. The nature of the libel is not indicated in the report, which only gives the title, 'The Hereditary Rights, &c.'

referred to which shews that what they aimed at was not insult to the opinions of the majority of mankind nor to Christianity itself, but real, quiet, earnest pursuit of truth. And if the truth at which they have arrived is not that which you and I have been taught and at which perhaps we might now arrive, it is not because their conclusions differ from ours that they are to be deemed fit subjects for criminal prosecution' (*h*).

The rulings above given have been criticised by Sir James Stephen as amounting to a judicial change in the law (*i*). But their substance has been accepted as correct in the most recent prosecution, R. *v.* Boulter (*j*), an indictment for blasphemous speeches, where Phillimore, J., directed the jury as follows: 'A man is free to speak and teach what he pleases as to religious matters, though not as to morals. He is free to teach what he likes as to religious matters even if it is unbelief. But when we come to consider whether he has exceeded the limits, we must not neglect to consider the place where he speaks, and the persons to whom he speaks. A man is not free in a public place where passers by who might not willingly go to listen to him knowing what he was going to say might accidentally hear his words, or where young people might be present. A man is not free in such places to use coarse ridicule on subjects which are sacred to most people in the country. He is free to use arguments.' He suggested further that it was for the jury to draw the line, and they should do so in favour of the accused if he were arguing in favour of his honest belief or unbelief, but not if he were making a scurrilous attack on the beliefs of most people in a public place where passers by might have their ears offended or the young might come. Such conduct would tend to a breach of the peace by hot-headed believers.

In a case where a pamphlet stated that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a juryman asked whether a work denying the divinity of our Saviour was blasphemous; and Abbott, C.J., answered that a work speaking of Jesus Christ in the language used in the pamphlet was blasphemous; and on a motion for a new trial, on the ground that this was a wrong answer, the Court held that the answer was right (*k*).

In R. *v.* Williams (*l*), in pronouncing the judgment of the Court of King's Bench upon a person convicted of blasphemy in respect of having published Paine's 'Age of Reason,' Ashhurst, J., said, that, although the Almighty did not require the aid of human tribunals to vindicate His precepts, it was, nevertheless, fit to shew our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the Christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the

(*h*) R. *v.* Ramsay, 15 Cox, 231, Coleridge, L.C.J.

(*i*) Steph. Dig. Cr. Law (6th ed.). 125.

(*j*) 72 J. P. 188, Phillimore, J.

(*k*) R. *v.* Waddington, 2 B. & C. 26.

(*l*) [1797] 26 St. Tr. 696. See Holt on Libel, 69, note (*a*); 2 Starkie on Libel, 141; Odgers on Libel (4th ed.), 445.

law be stripped of one of its principal sanctions, the dread of future punishments (*m*).

In R. *v.* Petcherine (*n*), a Roman Catholic priest was indicted for burning a copy of the Authorised Version of the Scriptures, but was acquitted.

It has already been stated that it is immaterial whether the publication is oral or written (*o*). Committing mischievous matter to print or writing, and thereby affording it a wider circulation, may be an aggravation of the offence, and affect the measure of punishment (*p*). On the other hand, the open speaking of blasphemous matter in a public place where many must pass may be a graver offence than abuse of religion at a ticket meeting of a secular society (*q*).

Pleas, &c.—The privilege attaching to reports of judicial proceedings does not cover the republication of blasphemous matter. This was so laid down in R. *v.* Mary Carlile (*r*), where the defendant published the proceedings at the trial of Richard Carlile (*s*), in which he read to the jury the whole of Paine's 'Age of Reason.'

In R. *v.* Creevey (*t*), which related to proceedings in Parliament, Bayley, J., said: 'It has been argued that the proceedings of Courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced; would every one be at liberty to poison the minds of the public, by circulating that which for the purposes of justice the Court is bound to hear? I should think not: and it is not true, therefore, that in all instances the proceedings of a Court of justice may be published.'

The provisions of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), giving privilege to fair and accurate reports in newspapers of proceedings in courts of justice and public meetings, expressly exclude blasphemous matter from the privilege (*u*).

The provisions of the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 6, as to justification, do not extend to blasphemous libel (*v*). At common law it is no answer to an indictment for blasphemy to prove the truth of the attack on Christianity which is the subject of the indictment (*w*); in one case the Court went so far as to punish as contempt the persistence of the defendant in reviling Christianity in the course and as part of his defence (*x*). In other cases the Court has stopped attempts to repeat or justify the alleged blasphemy as part of the defence (*y*).

(*m*) This libel attacked the truth of the Old and New Testaments; arguing that there was no genuine revelation of the will of God existing in the world; and that reason was the only true faith which laid any obligations on the conduct of mankind. In other respects also it ridiculed and vilified the prophets, our Saviour, His disciples, and the Holy Scriptures.

(*n*) [1855] 8 St. Tr. (N. S.) 1086; 7 Cox, 79.

(*o*) See R. *v.* Boulter, 72 J. P. 188, Phillimore, J.

(*p*) 2 Starkie on Libel (2nd ed.), 144; Odgers on Libel (4th ed.), 446 *et seq.*

(*q*) R. *v.* Boulter, 72 J. P. 188.

(*r*) 1 St. Tr. (N. S.) 1033. R. *v.* Creevey, *infra*.

(*s*) 3 B. & Ald. 131; 1 St. Tr. (N. S.) 1387.

(*t*) 1 M. & S. 223, 231.

(*u*) Ss. 3, 4, *post*, p. 1021 *et seq.*

(*v*) R. *v.* Duffy [1846], 6 St. Tr. (N. S.) 303; 9 Ir. L. R. 329; 2 Cox, 45.

(*w*) R. *v.* Tunbridge [1822], 1 St. Tr. (N. S.) 1368, an indictment for publishing 'Palmer's Principles of Nature.' Cooke *v.* Hughes, Ry. & M. 114.

(*x*) R. *v.* Davison [1821], 1 St. Tr. (N. S.) 1366.

(*y*) R. *v.* Richard Carlile [1819], 4 St. Tr. (N. S.) 1243; R. *v.* Mary Carlile [1821], 1 St. Tr. (N. S.) 1033, 1042, 1049. R. *v.* Tunbridge, 1 St. Tr. (N. S.) 1369. Cooke *v.* Hughes, Ry. & M. 114.

The provisions of the Act of 1843, sect. 7 (*z*), as to exculpatory evidence to displace a *prima facie* case of publication, apply to blasphemous libels (*a*). The offence is not cognisable at quarter sessions (*b*).

Punishment.—Blasphemy, being a misdemeanor at common law, is punishable by fine or imprisonment, without hard labour, or both (*c*). The quantum is in the discretion of the Court. As to the punishment under 9 Will. III. c. 35, *vide ante*, p. 395. Under the Criminal Libel Act, 1820 (60 Geo. III. & 1 Geo. IV.), c. 8, the composing, printing, or publishing of a blasphemous libel is punishable on a second conviction by such punishment as might in 1820 be inflicted in cases of high misdemeanors (sect. 4) (*d*). By the same Act provision is made for ordering search for, seizure, and disposal of copies of blasphemous libels after conviction (sects. 1, 2).

(*z*) *Post*, p. 1040.

(*a*) R. *v.* Bradlaugh, 15 Cox, 227, Coleridge, C.J.

(*b*) 5 & 6 Vict. c. 38, s. 1. This seems always to have been the rule. Atwood's case, Cro. Jac. 421. The contention there was that the jurisdiction was in the Court of High Commission.

(*c*) *Vide ante*, p. 249.

(*d*) *Ante*, p. 249. So much of the Act as prescribed banishment was repealed in 1830 (11 Geo. IV. & 1 Will. IV. c. 73, s. 1).

CANADIAN NOTES.

OF BLASPHEMY.

Blasphemous Libel.—Code sec. 198.

CHAPTER THE SECOND.

OF DISTURBANCES IN CHURCHYARDS OR PLACES OF PUBLIC WORSHIP (*a*).

AFFRAYS in a church or churchyard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated; and upon this consideration all irreverent behaviour in these places has been esteemed criminal by the makers of our laws. So that many disturbances occurring in these places are visited with punishment which, if they happened elsewhere, would not be punishable at all; as bare quarrelsome words: and some acts are criminal which would be commendable if done in another place; as arrests by virtue of legal process (*b*).

It seems to have been recognised that it was a misdemeanor to obstruct divine service in a church, but a criminal information was refused on the ground that the alleged disturbance arose out of the intrusion as preacher by the rector of a methodist who did not hold a licence to preach from the bishop of the diocese (*c*).

Several statutes have been passed for the purpose of preventing disturbances in places of worship belonging to the established church, and also in those belonging to congregations of Protestant Dissenters and Roman Catholics.

By an Act of 1551 (5 & 6 Edw. VI. c. 4), s. 1, 'if any person whatsoever shall . . . by words only, quarrel, chide, or brawl in any church or churchyard . . . then it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend every person so offending; that is to say, [if he be a layman, *ab ingressu ecclesiæ*, and (*d*)] if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion think meet and convenient, according to the fault.'

By sect. 2, 'if any person or persons shall smite or lay violent hands upon any other, either in any church or churchyard, then *ipso facto* every

(*a*) The first Act of Uniformity (5 & 6 Edw. VI. c. 1), s. 2, imposes a general duty on people to go to church, and conferred a general right correlatively to go to church. These provisions are repealed as to persons dissenting from the doctrines or worship of the Church of England, and as to pecuniary penalties for non-attendance at church (9 & 10 Vict. c. 89). Subject to these repeals, the Act still applies to members of the Church of England. See Taylor *v.* Timson, 20 Q.B.D. 671. Marshall *v.* Graham [1907], 2 K.B. 112, 129, Phillimore, J.

(*b*) 1 Hawk. c. 63, s. 23.

(*c*) R. *v.* Wroughton, 3 Burr. 1683.

(*d*) By the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), this Act is repealed as to persons not in holy orders (s. 4), and the jurisdiction of Ecclesiastical Courts to adjudicate on suits for brawling against persons not in holy orders, is taken away.

person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation' (*e*).

This statute was passed in aid of the ecclesiastical law for the protection of the sanctity of public worship, and in aid of the common law (*e*). It deals with three offences: (1) quarrelling by words only; (2) smiting or laying violent hands on another; (3) striking with a weapon, or drawing a weapon with intent to strike (*f*).

In 1787 (27 Geo. III. c. 31, s. 2) it was enacted that, 'no suit shall be commenced in any Ecclesiastical Court . . . for striking or brawling in any church or churchyard after the expiration of eight months from the time when such offence shall have been committed . . .'

In the construction of the Act of 1551 it has been held that the Ecclesiastical Court might proceed upon the two first sections; for though the offence mentioned in the second section of smiting in the church or churchyard is an offence at common law, and the offender may be indicted for it, yet, besides this, he may, under the statute, be *ipso facto* excommunicated (*g*). No previous conviction is necessary in this case; though, if there be one, the ordinary may use it as proof of the fact (*h*).

Cathedral churches, and the churchyards which belong to them, are within the statute (*i*). And it is no excuse for a person who strikes another in a church, &c., to shew that the other assaulted him (*j*). But churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, were never within the meaning of the statute (*k*).

By an Act of 1553 (1 Mary, st. 2, c. 3), s. 2, 'if any person or persons, of their own power and authority . . . at any time after the 20th day of December next coming (1553), do or shall willingly and of purpose, by open and overt word, fact, act, or deed, maliciously or contemptuously molest, let, disturb, vex, or trouble, or by any other unlawful ways or means disquiet or misuse, any preacher or preachers, licensed, allowed, or authorised to preach by the Queen's Highness, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by any of the universities of Oxford and Cambridge, or otherwise lawfully authorised or charged by reason of his or their cure, benefice, or other spiritual promotion or charge, in any of his or their open sermon, preaching, or collation, that he or they shall make, declare, preach, or pronounce, in any church, chapel, churchyard, or in any other place or places, used, frequented, or appointed, or that hereafter shall be used or appointed to be preached in; or if any person or persons shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble, any parson, vicar, parish priest, or curate, or any lawful priest, preparing,

(*e*) Smiting in a church or churchyard is a common-law offence. Wilson *v.* Greaves, 1 Burr. 240, 243, Lord Mansfield. Penhallo's case, Cro. Eliz. 231.

(*f*) Wilson *v.* Greaves, *ubi sup.*

(*g*) Id. ibid.

(*h*) Id. ibid. Proceedings for damages in either clause would be prohibited, for the Ecclesiastical Court acted *pro salute animæ*. Lord Mansfield, C.J.: 'We proceed to *punish*, they to *amend*.'

(*i*) Dethick's case, 1 Leon. 248.

(*j*) 1 Hawk. c. 63, s. 28.

(*k*) Id. ibid. s. 29. See notes (*a*) (p. 401) and (*e*) *supra*.

saying, doing, singing, ministering or celebrating the mass, or other such divine service, sacraments or sacramentals, as was most commonly frequented and used in the last year of the reign of the late sovereign lord King Henry the Eighth, or that at any time hereafter shall be allowed, set forth, or authorised, by the Queen's Majesty; or, if any person or persons . . . after the said 20th day of December shall contemptuously, unlawfully, or maliciously pull down, deface, spoil, abuse, break, or otherwise unreverently handle or order the most blessed, comfortable, and holy sacrament of the Body and Blood of our Saviour Jesus Christ, commonly called the Sacrament of the Altar, being, or that shall be, in any church or chapel, or in any other decent place, or the pyx or canopy wherein the said sacrament is or shall be; or unlawfully, contemptuously, or maliciously, of their own power or authority, pull down, deface, spoil, or otherwise break, any altar or altars, or any crucifix or cross, that now or hereafter shall be in any church, chapel, or churchyard: that then every such offender, his or their aider, procurer, or abettor, aiders, procurers, or abettors, immediately and forthwith, after any of the said act or acts, or other the said misdemeanors so committed, shall be apprehended by any constable or constables, churchwarden or churchwardens of the said parish, town, or place where the said offence or offences shall be so committed, made, or done, or by any other, or by any other officer or officers, or by any other person or persons then being present at the time of the said offence or offences so unlawfully committed, made, or done': and being so apprehended, shall be brought before some justice of the peace, by whom he shall, upon due accusation, be committed forthwith; and within six days next after the accusation the said justice, with one other justice, shall diligently examine the offence; and if the two justices find the person guilty, by proof of two witnesses, or confession, they shall commit him to gaol for three months, and further to the quarter sessions next after the end of the three months; at which sessions he is upon repentance to be discharged, finding surety for his good behaviour for a year; and if he will not repent, he is to be further committed till he does (*l*).

The statute of 1553 merely gave to the common law cognisance of an offence, which was before punishable by the ecclesiastical law. To fall within that statute, the party must maliciously, wilfully, or of purpose, molest the person celebrating divine service. The plaintiff on a Sunday presented a notice to the parish clerk, and desired him to read it. The clerk, after consulting the minister, refused to do so. After the Nicene Creed had been read, and whilst the minister was walking from the communion table to the vestry-room, and whilst no part of the service was actually going on, the plaintiff stood up in his pew and read a notice that a vestry would be held to choose churchwardens, whereupon the minister desired a constable to take him out of the church, which the constable did, and detained him an hour after the service was over, and then allowed him to go upon promising to attend before a magistrate the next day.

(*l*) 1 Mary, sess. 2, c. 3, s. 1. The Act is printed in the revised edition of the statutes and is specially saved from repeal by 23 & 24 Vict. c. 32, s. 6. It was held to apply to the book of Common Prayer in use under Acts of subsequent sovereigns. 1 Hawk. c. 63, s. 31; Gibs. 372.

It was held, that although the constable might be justified in removing him from the church, and detaining him until the service was over, he could not detain him afterwards to take him before a magistrate under this statute. Abbott, C.J., said: 'Had the notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister; but the act having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 Mary, st. 2, c. 3, warranted his detention in order that he might be taken before a justice' (*m*).

The statute further provides, that persons rescuing offenders so apprehended as aforesaid, or hindering the arrest of offenders, shall suffer like imprisonment, and pay a fine of five pounds for each offence (*n*). And if any offenders are not apprehended, but escape, the escape is to be presented at the quarter sessions, and the inhabitants of the parish where the escape was suffered are to forfeit five pounds (*o*).

Precedents are to be met with of indictments for breaking the windows of a church, by firing a gun against them (*p*): but it has been doubted whether such an indictment is sustainable, as being for a mere trespass (*q*).

By sect. 3 of the Act of Uniformity of 1558 (1 Eliz. c. 2) (*r*), 'If any person or persons whatsoever, after the said feast of the Nativity of St. John the Baptist next coming, 24 June, 1559 . . . shall, by open fact, deed, or by open threatenings, compel or cause, or otherwise procure or maintain any parson, vicar, or other minister in any cathedral or parish church, or in chapel, or in any other place to sing or say any common or open prayer, &c. . . . or that by any of the said means shall unlawfully interrupt or let any parson, vicar, or other minister in any cathedral, parish church, chapel, or any other place to sing or say common or open prayer, or to minister the sacraments or any of them in such manner and form as is mentioned in the said book (*s*): that then every such person being lawfully convicted in form aforesaid' (*i.e.*, 'according to the laws of this realm, by verdict of twelve men, or his own confession, or by the notorious evidence of the fact' (sect. 1)), 'shall forfeit to the Queen . . . for the first offence 100 marks . . .' or in default of payment within six weeks of conviction imprisonment for six months, on a second conviction 400 marks, or in default, &c., imprisonment for twelve months, and, on a third conviction, forfeiture of all his goods and chattels and imprisonment for life. The Act of 1558 was in 1662 (14 Car. II. c. 4) applied to the Prayer Book then put into use.

Methodists and dissenters from the Established Church have a right to protection if interrupted in their decent and quiet devotions (*t*).

(*m*) Williams *v.* Glenister, 2 B. & C. 699. It was also held that the case did not come within the Toleration Act, 1 Will. & M. c. 18, *post*, p. 405.
(*n*) S. 2.
(*o*) S. 3.
(*p*) 2 Chit. Cr. L. 23.
(*q*) Id. ibid., and see *ante*, p. 16.
(*r*) Specially saved from repeal by 23 & 24 Vict. c. 32, s. 6.
(*s*) *i.e.*, The Common Prayer Book authorised by 5 & 6 Edw. VI. c. 1, as altered by 1 Eliz. c. 1, s. 1.
(*t*) R. *v.* Wroughton, 3 Burr. 1683, 1684, Lord Mansfield. This does not refer to any statute.

The Toleration Act of 1688 (1 Will. & M. c. 18) (*u*) provides (sect. 15) (*v*), that 'if any person or persons, at any time or times after the 10th day of June' (1688) 'do and shall, willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church, chapel, or other congregation permitted by this Act, and disquiet or disturb the same, or misuse any preacher or teacher, such person or persons, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognisance in the penal sum of fifty pounds, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of twenty pounds, to the use of the King's and Queen's Majesties, their heirs and successors' (*w*).

Before this statute the Court of King's Bench refused to grant a *certiorari* to remove an indictment found at the sessions against a person not behaving himself modestly and reverently at the church during divine service; for, although the offence was punishable by ecclesiastical censures, the Court considered it properly came within the cognisance of the justices of the peace (*x*). An indictment upon the Toleration Act, sect. 15 (18), found at quarter sessions, may be removed by *certiorari* before verdict, notwithstanding the words of the statute, which seem at the first view to confine the cognisance of the offence to the justices in the first instance, and in the next to the quarter sessions (*y*).

The oaths taken by a preacher under this Act (*z*) were matter of record, and could not be proved by parol evidence; but it was not necessary, upon an indictment for disturbing a dissenting congregation, to prove that the minister had taken the oaths (*a*). It is no defence to such an indictment that the defendant committed the outrage for the purpose of asserting his right to the situation of clerk (*b*). And it has been held that a congregation of foreign Lutherans, conducting the service of their chapel in the German language, are within the protection of the statute (*c*). Upon the conviction of several defendants, each of them is liable to a penalty of twenty pounds (*d*).

The Toleration Act only applies where the thing is done wilfully, and of purpose to disturb the congregation or misuse the minister (*e*).

By the Places of Religious Worship Act, 1812 (52 Geo. III. c. 155), s. 12, 'If any person or persons, at any time after the passing of this Act (July 29, 1812), do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons

(*u*) This Act was repealed in 1871 (34 & 35 Vict. c. 48), except ss. 5, 15, and so much of s. 8 as specifies the service and offices from which certain persons are exempt.

(*v*) This section is described as s. 18 in Ruffhead's edition of the statutes and in 23 & 24 Vict. c. 32, s. 6, by which it is specially saved.

(*w*) A similar provision as to Roman Catholic congregations, made by 31 Geo. III. c. 32, s. 10, was repealed in 1871 (34 & 35 Vict. c. 116, S. L. R.), as superseded by the enactments next to be mentioned.

(*x*) Anon., 1 Keb. 491. Burn's Just. tit. 'Public Worship.'

(*y*) R. *v.* Hube, 5 T. R. 542. R. *v.* Wadley, 4 M. & S. 508.

(*z*) These oaths were abolished in 1871 (34 & 35 Vict. c. 48).

(*a*) R. *v.* Hube, Peake, 131.

(*b*) Id. ibid.

(*c*) Id. ibid.

(*d*) R. *v.* Hube, 5 T. R. 542.

(*e*) Williams *v.* Glenister, 2 B. & C. 699, Abbott, C.J.

assembled for religious worship, permitted or authorised by this Act, or any former Act or Acts of Parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled; such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties to be bound by recognisances in the penal sum of fifty pounds to answer for such offence; and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions shall suffer the pain and penalty of forty pounds.' By sect. 14 nothing contained in the Act shall extend to *Quakers*, nor to any meetings or assemblies for religious worship held or convened by them.

By the Roman Catholic Churches Act, 1832 (2 & 3 Will. IV. c. 115), s. 1, British subjects professing the Roman Catholic religion were, as to their places for religious worship in Great Britain, made subject to the same laws as Protestant dissenters in England.

Sect. 2 of the Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), makes places for religious worship of His Majesty's subjects professing the Jewish religion subject to the same laws as His Majesty's Protestant subjects dissenting from the Church of England; and by sect. 4 of the same Act, 'all laws now (August 18, 1846) in force against the wilfully and maliciously or contemptuously disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship permitted or authorised by any former Act or Acts of Parliament, or the disturbing, molesting, or misusing any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, shall apply respectively to all meetings, assemblies, or congregations whatsoever of persons lawfully assembled for religious worship, and the preachers, teachers, or persons officiating at such last-mentioned meetings, assemblies, or congregations, and the persons there assembled.'

By the Liberty of Religious Worship Act, 1855 (18 & 19 Vict. c. 86), s. 1, 'nothing contained' (in the recited Acts—1 Will. & M. sess. 1, c. 18, and 52 Geo. III. c. 155, *supra*) 'shall apply, (1), to any congregation or assembly for religious worship held in any parish or ecclesiastical district, and conducted by the incumbent, or in case the incumbent is not resident, by the curate of such parish or district, or by any person authorised by them respectively; (2), to any congregation or assembly for religious worship meeting in a private dwelling-house or on the premises belonging thereto; (3), to any congregation or assembly for religious worship meeting occasionally in any building or buildings not usually appropriated to purposes of religious worship. And no person permitting any such congregation to meet as herein-mentioned in any place occupied by him shall be liable to any penalty for so doing.' The same Act further provides (sect. 2) that so much of the Acts of 1832 and 1846 as (*supra*) relates to the places of religious worship of Roman Catholics and Jews 'shall be respectively read as applicable to the laws to which Protestant dissenters are subject for the time being after the passing of this Act' (August 14, 1855).

By the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 23), s. 2, 'any person (*f*) who shall be guilty of riotous, violent, or indecent behaviour (*g*), in England or Ireland, in any cathedral church, parish or district church or chapel of the Church of England and Ireland, or in any chapel of any religious denomination, or in England in any place of religious worship duly certified under the provisions of The Places of Worship Registration Act, 1855 (*h*), whether during the celebration of divine service or at any other time, or in any churchyard or burial ground, or who shall molest, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office (*i*) in any cathedral, church, or chapel, or in any churchyard or burial ground, shall, on conviction thereof before two justices, for every such offence be liable to a penalty of not more than £5 for every such offence, or may, if the justices before whom he shall be convicted think fit, instead of being subjected to any pecuniary penalty, be committed to prison for any time not exceeding two months.' By sect. 3, every offender 'after the said misdemeanor so committed immediately and forthwith may be apprehended by any constable or churchwarden of the parish or place' where the offence is committed (sect. 3). An appeal lies to quarter sessions from any conviction (sect. 4).

By sect. 36 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), 'Whosoever shall, by threats or force, obstruct or prevent, *or endeavour to obstruct or prevent*, any clergyman *or other minister* in or from celebrating divine service *or otherwise officiating* in any church, chapel, *meeting house, or other place of divine worship*, or in or from the performance of his duty in the lawful burial of the dead in any churchyard *or other burial place*, or shall strike or offer any violence to, or shall, upon any civil process, *or under the pretence of executing any civil process*, arrest 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 aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour' (*j*).

(*f*) This enactment applies to clergy as well as laity. Vallancy *v.* Fletcher [1897], 1 Q.B. 265. Persons in holy orders are also liable to proceedings in Ecclesiastical Courts under 5 & 6 Edw. VI. c. 4 (*supra*, p. 401), or the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32). Girt *v.* Fillingham [1901], Prob. 176.

(*g*) This Act applies even when the behaviour is under claim of right. Asher *v.* Calcraft, 18 Q.B.D. 607.

(*h*) 18 & 19 Vict. c. .

(*i*) Including an ordination service. Kensit *v.* Dean and Chapter of St. Paul's [1905], 2 K.B. 249. But not collecting an offertory. Copes *v.* Barber, L. R. 7 C. P. 393.

(*j*) This section was new in England in 1861, except that part which applies to the arrest of any clergyman while performing divine service, or going to perform the same, or returning from the performance thereof, which was contained in both 9 Geo. IV. c. 31, s. 23 (E), and 10 Geo. IV. c. 34, s. 27 (I). The rest of the clause was framed on the Irish Acts of 27 Geo. III. c. 15, s. 5; 40 Geo. III. c. 96, s. 5; 5 Geo. IV. c. 25, s. 5; and 5 & 6 Vict. sess. 2, c. 28, ss. 7, 19. The amendments consist in including ministers not of the Church of England *and Ireland*, and all places of divine worship, and all burial places, and in adding the endeavour to prevent or obstruct, the offering any violence to, and the

By the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), which provides for burials without the rites of the Church of England, sect. 7, 'All burials under this Act, whether with or without a religious service, shall be conducted in a decent and orderly manner, and every person guilty of riotous, violent, or indecent behaviour at any burial under this Act, or wilfully obstructing such burial or any such service as aforesaid thereat, or who shall in any such churchyard or graveyard as aforesaid deliver any address not being part of or incidental to a religious service permitted by this Act, and not otherwise permitted by any lawful authority, or who shall, under colour of any religious service or otherwise in any such churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanor.'

By sect. 8, 'All powers and authorities now existing by law for the preservation of order and for the prevention and punishment of disorderly behaviour in any churchyard or graveyard may be exercised in any case of burial under this Act in the same manner and by the same persons as if the same had been a burial according to the rites of the Church of England.'

Where a Protestant lecturer held meetings in public places in Liverpool and used language and gestures highly insulting to the religion of the numerous Roman Catholic inhabitants, it was held that a magistrate had jurisdiction to bind him over to be of good behaviour. It was considered but not directly decided that the power to put under such recognisances attaches where language, though not directly inciting to a breach of the peace, is calculated to cause breaches of the peace by others (*k*).

The facts attending disturbances of religious assemblies may sometimes justify proceedings at common law for conspiracy or riot (*l*): and under sect. 11 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97) (*m*), it is a felony for persons riotously assembled to demolish or pull down any church or chapel, or any chapel for the religious worship of persons dissenting from the worship of the United Church of England and Ireland.

arrest under pretence of executing any civil process of, any clergyman or minister engaged in or about to engage in any of the rites or duties mentioned in this clause. The indictment should allege that the person obstructed is a clergyman (or other minister). R. *v.* Cheere, 4 B. & C. 902. As to hard labour, &c., see *ante*, p. 212.

(*k*) Wise *v.* Dunning [1902], 1 K.B. 167.

(*l*) See Preced. 2 Chit. Cr. L. 29.

(*m*) *Post*, p. 418.

CANADIAN NOTES.

OF DISTURBANCES IN CHURCHYARDS OR PLACES OF WORSHIP.

Obstructing Officiating Clergymen.—Code sec. 199.

The offence of unlawfully obstructing divine service is not made out where the clergyman obstructed had no legal claim to the possession of or use of the church premises and was in point of law himself a trespasser thereon. But an indictment for obstructing a clergyman in celebrating divine service will not be quashed for failure to allege therein that the clergyman was in lawful charge of the church or place of worship. R. v. Wasyl Kapij (1905), 9 Can. Cr. Cas. 186.

Violence to Officiating Clergyman.—Code sec. 200.

Disturbing Meetings for Religious Worship or Special Purposes.—Code sec. 201.

A person who enters a hall, leased by a religious association or body, while a meeting for religious worship is being held in it under the direction of officers of the association, and addressing himself to the assemblage, says that he is a Catholic and a French Canadian, as most of them are, that they should not stay where they are, and calls upon them to leave, is guilty of the offence of disturbing a religious meeting, under Cr. Code sec. 201. R. v. Gauthier, 11 Can. Cr. Cas. 263.

A meeting of the electors called by one of the candidates during a municipal election is not included. R. v. Lavoie, 6 Can. Cr. Cas. 39.

BOOK THE SIXTH.

OF DISTURBANCES OF THE PUBLIC PEACE.

CHAPTER THE FIRST.

OF RIOTS, ROUTS, UNLAWFUL ASSEMBLIES AND AFFRAYS.

SECT. I.—RIOTS.

A. *Common Law.*

Riot.—A riot is a tumultuous disturbance of the peace by *three persons* (*a*) *or more*, who assemble together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of *a private nature, and afterwards actually execute the enterprise* (*aa*), in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful (*b*). That is to say doing the act whether lawful or unlawful in a manner calculated to inspire terror is an essential element in the offence (*c*).

This definition was in substance adopted by Charles, J., in the case of the Trafalgar Square Riots (*d*). According to the latest judicial definition (*e*), 'There are five necessary elements of a riot: (1) a number of persons, three (*f*) at least; (2) common purpose; (3) execution or conception of the common purpose; (4) an intent to help one another by

(*a*) Women are punishable as rioters, but infants under the age of discretion are said not to be punishable. 1 Hawk. c. 65, s. 14. *Vide ante*, pp. 61, 98.

(*aa*) Some act must be done. R. *v.* Vincent, 9 C. & P. 91; R. *v.* Neale, ibid. 431.

(*b*) 1 Hawk. c. 65, ss. 1–5. See R. *v.* Birt, 5 C. & P. 154, Patteson, J. *Three persons or more* is the correct description of the number of persons necessary to constitute a riotous meeting; but in Hawkins (c. 65, ss. 2, 5, 7) the words 'more than three persons' are three times over inserted instead of 'three persons or more'; which in Burn's Just. tit. 'Riot,' s. 1, is remarked as an instance that, in a variety of matter, it is impossible for the mind of man to be always equally attentive. The description of riot stated in the text, and taken from Hawkins, is submitted as that which would probably be deemed most correct at the present time. It should be observed, however, that riot has been described differently by high authority. In R. *v.* Soley, 11 Mod. 116, Holt, C.J., said: 'The books are obscure in the definition of riots. I take it, it is not necessary to say they assembled for that purpose, but there must be an unlawful assembly; and as to what act will make a riot, or trespass, such an act as will make a trespass will make a riot. If a number of men assemble with arms, *in terrorem populi*, though *no act is done*, it is a riot. If three come out of an alehouse, and go armed, it is a riot.' Coke's definition of riot (3 Inst. 176) is not now accepted. See Field *v.* Receiver of Metropolitan Police [1907], 2 K.B. 853, 859.

(*c*) *Vide post*, p. 410.

(*d*) R. *v.* Cunninghame Graham, 16 Cox, 420.

(*e*) Field *v.* Receiver of Metrop. Police [1907], 2 K.B. 853, 860, Phillimore and Bray, JJ. In that case (at p. 858) all the earlier authorities are collected and discussed.

(*f*) See R. *v.* Scott, 3 Burr. 1262. R. *v.* Beach, 2 Cr. App. R. 189.

force if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence 'used in the execution of the common purpose, 'not merely used in demolishing (*g*), but displayed in such a manner as to alarm at least one person of reasonable firmness and courage' (*h*). Unless all these elements are present the offence of riot is not committed.

The definition of riot does not apply to cases in which the law authorises force. In such cases it is not only lawful, but also commendable, to make use of it; as for a justice of the peace, sheriff or constable, or perhaps even for a private person (*i*), to assemble a competent number of people in order with force to suppress rebels, or enemies, or rioters; and afterwards with such force actually to suppress them (*j*); or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse comitatus*, in order to remove a force in making an entry into, or detaining of, lands (*k*). The persons gathered to make such resistance constitute an unlawful assembly. And it is the duty of a sheriff who finds any resistance in the execution of a writ to take with him the *posse comitatus*, and go in proper person to do execution, and he may arrest the resisters and commit them to prison, and every such resister is guilty of a misdemeanor (*l*).

The injury or grievance complained of, and intended to be revenged or remedied by a riotous assembly, must relate to some *private quarrel* only, *e.g.*, pulling down a mill owned by an obnoxious proprietor or procuring the liberation or better treatment of prisoners (*m*), breaking down inclosures of lands in which the inhabitants of a town claim a right of common, or taking possession of tenements the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons, in no way concerning the public. The proceedings of a riotous assembly for a public or general purpose, as *e.g.*, to take possession of a town by surprise, terror or force, with the object of carrying out some general political purpose (*n*), or to pull down all inclosures (*o*), and also resisting the King's forces, if sent to keep the peace, may amount to overt acts of insurrection, *i.e.*, of high treason by levying war against the King (*p*).

Riot must be *in terrorem populi* (*q*), *i.e.*, in every riot there must be such actual force or violence, or at least such apparent tendency thereto, as would naturally strike terror into *the people*; as the show of arms, threatening speeches, or turbulent gestures; but it is not necessary that personal violence should be committed (*r*). It is enough if sufficient

(*g*) See *post*, p. 418.

(*h*) See R. *v.* Langford, C. & M. 602, *post*, p. 411.

(*i*) *Post*, p. 433.

(*j*) See 13 Hen. IV. c. 7, *post*, p. 433.

(*k*) See 15 Rich. II. c. 2, *post*, p. 432.

(*l*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 8 (2). The Act of 1887 applies primarily to execution of civil process. The sheriff is now little concerned with the execution of criminal process. Use of needless outrage or violence by officers of the law is punishable. See 1 Hawk. c. 65, s. 2; 19 Vin. Abr. tit. 'Riots, &c.' (A.) 4.

(*m*) R. *v.* Vincent, 9 C. & P. 109. R. *v.* Frost, 9 C. & P. 94n., 129; 4 St. Tr. (N. S.) 85. R. *v.* Hardie, 1 St. Tr. (N. S.) 623, 765.

(*n*) R. *v.* Frost, 9 C. & P. 94n., 129. See R. *v.* Gordon, 21 St. Tr. 614.

(*o*) See Kel. (J.) 76.

(*p*) 4 Bl. Com. 147; 1 Hawk. c. 65, s. 6.

(*q*) 1 Hawk. c. 65, ss. 5, 6. In R. *v.* Soley, 11 Mod. 100, Holt, C.J., said: 'If I am writing a letter and three or more come hallooing and jogging me, is this a riot?' No, it ought to be *in terrorem populi*.

(*r*) Clifford *v.* Brandon, 2 Camp. 369. Sir J. Mansfield, C.J.

force is used to terrify a single person, though no other persons are near enough to be within reach of the alarm. Four persons went to a cottage, in which was one old man; one of them began to knock down the end of the cottage with an axe, and knocked part of the woodwork against the old man; he then caught the old man by the collar, and said, 'Come, you must go out of the house,' and he did go out, and the prisoners pulled the house to the ground, except the chimney; the jury were told that if such force was used by the four prisoners as to terrify the old man, they might find that there was a riot, and this direction was held right (*s*).

From the absence of *terror populi*, assemblies at wakes, or other festival times, or meetings for the exercise of common sports or diversions, as wrestling, and such like, are not riotous (*t*). Three persons or more may assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters. Thus, if a man assembles a number of persons to carry away a piece of timber or other thing to which he claims a right, and which cannot be carried away without a number of persons, this will not of itself be a riot if the number of persons are not more than are necessary for the purpose, and if there are no threatening words used, nor any other disturbance of the peace; even though another man has better right to the thing carried away, and the act is therefore wrong and unlawful (*u*). Where on an indictment for riot it appeared that two men were fighting amidst a great crowd, and that some persons were aiding and assisting; but on some peace officers appearing the fight ceased, and the fighters quietly yielded to the officers: Alderson, B., held that this was not a riot (*v*). And of course any person may, *in a peaceable manner*, assemble a fit number of persons to do any lawful thing; as to remove a public nuisance, or a nuisance to his own house or land. And he may do this before any prejudice is received from the nuisance, and may also enter into another man's ground for the purpose. Thus, where a man having erected a weir across a public navigable river, divers persons assembled with spades and other instruments necessary for removing it, and dug a trench in the land of the man who made the weir in order to turn the water and the better to remove the weir, and thus removed the nuisance, it was held not to be a forcible entry nor a riot (*w*).

(*s*) R. *v.* Phillips, 2 Mood. 252; s.c. as R. *v.* Langford, C. & M. 602: followed in Field *v.* Receiver of Metrop. Police [1907], 2 K.B. 853.

(*t*) 1 Hawk. c. 65, s. 5. Bull baiting, referred to in prior editions, has been illegal since 1849 (12 & 13 Vict. c. 92, s. 3). In 2 Chit. Cr. L. 494, will be found an indictment said to have been drawn in the year 1797, by a very eminent pleader, for the purpose of suppressing an ancient custom of kicking about foot-balls on Shrove Tuesday, at Kingston-upon-Thames. The first count is for riotously kicking about a foot-ball in the town of Kingston; and the second, for a common nuisance in kicking about a foot-ball in the said town. In Sir Antony Ashley's case, 1 Rolle Rep. 109, Coke, C.J., said that *stage-players* might be indicted for a riot and unlawful assembly. And see Dalt. Just. c. 136 (citing Roll. R.), that if such players by their shows occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted and fined. 19 Vin. Abr. tit. 'Riots, &c.' (A.) 8.

(*u*) 1 Hawk. c. 65, s. 5. R. *v.* Soley, 11 Mod. 117; Dalt. c. 137; Burn's Just. tit. 'Riot,' s. 1.

(*v*) R. *v.* Hunt, 1 Cox, 177.

(*w*) Dalt. c. 137; Burn, tit. 'Riot,' s. 1.

If there be violence and tumult, it makes no difference whether the act intended to be done by the persons assembled is lawful or unlawful. Thus, if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as much rioters as if the act intended to be done by them were absolutely unlawful (*x*). And if in removing a nuisance the persons assembled use threats (such as, they will do it though they die for it, or the like), or in any other way behave in actual disturbance of the peace, it seems to be a riot (*y*). If a large body of men assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in a turbulent manner, either accompanied with acts of violence, or with threats and intimidation calculated to excite the terror and alarm of the King's subjects, this is in itself a riot, whether the end and object proposed be a just and legitimate one or not (*z*).

The violence and tumult must in some degree be premeditated. If a number of persons, being met together at a fair, market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of riot, but only of a sudden affray (*a*), of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention (*b*). But although the audience in a public theatre have a right to express the feelings excited by the performance, and to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are guilty of riot (*c*).

Even though the parties may have assembled in the first instance for an innocent purpose, yet if they afterwards, upon a dispute arising amongst them, form themselves into parties, with promises of mutual assistance, and then make an affray, it is said that they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming had been on such a design; and if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal is started of going together in a body to pull down a house, or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion

(*x*) 1 Hawk. c. 65, s. 7. Anon., 12 Mod. 648. R. *v.* Hughes, M. & M. 178, note (*a*).

(*y*) Dalt. c. 137; Burn's Just. tit. 'Riot,' I.

(*z*) Tindal, C.J., in charging the grand jury at Stafford [1842], C. & M. 661.

(*a*) *Post*, p. 427.

(*b*) 1 Hawk. c. 65, s. 3.

(*c*) Clifford *v.* Brandon, 2 Camp. 358. See Gregory *v.* Duke of Brunswick, 6 M. & G. 953; 3 C. B. 481; 1 C. & K. 24. R. *v.* Leigh, Ann. Reg. for 1775, p. 117, *ante*, p. 171.

is agreed to, and executed accordingly, the persons concerned are guilty of riot; because their associating themselves together, for the new purpose, is in no way extenuated by their having met at first upon another (*d*).

If any person seeing others actually engaged in a riot, joins them and assists them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but joined himself to them with an intention of seconding them in the execution of their unlawful enterprise. And it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design (*e*). And if any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he becomes a rioter; for in this case all are principals (*f*). But mere presence without encouragement is not enough to establish criminality (*g*). If three or more, being lawfully assembled, quarrel, and the party fall on one of their own company, this is no riot; but if it be on a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in those who concur, so that it is a riot in them that act, and in no more (*h*). *Inciting* persons to assemble in a riotous manner seems to be an indictable offence (*i*), and if the riot ensues in consequence of incitement by speeches at a meeting, the inciter is liable as a principal, although absent from the scene of the actual riot (*ii*).

The law recognises no right of public meeting in thoroughfares, which are dedicated only for public passage and repassage (*j*). A place of public resort is analogous to a public thoroughfare, and although public meetings may often have been held in a place of public resort, without interruption by those who have the control of such place, yet there is not in law any right of public meeting there for the purpose of discussing any question, whether social, political, or religious.

A magistrate, being responsible for order in the district over which he has control, and the Commissioner of the Police for the Metropolis being the officer mainly responsible for the preservation of peace and order in the metropolis (*k*), is fully justified in issuing a public notice to the effect that public meetings will not be permitted to take place in any place of public resort under his control, when he has reasonable grounds for believing that a breach of the public peace is likely to result from holding

(*d*) 1 Hawk. c. 65, s. 3. See R. *v.* Burns, 16 Cox, 355, *ante*, p. 302.

(*e*) Id. ibid.

(*f*) Clifford *v.* Brandon, 2 Camp. 370, Mansfield, C.J. And see R. *v.* Royce, 4 Burr. 2073, and the second and third resolution in the Sissinghurst house case, 1 Hale, 463.

(*g*) R. *v.* Atkinson, 11 Cox, 330.

(*h*) 19 Vin. Abr. tit. 'Riots, &c.' (A.) 15. R. *v.* Ellis, 2 Salk. 595.

(*i*) See the principles stated *ante*, p. 203. In an indictment in Cro. Circ. Comp. (8th ed.) 420, the first count is for *inciting* persons to assemble, and that in consequence of such incitement they did so: and the second count states the inciting, and omits the assembling in consequence of it. See a similar precedent, 2 Chit. Cr. L. 500.

(*ii*) R. *v.* Sharpe, 3 Cox, 288, Wilde, C.J.

(*j*) Harrison *v.* Duke of Rutland [1893], 1 Q.B. 142.

(*k*) As to punishment for neglect of this duty, see R. *v.* Pinney, 3 St. Tr. (N. S.) 11, and *post*, p. 434.

public meetings in such places. A public meeting held at a place of public resort after the publication of such a notice is not, however, rendered an unlawful assembly merely by reason of such publication (*l*).

Where the defendants resisted the police by endeavouring to break through their ranks in order to take part in a public meeting in Trafalgar Square, a place of public resort within the metropolis, which meeting had been prohibited by the Commissioner of Police for the Metropolis, and the holding of which the police had received orders to prevent, it was held that, by the operation of 2 & 3 Vict. c. 47, 7 & 8 Vict. c. 60, and 14 & 15 Vict. c. 42, Trafalgar Square is placed under the control and supervision of the police in the same manner as any street, thoroughfare, or public place, and that whether the defendants were guilty of participating in a riotous assembly depended upon whether they, with others who were following them, or who, as they expected, would follow them, approached the square with the intention of holding a meeting, come what might, or merely approached it with the intention of requesting to be allowed to hold a meeting, and of departing if their request was refused.

It was also held, that if the jury were satisfied that the defendants headed a mob with the intention of getting to a place of public resort if they could, and by doing so endangered the public peace and alarmed reasonable people, they would be justified in finding them guilty of riot (*m*).

B. *Statutes as to Riots.*

Besides the early statutes for the suppression of riots referred to *post*, p. 431, the following statutory provisions are in force as to riots:

(1.) The Riot Act.—The Riot Act (1714, 1 Geo. I. st. 2, c. 5), after reciting that many rebellious riots and tumults had been in divers parts of the kingdom, to the disturbance of the public peace and the endangering of His Majesty's person and government (*n*), and that the punishments provided by the laws then in being were not adequate to such heinous offences; for the preventing and suppressing such riots and tumults, and for the more speedy and effectual punishing the offenders, enacts (sect. 1), 'that if any persons to the number of *twelve* or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation,

(*l*) R. *v.* Fursey, 3 St. Tr. (N.S.) 543; 6 C. & P. 81; where a notice by a Secretary of State, describing an intended public meeting as dangerous to the public peace and illegal, was held not to make the meeting illegal, nor to be any evidence that it was illegal.

(*m*) R. *v.* Cunninghame Graham, 16 Cox, 420, Charles, J. As to Trafalgar Square, see *Ex parte* Lewis, 21 Q.B.D. 191.

(*n*) The Act was aimed at the Jacobites.

and then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony . . .' (*o*).

Sect. 2. 'And . . . the order and form of the proclamation that shall be made by the authority of this Act shall be as hereafter followeth (that is to say): The justice of the peace, or other person authorised by the Act to make the proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with loud voice make, or cause to be made, proclamation in these words, or like in effect:

'"Our sovereign lord the King chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies.

'"God save the King."

'And every such justice, and justices of the peace, sheriff, mayor, bailiff, and other head officer aforesaid, within the limits of their respective jurisdictions, are hereby authorised and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assembly shall be of persons to the number of twelve or more, and there to make or cause to be made proclamation in manner aforesaid.'

Sect. 3. . . . 'If such persons so unlawfully, riotously, and tumultuously assembled, or twelve or more of them, after proclamation made in manner aforesaid shall continue together, and not disperse themselves within one hour, it shall be lawful to and for every justice of the peace, sheriff, or under-sheriff of the county where such assembly shall be, and for every high or petty constable or other peace-officer within such county, and also to and for every mayor, justice of the peace, sheriff, bailiff, and other head officer, high or petty constable, and other peace-officer of any city or town corporate where such assembly shall be, and to and for such other persons as shall be commanded to be assisting under any such justice of the peace, sheriff, or under-sheriff, mayor, bailiff, or other head officer (who are hereby authorised to command all His Majesty's subjects of age and ability to be assisting to them therein) to seize and apprehend, and they are hereby required to seize and apprehend, such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made as aforesaid; and forthwith to carry the persons so apprehended before one or more of His Majesty's justices of the peace of the county or place where such persons shall be so apprehended, in order to their being proceeded against according to law.' The section also enacts, that if any of the persons so assembled shall happen to be killed, maimed, or hurt, in the dispersing, seizing,

(*o*) The rest of the section was repealed in 1888 (S. L. R.). As to present punishment, see *post*, p. 416, note (*r*). This section does not affect the common-law offence of riot, but merely aggravates its quality and punishment when the circumstances specified in the statute are superadded. See R. *v.* Fursey, 6 C. & P. 81. Featherstone Riots Report, Parl. Pap. 1893, c. 7324.

or apprehending them, or in the endeavour to do so, by reason of their resisting, then every such justice, &c., constable, or other peace-officer, and all persons being aiding and assisting to them, shall be free, discharged, and indemnified concerning such killing, maiming, or hurting (*p*).

Sect. 5. 'Provided always . . . that if any person or persons do, or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder, or hurt, any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering, or hurting, such person or persons, so beginning or going to make such proclamation as aforesaid, shall be adjudged felony . . . (*q*); and that also every such person or persons being so unlawfully, riotously, and tumultuously assembled, to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made, if the same had not been hindered, as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made, shall be adjudged felons . . .' (*r*).

Sect. 8. 'Provided always, that no person or persons shall be prosecuted by virtue of this Act for any offence or offences committed, contrary to the same, unless such prosecution be commenced (*s*) within twelve months (*t*) after the offence committed' (*u*).

7 Will. IV. & 1 Vict. c. 91, recites sects. 1 & 5 of the Riot Act, and provides (sect. 1) that . . . any person convicted of any of the said offences shall not suffer death, but be liable to transportation (*v*) for life . . . (*w*).

The Riot Act contains no provisions as to principals in the second degree, or accessories; there may, however, be such principals and accessories (*x*). Principals in the second degree and accessories before the fact are punishable as principals in the first degree (*y*); and accessories after the fact are punishable with imprisonment for not exceeding two years, with or without hard labour (*z*).

If the magistrate omits the words 'God save the King,' the proclamation

(*p*) S. 4, punishing rioters who unlawfully and with force pull down a church, chapel, or a place for religious worship tolerated by law (s. 10), was repealed as to England in 1827 (7 & 8 Geo. IV. c. 27, s. 1), and as to India in 1828 (9 Geo. IV. c. 74, s. 125). See the present enactments on the subject, *post*, p. 418.

(*q*) Words omitted repealed in 1888 (S. L. R.). For present punishment, see note (*v*) *infra*.

(*r*) The words omitted here were repealed in 1888 (S. L. R.). As to present punishment, see note (*v*) *infra*. S. 6 was repealed as to England in 1827 (7 & 8 Geo. IV. c. 28, s. 1); S. 7 requires that the Act be openly read at every quarter sessions and at every leet or law day.

(*s*) *i.e.*, by arrest, or by information laid.

(*t*) Strictly speaking, this means lunar months, *vide ante*, p. 3.

(*u*) Ss. 9, 10 relate to Scotland.

(*v*) The present punishment is penal servitude for life or not less than three years, or imprisonment with or without hard labour for not more than two years. 20 & 21 Vict. c. 3, s. 2; 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212.

(*w*) The section made further provisions for the minimum term of transportation and for imprisonment, which were superseded by s. 1 of the P. S. Act, 1891, and were repealed in 1892 (S. L. R.).

(*x*) See *ante*, p. 106, 'Accessories, &c.'

(*y*) R. *v.* Royce, 4 Burr. 2073. 24 & 25 Vict. c. 94, s. 1, *ante*, p. 130.

(*z*) 24 & 25 Vict. c. 94, s. 4, *ante*, p. 131.

is insufficient (*a*). Where an indictment upon sect. 1, in setting out the proclamation, omits the words 'of the reign of,' which were contained in the proclamation read, this was held a fatal variance (*b*). But it is submitted that the proclamation may now simply refer to the Act by its short title, 'The Riot Act' (*c*). The hour is computed from the first reading of the proclamation. Where, therefore, a magistrate read the proclamation a second and third time before an hour had elapsed from the time of his reading it the first time, and it was objected that the second and third readings must be considered as new warnings, and as if the former readings were abandoned, it was held that the second, or any subsequent reading of the proclamation, did not at all do away with the effect of the first reading, and that the hour was to be computed from the time of the first reading of the proclamation (*b*).

If there be such an assembly that there would have been a riot, if the parties had carried their purpose into effect, it is within the Act (*b*).

Upon an indictment under sect. 1, it was not proved that the prisoner was among the mob during the whole of the hour, but he was proved to have been there at various times during the hour. It was held that it was a question for the jury, upon all the circumstances, whether he did substantially continue making part of the assembly for the hour; for although he might have occasion to separate himself for a minute or two, yet if in substance he was there during the hour he would not be thereby excused (*d*).

A riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the Riot Act has not been read, the effect of the reading being to make the parties guilty of a statutory offence if they do not disperse within an hour; but if the proclamation be not read, the common law offence remains (*e*).

(ii) Riots to prevent Loading or Unloading of Ships.—The Shipping Offences Act, 1793 (33 Geo. III. c. 67), s. 1, recites that seamen, keelmen, &c., had of late assembled themselves in great numbers, and had committed many acts of violence; and that such practices, if continued, might occasion great loss and damage to individuals, and injure the trade and navigation of the kingdom, and enacts (sect. 1), that 'if any seamen, keelmen, casters, ship-carpenters, or other persons, *riotously* assembled together to the number of three or more . . . shall unlawfully and with force prevent, hinder, or obstruct the loading or unloading, or the sailing or navigating, of any ship, keel, or other vessel, or shall unlawfully and with force board any ship, keel, or other vessel, with intent to prevent, hinder, or obstruct, the loading or unloading or the sailing or navigating of such ship, keel, or other vessel, every seaman, keelman, caster, ship-carpenter, and other person being lawfully convicted of any of the offences aforesaid upon any indictment to be found against him, her, or them in any Court of Oyer and Terminer, or general or quarter sessions of the peace' for the county, &c., wherein the offence was

(*a*) R. *v.* Child, 4 C. & P. 442, Vaughan, B., and Alderson, J.

(*b*) R. *v.* Woolcock, 5 C. & P. 516, Patteson, J.

(*c*) 52 & 53 Vict. c. 63, s. 35; 59 & 60 Vict. c. 14, sched. I.

(*d*) R. *v.* James, Gloucester Summer Assizes, 1831, Patteson, J. MS. C. S. G.

(*e*) R. *v.* Fursey, 6 C. & P. 81, Gaselee and Parke, JJ.

committed, shall be committed either to the common gaol and remain without bail or mainprize . . . for the same county, &c., 'there to continue and to be kept to hard labour for any term not exceeding twelve calendar months, nor less than six calendar months' (*f*). By sect. 3 'If any seaman, caster, ship-carpenter, or other person shall be convicted of any of the offences aforesaid, in pursuance of this Act, and shall afterwards offend again in like manner, every such seaman, &c., so offending again in like manner, and being lawfully convicted thereof . . . shall be adjudged guilty of felony, and shall be transported to some of His Majesty's dominions beyond the seas for any space of time or term of years not exceeding fourteen years, nor less than seven years' (*g*). By sect. 4, the Act does not extend to any act, deed, &c., done in the service, or by the authority of His Majesty (*h*). By sect. 7, offences committed on the high seas are triable in any session of Over and Terminer, &c., for the trial of offences committed on the high seas within the jurisdiction of the Admiralty of England (*i*). And by sect. 8, The prosecution for any of the said offences is to be commenced within twelve *calendar* months after the offence committed (*j*).

(iii) Damage by Rioters.—By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 11 (*k*), 'If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or 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 the King, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution*, or any machinery, whether fixed or moveable, 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, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for life . . . (*l*).

(*f*) S. 2 was repealed as to England and India in 1828 (9 Geo. IV. c. 31, s. 1; c. 74, s. 125). As to unlawful and forcible interference with seamen, &c., see 24 & 25 Vict. c. 100, s. 40.

(*g*) The present punishment is penal servitude from three to fourteen years, or imprisonment with or without hard labour for not more than two years. 20 & 21 Vict. c. 3, s. 2; 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212.

(*h*) Ss. 5, 6 were repealed as to England in 1827 (7 & 8 Geo. IV. c. 27, s. 1) and as to India in 1828 (9 Geo. IV. c. 74, s. 125).

(*i*) *Vide* 39 Geo. III. c. 37, s. 1, *ante*, p. 37.

(*j*) The Act was originally temporary, but was made perpetual in 1801 (41 Geo. III. c. 19).

(*k*) Taken from 7 & 8 Geo. IV. c. 30, s. 8 (E). There were similar enactments in 23 & 24 Geo. III. c. 20, ss. 7, 8 (I), and 27 Geo. III. c. 15, s. 5 (I).

(*l*) For minimum term of penal servitude and term of imprisonment, see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 219. The words omitted are repealed.

By virtue of the proviso to sect. 12 *infra*, the jury may, on an indictment under sect. 11, find the accused guilty of an offence under sect. 12: or they may, under 14 & 15 Vict. c. 100, s. 9, find him guilty of common-law riot (*m*).

By sect. 12, 'If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall 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, waggon-way, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . (*n*).

Provided that if upon the trial of any person for any felony in the last preceding section mentioned the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly' (*o*).

The following decisions on 7 & 8 Geo. IV. c. 30, s. 8 (rep.), are still of value in the interpretation of sects. 11 and 12 of the Act of 1861. In the absence of a definition of riot in sect. 8, the common-law definition of a riot was resorted to, and where *any one* of His Majesty's subjects was terrified this it was held was a sufficient terror and alarm to substantiate that part of the charge (*p*).

If persons riotously assembled and demolished a house, *really believing* that it was the property of one of them, and acted *bonâ fide* in the assertion of a supposed right, this was not a felonious demolition of the house within sect. 8, even though there were a riot (*q*). It is not necessary that the rioters should have any ill-will against the person whose property is destroyed, &c., demolished (*r*).

If rioters, after proceeding a certain length, leave off of their own accord before the act of demolition be completed, a jury may infer that they did not intend to demolish the house. A party of rioters came to a house about midnight, and in a riotous manner burst open the door, broke some of the furniture, all the windows, and one of the window-frames, and then went away, there being nothing to hinder them from doing more damage; it was held that, although the breaking and damage done was a sufficient beginning to demolish the house, yet unless the jury were satisfied that the ultimate object was to destroy the house, and that if they had carried their intentions into full effect, they would, in

(*m*) See Casey *v.* R., Ir. Rep. 8 C. L. 408 (C. C. R.).

(*n*) The words omitted are repealed. For minimum term of penal servitude and term of imprisonment, see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212.

(*o*) This section, which was new in 1861, is intended to provide for cases where there is not sufficient evidence of an intention to proceed to the total demolition of the house, &c. (*vide infra*), and also for cases where no such intention ever existed, provided there be a riot, and injury done, within the terms of the section.

(*p*) R. *v.* Phillips, 2 Mood. 252; S. C. as R. *v.* Langford, C. & M. 602, approved in Field *v.* Receiver of Metropolitan Police [1907], 1 K.B. 853, 860.

(*q*) R. *v.* Howell, 9 C. & P. 437, Littledale, J.

(*r*) Bristol Special Commission, 3 St. Tr. (N. S.) 1, Tindal, C.J.

point of fact, have demolished it, it was not a beginning to demolish within sect. 8 (*s*).

The fact that the rioters' main object was to injure a person did not take a case out of sect. 8 if they also meant to demolish his house.

A party of coal-whippers having a feeling of ill-will to a coal-lumper, who paid less than the usual wages, created a mob, riotously went to the house where his pay-table was, cried out that they would murder him, threw stones, brick-bats, &c., broke windows and partitions, and threw down part of a wall in a yard, and continued, after his escape, throwing stones at the house, till they were compelled to desist by the threats of the police; it was held that this case was distinguishable from R. *v.* Thomas (*s*), because the mob did not leave off voluntarily, but after the threats of the police, and that they might be convicted of beginning to demolish the house, though their principal object was to injure the lumper, provided it was also their object to demolish the house (*t*).

Where on an indictment for 'beginning' to demolish a building used for trade, it appeared that the prisoners began by breaking the windows and doors, and having afterwards entered the house, they set fire to the furniture, but that no part of the house was burnt. Parke, J., told the jury 'beginning to pull down means not simply a demolition of a part, but a part with an intent to demolish the whole. It is for you to say if the prisoners meant to stop where they did, and do no more; because if they did, they are not guilty; but if they intended, when they broke the windows and doors, to go farther, and destroy the house, then they are guilty of a capital offence. If they had the full means of going farther, and were not interrupted, but left off of their own accord, it is evidence from which you may judge that they meant the work of demolition to stop where it did. If you think that they originally came there without intent to demolish, and the setting fire to the furniture was an afterthought but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy the house. If they came originally without such intent, but had afterwards set fire to the house, then the offence would be arson. If you have doubts whether they originally came with a purpose to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner, as that the necessary consequence, if not for timely interference, would would have been the burning of the house, as evidence to shew that they had such intent, although they began to demolish in another manner' (*u*). Upon an indictment under sect. 8, the jury could not convict unless they were satisfied that the prisoners intended to leave the house no house at all in fact; for if they intended to leave it still a house, though in a state however dilapidated, they were not guilty of the offence. To have left off the work of devastation without interruption would lead to the inference that the prisoners did not intend to destroy the house; but even if they were interrupted, the question still remained, what was their ultimate intention? If they had been some time at their work of

(*s*) R. *v.* Thomas, MS. C. S. G., and 4 C. & P. 237, Littledale, J. See also R. *v.* Howell, 9 C. & P. 437. R. *v.* Price, 5 C. & P. 510, where the persons committing the outrage only intended to get possession of a person who had entered the house.

(*t*) R. *v.* Batt, 6 C. & P. 329, Gurney, B.

(*u*) R. *v.* Ashton, 1 Lew. 296, Parke, J

ruin before they were interrupted, it was for the jury to say, looking to the nature of the things which they had destroyed, whether their purpose was to demolish the house itself (*v*).

Although setting fire to a house is a substantive felony, yet if fire is made the means of attempting to destroy a house, it is as much a beginning to demolish as if any other mode of destruction were resorted to, and the indictment may be for that offence (*w*).

If a person forms part of a riotous assembly at the time the act of demolition commences, or if he wilfully joins such riotous assembly, so as to co-operate with them whilst the act of demolition is going on, and before it is completed, in either case he comes within the description of the offence, although he may not have assisted with his own hand in the demolition of the building (*x*). On an indictment under 7 & 8 Geo. IV. c. 30, s. 8 (rep.), it appeared that a house was demolished by rioters by means of fire, which was lighted before one o'clock in the night, and there was no evidence to shew that the prisoner was present at the time when the house was set on fire, but it was proved that he was there between two and three o'clock whilst the house was burning, and whilst the mob, who set it on fire, were still there; it was held that the prisoner was properly convicted as a principal. For although it was possible, if this had been an indictment for burning the house, that the prisoner could not have been convicted as a principal, yet this was an offence under an enactment that made it felony if persons riotously and tumultuously assembled together to the disturbance of the public peace, and when so assembled destroyed a house; therefore it was not simply the fact of destroying a house by fire, but it was the combined fact of riotously assembling together and whilst the riot continued demolishing the house. To make a party guilty of that, he must be shewn to be one of those who were present at the offence, or he could not be aiding or abetting. But as it was not only the burning, but also the riotously assembling together, the whole of the prisoner's conduct on that day was left to the jury; and it was distinctly left to them that unless they were satisfied that the prisoner had by his language excited the mob to the act which was the subject-matter of the inquiry, and afterwards been present at it, he was not guilty (*y*).

Under 7 & 8 Geo. IV. c. 30, s. 8 (rep.), it was a sufficient demolishing of the house by rioters if it were so far destroyed as to be no longer a house; and the fact that the rioters left the chimney standing made no difference (*z*).

In order to prove that there was a beginning to demolish the house, it must be proved that some part of the freehold was destroyed; it was not therefore sufficient to prove that the window shutters were demolished (*a*).

There have been few direct rulings as to the offences created by

(*v*) R. *v.* Adams, C. & M. 299, Coleridge, J.

(*w*) R. *v.* Simpson, C. & M. 669. R. *v.* Harris, C. & M. 661, Tindal, C.J., Parke, and Rolfe, BB.

(*x*) Per Tindal, C.J., Bristol Special Commission, 3 St. Tr. (N. S.) 1, 7; 5 C. & P. 265n.

(*y*) R. *v.* Simpson, C. & M. 669, Tindal, C.J., Parke, B., and Rolfe, B.

(*z*) R. *v.* Phillips, 2 Mood. 252; S. C. as R. *v.* Langford, C. & M. 602.

(*a*) Ibid.

sects. 11 and 12 of the Act of 1861, but it would seem to be clear that malicious injury to property done by three or more is not in itself a riot (*b*): that to constitute an offence within the sections there must be also a riot in the common-law sense of the term (*c*). It has been held that demolition of boundary-wall of an empty house by a gang of rough youths was not a demolition by persons riotously and tumultuously assembled so as to warrant a claim for compensation under the Riot Damages Act, 1886 (*d*), there being no evidence of any intention of members of the gang to help each other, if need arose, in the execution of their common purpose nor of any force or violence (other than that used in demolishing the wall) displayed in such a manner as to alarm any person of reasonable firmness and courage (*e*); and to constitute an offence against sect. 11 there must be an intent totally to demolish the house, &c. (*f*).

Sect. II.—Routs.

In some books the notion of a *rout* is limited to assemblies occasioned by some grievance common to all the company: as the inclosure of land in which they all claim a right of common, &c. But, according to the general opinion, it seems to be a disturbance of the peace by three or more persons assembling together with an intention to do a thing, which, if executed, will make them rioters, and actually making *a motion to execute* their purpose. In fact, it agrees in all particulars with a riot except that it may be complete without the execution of the intended enterprise (*g*). And it seems, by the recitals in several early statutes, that if people assemble themselves, and afterwards proceed, ride, go forth, or move by instigation of one or several conducting them, this is a *rout*; inasmuch as they move and proceed in rout and number (*h*).

It is usual to insert in indictments for riot the word 'routously'; and if a riot is not proved, the jury may in such indictment convict of rout. The offence is an indictable misdemeanor, punishable by fine (or) imprisonment without hard labour, or both (*gg*). Indictments for rout alone are rarely, if ever, preferred.

Sect. III.—Unlawful Assembly and Association.

A. *Common Law.*

An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards its execution. Hawkins, however, thinks this opinion much too narrow; and that any meeting of great numbers of people with such circumstances of terror as

(*b*) Field *v.* Receiver of Metrop. Police [1907], 2 K.B. 853, 859, rejecting Coke's definition of riot (3 Inst. 146).

(*c*) *Vide ante*, p. 409.

(*d*) 49 & 50 Vict. c. 38, s. 2.

(*e*) Field *v.* Receiver of Metrop. Police, *ubi sup.*

(*f*) Drake *v.* Foottit, 7 Q.B.D. 201. Cf. R. *v.* Howell, 9 C. & P. 437, *ante*, p. 419.

(*g*) Redford *v.* Birley, 1 St. Tr. (N. S.) 1211, 1214, Holroyd, J. 1 Hawk. c. 65. ss. 1, 8, 9. Cf. 3 Co. Inst. 176; 2 Chit. Cr. L. 488.

(*gg*) *Vide ante*, p. 249.

(*h*) 19 Vin. Abr. tit. 'Riots, &c.' (A.), 2, referring to 13 Hen. IV. c. 7; 2 Hen. V. stat. c. 8, *q.v. post*, p. 432.

cannot but endanger the public peace, and raise fears and jealousies among the King's subjects, seems properly to be called an *unlawful assembly*. As where great numbers complaining of a common grievance meet together, armed in a warlike manner (*i*) in order to consult together concerning the most proper means for the recovery of their interests: for no one can foresee what may be the event of such an assembly (*j*). In substance this means that an assembly is unlawful if it may reasonably be found that it will endanger the public peace: 'if a mutiny from its general appearance and accompanying circumstances is calculated to excite terror, alarm, and consternation it is generally criminal and unlawful' (*k*). And 'any meeting assembled under such circumstances as, according to the opinion of rational and firm men are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly' (*l*). In viewing this question, the jury should take into consideration the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them: and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage (*m*). All persons who join an assembly of this kind, disregarding its probable effect and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminally responsible as parties to the assembly (*n*).

The difference between riot and unlawful assembly is this: if the parties assemble in a tumultuous manner calculated to cause terror, and actually execute their purpose with violence, it is a riot; but if they *merely assemble* upon a purpose which, *if executed*, would make them rioters, but *do not execute or make any motions to create such purpose* and having done nothing, separate without carrying their purpose into effect, it is an unlawful assembly (*o*).

An assembly of a man's friends for the defence of his person against those who threaten to beat him if he go to a market, &c., is unlawful; for he who is in fear of such insults must provide for his safety by swearing the peace against the persons by whom he is threatened, and must not make use of violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public

(*i*) Or with sticks. See R. *v.* Vincent, 9 C. & P. 95, Alderson, B.

(*j*) 1 Hawk. c. 65, s. 9. There may be an unlawful assembly if the people assemble themselves together for an ill purpose *contra pacem*, though they do nothing, Br. tit. 'Riots,' pl. 4. Coke speaks of an unlawful assembly as being when three or more assemble themselves together to commit a riot or rout, and do not do it. 3 Inst. 176. R. *v.* McNaughten, 14 Cox, 576. See also R. *v.* Cunninghame Graham, 16 Cox, 420, Charles, J.

(*k*) Per Bayley, J., in R. *v.* Hunt, York Spring Assizes, 1820, cited by Alderson, B. 9 C. & P. 94n; and per Holroyd, J., in Redford *v.* Birley [1822], 3 Stark. (N. P.) 76; 1 St. Tr. (N. S.) 1217.

(*l*) R. *v.* Vincent, 9 C. & P. 91; 3 St. Tr. (N. S.) 1037, Alderson, B. See R. *v.* Neale, 9 C. & P. 431, Littledale, J.

(*m*) Ibid.

(*n*) Per Holroyd, J., Redford *v.* Birley, *supra*.

(*o*) R. *v.* Birt, 5 C. & P. 154, Patteson, J. Lord Thring (Manual of Military Law) describes unlawful assembly and riot as different stages on the way to insurrection.

peace (*p*). But an assembly of a man's friends in his own house, for the defence of the possession of it against persons who threaten to make an unlawful entry, or for the defence of his person against persons who threaten to beat him in his house, is indulged by law; for a man's house is looked upon as his castle (*q*). It is said, however, that he may not arm himself and assemble his friends in defence of his close (*r*).

An assembly of persons to witness a prize fight or bull fight, cock fight, or badger baiting (*s*), is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence (*t*). Where sixteen persons, with their faces blackened, and armed with guns and sticks, met at a house at night, intending to go out for the purpose of night poaching, it was held, that it was impossible that a meeting to go out with their faces thus disguised, at night, and under such circumstances, could be other than an unlawful assembly (*u*).

An assembly in a public place for a lawful purpose, and with no intention of carrying out such purpose in an unlawful manner, is not rendered unlawful by the fact that those who compose it meet with the knowledge that it is likely to be attacked or resisted by others (*v*).

A conspiracy between several persons to meet together for the purpose of disturbing the peace and tranquillity of the realm, of exciting discontent and disaffection, and of exciting the King's subjects to hatred of the government and constitution is indictable, but independently of any question of conspiracy, treason, or sedition, such assembly appears to be unlawful (*w*).

Unlawful assembly is an indictable misdemeanor punishable at common law by fine and (or) imprisonment without hard labour.

B. *Assemblies and Associations made Unlawful by Statute.*

Tumultuous Petitioning.—13 Car. II. st. 1., c. 5 (1662), after reciting the mischiefs of *tumultuous petitioning*, enacts (sect. 1) that no person shall 'solicit, labour, or procure the getting of hands or other consent of any persons above the number of twenty, to any petition, complaint, remonstrance, declaration or other addresses to the King or both or either houses of Parliament, for alteration of matters established by law in church or state, unless the matter thereof shall have been first consented unto and ordered' by three or more justices, or by the

(*p*) Treason Act, 1351 (25 Edw. III. stat. 2, c. 2), in excepting from the definition of treason the riding of any man armed overtly or secretly with men of arms, to slay, &c., declares that the offence shall be felony or trespass, according to the laws of the land of old time used, and according as the case requireth.

(*q*) 1 Hawk. c. 65, ss. 9, 10. 19 Vin. Abr. tit. 'Riots, &c.' (A.) 5, 6. 3 Co. Inst. 176. 4 Bl. Com. 146. Holt, C.J., in R. *v.* Soley, 11 Mod. 116, says that, though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence.

(*r*) R. *v.* Bishop of Bangor, Shrewsbury Summer Assizes, 1796, 26 St. Tr. 523, Heath, J.

(*s*) 12 & 13 Vict. c. 92.

(*t*) R. *v.* Billingham, 2 C. & P. 234, Burrough, J. See R. *v.* Perkins, 4 C. & P. 537, Patteson, J. R. *v.* Coney, 8 Q.B.D. 534. A sparring match, or an ordinary boxing match with gloves, does not seem to fall within the definition of unlawful assembly. See R. *v.* Young, 10 Cox, 371. R. *v.* Orton, 14 Cox, 226 (C. C. R.).

(*u*) R. *v.* Brodribb, 6 C. & P. 571, Holroyd, J.

(*v*) Beatty *v.* Gillbanks, 9 Q.B.D. 308. R. *v.* Clarkson, 17 Cox, 483 (C. C. R.). Both cases of meetings of the Salvation Army. But see Wise *v.* Dunning [1902], 1 K.B. 167, *ante*, p. 408.

(*w*) R. *v.* Hunt, 3 B. & Ald. 566; 1 St. Tr. (N. S.) 171. R. *v.* Vincent, 3 St. Tr. (N. S.) 1037, *vide ante*, pp. 152, 423.

major part of the grand jury of the county, &c., where the matter shall arise, at the assizes or quarter sessions; or, in London, by the lord mayor, aldermen, and commons in common council: and that no person shall 'repair to His Majesty or both or either houses of Parliament, upon pretence of presenting or delivering any petition,' &c., 'accompanied with excessive number of people, nor at any one time with above the number of ten persons, upon pain of incurring a penalty not exceeding one hundred pounds, and three months' imprisonment for every offence;' which offence to be prosecuted in the Court of King's Bench, or at the assizes or general quarter sessions, within six months after the offence committed and proved by two credible witnesses. But sect. 2 provides that the Act shall not hinder persons, not exceeding ten in number, from presenting any public or private grievance or complaint to any member of Parliament, or to the King, for any remedy to be thereupon had; nor extend to any address to His Majesty by the members of both or either houses of Parliament, during the sitting of Parliament (*x*).

The Unlawful Drilling Act, 1820 (60 Geo. III. & 1 Geo. IV. c. 1), s. 1, reciting that 'in some parts of the United Kingdom men clandestinely and unlawfully assembled have practised military training and exercise, to the great terror and alarm of His Majesty's peaceable and loyal subjects, and the imminent danger of the public peace,' enacts (sect. 1) that '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 exercise, movements, or evolutions, without any lawful authority from His Majesty, or the lieutenant, or two justices of the peace of any county or riding, or of any stewartry, by commission or otherwise, for so doing shall be, and the same are hereby prohibited as dangerous to the peace and security of His Majesty's liege subjects, and of his government; and every person who shall be present at, or attend any such meeting or assembly for the purpose of training and drilling any other person or persons, to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported (*y*) for any term not exceeding seven (*z*) years, or to be punished by imprisonment not exceeding two years (*a*), at the discretion of the Court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished

(*x*) S. 3. By the Bill of Rights (1 Will. & M. sess. 2, c. 2, s. 1), art. 5, 'It is the right of the subjects to petition the King, and that all commitments and prosecutions for such petitioning are illegal.' It was contended, that this article had virtually repealed 13 Car. II. stat. 1, c. 5, but Lord Mansfield declared it to be the unanimous opinion of the Court, that neither that nor any other Act of Parliament had repealed it, and that it was in full force. R. *v.* Lord George Gordon, 2 Dougl. 571.

(*y*) Now penal servitude. 20 & 21 Vict. c. 3, s. 2, *ante*, p. 210.

(*z*) Nor less than three years. 54 & 55 Vict. c. 69, s. 1, *ante*, p. 211.

(*a*) Apparently with or without hard labour. 54 & 55 Vict. c. 69, s. 1, *ante*, p. 212.

by fine and imprisonment, not exceeding two years, at the discretion of the Court in which such conviction shall be had' (*b*).

Where an indictment alleged that there was an unlawful meeting of the defendant and of divers other persons unknown, for the purpose of unlawfully practising military exercise, and which persons so met and assembled were there without any lawful authority of the Queen, &c., and that the defendant was present at and unlawfully did attend the said meeting for the purpose of unlawfully training and drilling divers persons unknown to the practice of military exercise; Maule, J., held that the indictment was not bad for charging two offences (*c*).

An indictment upon this Act should aver that the meeting was for the purpose of training and drilling, or of being trained and drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions, and that the meeting was held without any lawful authority from His Majesty, or the lieutenant, or two justices of the peace, &c., by commission or otherwise (*d*).

Meetings within a Mile of Parliament when sitting.—The Seditious Meetings Act, 1817 (57 Geo. III. c. 19), contains certain enactments relating to meetings and assemblies of persons which are still in force (*e*).

Sect. 23, after reciting that it is highly inexpedient that public meetings or assemblies should be held near the houses of Parliament, or near the courts of justice in Westminster Hall, on certain days, enacts, that it shall not be lawful for any person to convene or call together, or to give any notice for convening or calling together, any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet in any street, square, or open place, in the city or liberties of Westminster, or county of Middlesex, within the distance of a mile from the gate of Westminster Hall (except such parts of the parish of St. Paul's, Covent Garden, as are within the said distance), for the purpose or on the pretext of considering of or preparing any petition, &c., for alteration of matters in Church or State, on any day on which the two houses, or either house of Parliament, shall meet and sit . . . nor on any day on which the courts shall sit in Westminster Hall (*f*): and that if any meeting or assembly for such purposes or on such pretexts shall be assembled or holden on such day, it shall be deemed an *unlawful assembly*. But there is a proviso that the enactment shall not apply to any meeting for the election of members of Parliament, or to persons attending upon the business of either house of Parliament, or any of the said courts (*g*).

(*b*) S. 2 provides for the dispersion of persons so assembled by justices of the peace, constables, or peace officers or persons acting in their aid and assistance, and for arresting and detaining or holding to bail such offenders. By s. 7 prosecutions for offences against the provisions of the Act must be commenced within six months after the offence committed. S. 4 makes the Act alternative to other criminal remedies (*vide ante*, pp. 4, 6. Ss. 5, 6 were repealed in 1893 (56 & 57 Vict. c. 61). S. 8 was repealed in 1873 (36 & 37 Vict. c. 91).

(*c*) R. *v.* Hunt, 3 Cox, 215.

(*d*) Gogarty *v.* R., 3 Cox, 306 (Ir.).

(*e*) Ss. 1–22 of the Act expired in 1818, and were repealed in 1820 (60 Geo. III. and 1 Geo. IV. c. 6). That Act and the expired sections of the Act of 1817 were repealed in 1873 (36 & 37 Vict. c. 91). The rest of the Act, so far as unrepealed, relates to unlawful combinations and confederacies (see p. 335), except s. 35, which declares that nothing in the Act shall take away, abridge, or affect any law of the realm for the suppression or punishment of any offence named therein (*vide ante*, pp. 4. 5).

(*f*) It is doubtful whether this applies to the sittings at the Royal Courts of Justice.

(*g*) S. 24 was repealed in 1890 (53 & 54 Vict. c. 33).

Sect. IV.—Affrays.

Common Law.—An affray is the fighting of two or more persons in a *public place*, to the terror of His Majesty's subjects, and is a misdemeanor at common law (*h*). It differs from riot in that it may be committed by *two* persons (*i*). By public place seems to be meant a street or highway, or other place where the public may pass or be as of right (*j*). Where two of the prisoners fought together amidst a great crowd of persons, and the others were present aiding and assisting, at a place far from any highway, and the fight ceased on the appearance of some peace-officers, it was held that this was not an affray, because the scene of action was to all intents and purposes a private place (*k*). A gathering for such a fight or a prize fight is clearly an unlawful assembly, and where there is resistance to lawful authority exercised for the purpose of putting a stop to it, the offence may amount to an affray, or even a riot (*l*). An affray may fall short of a riot, though many persons are engaged in it. Thus, if a number of persons met together at a fair or market, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they will not be guilty of riot, but only of a sudden affray, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention (*m*).

An affray may be aggravated by the circumstances under which it takes place or by its dangerous tendency; where persons coolly and deliberately engage in a duel which must be attended by the risk of murder, this is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, putting men under the necessity of righting themselves (*n*). And it is an aggravated form of affray violently to disturb the officers of justice in the due execution of their office, by the rescue of a person legally arrested, or the attempt to make such a rescue (*o*). An affray is severely punishable when committed in the King's Courts, or even in the palace yard near those Courts; and it is highly finable even when made in the presence of an inferior Court of justice (*p*). As to affrays in a church or churchyard, *vide ante*, p. 401.

It is said that no quarrelsome or threatening words whatsoever

(*h*) 4 Bl. Com. 144; 3 Co. Inst. 158; Burn's Just. tit. 'Affray' (I.). The word affray is derived from the French *effroi* (terror). In 3 Co. Inst. 158, it is said that an affray is a public offence to the terror of the King's subjects; and is an English word, and so called because it affrighteth and maketh men afraid; and that it is inquirable in a leet as a common nuisance.

(*i*) *Vide ante*, p. 409.

(*j*) R. *v.* O'Neill [1871], Ir. Rep. 6 C. L. 1.

(*k*) R. *v.* Hunt, 1 Cox, 177, Alderson, B. See 1 Hawk. c. 63, s. 1. If all the persons present went to see the fight, they were all guilty of an assault. R. *v.* Perkins, 4 C. & P. 537, Patteson, J. The indictment was for riot as well as assault, arising out of a prize-fight.

(*l*) R. *v.* Billingham, 2 C. & P. 234, Burrough, J. The indictment was for riot, arising in a gathering of 1000 persons to witness a prize-fight. A magistrate tried to stop the fight, which resulted in tumult and the rescue of a man arrested. *Vide ante*, p. 424.

(*m*) 1 Hawk. c. 65, s. 3.

(*n*) 1 Hawk. c. 63, s. 21.

(*o*) 1 Hawk. c. 63, s. 22. And see *post*, p. 567, 'Rescue.'

(*p*) 1 Hawk. c. 21, ss. 6, 10; c. 63, s. 23. As to striking in palaces or courts of justice, see *post*, p. 891, 'Aggravated Assaults.'

amount to an affray (*q*), and that no one can justify laying his hands on those who barely quarrel with angry words, without coming to blows: but it seems that a constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties. And though mere words cannot in law create such terror as to constitute an affray, yet there may be an affray without actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said to be an offence at common law (*r*).

Statute.—The Statute of Northampton (2 Edw. III. c. 3) enacts, that 'no man, great or small, of what condition soever, except the King's servants in his presence, and his ministers in executing of the King's precepts or of their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace (*armes de pees*), and the same in such places where such acts do happen (*s*), be so hardy to come before the King's justices or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of peace (*t*), nor to go nor ride armed, by night nor by day, in fairs or markets, nor in the presence of the King's justices, or other ministers, nor in no part elsewhere; upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure. And that the King's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the cities and boroughs, and borough-holders, constables, and wardens of the peace within their wards, shall have power to execute this Act (*u*). And that the justices assigned at their coming down into the country shall have power to inquire how such officers and lords have exercised their offices, and to punish them whom they find that have not done that which pertained to their office' (*v*).

The wearing of arms is not punishable under this statute unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace (*w*). And no person is within the statute who arms himself to

(*q*) 1 Hale, 456; 1 Hawk. c. 63, s. 2.

(*r*) 1 Hawk. c. 63, ss. 2, 4; Burn's Justice, tit. 'Affray.'

(*s*) These obscure words may mean proclamation of a joust or tournament, or of places where such may be held. See 1 Rev. Stat. (2nd ed.) p. 88n. Tournaments, except by command of the King, seem to have been illegal. R. *v.* Coney, 8 Q.B.D. 534, 549, Stephen, J.

(*t*) The words of the statute are '*en affrai de la pees*' [*paix*]. In another part of the statute '*armes de pees*' clearly means 'arms to keep the peace.' Coke, 3 Inst. 158, cites the words as '*en effraier de la pais*,' and reads the latter word as 'pays' in disregard of its gender.

(*u*) Offences within this statute were specifically mentioned in the old form of the commission of the peace settled in 30 Eliz.

(*v*) Two early statutes enforcing this Act have been repealed, viz., 7 Rich. II. c. 13 (in 1857), and 20 Rich. II. c. 1 (in 1863 as to England, and in 1872 as to Ireland). A statute of 1313 (7 Edw. II.) requires persons to come to Parliament, 'without force and without armour, well, and peaceably.'

(*w*) 1 Hawk. c. 63, s. 9.

suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm (*x*). But a man cannot excuse wearing such armour in public by alleging that a person threatened him, and that he wears it for the safety of his person from the assault: though no one incurs the penalty of the statue by assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle (*y*). In R. *v.* Meade (*z*), a single person who went armed in the streets without lawful occasion, or so acted as to be a nuisance and terror to the public, was convicted under this statute.

Punishment.—The punishment of affrays at common law or under 2 Edw. III. c. 3, is by fine and (or) imprisonment without hard labour. The term of imprisonment and the amount of the fine are in the discretion of the Court (*a*).

As to the powers and duties of officials and private persons to stop affrays, see *post*, p. 431.

Sect. V.—Indictment, Evidence and Punishment.

Indictment.—An indictment for riot, rout, or unlawful assembly must shew that there was an unlawful assembly of more than two persons (*b*). It is not clear whether it is now necessary that an indictment for riot should contain the words 'to the terror of the people' (*c*). Where the indictment is aptly drawn the defendants if acquitted of riot may be convicted of rout or of unlawful assembly if the facts so warrant. Where six persons were indicted for a riot, two of them died without being tried, two were acquitted, and the other two were found guilty. The Court refused to arrest the judgment, saying, that as the jury had found two persons to be guilty of a riot, it must have been together with those two who had never been tried, as it could not otherwise have been a riot (*d*). But two persons only cannot be guilty of a riot (*e*). Where the offence was specially laid as a riot, the *riotosè* extending to all the facts, and stated a battery of an individual as part of the riot: it was held that an acquittal of the riot was an acquittal on the whole indictment. But it was also held, that if the indictment had been, that the defendants, with *divers other* disturbers of the peace, had committed this riot and battery, the defendants might have been found guilty of the battery (*f*).

(*x*) 1 Hawk. c. 63, s. 10.

(*y*) Id. s. 8, and see in ss. 5, 6, 7, as to the proceedings of justices, &c., executing the Act.

(*z*) [1903] 19 Times L. R. 540, Wills, J.

(*a*) 1 Hawk. c. 63, s. 20; 4 Bl. Com. 145, *vide ante*, p. 249.

(*b*) R. *v.* Soley, 2 Salk. 593, 594.

(*c*) 14 & 15 Vict. c. 100, s. 24, makes formal conclusions unnecessary. In R. *v.* Hughes [1830], 4 C. & P. 373; 6 St. Tr. (N. S.) 1101, Park, J., held such conclusion necessary at common law. But in R. *v.* Cox [1831], 4 C. & P. 538, Patteson, J., held that on an indictment for riot without such conclusion, but charging the cutting down of fences a conviction could be had for unlawful assembly. It is not, however, clear that the words are in reality a formal conclusion. They may fairly be treated an essential part of the description of the offence. See Field *v.* Receiver of Metrop. Police [1907], 2 K.B. 853. An indictment under s. 1 of the Riot Act never needed this conclusion. R. *v.* James [1831], 5 C. & P. 153, and MS. C. S. G., per Patteson, J.

(*d*) R. *v.* Scott, 3 Burr. 1262.

(*e*) R. *v.* Sadbury, 1 Ld. Raym. 484. And see 19 Vin. Abr. tit. 'Riots (E.)' 1.

(*f*) R. *v.* Sadbury, 1 Ld. Raym. 484. R. *v.* Ingram, 2 Salk. 593; 12 Mod. 262. 19 Vin. Abr. tit. 'Riots (E.)' 6.

Where several were indicted for a riot, it was moved, that the prosecutor might name two or three, and try it against them, and that the rest might enter into a rule to plead not guilty (*guilty if the others were found guilty*); and as a rule was made accordingly; this being to prevent the expense of putting them all to plead (*g*).

Evidence.—In substance the rules as to admissibility of evidence in cases of riot, rout, or unlawful assembly are the same as in cases of conspiracy, the offences like that offence involving concerted action (*h*). Upon an indictment against H. and others, for a conspiracy and unlawful meeting together with persons unknown, for the purpose of exciting discontent and disaffection, at which meeting H. was the chairman, it was held that resolutions passed at a former meeting assembled a short time before, in a distant place, at which H. also presided, and the avowed object of which meeting was the same as that of the meeting mentioned in the indictment, were admissible in evidence, to show the intention of H. in assembling and attending the meeting in question. And it was also held that a copy of these resolutions delivered by H., to the witness at the time of the former meeting, as the resolutions then intended to be proposed and which corresponded with those which the witness heard read from a written paper, was admissible, without producing the original (*i*).

In the same case it appeared that large bodies of men had come to the meeting in question from a distance, marching in regular order resembling a military march; and it was held to be admissible evidence, to shew the character and intention of the meeting, that within two days of the time at which it took place considerable numbers were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting, and that, upon their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again. And it was also admitted as evidence for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing (*j*).

It was decided in the same case that parol evidence of inscriptions and devices on banners and flags displayed at a meeting was admissible without producing the originals (*k*), but that upon the indictment in question evidence of the supposed misconduct of those who dispersed the meeting was not admissible (*l*).

Where the question was, with what intention a great number of persons assembled to drill, declarations made by those assembled and in the act of drilling, and further declarations made by others who were proceeding to the place, and solicitations made by them to others to accompany them declaratory of their object, were held to be admissible in evidence for the purpose of showing their object (*m*). And in general, evidence is admissible to show that the meeting caused alarm and apprehension, and to prove information given to the civil authorities, and the measures taken by them in consequence of such information (*n*).

(*g*) R. *v.* Middlemore, 6 Mod. 212.
(*h*) *Vide ante*, p. 191; *post*, Bk. xiii. c. ii.
(*i*) R. *v.* Hunt, 3 B. & Ald. 566; 1 St. Tr. (N. S.) 171.
(*j*) Id. ibid.
(*k*) Id. ibid.
(*l*) Id. ibid.
(*m*) Redford *v.* Birley, 1 St. Tr. (N. S.) 1071: 3 Stark. (N. P.) 76, Holroyd, J.
(*n*) Id. ibid.

It was held, that the prisoners must first be identified as forming part of the crowd before the riot is proved (*o*). But this is a very inconvenient course, causing much waste of time by recalling witnesses; and it has since been held that on an indictment for riot the prosecutor is entitled to prove the acts of any rioters before he connects the others with the riot (*p*), and this is in conformity with the practice in cases of conspiracy (*q*).

Punishment.—(1) *Riot.*—Riot at common law is an indictable misdemeanor punishable by fine and (or) imprisonment without hard labour (*r*).

By the Hard Labour Act, 1822 (3 Geo. IV., c. 114) (*s*), on conviction of riot the Court may impose a sentence of imprisonment with hard labour in addition to or in lieu of any punishment which could be inflicted before 1822 (*t*). This statute does not apply to felonious riot. The punishment for statutory offences in relation to riot are stated under the statutes (*ante*, pp. 414–416). Common-law riot is triable at quarter sessions (*u*); offences under sects. 1–5 of the Riot Act are not so triable (*v*).

(2) *Routs, Unlawful Assemblies, and Affrays.*—These offences are misdemeanors punishable at common law by fine or imprisonment without hard labour or both (*vide ante*, p. 249), and triable at quarter sessions (*u*).

Sect. VI.—Suppression of Riots, &c.

The powers and duties of public officers and private persons with reference to the suppression of unlawful assemblies, affrays, routs, and riots, rest partly on the common law and partly on statutes.

On the constitution of the office of justices of the peace (34 Edw. III. c. 1) they were given power to restrain rioters and all other barrators, and to pursue, arrest, take, and chastise them according to their trespass and offence, and to cause them to be imprisoned and duly punished according to the law and customs of the realm (*w*). This statute has been construed as authorising a single justice to arrest, or by parol command to authorise the arrest, of persons riotously assembled. Those early statutes, still unrepealed, were passed for the suppression of riots (*x*),

(*o*) So ruled by Vaughan, Parke and Alderson, BB., on the special commission of 1830 at Salisbury, and approved by all the judges. Per Alderson, B., in R. *v.* Nicholson, 1 Lew. 300, where the same course was adopted.

(*p*) R. *v.* Cooper, Stafford Summer Ass. 1850, Williams, J. MSS. C. S. G.

(*q*) *Ante*, p. 191.

(*r*) 1 Hawk. c. 65, s. 12.

(*s*) *Ante*, p. 212.

(*t*) One of these punishments was the pillory (1 Hawk. c. 65, s. 12), which was partly abolished in 1816 (56 Geo. III. c. 138) and completely abolished in 1837. *Vide ante*, p. 250.

(*u*) 34 Edw. III. c. 1; 15 Rich. II. c. 2; 5 & 6 Vict. c. 38, s. 1. As to removal of indictments for riot by *certiorari*, see 21 Jac. I. c. 8, s. 4.

(*v*) 5 & 6 Vict. c. 38, *post*, Bk. xii. c. i.

(*w*) 'Unlawful assemblings' and ridings with armed force against the peace are specifically mentioned in the old form of commission of the peace, settled 30 Eliz. and used until 1878.

(*x*) Their immediate object is said to have been to compel sheriffs and others to put the law in force against Lollards and other organisations of the fourteenth and fifteenth centuries. Wright's Report on Criminal Law (Parl. Pap., 1878, H.L. No. 178), p. 29. See 1 Hawk. c. 65, s. 14 *et seq.* Burn's Justice (30th ed.), tit. 'Riot.' R. *v.* Gulston, 2 Ld. Raym. 1210.

17 Rich. II. c. 8 (1393) (*y*), 13 Hen. IV. c. 7 (1411) (*z*), and 2 Hen. V. st. 1 c. 8 (1414) (*a*). The first two require the use of the *posse comitatus* (*b*) by the sheriff, &c., in cases of riot, rout, and unlawful assembly, and authorise the arrest of offenders and the recording of offences committed in the presence of the justices. The third provides for the case of default by justices in enforcing the Act of 1411, and prescribes punishments for great and petty riots and for neglecting to aid in suppressing riot. And it has been held to be an indictable misdemeanor to refuse to aid a constable in suppressing a riot or affray (*c*). The duties of private persons in such cases were thus expounded by Tindal, C.J., in his charge to the grand jury in the case of the Bristol Riots (*d*), as follows: 'By the common law every private person may lawfully endeavour of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose (*e*); he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority, but it is *his bounden duty* as a good subject of the King to perform this to *the utmost of his ability*. If the riot be general and dangerous, he may arm himself against the evil doers to keep the peace (*f*). Such was the opinion of the judges of England in the time of Queen Elizabeth, "the case of Arms" (*g*), although the judges add that it would "be more discreet for everyone in such a case to attend and be assistant to the justices, sheriffs, and other ministers of the King in the doing of it." It would undoubtedly be more advisable so to do; for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger were sufficiently immediate, or until some felony was either committed, or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts, however well intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself, and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law.' This charge was approved in Phillips *v.* Eyre (*h*).

The duties of officers as to the suppression of rioters are thus laid

(*y*) 1 Rev. Stat. (2nd ed.) 180.

(*z*) Ibid. 189. See Bristol Special Commission [1832], 3 St. Tr. (N. S.) 5; 5 C. & P. 254, Tindal, C.J.

(*a*) Ibid. 197.

(*b*) *i.e.*, the general levy of all able-bodied men in the county. See Man. Mil. Law (ed. 1907), 146.

(*c*) And see R. *v.* Brown, C. & M. 314.

(*d*) 3 St. Tr. (N. S.) 1, 4; 5 C. & P. 252, 261.

(*e*) See 1 Hawk. c. 65, s. 11.

(*f*) From this it would seem that they may use arms to suppress the riot in case of necessity, where the riots savour of rebellion (1 Hawk. c. 65, s. 11), or where a felony is about to be committed. Handcock *v.* Baker, 2 B. & P. 265, Chambré, J. As to military intervention, see *post*, p. 434.

(*g*) Poph. 121. Cf. Kel. (J.) 76.

(*h*) L. R. 6 Q.B. 15. Willes, J., delivering the judgment of the Exchequer Chamber.

down by Tindal, C.J., in the Bristol Riots case (*i*). 'Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace-officer, is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the King to assist him in that undertaking. By an early statute, which is still in force (13 Hen. IV. c. 7) (*j*), any two justices, with the sheriff or under-sheriff of the county, may come with the power of the county, if need be, to arrest any rioters, and shall arrest them; and they have power to record that which they see done in their presence against the law; by which record the offenders shall be convicted (*k*), and may afterwards be brought to punishment. And here I must distinctly observe, that *it is not left to the choice or will of the subject*, as some have erroneously supposed, *to attend or not to the call of the magistrate, as they think proper*, but *every man is bound when called upon*, under pain of fine and imprisonment, *to yield a ready and implicit obedience to the call of the magistrate and to do his utmost in assisting him to suppress any tumultous assembly*' (*l*). For in the succeeding reign another statute (2 Hen. V., st. 1, c. 8) was passed which enacts that the King's liege people being sufficient to travel in the counties where such routs, assemblies, or riots shall be, shall be assistant to the justices, commissioners, and sheriffs, and other officers upon reasonable warning (*m*), to ride with them in aid to resist such riots, routs, and assemblies on pain of imprisonment and to make fine and ransom to the King (*n*). In later times the course has been for the magistrate on occasions of actual riot and confusion, to call in the aid of such persons as he thought necessary, and to swear them in as special constables; and in order to prevent any doubt, if doubt could exist, the statute 1 Geo. IV. c. 37, and (since that has been repealed by the statute 1 & 2 Will. IV. c. 41) (*o*) the statute last referred to has invested the magistrate with that power in direct and express terms when tumult, riot, or felony was only likely to take place or might reasonably be apprehended.' The magistrates may also call in the aid of the local militia (*p*), the yeomanry (*q*), and the reserve forces (*r*), and the territorial army (*s*), and may obtain on requisition the aid of the regular army (*t*). Members of the

(*i*) 3 St. Tr. (N. S.) 1, 5; 5 C. & P. 262.

(*j*) *Ante*, p. 432.

(*k*) In the same manner as is contained in the Statute of Forcible Entries. 5 Rich. II. stat. 1, c. 7, *post*, p. 442.

(*l*) See R. *v.* Neale, 9 C. & P. 431; 3 St. Tr. (N. S.) 1312, Littledale, J.

(*m*) The duty attaches even though precepts for the *posse comitatus* have not been made out or signed. R. *v.* Pinney, 3 St. Tr. (N. S.) 11.

(*n*) Under this Act it has been held that knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, apprentices and all others, except women, clergymen, decrepit persons and infants under fifteen, are bound to attend the justices on pain of fine and imprisonment, and that any battery, wounding, or killing of the rioters which may happen in suppressing the riot is justifiable. Dalton, c. 82. 1 Hale, 495. 4 Bl. Com. 146, 147. Bristol Riots Charge, 3 St. Tr. (N. S.) 1, 6, Tindal, C.J. R. *v.* Pinney, 3 St. Tr. (N. S.) 11.

(*o*) Special Constables Act, 1831. By s. 8, disobedience to the summons is specifically punishable. As to Ireland, see 2 & 3 Will. IV. c. 108. The powers of the Act of 1831 were used during the Trafalgar Square disturbances in 1886.

(*p*) 52 Geo. III. c. 38, ss. 42, 92, 94.

(*q*) 44 Geo. III. c. 54, s. 23; 56 Geo. III. c. 39; 1 Edw. VII. c. 14, s. 1. See the Peterloo riots, 1 St. Tr. (N. S.) 1071.

(*r*) 45 & 46 Vict. c. 48, s. 5.

(*s*) See 7 Edw. VII. c. 9.

(*t*) See King's Regulations, ss. 948–968. Man. Mil. Law, c. xiii., ss. 34, 35.

militia and reserve and territorial forces, when called out in aid of the civil power, are subject to military law (*u*).

The powers and duties of magistrates and police to disperse riots, &c., do not depend on the making of the proclamation to disperse, the provisions of the Riot Act being in aid, and not in supersession, of the common law (*v*), and where the Riot Act has been read it does not interrupt or suspend such powers and duties during the following hour (*w*).

In R. *v.* Kennett (*x*), the Lord Mayor of London was tried in 1780 for neglect of duty during the Gordon Riots by not reading the Riot Act and releasing prisoners.

Upon an information against the Mayor of Bristol for neglect of duty in not suppressing the Bristol riots in 1831, which was tried at bar, it was laid down that the general rules of law require of magistrates that at the time of riots they should keep the peace, restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the King's subjects to assist them, which they are bound to do upon reasonable warning; and in point of law, a magistrate would be justified in giving firearms to those who thus came to assist him, but it would be imprudent in him to give them to those who might not know their use, and who might be under no control, and who, not being used to act together, might be cut off from the rest of the force, and the arms, by those means, get into the hands of the rioters (*y*).

It is no part of the duty of a magistrate to go out and head the constables, or to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot; nor to keep a body of men, as a reserve, to act as occasion may require; nor is it any part of his duty to give any orders respecting the firearms in gunsmiths' shops. Nor is a magistrate bound to ride with the military: if he gives the military officer orders to act, that is all that is required of him (*z*).

The justices have also powers, if a riot is apprehended or is proceeding, to adjourn elections (*a*), or to close theatres (*b*), or public houses (*c*).

Military Forces of the Crown.—With respect to the powers, duties, and responsibilities of soldiers in the suppression of riots, Tindal, C.J., in the Bristol Riots case (*d*) thus stated the law: 'The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the King as any other subject (*e*). If the one is bound to attend the call of the civil magistrate, so is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms

(*u*) 44 & 45 Vict. c. 58, s. 176 (5); 7 Edw. VII. c. 9, s. 28.

(*v*) R. *v.* Pursey, 6 C. & P. 81; 3 St. Tr. (N. S.) 543.

(*w*) R. *v.* Gordon, 21 St. Tr. 493. And see 2 St. Tr. (N. S.) 1029.

(*x*) 5 C. & P. 282; 3 St. Tr. (N. S.) 506, cit. And see Lord Advocate *v.* Stewart, 18 St. Tr. 875.

(*y*) R. *v.* Pinney, 3 St. Tr. (N. S.) 11; 5 C. & P. 254; 3 B. & Ad. 946, Littledale, Parke, and Taunton, JJ.

(*z*) R. *v.* Pinney, ibid.

(*a*) 2 & 3 Will. IV. c. 45, s. 30; 5 & 6 Will. IV. c. 36, s. 8; 16 & 17 Vict. c. 15, s. 3; 35 & 36 Vict. c. 33, ss. 10, 15, 17.

(*b*) 6 & 7 Vict. c. 68, s. 9.

(*c*) 35 & 36 Vict. c. 93, s. 23.

(*d*) 3 St. Tr. (N. S.) 1.

(*e*) See Burdett *v.* Abbot, 4 Taunt. 402. Redford *v.* Birley, 1 St. Tr. (N. S.) 1176.

are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a stronger degree with a military force. But where the danger is pressing and immediate, where a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities (*f*), the military subjects of the King not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people.'

The law as laid down in this charge was adopted in the Report on the Featherstone Riots (*g*), where it is said that 'a soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. He cannot, because he is a soldier, excuse himself if, without necessity, he takes human life. A soldier can only act by using his arms. The weapons he carries are deadly. They cannot be employed at all without danger to life, and in these days of improved rifles and perfected ammunition, without some risk of injuring distant and possibly innocent bystanders. . . . The whole action of the military when called in ought to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done; and the presence of a magistrate, while expedient, is not in the least necessary to entitle the military to act, even by firing, to prevent felonious outrage or dangerous riot' (*h*).

From the right to suppress riots flows the right to use such force as is reasonably necessary to disperse the rioters assembled (*i*). The degree of force which may be used depends on the nature of the riot, and must always be moderated and proportioned to the circumstances of the case, and to the end to be obtained. The taking of life can only be justified by the necessity of protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has been felonious, through disobedience to the provisions of the Riot Act (*j*), and who resist by force the attempt to disperse and apprehend them (*k*).

Unlawful Assemblies.—What has been above stated as to riots is also applicable to unlawful assemblies, even when no act of violence has been committed (*l*), subject to the qualification that unless such assembly is calculated to cause a serious breach of the peace, the action of officers of the law or private persons towards its suppression must be limited

(*f*) *Vide ante*, p. 433.

(*g*) Parl. Pap. 1893, c. 7234. The report was mainly the work of Lord Bowen. See the further report of 1908 (Parl. Pap. 1908, c. 236), as to the employment of the military to suppress riots.

(*h*) Cf. R. *v.* Pinney, 3 St. Tr. (N. S.) 11. The duties of the military in aid of the civil power are laid down in the King's Regulations, §§ 948–968.

(*i*) See R. *v.* Neale, 9 C. & P. 435. R. *v.* Vincent, *ubi sup.*

(*j*) *Ante*, p. 412.

(*k*) Featherstone Riots Report (Parl. Pap. 1893, c. 7234), Lord Bowen.

(*l*) R. *v.* Vincent, 9 C. & P. 94, Alderson, B.

to what is reasonably needed to prevent a disturbance. The officers of the law may order such assembly to disperse, arrest those who refuse to disperse, stop others from joining them, and if resisted, use force to compel obedience (*m*). Such resistance, if concerted, might amount to riot (*n*).

Affrays.—Any person who sees others engaged in a fight or affray may arrest them while still engaged in the fight, and detain them till their passion has cooled and their desire to break the peace has ceased, and then deliver them to a peace-officer; and so any person may arrest an affrayer after the actual violence is over, but whilst he shews a disposition to renew it (*o*). The principle is that for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts. Whilst persons are assembled who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue: and during the affray a constable may, not merely on his own view, but on the information and complaint of another, arrest the offenders, and of course the person so complaining is justified in giving the charge to the constable (*p*). If either party is dangerously wounded in an affray, and a bystander, endeavouring to arrest the other, is not able to arrest him without hurting or even wounding him, he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either to detain him till it appears whether the party will live or die, or to carry him before a justice of peace (*q*). A constable is not only empowered, but bound to do his best to stop an affray which *occurs in his presence* (*r*), and is also bound, in case of need, to call for the assistance of others, who, on refusal, are guilty of misdemeanor and liable to fine and imprisonment. To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove: (1) that the constable actually saw a breach of the peace committed by two or more persons; (2) that there was a reasonable necessity for the constable calling upon other persons for their assistance and support; and (3) that the defendant was duly called upon to render his assistance, and that, without any physical impossibility or lawful excuse, he refused to give it. It is immaterial whether the aid of the defendant, if given, would have proved sufficient or useful (*s*). In the case of a violent quarrel in a house, the constable may break open the

(*m*) 1 Hawk. c. 65, s. 11. See particularly the charge of Tindal, C.J., to the Bristol grand jury, 3 St. Tr. (N. S.) 1, *ante*, p. 432.

(*n*) See R. *v.* Cunninghame Graham, 16 Cox, 420, *ante*, p. 412, 414.

(*o*) 1 Hawk. c. 63, s. 11, where it is said that it seems clearly to follow, that if a man receive a hurt from either party, in thus endeavouring to preserve the peace, he shall have his remedy by an action against him; and that upon the same ground it seems equally reasonable that if he unavoidably happen to hurt either party, in thus doing what the law both allows and commends, he may well justify it; inasmuch as he is no way in fault, and the damage done to the other was occasioned by a laudable intention to do him a kindness.

(*p*) See Timothy *v.* Simpson, 1 Cr. M. & R. 757.

(*q*) 1 Hawk. c. 63, s. 12. 3 Co. Inst. 158.

(*r*) See the charge of Tindal, C.J., *ante*, p. 433.

(*s*) R. *v.* Brown, C. & M. 314. See R. *v.* Sherlock, L. R. 1 C. C. R. 20.

doors to preserve the peace; and if affrayers fly to a house, and he follow with fresh suit, he may break open the doors to take them (*t*). And so far is the constable entrusted with a power over all actual affrays, that though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress; and therefore if an assault be made upon him, he may not only defend himself but also imprison the offender in the same manner as if he were in no way a party (*u*). If a constable sees persons either actually engaged in an affray, as by striking, or offering to strike, by drawing their weapons, &c., or upon the very point of entering upon an affray, as where one threatens to kill, wound, or beat another, he may carry the offender before a justice of the peace, to be dealt with according to law for his offence. It is said that he ought not to arrest persons who are quarrelling by words only, without any threats of personal hurt: and that he may only in such a case command them to avoid fighting (*v*). At common law (*w*), where the affray is over before the constable arrives, he cannot without a justice's warrant arrest the affrayers (*x*), unless a felony has been committed. But it would seem that where the affray has been stopped by private enterprise before his arrival he may take over affrayers arrested by private persons and carry them before a justice (*y*).

A justice of peace may and must do all such things for the suppression

(*t*) 1 Hawk. c. 63, ss. 13, 16. But, *qu.*, if a constable can safely break open the doors of a dwelling house in such case, without a magistrate's warrant. At least, it would seem, there must be some circumstances of extraordinary violence in the affray to justify him in so doing.

(*u*) Id. ibid. s. 15.

(*v*) *Vide* 1 Hawk. c. 63, s. 14.

(*w*) Cook *v.* Nethercote, 6 C. & P. 741, Alderson, B. See the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 65, as to the apprehension of persons on a charge of aggravated assault committed out of sight of a police officer.

(*x*) Cook *v.* Nethercote, *supra*. Fox *v.* Gaunt, 3 B. & Ad. 798. R. *v.* Curvan, 1 Mood. 132. R. *v.* Bright, 4 C. & P. 387. R. *v.* Light, D. & B. 332. R. *v.* Walker, Dears. 358. See these cases, *post*, and Cohen *v.* Huskisson, 2 M. & W. 477. Baynes *v.* Brewster, 2 Q.B. 375. Webster *v.* Watts, 11 Q.B. 311. In Timothy *v.* Simpson, 1 Cr. M. & R. 757, the Court said: 'the power of a constable to take into his custody, upon a reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest in order himself to take sureties of the peace, for he cannot administer an oath. Sharrock *v.* Hannemer, Cro. Eliz. 375, S.C. *nom.* Scarrett *v.* Tanner, Owen, 105. But whether he has that power in order to take before a magistrate, that he may take sureties of the peace, is a question on which the authorities differ. Hale seems to have been of opinion that a constable has this power (2 H. P. C. 89), and the same rule was laid down at Nisi Prius by Lord Mansfield, in a case referred to in 2 East, 306, and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Camp. 421. On the other hand, there is a dictum to the contrary in Brooke's Abridgment, tit. 'Faux Imprisonment,' which is referred to and adopted by Coke in 2 Inst. 52; and in R. *v.* Tooley, 2 Ld. Raym. 1301, Holt, C.J., expressed the same opinion. Eyre, C.J., in Coupey *v.* Henley, 1 Esp. 540, does the same, and many of the text-books state that to be the law. Burn's Just. 258, tit. 'Arrest' (30th ed.); Bac. Abr. (D.) tit. 'Trespass,' 53. 2 East, P. C. 506. 2 Hawk. c. 13, s. 8.

(*y*) 1 Hawk. c. 63, s. 17, citing Lamb. 131, and Dalt. c. 8. Dalton says: 'every private man, being present, may stay the affrayers till their heat be over, and then deliver them to the constables to imprison them till they find surety for the peace': which seems to imply that they may take them before a justice, in order that they may find such sureties: and as it seems that the private individual might take them for that purpose before a justice, it is but reasonable that the constables should have the authority to take them likewise. See *ante*, p. 433; and see Griffin *v.* Coleman, 4 H. & N. 265, as to a constable taking before a magistrate, without due inquiry, a man arrested and locked up by another constable on a false charge of assault.

of an affray, which private men or constables are either enabled or required by law to do. It would seem that he cannot, without a warrant, authorise the arrest of any person for an affray out of his view, but may issue his warrant to bring the offender before him, in order to compel him to find sureties for the peace (z).

(z) 1 Hawk. c. 63, s. 19. *Vide ante*, p. 433, as to powers and duties of justices with reference to riots.

CANADIAN NOTES.

DISTURBANCES OF THE PUBLIC PEACE.

Riots, Routs, Unlawful Assemblies, and Affrays.

Sec. 1.—*Riots.*

Definition.—Code sec. 88.

A procession having been attacked by rioters, the prisoner, one of the processionists, and in no way connected with the rioters, was proved during the course of the attack to have fired off a pistol on two occasions, first in the air, and then at the rioters. So far as appeared from the evidence the prisoner acted alone and not in connection with any one else. It was held that a conviction for riot could not be sustained. R. v. Corcoran (1876), 26 U.C.C.P. 134.

Where before the Code a person was indicted for a riot and assault, and the jury found him guilty of a riot, but not of the assault charged; it was held that the conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed; although the defendant might have been guilty of joining in an unlawful assembly. R. v. Kelly (1857), 6 U.C.C.P. 372. The present section makes it unnecessary that the object of the disturbance should have been actually carried out if there has been a tumultuous disturbance of the peace.

Inciting Indians to Riotous Conduct.—Code sec. 109.

Riotous Destruction of Property.—Code sec. 96.

Riotous Damage to Property.—Code sec. 97.

Sec. 3.—*Unlawful Assemblies.*

Definition.—Code sec. 87.

Punishment.—Code sec. 89.

It has been held in New Brunswick that it is not a ground for quashing a conviction for unlawful assembly on a certain 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. R. v. Mailloux, 3 Pug. 493.

Evidence of the conduct of the accused persons on the day previous to their alleged unlawful assembly is not admissible on their behalf to explain or qualify their conduct at the time of the alleged offence. *Ibid.*

Unlawful Drillings.—Code sec. 98.

Attendance at Unlawful Drilling.—Code sec. 99.

Sec. 4.—Affrays.

Definition.—Code sec. 100.

Punishment.—Code sec. 100(2).

Sec. 6.—Suppression of Riots.

Suppression of Riots by Magistrate.—Code sec. 48.

Suppression of Riot by Persons Commissioned Thereto.—Code sec. 49.

Suppression of Riot by Persons Apprehending Serious Mischief.—Code sec. 50.

Obedience to Superior Officer in Suppression of Riot.—Code sec. 51.

Punishment of Rioters.—Code sec. 90.

Reading of Riot Act.—Code sec. 91.

Penalty for Preventing Proclamation and for not Dispersing.—Code sec. 92.

Duty of Officers, and Indemnification if Rioters do not disperse.—Code sec. 93.

Neglect of Peace Officers to Suppress Riot.—Code sec. 94.

Punishment for neglecting to aid Peace Officers.—Code sec. 95.

Limitation of Prosecution.—Code sec. 1140.

Military Force of the Crown.—Code sec. 167.

The procedure governing the calling out of the militia in aid of the civil power is contained in the Militia Act, R.S.C. (1906) ch. 41, secs. 80-90, inclusive.

CHAPTER THE SECOND.

OF CHALLENGING TO FIGHT.

THE law does not recognise the right of two persons to agree to fight or strike each other in a hostile manner with intent to wound or subdue each other, consequently duels and prize fights are wholly illegal (*a*).

It is an indictable misdemeanor to challenge another, either by speech or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters for that purpose, full of reflections, and insinuating a desire to fight (*b*). A duel in a public place is an affray (*c*); and even in a private place it would seem if with seconds to be an unlawful assembly (*d*). It is no defence, though it may be a ground for lighter punishment, to prove that the party challenging received provocation; for as, if one person should kill another, in a deliberate duel, under the provocation of charges against his character and conduct ever so grievous, it will be murder in him and his second, and, even mere incitement to fight, though under provocation, is in itself a misdemeanor, though no actual breach of the peace ensue from the challenge (*e*). Where, after a prisoner had been convicted, his brother went to the house of the foreman of the jury, and challenged him to mortal combat, it was held that this was a high contempt of the Court before which the trial was held, and punishable as such (*f*).

The offence of endeavouring to provoke another to send a challenge to fight is an indictable misdemeanor (*g*). In the case in which this was decided the provocation was given in a letter containing libellous matter, and the prefatory part of the indictment alleged that the defendant intended to do the party bodily harm, and to break the King's peace. The sending such letter was held to be an act done towards the procuring the commission of the misdemeanor meant to be accomplished (*h*). In such a case where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the prefatory or in some other part of the indictment; but where the act is in itself unlawful, the law infers an evil intent, and the allegation of such intent is

(*a*) R. *v.* Coney, 8 Q.B.D. 534, 553, 554, 556, Hawkins, J.; 563, Pollock, B.
(*b*) 1 Hawk. c. 63, s. 3. 3 Co. Inst. 158. 4 Bl. Com. 150. Hick's case, Hob. 215.
(*c*) *Ante*, p. 427.
(*d*) *Ante*, p. 422.
(*e*) R. *v.* Rice, 3 East, 581.
(*f*) R. *v.* Martin, 5 Cox, 356 (Ir.), Pigot, C.B., and Pennefather, B.
(*g*) R. *v.* Philipps, 6 East, 464. See also R. *v.* O'Brien, Smith & Batty (Ir. K.B.) 79; 3 Chit. Cr. L. 848. For punishment, *vide ante*, p. 249.
(*h*) The letter was: 'Sir,—It will, I conclude, from the description you give of your feelings and ideas with respect to insult, in a letter to Mr. Jones, of last Monday's date, be sufficient for me to tell you, that in the whole of the Carmarthenshire election business, as far as it relates to me, you have behaved like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make.' See *ante*, pp. 140, 203.

merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecution (*i*).

In substance the offences above stated are mere examples of the general rule of law that it is a misdemeanor to incite another to commit a criminal offence (*j*).

Mere words of provocation, as 'liar' and 'knave,' though motives and *mediate* provocation for a breach of the peace, yet do not tend *immediately* to the breach of the peace, like a challenge to fight, or a threat to commit a battery (*k*). But words directly tending to a breach of the peace may be indictable; as if one man challenge another by words; (*l*) and if it can be proved that the words used were intended to provoke the party to whom they were addressed to give a challenge, the case would seem to fall within the same rule (*m*).

Where a person wrote a letter with intent to provoke a challenge, sealed it up, and posted it in Westminster, addressed to the prosecutor in the city of London, by whom it was there received; Ellenborough, C.J., held that the defendant might be indicted in Middlesex, as there was a sufficient publication in that county by putting the letter into the post-office there with the intent that it should be delivered to the prosecutor elsewhere; and that if the letter had never been delivered, the defendant's offence would have been the same (*n*).

Criminal informations for sending challenges have often been granted in the High Court (*o*); but where it appeared, upon the affidavits, that the party applying for an information had himself given the first challenge, the Court refused to proceed against the other party by way of information and left the prosecutor to his ordinary remedy by action or indictment (*p*). A rule to show cause why such an information should not be granted has been made, upon producing *copies* only of the letters in which the challenge was contained, such copies being sufficiently verified (*q*).

The punishment for this misdemeanor is fine and (or) imprisonment without hard labour, at the discretion of the Court, which will be guided by such circumstances of aggravation or mitigation as are to be found in each particular case (*r*).

(*i*) R. *v.* Philipps, 6 East, 464, 470–475.

(*j*) Steph. Dig. Cr. L. (6th ed.) p. 54n. *ante*, Bk. i. c. vi. p. 203.

(*k*) William King's case, 4 Co. Inst. 181.

(*l*) R. *v.* Langley, 6 Mod. 125; 2 Ld. Raym. 1031.

(*m*) The rule given in 3 Co. Inst. 158, is —*Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*

(*n*) R. *v.* Williams, 2 Camp. 506. Westminster, then a liberty of Middlesex, is now an integral part of the county of London, which is still, for judicial purposes, distinct from the City of London.

(*o*) The procedure is regulated by the Crown Office Rules, 1906. See r. 37.

(*p*) R. *v.* Hankey, 1 Burr. 316, where it is said that the Court held that it might have been right to have granted *cross informations*, in case each party had applied for an information against the other.

(*q*) R. *v.* Chappel, 1 Burr. 402.

(*r*) R. *v.* Rice, 3 East, 584. In that case the defendant (though he had undergone some imprisonment, and though there were several circumstances tending materially to mitigate his offence) was sentenced to pay a fine of £100, and to be imprisoned for one calendar month, and at the expiration of that time to give security to keep the peace for three years, himself in £1000 and two sureties in £250 each, and to be further imprisoned till such fine was paid and such securities given. Hawkins (1 P. C. c. 63, s. 21), speaking of the pernicious consequence of duelling, says: 'Upon which considerations persons convicted of barely sending a challenge have been adjudged to pay a fine of £100, and to be imprisoned for one month without bail, and also to make a public acknowledgment of their offence, and to be bound to their good behaviour.'

CANADIAN NOTES.

OF CHALLENGING TO FIGHT.

Duels.—Code sec. 101.

Prize Fights.—Code sec. 104.

Principal in Prize Fight.—Code sec. 105.

Attending or Promoting.—Code sec. 106.

Leaving Canada to Engage in Prize Fight.—Code sec. 107.

When Fight is not Prize Fight.—Code sec. 108.

Discharge of Person after Failure to Give Sureties not to Engage in Prize Fight.—Code sec. 1059.

A sparring match with gloves, under Queensberry or similar rules given merely as an exhibition of skill and without any intention to fight until one is incapacitated by injury or exhaustion is not a "prize fight" under Code secs. 105 and 2(31); to constitute a "prize fight" there must have been a previous arrangement for a "fight" in the ordinary sense of the term, and that involves an intention to continue the encounter until one or the other of the combatants gives in from exhaustion or from injury received. R. v. Littlejohn, 8 Can. Cr. Cas. 212.

The defendants advertised a boxing exhibition which was effectively held in a public hall, and was accompanied by all the particulars and circumstances of a prize fight. Complainant submitted that the accused came within the provision of the statute; and on behalf of the defendants it was contended that the encounter was merely a scientific boxing match, and, moreover, only a sham fight, not forbidden by law. Held, that as the proof adduced established that the encounter in question was accompanied by all the circumstances and elements which constitute a prize fight, the defendants committed an infraction of the law, for which they must be found guilty. Steele v. Maber, 6 Can. Cr. Cas. 445.

CHAPTER THE THIRD.

OF FORCIBLE ENTRY AND DETAINER.

SECT. I.—COMMON LAW.

A FORCIBLE *entry* or *detainer* is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law (*a*). At common law, and before the passing of the statutes relating to this subject, if a man had a right of entry upon *lands* or *tenements*, he was permitted to enter with force and arms; and to retain possession by force, where his entry was lawful (*b*). And a person wrongfully dispossessed of his *goods* may justify the retaking of them by force from the wrong-doer, if he refuses to redeliver them (*c*). In many cases, however, an indictment will lie at common law for a forcible entry if it contains not merely the common technical words, 'with force and arms,' but also if the facts charged shew actual force, violence, unlawful assembly, riot, or other circumstances amounting to something more than a bare trespass (*d*). In R. *v.* Wilson (*e*), Kenyon, C. J., laid it down that no one may with force and violence assert his own title. But on a subsequent day of the same term he said that the Court wished that the grounds of their opinion in that case might be understood, and that it might not be considered as a precedent in other cases to which it did not apply. He then proceeded: 'Perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says (*f*), that at common law the party may enter with force into that to which he has a legal title. But without giving any opinion concerning that *dictum* one way or the other, but leaving it to be proved or disproved whenever that question

(*a*) 4 Bl. Com. 148.

(*b*) 13 Vin. Abr. 379. Dalt. Just. 297. Lamb. 135. Crom. 70 a, b. 2 Hawk. c. 64, ss. 1, 2, 3. Bac. Abr. tit. 'Forcible Entry and Detainer.'

(*c*) 1 Hawk. c. 64, s. 1. Blades *v.* Higgs, 10 C. B. (N. S.) 713, 721, where the servants of the owner of land were held justified in taking from a stranger game unlawfully killed on the land.

(*d*) R. *v.* Bake, 3 Burr. 1731. R. *v.* Bathurst, Say. 225, referred to in R. *v.* Storr, 3 Burr. 1699, 1702. In R. *v.* Wilson, 8 T. R. 357, an indictment charging the defendants (twelve in number) with having *unlawfully and with a strong hand*, entered, &c., was held good. *Vide ante*, Bk. i. c. ii, p. 16, as to mere trespass not being indictable.

(*e*) 8 T. R. 361. In Taunton *v.* Costar, 7 T. R. 431, the entry made was by the landlord's putting his cattle on the ground after the expiration of the tenant's term, and was entirely peaceable; but Kenyon, C.J., said: 'If the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry.' In Turner *v.* Meymott, 1 Bing. 158; 7 Moore (C. P.), 574, where the landlord had broken into an empty house after the expiration of the tenant's term, but before the tenant had delivered up possession, it was held that as against the tenant he had a right to enter; but Dallas, C.J., said: 'If he has used force, that is an offence of itself, but an offence against the public for which, if he had done wrong, he may be indicted.'

(*f*) 1 Hawk. c. 64, s. 1.

shall arise, all that we wish to say is, that our opinion in this case leaves that question untouched: it appearing by this indictment that the defendants unlawfully entered, and therefore the Court cannot intend that they had any title' (*g*). There is now no doubt that a party may be guilty of a forcible entry by violently, and with force, entering into that to which he has a legal title (*h*). But where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be liable to indictment for a forcible entry, he is not civilly liable to the person wrongfully holding possession (*i*).

Sect. II.—Under the Statutes of Forcible Entry.

Whatever may be the true doctrine upon this subject at common law, the statutes which have been passed respecting forcible entries and detainers are clearly intended to restrain all persons from having recourse to violent methods of doing themselves justice; and it is the more usual and effectual method to proceed upon these statutes, which give restitution and damages to the party aggrieved.

By a statute of 1381 (5 Rich. II. stat. 1, c. 7) (*j*), 'The King defendeth that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed (*k*) at the King's will.' This statute gave no speedy remedy, leaving the party injured to proceed by indictment (*l*); and made no provision at all against forcible detainers. By a statute of 1391 (15 Rich. II. c. 2), it is enacted, that if complaint of forcible entry into lands and tenements, or other possessions whatsoever, 'cometh to the justices of peace or to any of them, the same justices or justice take sufficient power of the county, and go to the place where such force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine

(*g*) 8 T. R. 364.

(*h*) In Newton *v.* Harland, 1 M. & Gr. 644, Court of Common Pleas seems to have been of opinion that a landlord who entered forcibly into the house of a tenant after the expiration of his term, would be guilty of a forcible entry, both at common law and under the statutes; and the only doubt was whether, supposing there was such a forcible entry upon a tenant after the expiration of the term, the possession thereby obtained was legal. There has been considerable discussion as to whether Newton *v.* Harland is good law on the question whether an action lay for the forcible entry. This is denied in Harvey *v.* Bridges, 14 M. & W. 437; Blades *v.* Higgs, 10 C. B. (N. S.) 713; Beddall *v.* Maitland, 17 Ch. D. 174; and in Smith, L.C. (11th ed.) 138, 139. See further, Lows *v.* Telford, 1 A.C. 414. Butcher *v.* Butcher, 7 B. & C. 399. Hillary *v.* Gay, 6 C. & P. 284. Davison *v.* Wilson, 11 Q.B. 890. Burling *v.* Read, 11 Q.B. 904. Pollen *v.* Brewer, 7 C. B. (N. S.) 371. R. *v.* Studd, 14 L. T. (N. S.) 633. Taylor *v.* Cole, 3 T. R. 295.

(*i*) Harvey *v.* Bridges, *supra*, Parke, B.

(*j*) C. viii. in Ruffhead's edition.

(*k*) *i.e.*, fine at the discretion of the Court.

(*l*) There is no civil remedy given by the statute for the forcible entry (Beddall *v.* Maitland, 17 Ch. D. 174, Fry, J.), although such a remedy is available for independent wrongful acts, *e.g.*, assault (Newton *v.* Harland, 1 M. & G. 644), or damage to furniture (Beddall *v.* Maitland, *ubi sup.*). But see Jones *v.* Foley [1891], 1 Q.B. 730.

and ransom to the King (*m*): and that all the people of the county, as well the sheriffs as other, shall be attendant upon the same justices to go and assist the same justices to arrest such offenders upon pain of imprisonment, and to make fine to the King. And in the same manner it shall be done of them that make such forcible entries in benefices or offices of holy church.' This statute gave no remedy against those who were guilty of a forcible detainer after a peaceful entry (*n*), nor against those who were guilty of both a forcible entry and forcible detainer, if they were removed before the coming of a justice of peace (*o*), and it gave no power to the justices to restore the party injured to his possession, and did not impose any penalty on the sheriff for disobeying the precepts of the justices in the execution of the statute (*p*).

It was, therefore, found necessary to provide by a statute of 1429 (8 Hen. VI. c. 9), after reciting the above defects of the Act of 1391, that it should be confirmed and extended to forcible detainers, and it was enacted as follows:—

'Though that such persons making such entry be present or else departed before the coming of the justices or justice, notwithstanding the same justices or justice, in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have or either of them shall have authority and power to inquire, by the people of the same county, as well of them that make such forcible entries into lands and tenements as of them which the same hold with force; and if it be found before any of them that any doth contrary to this statute, then the said justices or justice shall cause to re-seise the lands and tenements so entered or holden as afore, and shall put the party so put out in full possession of the same lands and tenements so entered or holden as before.' After making provision concerning the precepts of the justices to the sheriff to return a jury to inquire of forcible entries, the qualification of the jurors (*q*), and the remedy by action against those who obtain forcible possession of lands, &c., the statute enacts, that 'mayors, justices or justice of peace, sheriffs and bailiffs of cities, towns, and boroughs (*r*), having franchise, have in such cities, &c., like power to remove such entries and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties.' The statute concludes with a proviso that 'they which keep their possessions with force in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute.' This proviso is further confirmed by an Act of 1588 (31 Eliz. c. 11), which enacts that 'no restitution, upon any indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession, by the space of three whole years together, next before the day

(*m*) As to imposing and levying fines under this statute, see 1 Hawk. c. 64, s. 8, and the cases collected in Bac. Abr. tit. 'Forcible Entry and Detainer' (A.) in the notes.

(*n*) See recital of 8 Hen. VI. c. 9.

(*o*) Ibid.

(*p*) Ibid.

(*q*) These qualifications are abolished by the Juries Act, 1825 (6 Geo. IV. c. 50).

(*r*) This gives borough quarter sessions jurisdiction over forcible entry and detainer.

of such indictment so found, and his, her, or their estate or estates therein not ended or determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried, if the other will deny or traverse the same; and if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions.'

Summary Jurisdiction.—The Act of 1391 (15 Rich. II., c. 2), gives magistrates jurisdiction to convict summarily on their own view in cases of forcible detainer only where there had been a previous forcible entry, so that, notwithstanding that statute, a party who had acquired the possession of lands peaceably but unlawfully, could detain them forcibly without incurring any criminal liability (*s*). 8 Hen. VI. c. 9 gives justices summary jurisdiction only in cases of forcible detainer, *preceded* by an *unlawful* entry, and therefore a conviction by justices on that statute merely stating an *entry* and a forcible detainer is insufficient (*t*).

Summary convictions under the statutes were at all times rare, and the parties usually sought restitution by indictment (*u*). On these statutes it has been held, that if a lessee for years or a copyholder is ousted, and the lessor or lord disseised, and such ouster, as well as disseisin, is found in an indictment of forcible entry, the Court may, in their discretion, award restitution of the possession to the lessee or copyholder; which was, by necessary consequence, a re-seisin of the freehold also, whether the lessor or lord had desired or opposed it. But it was disputed whether a lessee for years or a copyholder, ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 Hen. VI., c. 9, the words of which are, that the justice 'shall cause to re-seise the lands,' &c., by which it seems to be implied that the party must be ousted of an estate whereof he may be said to be seised, which must at least be a freehold. To remove this doubt, 21 Jac. I. c. 15 enacted that such judges, justices, or justice of the peace as by reason of any Act of Parliament then in force were authorised and enabled upon inquiry to give restitution of possession to tenants of any estate of freehold of their lands, &c., entered upon by force or withholden by force, shall have the like authority (upon indictment of such forcible entry or forcible withholding before then duly found) to give like restitution of possession to 'tenants for term of years, tenants by copy of Court roll, guardians by knight's service, tenants by elegit, statute merchant and staple.' A tenant by the verge has been held not to be within this statute: but this decision has been questioned; as such person, having no other evidence of his title than the copy of Court roll, seems at least to be within the meaning, if not within the words, of the statute (*v*).

If a lessor ejects his lessee for years, and is afterwards forcibly put out of possession again by such lessee, he cannot obtain a restitution

(*s*) R. *v.* Oakley, 4 B. & Ad. 307.

(*t*) Id. ibid. See R. *v.* Wilson, 1 A. & E. 627. R. *v.* Wilson, 3 A. & E. 817; and as to the form of such a conviction, Attwood *v.* Joliffe, 3 Sess. Cas. 116.

(*u*) R. *v.* Wilson, 3 A. & E. 817, 829, Denman, C.J.

(*v*) 1 Hawk. c. 64, s. 17.

under the statutes: but a justice of peace, it would seem, may remove the force, and commit the offender (*w*).

The law upon these statutes may be further considered with reference—

I. To the persons who may commit the offence, *infra*.

II. To the nature of the possessions in respect of which it may be committed, p. 446.

III. To the acts which will amount to a forcible entry, p. 446.

IV. To the acts which amount to a forcible detainer, p. 418.

The principle of the statutes is to require resort to the Courts by persons seeking to enforce a right of entry on land, unless they are in a position to enter in a peaceable and easy manner (*x*).

Where the person who has the legal title to land is in actual possession, any attempt to eject him by force falls within the statutes of forcible entry. This rule applies even if the possession has only just begun, or has been acquired by forcing open a lock, and even where the ejector sets up a claim to possession (*y*).

And a licence by tenant to landlord to eject him without legal process has been held void, as in effect or licence to break the statutes (5 Rich. II. st. 1, c. 7) (*z*).

I. A man who forcibly enters into a tenement of which he is the sole and lawful possessor, *e.g.*, who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare *custody* of it, is not guilty of a forcible entry or detainer within the statutes (*a*). A wife was indicted with others for a forcible entry into a house, which she had taken for herself, but of which her husband had afterwards, with the landlord's consent, obtained possession, and it was objected that a wife could not be guilty of a forcible entry into the house of her husband. Tenterden, C.J., said: 'although a wife certainly cannot commit a trespass on the property of her husband, I am by no means satisfied that, if she comes with strong hand, she may not be indictable for a forcible entry, which proceeds on the breach of the public peace . . .' 'As at present advised I think she may be guilty of a forcible entry, if her entry was made under circumstances of violence amounting to a breach of the public peace' (*b*). A joint tenant or tenant in common may offend against the statutes either by forcibly ejecting or forcibly keeping out his co-tenant; for though the entry of such a tenant is lawful *per my et per tout*, so that he is not liable to an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence, or lessen the injury, done to his co-tenant; and, consequently, an indictment of forcible entry into a moiety of a manor, &c., is good (*c*). Where a man has been long in possession of land under a defeasible title, and a claim is made by him who has

(*w*) 1 Hawk. c. 64, ss. 17, 18.

(*x*) Lows *v.* Telford [1876], 1 A.C. 414, 426. And cf. Harvey *v.* Bridges, 14 M. & W. 442.

(*y*) Edwick *v.* Hawkes, 18 Ch. D. 199, 212, Fry, J.

(*z*) Edwick *v.* Hawkes, 18 Ch. D. 199.

(*a*) Bac. Abr. tit. 'Forcible Entry, &c., (D). 1 Hawk. c. 64, s. 32, where it is queried whether a man will be within the statutes who forcibly enters into land in the possession of his own tenant at will. It would seem that forcible entry, even against a tenant at will, is indictable within the statutes. See R. *v.* Wilson, 8 T. R. 357, 364. Taunton *v.* Costar, 7 T. R. 431. Turner *v.* Meymott, 1 Bing. 158. Lows *v.* Telford [1876], 1 App. Cas. 414. Beddall *v.* Maitland, 17 Ch.D. 174.

(*b*) R. *v.* Smyth, 1 M. & Rob. 155; 5 C. & P. 201. And see Doe *v.* Daly, 8 Q.B. 934.

(*c*) 1 Hawk. c. 64, s. 33.

a right of entry, if the wrongful possessor continues his occupation, he will be punishable for a forcible entry and detainer; because all his estate was defeated by the claim, and his continuance in possession afterwards amounts in the judgment of law to a new entry (*d*). It does not follow from the decision in R. *v.* Oakley (*e*) that 8 Hen. VI. c. 9, does not apply to the case of a tenant at will or for years, holding over after the will is determined or term expired, because the continuance in possession afterwards may amount in judgment of law to a new entry (*f*).

II. A person may be guilty of forcible entry into ecclesiastical possessions, as churches, vicarage houses, &c. (*g*). And as a general rule, a person may be indicted for forcible entry into any incorporeal hereditament for which a writ of entry would lie, either by the common law, as for rent, or by statute, as for tithes, &c. It is, however, questioned whether there is any good authority that such an indictment will lie for a common or office; though it seems agreed that an indictment of forcible detainer lies against any one, whether he be the tenant or a stranger, who forcibly disturbs the lawful proprietor in the enjoyment of such possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dares to put in his beasts into the common, &c. No one comes within the statutes by violence offered to another in respect of a way, or other easement which is no possession. And it seems that a man cannot be convicted, upon view, under 15 Rich. II. c. 2, of a forcible detainer of any incorporeal hereditaments wherein he cannot be said to have made a precedent forcible entry (*h*).

L. was mortgagee in fee of a dwelling-house, the possession being left in the mortgagor. The mortgagor while in possession let the house to T. for a goods store. It was otherwise unoccupied. Early one morning, during the continuance of T.'s tenancy, L., without giving any notice to the mortgagor or to T., went to the house, in company with a carpenter and another man. The carpenter opened the front door, and the other man entered the house. L. and the carpenter remained on the doorstep, the latter being employed in putting on a new lock. While this was happening, T., and his brother-in-law, W., with several other persons came up, and T. and W. climbed into the house through a window, and after a slight struggle expelled L. and his men from the premises. L. indicted T. and W. and others for a forcible entry, riot, affray, and assault. T. and W. were tried and acquitted. They defended themselves by the same solicitor, and incurred joint costs. T. and W. then brought an action against L. for malicious prosecution, and obtained a verdict. It was held in the House of Lords that there was reasonable and probable cause for the prosecution, inasmuch as the facts shewed that T. and W. were, at the time of the expulsion of L., disturbing a possession which had been lawfully acquired by him (*i*).

(*d*) 1 Hawk. c. 64, s. 34; Crom. 69; Co. Lit. 256.

(*e*) 4 B. & Ad. 307, *ante*, p. 444.

(*f*) 4 B. & Ad. 307, 312, Parke, J. In R. *v.* Bathurst, Say. 225, it is said that forcible entry on lands in possession of a tenant at will is not within the statute: but *vide ante*, p. 445, note (*a*).

(*g*) See the terms of 15 Rich. II. c. 2, *ante*, p. 442, and Baude's case, Cro. Jac. 41.

(*h*) 1 Hawk. c. 64, s. 31. Bac. Abr. tit. 'Forcible Entry, &c.' (C.). But see 13 Vin. Abr. 381.

(*i*) Lows *v.* Telford, 1 App. Cas. 414.

III. A *forcible entry* must be with a strong hand, coming with a multitude of people or any excessive number of persons, or with unusual weapons, or with menace of life or limb; it must be accompanied with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by the law in every trespass is not within the statutes (*j*). An entry may be forcible not only in respect of a violence actually done to the person of a man, as by beating him if he refuses to relinquish his possession; but also in respect of any other violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in at the time or not, especially if it be a dwelling-house (*k*), and perhaps also by any act of outrage after the entry, as by carrying away the party's goods, &c., which if found in an assize of *novel disseisin*, made the defendant a disseisor with force, and liable to fine and (or) imprisonment (*l*). It is a forcible entry for a man to enter by force to distrain for arrears of rent, because, though he does not claim the land itself, yet he claims a right and title out of it, which by the statutes he is forbidden to exert by force. But if a man who has a rent is resisted from his distress with force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assize, or may fine and imprison the party; but he cannot have a writ of restitution; for the statutes do not give the justices power to reseise the rent, but only the lands and tenements themselves (*m*). If one finds a man out of his house, and forcibly keeps him out of it, and sends persons to take peaceable possession of it in the party's absence, this seems to be a forcible entry (*n*). And there may be a forcible entry where any person's wife, children, or servants, are upon the lands to preserve the possession; because whatever a man does by his agents is his own act; his possession is not preserved by having his cattle on the ground, because they are not capable of being substituted as agents (*o*).

Whenever a man, either by speech or conduct, at the time of entry, gives those in possession of the tenements, which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is deemed forcible; whether he causes such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly indicates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance (*p*). It is not necessary that any one should be assaulted; for it is sufficient if the entry is with such number of persons and show of force as is calculated to deter the rightful owner from sending them away, and resuming his own possession (*q*). But forcible entry is not proved by

(*j*) Bac. Abr. tit. 'Forcible Entry, &c.' (D.) 1 Dalt. 293; 1 Hawk. c. 64, s. 25.

(*k*) R. *v.* Bathurst, Sayer, 225.

(*l*) 1 Hawk. c. 64, s. 26. R. *v.* Jopson, 3 Burr. 1702 *cit.*

(*m*) Bac. Abr. tit. 'Forcible Entry, &c.' (B.).

(*n*) 1 Hawk. c. 64, s. 26, where it is given as the author's opinion; and contrary opinions are noticed proceeding on the ground that no violence was done to the house, but only to the person of the party.

(*o*) Bac. Abr. tit. 'Forcible Entry, &c.' (B.). Taunton *v.* Costar, 7 T. R. 431, *ante*, p. 441 note (*e*). Turner *v.* Meymott, 1 Bing. 158.

(*p*) 1 Hawk. c. 64, s. 27.

(*q*) Milner *v.* Maclean, 2 C. & P. 17, Abbott, C.J.

evidence of a mere trespass, there must be proof of such force, or at least such a show of force, as is calculated to prevent any resistance (*r*). 'If one enters peaceably, and when he is come in useth violence, this is a forcible entry' (*s*). Thus, if a man enters peaceably, yet if he turns the party out of possession by force, or frightens him out of possession by threats, it is a forcible entry (*t*). But threatening to spoil the party's goods, or destroy his cattle, or to do him any like damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry (*u*).

If a person who pretends a title to lands, merely goes over them, either with or without a great number of attendants, armed or unarmed, in his way to the church, or market, or for a like purpose, without doing any act which either expressly or impliedly amounts to a claim of the lands, he does not 'enter' within the meaning of the statutes; otherwise if he make an *actual claim* with any circumstances of force or terror (*v*). Drawing a latch and entering a house seems not to be a forcible entry (*w*), *e.g.*, if a man opens the door with a key, or enters by an open window, or if the entry is without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force (*x*).

A single person may commit a forcible entry as well as a number (*y*). But all who accompany a man when he makes a forcible entry are deemed to enter with him, whether they actually come upon the lands or not (*z*). So, if several come in company where their entry is not lawful, and all, except one, enter in a peaceable manner, and that one only uses force, it is a forcible entry in them all, because they came in company to do an unlawful act; but it is otherwise where one had a right of entry, for there they only come to do a lawful act, and therefore it is the force of him only who used it (*a*). And a person who barely agrees to a forcible entry made for his benefit, but without his knowledge or privity, is not within the statutes, because he did not concur in or promote the force (*b*).

IV. *Forcible detainer* is where a man, who enters peaceably, afterwards detains his possession by force; and the same circumstances of violence or terror which will make an entry forcible, will also make a detainer forcible. It seems to follow that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, is guilty of a forcible detainer, though no attempt is made to re-enter; and it has been said that he also will come under the like construction who places men at a distance from the house in order to assault anyone who shall attempt to make an entry into it; and that he is in like manner guilty who shuts

(*r*) R. *v.* Smyth, 5 C. & P. 201, Tenterden, C.J.

(*s*) Vin. Abr. xiii. 380, approved by Fry, J., in Edwick *v.* Hawkes, 18 Ch.D. 199, 211.

(*t*) Bac. Abr. tit. 'Forcible Entry, &c.' (B.); Dalt. 299.

(*u*) 1 Co. Inst. 257; Bro. tit. 'Duress,' 12, 16; 1 Hawk. c. 64, s. 28.

(*v*) 1 Hawk. c. 64, ss. 20, 21.

(*w*) There have been different opinions upon this point. Beade *v.* Orme, Noy, 136; Bac. Abr. tit. 'Forcible Entry, &c.' (B.); 1 Hawk. c. 64, s. 26.

(*x*) Com. Dig. tit. 'Forcible Entry, &c.' (A.) 3.

(*y*) Id. (A.) 2. 1 Hawk. c. 64, s. 29.

(*z*) 1 Hawk. c. 64, s. 22.

(*a*) Bac. Abr. tit. 'Forcible Entry, &c.' (B.).

(*b*) 1 Hawk. c. 64, s. 24.

his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in (*c*). This doctrine will apply to a lessee who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry; or to a tenant at will detaining with force after the will is determined (*d*): and it will apply in like manner to a detaining with force by a mortgagor after the mortgage is foreclosed. And a lessee who resists with force a distress for rent, or forestalling or rescuing the distress, is also guilty of this offence (*e*).

But a man is not guilty of the offence of forcible detainer if he merely refuses to go out of a house, and continues therein in despite of another (*f*). So that it is not a forcible detainer if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it; or shuts the door against the lessor when he would enter; or if he keeps out, by force, a commoner upon his own land (*g*). And 8 Hen. VI. c. 9, and 31 Eliz. c. 11 (*h*), do not apply to a person who has been in possession for three years by himself, or any other under whom he claims. But a person in quiet possession for three years, and then disseised by force, and restored, cannot afterwards detain with force within three years after his restitution; for his possession was interrupted (*i*).

The criminal remedies against persons guilty of forcible entries or detainers are either by complaint to justices of the peace (who may proceed upon view), or by indictment at quarter sessions (*j*). And if a forcible entry or detainer is made by three persons or more, it is also a riot; and may be proceeded against as such, if no inquiry has before been made of the force (*k*). Some of the points which have been determined with respect to an indictment for these offences, and also concerning the award of restitution, may be shortly noticed (*l*).

Indictment.—The statutes seem to require that the entry should be laid in the indictment to be with a strong hand (*manu forti*), or *cum multitudine gentium* (*m*): but some have held that equivalent words would be sufficient, especially if the indictment concluded *contra formam statuti*; but it was held not sufficient to say only that the party entered *vi et armis* since that was the common allegation in every trespass (*n*). No particular technical words are necessary in an indictment at common law; all that is required is, that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace (*o*).

(*c*) 1 Hawk. c. 64, s. 30.

(*d*) See R. *v.* Oakley, 4 B. & Ad. 307, 312, Parke, J.

(*e*) Com. Dig. tit. 'Forcible Detainer' (B.) 1.

(*f*) 1 Hawk. c. 64, s. 30.

(*g*) Com. Dig. tit. 'Forcible Detainer' (B.) 2.

(*h*) *Ante*, p. 443.

(*i*) Com. Dig. tit. 'Forcible Detainer' (B.) 2.

(*j*) See the statutes, *ante*, pp. 442–444. Com. Dig. tit. 'Forcible Entry' (C.) 4 Bl. Com. 148. Burn's Just. tit. 'Forcible Entry, &c.' III., IV., V.

(*k*) Burn's Just. tit. 'Forcible Entry and Detainer,' VII. *Ante*, p. 409 *et seq.*

(*l*) As to the proceedings by justices of peace, see Burn's Just. tit. 'Forcible Entry, &c.,' V. Com. Dig. tit. 'Forcible Entry' (D.).

(*m*) See R. *v.* Bathurst, Say. 225.

(*n*) Baude's case, Cro. Jac. 41; 79 E. R. 34. Rast. Ent. 354. Bac. Abr. tit. 'Forcible Entry, &c.' (E.).

(*o*) R. *v.* Wilson, 8 T. R. 362, Lawrence, J. R. *v.* Bathurst, Say. 225.

The tenement in which the force was committed must be described with such certainty as to inform the defendant of the particular charge against him, and to enable the justices or sheriff to know how to restore the injured party to his possession. Thus an indictment has been held insufficient where it charged forcible entry into a 'tenement' (*p*), which may signify anything whatsoever wherein a man may have an estate of freehold (*q*), or into a 'house or tenement' (*r*), or into 'two closes of meadow or pasture' (*s*), or into 'a rood or half a rood of land' (*t*), or 'into certain lands belonging to such a house' (*u*), or into such a house without shewing in what town it lies (*v*), or into a tenement, with the appurtenances, called Truepenny in D. (*w*). But an indictment for a forcible entry *in unum messuagium sive domum mansionalem*, &c., is good, for these are words equipollent (*x*). And an indictment for an entry into a close called H.'s close, without adding the number of acres, is good; for here is as much certainty as is required in ejectment (*y*). And an indictment may be void as to such part of it only as is uncertain, and good for so much as is certain: thus an indictment for a forcible entry into a house and certain acres of land may be quashed as to the land, and stand good as to the house (*z*). Upon an indictment against a wife for a forcible entry into a house, which she had originally taken in her own name, but into which her husband had afterwards entered for the purpose of giving up possession to the owner, the house is well described as the house of the husband (*a*).

An indictment on 8 Hen. VI. c. 9 (*b*), must state that the place was the freehold of the party aggrieved at the time of the force (*c*); and if founded on 21 Jac. I. c. 15 (*ante*, p. 444), it should state that he was at such time a tenant for a term of years or otherwise entitled as mentioned in that statute (*d*). An inquisition under 8 Hen. VI. c. 9, will not warrant a justice in restoring possession, unless it sets forth the estate possessed by the party in the property (*e*). But an indictment which charges that the defendants forcibly entered into a messuage of one W. P., he the said W. P. then and there being seised thereof, sufficiently avers the present seisin of W. P. to warrant the Court in awarding restitution (*f*). But in an indictment at common law, where the breach of the public peace is the gist of the offence, and the prosecutor is not entitled to restitution and damages, it appears to be sufficient to state only that the prosecutor was in possession of the premises (*g*).

(*p*) 2 Rolle Rep. 46. 2 Rolle Abr. 80, pl. 8. Wroth & Capell's case, 3 Leon. 102, 4 Leon. 197.

(*q*) Co. Litt. 6a.

(*r*) 2 Rolle Abr. 80, pl. 4, 5. Rolle R. 334. Ellis's case, Cro. Jac. 634; 79 E. R. 546.

(*s*) 2 Rolle Abr. 81, pl. 4.

(*t*) Bulst. 201.

(*u*) Farnam's case, 2 Leon. 186. Wroth & Capell's case, *ubi sup.* Broke tit. 'Forcible Entry,' 23.

(*v*) Farnam's case, 2 Leon. 186.

(*w*) 2 Rolle Abr. 80, pl. 7.

(*x*) Ellis's case, Cro. Jac. 634; Palm. 277.

(*y*) Bac. Abr. tit. 'Forcible Entry, &c.' (E.). 1 Hawk. c. 64, s. 37.

(*z*) Bac. Abr. tit. 'Forcible Entry, &c.' (E.). 1 Hawk. c. 64, s. 37.

(*a*) R. *v.* Smyth, 1 M. & Rob. 155.

(*b*) *Ante*, p. 443.

(*c*) R. *v.* Dorny, 1 Ld. Raym. 210; 1 Salk. 260. Anon. 1 Vent. 89; 2 Keb. 493. Hetl. 73. Latch. 109.

(*d*) See R. *v.* Lloyd, Cald. 415. R. *v.* Wannop, Say. 142. It is difficult to understand what is meant by some of these cases.

(*e*) R. *v.* Bowser, Dowl. D. Pr. R. 128, Coleridge, J.; Bac. Abr. tit. 'Forcible Entry, &c.' (E.), where, and in 1 Hawk. c. 64, s. 38, see the cases on this subject collected. And see also R. *v.* Griffith, 3 Salk. 169.

(*f*) R. *v.* Hoare, 6 M. & S. 267. R. *v.* Dillon, 2 Chit. (K.B.) 314.

(*g*) R. *v.* Wilson, 8 T. R. 357.

A repugnancy in setting forth the offence in an indictment on the statutes is incurable: as where it is alleged that the party was possessed 'of a term of years, *or* of a copyhold estate,' and that the defendants disseised him; or that the defendants disseised J. S. of land then and *yet being* his freehold, for such statement implies that he always continued in possession; and if so, it is impossible he could be disseised at all (*h*). An indictment on 8 Hen. VI. c. 9, setting forth an entry and forcible detainer, seems to be good, without shewing whether the entry was forcible or peaceable: but it must set forth an entry; for otherwise it does not appear but that the party has been always in possession, in which case he may lawfully detain it by force (*i*). It appears to be sufficient to state, that the defendant on such a day entered, &c., and disseised, &c., without adding the words *then and there*; for it is the natural intendment that the entry and disseisin both happened together (*j*). A disseisin is sufficiently set forth by alleging that the defendant entered, &c., into such a tenement, and disseised the party, without using the words 'unlawfully,' or 'expelled,' for they are implied (*k*). But no indictment can warrant restitution, unless it finds that the wrong-doer ousted the party aggrieved, and also continues his possession at the time of the finding of the indictment; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is in vain to award it to one who does not appear to have lost it (*l*).

It is said that if a bill, both for forcible entry and forcible detainer, is preferred to a grand jury, and found 'not a true bill' as to the entry with force, and 'a true bill' as to the detainer, it will not warrant an award of restitution; but is void, because the grand jury cannot find a bill, true for part, and false for part, as a petit jury may (*m*).

Upon an indictment on 21 Jac. I. c. 15, or 8 Hen. VI. c. 9, whereby restitution of the possession of lands entered upon by force, or holden by force, may be awarded to the respective tenants thereof; the tenant whose land has been entered upon, or withheld by force, is a competent witness for the prosecution (*n*).

On an indictment at common law, the prosecutor need only prove peaceable possession at the time of the ouster (*o*). On an indictment upon 8 Hen. VI. c. 9, seisin in fee must be shewn; and on an indictment founded on 21 Jac. I. c. 15, a tenancy for years or other term within that statute must be shewn (*p*); but it seems that proof that the prosecutor held colourably as a freeholder or leaseholder will suffice; and that the Court will not, on the trial, enter into the validity of an adverse

(*h*) 1 Hawk. c. 64, s. 39. Bac. Abr. 'Forcible Entry, &c.' (E.).

(*i*) 1 Hawk. c. 64, s. 40. Bac. Abr. ibid. See the statute, *ante*, p. 443.

(*j*) Baude's case, Cro. Jac. 41; 79 E. R. 34. 1 Hawk. c. 64, s. 42.

(*k*) Bac. Abr. 'Forcible Entry, &c.' (E.).

(*l*) 1 Hawk. c. 64, s. 41.

(*m*) 1 Hawk. c. 64, s. 40. But this, it seems, does not apply to the case of different counts in the same indictment, but only where the grand jury find 'a true bill' and not a 'true bill' upon different parts of one and the same charge. See R. *v.* Fieldhouse, Cowp. 325.

(*n*) 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99. Before these Acts he was incompetent. R. *v.* Williams, 9 B. & C. 549. R. *v.* Beavan, Ry. & M. 242.

(*o*) Talf. Dick. Q. S. 377.

(*p*) R. *v.* Child, 2 Cox, 102. In this case it is stated that the indictment was under 5 Rich. II. stat. 1, c. 7. It is a very loose report.

claim made by the defendant, which he ought to assert, not by force, but by action (*q*).

Restitution may be awarded by the justice or justices before whom an indictment of forcible entry or detainer is found: but by no other justices, unless the indictment be removed by *certiorari* into the High Court (King's Bench Division); and that Court, by the plenitude of its power, can restore, because that is supposed to be implied by the statute; on the ground that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at their quarter sessions, they have authority to award a writ of restitution, because the statute having given power to the justices or justice to reseise, it may as well be done by them in court as out of it (*r*). It is laid down in some books that the justices of *Oyer* and *Terminer* or General Gaol Delivery, though they may inquire of forcible entries, and fine the parties, cannot award a writ of restitution (*s*).

Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man who has a right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions is to have the force removed, and those who are guilty of it punished, which may be done by 15 Rich. II. c. 2 (*t*). And restitution is to be awarded only to the person found by the indictment to have been put out of *actual possession*, and not to one who was only seised in law (*u*). Upon the removal of the proceedings into the High Court by *certiorari*, that Court may award a restitution discretionally (*v*). And the same principle applies to a judge of assize upon the finding of an indictment for forcible entry; namely, that the proceedings being *ex parte*, a discretion may be exercised. Where, therefore, an indictment for a forcible entry and detainer is found at the assizes, it is in the discretion of the judge whether he will grant restitution or

(*q*) Per Vaughan, B., in R. *v.* Williams, Monmouth, 1828, and confirmed on a motion for a new trial. Talf. Dickenson, 377; and see Jayne *v.* Price, 5 Taunt. 326.

(*r*) Bac. Abr. tit. 'Forcible Entry,' (F.). See Short and Mellor, Cr. Pr. (2nd ed.) 420, and for form of writ, ibid. 560.

(*s*) Id. ibid. and 1 Hawk. c. 64, s. 51, where it is said that justices of *oyer* and *terminer* have no power either to inquire of a forcible entry or detainer, or to award restitution on an indictment on the statutes, because when a new power is created by statute, and certain justices are assigned to execute it, it cannot regularly be executed by any other; and inasmuch as justices of *oyer* and *terminer* have a commission entirely distinct from that of justices of peace, they shall not from the general words of their commission *ad inquirendum de omnibus, &c.*, be construed to have any such powers as are specially limited to justices of peace. But in Com. Dig. tit. 'Forc. Entr.' (D. 5), it is said that justices of gaol delivery may award restitution upon an indictment before them: and Sav. 78 is cited: and afterwards id. (D. 7), it is said that restitution shall not be by justices of assize, gaol delivery, or justices of peace, *if the indictment was not found before them*; and 1 Hale, 140, Dalt. c. 44, 131, are cited; assuming here, as it should seem, that if the indictment were found before justices of assize and gaol delivery, they might award restitution: and see R. *v.* Harland, 8 A. & E. 826, and R. *v.* Hake, note (*a*), to R. *v.* Williams, 4 Man. & Ry. 483, where a judge at the assizes granted a writ of restitution.

(*t*) 1 Hawk. c. 64, s. 45. Lamb. Just. 153. Co. Lit. 323.

(*u*) Lamb. Just. 153. Dalt. 304.

(*v*) R. *v.* Marrow, cas. *temp.* Hardw. 174.

not; and if he refuse to grant it, the High Court will not inquire whether he has exercised his discretion rightly, or grant a mandamus to the judge to grant restitution (*w*). But in the case of local justices, who are to go to the spot, and make inquiry by the inquisition of the jury, and examination of witnesses; if the jury find the facts, it is imperative on the justices to grant restitution; and the reason is that there has been a fair inquiry (*x*).

It appears by the proviso in 8 Hen. VI. c. 9, and also by 31 Eliz. c. 11, that any one indicted upon those statutes may allege quiet possession for three whole years to stay the award of restitution: and it has been held that such possession must have continued without interruption during three whole years next before the indictment (*y*). And it must be of a lawful estate, so that a disseisor can in no case justify a forcible entry or detainer against the disseisee having a right of entry, as it seems that he may against a stranger, or even against the disseisee having, by his laches, lost his right of entry (*z*). Wherever such possession is pleaded in bar of a restitution, either in the High Court or before justices of the peace, no restitution ought to be awarded till the truth of the plea has been tried. The plea need not shew under what title, or of what estate, such possession was; because not the title, but the possession only, is material (*a*). If the defendant tenders a traverse of the force (which must be in writing), no restitution ought to be till the traverse is tried; and the justice, before whom the indictment is found, ought to award a *venire* for a jury: but if such jury find so much of the indictment to be true as will warrant restitution, it will be sufficient, though they find the other part of it to be false (*b*). Where the defendant pleads three years' possession in stay of restitution, under 31 Eliz. c. 11, and it is found against him, he must pay costs (*c*).

The justices who have awarded a restitution on an indictment of forcible entry, &c., or any two or one of them, may afterwards *supersede* such restitution upon an insufficiency in the indictment appearing unto them: but no other justices or Court whatsoever have such power, except the High Court; a *certiorari* from whence wholly closes the hands of the justices of peace, and avoids any restitution which is executed after its *teste*, but does not bring the justices into contempt without notice (*d*).

On an equitable construction of the statutes, but on their express words, it is considered that the High Court has discretionary power, if a restitution shall appear to have been illegally awarded or executed, to *set it aside*, and grant a re-restitution to the defendant. But a defendant cannot in any case whatsoever, *ex rigore juris*, demand restitution,

(*w*) R. *v.* Harland, 8 A. & E. 826; 1 P. & D. 93; 2 Man. & Ry. 141. See R. *v.* Hake, note (*a*) to R. *v.* Williams, 4 Man. & Ry. 483, where a judge, upon such an inquisition, granted a writ of restitution, not as a matter of right, but in the exercise of his discretion.

(*x*) Ibid. Patteson, J.

(*y*) Bac. Abr. tit. 'Forcible Entry, &c.' (G.). 1 Hawk. c. 64, s. 53.

(*z*) Bac. Abr. tit. 'Forcible Entry, &c.' (G.). 1 Hawk. c. 64, s. 54.

(*a*) 1 Hawk. c. 64, s. 56.

(*b*) Bac. Abr. tit. 'Forcible Entry, &c.' (G.). 1 Hawk. c. 64, ss. 58, 59. R. *v.* Winter, 2 Salk. 588.

(*c*) R. *v.* Goodenough, 2 Ld. Raym. 1036. And see the words of the statute, *ante*, p. 443.

(*d*) Bac. Abr. Id. ibid. 1 Hawk. c. 64, ss. 61, 62.

either upon the quashing of the indictment, or on a verdict found for him on a traverse thereof, &c.; for the power is never made use of by the High Court except when, upon consideration of the whole circumstances of the case, the defendant appears to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor (*e*).

Where a conviction for a forcible entry or detainer is quashed by the High Court after restitution ordered, the Court is bound to award re-restitution, although the conviction be quashed for a merely technical error, and the lease of the dispossessed person has expired during the litigation (*f*).

Where on a traverse of an indictment under the statutes, a man has been found to have been unjustly put out of possession, the Court of King's Bench has awarded re-restitution, notwithstanding proof that, since the restitution granted upon the indictment, a stranger has recovered the possession of the same land in a Manorial Court (*g*).

The justices or justice may execute the writ of restitution in person, or may make their precept to the sheriff to do it (*h*). The sheriff, if need be, may raise the power of the county to assist him in the execution of the precept; and therefore, if he makes a return thereto that he could not make a restitution by reason of resistance, he is liable to amercement (*i*). It is said, that a justice of peace or sheriff may break open a house to make restitution (*j*).

If possession under a writ of restitution is avoided immediately after execution by a fresh force, the party shall have a second writ of restitution without a new inquisition; but the second writ must be applied for within a reasonable time (*k*). And an order of restitution made three years after the inquisition, was quashed (*l*).

(*e*) Bac. Abr. Id. ibid. 1 Hawk. c. 64, ss. 63, 64, 65. Dalt. 309.

(*f*) R. *v.* Jones, 1 Str. 474. R. *v.* Wilson, 3 A. & E. 817, 837. But in R. *v.* Harris, 1 Ld. Raym. 482, it was said by Holt, C.J., that restitution is of right where the restitution was tortious, discretionary if the restitution was just.

(*g*) Bac. Abr. Id. ibid. 1 Hawk. c. 64, s. 66.

(*h*) 1 Hawk. c. 64, s. 59.

(*i*) Id. ibid. s. 52. And see 50 & 51 Vict. c. 55, ss. 8, 29.

(*j*) Com. Dig. tit. 'Forcible Entry, &c.' (D.) 6.

(*k*) R. *v.* Harris, 1 Ld. Raym. 440, 482, a case of forcible entry into a rectory.

(*l*) R. *v.* Harris, 3 Salk. 313.

CANADIAN NOTES.

OF FORCIBLE ENTRY AND DETAINER.

Sec. 2.—Under the Statutes.

Definition of Forcible Entry.—Code sec. 102.
Definition of Forcible Detainer.—Code sec. 102(2).
Punishment of.—Code sec. 103.

"Entering" means not merely going upon land or trespassing upon it; there must accompany the act of going upon the land some intent to take possession of the land itself and deprive the possessor of the land. Such an interference with the possession as trespassing upon it for the purpose of taking away chattels upon the land is not an "entering" within the Code. R. v. Pike (1898), 2 Can. Cr. Cas. 314, 12 Man. R. 314.

Forcible entry of a dwelling house may consist of an entry made with such threats and shew of force as would, if resisted, cause a breach of the peace, although no actual force was used. R. v. Walker (1906), 12 Can. Cr. Cas. 197, 4 O.L.R. 288.

Where, from thirty to forty employees of the G. W. Railway Co. went upon land then in possession of the S. & H. Railway Co., and those resisting had good reason to apprehend violence in the event of further resistance, and yielded possession in the apprehension of such violence, it was held that the entry was a forcible one. R. v. Smith, 43 U.C.Q.B. 369.

The gist of the offence is the forcible depriving of the other's actual and peaceable possession in a manner likely to cause a breach of the peace. R. v. Cokely, 13 U.C.Q.B. 521. Even if the defendant had a right of entry, the assertion of that right "with strong hand or with multitude of people" is equally an offence as if he had no right.

It is within the discretion of the Judge who tries the cause either to grant or refuse restitution. R. v. Wightman (1869), 29 U.C.Q.B. 211; R. v. Smith (1878), 43 U.C.Q.B. 369; R. v. Jackson, Draper's Rep. Upper Canada 53.

BOOK THE SEVENTH.

OF OFFENCES AGAINST THE DUE ADMINISTRATION OF JUSTICE.

CHAPTER THE FIRST.

OF PERJURY AND COGNATE OFFENCES.

SECT. I.—PERJURY IN GENERAL.

PERJURY is a misdemeanor indictable at common law (*a*). It consists in giving *upon oath, in (or for the purposes of) a judicial proceeding, before a competent tribunal*, whether it be a Court of the common law or acting under a statute (*aa*), evidence which is material to some question depending on the proceeding and is false to the knowledge of the deponent, or is not believed by him to be true (*b*). The oath taken must be to swear the truth, and the offence does not include breaches of the oath of a juror, or of promissory oaths (*c*). 'Oath' in this chapter includes affirmation and declaration in cases where a witness is by law empowered or required to affirm or declare instead of taking the witness's oath (*d*).

Perjury is not committed when the false evidence is given by a person who is not a competent witness. Thus, before the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), if a defendant in a criminal case was sworn, perjury could not be assigned on his evidence (*e*). Incompetence may arise from a disqualification imposed by common law, *e.g.*, of calling a wife as a witness against her husband in a criminal case; or by statute; or may, as in the case of young children, arise from inability to understand the nature of the witness's oath. The witness must be sworn or affirmed. The old averment was that he was 'sworn in due course of law, and did then take his corporal oath upon the Holy Gospel of God' (*f*). But a witness may be convicted of perjury on an oath administered to him in such form and with such ceremonies as he may declare to be binding (*g*),

(*a*) *Re* Rowland ap Eliza, 3 Co. Inst. 164.

(*aa*) R. *v.* Castro, 4 L.R.Q.B. 350, 357, Blackburn, J.

(*b*) R. *v.* Aylett [1785], 1 T. R. 64, 69, Lord Mansfield. Cf. 1 Hawk. c. 69, s. 1. Com. Dig. tit. 'Justice of Peace' (B.) 102. Bac. Abr. tit. 'Perjury.'

(*c*) 1 Hawk. c. 69, s. 5. In 8 Hen. VIII. c. 9, s. 3, *post*, p. 525, reference is made to perjury by false verdict. As to the old remedies in such a case, see Bushell's case [1670], 6 St. Tr. 999; Vaugh. 135; Selden Soc. Publ., Vol. 16, p. cxxxii. The present remedy is by appeal in criminal as well as in civil cases. As to promissory oaths, see 31 & 32 Vict. c. 72.

(*d*) See 52 & 53 Vict. c. 63, s. 3, *ante*, p. 3; 52 & 53 Vict. c. 10, *post*, p. 461.

(*e*) R. *v.* Clegg [1868], 19 L. T. (N. S.) 47, Hannen, J. Since that Act, the prisoner is indictable for perjury in evidence given by him *for the defence*. R. *v.* Baker [1895], 1 Q.B. 797.

(*f*) The words after 'law' were always superfluous. R. *v.* McCarthey, Peake (3rd ed.), 311.

(*g*) 1 & 2 Vict. c. 108, s. 1, *post*, p. 456. Sells *v.* Hoare, 3 B. & B. 232.

or upon solemn affirmation where he has no religious belief (*h*), or the taking of an oath is contrary to his religious belief (*i*).

It does not matter whether the false evidence is given orally or on affidavit, or in answer to interrogatories in an action, or concerning a contempt, nor whether the oath was in the deponent's own cause, or in that of another person, nor whether the evidence was given for the Crown or for the defence in a criminal case (*j*). Nor does it matter whether the false oath was believed or disbelieved, nor whether it caused any injury to the person against whom it was given; for the gist of the offence at common law (*k*) is the abuse of public justice, and not the injury to an individual (*l*).

By the Oaths Act, 1838 (1 & 2 Vict. c. 105), 'in all cases in which an oath may lawfully be and shall have been administered to any person either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any Court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered: provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.'

This Act does not apply to affirmations or declarations in lieu of the witness's oath. But such affirmations are permitted in the case of Quakers and Moravians, and persons who have no religious belief, or a religious belief which precludes their taking the witness's oath. The statutes substituting affirmation for oath provide that a false affirmation shall be punishable as perjury (*m*).

Unsworn Evidence.—By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, 'upon the hearing of a charge under the section, a child of tender years, who is tendered as a witness, does not, in the opinion of the Court, understand the nature of an oath, but is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; the evidence of such child may be received, though not given upon oath. [Provided that any witness, whose evidence has been admitted under this section, shall be liable, in all respects, to indictment and punishment for perjury as if he or she had been sworn]' (*mm*).

Similar provision was made by sect. 15 of the Prevention of Cruelty

(*h*) 51 & 52 Vict. c. 46, s. 1.

(*i*) 3 & 4 Will. IV. c. 49, s. 1; 1 & 2 Vict. c. 77, s. 1 (relating to persons who are or have been Quakers or Moravians); 51 & 52 Vict. c. 46, s. 1 (general). 3 & 4 Will. IV. c. 82 (Separatists), was repealed in 1890 (53 & 54 Vict. c. 33). As to the mode of ascertaining whether a witness is entitled to affirm, see R. *v.* Moore. Each of these Acts specifically puts false affirmations in the same position as false oaths with respect to the penalties for perjury.

(*j*) Perjury by a witness for the Crown was held to be criminal at common law (3 Co. Inst. 164), but not under the Act of Elizabeth (*post*, p. 525). Witnesses for the defence in treason and felony could not be sworn until 1 Anne, st. 2, c. 9, s. 3, which also made their false swearing perjury.

(*k*) As to the Act of Elizabeth, *vide post*, p. 525.

(*l*) 1 Hawk. c. 69, s. 9. Bac. Abr. tit. 'Perjury' (A.). In R. *v.* Nicholls, Gloucester Sum. Ass. 1838, *cor.* Patteson, J., the prisoner had on the trial of one for larceny sworn that he had not given the stolen property to P., but the jury disbelieved him, and acquitted P., and he was convicted of perjury. C. S. G.

(*m*) See the Acts *post*, Bk. xiii. c. v.

(*mm*) Words in brackets repealed as from April 1, 1909, by 8 Edw. VII. c. 67, s. 134.

to Children Act, 1904 (4 Edw. VII. c. 15), as to offences under that Act and offences named in the first schedule thereto. This continues in force as to offences within sects. 2, 3 of the Act, but as to other offences is superseded by sect. 30 of the Children Act, 1908 (8 Edw. VII. c. 67). That section applies to offences against Part II. of the Act and named in Schedule I (*n*), and provides, '(*b*) Any child whose evidence is received as aforesaid and who wilfully gives false evidence under such circumstances that, if the evidence had been given on oath, he would have been guilty of perjury, shall, subject to the provisions of this Act, be liable on summary conviction to be adjudged such punishment as might have been awarded had he been charged with perjury and the case dealt with summarily under section ten of the Summary Jurisdiction Act, 1879' (42 & 43 Vict. c. 49) (*nn*).

Judicial Proceeding.—The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, before persons authorised by the King to examine witnesses on any matter whatsoever (*o*). It is not material whether the Court, in which the oath is taken, is a Court of record or not, or whether it is a Court of common law, of equity, or of the civil law, or an ecclesiastical court (*p*), &c., nor whether the oath is taken in the face of the Court, or out of it before persons authorised to examine a matter depending in it, as before the sheriff or his lawful deputy or under-sheriff, on a writ of inquiry, &c., or whether it is taken in relation to the merits of a cause, or in a collateral matter, as, where one who offers himself to be bail for another, swears that his substance is greater than it is (*q*).

There must be something in the nature of a judicial proceeding, *e.g.*, an existing cause (*r*). But the oath may be the first step for initiating the proceeding, *e.g.*, swearing an information, or swearing an affidavit in support of an *ex parte* motion, or swearing a petition in a divorce cause, or an affidavit to support a summons to hold to bail (*s*). In the case of perjury in an affidavit or the like, the offence is committed when the deponent takes oath to the truth of the affidavit, and it is unnecessary to aver or prove that the affidavit was filed or in any way used (*t*).

It is no defence that the affidavit, through defects in the jurat, cannot be received in the Court for which it is sworn. Upon an indictment for perjury, in an affidavit, it appeared that the affidavit was signed with the mark of the defendant, and the jurat did not state either where it

(*n*) *i.e.* cruelty and offences against persons under 16, *post*, Bk ix. pp. 907 *et seq.*

(*nn*) There is no authoritative decision as to the examination of a child on the *voire dire* before determining whether it may be allowed to give unsworn evidence. But *semble*, that the child need not understand the legal consequences of giving false evidence. R. *v.* Dent [1907], 71 J. P. 511, Rentoul, Commissioner.

(*o*) 1 Hawk. c. 69, s. 3. The old books speak of the proceedings as those wherein the King's honour or interest are concerned, *e.g.*, before commissioners appointed to inquire of the forfeitures of his tenants, or of defective titles waiting the supply of the King's patents.

(*p*) See Plaice *v.* Howe, Cro. Eliz. 185.

(*q*) 1 Hawk. c. 69, s. 3. Bac. Abr. tit. 'Perjury' (A.). R. *v.* Crossley, 7 T. R. 315.

(*r*) R. *v.* Pearce, 3 B. & S. 531, *post*, p. 459. Before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 152), where an action had *abated* by the death of a co-plaintiff, and no suggestion had been entered under 8 & 9 Will. III. c. 11, s. 6, a trial was held extra-judicial, and perjury could not be assigned on false evidence given therein. R. *v.* Cohen, 1 Stark. (N. P.) 511.

(*s*) King *v.* R., 14 Q.B. 31, which turned on the Judgments Act, 1838 (1 & 2 Vict. c. 110).

(*t*) R. *v.* Crossley, 7 T. R. 315. R. *v.* Phillpotts [1851], 2 Den. 302, *post*, pp. 467–9.

was sworn, or that the affidavit was read over to the party, and it was proved by a clerk in the Master's office that where the party swearing an affidavit cannot write, the jurat ought, after stating the place where it was sworn, to state that the witness to the mark of the deponent had been first duly sworn, that the person administering the oath had read over the affidavit to the deponent, and saw the mark affixed; and that no affidavit would be received which did not contain this form of jurat when the party could not write. Littledale, J., said: 'The omission of the form directed by this and other Courts to be used in the jurat of affidavits may be an objection to their being received in the Court, whose rules and regulations the party has neglected to comply with; but I am of opinion that the perjury is complete at the time the affidavit is sworn, and although it cannot be used in the Court for which it is prepared, that nevertheless perjury may be assigned upon it' (*u*). So where an affidavit when sworn had been marked by the judge's clerk with his initials, but through mistake had not been then presented to the judge for his signature, but some days afterwards it was signed by the judge; Alderson, B., in the presence of the other Barons of the Exchequer, expressed a clear opinion that perjury might be assigned upon the affidavit, although the judge's signature was omitted (*v*).

Upon an indictment for perjury, it appeared that the defendant had filed a bill in chancery for an injunction, and had made the affidavit, on which the perjury was assigned, in support of the allegations in that bill. The indictment averred the bill to have been filed, and the affidavit exhibited in support of it; and stated the matters assigned as perjury to be material to the questions arising on the bill; but did not contain any statement that a motion had been made for an injunction, nor did it appear by the evidence that any such motion had in fact been made. It was submitted that the defendant was entitled to an acquittal (*w*). Tenterden, C.J., said: 'I do not think the averment or proof, the absence of which is objected to, can be necessary. The statements in the affidavit are material to the matters contained in the bill, which is for an injunction; and it may well have been filed in anticipation of a contemplated motion for an injunction, on which it might have been used. Can it make any difference that it afterwards turns out that the motion is not made? The crime, if any, is the same, morally, in each case; and I certainly shall not, where the objection is open hereafter, hold it necessary to give proof of a fact which does not vary the conduct of the party in taking the oath in question' (*x*). An affidavit sworn for the purpose of being used in a cause, but which is neither used nor filed, is nevertheless the subject of perjury (*y*).

(*u*) R. *v.* Hailey, Ry. & M. 94; 1 C. & P. 258.

(*v*) Bill *v.* Bament, 8 M. & W. 317.

(*w*) By the practice of the Court of Chancery, an injunction could not be obtained, except for want of an answer, or on the insufficiency of the answer, or on evidence disproving the answer, in none of which cases was the affidavit of the plaintiff admissible; or else *ex parte* before the time allowed to the defendant for answering has elapsed. In the last case, and in that only, could the plaintiff's affidavit be used. The averment, therefore, that the perjury was assigned on the matter material to the bill was not true; it could only be material to an application of a peculiar nature, and it did not appear, and was not alleged, that such an application was ever made. It was answered that the objection, if tenable at all, amounted to this, that perjury could not be assigned upon an affidavit which had not been used.

(*x*) R. *v.* White, M. & M. 271.

(*y*) Hammond *v.* Chitty, Q.B., E. T. 1846, MSS. C. S. G.

An indictment for perjury alleged that the defendant produced before a Master in Chancery an affidavit, 'entitled, in the said Court of Chancery, and in the said suit therein at the suit of the said E. J. C., and also in the said suit therein at the suit of the said *Commissioners* of Charitable Donations and Bequests in Ireland.' The affidavit, when produced, appeared to be entitled 'between the *Commissioner* (sic) of Charitable Donations and Bequests in Ireland, against J. E. D., &c. (naming the other defendants), and between E. J. C. and J. E. D., the Commissioners of Charitable Donations and Bequests in Ireland, *and others*.' It was objected that this affidavit was not one on which perjury could be assigned, as there was no such suit as that in which the *Commissioner* of Charitable Bequests was plaintiff; and the affidavit was improperly entitled, as the names of all the defendants were not stated, and therefore the affidavit was not admissible in the Court of Chancery. Denman, C.J., said: 'The Courts are quite right in not receiving affidavits which are not properly entitled; but I do not think the question whether there be perjury or not depends on the rule as to entitling being strictly complied with' (*z*).

In Amended Proceedings.—Where the powers of amendment of its proceedings possessed by a Court are limited, after an amendment has been made without jurisdiction the cause may be described as non-existent (*a*), or subsequent proceedings as *coram non judice*: and perjury cannot be assigned on a false oath taken therein (*b*). In the statutes empowering the amendment of criminal proceedings it is expressly provided that witnesses shall be indictable for perjury committed after the amendments have been made (*c*). A proceeding is not the less judicial because of some defect, falling short of absolute want of jurisdiction. Thus perjury may be assigned on evidence given in support of an indictment for perjury, even though that indictment was subsequently held bad on the ground that it did not contain a sufficient assignment of perjury (*d*).

Competent Jurisdiction.—The oath must be taken before a competent jurisdiction, that is, before some person or persons authorised by English law to take cognisance of the proceeding in or for which the oath is

(*z*) R. *v.* Christian, C. & M. 388, 393. In R. *v.* Hudson, 1 F. & F. 56, where perjury was charged to have been committed in an affidavit of service of notice of an application for leave to issue execution against a shareholder in a joint stock company, and the affidavit was produced, but the notice was not annexed to it; Cockburn, C.J., held the affidavit inadmissible. *Sed quære.*

(*a*) R. *v.* Hughes, 4 Q.B.D. 614, 628, Hawkins, J.

(*b*) R. *v.* Pearce, 3 B. & S. 531; 9 Cox, 258. Approved by Hawkins, J., in R. *v.* Hughes, 4 Q.B.D. 614, 628. In R. *v.* Pearce, an unmarried woman having obtained a judgment in a county court, sought to enforce it in the City of London Court, and it appearing that she had married since judgment, that Court (constituted under 15 & 16 Vict. c. lxxvii.) had amended the judgment summons by adding the name of her husband, having no jurisdiction to make the amendment.

(*c*) 11 & 12 Vict. c. 46, s. 4; 12 & 13 Vict. c. 45, s. 10; 14 & 15 Vict. c. 100, s. 1, *post*, Bk. xii. c. ii.

(*d*) R. *v.* Meek, 9 C. & P. 513, Williams, J. The former indictment, also for perjury, had been held bad on a writ of error, because the assignment of perjury was insufficient. See R. *v.* Burraston, 4 Jur. 697, *post*, p. 497. Mullett *v.* Hunt, 1 Cr. & M. 752, was cited in support of the objection in R. *v.* Meek. See also Davis *v.* Lovell, 4 M. & W. 678. 'If judgment be arrested in a civil action for a defect in the declaration, it has never been said that that circumstance would prevent a witness, who had been guilty of false swearing at the previous trial, from being indicted for perjury.' R. *v.* Cooke, 2 Den. 462, 463, Pollock, C.B.

taken, and to administer the oath. Thus a false oath taken in a court of requests, in a matter concerning lands, was held not to be indictable, that Court having no jurisdiction in such cases (*e*). And perjury cannot be assigned on an oath taken before persons acting merely in a private capacity (*f*), or before those who take upon them to administer oaths of a public nature, without legal authority for their so doing, or before those who are legally authorised to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarrantable and merely void. But a false oath taken before commissioners, whose commission at the time was determined by the demise of the Crown, would be perjury, if taken before the commissioners had notice of the demise (*g*).

Coke (*h*) seems to have considered that the authority to administer the oath must be derived from a commission recognised by the common law, and doubts have often arisen as to the power of particular persons to administer an oath on which perjury could be assigned. By sect. 16 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), 'every Court, judge, justice, officer, commissioner, arbitrator (*i*), or other person now or hereafter having by law or *by consent* of parties, authority to hear, receive, and *examine* evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.'

False evidence before the following tribunals is perjury: the superior courts of law, including courts of assize, and courts of quarter sessions, and of summary jurisdiction (*j*), county courts (*k*), local marine boards (*l*), naval courts-martial (*m*), revising barristers (*n*), grand juries (*o*), the judicial committee of the Privy Council (*p*), registrars of the Admiralty

(*e*) Buxton *v.* Gouch, 3 Salk. 269.

(*f*) 1 Hawk. c. 69, s. 4, and authorities there cited. 4 Bl. Com. 137. This must be read subject to 14 & 15 Vict. c. 99, s. 16, *infra*.

(*g*) Ibid. 4 Bac. Abr. tit. 'Perjury.' The demise of the Crown does not determine any appointment or office (1 Edw. VII. c. 5). By 4 Will. & M. c. 18, s. 6, pleas to information in the Court of King's Bench are not affected by the demise of the Crown. By 1 Anne, c. 2, commissions of assize, *oyer* and *terminer*, and gaol delivery, and of the peace, continue in full force for six months after the demise of the Crown, unless sooner superseded. Cf. 1 Edw. VII. c. 5, s. 1.

(*h*) 3 Co. Inst. 165.

(*i*) See R. *v.* Hallett, 2 Den. 237, which related to an arbitration under the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 77 (rep.). It is perjury to give false evidence in an arbitration within the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 22, or under the Agricultural Holdings Act, 1908 (8 Edw. VII. c. 28), s. 13 (5).

(*j*) Common law and the commissions of the judges and justices.

(*k*) R. *v.* Morgan, 6 Cox, 107, Martin, B. And see R. *v.* Crossley [1909], 1 K.B. 411.

(*l*) R. *v.* Tomlinson, L. R. 1 C. C. R. 49. These tribunals were formerly regulated by 17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 63, s. 23. They are now governed by ss. 244, 245 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and by the Merchant Shipping Act, 1906 (6 Edw. VII. c. 48). See s. 85.

(*m*) Common law. R. *v.* Heane, 4 B. & S. 947. By the Naval Discipline Act (29 & 30 Vict. c. 109), s. 67, 'every person who, upon any examination upon oath or upon affirmation before any court-martial held in pursuance of this Act, shall wilfully and corruptly give false evidence, shall be deemed guilty of wilful and corrupt perjury, and every such offence, *wheresoever committed, shall be triable and punishable in England*;' and where any such offence committed out of England is tried in England, all statutes and laws, applicable to cases of perjury, shall apply to the case.'

(*n*) 6 & 7 Vict. c. 18, s. 41 (E); 13 & 14 Vict. c. 69, s. 56 (I). The offence is in R. *v.* Thornhill, 8 C. & P. 575, treated as perjury at common law.

(*o*) 19 & 20 Vict. c. 54, s. 1 (E); and common law (see R. *v.* Hughes, 1 C. & K. 519); 56 Geo. III. c. 87, s. 2; and 1 & 2 Vict. c. 37, s. 2 (I).

(*p*) 3 & 4 Will. IV. c. 41, s. 9.

Court (*q*), of vice-admiralty courts (*r*), and of county courts in admiralty (*s*), matrimonial courts (*t*), probate courts (*u*), proceedings to wind-up companies (*v*), commissioners to inquire into corrupt practices at elections (*w*), committees of either House of Parliament (*x*), and the court of referees on private bills (*y*), judges on Irish and Scotch private estate bills (*z*), and the taxing officers in either House (*a*), and ecclesiastical courts (*b*), including the statutory church discipline courts (*c*).

There are numerous other enactments making false swearing before particular tribunals and in particular cases perjury or punishable as perjury (*d*). The only one of sufficient importance to be here set out is the Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), which by sect. 7 enacts that, 'Whoever wilfully and corruptly swears falsely in any oath or affidavit (*e*) taken or made in accordance with the provisions of this Act, shall be guilty of perjury in every case where if he had so sworn in a judicial proceeding before a Court of competent jurisdiction he would be guilty of perjury.'

This enactment extends to all affidavits taken in England for use in Courts in England (*f*), and also to oaths taken abroad for the purpose of a cause or matter in England, or the registration of a document in England, if taken before a British diplomatic or consular officer acting there, or a person having power to administer an oath there (*g*).

By sect. 9, any offence under this Act, whether committed within or without His Majesty's dominions, may be tried in any county in the United Kingdom in which the person charged was apprehended, or is in custody.

Provision is also made for punishing as perjury oaths taken before commissioners or tribunals appointed to take evidence for proceedings in other Courts, whether of the United Kingdom (*h*), British dominions (*i*), or foreign states (*j*).

Bankruptcy Courts.—In R. *v.* Lloyd (*k*), a conviction of perjury in

(*q*) 24 & 25 Vict. c. 10, s. 26.
(*r*) 26 & 27 Vict. c. 24, s. 20.
(*s*) 31 & 32 Vict. c. 71, s. 19.
(*t*) 20 & 21 Vict. c. 85, s. 50 (E); 33 & 34 Vict. c. 110, s. 25 (I).
(*u*) 20 & 21 Vict. c. 79, s. 32 (I).
(*v*) 8 Edw. VII. c. 69, s. 218.
(*w*) 31 & 32 Vict. c. 125, s. 31; 45 & 46 Vict. c. 50, s. 94.
(*x*) 21 & 22 Vict. c. 78, s. 3 (Lords); 34 & 35 Vict. c. 83, s. 1 (Commons). The latter Act applies also to witnesses sworn at the bar of the House.
(*y*) 30 & 31 Vict. c. 136, s. 2.
(*z*) 41 Geo. III. c. 105, s. 1 (S, I).
(*a*) 10 & 11 Vict. c. 69, s. 5 (Commons); 12 & 13 Vict. c. 78, s. 5 (Lords).
(*b*) *Vide* Plaice *v.* Howe, Cro. Eliz. 185; 78 E. R. 441.
(*c*) 3 & 4 Vict. c. 86, s. 18 (discipline); 48 & 49 Vict. c. 54, s. 7 (pluralities); 55 & 56 Vict. c. 32, s. 10 and Sched.
(*d*) See Chronological Index to Statutes, tit. 'Perjury.'
(*e*) The definition of oath and affidavit in this Act includes statutory declarations, and is framed so as to put sworn evidence taken before a commissioner in the same position as it had been given in Court.
(*f*) As to County Courts, see 51 & 52 Vict. c. 43, s. 83; 53 & 54 Vict. c. 7, s. 1.
(*g*) 52 & 53 Vict. c. 10, ss. 3, 6.
(*h*) 55 Geo. III. c. 157, ss. 8, 9, taking affidavits, &c., in England or Scotland for Irish Courts.
(*i*) 42 Geo. III. c. 85, s. 5 (evidence for prosecutions in England of public officials for offences abroad). 1 Will. IV. c. 22, s. 7 (examinations of witnesses in Colonies for proceedings in superior Courts in England). 22 Vict. c. 20, s. 2 (evidence for British tribunals). 44 & 45 Vict. c. 69, s. 32 (evidence for British tribunals in criminal cases).
(*j*) See 19 & 20 Vict. c. 113, s. 3 (for civil or commercial causes in foreign tribunals). 36 & 37 Vict. c. 60, s. 5 (for criminal proceedings in foreign tribunals).
(*k*) 19 Q.B.D. 213.

an examination 'by the Court,' under sect. 27 of the Bankruptcy Act, 1883, was quashed on the ground that there had been no valid examination by the Court, inasmuch as the registrar in bankruptcy, before whom the examination was to be held, after administering the oath, had left the room (*l*).

Deputy Judges.—The question whether perjury can be assigned on evidence taken before the deputy of a judicial officer, depends on whether the deputy is lawfully appointed and acting. In the case of false swearing before a deputy coroner, acting in the absence of the coroner, it appears to be for the judge who tries an indictment for perjury to determine whether the occasion which entitled the coroner to appoint a deputy had arisen (*m*).

Justices of the Peace.—Where perjury is assigned on an oath taken before a justice of the peace it must be shewn that he had jurisdiction to deal with the matter in which the oath was taken. When he has jurisdiction to take evidence he can take it on oath (*n*). Where a charge is made in the presence of the accused (*o*), as to a matter in which the justices have jurisdiction, who is then and there called upon to answer it, as he lawfully may be according to the dictum of Lord Holt (*p*) . . . 'it is . . . altogether immaterial, so far as the jurisdiction of the justices to hear the charge is concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process' (*q*). The Indictable Offences Act, 1848, and the Summary Jurisdiction Acts regulate the formalities to be observed when a charge is made against an absent person whose presence before the justices it is desired to procure (*r*): but unless a statute specifically requires it, the laying of an information in writing, or on oath, is not a condition precedent to his exercise of jurisdiction (*s*), and statutes providing for informations on oath, unless in very

(*l*) In R. *v.* Westley, Bell. 193, and R. *v.* Dunn, 12 Q.B. 1026, questions were raised as to the jurisdiction to administer the oath under insolvency Acts now repealed, viz. 1 & 2 Vict. c. 110, s. 8; 5 & 6 Vict. cc. 116 & 122; and 7 & 8 Vict. c. 96.

(*m*) R. *v.* Johnson, L. R. 2 C. C. R. 15, decided on 6 & 7 Vict. c. 83, s. 1 (rep.). R. *v.* Schlesinger, 10 Q.B. 670. The appointment and jurisdiction of deputy-coroners is regulated by the Coroners Act, 1892 (55 & 56 Vict. c. 56); of deputy county court judges by 51 & 52 Vict. c. 43, s. 18 (see R. *v.* Roberts, 14 Cox, 101 (C. C. R.): R. *v.* Lloyd [1906], 1 K.B. 552); of deputy recorders by 45 & 46 Vict. c. 50, s. 75, and 6 Edw. VII. c. 46; and of deputy stipendiary magistrates by 6 Edw. VII. c. 46. As to perjury before a deputy or under-sheriff, see R. *v.* Dunn, 2 Mood. 297; 1 C. & K. 730, 732n.

(*n*) At common law and under 14 & 15 Vict. c. 99, s. 16, *ante*, p. 460. As to extra-judicial matters, his power of administering oaths is limited by 5 & 6 Will. IV. c. 62, s. 13. *Vide* 'Voluntary Oaths,' *ante*, p. 325.

(*o*) See R. *v.* Stone, 1 East, 649, Kenyon, C.J.

(*p*) That a conviction upon an information instanter is legal. R. *v.* Fuller, 1 Ld Raym. 509.

(*q*) R. *v.* Hughes, 4 Q.B.D. 614, 629, Hawkins, J.

(*r*) At common law, warrants to arrest appear to be illegal unless obtained on sworn information. R. *v.* Heber, 2 Barnard (K.B.) 101.

(*s*) R. *v.* Millard, Dears. 166; 22 L. J. M. C. 108, Parke, B., decided on 7 & 8 Geo. IV. c. 30, s. 30, repealed in 1861, and re-enacted as s. 62 of the Malicious Damage Act, 1861. See also R. *v.* Shaw, 34 L. J. M. C. 169, Erle, C.J. Turner *v.* Postmaster General, 5 B. & S. 756. R. *v.* Hughes, 4 Q.B.D. 614, where the subject is exhaustively discussed, and the contrary dictum of Lord Mansfield (R. *v.* Fearshire, 1 Leach 202) is rejected. R. *v.* Scotton, 5 Q.B. 493, is explained in R. *v.* Hughes, *ubi supra*, as turning on the special language of 6 & 7 Will. IV. c. 65 (rep.), which required the charge to be deposed to on oath before any proceedings were taken, &c. In Blake *v.* Beech, 1 Ex. D. 320, the conviction seems to have been quashed for irregularity, not for want of jurisdiction.

special terms, are read as merely giving cumulative powers in order to compel the attendance of an absent person, or to enable a case to proceed *ex parte* if he does not appear.

'There is a marked distinction between the jurisdiction to take cognisance of an offence and the jurisdiction to issue particular process to compel the accused to answer it' (*t*).

This is recognised by sect. 17 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), which provides for conducting a preliminary inquiry, even in cases where a prisoner is brought before a justice without warrant on a charge of an indictable offence. And even where a man is illegally brought before justices upon a charge as to which they have jurisdiction (*u*), if he does not demand his release (whether from ignorance of the illegality or other cause), but proceeds with his defence, he is treated as having waived his objections, and witnesses who swear falsely at the hearing are liable to indictment for perjury (*v*).

H., a constable, was indicted for perjury, committed on the hearing of a charge against S. for assault upon H., and for obstructing him in the discharge of his duty. The first charge made was for an offence against 24 & 25 Vict. c. 100, s. 38, and on that charge the evidence was given, but the justices summarily convicted under 34 & 35 Vict. c. 112, s. 12. On the trial of H. it was objected that he could not be convicted because the magistrates had no jurisdiction to hear the charge of assault, and therefore perjury could not be committed on the hearing. No written information or oath had been made before the issue of the warrant upon which S. had been brought before the justices; but H. took no objection to this although he defended himself on the merits, and called a witness on the facts. It was held that, although the warrant was illegal, the false oath taken by H. was perjury, because it was taken before justices who were competent to entertain the charge of assault, and had jurisdiction in respect of time and place over the offence. On a case reserved the conviction was affirmed (*w*). Hawkins, J., said: 'I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion I have assumed as a fact, from the case as stated, that S. was arrested and brought before the justices upon as illegal a warrant as ever was issued,—a warrant signed by a magistrate not only without any written information or oath to justify it, but without any information at all. . . . Wrongful, however, as were the proceedings by which S. was brought into the presence of the magistrates to answer a charge which up to that moment had never been legally preferred against him; before those magistrates and in his presence a charge was made over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded; and in support of that charge it was that the defendant was sworn, and

(*t*) R. *v.* Hughes, 4 Q.B.D. 614, 624, Hawkins, J.

(*u*) Ibid. pp. 622. 623.

(*v*) R. *v.* Shaw, 34 L. J. M. C. 169, Blackburn, J. In that case there had been a conviction of perjury on proceedings against K., under 18 & 19 Vict. c. 118, which were regulated by the S. J. Act, 1848. There seems to have been no information, but K. had appeared, heard and answered the charge, and the perjury assigned was committed by a witness called for the defence. See also R. *v.* Millard, 22 L. J. M. C. 108; R. *v.* Smith, L. R. 1 C. C. R. 110.

(*w*) R. *v.* Hughes, 4 Q.B.D. 614.

in giving his evidence swore corruptly and falsely.' In the view of the Court it was immaterial to the charge of perjury whether the judgment given by the justices on the evidence was legal or illegal, so long as they had jurisdiction to hear evidence on the charge made.

Under 7 & 8 Vict. c. 101, s. 2 (*x*), an application for an order in bastardy must be made to the justices acting for the petty sessional division in which the mother 'may reside'; and they had no jurisdiction to entertain such an application, unless she did reside within their division, and consequently, if she did not so reside, perjury could not be committed on such an application (*y*).

Upon an indictment for perjury upon the hearing of an application by M. H. for an order upon the prisoner for the maintenance of her bastard child, it appeared that the summons was issued by a magistrate on the application of M. H., who stated, but not on oath, that she had been delivered of a bastard child more than twelve months previous, and that money had been paid by the prisoner for its maintenance within twelve months of its birth. The summons alleged that the prisoner had 'paid money for its maintenance within twelve months after its birth,' instead of stating that proof thereof had been made. The prisoner appeared personally in answer to the summons, and was assisted by an attorney. No objection was made to any of the proceedings on which the summons was founded, and the case was gone into on the merits before the stipendiary magistrate, before whom M. H. swore to the payment of money as alleged, and the prisoner swore that he had never paid M. H. any money. It was objected that, as there had been no proof on oath of money having been paid for the maintenance of the child within twelve months from its birth *before* the summons was issued, the magistrate had no jurisdiction to hear the case; but, upon a case reserved, it was held that the prisoner had waived the objection. Proceedings to obtain an affiliation order are not criminal but civil in character, taken to impose a pecuniary obligation, and the summons is mere process to bring the defendant into Court (*z*). Before the summons issued there ought to have been evidence on oath of the payment of the money, although it was not expressly required by the statute to be on oath, as in the case of a complaint made before the birth of the child. Further, the summons should have been in the form given by the statute; but even assuming that, if the prisoner had not appeared, the magistrate could not have lawfully proceeded to hear evidence of the paternity; or that, if he had appeared, and objected to the regularity of the summons, the objection

(*x*) Repealed, but in substance re-enacted in 1872 (35 & 36 Vict. c. 65, ss. 2, 3).

(*y*) R. *v.* Hughes, D. & B. 188. The mother of the child was delivered in March, and resided with her parents till November. She then went and lodged at D. in another petty sessional division for three weeks, and then applied to the justices of that division. Her lodging there was not for any improper or fraudulent purpose, but because the justices met in the town, and it was more convenient for her than to go a distance from her parents' house to the justices' meeting of the division in which her parents resided. After the order she went into service without returning home. The jury found that she had no other home than D., and that she was residing at D., if in point of law she could under the circumstances be considered to be so. It was held that the justices had jurisdiction to make the order, as her residence was at D.

(*z*) The proceedings to enforce a bastardy order when default is made, are quasi criminal. 42 & 43 Vict. c. 49, s. 54.

ought to have prevailed; yet when he actually appeared, and instead of objecting to the regularity of the summons, asked the Court to give judgment in his favour on the merits, and tendered evidence to absolve himself from liability, he waived any irregularity in the process, and when he had thus submitted himself to the jurisdiction of the Court, the Court had jurisdiction to hear and decide the case (*a*).

The same principle has been adopted in the case of a bastardy summons issued before the birth of the child without the deposition required by 7 & 8 Vict. c. 101 (*b*). Where a bastardy summons is applied for within the statutory period, twelve months, but not issued till after it has elapsed, the justices have jurisdiction to hear the proceedings (*c*).

Upon an indictment for perjury, it appeared that the perjury had been committed upon the hearing of a second application for a bastardy order, a former application having been heard by the magistrates and dismissed upon the merits. It was contended that the magistrates were *functi officio* after the first application had been dismissed on the merits, and had no jurisdiction to entertain the second application. But it was held that the magistrates had jurisdiction to hear the second application and administer an oath, even if the previous dismissal were a defence (*d*).

On a trial for perjury alleged to have been committed on the hearing of an information for refusing to quit licensed premises, it was held that proof of the existence of the licence was necessary to shew that the justices had jurisdiction (*e*).

An indictment alleged that Horne was duly licensed to keep a beer-house, and that an information had been laid against him for that he, being duly licensed to keep a beer-house, had it open unlawfully on the morning of Sunday, February 6, 1853, and charged the defendant with falsely swearing that he had not been supplied with beer in the house on that morning. Horne's licence was for a year, commencing on May 11, 1853, but Horne was keeping the beerhouse on the February 6 previously. It was objected that the averment that Horne was duly licensed on February 6 was not proved, and that if he was not so licensed, the justices had no jurisdiction to hear the information. But Crompton, J., held that the justices had jurisdiction generally over the subject of keeping houses for the sale of beer and other liquors open on Sunday; and that as, in order to establish an offence, it was not necessary to prove that the keeper of the house was licensed, what was sworn on the subject of Horne's keeping the house open brought the case within the jurisdiction of the justices, even if it turned out that he was not licensed at the time (*f*).

By 4 Geo. IV. c. 34, s. 2 (rep.), all complaints arising between masters or mistresses and their apprentices, as to wages, &c., might be heard and determined before a justice of the peace. After an apprenticeship

(*a*) R. *v.* Berry, Bell. 46, Martin, B., *diss.* Cf. R. *v.* Simmonds, Bell. 168.

(*b*) R. *v.* Fletcher, L. R. 1 C. C. R. 320.

(*c*) R. *v.* Chugg, 11 Cox, 558 (C. C. R.).

(*d*) R. *v.* Cooke, 2 Den. 462. See R. *v.* Brisby, 1 Den. 416.

(*e*) R. *v.* Evans, 17 Cox, 37. Cf. R. *v.* Lewis, 12 Cox, 163. R. *v.* Willis, 12 Cox, 164. These decisions seem to have been doubted in R. *v.* Lakin, March 10, 1900, noted in 35 L. J. (newsp.) 191.

(*f*) R. *v.* Kirton, 6 Cox, 393, Crompton, J.

was over, the former apprentice summoned his late master under this Act for wages alleged to be unpaid, and on the hearing swore falsely. It was held that this was perjury, inasmuch as the magistrate had jurisdiction to determine whether the relation of apprenticeship continued or not (*g*).

Justices have no jurisdiction to inquire into the truth of a charge of libel preferred before them, or to hear any other justification (*h*), except in cases within sect. 4 of the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60). If publication is proved, they are bound to commit for trial. Where, therefore, an indictment was preferred for perjury alleged to have been committed in the course of the cross-examination of a witness for the defendant on a charge of libel before magistrates, the object of which was to prove the truth of the libel, the Court directed an acquittal (*i*).

Materiality.—The essence of perjury is its tendency to mislead a Court in proceedings relative to a matter judicially before the Court (*j*). Consequently the false evidence must be relevant to a question already raised, or to be raised, in the proceeding; for if it is wholly foreign from the purpose, or altogether immaterial, and neither in any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as, where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, not at all relating to what is material, and is guilty of a falsity as to such facts (*k*).

If it appears plainly that the scope of the question to a witness was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he gave a particular and distinct, but wilfully false, account of the circumstances, he is guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it (*l*). And a witness may be guilty of perjury in respect of a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if, in an action of trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears

(*g*) R. *v.* Sanders, L. R. 1 C. C. R. 75.

(*h*) R. *v.* Carden, 5 Q.B.D. 1.

(*i*) R. *v.* Townsend, 10 Cox, 356, Montague Smith, J. The judge held that the cross-examination was not upon a matter material to the crime. But the decision can be better justified on the ground that the justices had no power to enter on the inquiry at all.

(*j*) 1 Hawk. c. 69, s. 3.

(*k*) R. *v.* Griepe, 1 Ld. Raym. 256. Allen *v.* Westley, Hetley, 97. Bac. Abr. tit. 'Perjury' (A.). See 2 Rolle, 41, 42, 369. 1 Hawk. c. 69, s. 8.

(*l*) Upon an indictment for robbery committed on April 13, between eight and ten o'clock at night, a witness for the prisoner swore, not only was the prisoner at home at that time, but in answer to the judge said, that the prisoner had lived in the same house for the two years previous, and that during the whole of that time he had not been absent from the same house for more than three nights together. The last two statements were proved to be false, as the prisoner for a whole year of the period spoken to had been in prison. Held, that the evidence so last given was material to the inquiry, and the proper subject of assignments of perjury, inasmuch as those latter statements tended to render more probable the previous statements made, that the prisoner was at home on the night of April 13. R. *v.* Tyson, L. R. 1 C. C. R. 107. See R. *v.* Naylor, 11 Cox, 13; R. *v.* Alsop, 11 Cox, 264.

that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's mark, whereas, in truth, the defendant never used any such mark (*m*). And it is not necessary to shew to what degree the false evidence was material to the issue, but it is enough that the point was circumstantially material (*n*). And still less is it necessary that the evidence should be sufficient for the plaintiff to recover upon, since evidence may be very material, and yet not conclusive upon, nor even directly probative of the point in question (*o*). Where A. advanced money to B. on two distinct mortgages, upon one of which the security was insufficient, and B. assigned the equity of redemption *in both* to C., who assigned the insufficient estate to an insolvent, and filed a bill against A. to redeem the other, to which bill A. put in his answer, and therein denied having had notice of the assignment to the insolvent; it was held that the notice was a material fact upon which perjury might be assigned (*p*).

Materiality is not limited to direct relevance to the issues raised, or to be raised (*q*), in the proceeding for the determination of the tribunal, or to the principal judgment to be given (*r*). Thus, perjury may be assigned on evidence given to enable a judge to decide whether a document is admissible (*s*), or by a person who offers himself as bail for another, as to his possessing the necessary qualifications (*t*). Whether false swearing in a judicial proceeding with intent to *mislead* is not punishable, when it is wholly irrelevant and immaterial to the issue that is being tried, has not been judicially determined (*u*).

Upon the trial of Doe *d.* Richard *v.* Griffiths, a copy of the will of W. J. was tendered, and on objection to its admissibility, P., who was then attorney for the lessor of the plaintiff, swore that he had examined the copy produced with the original will in the registry at Llandaff. Upon further objection that the original will was inoperative in respect of a chattel interest, and that, therefore, either the probate ought to be produced or the Act Book be proved, P. further deposed that he had examined the memorandum at the foot of the copy of the will, with the entry in the Act Book at the same registry. Upon this evidence the judge offered to receive the document in evidence, but the plaintiff's counsel withdrew it. P. was indicted for perjury. It was proved that he had not made either of the examinations to which he had deposed, and he was convicted. Erle, J., reserved the question, whether the false oath was relevant

(*m*) Bac. Abr. tit. 'Perjury' (A.). 1 Hawk. c. 69, s. 8. See R. *v.* Gardiner, *post*, p. 501.

(*n*) R. *v.* Griepe, 1 Ld. Raym. 256. R. *v.* Muscot, 10 Mod. 195.

(*o*) R. *v.* Rhodes, 2 Ld. Raym. 886.

(*p*) R. *v.* Pepys, Peake, 138 (3rd edit. 187), Kenyon, C.J.

(*q*) In Finney *v.* Beesley [1851], 17 Q.B. 86; 20 L. J. Q.B. 96, Campbell, C.J., said: 'I do not agree that there could be no indictment for perjury where the examination of the witness has taken place before issue joined, if his evidence would be material to the issue afterwards joined.' The case arose on an application to rescind a commission to examine witnesses' issue after writ but before the defendant's appearance. It had been urged that a commission should not go till issue was joined in the cause, as till this, perjury could not be assigned in the depositions.

(*r*) 1 Hawk. c. 69, s. 3. R. *v.* Mullany, L. & C. 593.

(*s*) R. *v.* Phillpotts, 2 Den. 302.

(*t*) R. *v.* Royson, Cro. Car. 146.

(*u*) See R. *v.* Mullany, L. & C. 593, 596, Erle, C.J.; and per Maule, J., in R. *v.* Phillpotts, 2 Den. 302, 306.

and material to the issue then being tried, so as to amount to perjury; as to which the following were the facts:—On the trial of an action of ejectment (Doe *d.* Richard *v.* Griffiths), the lessor of the plaintiff claimed to be entitled to a term, which had been granted to W. J. and R. M. jointly. The will of J. was irrelevant to this title; but the time of his death was a material fact, and proof of the probate of the will of J. would thus have been relevant evidence towards establishing the plaintiff's title. A copy of this will was tendered in evidence. The purpose of the plaintiff's counsel in tendering the evidence, was to clear a doubt respecting the interest of J. in the term, which was expected to be raised by the defendant, and after the document was withdrawn the survivorship of R. M. was proved by other evidence. The examination of the document tendered with the entry in the book called 'The Act Book' at Llandaff, did not render the document legally admissible as an examined copy of the act of probate.

For the prisoner, it was contended before the judges, that the question was simply whether if a witness swears that he has examined a document, *not receivable in evidence*, with a certain book, can that be said to be material to the issue? The time of J.'s death was in issue; how could the fact that the witness swore that he had examined a paper, not receivable in evidence, with a certain book, be material to the *issue* then being tried? It is not enough that the evidence has relation to the matter in issue; it must be material to the issue. It was contended, when the defendant was tried, that what he had sworn was material for the jury, who were to act on the evidence before them; and, secondly, that it was material for the judge, who was to say whether it was to be put to the jury or not. But it could not be material for the jury; for it was withdrawn from their consideration, and they could not legitimately act upon it; and here the judge was not a judge of fact. This evidence was not on any issue of fact which the judge had to try. It was merely evidence to be given to the jury through the judge. Campbell, C.J., said: 'I am of opinion that the conviction was right. There was false swearing in a judicial proceeding. How can it be said not to have been material? It was necessary to prove that J. died before M. Although the fact of J.'s death had been proved by parol testimony, if evidence was given to shew that probate had been granted of J.'s will while M. was still living, it would have been material in corroboration. With a view to have the copy of the will received in evidence, the defendant swore falsely that he had examined the paper produced with the original will at Llandaff, and the entry on it with the entry in the Act Book; and thereupon the judge said, I will admit it, and if it had been read, it would have gone to the jury with the rest of the evidence in the case. Afterwards the document is withdrawn, but that cannot purge the false swearing committed by the defendant. It has been said that if the judge were wrong in admitting the document in evidence, the defendant could not be convicted, making the offence of perjury depend upon whether a judge were right or wrong in his decision on a question of law, and upon the decision of some nice point in a bill of exceptions, which might ultimately go to the House of Lords. We are all of opinion, as the evidence was given in

a judicial proceeding, with a view to the reception in evidence of a document, which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present' (*v*).

The prisoner was indicted for perjury before a Court of Requests, in a proceeding under the interpleader section of the Act establishing the Court, to ascertain whether a certain pig, which had been seized under an execution issued against him on September 26, had been sold by him on August 5 to his brother. The prisoner had sworn that he had sold the pig to his brother on August 5, and the allegation of perjury was, that the pig was not sold by the prisoner to his brother on the said 5th day of August. It was contended that whether the pig was sold or not on August 5 was not the material question; the material question was whether or not, at any time before the issuing of execution, there had been a sale of the pig by the prisoner to his brother. It was quite immaterial whether the sale took place on a particular day, if it took place at some time prior to the execution. Maule, J., said: 'I think that the ultimate question to be decided is one thing, and yet that a material question may be raised upon a matter collateral to that question. I do not at all think that I can confine the law of perjury by making that only perjury which is material to the only question to be tried, otherwise persons might perjure themselves with impunity. It might be a material question in a case of murder what coloured coat a man had on: the colour of the pig, as I put it, might be most material; for suppose a person swore that this was a black pig, and another witness swore it was white, it would have been a material question whether the pig was black or white, although the ultimate question would have been whether it was sold at the time when it was alleged to have been sold' (*w*).

On the hearing of an information against R., under sect. 30 of the Game Act, 1831 (1 & 2 Will. IV. c. 32), for committing a trespass in pursuit of game on a close in the occupation of W., a witness having proved that he saw R. in W.'s field, and saw him commit the offence there, the prisoner swore, on behalf of R., that he went with R. into a lane adjoining the field, and that R. shot into the field, but did not enter it, and that he himself went into the field and fetched off what R. killed. On an indictment for perjury in respect of this evidence, it was contended that the evidence was not material; because R. was equally guilty of an offence within sect. 30, whether he went into the field and shot there, or whether he shot from the lane, and the prisoner in his company went in and brought away the game. But Williams, J., held that the evidence was material (*x*).

(*v*) R. *v.* Phillpotts [1851], 2 Den. 302. In the course of the argument, Maule, J., said: 'Here the defendant by means of a false oath endeavours to have a document received in evidence; it is, therefore, a false oath in a judicial proceeding; it is material to that judicial proceeding; and it is not necessary that it should have been relevant and material to the issue being tried.' In R. *v.* Gibbon, Pollock, C.B., said that there was a great deal of very good sense in Lord Campbell's judgment in this case. Cf. on this point, R. *v.* Mullany, L. & C. 593, *post*, p. 470.

(*w*) R. *v.* Altass [1843], 1 Cox, 17. A case once occurred at Gloucester where on an indictment for stealing a rabbit the question turned on whether a rabbit found in the prisoner's possession was a buck or doe rabbit, and numerous witnesses were called on each side, and the verdict was, 'We find it was a buck rabbit'—a case well illustrating Maule, J.'s remarks.

(*x*) R. *v.* Scotton [1844], 5 Q.B. 493. The case was not argued on this point in the Queen's Bench.

In R. *v.* Mullany (*y*), the perjury assigned was that the defendant, on the trial of a cause in a County Court, wilfully, corruptly, and falsely swore that his name was Edward and not Bernard Edward. On this evidence the County Court judge had refused an amendment and struck out the cause. On his conviction it was contended that the inquiry as to the prisoner's name was immaterial. But Erle, C.J., said: 'The question was put in the course of a judicial inquiry, and was so put by the judge in the course of forming his judgment on the case, and for his own guidance in forming such judgment. The prisoner thereupon swore that which was false. He swore it in a judicial proceeding for the purpose of affecting the decision; and the statement he made was material because on the strength of it the judge altered his judgment for the petitioner into one for the defendant. The case therefore clearly comes within the rule laid down in R. *v.* Phillpotts (*z*) and R. *v.* Gibbon' (*a*).

Upon an indictment for perjury alleged to have been committed in an answer to a bill filed in Chancery, it appeared that the bill was filed against the defendant and R., stating an agreement to purchase certain wheat, to be paid for by draft at three months, which agreement was not reduced into writing, and that afterwards a bought note was delivered to the defendant, which note did not contain fully the terms of the agreement; that the defendant brought an action and recovered a verdict; and that he was enabled to obtain such verdict by reason of his fraudulently concealing the true terms of the agreement, and the bill prayed that one of the terms of the contract might be declared to be that the purchase-money should be paid by a bill of exchange, payable three months after date; and the defendant by his answer denied the parol agreement stated in the bill. The bill was dismissed, and the denial by the defendant was the subject of the indictment for perjury. It was contended that the indictment could not be sustained on the ground that the only proper evidence of the contract was the bought and sold notes: that the contract by parol was void by the Statute of Frauds: and that a false answer to a bill for the discovery of such a contract would not subject a person to the indictment for perjury; and R. *v.* Dunston (*b*) was relied upon. Coleridge, J., said: 'In that case the bill in Chancery was to enforce the performance of a parol contract, which could not be enforced by reason of the Statute of Frauds; and the case of R. *v.* Benesech (*c*) proceeded on the same ground. Though it is true that a party cannot vary

(*y*) L. & C. 593.

(*z*) 2 Den. 302.

(*a*) L. & C. 109. *post*, p. 473. In R. *v.* Worley, 3 Cox, 535, the indictment was for perjury in a matrimonial cause before an Ecclesiastical Court, and the perjury was assigned on an oath that W. had never passed by the assumed names A. or J. Denman, C.J., held the evidence of materiality insufficient, but as none of the evidence is stated, except the single question and answer on which perjury was assigned, it is difficult to see where this decision assists.

(*b*) Ry. & M. 109. Tenterden, C.J., held that perjury could not be assigned on the denial of the making of an agreement pleaded to relate to the sale of lands, and not enforceable by reason of s. 4 of the Statute of Frauds on the ground that the oath was irrelevant and immaterial.

(*c*) Peake, Add. Cas. 93. Kenyon, C.J., held that perjury could not be assigned on denial of a promise to pay a marriage portion, it being pleaded in the suit that the agreement to give the portion was not in writing, and was void under the Statute of Frauds. See Bartlett *v.* Pickersgill, 4 Burr. 2255; 4 East, 577n.; where a case of indictment for perjury for denial of a part agreement to buy land, which a Court of Equity had refused to enforce. The Statute of Frauds does not seem to have been pleaded.

the terms of a written contract by parol evidence, he may shew by such evidence that he was induced to sign the written contract inadvertently and by fraud. In this case the object of setting up the parol terms of the contract is for the purpose of avoiding the contract on the ground of fraud.' 'I think that the principle, that parol evidence is inadmissible to contradict or vary the terms of a written contract, does not apply where the object of that evidence, as in this case, is to impeach the transaction on the ground of fraud. I think that the assignment of perjury on the denial in the answer of the parol terms, which the bill prayed to have established, is material and relevant; and I think therefore that the objection cannot be sustained' (*d*).

In R. *v.* Courtney (*e*), an indictment for perjury before a coroner while holding an inquest, alleged that it was a material question whether the deceased, the prisoner, or another person had drunk any intoxicating liquor during a certain interval, and that the prisoner falsely swore that none of them had tasted any intoxicating liquor during that interval. This statement was shewn to be false, but there were no grounds for supposing that the deceased came to his death from anything except from the effects of having been exposed to the night air. It was objected that the matter so falsely sworn was not material, but Monahan, C.J., left the question of materiality to the jury, and they convicted; and, upon a case reserved, it was held that the evidence was material. It was the duty of the coroner to inquire into all the circumstances attending, or which might have caused, the death of the person upon whom the inquiry was held. That being so, it at once became material to ascertain whether or not death had not been caused to some extent by the deceased having been tippling in a public-house, and therefore in a state to render it more probable that he should have lost his way. It was material for the coroner to ascertain, not only the actual cause of death, as murder, *felo de se*, or otherwise, but also all the circumstances attending it, and therefore it was a necessary part of his duty to ascertain the way in which the deceased spent the evening before his death (*f*).

In R. *v.* Berry (*g*), the prisoner was indicted for perjury alleged to have been committed by him on the hearing of an application of M. H., the mother of a bastard child, for an order in bastardy to be made upon the prisoner. Upon the hearing M. H. swore that on the day after the birth of the child the prisoner paid her £1 7*s.* 6*d.*, and that he paid her

(*d*) R. *v.* Yates, C. & M. 132.

(*e*) [1856] 7 Cox, 111 (Ir.).

(*f*) In R. *v.* Ball [1854], 6 Cox, 360, Russell Gurney, Recorder, is reported to have said: 'In all these cases it is necessary to shew that the matter alleged to be falsely sworn was material. That cannot be done in this case without proof that it was material either to the action or to the other matters in difference. The evidence failing to shew this distinctly, the defendant must be acquitted.' The indictment was for perjury in an arbitration of a cause and all matters in difference. The perjury was assigned as to the signature of a paper. The arbitrator was unable to say definitely whether the answer related to matters in the cause or to other matters in difference. On this report, Mr. Greaves says: 'Gurney, R., is far too good a criminal lawyer to have made such a decision as this, and I have the best authority for saying that he never did so decide. Probably the evidence failed to shew that the evidence was material in any respect upon the hearing of the matters referred. It is obvious that the paper in this case might have been material both to the matter in issue in the cause, and to the other matters referred, and yet according to this report the evidence would not have been material.'

(*g*) [1859] Bell. 46.

a weekly sum for several weeks after; in answer thereto the prisoner swore that he never paid M. H. any money at all upon any account whatsoever, and on this statement perjury was assigned. The statement was held material; as it was necessary to prove at the hearing the payment of the money; and as the payment of the money for the maintenance of the child was corroborative evidence of the paternity (*h*).

Where a count stated that it was a material question whether a bond was obtained by the fraud of the prisoner, and that the prisoner falsely swore that he read over and explained it to the obligor; Erle, J., ruled that the reading over the bond was material as being strong evidence to negative fraud (*i*).

On an indictment of B. for falsely swearing on a trial for rape that she had never got one W. to write a letter for her, which was shewn to her, it was proved that B. had got W. to write a letter to the person she had charged with the rape, saying, 'I will do all I can to clear you.' 'I should not have went to the police about the matter at all, if I had not been persuaded by' two persons whom she named, &c. The evidence relating to the writing of this letter was held material (*j*).

On an indictment for having falsely sworn before justices, on a charge against the prosecutor for stealing three account books, that the defendant saw him destroy another account book, the prosecutor being also charged with embezzlement; it was held that the evidence was not material on the charge of larceny, as it would be merely bad conduct in one instance, inducing a probability of bad conduct in another (*k*).

The prisoner was indicted for perjury on the hearing of a summons, which he had taken out against the prosecutor for using language calculated to incite him to commit a breach of the peace. The language used by the prosecutor was in consequence of H. having, as the prosecutor alleged, kicked and struck a horse, and several witnesses were called who proved this. H. was asked on cross-examination whether it was true that he had ever kicked or struck the horse, and denied that he had. Held, that the statement by the prisoner that he had never kicked or struck the horse was merely collateral (*l*).

All false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of them. So where a person charged before a magistrate with selling beer without a licence, falsely swore that, when previously convicted of a similar offence, he had not authorised his solicitor to plead guilty, it was held that such a statement was material, as it affected his character as a witness, and that he was rightly con-

(*h*) In R. *v.* Owen [1852], 6 Cox, 105, perjury was assigned on the oath of O. on a bastardy summons, that R. was the father of her child, and that R.'s uncle had offered to raise her wages if she would swear the child to another man than R. It does not appear how this evidence came to be admitted by the justices. Martin, B., doubted its materiality, but left the case to the jury, who acquitted.

(*i*) R. *v.* Smith [1858], 1 F. & F. 98.

(*j*) R. *v.* Bennett [1851], 2 Den. 240, Talfourd, J., on the trial: approved by the judges on a case reserved on other points.

(*k*) R. *v.* Southwood [1858], 1 F. & F. 356, Watson, B. It would have been material on the charge of embezzlement.

(*l*) R. *v.* Holden, 12 Cox, 166. Should it not have been said 'quite irrelevant'? As to perjury on collateral matters, *vide ante*, p. 467.

victed of perjury (*m*). The Court came to this conclusion on the authority of the three cases next to be cited, and considered that the fact and circumstances of the previous conviction were material not merely to the quantum of punishment, but to the formation of the decision of the magistrate on the case.

An indictment for perjury before commissioners of taxes on an appeal of H. against a surcharge for a greyhound used by him on November 24, averred that it was a material question whether a certain receipt produced by the prisoner on the hearing of the appeal was given to him before September 12, and that the defendant falsely swore that the receipt was given to him before September 12. At the commissioners' meeting, evidence was given that H. and the prisoner were coursing, on November 24, with two greyhounds, one of which had been H.'s, who had no certificate. H., in support of his appeal against a surcharge for this dog, said that the dog had been sold to the defendant long before, and called him as a witness. The prisoner swore that he bought the dog on September 6, and produced a receipt for the purchase-money bearing that date. The surveyor asked him whether the receipt was given at the time of the sale, and he said it was not, but a few days after. On being pressed, he swore positively that it was given him before September 12. It was objected that the materiality of the question as stated in the indictment had not been shewn; that the material question was, whether the dog was the defendant's or H.'s on November 24, the day of the coursing. It had not been disproved that there had been a sale of the dog on September 6, and if there was, the time of giving the receipt, or even the fact of any receipt having been given, was immaterial. The objection was overruled, and on a case reserved, Abinger, C.B., said: 'The whole matter turned on the credit of the witness, and he tries to support his credit by false evidence. The receipt is to confirm his evidence, and he swears it was given before the 12th. If that were true, the proof would be decisive.' Williams, J.: 'The time when this receipt was given is a step in the proof.' Denman, C.J.: 'Everything is material which affects the credit of the witness.' Abinger, C.B.: 'Every question in cross-examination which goes to the credit of the witness is material. If a witness were asked, in cross-examination, whether he was in such a place at such a time, and he denied it, that would be material if it went to his credit. In the present case, if they could not have contradicted the prisoner by the date of the stamp, the receipt confirming his evidence would have made out the case before the commissioners' (*n*).

In R. *v.* Gibbon (*o*), the prisoner was indicted for falsely swearing on the hearing of an application in bastardy, that he had had connection with the mother of the child. The mother in support of the application had made a deposition before the magistrates, and she was then cross-examined as to whether she had not had connection with the prisoner, and she denied it. The prisoner swore that he had had connection with her as imputed by the question put to her. It was objected that the

(*m*) R. *v.* Baker [1895], 1 Q.B. 797.

(*n*) R. *v.* Overton [1842], C. & M. 655. See also R. *v.* Lavey [1850], 3 C. & K. 26, *post*, p. 474.

(*o*) L. & C. 109; 31 L. J. M. C. 98. Cf. R. *v.* Tyson, L. R. 1 C. C. R. 107. As to statements tending to render more credible a material allegation.

evidence given by the prisoner was not material to the issue raised on the application for the affiliation order, as the question put to the mother as to her having had connection with the prisoner merely went to affect her credit, and her answer to it ought to have been regarded as conclusive, and the evidence given by the prisoner was inadmissible. But, on a case reserved, it was held that the prisoner was liable to be convicted. 'It is now clearly established that a cross-examination going to a witness's credit is material, and that perjury may be assigned upon it' (*p*). Here, therefore, the mother might have been indicted if she had sworn falsely on cross-examination upon this matter. 'Although it did not refer to the main issue, which was the paternity of the child, it had a bearing upon what was indirectly in issue; namely, how far the complainant was deserving of credit' (*q*). 'Then, as the question only affected her credit, as soon as she had answered it, all should have been bound by her answer. This is an established rule of our law. Notwithstanding that, the magistrates admitted the evidence of the prisoner, which legally was inadmissible. Then, although not legally admissible, yet, being admitted, it had a reference to what was indirectly in issue,—the credibility of the complainant. The evidence having been admitted, although wrongly, R. *v.* Phillpotts (*r*) is an authority directly in point that perjury may be assigned upon it. Although the evidence was open to objection, yet it does not lie in the witness's mouth to say that it was not a question on which he was bound to speak the truth' (*s*).

Is Materiality for Judge or Jury?—There are conflicting decisions on the question whether materiality is for the judge or for the jury.

In R. *v.* Lavey (*t*), the indictment alleged that the defendant, as

(*p*) L. & C. 109, Crompton, J.

(*q*) Ibid. Cockburn, C.J.

(*r*) *Ante*, pp. 467–9.

(*s*) By eleven judges, Crompton, J., and Martin, B., doubting. It was stated in the argument that the child was a full-grown child. The cases where it has been held on a trial for rape that the woman may be proved to have had connection with other men, were distinguished by Williams, J., on the ground that 'the character of the prosecutrix in those cases may be so mixed up with the facts as to be material, not only to her credit, but to the cause.' By counsel for the prosecution they were distinguished on the ground that voluntary intercourse with others was very material on the question whether she consented; and this distinction was not denied by any judge. The cases where in an action for seduction such evidence has been held admissible, were distinguished on the ground that such evidence affected the damages. But although Alderson, B., in Verry *v.* Watkins, 7 C. & P. 308, left such evidence to the jury in mitigation of damages, he first left the question to them whether the defendant was the father of the child, and my recollection of the case (in which I was counsel for the defendant) is that the evidence was given chiefly with a view to that question. And in Grinnell *v.* Wells, Gloucester Spr. and Sum. Ass., 1843, the mother on the first trial swore to connection with the defendant on one occasion only; and on the second trial, before Williams, J., evidence of an *alibi* was given, and also evidence that the mother had had connection with others at such a time that one of them might have been the father of the child; and this evidence was given only with a view to the paternity of the child. The new trial had been obtained on the affidavit (amongst others) of the defendant expressly negativing any connection with the mother. C. S. G. In R. *v.* Murray [1858], 1 F. & F. 80, B. had been charged before justices with robbery in a railway carriage. He had cross-examined the prosecutor as to whether he had been in company with B. and M. in Manchester on the previous day, and then called M., who swore that the prosecutor had accosted him while in company with B., and proposed that he should assist him in breaking into his uncle's house. Martin, B., after consulting Byles, J., held this to be evidence. On this case being cited in R. *v.* Gibbon, Martin, B., said, 'that case should not be looked upon as any authority. It was only my impression of what was material formed hastily on circuit.'

(*t*) [1850] 3 C. & K. 26.

executrix of her husband, was plaintiff in a County Court action, and that she falsely swore that she had never been tried at the Central Criminal Court for any offence, and had never been in custody at the Thames police station. It was proved that she had been in custody at the station, and had been tried at the Central Criminal Court, and acquitted by the direction of the judge. The County Court action was for goods sold by the testator, and was heard by the judge without a jury, and the evidence in question was given by the plaintiff during her cross-examination. It was objected that the evidence given by the defendant was not material on the question whether the testator in his lifetime sold the goods for which the action was brought; and as the trial in the County Court was before a judge, and not before a jury, it did not weigh as to the result of that trial whether she had been tried or not; and since giving a true answer that she had been acquitted by the direction of the judge would have equally cleared her character, it could not have been material that she denied having been taken into custody and tried on that charge. Campbell, C.J., said: 'I think that there is evidence of materiality,' and left that question to the jury, directing them to consider whether her evidence on the two points in question might not influence the mind of the County Court judge in believing or disbelieving the other statements she made in giving her evidence (*u*).

In R. *v.* Courtney (*v*), where on an indictment for perjury before a coroner a question was raised as to the materiality of the matter sworn, and that question was left to the jury, who convicted; it was held, in Ireland, that the matter was material: and all the judges except one (*w*), after fully considering the preceding case, expressed a very strong opinion that it was for the judge to determine whether the matter was material or not.

In R. *v.* Goddard (*x*), the indictment alleged that on the hearing of an application for an order in bastardy, it became material to inquire whether the prisoner had ever kissed the prosecutrix or had familiarity with her. The prisoner, being examined in answer to the evidence given by the prosecutrix, swore that he never had any connection or familiarity with her, and never kissed her. It was objected that the evidence was not material, as it was far too wide in the form in which it was given. Wightman, J., consulted Erle, C.J., and declined to stop the case, and after pointing out the necessity for two witnesses to prove the falsehood of the prisoner's evidence, told the jury: 'Then the question arises whether the parts of his evidence which are assigned as perjury were material to the investigation. It seems to me that they were so, but that is for you. Were they material and wilfully false?' These decisions appear to be

(*u*) In every previous case materiality has been treated as a question of law, and it is submitted that it is clearly so; otherwise all the cases in which it has been held that an averment of materiality is unnecessary where the materiality appears on the face of the indictment, are erroneous.

(*v*) 7 Cox, 111; 5 Ir. C. L. Rep. 434.

(*w*) Ball, J., doubted. It is to be observed that in this case all the judges held the evidence to be material; they did, therefore, treat the question as a matter of law. If they had held it to be a question for the jury, the question would have been whether the evidence warranted the verdict. See this case more fully stated, *ante*, p. 471.

(*x*) [1861] 2 F. & F. 361. No authorities were cited.

in conflict with R. *v.* Gibbon (*y*). Channell, B., on that case said he never could understand R. *v.* Lavey, 'unless on the ground that there was a question whether the defendant in the County Court action meant to plead or admit the claim. That point having been ascertained, the question of materiality was no longer for the jury.'

Deliberation.—The false evidence must be given *wilfully*, *i.e.*, with some degree of deliberation. It cannot be regarded as wilful or corrupt perjury if given through surprise or inattention or mistake (*z*). And upon a trial for perjury it is necessary to shew that the prisoner's attention has been sufficiently drawn to the exact question put to him (*a*), and that the matter deposed to was then *known* to be false, or *not known* to be *true*.

It does not matter whether the fact deposed to is in itself true or false; even if the thing sworn may happen to be true, yet, if it were not known to be so by him who swears to it, his offence is as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition which any stranger might make as well as he (*b*).

Nor does it matter whether the falsity relates to something which the witness swore he saw or heard or did, or to what he swore he thought, or knew or remembered, or believed. It is certainly true that a man may be indicted for swearing that he believes a fact to be true which he must know to be false (*c*). In R. *v.* Schlesinger (*d*), an indictment for perjury alleged that the defendant swore that he *thought* that certain words written in red ink were not his writing; whereas the defendant, when he so deposed, *thought* that the said words were his writing; and it was held that the assignment was sufficient. If a witness swears that he thought a certain fact took place, it may be difficult indeed to shew that he committed wilful perjury. But it is certainly possible, and the averment is as properly a subject of perjury as any other.

In R. *v.* Stolady (*e*), the prisoner was indicted for perjury on the hearing of an information against B. for trespassing in pursuit of game. The occupier of the land and two of his men swore that they saw B. on the land on a particular Sunday morning. The prisoner was called by B. as a witness, and swore that B. lodged with him, and that he never was absent from his lodgings on any Sunday morning during the whole time that they lodged together, which included the Sunday on which

(*y*) L. & C. 109, *ante*, p. 473.

(*z*) 1 Hawk. c. 69, s. 2.

(*a*) See R. *v.* Mawbey, 6 T. R. 619.

(*b*) 1 Hawk. c. 69, s. 6. R. *v.* Edwards, *cor.* Adams, B., Shrewsbury Lent Ass. 1764; and subsequently considered by the judges, MS. And see R. *v.* Mawbey, 6 T. R. 619, Lawrence, J. 2 Rolle Abr. 'Indictment' (E.) pl. 5, p. 77. Allen *v.* Westley, Hetley, 97. Gurney's case, 3 Co. Inst. 166. See R. *v.* Newton, 1 C. & K. 469, for a count framed to meet such a case.

(*c*) R. *v.* Pedley, 1 Leach, 325, Lord Mansfield. All the judges are said to have expressed a like opinion in Anon. [1780], 1 Hawk. c. 69, s. 7, note (*a*); and De Grey, C.J., so ruled in R. *v.* Miller, 3 Wils. K.B. 427; 2 W. Bl. 881. The opinion expressed by Coke that perjury cannot be assigned on an oath as to opinion, recollection or belief (3 Inst. 166) must, therefore, be regarded as erroneous. But perjury could hardly be assigned on an opinion on such a matter as the construction of a deed. See R. *v.* Crespigny, 1 Esp. 280, Kenyon, C.J.

(*d*) 10 Q.B. 670. 17 L. J. M. C. 29.

(*e*) 1 F. & F. 518.

the alleged offence was committed. Pollock, C.B., was of opinion that the attention of the prisoner ought to have been called to the particular day on which the transaction took place as to which he was asked to speak; and that a general allegation, such as had been made in this case, including all Sundays between two fixed dates, was not sufficiently precise upon which to found an indictment for perjury, and directed an acquittal (*f*).

In R. *v.* London (*g*), the indictment charged that prisoner (on the trial of a plaint in the County Court for the price of coals obtained on credit at different times, in which it was a material question whether or not the prisoner had received any coals on credit from P., either on account of himself or A.), swore 'that he had never received any coals on credit from P., either on account of himself or A.' Held, that the allegation in the indictment was not too general, although no specific instance was averred in which the prisoner had received coals on credit from P. At the trial the prisoner was asked three or four times by the advocate and judge whether he did at any time, either on his own account or that of A., have any coals on credit from P., to which the prisoner always answered, 'I did not.' It was held, that the prisoner's attention was sufficiently called to the subject so as to found a charge of perjury upon the answer, although no distinct transactions on credit were suggested to him during his examination (*h*).

Corrupt Motive.—Perjury is always charged as having been committed 'corruptly,' as well as 'wilfully.' The word 'corruptly,' even if it be not essential at common law (*hh*), is inserted in indictments to justify the statutory punishments provided for wilful and corrupt perjury (*i*).

The corrupt motive may be inferred by the jury from the circumstances

(*f*) 'This case is very unsatisfactorily reported; no date is given, or anything more than is above stated. As the proof of the offence was on "*a particular* Sunday morning," the prisoner, if present, *must* have had his attention drawn to that particular date; and, if absent, still the date would have been known to B. from the summons, and, as he called the prisoner as his witness, he no doubt had communicated the day to him, so that the ground of the decision really did not exist. But supposing the decision to be as reported, it is very confidently submitted that it is erroneous. Suppose a man called to prove an *alibi* swears that he and the prisoner were in Paris during all the month in which the offence was committed, can it be the law that he is not guilty of perjury because he is not asked as to the particular day? If a man swears that he was not absent from church on any Sunday in January, is not that as precise a swearing as to each and every Sunday as if he were asked as to each in succession? An information, which charges the defendant with killing ten deer between July 1 and Sept. 10, without shewing the particular days on which they were killed, is good. R. *v.* Chandler, 1 Ld. Raym. 581. And where, on a similar information, the evidence was that the defendant did, within such a time and such a time, steal a deer, so that the time was left as uncertain in the evidence as in the information, it was held sufficient. R. *v.* Simpson, 10 Mod. 248.' C. S. G.

(*g*) 12 Cox, 50 (C. C. R.).

(*h*) Bovill, C.J., said: 'We are all of opinion that this conviction was good. The first question is upon the form of the indictment, that is sufficient in our opinion. The second point is whether the attention of the prisoner was sufficiently called to the transaction he was being questioned about, and we are all of opinion it was amply called to it, even if the second point had been reserved for us.' Willes, J., said: 'We do not intend to overrule what Pollock, C.B., said, "that the attention of a witness ought to be called to the point upon which his answer is supposed to be erroneous, before a charge for perjury can be founded upon it." Mr. Greaves in the 4th edition of Russell on Crimes, makes some observations on R. *v.* Stolady, which are in accordance with the judgment of the Lord Chief Justice.'

(*hh*) It is used in 32 Hen. VIII. c. 9, s. 3; 5 Eliz. c. 9, s. 2, *post*, p. 525.

(*i*) See *post*, p. 479.

of the case (*j*), and in order to shew that the accused swore wilfully and corruptly what was not true, evidence may be given of expressions of malice used by the defendant towards the person against whom he gave the false evidence (*k*).

Where an indictment for perjury alleged that the prisoner '*feloniously*' swore to the matter on which the perjury was assigned instead of 'falsely,' it was held that the indictment was bad in substance, and that the words 'corruptly, knowingly, wilfully, and maliciously,' did not supply the defect: a man might swear 'corruptly' under some corrupt influence and yet swear the truth; so with respect to the word 'knowingly'; and he might swear 'wilfully and maliciously' to gratify some malicious feeling, but yet it might not be 'falsely.' Nor did the conclusion that the prisoner 'in manner and form aforesaid did commit wilful and corrupt perjury' cure the defect; for the meaning of that was, that the prisoner committed the offence in the manner stated, and, that statement being defective, the indictment was bad (*l*).

Trial.

Perjury is now tried only on indictment or criminal information, except in those cases in which a child of tender years allowed to give unsworn evidence may be summarily convicted (*vide ante*, p. 457).

In one old case, where a person made an affidavit in the Court of Common Pleas, and afterwards, being summoned to appear in Court, came there, and confessed it to be false, the Court recorded his confession, and ordered that he should be taken into custody, and put in the pillory. In answer to the objections of the defendant's counsel to this proceeding, it was argued that it was fully justified under 5 Eliz. c. 9, and that even if the Court could not punish the defendant by virtue of that statute, he might be punished at common law, on the ground that any Court might punish such a criminal for an offence committed *in facie curiae* (*m*). This ruling appears to treat perjury or prevarication as a form of contempt of Court (*n*).

Courts of Quarter Sessions had no jurisdiction to *try* common law perjury (*o*). They were given jurisdiction by 5 Eliz. c. 9 (*post*, p. 525). But by the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 1, Courts of Quarter Sessions have no jurisdiction to try 'any person or persons for . . . perjury or subornation of perjury'; or 'making or suborning any other person to make a false oath, affirmation, or declaration punishable as perjury, or as a misdemeanor' (*p*).

(*j*) R. *v.* Knill, 5 B. & Ald. 929n.

(*k*) R. *v.* Munton, 3 C. & P. 498, Tenterden, C.J. In this case the evidence seems to have been admitted without objection. See also 1 Hawk. c. 69, s. 2. R. *v.* Melling, 5 Mod. 349. R. *v.* Muscot, 10 Mod. 192.

(*l*) R. *v.* Oxley, 3 C. & K. 317, Cresswell, J., after consulting Alderson, B.

(*m*) R. *v.* Thorogood, 8 Mod. 179. Bushell's case, Vaughan, 152, was cited.

(*n*) See Oswald on Contempts (2nd ed.). Chang Hang Kiu *v.* Piggott [1909], A. C. 313.

(*o*) R. *v.* Bainton, 2 Str. 1088. R. *v.* Westiness, id. ibid. 1 Chit. Cr. L. 301. In R. *v.* Haynes, Ry. & M. 298, Gaselee, J., refused to try an indictment for perjury found at quarter sessions, and removed by *certiorari* into the King's Bench for trial at *nisi prius*, on the ground that the indictment was void, having been found before a Court which had no jurisdiction over perjury at common law. See also R. *v.* Rigby, 8 C. & P. 770.

(*p*) It is to be observed that the word 'try' is used, and under this Act it would seem possible for the grand jury at quarter sessions to find an indictment for perjury but for the provisions of the Vexatious Indictments Act, which in effect ensure committal of charges of perjury to a court of assize

It is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil suit while that suit is in any way undetermined, except in cases in which the Court, where the suit is pending, postpones the decision of it in order that the criminal charge might first be disposed of (*q*).

Where two justices refused to hold a preliminary inquiry into a charge of perjury alleged to have been committed in a suit in the Ecclesiastical Court, on the ground that that suit was still pending, a mandamus to compel them to hear the charge was refused, and it seems to have been considered that the course the justices had taken was the most likely to answer the ends of justice (*r*).

Punishment.

The punishment of wilful perjury by a witness is at common law (*s*) fine and (or) imprisonment without hard labour. The amount of the fine and the term of imprisonment are in the discretion of the Court (*t*). By the Hard Labour Act, 1822 (3 Geo. IV. c. 114) (*u*), the imprisonment may be with hard labour. The Court may also adjudge the defendant to give surety to keep the peace and be of good behaviour for a reasonable time, to be computed from and after the expiration of the term of his imprisonment, himself in a sum named in such judgment, with two sufficient sureties, each in a sum therein also mentioned, and may adjudge the defendant to be further imprisoned until such security be given; and such sentence does not amount to perpetual imprisonment, as in default of sureties being given the defendant would be entitled to be discharged at the expiration of the term during which the sureties were required (*v*).

By the Perjury Act, 1728 (2 Geo. II. c. 25), s. 2, in order the more effectually to deter persons from committing *wilful and corrupt* perjury, or subornation of perjury, it is enacted, 'that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county for a time not exceeding seven years (*w*), there to be kept to hard labour (*x*) during all the said time, or otherwise to be transported to some of His Majesty's plantations

(*q*) See R. *v.* Ashburn and R. *v.* Simmons, 8 C. & P. 50.

(*r*) R. *v.* Ingham, 14 Q.B. 396.

(*s*) As to the punishment under the Statute of Elizabeth, see *post*, p. 526. As to former punishments, see 4 Bl. Com. 138.

(*t*) 4 Bl. Com. 138. R. *v.* Nueys and Galey, 1 W. Bl. 416. R. *v.* Lookup, 3 Burr. 1901. In this last case the form of the sentence was that the defendant 'should be set in and upon the pillory at Charing Cross, for an hour between the hours of twelve and two; and that he should afterwards be transported to some of His Majesty's colonies or plantations in America, for the space of seven years (2 Geo. II. c. 25, s. 2, *infra*); and be now remanded to the custody of the marshal, to be kept by him in safe custody, in execution of the judgment aforesaid, and until he shall be transported as aforesaid.' The pillory is abolished, *vide ante*, p. 250.

(*u*) *Ante*, p. 212.

(*v*) R. *v.* Dunn, 12 Q.B. 1026, decided on the authority of R. *v.* Hart, 30 St. Tr. 1131, 1194, 1344, where the judges, in answer to a question from the House of Lords, delivered their unanimous opinion that in all cases of misdemeanor the Court might give sentence in that form.

(*w*) It is submitted that this term is reduced to two years by 54 & 55 Vict. c. 69, s. 1, *ante*, p. 212.

(*x*) See 3 Geo. IV. c. 114, *ante*, p. 212.

beyond the seas, for a term not exceeding seven years (*y*), as the Court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being (*z*); and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons.' The section goes on to provide that 'if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon (*a*), without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.'

The old law (*b*) disqualifying a person convicted of perjury from giving evidence was abrogated by the Evidence Act, 1843 (6 & 7 Vict. c. 85, s. 1). 2 Geo. II. c. 25, s. 2, applies to false oaths punishable as perjury taken in a manner authorised by subsequent statutes (*c*), and under it successive sentences of seven years penal servitude may be imposed on conviction on two or more counts charging perjury by the defendant on different occasions, although in each case with the same object (*d*).

The first count of an indictment assigned perjury on an affidavit of the defendant, which alleged that the defendant did not retain or employ W. U. to act as attorney for him and J. I., or for either of them, in and about the business mentioned in the said W. U.'s bill of costs; and that he, the defendant, never retained or employed the said W. U. to act as attorney or agent for him in any cause or manner whatever. The second count assigned perjury on the statement in the affidavit as follows: 'that he the said defendant did not retain or employ (meaning that he the defendant did not alone, or jointly with the said J. I., retain or employ) W. U. to act as attorney for him and J. I.' The third count was the same as the first, and the fourth as the second. The plea was, not guilty of the premises in the indictment specified. The *venire* was 'to recognise whether the defendant be guilty of the perjury and misdemeanor aforesaid, or not guilty.' The verdict was that the defendant 'is guilty of the perjury and misdemeanor aforesaid,' and the judgment that the defendant 'be imprisoned and kept to hard labour for ten calendar months.' It was urged that the *venire*, the verdict and judgment, were uncertain for not shewing to which of the counts they referred: that they were in the singular number, speaking of 'the perjury and

(*y*) Now penal servitude from three to seven years (54 & 55 Vict. c. 69, s. 1, *ante*, p. 211). As to the proper form of a judgment of transportation while it was in force, see R. *v.* Kenworthy, 1 B. & C. 711, R. *v.* Lookup, 3 Burr. 1901.

(*z*) It is not imperative upon the Court to award any punishment previous to, or additional to, that of penal servitude. Castro *v.* R., 6 A.C. 229.

(*a*) This death penalty has not been expressly repealed. But so far as concerns transportation, the clause seems to be superseded by 5 Geo. IV. c. 84, s. 22, and the death penalty under that section was repealed in 1834 (5 & 6 Will. IV. c. 67), in terms which seem wide enough to cover the above clause.

(*b*) Gilb. Ev. 126. Bull. (N. P.) 291. 4 Bl. Com. 138. 2 Hawk. c. 46, s. 101. And see 5 Eliz. c. 9, s. 2, *post*, p. 526.

(*c*) R. *v.* Castro, L. R. 9 Q.B. 350.

(*d*) Castro *v.* R., 6 A.C. 229.

misdemeanor aforesaid,' and that this could only mean one perjury and misdemeanor; and that as four were alleged in the indictment, it was uncertain which of them the jury was summoned to try, and of which of them the defendant was found guilty; but the Courts of Queen's Bench and Exchequer Chamber held that 'misdemeanor' was *nomen collectivum*, and meant 'the misconduct aforesaid,' and that consequently the *venire* applied to all the counts of the indictment, and the defendant had been found guilty by the verdict on all the counts (*e*).

Where on an indictment for perjury containing several counts the judgment was 'that the prisoner for the offence charged upon him in and by each and every count be imprisoned for the space of eight calendar months now next ensuing'; it was held by the Court of Exchequer Chamber that the judgment was good, on the ground that it meant that the prisoner was to be imprisoned for the same period of eight months for each offence (*f*).

Ordering Prosecution.—By the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 19, 'it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of His Majesty's justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder, or deputy recorder, chairman, or other judge holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court, or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit (*g*) such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognisance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognisance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-

(*e*) Ryalls *v.* R., 11 Q.B. 781, approving R. *v.* Powell, 2 B. & Ad. 75.

(*f*) King *v.* R., 14 Q.B. 31.

(*g*) The power of direct committal under this section is not used, and its exercise is obviously inconvenient. See 44 Sol. Jo. 525; 64 J. P. 370. The section extends to Ireland: and see 14 & 15 Vict. c. 57, s. 157 (I).

mentioned court shall specially otherwise direct; and when allowed by any such court in Ireland such sum as shall be so allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid' (*h*).

Form of Indictment.—Besides the general rules of the common and statute law as to criminal pleading, indictments for perjury and cognate offences are subject to the following enactments:—

14 & 15 Vict. c. 100, s. 20. 'In every indictment for perjury, or for unlawfully, wilfully, 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 in equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed' (*i*).

Sect. 21. '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, wilfully, 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, wherever such perjury or other offence aforesaid shall have 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 the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually 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.'

Sect. 22. 'A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or

(*h*) As to costs in England, see 8 Edw. VII. c. 15, *post*, Bk. xii. c. v. Subject to this enactment perjury and subornation are within the Vexatious Indictments Act, *post*, Bk. xii. c. i.

(*i*) This section is almost identical in terms with 23 Geo. II. c. 11, s. 1, except that it omits the words 'averring such Court or persons to have a competent authority to administer the same.' 23 Geo. II. c. 11 was repealed in 1867 (S. L. R.). R. *v.* Dunning, L. R. 1 C. C. R. 290, 292; 40 L. J. M. C. 58, Channell, B. As to the inadequate use made of that enactment, see R. *v.* Dowlin, 5 T. R. 311.

misdemeanor, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall upon the trial of any 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' (*j*).

Several persons cannot be joined in one indictment for perjury, the crime being in its nature several (*k*).

Venue.—In an indictment for perjury the marginal venue is sufficient (*l*) and it is enough to shew the offence committed anywhere within the county, without naming the parish or place where the false oath was taken. Where perjury had been committed in the booth-hall within the limits of the city of Gloucester, which is a county of itself, on the trial of a cause before a jury of the county at large, it was held that the indictment might be found and tried by juries of the county at large (*m*). And where perjury had been committed on the trial of an indictment at the Worcester quarter sessions, which were held in the Guildhall at Worcester, which is situate in the county of the city of Worcester, it was held that the indictment, which was found by the grand jury of the county of the city of Worcester, was good, as it was preferred in the county where the oath was actually taken (*n*). Where perjury was assigned on an affidavit of an attorney of the Court made in answer to a summary application against him, it was objected that it was not stated where the Court was held when the original application was made, or when the rule was made, calling upon the defendant to answer the charge. But the venue was held to have been sufficiently stated, it being expressly averred that the defendant '*then* and there before the said Court was duly sworn' (*o*). In the case of an affidavit sworn in the country the party at common law could not be indicted where the affidavit is used, but only where the offence was completed by making the false oath (*p*). But in the case of affidavits sworn under the Commissioners of Oaths Act, 1889, the deponent may be indicted in any county or place in the United Kingdom in which he was apprehended or is in custody (*q*).

(*j*) The complete record would be equally good evidence; but production of the indictment alone has been held insufficient. R. *v.* Coles, 16 Cox, 165, Stephen, J.

(*k*) R. *v.* Philips, 2 Str. 921. 'In R. *v.* Goodfellow, C. & M. 569, one defendant was indicted for perjury, and the other for suborning him to commit the perjury, and no objection was taken to both being included in the same indictment; and it would seem none could have been successfully taken on that ground, as it is like the case of principal and accessory before the fact, included in the same indictment.' C. S. G. *Vide post*, p. 527.

(*l*) 14 & 15 Vict. c. 100, s. 23. See R. *v.* Harris, 2 Leach, 800. R. *v.* Woodward, 1 Mood. 323. Allegations of place should be made when they are material. R. *v.* Aylett, 1 T. R. 64, 69, Lord Mansfield.

(*m*) R. *v.* Gough, 2 Dougl. 791. In this case a charter had made Gloucester a county of itself, reserving only the trial of matters arising in the county at large within Gloucester as before. The judges intimated their opinions that the indictment might be in either county, but they were clear it might be in the county at large.

(*n*) R. *v.* Jones, 6 C. & P. 137, Tindal, C.J. See the Counties of Cities Acts, *ante*, p. 25.

(*o*) R. *v.* Crossley, 7 T. R. 315.

(*p*) Same case, Kenyon, C.J.

(*q*) 52 & 53 Vict. c. 10, s. 9.

Time.—The indictment need not state the time at which the offence was committed unless the time is of the essence of the offence (*r*), and if averred where it is not material, it may be rejected (*s*). Where an indictment for perjury, charged to have been committed in the defendant's answer to a bill of discovery filed in the Court of Exchequer, alleged that the bill was filed on a day specified, it was held that the day was not material, as it was not alleged as part of the record (*t*). Where perjury was assigned on an answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term, by order of the Court, it was held that the amended bill was part of the original bill (*u*). On an indictment for perjury committed on the trial of a cause at *nisi prius* which contained no express reference to the record, it was held immaterial that the *nisi prius* record stated the trial to have been on a day different from that stated in the indictment (*v*).

Description of Court.—It is necessary to aver by what Court or before whom the oath was taken, but unnecessary to set forth the commission or authority of the Court or person (*w*). The description of the Court should, of course, be accurate, especially if it is a Court of limited jurisdiction; but may be amended if there is a variance between the statement and the evidence as to something not material to the merits of the case (*x*). The enactments mentioned above have lessened, if not destroyed, the authority of the cases in which certain variances have been held fatal, *e.g.*, where the indictment charged perjury before justices assigned to take the assizes (*y*), and the evidence shewed that the judge was sitting under the Commission of Oyer and Terminer, and Gaol Delivery (*z*), or where the indictment charged perjury at the assizes and general sessions of Oyer and Terminer, and the evidence proved the oath to have been taken on the Crown side, and not on the civil side (*a*).

(*r*) 14 & 15 Vict. c. 100, s. 24. In R. *v.* Aylett, T. R. 64, 69, Lord Mansfield said: 'There must be an allegation of time and place, which are sometimes material and necessary, sometimes not.'

(*s*) R. *v.* Aylett, 1 T. R. 70, 71.

(*t*) R. *v.* Hucks, 1 Stark. (N.P.) 521, Ellenborough, C.J. And see Rastall *v.* Straton, 1 H. Bl. 49. Woodford *v.* Ashley, 2 Camp. 193, and 1 Stark. Cr. Pl. 122.

(*u*) R. *v.* Waller [1719], 3 Stark. Evid. 856.

(*v*) R. *v.* Coppard, M. & M. 118. 3 C. & P. 59, Tenterden, C.J., on the authority of Purcell *v.* Macnamara, 9 East, 157. It is no longer necessary, and is not now the practice, to use the words 'as appears by the record.' 14 & 15 Vict. c. 100, s. 24.

(*w*) 14 & 15 Vict. c. 100, s. 20, *ante*, p. 482.

(*x*) 14 & 15 Vict. c. 100, s. 1. In R. *v.* Child [1851], 5 Cox, 197, the indictment alleged perjury at [the assizes and] general sessions of the delivery of the gaol. Talfourd, J., ordered the words in brackets to be struck out to make the indictment correspond with the record of the former trial. In R. *v.* Western, L. R. 1 C. C. R. 122, the Court held that the indictment could be amended by substituting the description of the court of justices for a borough instead of justices for a county. The justices were named in the indictment.

(*y*) As to present definition of 'assizes,' *vide ante*, p. 3.

(*z*) R. *v.* Lincoln, R. & R. 421, MS. Bayley, J.

(*a*) See the precedents, 2 Chit. Cr. L. 366, 367 (*a*), of indictments for perjury on the trial of causes at the assizes, which are in the form of this indictment; though, according to 3 Bl. Com. 60, the commission of assize is to take the verdict of a peculiar species of jury, called an assize. Blackstone also speaks of a commission of assize being issued each circuit; but no such commission is now issued, and the cases tried on the civil side are tried under the commission of assize. And this is according to what Lord Holt said (Bullock *v.* Parsons, 2 Salk. 454): 'The authority of the judge of *nisi prius* is not by the *distringas*, but by the commission of assize; for it is

An indictment for perjury may state the trial to have taken place before the judge, who in fact tried the case, or before the judges before whom it is considered in point of law to have taken place (*b*).

An indictment alleged that an issue was tried before the sheriff of the county of Durham, by virtue of a writ to him directed, and that upon the trial of that issue the prisoner was duly sworn before the said sheriff. By the writ of trial, return, and the record, the issue did appear to have been tried before the sheriff; but by the parol evidence it appeared that the issue was not tried before the sheriff or under-sheriff, and that neither of them was present, but that it was in fact tried before S., who was stated to be the deputy of the high-sheriff; but no appointment of S. was put in, nor was his office more particularly described. Wightman, J., upon being informed that it was the invariable practice when writs of trial were directed to the sheriff, to make up the record as if the trial had been before him, though in fact it was before some deputy, allowed the trial to proceed, and the prisoner was convicted; and, upon a case reserved, the majority of the judges held that the conviction was right (*c*).

Description of the Proceedings.—It is not necessary to set forth in detail any part of the proceedings in which the false oath is said to have been taken (*d*). It is enough to aver that there was a certain cause, &c., and that it came on to be tried in due form of law (*e*); and even before 1851 it was sufficient to recite the substance and not the tenor of the record of the former proceeding (*f*).

An indictment for perjury, alleged to have been committed before a Court of Quarter Sessions, averred in substance that a certain indictment

13 Edw. I. c. 30 which gives the trial by *nisi prius*, and by that statute the trial by *nisi prius* is given before justices of assize.' It is clear, therefore, that where perjury is committed either on a civil or criminal trial at *nisi prius* on circuit the trial ought to be alleged to have taken place before the justices assigned to take the assizes. C. S. G. In R. *v.* Fairburn (Stafford Summer Assizes, 1850, MSS. C. S. G.) the indictment charged perjury before justices assigned to take the assizes. The record proved that the former trial had taken place at the assizes and general sessions of oyer and terminer. Greaves, Q.C., ruled that this was not a fatal variance, as the indictment for rape might have been removed by *certiorari* and tried on the civil side. But the record went on to say that the trial was in the Crown Court, which was held fatal, and not amendable under 9 Geo. IV. c. 15, now superseded and extended by 14 & 15 Vict. c. 100, s. 1. As to the proper mode of describing the tribunal on indictments for perjury in a county court or before a committee of Parliament, see Lavey *v.* R., 2 Den. 504: 3 C. & K. 26. R. *v* Dunn, 12 Q.B. 1026. As to describing a common-law county court, see Jones *v.* Jones, 5 M. & W. 523. R. *v.* Fellows, 1 C. & K. 115.

(*b*) R. *v.* Alford, 1 Leach, 150. The indictment was for perjury at the assizes (civil side). Two judges were named in the commission and in the caption of the indictment. The point was reserved and decided as stated in the text. Cf. R. *v.* Coppard, M. & M. 148, which turned on the now obsolete practice as to trials in sittings after term in London; and R. *v.* Deman, 2 Ld. Raym. 1221.

(*c*) R. *v.* Dunn, 2 Mood. 297, followed in R. *v.* Schlesinger, 10 Q.B. 670. In R. *v.* Child, 5 Cox, 197, the indictment alleged a trial for felony before the judges named in a commission of oyer and terminer, &c. It had, in fact, taken place before Greaves, Q.C., in the grand jury room. Mr. Greaves was a J.P. for the county in which the assizes were held. Talfourd, J., expressed a doubt whether his authority to try the case sufficiently appeared in the indictment.

(*d*) 14 & 15 Vict. c. 100, s. 20, *ante*, p. 482.

(*e*) R. *v.* Dowlin, 5 T. R. 311, 320. R. *v.* Dunning, L. R. 1 C. C. R. 290, 293.

(*f*) May's case, Buller, J., 1799. He cited R. *v.* Beech, 1 Leach, 133 (a case of mis-spelling). See R. *v.* Spencer, 1 C. & P. 260; Ry. & M. 97. Doubts on words in a record are for the Court to settle. R. *v.* Hucks, 1 Stark. (N. P.) 521, Ellenborough, L.C.J.

for misdemeanor (*g*), &c., came on to be tried in due form of law, and was tried by a jury duly sworn, and the prisoner, as a witness on the trial, was duly sworn, and contained the other usual averments and conclusion. It did not state the nature of the misdemeanor, or aver that the Court of Quarter Sessions had authority to try the same or administer an oath on the trial. It was held, that the substance of the offence charged against the defendant was sufficiently stated under this enactment, and that the indictment was good on motion in arrest of judgment (*h*).

But enough should be stated to shew that the proceeding in or for which the oath was sworn was judicial, and the oath not a voluntary oath (*i*). Most of the older authorities (*j*) on this subject may be disregarded, as superseded by the provisions of the Criminal Procedure Act, 1851, and the power of amendment by that Act given.

Where an indictment for perjury alleged that a certain issue in a plea of debt came on to be tried, and that upon the trial of the said issue so joined between the parties, certain questions became material, &c., but by the record it appeared that three issues had been joined on three pleas: it was objected that it was impossible to know to which of them the averment of materiality referred; but Erle, J., held that 'issue' was *nomen collectivum*, and overruled the objection (*k*).

In R. *v.* Pearson (*l*), it was held insufficient to aver that P. went before two justices and deposed to assault on him and the taking of a £5 note from him by M., without stating that there was any proceeding pending before the justices, or that the deposition was taken in support of a charge of crime, on the ground that the statement made was consistent with P. having merely made a voluntary affidavit, where there was no charge and no prosecution and no cause in hand (*m*). But in R. *v.* Bradley (*n*), Coleridge, J., said that considerable doubts had been raised in R. *v.* Gardiner (*o*) whether R. *v.* Pearson was rightly decided.

Jurisdiction of the Court.—Before 1851 it was necessary expressly to allege, or clearly to indicate in the indictment, that the Court or person before whom the oath was taken had authority to administer the oath for the purpose of the proceeding in which it was taken. Under 14 & 15 Vict.

(*g*) It is expedient to specify the nature of the offence to which the first trial related. Where the indictment charged perjury on the hearing of a charge of feloniously receiving stolen silk, and the evidence shewed that the charge was for having possession of silk suspected to have been purloined or embezzled (17 Geo. III. c. 56), Patteson, J., held that the indictment was not proved. R. *v.* Goodfellow, C. & M. 569.

(*h*) R. *v.* Dunning, L. R. 1 C. C. R. 290. As to curing by proof defects in statement of the adjournment of a Court of Quarter Sessions, see R. *v.* Bellamy, Ry. & M. 171, Abbott, C.J.

(*i*) R. *v.* Bishop, C. & M. 302. R. *v.* Pearson, 8 C. & P. 119, Coleridge, J., *infra*.

(*j*) See R. *v.* Roper, 6 M. & S. 327; 1 Stark. (N. P.) 518. R. *v.* Benson, 2 Camp. 508. R. *v.* Powell, Ry. & M. 101: where the indictments erroneously stated the names of one or more of the parties to an equity proceeding. R. *v.* Bailey, 7 C. & P. 264 (misdescription of the parties in proceedings in an Ecclesiastical Court). Cf. R. *v.* Peace, 2 B. & Ald. 579.

(*k*) R. *v.* Smith, 1 F. & F. 98.

(*l*) 8 C. & P. 119, Coleridge, J.

(*m*) By 5 & 6 Will. IV. c. 62, s. 13, *ante*, p. 325, justices are prohibited from taking affidavits under such circumstances.

(*n*) [1844] Stafford Spring Assizes, MSS. C. S. G.

(*o*) 2 Mood. 95; 8 C. & P. 737. In that case an indictment was held good, which averred 'upon an information and examination, &c.' but did not state directly that a charge was pending. In R. *v.* Crawley, 12 Cox, 163, an indictment for perjury on proceedings before justices in petty sessions, for stealing suet, was held defective because it did not allege felonious taking. *Sed quære.*

c. 100, s. 20, this strictness is relaxed, and the competence of the Court is matter of proof (*p*). It is not necessary to set out the commission or authority of the Court or person (*q*). But where the Court, &c., is of limited jurisdiction (*r*) enough should be stated to shew that its jurisdiction attached (*s*). In the case of an oath taken before justices of the peace, the indictment should specify the justices before whom it was sworn, and for what place and purpose they were acting (*t*).

On an indictment charging the commission of perjury on the hearing of an appeal, before commissioners of assessed taxes, that a notice of appeal had been given to the 'assessors,' whereas, under the relevant statute (43 Geo. III. c. 99), the notice of appeal was to be to the surveyor or commissioners, and the commissioners were to dismiss the appeal unless such notice had been given (s. 25), it was held, that the indictment on the face of it shewed want of jurisdiction to hear the appeal (*u*). In cases of perjury on affidavits before commissioners of oaths, the circumstances under which the oath came to be administered should be stated (*v*).

In R. *v.* Callanan (*w*), an indictment for perjury in an affidavit alleged that the defendant did take his corporal oath before F. J. C. (he the said F. J. C. then and there having sufficient and competent power and authority to administer the said oath to the defendant in that behalf), and that the defendant did before the said F. J. C., as such commissioner as aforesaid, depose, &c. The indictment did not state the cause for or in respect of which the affidavit was made (*w*). It was contended (in arrest of judgment) that the indictment was bad, as it did not describe the official station of the person before whom the defendant was sworn. It was, indeed, stated that he made affidavit of certain matters before F. J. C., as such commissioner as aforesaid; but he had not been before mentioned as a commissioner, and therefore that averment could not cure the defect. Abbott, C.J.: 'Looking at the Act of Parliament, 23 Geo. II. c. 11 (*x*), we find that all that is required to be set out in indictments for perjury is the substance of the offence charged, and by what Court or before whom the oath was taken, averring such Court or

(*p*) R. *v.* Dunning, L. R. 1 C. C. R. 290, 295.

(*q*) 14 & 15 Vict. c. 100, s. 20, *ante*, p. 482.

(*r*) Where a judge has general jurisdiction, he must be taken to have had jurisdiction in the particular case, unless the contrary appears. Ryalls *v.* R. [1851], 11 Q.B. 178. The contrary rulings in R. *v.* Lewis, 12 Cox, 163, and R. *v.* Willis, 12 Cox, 164, seem to be erroneous. In Ryalls *v.* R. the argument turned on the use of the word 'month' in the indictment, in referring to proceedings under s. 37 of the Solicitors Act, 1843, in which the words 'calendar month' are used. At common law month is presumed to mean lunar month. *Vide ante*, p. 3.

(*s*) *e.g.*, that justices were acting for a particular division of a county, when the act in question must be done in that division in petty sessions. R. *v.* Rawlings, 8 C. & P. 439, Parke and Patteson, JJ.

(*t*) R. *v.* Goodfellow, C. & M. 569, where an allegation that G. came before named justices, and exhibited to them an information oath, was held not sufficiently to shew that the oath was sworn before the named justices.

(*u*) Anon., 1 Cox, 50, Patteson, J.

(*v*) R. *v.* Macdonald, 21 Cox, 70, Darling, J.

(*w*) 6 B. & C. 102; 9 D. & Ry. 97. In R. *v.* Macdonald, 21 Cox, 70, Darling, J., held that in the case of perjury assigned on an affidavit before a commissioner of oaths, the circumstances under which the oath was administered should be set out. This ruling seems inconsistent with R. *v.* Callanan and R. *v.* Dunning, L. R. 1 C. C. R. 290, *ante*, p. 486.

(*x*) Superseded by the provisions of 14 & 15 Vict. c. 100, s. 20, *ante*, p. 482, and repealed in 1867 (S. L. R.). As to the general authority to administer oaths, see 14 & 15 Vict. c. 99, s. 16, *ante*, p. 460.

person to have competent authority to administer the same, without setting forth the commission or authority of the Court or person before whom the perjury was committed. It is, therefore, to be considered whether the present indictment has set forth all that is required by the statute. It sets forth the substance of the matter sworn, the person before whom the oath was taken, and avers that he had authority to administer it. The indictment does, therefore, contain all that is required by the words of the statute; and taking into consideration the object of the Act, which was framed to remove the difficulties before felt by reason of the averments and matters which were usually set out in indictments for perjury, we ought not to require more than the words of the legislature have made necessary. When a case of this sort comes on for trial, the prosecutor must prove the situation of the person before whom the oath was taken, and the nature of his authority. I am, therefore, of opinion, that the indictment is sufficient if it contains the name of the person, if the defendant was sworn before a person, or of the Court, if he was sworn before a Court. There is not, then, any reason for granting this application' (*y*).

In Overton *v.* R. (*z*), the indictment stated that at the time of the taking of the false oath by J. O. thereinafter mentioned, R. L., F. D. P., and H. S. G. were commissioners of assessed taxes in and for the district of the hundred of K., in the county of W., and thereupon heretofore, to wit, on, &c., at, &c., in the district and county aforesaid (at a meeting then and there held by the commissioners aforesaid for the purpose of hearing and determining appeals against the certificate of supplementary charges made by one J. L., crown surveyor, in pursuance of the said Acts), a certain appeal of one W. H. of C., in the district and county aforesaid, in due form of law came on to be heard. The indictment then averred that the defendant on, &c., at, &c., appeared before the said commissioners as a witness for and on the behalf of the said W. H., on the hearing of the said appeal, and was then and there sworn, &c., before the said R. L., F. D. P., and H. S. G., so being such commissioners as aforesaid, that the evidence which he the defendant should give upon the hearing of the

(*y*) This case having been much relied upon in Overton *v.* R., *infra*, and the record examined, I have thought it right to insert the following statement of the first count, which I took from the record. The indictment stated that C. C., contriving and intending to injure one T. S., and in order to obtain a rule of the Court of B. R., whereby it might be ordered by the said Court that the said T. S. should shew cause why a certain judgment signed on a warrant of attorney in a cause in the said Court of S. against C., and the execution issued thereon, should not be set aside, and the said warrant of attorney be delivered up to be cancelled, and why the proceeds of the said execution should not be restored to the said C. C., and why the said T. S. should not pay the costs of that application, and that in the meantime the said proceeds should remain in the hands of the sheriff of the county of Middlesex, came in his proper person, &c., on, &c., at, &c., before F. J. Chell, gentleman, and the said defendant then and there, to wit, on, &c., at, &c., was duly sworn, F. J. Chell (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the said C. C. in that behalf), and the said C. C. being so sworn as aforesaid, falsely, &c., did then and there before the said F. J. Chell, as such commissioner as aforesaid, depose, swear, and make affidavit in writing, amongst other things, in substance, &c. The indictment then set out the affidavit: 'all which said several matters and things so deposed and sworn by the said C. C. as aforesaid were, and each of them was material for the obtaining and supporting the said rule.' C. S. G.

(*z*) 4 Q.B. 83: 12 L. J. M. C. 61.

said appeal should be the truth and nothing but the truth (they the said commissioners then and there having authority to administer the said oath, &c.). The indictment then proceeded to aver the materiality, the giving the evidence, &c. The defendant having been convicted, a writ of error was brought, and one of the errors assigned was, that it did not appear that the said appeal was an appeal against such a certificate as in the said indictment mentioned, or that the same appeal was such an appeal as the said commissioners or any of them had power, authority, or jurisdiction to determine, and if they had no such power, &c., they had no jurisdiction to administer the said oath. The indictment was held bad upon this ground, and the judgment reversed (*a*).

In R. *v.* Lavey (*b*), it was said that in Overton *v.* R. the Court considered that there was no averment that the oath was administered *in* the course of a judicial proceeding.

In R. *v.* Lavey (*b*), the indictment alleged that 'a certain action of contract' was pending in a County Court, and that the defendant was duly sworn before the judge of the said Court, 'then and there having sufficient and competent authority to administer the said oath to her in that behalf.' It was objected that there was no averment that the action was one over which the County Court had jurisdiction, and that no intendment could be made that an action pending in an inferior Court was one over which the Court had jurisdiction. But the Court of Exchequer Chamber held that the alleged defect, in the averment of the substance of the charge was supplied by necessary implication by the averment of the competency of authority in the judge to administer the oath, which necessarily implied that he had jurisdiction over the action (*b*).

This decision was followed in the Irish case of R. *v.* Lawlor (*c*), where an indictment for perjury at quarter sessions in Ireland alleged that a certain civil bill came on to be tried in due form of law before an assistant barrister, and alleged the oath to have been taken before the said assistant barrister, he having sufficient and competent authority to administer the said oath; an objection that the indictment ought to have stated that the civil bill was for a cause of action within the jurisdiction of the Court was overruled.

In Walker *v.* R. (*d*), the indictment alleged that a petition for protection from process was, under and in pursuance of 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 93, and 10 & 11 Vict. c. 102, filed and presented in the County Court of Staffordshire at W. by the prisoner; and that the prisoner afterwards duly received an order for protection from process, and that afterwards, whilst the proceedings upon and in respect of the said insolvency were pending in the said County Court, to wit, at the time of filing the said petition and schedule, the prisoner came before H. K., at the Court at W., and within the jurisdiction aforesaid, for the purpose of making

(*a*) Many other errors were assigned, but not determined by the Court.

(*b*) Ex. Ch. 17 Q.B. 496. See the indictment, 3 C. & K. 26. Overton *v.* R., *supra*, was mainly relied on, in support of the objection, and the Court observed: 'If it were necessary for us to say how we should decide the present case if it were not distinguishable from that, we should require further time for consideration.'

(*c*) 6 Cox, 187 (C. C. R. Ir.).

(*d*) 8 E. & B. 439.

an affidavit and verifying on oath his said petition and schedule (H. K. being a commissioner to administer oaths in chancery, and duly empowered to act in the matter of the said insolvency, and to take the oath of the prisoner), and was duly sworn and took his oath that the affidavit he then made was true (H. K. having competent authority to administer the said oath). The indictment then alleged the materiality of certain matter, and that the prisoner falsely swore, &c. It was objected on error that the indictment did not shew that there was jurisdiction to administer the oath, as it did not allege that the prisoner had resided within the jurisdiction of the Court for six calendar months next preceding the filing of the petition as required by 10 & 11 Vict. c. 102, s. 6 (rep.). But it was held that the indictment was good (*e*).

In R. *v.* Dunning (*f*), R. *v.* Callanan and Lavey *v.* R., were accepted as laying down the correct rule as to describing the offence.

The Mode of Taking the Oath.—Every count should expressly state that the defendant was sworn (*g*). It is enough to say that he was *duly* sworn (*h*). Where it was averred that he was *sworn on the Gospels*, and he appeared to have been sworn in the Scotch form, without kissing the book, the variance was considered fatal, but the averment was held to be proved by its appearing that he was *previously* sworn in the ordinary mode (*i*).

The indictment should aver that the defendant '*wilfully and corruptly*' swore (*j*). In R. *v.* Stevens (*k*) the first count of the indictment stated that the defendant on the trial of an indictment against J. H., intending to injure J. H., and to cause him to be wrongly convicted, appeared as a witness and was sworn, and 'then and there *falsely and maliciously* gave false testimony against J. H., by then and there deposing and giving evidence,' &c. The fifth count, the only one that differed materially from the first, alleged that by means of the false testimony in the first count mentioned, J. H. was found guilty; that a rule *nisi* for a new trial was granted; that the defendant, intending to hinder the said rule from being made absolute, came before a commissioner and was sworn, and being so sworn, wickedly, wilfully, and corruptly did depose, swear, and make affidavit in writing, in substance that the evidence which he, J. S., had given on the said trial was true; whereas the evidence which the said J. S. had given on the said trial was not true, but was false in the particulars in the said first count of this inquisition assigned and set forth. The defendant having been convicted, a rule was obtained for arresting the judgment, and after argument, Abbott, C.J., delivered the judgment of the Court as follows: 'I am of opinion that this rule must be made absolute. As to the first class of counts, the objection is that they do not charge that the defendant swore wilfully or corruptly. Every definition of perjury is swearing *wilfully and corruptly* that which

(*e*) Wightman, J., said: 'Suppose the petitioner, not so residing, had sworn in his petition that he did; would that be perjury?' It was admitted that it would. Lord Campbell, C.J.: 'Then such a petition would give the Court jurisdiction to inquire into the truth of the petition in that respect.'

(*f*) L. R. 1 C. C. R. 290, *ante*, p. 486.

(*g*) R. *v.* Stevens, 5 B. & C. 246.

(*h*) R. *v.* M'Carthur, Peake (3rd ed.) 211, Kenyon, C.J.

(*i*) Id. ibid.

(*j*) *Vide ante*, p. 477.

(*k*) 5 B. & C. 246.

is false. Whether the word *maliciously* might supply the place of either wilfully or corruptly, it is not necessary to determine, for neither of those words is found in the counts in question, and *Cox's case* (*l*), which has been referred to, proves at all events that such counts are insufficient. I now come to the consideration of the last count. It is in a form perfectly novel; it was intended to allege perjury in an affidavit made in this Court. In the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false, and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But it is said that the fact of his having been sworn must be taken by intendment. Were we to do that, as we are desired to do, in support of this indictment, we should furnish a precedent for a very loose and insufficient mode of charging a very serious offence, which has always hitherto been required to be charged with great certainty and particularity. I think that these novel attempts in pleading are not to be encouraged, and that the judgment must be arrested.'

The False Evidence.—It has never been necessary in indictments for perjury (as it is in libel) (*m*) to set out the tenor of what the defendant is alleged to have sworn. In indictments for perjury 'whether in an affidavit (*m*) or in oral evidence (*n*) it is sufficient to state the substance and effect of the false oath' (*m*). But where such evidence is not continuous the indictment should not set it out as continuous, but should indicate that the statements alleged to be false were separated by other intervening evidence. Even where it is set out as continuous without shewing that it was not so in fact, the variance between the indictment and evidence has been held not to be fatal, unless the intervening matter varies the effect of the matter set out (*m*). An indictment for perjury committed on the trial of an action for assault and battery, charged the defendant with having sworn that the plaintiff spat in the defendant's face before the defendant struck him, and that he, the defendant in the indictment, had not said certain words, and assigned perjury on both statements. The evidence given by the defendant on the former trial contained all the matter charged as perjury, but other matter intervened between the statement as to the spitting, and that as to the words. Abbott, C.J., held that what intervened did not vary the effect of what was stated (*n*).

Where a count in an indictment for perjury set out continuously the *substance and effect* of what the defendant swore when examined as a witness, Ellenborough, L.C.J., held it necessary in support of this count, to prove that *in substance and effect* he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury. It was urged in support of the prosecution that *reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned

(*l*) 1 Leach, 71, where 'falsely, maliciously, wickedly, and corruptly' were held to imply 'wilfully.'

(*m*) R. *v.* Callanan, 6 B. & C. 102, Abbott, C.J.

(*n*) R. *v.* Solomon, Ry. & M. 252.

in the indictment. But Ellenborough, C.J., said: 'Suppose you had undertaken to set out the tenor of what the defendant swore, and it should appear by the evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words; but must you not prove that he swore in substance and effect the whole that you have stated? You aver that part of the defendant's evidence concerning the assurance given by Lord H. to be material, and you have not proved that he swore to any such assurance. Did you ever know the rule *reddendo singula singulis* applied to a misrecital? Is there any authority to shew that under *secundum substantiam* you are not bound to prove the *substance* of what you state, as under *secundum tenorem* you are bound to prove the *tenor?* To hold otherwise would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence that words set out in the record should be either literally or substantially proved. A person giving his assurance generally and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts' (*p*). But this decision is questionable (*q*).

An indictment for perjury alleged that the prisoner falsely swore to 'in substance and to the effect following,' and then set out *in totidem verbis* and in the first person a deposition of the prisoner in the English language. It appeared that the prisoner was examined in Welsh through an interpreter, and that his examination was translated into English, taken down in writing, and signed by the prisoner; and this written

(*p*) R. *v.* Leefe, 2 Camp. 134. The learned reporter says: 'I find no decision or dictum in the books as to the evidence of the words sworn which is necessary to support an indictment for perjury. For the general principles upon this subject, *vide* 2 Hawk. c. 46, ss. 34, 35, 36. Compagnon *v.* Martin, 2 W. Bl. 790.'

(*q*) The count upon which the question in R. *v.* Leefe turned, alleged that a committee was appointed and met to try the merits of a petition complaining of an undue election, that certain questions were material, and that the defendant swore 'touching the said material questions, and the merits of the said petition,' in substance and effect as follows: that he, by the directions of J. L., waited upon Lord H. and proposed to the said Lord H. that the said J. L. would decline upon the expenses being paid him, including the previous expenses of the day before; that Lord H. agreed that the said expenses should be paid, including the expenses that had been incurred at different inns in the town; that J. L.'s voters were to be applied to in consequence of that arrangement for the purpose of voting for the said Lord H., and that the defendant enumerated the expenses; that the defendant upon his return to the committee of the said J. L. communicated to them what had so passed between the said Lord H. and him; and that the said committee dispersed to carry the said agreement into effect; and that the said J. L. asked the defendant if the expenses were secured; and that the defendant told the said J. L. his lordship had given his assurance *that it should be so.* The assignments of perjury negatived each of these statements, and it was proved that everything alleged was sworn, except the last words 'that it should be so.' As it is clearly settled that a defendant may be convicted of any one distinct assignment of perjury, though acquitted of all the rest (see p. 502), there seems no reason why proof of having sworn the matter negatived by one assignment should not be sufficient. In the case of obtaining goods by false pretences, it is clearly settled that proof of any one false pretence, is sufficient, *vide post*, Vol. ii. p. 1575 *et seq.*; and that is a stronger case, because there the indictment in fact avers that all the pretences operated towards the obtaining the goods. C. S. G. See R. *v.* Rhodes, 2 Ld. Raym. 886, *post*, p. 502, note (*z*).

deposition was set out in the indictment. It was submitted that the evidence ought to have been set out in Welsh with a translation in English. Williams, J., said: 'In perjury it is only necessary to prove "the substance and effect." The indictment charges that the prisoner deposed and swore in substance and to the effect there stated. It was not necessary in this indictment to have set forth the deposition *in totidem verbis*; still the substance and effect of what the prisoner swore in the Welsh language may be proved; and if that is in substance and to the effect the same as is stated in this indictment, that will be sufficient' (*r*).

An indictment stated that upon a certain information upon oath, entitled 'the information,' &c., the defendant wilfully deposed in substance and to the effect following: 'the defendant (meaning C. D.) I am certain is one of the persons that assaulted and ill-treated my wife,' &c. The information began, 'The information and complaint of J., the wife of C. E. G., and of the said C. E. G., made on oath,' &c. 'And first, the said J. G. for herself saith that the defendant is one of the persons who assisted W. J. S. and others in handcuffing and otherwise assaulting me on,' &c. (Signed) 'J. G.' 'And the said C. E. G. sworn says, "the defendant, I am sure, is one of the persons that assaulted and ill-treated my wife,"' &c. It was held that, as what the defendant swore was set out in substance, it was sufficient (*s*).

Where an indictment for perjury alleged that an officer of excise went before two justices of the peace, and gave the said justices to understand and be informed that 'W. S., victualler, *being a brewer of beer or ale for sale*,' did neglect to make a declaration of the quantity of beer brewed; and the words in italics were not found in the information when produced: the variance was held fatal, as the meaning of the indictment was that 'S. *being a brewer* neglected' (*t*).

Ambiguity.—If an indictment uses a word of equivocal meaning the meaning in which it is used must be collected from the context of the sentence in which it occurs. An indictment for perjury alleged that a commission of bankruptcy was issued against the defendant, under which he was duly declared bankrupt, and that afterwards he preferred a petition to the chancellor, stating (amongst other things) that a commission had issued, that the petitioner, on March 1, 1821, was declared bankrupt, and that at the several meetings *before the commission* the petitioner declared that the bill of exchange (on which the commission had issued) was not due, &c. But the allegation in the petition was that at the several meetings *before the commissioners* the petitioner declared that the bill was not due. It was contended that the words 'commission' and 'commissioners' were not convertible terms; that the word 'commission' denoted the authority under which the parties acted, and therefore the variance was fatal. Abbott, C. J., said: 'The objection is that there is a variance between the petition set forth in the indictment and that which is given in evidence at the trial. Now, in a proceeding of this kind it is not necessary to set out in the indictment *verbatim* the tenor of the petition; it is sufficient if it be set out truly in substance

(*r*) R. *v.* Thomas, 2 C. & K. 806.
(*s*) R. *v.* Grindall, 2 C. & P. 563, Abbott, C.J.
(*t*) R. *v.* Leech, 2 Man. & Ry. 119.

and effect. The petition, as set out in the indictment, purports that at the several meetings before the commission, the petitioner declared in the hearing of the said assignee that the bill of exchange given to G. D. for the debt was not due at the time when he struck the docket. Now the allegation in the petition, which was proved in evidence, was that at the several meetings before the commissioners the petitioner declared so and so, and the question is whether that is a fatal variance. The word "commission" is one of equivocal meaning; it is used either to denote a trust or authority exercised, or the instrument by which the authority is exercised, or the persons by whom the trust or authority is exercised. And if it may denote the persons exercising the authority, we must collect from the context of the sentence in which the words "before the commission" occur, and of the other parts of the petition, whether it was used in that sense or not.' After stating the indictment the chief justice proceeded: 'Now, if the word commission as there used was intended to denote the commission itself, it would follow that the several meetings took place before any commission issued; but that is impossible, because in that case the petitioner could not have made his declaration in the hearing of the said assignee. Then, if that cannot be the meaning of the word commission, we must construe it in the other sense which it is capable of bearing, namely, as denoting the persons to whom the authority was given; and if it be so construed, there was no variance between the petition set forth in the indictment and that which was given in evidence; the consequence is, that there must be judgment for the Crown' (*u*).

In an indictment for perjury the averment stated that the prisoner swore he saw W. 'about fifteen minutes after the hour of 11 o'clock *in the forenoon*,' whereas it was proved that he had sworn that he saw W. about a quarter past eleven on the day in question, without stating whether it was the forenoon or the afternoon. Day, J., held that the averment in the indictment was not proved, and directed an acquittal (*v*).

Where a complaint having been made *ore tenus* by a solicitor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that, 'at and upon the hearing of the said complaint,' the defendant deposed, &c. This was held a sufficient averment that the complaint was *heard* (*w*).

Materiality.—Averments of materiality are not rendered unnecessary by 14 & 15 Vict. c. 100, s. 20 (*ante*, p. 482) (*x*), and an omission of such an averment, when it is needed, appears to be a matter of substance not curable by amendment (*y*). Either it must clearly appear on the face of the indictment (*z*), or it must be therein expressly alleged that the matter, in respect whereof perjury is assigned, was material, not merely might be material (*a*). It is, however, enough to allege that the

(*u*) R. *v.* Dudman, 4 B. & C. 850.
(*v*) R. *v.* Bird, 17 Cox, 387.
(*w*) R. *v.* Aylett, 1 T. R. 70.
(*x*) R. *v.* Harvey, 8 Cox, 99.
(*y*) 14 & 15 Vict. c. 100, s. 25. R. *v.* Harvey, *ubi sup.*
(*z*) R. *v.* Aylett, 1 T. R. 69. If the falsehoods affect the very circumstance of innocence or guilt, or where the perjury is assigned, or documents from which it is evident that the false evidence was important, the express allegation may be dispensed with. See 2 Chit. Cr. L. 307, citing Tremayne, 139, &c. R. *v.* Crossley, 7 T. R. 315. Ryalls *v.* R., 11 Q.B. 781. R. *v.* Harvey, 8 Cox, 99, Byles, J.
(*a*) R. *v.* Bird, *post*, p. 500.

particular question became a material question without setting forth in the indictment so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned (*b*). Thus statements, that, at a Court of Admiralty Sessions, J. K. was 'in due form of law tried upon a certain indictment then and there depending against him' for murder, and that 'at and upon the said trial it then and there became and was made a material question,' whether, &c., were held sufficient averments that the perjury was committed upon the trial of J. K. for the murder, and that the question on which the perjury was assigned was material on that trial (*c*).

In R. *v.* Nicholl (*d*), Parke, J., said: 'It is part of the definition of perjury that the false swearing is on some point material to the question in issue. In an indictment this may appear either from the matter of the suit, as shewn on the record, or by direct averment.' And in R. *v.* Cutts (*e*), Campbell, C.J., said: 'An indictment for perjury must either shew that the evidence alleged to be false was necessarily material to the issue, or there must be a positive averment that it is material.' Where, upon an indictment for perjury on a trial for felony, it was not alleged, and did not appear that the matter sworn was material, it was held, that if the original indictment had been set out, and it could plainly have been collected that the matter was material, the indictment would have been sufficient without an averment of materiality, but that as this was not the case the indictment was bad (*f*). Where an indictment assigned perjury on defendant's denial (in an answer in Chancery) that he had agreed, upon forming an insurance company of which he was a director, &c., to advance £10,000 for three years to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, to which the answer had been sworn, nor what was the prayer, judgment was arrested (*g*).

An indictment for perjury alleged that on the trial of a certain issue the defendant was sworn as a witness, and that on such trial certain questions became material, that is to say, 'whether one J. K. had been arrested by one J. L.; whether the said J. L. had on the occasion of the said alleged arrest touched the person of the said J. K.; and whether the said J. L. had on the occasion of the said alleged arrest put his arms round the said J. K. and embraced him.' The indictment then charged that the defendant swore falsely to the following effect: 'L. (meaning the said J. L.) put his arms round him (meaning the said J. K.) and embraced him (meaning the said J. K., and meaning thereby that the said J. L. had *on the occasion to which the said evidence applied*, touched the person of the said J. K.).' A writ of error was brought by the defendant

(*b*) R. *v.* Dowlin 5 T. R. 311. Lavey *v.* R., 2 Den. 504; 17 Q.B. 496. R. *v.* Dunning, L. R. 1 C. C. R. 290.

(*c*) Id. ibid.

(*d*) 1 B. & Ad. 21.

(*e*) 4 Cox, 435. See also R. *v.* Scott, 13 Cox, 594.

(*f*) R. *v.* M'Keron [1792], 5 T. R. 316, and MS. Bayley, J.

(*g*) R. *v.* Bignold [Trin. T. 1824], MS. Bayley, J. The indictment was shewn to Lord Gifford, M.R., and Mr. Bell, K.C., who both thought that upon the face of the indictment it could not be said whether the question was material or not; and the materiality of all questions in a chancery suit depending upon the purpose for which the suit is instituted, the Court held that the indictment could not be supported. MS. Bayley, J.

on conviction, and the error specially assigned was that the materiality of the evidence alleged to have been false was not sufficiently averred in the indictment; and it was contended that in the evidence, on which the perjury was assigned, there appeared neither time, place, nor circumstance to connect the statement with the alleged arrest. The whole might have turned upon some former and entirely different transaction. And the innuendoes did not remove the difficulty; for there was no averment in them that it was on the occasion of the alleged arrest; it merely imported that the evidence was given concerning *an* occasion, which was not identified with that in question. Bayley, J., said: 'An indictment must be good without the help of argument or inference. In the case of perjury the indictment must shew either by a statement of the proceedings or by other averments, that the question to which the offence related was material. That is not shewn here in either way. The words on which perjury is assigned, if taken without the innuendoes, have no necessary reference to the occasion of an alleged arrest; nor is there anything in the indictment to connect them with it. It is contended that the inquiry, to which part of the evidence was an answer, would not have been relevant if applicable to any other matter and occasion than those now in question; but we know nothing of the merits of the case except from the indictment. The innuendoes rather introduce greater doubt than greater certainty, and lessen the force of the argument that only one occasion could have been contemplated. I am, therefore, of opinion that the indictment is defective, and the judgment ought to be reversed' (*h*).

Where an indictment stated that a suit was pending in the Court of Chancery, and that a commission was issued to certain commissioners to examine witnesses upon interrogatories, and then set out the ninth interrogatory, and averred that 'upon the examination of the defendant upon the said interrogatories, it became, and was, material to ascertain the truth of the matters *hereinafter alleged to have been sworn* to and deposed by the defendant, upon his oath, in answer to the said ninth interrogatory'; it was objected that the averment of materiality was insufficient, there being no statement of the alleged perjury being material to the chancery suit, or to any question in that suit. Coleridge, J., expressed some doubt whether the averment of materiality was sufficient, and would have reserved the point if it had become necessary (*i*). And where an indictment for perjury, after alleging that an information was exhibited before two magistrates, and that the same information came on to be heard before M. G. and J. S., two justices, and that 'upon the hearing of the said information before the said M. G. and J. S., so being such justices as aforesaid, it became and was material to ascertain the truth of the matter *hereinafter alleged to have been sworn* to and stated by the said J. S. upon his oath'; it was held that this averment of materiality was insufficient (*j*).

(*h*) R. *v.* Nicholl, 1 B. & Ad. 21.

(*i*) R. *v.* Hewins, 9 C. & P. 786. The form of the averment in this and the following case was taken from 2 Chit. Cr. L. p. 307 *a*; where it is said that this 'concise statement would, it should seem, in all cases suffice.'

(*j*) R. *v.* Goodfellow, C. & M. 569, Patteson, J., after consulting Cresswell, J. See the averment of materiality in R. *v.* Callanan, *ante*, p. 488, note (*f*).

An indictment stated that, on the trial of an action of Meek *v.* Knight, 'it became and was *a material question*, whether a certain bill of exchange, bearing date, &c.' (here the bill was described) 'was accepted by the said J. M., for the accommodation of the said W. K., and without valuable consideration to the said J. M. from the said W. K.; and whether a certain paper writing or memorandum, *then and there* produced, by and in the handwriting of the defendant, J. B., was really and truly executed by the said W. K., by affixing his mark thereto *at the time of the making of the said bill of exchange;*' (the indictment then set out the memorandum) 'and whether the said memorandum was read over by the said J. B. to the said W. K., at the time of making the said bill of exchange as aforesaid.' The indictment then alleged that the defendant swore that the said paper writing or memorandum was duly executed by the said W. K., by affixing his mark to the same, in the presence of the said J. B., *on the day on which the same bears date and at the time of the making of the said bill of exchange*, and that the said memorandum was then and there read over by the said J. B. to the said W. K. 'Whereas, in truth and in fact, the said W. K. did not execute the said paper writing or memorandum by affixing his mark thereto, in the presence of the said J. B., *on the day on which the same bears date*, nor was the said memorandum read over by the said J. B. to the said W. K. at the time of the making of the said bill of exchange, nor was the said memorandum produced or shewn to the said W. K. by the said J. B., at the time of making the said bill of exchange.' Upon a writ of error, brought after a general verdict of guilty, the errors assigned were, that no perjury was assigned upon the question alleged to have been a material question upon the trial, and that no perjury was assigned upon any question alleged to have been a material question upon the trial; and the Court of Queen's Bench held that the indictment was bad. The assignment of perjury, that the bill was not executed on the day on which the same bore date, departed from the statement of the evidence, and the allegation of its materiality. And the assignment of perjury, that the paper was not executed at the time of the making of the bill, bore no relation to the allegations of the evidence of the defendant. The statement of the evidence of the defendant, as well as the allegation of the falsehood, were uncertain, as the words 'then and there' might refer to the two dates, the date of the memorandum and the day of the making of the bill, and it might be consistent with the fact that it never was read over on both days, or the defendant might never have intended to say that it was (*k*).

An indictment alleged that E. S. filed his bill in chancery against the prisoner, J. S. S., and J. S., whereby he prayed that a purchase by the prisoner might be declared fraudulent and void, and that he might be decreed to deliver up the contract to be cancelled, and then averred

(*k*) R. *v.* Burraston, 4 Jurist, 697. The Court expressed strong doubts whether it was possible to separate the three propositions, which were said to have formed one question; and Littledale, J., said that if it was one assignment of perjury, and part was bad, the whole was vitiated. It was also doubted whether where a matter was stated to be a material question the prosecutor could abstain from stating any swearing as to such matter, or assigning any perjury upon it. But it became unnecessary for the Court to decide either of these points, as the indictment was held bad on the grounds stated in the text.

that it *then and there* became a material question whether the prisoner did advise the said J. S., E. S., and J. S. S., that certain real estate, including the premises described in the said bill, should be sold. It was held that the averment of materiality was insufficient. There might be very good reasons for setting aside the sale as fraudulent, quite independently of any advice given by the prisoner; and that being so, the question was whether there was a sufficient averment of materiality, and the words 'then and there' were not sufficient to supply the omission of the words 'in the said suit,' or words to the same effect (*l*).

An indictment for perjury alleged that H. L. stood charged before T. S., a justice of the peace, with having on August 12 committed a trespass by entering in the daytime on certain land in pursuit of game, and that upon the hearing of the said charge, the prisoner appeared as a witness for the said H. L., and was duly sworn to speak the truth touching the said charge; and that the prisoner upon the hearing of the said charge, falsely swore that he did not see the said H. L., during the whole day of August 12, and that '*at the time he the said prisoner swore as aforesaid* it was material and necessary for the said T. S., so being such justice as aforesaid, to inquire of and be informed by the said prisoner whether he did see the said H. L. at all during the said 12th day of August,' and it was held that the indictment was bad; for 'it is not stated that it was a material and necessary question in the inquiry before the said T. S., to which the false and corrupt answer was given. It may have been, therefore, consistently with the averments in the indictment, material and important for T. S. in some other matter, and not in the matter stated to be in issue before him, to have put this question and received this answer. Now as the offence of perjury consists in taking a false oath in a matter stated to be in judgment before a Court or person having competent authority to decide it, and as this indictment does not clearly and distinctly charge that, it does not charge the offence of perjury' (*m*).

An indictment for perjury said to have been committed on a trial for rape alleged that it was a material question whether the prisoner ever got one M. W. to write *a* letter for her, and whether or not she saw the said M. W. at the house of S. L.'s father when the said letter was written; and that the prisoner falsely swore that she never got a M. W. to write a letter for her, and that she did not see the said M. W. at the house of the said S. L.'s father. Whereas the prisoner did get the said M. W. to write a letter for her, &c. At the trial for rape, the prisoner was asked whether she ever got M. W. (who was pointed out to her in court) to write a letter for her. She replied: 'No, I did not.' And repeated her denial, after being shewn the letter, and also denied ever having seen M. W. at S. L.'s father's house. The falsity of what she so swore was clearly proved and the letter produced. It was objected, 1st, that the materiality of the matters assigned as perjury was not sufficiently alleged; 2nd, that the reference to the letter was too vague and general, and not properly pointed to the particular letter; 3rd, that the references to M. W. and to S. L.'s father's house were not properly introduced by an averment; 4th,

(*l*) R. *v.* Cutts, 4 Cox, 435.
(*m*) R. *v.* Bartholomew, 1 C. & K. 366. (All the judges.)

that the letter produced was not sufficiently identified with the statements on the record to support them. The objections were overruled at the trial, and, on a case reserved, it was urged that all the assignments of perjury were defective in not identifying the M. W. spoken of in them with the M. W. spoken of in the allegation of materiality; but it was held that the indictment was sufficient: it averred that it was a material question whether the prisoner got *any* M. W. to write a letter. That averment comprehended every person of the name of M. W. The description therefore in this averment was larger than the description in the assignments of perjury, and comprehended the M. W. there spoken of. As to the objection relating to the letter, it was contended that it could not possibly be material that the prisoner got Williams to write *a* letter. But it was held that, as there was an express averment that it was material, that averment let in evidence to prove its materiality, and when the evidence was looked at it was clear that the letter was material (*n*).

An indictment for giving false evidence before a commissioner of bankruptcy alleged that upon the examination of the prisoner it was material to inquire what was the extent of the dealings of the prisoner with 'one M., and how long he had known the said M.,' &c., and then alleged that the prisoner solemnly declared that 'M. is the landlord of No. 4, York-terrace,' &c. 'I have known M. two or three years,' &c., whereas the said person so described was the same person as one S. M. Legge, and was the father of the prisoner, &c. It was objected, in arrest of judgment, that there was nothing to connect the allegation of materiality with the assignment of perjury, as there was *no innuendo* that M. meant S. Legge; and the judgment was arrested as the averment of materiality was insufficient to connect it with the other parts of the indictment (*o*).

An indictment for perjury alleged that a cause came on to be tried before a County Court judge, and that it became a material question on the trial whether J. H. B. had, in the presence of the prisoner, signed at the foot of a certain bill of account, purporting to be a bill of account between a certain firm called 'B. and Co.' and J. W., a receipt for the payment of the said bill, and that the prisoner falsely swore that J. H. B. did in her presence sign the said receipt. It was proved that on the trial the prisoner produced an invoice of goods, at the foot of which was a receipt, which purported to bear the signature of B., and swore that B. in her presence wrote and signed that receipt. B. had on other occasions signed receipts in the presence of the prisoner at the foot of invoices. It was objected that the indictment did not sufficiently specify the account and receipt to which the evidence related on which the perjury was assigned; but, it was held that the indictment was sufficient, as it was only necessary to refer to the receipt as introductory to making out the materiality of the perjury (*p*).

Where an indictment for perjury alleged that the defendant swore that he had not written certain words in the presence of one D., and

(*n*) R. *v.* Bennett, 2 Den. 240; 3 C. & K. 124; 5 Cox, 207. It is trusted that the text represents substantially the grounds of the decision on the two points; but all three reports are very unsatisfactory. No express notice was taken of the other points.

(*o*) R. *v.* Legge, 6 Cox, 220. The Recorder, after consulting Parke, B.

(*p*) R. *v.* Webster, Bell, 154.

alleged that it was a material question whether the defendant had so written such words in the presence of D.; it was held that the indictment was sufficient; for the question whether the words were written in the presence of D. might have been material; and it was impossible to assume the contrary against the record (*q*).

Where an indictment for perjury on the taking of an inquisition before a coroner alleged that it 'was, upon the taking of the said inquisition, a material question whether,' &c., it was held that the statement sufficiently imported that the question was material to the subject-matter of the inquisition (*r*).

An indictment alleged that it was a material question whether, before the execution of a bond, it was agreed between certain persons that the prisoner should lend W. £1500 before the title to certain premises was investigated by the prisoner, and before any mortgage thereof was executed to secure repayment thereof, and that they should execute the bond to secure the prisoner the repayment of the said sum and interest in case the title should turn out to be defective, or the mortgage should not be duly executed; but if the title turned out to be good, *and* the mortgage was executed, they were not to be liable on the bond; and then alleged that the prisoner falsely swore that nothing was said by him or in his hearing about the bond being a temporary security, or a security until the mortgage was prepared, '*or any thing of the kind.*' It was objected that, according to the agreement as stated, the bond would be binding until the title turned out to be good, which would not necessarily be when the mortgage was executed, so that the bond would not necessarily be a temporary security. But it was held that the exact terms of the alleged agreement were not material; for the prisoner swore that there was no agreement 'of the kind' (*s*).

An indictment for perjury alleged that, on the trial of an indictment for an assault, with intent to commit a rape, and for a common assault, upon one A. B., the said A. B. swore that she was the wife of one J. B., and had been married to him at such a time and such a place, whereas she was not the wife of the said J. B. and had never been married to him. The indictment contained an allegation of materiality, which was insensible in consequence of an error in copying it from the draft; it was, nevertheless, contended that it sufficiently appeared on the face of the indictment, that the evidence on which the perjury was assigned was material on two grounds. First, that on any indictment for an assault, with intent to commit a rape, it was most material, not only as affecting the credit of the witness, but as going to the very gist of the charge itself, whether the party assaulted had falsely sworn that she was a married woman. Secondly, that by swearing that she was the wife of J. B., the prosecutrix supported the allegation that the assault was upon 'A. B.,' which would have failed if she had admitted that she was not married to J. B. But it was held that it did not sufficiently appear that the evidence was material; it might or might not be material, and that was not sufficient (*t*).

(*q*) R. *v.* Schlesinger, 10 Q.B. 670.
(*r*) R. *v.* Kimpton, 2 Cox, 296, Parke, B.
(*s*) R. *v.* Smith, 1 F. & F. 93, Erle, J.
(*t*) R. *v.* Ann Bird, Gloucester Spr. Ass. 1842, Cresswell, J. The indictment for the assault simply stated the assault to be upon

Where an indictment stated that a cause was set down for trial, and appointed for a particular day, and that the defendant in that cause, before that day, made an affidavit before a judge, in which he stated that he had a good defence to the action, which he would be able to prove at the trial, and that some of the bills on which it was brought were void for usury, and then assigned perjury on these allegations; it was objected that the indictment was clearly bad: the only manner in which such an affidavit could be in a judicial proceeding, or the matters contained in it become material, would be upon an application to postpone the trial of the cause; but the indictment did not shew that any such application was made or intended. Tenterden, C.J., however, held that the occasion, on which the affidavit was intended to be used, might be sufficiently collected from the indictment, and refused to stop the trial, as the defendant, if there was any weight in the objection, might have the benefit of it after he was convicted (*u*).

In R. *v.* Gardiner (*v*), the seventh count of the indictment charged that the defendant, intending to aggrieve C. F. E., came before a certain magistrate (having authority, &c.), falsely, &c., did depose, swear, and charge, and gave the said magistrate to be informed that the said C. F. E. had been guilty of an abominable crime, then capital, the details of which charge were then set forth as deposed to. It was objected that this count did not distinctly shew any proceeding pending before the magistrate; that they ought to have averred directly that a charge was pending, and R. *v.* Pearson (*w*) was cited. But Patteson, J., thought that case distinguishable, because of the words 'upon an information and examination,' &c. (*x*). It was also argued that, although the state of C. F. E.'s dress was averred in the count to be material, yet by such averment was meant, not whether the flap of his trousers was unbuttoned, but the trousers generally; and that the count alleged that the prisoner charged the capital offence, whereas, by his information, he appeared to have charged only an attempt. The last two objections were taken before verdict, and did not apply in arrest of judgment, as was also an

Ann B., without any further description. The learned judge expressed an opinion that the indictment was insufficient before the case went to the jury, but he left it to them, and after they had found the prisoner guilty, arrested judgment, in order that the prosecutor might bring a writ of error if he thought fit. 'It sometimes happens that upon an objection taken to an indictment before verdict, the judge who tries the case, if he considers the objection valid, directs an acquittal; but the course adopted by the learned judge in this case is certainly the better course, as, if the decision be incorrect where the judgment is arrested, it may be reversed upon error; whereas if the prisoner is acquitted, and the decision is incorrect, there is no means of correcting the error, and as the verdict of the jury has been taken, it may be very questionable whether if a fresh indictment were preferred a plea of *autrefois acquit* might not be successfully pleaded. See R. *v.* Fowle, 4 C. & P. 592, Tenterden, C.J. In R. *v.* Purchase, C. & M. 617, Patteson, J., after consulting Cresswell, J., refused to allow any objection to be taken to an indictment for embezzlement, except upon demurrer or in arrest of judgment, and it seems most in accordance with the regular course of proceeding that such a course should be adopted in all cases.' C. S. G. Writs of error in England have been abolished by the Criminal Appeal Act, 1907, and the prosecutor has no means of relief if an indictment is wrongly quashed.

(*u*) R. *v.* Abraham, 1 M. & R. 7. The defendant was convicted, but did not appear to receive judgment when called upon, and no motion in arrest of judgment was made.

(*v*) 2 Mood. 65; 8 C. & P. 137.

(*w*) 8 C. & P. 119, *ante*, p. 486.

(*x*) The count is in the same form as that in 4 Wentw. 242; 2 Chit. Cr. L. 443.

objection whether the evidence of J. H. E. did not go to any material fact sufficient to satisfy the rule as to two witnesses in cases of perjury. On all these questions, Patteson, J., requested the opinion of the judges, and all the judges present held the conviction good on the seventh count (*y*).

Falsity : Assignments of Perjury.—The indictment should expressly contradict, and without any ambiguity, the matter falsely sworn to by the defendant. An assignment in general terms seems to be demurrable. Possibly it might be supplemented by ordering particulars where it is not demurred to or thus supplemented. General averment that the defendant falsely swore, &c., upon the whole matter, is not enough : the indictment must proceed by particular averments (or, as they are technically termed, by *assignments of perjury*), to negative that which is false. More than one assignment of perjury, in the same evidence, may be included in the same count (*z*). It may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence : but the word 'falsely' does not import that the whole is false ; and it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest (*a*). In negativing the defendant's oath where he has sworn only to his *belief* (*b*), it is proper to aver that '*he well knew*' the contrary of what he swore (*c*). An assignment of perjury may, in some instances, be more full than the statement of the defendant, which it is intended to contradict. Thus, where the fact in the affidavit, in which the defendant was charged to have perjured himself, was, that he never did, at any time during his transactions with the commissioners of the victualling office, charge more than the usual sum of sixpence per quarter beyond the price he actually paid *for* any malt or grain purchased by him for the said commissioners as their corn-factor ; and the assignment in the indictment, to falsify this, alleged that the defendant did charge more than sixpence per quarter *for and in respect of* such malt and grain so purchased ; it was objected that the words *in respect of* might include lighterage, freight, and many collateral and incidental expenses attending the corn and grain jointly with the charge for the corn or grain, and, that bearing such sense, the defendant was not guilty of perjury ; but the objection was overruled (*d*).

(*y*) Most of the judges seem to have held good other counts of the indictment which had been challenged on similar grounds.

(*z*) In R. *v.* Rhodes, 2 Ld. Raym. 886, 887, the indictment contained several assignments in one count, all bad, except one on which a conviction took place. The Court refused to arrest judgment. Cf. R. *v.* Virrier, 12 A. & E. 317. R. *v.* Gardiner, 2 Mood. 95 ; 8 C. & P. 737. Compagnon *v.* Martin, 2 W. Bl. 790. In R. *v.* Nicholls, Gloucester Sum. Ass. 1838, perjury was alleged to have been committed by the defendant in evidence given on a trial for larceny, in which he denied having been at a particular house on a particular occasion, and denied having had a conversation with certain persons there. The indictment contained many distinct assignments on the going to the house, and the conversation, upon all of which evidence was given ; and Patteson, J., directed the jury simply to consider whether the defendant had been to the house, and if they were satisfied that he had, to convict him, which they did. MSS. C. S. G. R. *v.* Leefe, 2 Camp. 134, seems to be wrong, in so far as it suggests that distinct assignments of perjury *must* be in different counts.

(*a*) R. *v.* Perrott, 2 M. & S. 385, 390. See hereon White *v.* R. [1906], 4 Australian Commonwealth L. R. 152, 163.

(*b*) *Ante*, p. 476.

(*c*) 2 Chit. Cr. L. 312.

(*d*) R. *v.* Atkinson, Dom. Proc. 1785. Bac. Abr. tit. 'Perjury' (C).

An indictment alleged that it was material, on the hearing of an information before justices of the peace, to prove that cards were played in the bar of a publichouse between the hours of six o'clock and eight o'clock on a certain evening, and that the prisoner falsely swore that he was in the bar of the said house from between the hours of six o'clock and seven o'clock until nine o'clock in the said evening, and that he did not play at any game at all, and that no cards or game of cards at all were or was during all the said last-mentioned time or between the hours aforesaid played therein; whereas the prisoner did between the hours of six o'clock and eight o'clock in the said evening play at a certain game of cards. It was held that the indictment was bad. The prisoner might have played at five minutes past six, and yet not have played from between six and seven until nine; the words 'from between six and seven' might be any time short of seven, five minutes or five seconds to that hour. The indictment could not be read as averring that the prisoner swore that he did not play at any time during that evening, but merely that he did not play at a particular period of that evening, namely, from some period before seven until nine. That might be perfectly true, and yet he might have played between six and seven, and so may have played, as is assigned in the indictment, between six and eight (*e*).

The averments introduced to negative the matter sworn ought to be so distinct and definite as to inform the defendant of the particular and precise charges which are intended to be proved against him. An indictment for perjury committed in the Insolvent Debtors Court alleged, that the defendant swore in substance that his schedule contained a full, true, and perfect account of all debts owing to him at the time of presenting his petition; whereas the said schedule did not contain a full, true, and perfect account of all debts owing to him at that time. It was held that the indictment was insufficient, as it was quite impossible that the defendant could know, from allegations so vague and indistinct, what was to be proved against him; the allegations conveyed no information whatever of the particular charges against which the defendant ought to be prepared to defend himself (*f*).

Where an indictment for perjury, alleged to have been committed in the Insolvent Debtors Court, stated that the defendant gave in his schedule on oath that the same and all its contents were true, and contained a full, true, and perfect account of all his just debts, credits, &c., and then went on to state that the said schedule and its contents were not true, and that certain persons whose names were set out were debtors to the defendant at the time of giving in his schedule; Tenterden, C.J., held that the evidence must be confined to the cases specified in the indictment, as the defendant could only come prepared to answer those cases, and that evidence that other persons, whose names were not set out in the indictment, were also debtors to the defendant and were omitted in the schedule, was inadmissible (*g*).

An indictment charged the prisoner with the offence of making a

(*e*) R. *v.* Whitehouse, 3 Cox, 86, Rolfe, B.

(*f*) R. *v.* Hepper, Ry. & M. 210, Tenterden, C.J., after consulting the other judges of the K.B. See R. *v.* London, 12 Cox, 50.

(*g*) R. *v.* Mudie, 1 M. & Rob. 128. R. *v.* Moody, 5 C. & P. 23. The indictment is set out in the note to the latter report.

false declaration before a justice, that he had lost a pawnbroker's ticket, 'whereas in truth and in fact he had not lost the said ticket, but had sold, lent, or deposited it, as a security to one S. C., &c.' It was held that the allegation 'but had sold, lent, or deposited it, &c.,' did not render the indictment ambiguous or uncertain, but was pure surplusage, which might be rejected, and need not be proved (*h*).

An indictment for perjury alleged that the defendant made an affidavit, which stated that the creditors of the defendant were all, with two exceptions (which were explained), paid in full; whereas the said creditors were not all, with two exceptions only, paid in full; and whereas divers creditors of the defendant exceeding the number of two, naming several creditors, were not paid in full; and evidence was being tendered of debts to other persons than those named being unpaid. It was objected that the first assignment was bad as too general, and that evidence as to debts due to others than those named ought not to be admitted. Tindal, C.J., said: 'You might have demurred to this assignment only, if it be too general; and as you have not done so, I do not see how I can exclude the evidence.' But he added: 'I think that omitting the names in one assignment of perjury and inserting them in the next is likely to mislead the defendant; as he would be very likely to suppose that the debts, mentioned in general terms in one assignment, were those particularised in the other'; whereon the evidence was not pressed (*i*).

Contrary Depositions.—An information stated that H. before a committee of the House of Commons being duly sworn deliberately and knowingly and of his own act and consent did say and give in evidence, &c., setting out the evidence so given. The count then averred that the said defendant at the bar of the House of Lords being duly sworn deliberately and knowingly and of his own act and consent did say, swear, and give in evidence, &c.: setting out in like manner the latter evidence, which was directly contrary to that given before the House of Commons; and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), 'and so the jurors aforesaid do say that the said H. did not commit wilful and corrupt perjury.' The information was held bad for not shewing and averring in which of the two depositions the falsehood consisted (*j*).

Innuendoes.—If there be any doubt on the words of the oath, which can be made more clear and precise by a reference to some former matter, it may be supplied by an *innuendo;* the proper office of which is to fix and point the meaning of something previously averred (*k*), or to explain the insertion in the indictment of a word omitted in the document, *e.g.*, in an affidavit in which the false oath was contained (*l*). Where an objection

(*h*) R. *v.* Parker, L. R. 1 C. C. R. 225.

(*i*) R. *v.* Parker, C. & M. 639.

(*j*) R. *v.* Harris, 5 B. & Ald. 926.

(*k*) R. *v.* Horne, 2 Cowp. 672. R. *v.* Aylett, 1 T. R. 70. R. *v.* Taylor, 1 Camp. 404. See R. *v.* Griepe, 1 Ld. Raym. 256. And see as to the use of an innuendo, 1 Wms. Saund. 243, note (4). 1 Chit. Plead. 406. 1 Stark. Crim. Plead. 118 *et seq.*

(*l*) See R. *v.* Taylor, 1 Camp. 404, Ellenborough, C.J., where the indictment stated that the defendant went before a justice of the peace, and swore in substance to the effect following, that is to say, &c., and part of the deposition so set forth was that a person therein named assaulted the deponent with an umbrella, and, *at the same time*, threatened to shoot her with a pistol; but when the deposition was produced it appeared that, after stating the assault

was taken to an indictment, that it added, by way of innuendo to the defendant's oath, 'his house situate in the Haymarket in St. Martin in the Fields,' without stating by any averment, recital, or introductory matter, that he had a house in the Haymarket, or (even admitting him to have such a house) that *his oath was of and concerning the said house*, so situated, the objection was overruled, on the ground that the innuendo was only a more particular description of the same house which had been previously mentioned (*m*). In the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an innuendo that it was the outer door was held good (*n*). If the innuendo, and the matter introduced by it, are altogether impertinent and immaterial, and can have no effect in enlarging the sense, they may be rejected as superfluous (*o*).

An indictment stated the presenting of a petition to the House of Commons concerning the election of B., and setting out the petition, which stated the said B. before and at the election was guilty of bribery, and that certain agents of the said B., being trustees of divers public charities, before and at the said election were guilty of various corrupt acts, &c., in order to procure the return of the said B. The indictment then averred that one C. was a trustee of divers of the said public charities, and 'that shortly before the said election (to wit), on, &c., the said C., the said B., and other persons, went to the house of one W. V. for the purpose of soliciting the said W. V. to vote for the said B. at the said election.' The indictment then stated that certain members of the House of Commons were chosen to try and determine the merits of the said election, and that the said persons so chosen met to try and determine the matter of the said petition. The indictment then averred that S. V. appeared 'as a witness before the said select committee touching the matter of the said petition,' and that the said S. V. was duly sworn, &c. 'And it then and there became and was a material question, whether at the time aforesaid, when the said C., the said B., and the said other persons, so went to the house of the said W. V., the said C. said that he would give the said W. V. £6 out of the funds of one of the aforesaid charities at Christmas, whereof the said C. was trustee as aforesaid, or that he would give him £6 at Christmas' (*p*). And that the said S. V. falsely, &c., did depose, &c., to the select committee 'touching the matters and merits of the said election and the matter of the said petition, that *before the said election* a canvassing party came to her husband's house, and B. and C. came into the house of the said W. V., and that C. said he would act like a sensible man, and "I will give him the £6 at Christmas"' (*q*). 'Whereas in truth and in fact the said C. did not at the said time when the said B., the said C., and other persons went to the said house of the said W. V. to solicit him to vote as aforesaid, or during the time when, on that occasion, they were

with the umbrella, it proceeded thus, 'and at the *same* threatened to shoot,' &c., omitting the word *time*.

(*m*) R. *v.* Aylett, 1 T. R. 70.

(*n*) Id. ibid.

(*o*) Roberts *v.* Camden, 9 East, 93. 2 Chit. Cr. L. 311. In R. *v.* Griepe, *ubi sup.* it was held that an innuendo improperly introduced and used in the indictment, could not be rejected as surplusage, and vitiated the indictment even after verdict.

(*p*) The indictment here stated other questions to be material in a similar manner.

(*q*) The indictment here set out more of the evidence. See the case, *post*, p. 511.

in or at the said house, say to the said S. V. that the said C. would give to the said W. V. the £6 at Christmas, or any sum of money from or out of any of the said public charities, or any sum of money whatsoever at Christmas or at any other time' (*r*). A motion on arrest of judgment on conviction of perjury was dismissed and the considered judgment of the Court was: 'Upon this indictment a motion has been made to arrest the judgment upon two objections: First, that the allegation of the oath having been taken "touching the matter of the said election, and the matter of the said petition," did not sufficiently point to the matter whereupon the defendant was alleged to have given evidence; and, secondly, that there was nothing to fix the alleged gift and promise of money to the said visit on the 6th of July. We think, however, that neither objection is sustainable. As to the first, it does sufficiently appear that a competent trial was had, that a material question arose as to the existence of certain facts, to which the defendant deposed, and was therein guilty of perjury. Now although it is certainly true that the averment stating the oath to have been "touching and concerning the matters and merits of the said election, and the matter of the said petition," does not directly refer to what are alleged to be the material questions which arose, yet, where it does sufficiently appear, both by averment and otherwise, that the oath was upon a material point, the allegation "touching and concerning," &c., is wholly superfluous and unnecessary, and the indictment would have been sufficient if it had omitted that part altogether, and had merely stated that the defendant deposed and swore "as follows," &c. The second objection is, that the evidence, upon which the perjury is alleged to have been committed, is not referred with sufficient distinctness to the said canvassing visit, and that the innuendo by which it is attempted so to apply it, introduces new matter, and is therefore bad. We, however, think otherwise; for an introductory averment expressly states that there was, in fact, such canvassing visit, and the innuendo directly refers thereto. It is plain, therefore, that this case comes within the rule laid down by De Grey, C.J., in R. *v.* Horne (*s*), which has always been recognised as the true one; and that the innuendo does only point and fix the meaning of something previously averred, which is the proper office of an innuendo, and that it does in no respect enlarge it. We think, therefore, that there is no ground for arresting the judgment' (*t*).

Conclusion.—Since 1851 (*u*), it has been unnecessary for an indictment for perjury to have a formal conclusion whether it be perjury at common law (*v*), or under statute. In some cases a count is concluded in a

(*r*) The indictment here set out other assignments of perjury to the other parts of the evidence, which was set out in the indictment.

(*s*) *Supra*, p. 504.

(*t*) R. *v.* Virrier, 12 A. & E. 317, per Denman, C.J.

(*u*) 14 & 15 Vict. c. 100, s. 24.

(*v*) In R. *v.* Thornhill, Salop Summer Assizes, 1838 (reported on another point, 8 C. & P. 575), on an indictment for perjury before a revising barrister, it was held that under 4 & 5 Will. IV. c. 45, s. 50 (rep.), his sittings were a court, and the false swearing in it perjury at common law, and need not be described as against the form, &c., though punishable under s. 52. See 6 & 7 Vict. c. 18, s. 41. In R. *v.* De Beauvoir, 7 C. & P. 17, the indictment seems not to have concluded 'against the form,' &c. See the note at the end of the case. In R. *v.* Morgan, 6 Cox, 107, Martin, B., held that perjury before a county court judge need not exclude *contra formam statuti*.

syllogistic form, being and so the jurors on their oath aforesaid say that the defendant on &c., at &c., before &c., did commit wilful and corrupt perjury. Perjury is not a word of art like murder, and such a conclusion is unnecessary if the false oath was sufficiently alleged in the earlier part of the indictment, and where it is superfluous mistakes in it are immaterial (*w*).

Defects.—If the indictment is defective it may be amended in matters within 14 & 15 Vict. c. 100, and if bad may be quashed (*x*) on motion to quash or demurrer, or judgment may be arrested if the defects have not been cured by verdict. None of these modes of challenging an indictment is specifically abolished by the Criminal Appeal Act, 1907 (*post*, Book XII. Chapter IV.).

Judges at *nisi prius* have sometimes refused to try indictments for perjury which were clearly bad on the face of them. An indictment for perjury charged that one A. B. had been convicted of certain offences, and that A. B. afterwards obtained a rule to shew cause why a new trial should not be granted, and that the defendant, in order to prevent the said rule from being made absolute, made the affidavit whereon the perjury was assigned, but there was no averment that the matters falsely sworn were material, nor could it be collected from the indictment that they were so; and Garrow, B., having consulted Abbott, C.J., who concurred with him in opinion that the indictment was clearly bad, held that it was the duty of the judge not to proceed to try the case (*y*). So where in an indictment for perjury the allegations negativing the matter sworn, were so vague and indistinct as to convey no information of the particular charges against the defendant; Abbott, C.J., after consulting the other judges of the Court of King's Bench, ordered the case to be struck out of the list (*z*). A judge will not allow counsel to argue at length at nisi prius the invalidity of an indictment, for the purpose of inducing the Court to refuse to try it, as that is not the time or place to discuss such disputed questions (*a*).

These rulings all relate to the very rare cases in which an indictment for perjury was removed by *certiorari* and tried at *nisi prius*, and seem to depend on the limitations of the *nisi prius* commission, for in ordinary cases such indictments would simply be quashed. Under the Judicature Acts trials at first instance are no longer subject to these limitations.

(*w*) Ryalls *v.* R., 11 A. & E. 781. *Vide* R. *v.* Hodgkiss, L. R. 1 C. C. R. 212; 39 L. J. M. C. 14, *post*, p. 529.

(*x*) Quashing is matter of discretion. R. *v.* Lynch [1903], 1 K.B. 444. It is said that the old practice was to require the defendant to demur or plead. 2 Hawk. c. 25, s. 146. R. *v.* Souter, 2 Stark. (N. P.) 423. R. *v.* Burnby, 5 Q.B. 348.

(*y*) R. *v.* Tremearne, Ry. & M. 147. In R. *v.* Deacon, Ry. & M. 27, Abbott, C.J., refused to try an indictment for a forcible entry, which was bad for want of alleging that the entry was *manu forti*, although the counsel for the defendant insisted that the case should proceed in order that the defendants might have the benefit of an acquittal by a jury, as they intended to institute proceedings for a malicious prosecution.

(*z*) R. *v.* Hepper, Ry. & M. 210. In R. *v.* Haynes, Ry. & M. 298, Gaselee, J., refused to try at *nisi prius* an indictment for perjury found at quarter sessions and removed by *certiorari* into the Court of King's Bench, on the ground that the sessions had no jurisdiction over perjury.

(*a*) R. *v.* Abraham, 1 M. & Rob. 7. In this case the defendant's counsel pointed out the objections in order to induce the Court to stop the trial, and Tenterden, C.J., said that 'it might be convenient sometimes for counsel to suggest a point on which an indictment is clearly bad, to save the time of the Court.' In R. *v.* Hepper (*ante*, p. 503), and R. *v.* Tremearne (*ubi supra*) the objections to the indictment were pointed out by the Court.

Evidence.

Corroboration.—Where the defendant on arraignment pleads guilty to the perjury charged, or where he has made a confession or admission (*b*), that his previous statement on oath was false (*c*), corroboration is not necessary to warrant his conviction and sentence. But in all other cases the evidence of one witness is not sufficient to convict the defendant on an indictment for perjury. This rule is founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against the oath of another (*d*). The rule does not extend to all the facts, which are necessary to be proved on the trial of an indictment for perjury; but only to the proof of the falsity of the matter upon which the perjury is assigned. Thus, the holding of the court, the proceedings in it, the administering the oath, and even the evidence given by the defendant, may all be proved by one witness (*e*).

Nor is the rule to be understood as establishing that *two witnesses* are necessary to disprove the fact sworn to by the defendant; for if any material circumstance is proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction (*f*).

In R. *v.* Roberts (*g*) the prisoner was indicted for having falsely sworn that P. never was out of his sight between the hours of 7 a.m. and 10 a.m. on a certain day, and two witnesses proved that they saw P. at 8.30 a.m. on that day near L., but could not tell whether the prisoner was in sight of P. or not, as the fences were high. Another witness proved that at 9 a.m. the same morning he saw the prisoner alone and on foot at a place more than six miles from L. It was objected that the assignment of perjury was not proved by two witnesses. Patteson, J., said: 'It is necessary to have two witnesses to prove an assignment of perjury; but there need not be two witnesses to prove every fact necessary to make out an assignment of perjury. If the false swearing be that two persons were together at a certain time, and the assignment of perjury that they were not together at that time, evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be a sufficient proof of the assignment of perjury.'

The rule applies to every assignment of perjury in the indictment. Where, therefore, an indictment contains several assignments of perjury, it is not sufficient to disprove each of them by one witness; but in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborative evidence, to negative the truth of the matter contained in such assignment. In R. *v.* Parker (*h*) the prisoner was indicted for perjury alleged to have been committed in an affidavit to obtain a criminal information, in which he had sworn that he had paid

(*b*) As to admissions, see *post*, Bk. xiii. c. iv. 'Evidence.'

(*c*) R. *v.* Hook, D. & B. 606, Byles, J.

(*d*) R. *v.* Muscot, 10 Mod. 193. 4 Bl. Com. 358. Taylor on Evidence (10th ed.), s. 959. And see 1 Phill. Ev. (7th ed.) 151; Stark. Ev. 859; Best, Ev. (10th ed.), ss. 603–7.

(*e*) 2 Hawk. c. 46, s. 10.

(*f*) R. *v.* Shaw, L. & C. 579; 34 L. J. M. C. 169. R. *v.* Lee [Mich. 1766], MS. Bayley, J. 1 Phill. Evid. 152 (7th ed.).

(*g*) 2 C. & K. 607.

(*h*) [1842] C. & M. 639, and MSS. C. S. G.

all his debts, except two, as to which there was an explanation, and there were several assignments of perjury averring that he had not paid certain persons who were named (besides the two excepted ones), and such persons proved that they had not been paid, but only spoke to their respective debts not having been paid; Tindal, C.J., held that this was not sufficient, and that as to each debt there should be the testimony of two witnesses, or of one witness, and such confirmatory evidence as was equivalent to the testimony of a second witness (*i*).

In R. *v.* Hare (*j*), where an assignment of perjury was in the vague terms that defendant falsely swore that he had not treated a certain person to brandy, &c., on a certain day, instead of in the definite terms, that he had not treated him at a particular public-house, on a certain day, it was held, that proof of treating at two public-houses by two distinct witnesses was sufficient to support a conviction, because any witness of a treating at a separate time and place on the same day was sufficient corroboration of a witness who spoke only to one act of treating.

In R. *v.* Champney (*k*), Coleridge, J., is reported to have said: 'One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, Lord Tenterden, C.J., was of opinion that two witnesses were *necessary* to a conviction.' In a later case, R. *v.* Yates (*l*), where the evidence of one witness went in support of all the assignments of perjury, and to confirm him another witness was examined as to a conversation between himself and the defendant, and some entries in the defendant's books were given in evidence; it was submitted that there was no evidence to go to the jury; that the rule is that a case of perjury cannot be submitted to the jury on the evidence of a single witness; and as to the evidence of confirmation, it was not enough that there should be *some* evidence in confirmation, as in an ordinary case at *nisi prius*, where some evidence is necessary to prevent a nonsuit; but it must be such evidence as, in the opinion of the judge, is really confirmatory in some important respect, and equivalent to the positive testimony of a second witness. Coleridge, J., said: 'I think that the case must go to the jury, but I also think without the slightest chance

(*i*) In R. *v.* Mudie, 1 M. & Rob. 128, Tenterden, C.J., had expressed a doubt on this point. The indictment was for perjury, alleged to have been committed by an insolvent debtor in falsely swearing to the correctness of his schedule, the defendant's account book, given by him to the Insolvent Debtors Court, was put in, and several persons, whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and 'paid' was marked to their accounts in the defendant's writing. These persons were called, and stated that they did not pay until after the petition and schedule. It was objected that this was not sufficient evidence, inasmuch as it was only oath against oath, the defendant having sworn that the debts were paid; a single witness, with respect to each particular debt, swore that it was not paid at the particular time of the schedule. Tenterden, C.J., said: 'I feel the force of the objection. It is a very important point whether the defendant's book, and the oath on one side, be not met by the oath of the witnesses on the other side. It would be very difficult to give any other evidence. I will not stop the case. If the defendant is convicted, you can move for a new trial.' The defendant was acquitted on other grounds.

(*j*) 13 Cox, 171, Denman, J.

(*k*) 2 Lew. 258. The same point is said to have been ruled by the same learned judge in R. *v.* Wigley, ibid. note. Mr. Starkie observes, 'And *semble* that the contradiction must be given by *two direct witnesses*, and that the negative supported by one witness and by circumstantial evidence, would not be sufficient. It has been so held (*ut audivi*) by Tenterden, C.J.' 3 Stark. Evid. 860, note (*g*).

(*l*) C. & M. 132.

of a verdict for the Crown. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness in some slight particulars only, is not sufficient to warrant a conviction.'

In R. *v.* Towey (*m*), an indictment for perjury committed on the trial of a 'civil bill' in Ireland, alleged that the prisoner, T. T., falsely swore that 'the note produced is not my handwriting, or any part of it, and the name "T. T." as a witness is not in my handwriting.' The note purported to bear the marks of P. and J. T. as makers of the note, and had on it, 'Witness present, T. T.' The payee of the note could not read, but he identified the note, and swore that he saw T. T. write on the paper, and saw P. and J. T. put their marks on it. Another witness proved that he had subpœnaed T. T. to appear at the sessions as a witness, and that the prisoner then said that there was no occasion to test (subpœna) him; that he would go to prove the note; and that at a meeting between the parties to try to settle the civil bill, on the payee of the note saying he had J. T.'s note, and would take the law on it unless he signed a new one, T. T. said that he had been tested (subpœnaed) to come there, but that there was no occasion to test him; that he would prove the note. But the note was not produced at this meeting. It was held that this evidence was a sufficient corroboration of the evidence of the payee. The prisoner was the only witness to the note, and he could only prove it in his character as a witness, and, therefore, when he said he could prove it, it came to sufficient evidence that he was the witness to the note.

In R. *v.* Boulter (*n*) the indictment alleged that in June, 1851, the prosecutor had distrained upon the prisoner's goods for certain arrears of rent, and that the prisoner on trial at *nisi prius* falsely swore that there was only one quarter's rent due at the time of the said distress. On the trial for perjury the prosecutor positively swore to the fact of there being five quarters' rent due at the time of the said distress; and produced his books by which he refreshed his memory; and for the purpose of corroborating his statement, the son of the prosecutor deposed to a conversation with the prisoner in August, 1850, in which the prisoner admitted that three or four quarters of the said rent were then due. The jury convicted; but, upon a case reserved, the judges were unanimously of opinion that this was not sufficient corroboration. There was nothing in the evidence of the son relevant to the issue. There was a year's interval between the transaction he spoke of and the time when the distress was made, and the money might have been paid intermediately. The oath of the son was quite as consistent with the oath of the prisoner as with that of the prosecutor. In perjury there must be something to make the one believed rather than the other, and there was no such evidence in this case (*o*).

(*m*) 8 Cox, 328 (C. C. R. Ir.).

(*n*) 2 Den. 396; 21 L. J. M. C. 57; 3 C. & K. 236.

(*o*) In Best, Ev. (10th ed.), s. 609, it is said to be a question whether 'the old rule and reason of the matter are satisfied unless the evidence of each witness has an existence and probative force of its own, independent of the other; so that, supposing the charge to be one in which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury, or would at least raise a strong suspicion of

In R. *v.* Virrier (*p*), where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the witness who spoke to such assignment on the fact contained in the other assignments. The assignment was that she falsely swore that B. shook hands with her, and put something into her hand, and told her to give it to her husband, and that it was a sovereign wrapped up in some paper. Evidence was given in support of all the assignments of perjury. Denman, C.J., in summing up, said that as to the second assignment the proof lay almost entirely in the evidence of one witness, and, therefore, he did not see how the jury could convict of the perjury imputed; but that on the others there was a distinct contradiction of the defendant's testimony by C. and several other witnesses; and he left it to the jury to say whether there were not a strong body of evidence clearly supporting C.'s denial (*q*).

In R. *v.* Gardiner (*r*) upon an indictment for perjury, alleged to have been committed in making a charge of an unnatural offence, in which the defendant had deposed that he saw the prosecutor committing the offence, and saw the flap of his trousers unbuttoned, and that he was there five minutes; the prosecutor swore that he did not commit the offence, and that his trousers had no flap; and to confirm him his brother proved that at the time in question the prosecutor was only absent three minutes, and that the trousers he had on, which were produced in court, had no flap. Patteson, J., held that the corroborative evidence was quite sufficient to go to the jury; and upon a case reserved, the judges held the conviction right (*r*). So where perjury was alleged to have been committed by the defendant, who was an attorney, in an affidavit made by him to oppose a motion to refer the defendant's bill of cost to taxation, and to prove the perjury one witness was called, and in lieu of a second witness, it was proposed to put in the defendant's bill of cost delivered by him to the prosecutor; it was suggested that this was not sufficient, as the bill had not been delivered by the defendant on oath. Denman, C.J.: 'I have quite made up my mind that the bill delivered by the defendant is sufficient evidence, or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness' (*s*).

Where a prisoner was indicted for falsely swearing that he had paid B. a certain sum of money on a particular occasion, and B. swore that

the guilt of the defendant.' See R. *v.* Shaw, 34 L. J. M. C. 169: L. & C. 579.

(*p*) 12 A. & E. 317.

(*q*) Denman, C.J., considered the most convenient mode of summing up the case to be to treat the second assignment as the first, and the first and third as one, and did so leave the case to the jury, who found a verdict of 'not guilty on the first *assignment* of perjury for want of sufficient evidence, and guilty on the second,' but said nothing on the third, and the verdict was entered accordingly. The Chief Justice did not at the time make any note of his summing up, but did so afterwards; and having a distinct remembrance of it, and no doubt of the jury's intention, he (on the summons) allowed the *postea* to be amended by entering a verdict of 'guilty' on the first and third assignments, and 'not guilty' on the second'; but the Court afterwards held that the amendment ought not to have been made, there being no note or memorandum of the judge or other document to amend by.

(*r*) 2 Mood. 95; 8 C. & P. 737.

(*s*) R. *v.* Mayhew, 6 C. & P. 315, and see Best, Ev. (10th ed.), p. 511.

he received the money in packages, and afterwards counted it, and found it £7 short; this statement was held not to be corroborated at all by evidence of another person, who also counted it, but had not been present when the money was received (*t*).

An indictment alleged that the prisoner falsely swore at a petty sessions that R. was the father of her illegitimate child. A witness other than R. proved that the prisoner had said that R. 'had never touched her clothes' at a time when she generally denied being in the family way. It was ruled that though, under some circumstances, such a statement might have been a sufficient corroboration of the evidence of R., yet this negation was so far a part of the general denial that the jury could not safely convict upon it alone (*u*).

In R. *v.* Hook (*v*), Wightman, J., said: 'It is not necessary that there should be two independent witnesses to contradict the particular fact, if there be two pieces of evidence in direct contradiction. Here one piece of evidence is that the prisoner himself is proved to have made statements directly contrary to his statement on oath; that alone would not do; but in addition to that you have the oaths of other witnesses, which go to shew that that which he stated when not upon oath was true; and therefore you have two pieces of evidence. I ought rather to put it that, instead of two witnesses being necessary to prove each fact, you must have the evidence of two persons giving evidence in contradiction to what has been sworn to by the prisoner; as, one witness who could prove, as in this case, that on other occasions the prisoner had stated that which was diametrically opposed to that which he has sworn, and the other witness to give evidence of that which is directly opposite. You have therefore two contradictions: you have the contradiction of the prisoner himself, as deposed to on oath by one witness, and you have the contradiction of another independent witness, who speaks to the falsehood of the fact: you, therefore, have two independent contradictions on oath.'

Contradictions by Defendant.—In R. *v.* Knill (*w*), where the defendant had been convicted of perjury, charged to have been committed in an

(*t*) R. *v.* Braithwaite, 1 F. & F. 638; 8 Cox, 444, Watson, B., and Hill, J. In the latter report it is stated that 'the prosecutor took it without counting it, and carried it to a Mrs. Watson's, and counted it over.' In the former, 'The prosecutor took it without counting it, and carried it to an adjacent lane, where he counted a part of it, and found it wrong; he then gave it to a Mrs. Watson, and asked her to count it over.' Mrs. Watson was the witness called to corroborate B.

(*u*) R. *v.* Owen, 6 Cox, 105, Martin, B. In R. *v.* Webster (1 F. & F. 515; 8 Cox, 187) a count alleged that the prisoner falsely swore that she had shewn to one C. certain invoices bearing certain dates. C. swore that the prisoner had not shewn him the invoices she had sworn to, but that she had shewn others; and he produced a memorandum, he had made privately at the time, of the dates of the invoices, which shewed that they were not the same as those sworn to by the prisoner. Cockburn, C.J., is said to have held the private memorandum to be a sufficient corroboration. If this case is correctly reported, it deserves reconsideration. The memorandum was not itself admissible, and could only be used to refresh the memory of the witness; so that the whole statement rested on his single oath; and, even if the memorandum had been admissible, it would only have been the written statement of the witness and not on oath; and the time when it was made and the veracity of its statements must have rested on his single oath. See R. *v.* Lara, 6 T. R. 565, in support of this reasoning. In R. *v.* Boulter, *supra*, p. 510, it was not even suggested that the prosecutor's books could be used to corroborate his evidence.

(*v*) D. & B. 606 (C. C. R.). For the facts of this case, see *post*, p. 515.

(*w*) 5 B. &. Ald. 929, note (*a*).

examination before the House of Lords, the only evidence was a contradictory examination of the defendant before a committee of the House of Commons. Application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness had been adduced to prove the *corpus delicti*, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons; and it was insisted that mere proof of a contradictory statement by the defendant on another occasion was not sufficient, without other circumstances shewing a corrupt motive, and negativing the probability of any mistake. But the Court held that the evidence was sufficient, *the contradiction being by the party himself*, and that the jury might infer the motive from the circumstances (*ww*). In an anonymous case (*x*) a man swore before a justice of the peace, that three women were concerned in a riot at his mill (which was dismantled by a mob on account of the price of corn). Afterwards, at the session, when the rioters were indicted (having been tampered with in their favour) he then swore they were not in the riot. Perjury was assigned on the oath that the women were in the riot; there was no evidence to prove that they were, but the defendant's own original information on oath, which was produced and read. The judge thought this evidence sufficient, and the defendant was convicted (*y*).

These two decisions, if correctly reported, appear to be contrary to first principles and to be virtually overruled by the series of cases next to be stated.

In R. *v.* Wheatland (*z*), on an indictment for perjury, alleged to have been committed on the trial of an indictment for larceny, it appeared that the defendant had sworn to several material facts before the committing magistrate, but when he was called on the trial, denied the whole of what he had stated before the magistrate. R. *v.* Knill and Anon. (*a*) were cited to shew that the contradiction by the oath before the magistrate would alone be sufficient evidence to convict the defendant; but Gurney, B., held, that it was not sufficient to prove that the defendant had, on two different occasions, given directly contradictory evidence, although he might have wilfully done so; but that the jury must be satisfied affirmatively that what he swore at the trial was false, and that would not be sufficiently shewn to be false by the mere fact that the defendant had sworn the contrary at another time; it might be that his evidence at the trial was true, and his deposition before the magistrate false. There must, he held, be such confirmatory evidence of the defendant's

(*ww*) 5 B. & Ald. 929, note (*a*).

(*x*) *Cor.* Yates, J., Lancaster Sum. Ass. 1764. And afterwards, Lord Mansfield, C.J., and Wilmot, J., and Aston, J., to whom Yates, J., stated the reasons of his judgment, concurred in his opinion. Notes to R. *v.* Harris, 5 B. & Ald. 939, MS. Bayley, J.

(*y*) The Precedent-book of Chambr', J., cited 5 B. & Ald. ibid., suggests that when the same person has by opposite oaths asserted and denied the same fact, the one seems sufficient to disprove the other; and with respect to the defendant (who cannot contradict what he himself has sworn) is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichsoever is given in evidence to disprove the other, it can hardly be in the defendant's mouth to deny the truth of that evidence, as it came from himself.

(*z*) 8 C. & P. 238.

(*a*) *Supra.*

deposition before the magistrate, as proved that the evidence given by the defendant at the trial was false (*b*).

And in R. *v.* Hughes (*c*), where a prisoner was indicted for perjury in evidence given before a grand jury, and her deposition on the hearing of the charge before the committing magistrate was put in to shew that the statement before the grand jury was false; Tindal, C.J., held, that further evidence must be given; for if the two contradictory statements on oath alone were proved, *non constat* which was the true one (*d*).

In R. *v.* Jackson (*e*), where the prisoner was indicted for perjury, and it appeared that she had made two statements on oath, one of which was directly at variance with the other; Holroyd, J., is reported to have said: 'Although you may believe that on one or other occasion she swore that which was not true, it is not a necessary consequence that she committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one

(*b*) In R. *v.* Knill, the Court held that 'the jury might infer the motive from the circumstances,' none of which are stated in the short minute of the case; some of them might have been such as to shew that the one statement was false, or the other statement true. In the Anonymous case the defendant had been *tampered* with after his first examination, and the evidence of the tampering with the defendant might be such as to lead to the conclusion that his evidence on the trial was false. But supposing those cases go the length of establishing the proposition, that the defendant's own evidence upon oath is sufficient to contradict the evidence on which the perjury is assigned, it is conceived they cannot be supported. The prosecutor may charge the perjury either on the one statement or on the other, and whichever he selects it is clear that the defendant could not avail himself of a plea of *autre fois acquit*, or *convict* in case he were subsequently indicted for the other, and therefore he might be twice put in jeopardy, and perhaps twice convicted for the same offence. The judgment in R. *v.* Harris, 5 B. & Ald. 926, is conclusive to shew that this is a good objection. Again, such evidence leaves it wholly uncertain which of the two statements is true; now it is a clear rule of criminal law that if the evidence on the part of the prosecution leaves it wholly uncertain whether the *crime charged* has been committed or not, the defendant must be acquitted; and as to the observation that 'it can hardly be in the defendant's mouth to deny the truth of the evidence that came from himself,' it must be remembered that there are two statements upon oath, and if he is to be concluded from denying one to be true, the same reason would conclude him from denying the other, and it would surely be unreasonable to hold that he is concluded to deny the truth of whichever the prosecutor may think fit to select. It is conceived, also, that an indictment charging each of the statements to be false in separate counts could not succeed. The charges being directly contradictory the one to the other, it may be doubted whether the grand jury would be warranted in finding such an indictment; or, if found, whether it would not be bad on the face of it; and as the defendant could only make a defence to one charge by proving himself guilty of the other, the judge would probably insist upon the prosecutor electing on which charge he would proceed. But supposing these difficulties to be surmounted, it is not easy to see how it would be possible for the jury to find a verdict without any evidence to shew which statement was false. If they found a general verdict they would at one and the same time find each of the statements to be both true and false, unless indeed they were satisfied that the defendant had, upon both occasions, wilfully sworn to matters about which he had no knowledge at all. *Ante*, pp. 476, 502. C. S. G.

(*c*) 1 C. & K. 519.

(*d*) The false statement before the grand jury was that certain tablecloths were the property of the prisoner's son, and she had sworn before the magistrates that they were her husband's; and evidence of the state of the family was given to prove that the latter statement must be true; but Tindal, C.J., thought that there was so much doubt whether the prisoner might not have sworn under a misapprehension, that he directed an acquittal.

(*e*) 1 Lew. 270.

thing at one time, and another at another, you cannot convict where it is not possible to tell which was the true and which was the false.

And in R. *v.* Hook (*f*), the prisoner, a policeman, laid an information against a publican for keeping open his house after lawful hours on the fast day, and on the hearing of the information swore that he knew nothing of the matter, except what he had been told by another person, and that '*he did not see any person leave the publican's house after eleven*' on the night in question. Perjury was assigned on this last allegation. It was proved by the clerk of the magistrates that the prisoner on laying the information said, he had caught the publican; he had last night seen four men leave his house after eleven; one of them he could swear to; it was W.; he knew him by his coat. Another witness proved that the prisoner, on another occasion, made the same statement to him. A third witness, W., proved that, on a third occasion, the prisoner repeated the statement with the variation, 'One I can swear to; it was your brother.' It was proved that W. and others had left the house on that night after eleven. The prisoner on the hearing of the information acknowledged that he had offered to smash the case for 30*s*. He told another witness he should make the publican give him money to settle it; another witness heard him offer the publican to settle it for £1, saying he was risking perjury; and another witness proved that the prisoner owned he had received 10*s*. to smash the case, and was to have 10*s*. more. It was objected that there was no sufficient evidence, as these were only the statements of the prisoner not on oath against that on oath. But, on a case reserved, it was held that the conviction was right. In addition to the statements of the prisoner, there were strong confirmatory circumstances. The prisoner's offering to smash the case for one pound, his admitting that he had received 10*s*. and was to receive 10*s*. more, and his talking of making the publican pay to settle it, are strong evidence to shew that what he stated upon his oath was false, and that his statements not upon oath were true (*f*).

In this case Pollock, C.B., expressed a doubt whether a conviction could thereafter be permitted in such a case as R. *v.* Knill (*g*).

Proof of Former Trial.—Where the former trial was of a civil action in any branch of the High Court of Justice (*h*), the record is proved (*i*) by the production of the original by an officer of the Court, under order of a judge or master (R. S. C. Ord. LXI., rules 28, 29), or of an office copy (*j*).

Thus upon an indictment for perjury charged as having been committed on the trial of an action in the High Court of Justice, the

(*f*) D. & B. 606 (C. C. R.). The question involved was not the fact that the men left the house, but whether the prisoner had truly stated that he saw them leave.

(*g*) In R. *v.* Cleland [1901], 20 N. Z. L. R. 509, the Court seem to have considered that R. *v.* Hook actually overrules R. *v.* Knill, *ante*, p. 512.

(*h*) Including actions tried at the assizes.

(*i*) As to former rule, see R. *v.* Iles, Hardr. 118. Bull (N. P.) 243. 2 Hawk. c. 46, s. 57. 3 Stark. Ev. 833. There is not now any judgment roll. Under the old practice, final judgment was entered before any roll was carried in, and an entry in a judgment book, stating that interlocutory judgment had been signed in an action, and final judgment afterwards entered, was held enough to prove the entry of such judgment without producing the judgment roll or an examined copy. R. *v.* Gordon, C. & M. 410, Denman, C.J. See Fisher *v.* Dudding, 9 Dowl. Pr. Cas. 872.

(*j*) *Vide post*, Bk. xiii. c. iii. 'Evidence.'

production by the officer of the Court of the copy writ filed under Ord. V., rule 7, and the copy pleadings filed under Ord. XLI., rule 1, and by the solicitor for the defendant in the action of the order to discuss the action were held sufficient evidence of the existence of the action (*k*).

A minute written by the officer of the Court on the jury panel, verdict for damages 1*s*., was held sufficient evidence of a trial at *nisi prius*, though the *nisi prius* record on production had no postea endorsed (*l*).

Where the perjury is assigned on a former trial for felony or misdemeanor, the former trial may be proved by certificate of the officer having custody of the records of the court where the former trial took place (*m*).

Where the former trial was before a jury it is not necessary to prove that their verdict was given on all the issues sent down for trial (*n*), nor even that they gave any verdict, if they have in fact been sworn and have tried the case (*o*). Whatever the form of trial, the material thing to prove is that there was a trial. Its result is immaterial to the issue of perjury, and the judgment or conviction (*p*) is not admissible as evidence that the perjury assigned was committed. Nor are statements made by the judge in giving judgment on the former trial admissible against a witness on a prosecution for perjury in his evidence given at that trial (*r*).

On an indictment against T. R. for suborning one M. to commit perjury, it was contended on the part of the Crown that the bare production of the record of M.'s conviction was of itself sufficient evidence that he had, in fact, taken the false oath as alleged in the indictment. But it was insisted, for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was right; that R. had a right to controvert the guilt of M.; and that the evidence given on M.'s trial ought to be submitted to the consideration of the present jury; and the Recorder obliged counsel for the Crown to go through the whole case in the same manner as if the jury had been charged to try M. (*s*).

Central Criminal Court.—On a trial for perjury at the Central Criminal Court the caption of the same Court of oyer and terminer or gaol delivery at which the indictment for perjury is preferred, the former indictment

(*k*) R. *v.* Scott, 2 Q.B.D. 415.

(*l*) R. *v.* Brown, M. & M. 315; 3 C. & P. 572, Tenterden, C.J., after consulting the other judges of the Court of King's Bench.

(*m*) 14 & 15 Vict. c. 100, s. 22, *ante*, p. 482.

(*n*) R. *v.* Schlesinger, 10 Q.B. 670. The indictment alleged the trial of two issues before the sheriffs of London on writ of execution, and the position shewed a verdict on one issue only. The jury had been summoned and sworn to try both, as approved by the record. The record stated that the jury, after evidence given, withdrew to consider their verdict, and after they had agreed, returned to the bar to deliver their verdict, 'Whereupon the plaintiff being called, comes not, &c.'

(*o*) R. *v.* Bray, 9 Cox, 218. The Recorder, after consulting Bramwell, B., and Byles, J.

(*p*) R. *v.* Goodfellow, C. & M. 569 (conviction before justices). See R. *v.* Dowlin, 5 T. R. 311. In R. *v.* Moreau, 11 Q.B. 1028 (award of an arbitrator), Denman, C.J., said: 'The decision of the arbitrator in respect of the fact is no more than a declaration of his opinion, and there is no instance of such a declaration of opinion being received as evidence of a fact against a party to be affected by proof of it in any criminal case.'

(*r*) R. *v.* Britton, 17 Cox, 627.

(*s*) R. *v.* Reilly, 1 Leach, 454. The record was not *res judicata* in the proceedings against R.

with the indorsement of the prisoner's plea, the verdict, and sentence of the Court thereon, together with the minutes of the trial, made by the officer of the Court, are at common law sufficient evidence of the former trial, without a regular record or any certificate thereof (*t*).

Quarter Sessions.—The sessions book containing the orders and other proceedings of a Court of Quarter Sessions made up and recorded after each sessions, with an entry containing the style and the date of the sessions, and the name of the justices in the usual form of a caption, no other record being kept, is good evidence of the trial of an appeal against an order of removal (*u*).

County Court.—Where an indictment is preferred for perjury committed on the hearing of a plaint in the County Court, the proper mode of proving the proceedings in that Court is to produce the Court book containing a note of the plaint or a copy of the minutes bearing the seal of the Court, and purporting to be signed and certified as a true copy by the registrar of the Court under s. 28 of the County Court Act, 1888 (51 & 52 Vict. c. 43) (*v*).

Ecclesiastical Court.—An indictment for perjury alleged that a certain suit was instituted in the Prerogative Court of Canterbury, in which M. S. M. was plaintiff, and J. T., J. H. T., W. B. W., and W. T. A., defendants; and in order to prove this allegation, an officer from the registrar's office in the Prerogative Court produced from the office an original allegation put in on behalf of M. S. M. and the original allegation put in on behalf of the executors in answer to it, and proved the signatures of two advocates, who acted as advocates in the Court, to each of the allegations. This was held sufficient proof of the suit having been instituted as alleged (*w*).

Proof of Authority to administer the Oath.—It is sufficient, to support the averment that the party administering the oath had competent authority for that purpose, to shew in the first instance that he *acted* as a person having such authority. Thus, upon an indictment for perjury before a surrogate in the Ecclesiastical Court, it was ruled, that the fact of the person who administered the oath having acted as a surrogate was sufficient *prima facie* evidence of his having been duly appointed, and having authority to administer it. And Ellenborough, C.J., said: 'I think the fact of Dr. P. having acted as surrogate is sufficient *prima facie* evidence that he was duly appointed and had competent authority to administer the oath. I cannot for this purpose make any distinction between the Ecclesiastical Courts and other jurisdictions. It is a general presumption of law, that a person acting in a

(*t*) R. *v.* Newman, 2 Den. 390. The trial for perjury was in December 1851; the trial on which the perjury was committed was at a session held on May 12, 1851, and the caption was dated on that day. As to other modes of proof, see 14 & 15 Vict. c. 100, s. 22, *ante*, p. 482.

(*u*) R. *v.* Yeoveley, 8 A. & E. 806. In R. *v.* Ward, 6 C. & P. 366, Park, J., had rejected the sessions book on the strength of a statement by the clerk of the peace that he would, on request, have drawn up a record of the trial of such an appeal.

(*v*) This enactment takes the place of 9 & 10 Vict. c. 95, s. 111. See R. *v.* Rowland, 1 F. & F. 72. Bramwell, B., held that the proceedings on hearing the plaint could not be proved by the assistant clerk of the Court. In R. *v.* Ward, 3 Cox, 279, Maule, J., held that want of proof of a county court summons was answered by the fact of the prisoner's appearance, which might be proved by parol.

(*w*) R. *v.* Turner, 5 C. & K. 732, Erle, J.

public capacity is duly authorised so to do' (*x*). But upon its appearing that the surrogate was appointed contrary to the canon (which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf), it was held that his appointment was a nullity and the averment that he had authority to administer the oath was negatived (*y*). Where perjury was assigned upon an affidavit sworn before C., a commissioner, &c., and it was proved that C. acted as a special commissioner for taking the affidavits of parties in prison, or unable from sickness to attend before a judge; Patteson, J., held that this was sufficient evidence that C. was a commissioner, and that it was not necessary to prove the commission under which the affidavit was taken, upon the general principle that a person acting as a public officer must be taken to have authority as such, and that a commissioner for taking affidavits came within that principle (*z*). An affidavit was alleged to have been sworn before R. G. W., a commissioner, 'then and there being duly authorised and empowered to take affidavits in the said county of G. in or concerning any cause depending in Her Majesty's Court of Exchequer.' It was proved that W. had acted as a commissioner for taking affidavits in the Court of Exchequer for ten years; that he had never seen his commission, but had directed it to be applied for ten years before through his agent, and had been told by him that it had been granted. It was held that W.'s acting as a commissioner was *prima facie* evidence that he was so (*a*).

On an indictment for perjury in a County Court, Maule, J., held that proof that the judge acted in the capacity of a judge of the Court in pursuance of and under the County Courts Act, 1846 (repealed), was sufficient (*b*).

The same rule applies to deputy judges of County Courts (*c*).

Where a question arises whether by the practice of a Court an affidavit is prescribed or required, the rules of practice should be proved by an official copy (*d*) or by an officer who can verify the practice (*e*).

Where the jury is assigned on an oath before a Court or person with limited jurisdiction it is necessary to prove such facts as would give jurisdiction to administer the oath (*f*). This rule was applied in several cases under the old bankruptcy law where the jurisdiction of commissioners of bankruptcy to examine a bankrupt depended on the existence of a good petitioning creditor's debt (*g*) or the fact of bankruptcy (*h*).

Where the issue and (or) service of a summons or the laying of an

(*x*) R. *v.* Verelst, 3 Camp. 432. R. *v.* Cresswell, 2 Chit. Cr. L. 312.

(*y*) R. *v.* Verelst, *supra*.

(*z*) R. *v.* Howard, 1 M. & Rob. 187.

(*a*) R. *v.* Newton, 1 C. & K. 469, Atcherley, Serjt., after consulting Tindal, C.J. The defendant had requested Whatley to act as commissioner in taking this particular affidavit.

(*b*) R. *v.* Ward, 3 Cox, 279. An attempt had been made to prove the due constitution of the Court by production of a copy of the 'London Gazette,' which turned out to be the wrong one.

(*c*) R. *v.* Roberts, 14 Cox, 101.

(*d*) *Vide post*, Bk. xiii. c. iii.

(*e*) See R. *v.* Koops, 6 A. & E. 198. In that case printed rules were not admitted in the absence of evidence that they were sanctioned by the Court, or known to express its practice.

(*f*) See R. *v.* Dunning, L. R. 1 C. C. R. 290, *ante*, p. 486.

(*g*) R. *v.* Ewington, 2 Mood. 223; C. & M. 319.

(*h*) R. *v.* Punshon [1812], 3 Camp. 96. *Vide* R. *v.* Bullock, 1 Taunt. 71.

information is necessary to give the justices jurisdiction to take the evidence on which the perjury is assigned, it is necessary to prove the issue service, &c. (*i*), or that its absence or defects were waived (*j*). Proof of such matters may also be necessary in order to ascertain the nature of the proceeding before the justices from the point of view of the materiality of the false evidence (*k*).

An indictment alleged that the prisoner appeared at petty sessions in pursuance of a summons requiring him to answer a complaint of A. J. touching a bastard child of which she alleged him to be the father (*l*), and alleged that he committed perjury on the hearing of that complaint. The magistrates' clerk produced a book containing the minutes made by him on the occasion, headed 'Ann J. *v.* R. N., affiliation,' and then the evidence was set out. There was no other evidence of the proceedings before the justices. It was objected that the summons ought to have been produced, or notice to produce it served on prisoner. Wightman, J., said: '7 & 8 Vict. c. 101, provides that "upon complaint by the mother, the justices shall have power to summon the putative father, and upon the appearance of the person so summoned, or upon proof of the service of the summons, to hear and adjudicate upon the case." A summons was, therefore, necessary to give the magistrates jurisdiction to hear the case; and to prove that they had jurisdiction in this case it must be proved that the prisoner was duly summoned, either by production of the summons, or by secondary evidence, after notice to the prisoner to produce it. The minutes of examination in this case were no more than the minutes of a shorthand writer' (*m*).

It has been ruled that on indictments for perjury before justices, if the proceeding there was on a written information it must be produced, or its loss or destruction accounted for (*n*).

Petty Sessional Courts now have a register of the minutes and memorandums of all the convictions and orders of the Court, and all proceedings directed by rules of Court to be registered (*o*). The register is *prima facie* evidence only in the Court for which it is kept (*p*).

Upon trial for perjury committed at the hearing of an information in bastardy, the indictment alleged the application for a summons, the issuing thereof, and the hearing upon it, proof of the information, of the appearance of the defendant, of the hearing, of evidence being given on both sides, and of no objection being made of the want of a summons, was held sufficient to shew jurisdiction in the justices who heard the information, without proof of the summons which issued upon that

(*i*) R. *v.* Whybrow, 8 Cox, 438: R. *v.* Hurrell, 3 F. & F. 271: R. *v.* Carr, 10 Cox, 564 (C. C. R): all cases relating to the production of summonses.

(*j*) R. *v.* Smith, L. R. 1 C. C. R. 110. R. *v.* Hughes, 4 Q.B.D. 614, *ante*, p. 463.

(*k*) R. *v.* Carr, *ubi sup.*

(*l*) The proceedings were taken under 7 & 8 Vict. c. 101, ss. 2, 3, now superseded by 35 & 36 Vict. c. 65, s. 3.

(*m*) R. *v.* Newell, 6 Cox, 21. Cf. R. *v.* Hughes, 4 Q.B.D. 614, and cases cited *ante*, p. 463.

(*n*) R. *v.* Dillon, 14 Cox, 4, Lopes, J.

(*o*) 42 & 43 Vict. *c.* 49, s. 22. Summary Jurisdiction Rules, 1886 and 1906.

(*p*) Police Commissioner *v.* Donovan [1903], 1 K.B. 895. In other cases it is only an *aide memoire*, and does not dispense with proof of summons, &c. R. *v.* Cox, 10 Cox, 564 (C. C. R.).

information; and a conviction for perjury upon the indictment was upheld (*q*).

Proof of the Oath.—The taking the oath must be proved as it is alleged, unless the indictment is amended. Therefore, if it is averred that the defendant was sworn upon the Holy Gospels, &c., it will not be enough to prove that he was sworn in some other manner (*r*). Where the allegation in an indictment was, that on the trial of an action the prisoner 'was duly sworn, and took his corporal oath on the Holy Gospel of God,' and the proof was that the witness was sworn and examined; and it was objected that the particular mode of swearing must be proved, as the evidence given would apply to the oath of a Jew, or person of any other religion than the Christian; Littledale, J., held the proof sufficient, as the ordinary mode of swearing was the one specified (*s*). Where an indictment stated that the prisoner was sworn to speak 'the truth, the whole truth and nothing but the truth,' and it was proved that the oath taken was in the form, 'you shall true answer make,' this was held to be no variance (*t*).

It is necessary to prove that the oath was taken in a place over which the Court of trial for the perjury has jurisdiction, but, where the oath is proved to have been taken in the county in which the defendant is indicted, variance between indictment and proof as to the place of taking the oath are immaterial (*u*).

The recital of the place where the oath is administered in the jurat of an affidavit is sufficient proof that the oath was administered at the place named (*v*). Where, therefore, perjury was assigned on an answer in Chancery, and the defendant's signature to the answer, and that of the Master in Chancery to the jurat, were proved, and that Southampton Buildings, which the jurat recited as the place where the oath was administered, was in the county of Middlesex; Tenterden, C.J., held that this was sufficient proof that the oath was administered in Middlesex (*w*). So where on an indictment for perjury committed in an affidavit, the original affidavit was produced, and proved to be signed 'J. T.,' in the handwriting of the prisoner, and the jurat was 'Sworn in open court at Westminster Hall, the 10th day of June, 1846, by the Court,' and it was proved that the words 'By the Court' were in the handwriting of one of the masters of the Court, by whom the jurats of affidavits are signed when the affidavits are sworn in Court. It was objected that it should be shewn that the master was in Court when the prisoner was sworn before him. Erle, J., said: 'We have proof of the handwriting of the party sworn, and of the officer, who is authorised to administer the oath; and when an officer thus authorised writes under a proper jurat the words "By the Court," I think that that is sufficient evidence that the affidavit was sworn before him, and properly sworn in Court' (*x*). And upon an indictment in Middlesex, it may

(*q*) R. *v.* Smith, L. R. 1 C. C. R. 110.
(*r*) R. *v.* McCarther, Peake (3rd ed.) 211. Kissing the book and lifting the hand are directory only. R. *v.* Haly, 1 Crawf. & Dix. Circ. Ct. (Ir.) 199.
(*s*) R. *v.* Rowley, Ry. & M. 299.
(*t*) R. *v.* Southwood, 1 F. & F. 356, Watson, B.
(*u*) R. *v.* Taylor, Skin. 403.
(*v*) R. *v.* Spencer, 1 C. & P. 260, Tenterden, C.J.
(*w*) R. *v.* Spencer, *supra*.
(*x*) R. *v.* Turner, 2 C. & K. 732.

be shewn that the oath was in fact taken in Middlesex, although the jurat state it to have been sworn in the city of London (*y*). The prisoner must of course be identified as having sworn the oath.

On an indictment for perjury, in an answer in Chancery, sworn before the passing of the Judicature Acts, the bill must be produced and proved in the usual way (*z*). Proof of the defendant's signature, and that of the master before whom the answer purported to be sworn, was evidence of the defendant's having sworn to the truth of the contents, without calling the person who wrote the jurat, or proving the identity of the defendant as being the very same person who had signed the answer (*a*). But unless there was such proof of the defendant's signature, or some other sufficient proof to identify him as the person by whom the oath was taken, no return by commissioners or of a master in Chancery was sufficient (*b*). In a case upon 31 Geo. II. c. 10, s. 24 (for taking a *false oath* to obtain administration to a seaman's effects, in order to receive his wages), it was held necessary to prove, directly and positively, that it was the prisoner who took the oath (*c*).

On an indictment for perjury all the evidence referable to the fact on which the perjury is assigned must be proved (*d*): such prefatory averments and innuendoes as are stated in the indictment with this object (*e*). On an indictment for perjury on the trial of an action it was held sufficient to go to the jury if that a witness deposed for recollection the evidence given by the prisoner, though he did not take it down in writing, and could not say with certainty that it was all the evidence given by the prisoner, but could only say with certainty that it was all he gave on that point, and that he said nothing to qualify it (*f*).

Where a prisoner is indicted for perjury in evidence given on the trial of a cause, it is only necessary for the prosecution to prove so much of that evidence as is relevant to the matter in issue on the trial for perjury; but if the prosecution prove the whole of the prisoner's evidence on the former trial, and it refers to any deed or other document, which is so mixed up with it that it is necessary to be read in order to make the evidence intelligible, the prisoner is entitled to have it put in

(*y*) R. *v.* Emden, 9 East, 437.

(*z*) 3 Stark. Ev. 859, citing R. *v.* Alford, 1 Leach, 150.

(*a*) R. *v.* Benson, 2 Camp. 508. R. *v.* Morris, 2 Burr. 1189; 1 Leach, 50. The Court of Chancery made a general order that all defendants should *sign* their answers with a view to the more easy proof of perjury in answers. 2 Burr. 1189. See R. *v.* Turner, 2 C. K. 732.

(*b*) Id. ibid.

(*c*) R. *v.* Brady, 1 Leach, 327.

(*d*) R. *v.* Rowley, Ry. & M. 111, 229, Littledale, J.

(*e*) Stark. Ev. 859. There are rulings by Kenyon, C.J., that the *whole* of the defendant's evidence must be proved, unless the perjury is assigned on a point which first arose on his cross-examination. R. *v.* Jones, Peake (3rd ed.), 51. R. *v.* Dowlin, ibid. 227. These rulings have been criticised by text writers as anomalous, in that they require the prosecutor to anticipate the defence (2 Chit. Cr. L. 312; 3 Stark. Ev. 858), and so far as inconsistent with the rule above stated, are not now law. The defendant can, of course, cross-examine the witness who proves his evidence to prove that he corrected or explained his evidence. R. *v.* Carr, 1 Sid. 418.

(*f*) R. *v.* Rowley, *ubi sup.* In R. *v.* Munton, 3 C. & P. 498, three witnesses stated what the defendant had said on the trial of an indictment for an assault, and the defendant was convicted, although none of the witnesses took down the evidence as it was given, and none of them professed to state the whole of the evidence given. And this course has been followed in subsequent cases. R. *v.* Meek, reported, 9 C. & P. 513, as to another point. R. *v.* Ann Bird, Gloucester Spr. Ass. 1842, Cresswell, J., *ante*, p. 500.

and read for that purpose; but he is not entitled to require it to be regularly proved by calling the attesting witness or the like (*g*).

Where the perjury is assigned on an affidavit, deposition or examination signed by the prisoner, the original must be produced and verified, and secondary evidence is not admissible (*h*), except on proof that the original is lost or destroyed (*i*), or under the control of the prisoner (*j*).

It seems that if a party produces an affidavit, purporting to have been made by him before commissioners in the country, and makes use of it in a motion in the cause, it will be evidence against him that he made it (*k*).

Upon an indictment for perjury alleged to have been committed upon the hearing of an information for sporting without a game certificate, in order to prove what the defendant swore before the magistrate, his deposition taken in writing before the magistrate was put in, and it was held that evidence was not admissible of other things stated by the defendant, when he was examined as a witness before the magistrate, but which were not contained in the written deposition (*l*).

Upon an indictment for perjury in an affidavit which was signed with the mark of the defendant, it appeared on production of the affidavit that the jurat omitted to state that it was read over to the defendant (*m*); Littledale, J., said: 'As the defendant is illiterate, it must be shewn that she understood the affidavit. In those cases where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents, but in the case of a marksman it is not so. If in such case the master by the jurat authenticates the fact of its having been read over, we give him credit; but if he does not, and the fact were so, he ought to be called to prove it. I should have difficulty in allowing the evidence of any other person to that fact.' And no evidence being adduced to shew that the affidavit was read over in the presence of the defendant, it was held that the assignments of perjury on this affidavit could not be supported (*n*).

(*g*) R. *v.* Smith, 1 F. & F. 98, Erle, J.

(*h*) If copies are produced, they must be office or examined copies, and not obviously defective. R. *v.* Christian, MSS. C. S. G. C. & M. 388, Denman, C.J. In that case, upon an indictment for perjury, a copy of a bill in Chancery was rejected which contained many abbreviations, and had all the dates in figures, it being proved that in the original bill all the words were written at full length, and all the dates expressed by words.

(*i*) *Vide post*, Bk. xiii. c. i. 'Evidence.'

(*j*) R. *v.* Milnes, 2 F. & F. 10, Hill, J. Taylor on Evidence (10th ed.), s. 1535.

(*k*) R. *v.* James, Show. 397. 3 Stark. Evid. 857. And see Brickell *v.* Hulse, 7 A. & E. 454.

(*l*) R. *v.* Wylde, 6 C. & P. 380, Park, J. The correctness of this decision seems questionable. In the case of summary convictions there is no statute which requires magistrates to take down the evidence in writing, and therefore what a party says in an examination before a magistrate on such an occasion may be proved by parol, whether any person took it down or not. Robinson *v.* Vaughton, 8 C. & P. 252, Alderson, B. Inasmuch, therefore, as all the defendant said might have been proved by parol, it is difficult to see how the deposition being put in could prevent other matters not contained in it from being proved by parol. The distinction between depositions in felony and in summary convictions was not noticed in this case, nor was any reference made to R. *v.* Harris, 1 Mood. 338. And the decision in the text appears at variance with the ordinary practice of examining a witness in cases of felony as to other statements made by him before the committing magistrate, after his deposition had been put in and read. C. S. G.

(*m*) Unless the jurat so states, other evidence must be given that the affidavit was read over to the defendant.

(*n*) R. *v.* Hailey, Ry. & M. 94. It was also held in this case, that where one affidavit, which has a perfect jurat, refers to another affidavit which is inadmissible for want of proof that it was read over to the

Where the evidence was given orally it must be proved by a person present when it was given, *e.g.*, a shorthand writer or other person who took a note of it which he can verify, or a person who can swear from memory to the substance of the evidence. The clerk of the Court may be called for this purpose, but it is unusual and inexpedient, even if lawful, to call the judge.

Where a bill of indictment was preferred for perjury, alleged to have been committed at Quarter Sessions, it was proposed to examine the chairman of the Quarter Sessions at the trial at which the alleged perjury was committed, but he expressed a desire not to be examined as a witness to prove what was sworn before him; Patteson, J., held that he ought not to be examined. He was the president of a Court of Record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in Court (*o*).

On an indictment for perjury committed on a trial at the assizes before a Queen's counsel, his notes of the evidence, proved to be in his handwriting, were tendered in evidence, but were held inadmissible (*p*).

A grand juror in England may not be called to prove perjury committed before the grand jury (*q*).

In a case of perjury where the statements of the prisoner had not been taken down and were proved from memory, some observations being made as to the judge of the County Court who had tried the case not being called to prove his notes, though he was willing to appear; Byles, J., said that the judges of the superior Courts ought not, of course, to be called upon to produce their notes. If he were subpœnaed for such a purpose he should certainly refuse to appear. But the same objection was not applicable to the judges of inferior Courts; he saw no reason why they should not be called, especially where, as in this case, the judge was willing to appear (*r*).

In R. *v.* Withers (*s*) the notes of a County Court judge seem to have

defendant, the former affidavit cannot be read. The report does not state in what manner the one affidavit referred to the other. Cf. R. *v.* Petricus, 67 J. P. 578.

(*o*) R. *v.* Gazard, 8 C. & P. 595. The gentleman in question was one of the grand jurors who had to consider the bill, and the grand jury asked the judge whether he ought to be examined. In the absence of his evidence, the bill was ignored. The case is noted with a query in 3 Stark. 361. In R. *v.* Jones, 6 C. & P. 137, on an indictment for perjury, the chairman of the Worcestershire Quarter Sessions proved what a witness swore on a trial before him at the Quarter Sessions. 'It would, no doubt, be extremely inconvenient if the judges were called upon to give evidence as to what occurred before them in court, but the inconvenience in the case of chairmen of Quarter Sessions is comparatively slight, especially as they are usually present at the Assizes, and the evidence must be given in the county where they are chairmen. Assuming, however, that the inconveniences in their case were considerable, it seems worthy of further consideration how far that can prevent their liability to be called as witnesses. The general rule undoubtedly is, that every person is liable to be compelled to give evidence in a criminal case, and it may be dangerous to introduce exceptions which may prevent persons from giving evidence either for the Crown or for the defendant.' C. S. G.

(*p*) R. *v.* Child, 5 Cox, 197, Talfourd, J. Nor is the conviction or judgment on the trial in which the false oath was taken. R. *v.* Goodfellow, C. & M. 569.

(*q*) R. *v.* Hughes, 1 C. & K. 529, Tindal, C.J. *Secus* in Ireland, 1 & 2 Vict. c. 37, s. 2.

(*r*) R. *v.* Harvey, 8 Cox, 99. Cf. R. *v.* Morgan, 6 Cox, 107. R. *v.* Newall, ibid. 21.

(*s*) R. *v.* Withers, 4 Cox, 17. The indictment alleged that the prisoner falsely swore that the words J. S. were written by J. S. at the house of M. P. in the parish of M. in the county of G. The proof by the

been used on a trial for perjury in a County Court to prove the evidence given by the prisoner there.

Statements or admissions by the prisoner, whether sworn or unsworn, may be put in evidence against him to prove any allegation in the indictment. Thus statements made by the prisoner in a petition to an insolvency Court, uncontradicted by any conflicting testimony, were held good evidence to prove allegations on an indictment for perjury as to the condition of the prisoner's affairs and the presentation of the petition (*t*).

Where an indictment for perjury alleged that a bill was pending in the Court of Chancery, and that it became material to ascertain whether an annuity granted by G. H. to the defendant, or granted to J. B. B., as trustee for the defendant, had been paid up to 1828, and that the defendant falsely swore that the annuity had not been paid up to 1828; and in order to shew that B., who was abroad, had paid the money to the defendant, it was proved that B. had sent money to his banker's by his clerk; it was held that what the clerk said about the money at the time he paid it into the banker's was admissible in evidence, on the ground that it was a declaration made by an agent acting at the time within the scope of his authority (*u*).

As to evidence of handwriting where the perjury is assigned on a denial of a signature, see 28 & 29 Vict. c. 18, s. 8, *post*, Book XIII. 'Evidence' (*v*).

On an indictment for perjury alleged to have been committed on the trial of A. P., for an indecent assault, it appeared that the prisoner had sworn that P. had assaulted her at a certain time and place, but on cross-examination she had admitted that certain liberties had been taken without resistance; whereon the judge directed an acquittal. P. and others were called to prove that no such assault could have been committed at the time alleged; and it was held that the prisoner was entitled to prove what her conduct was immediately after the alleged assault; that she had made immediate complaint; and that all the evidence which was admissible on the trial of the assault was admissible for the purpose of shewing that the prisoner was not guilty (*w*).

The defendant is of course entitled to adduce evidence to prove that the evidence alleged to be false was qualified or explained by later answers, whether in an oral examination or on affidavits, &c. (*x*).

Competency.—Most of the common law rules as to the competency

judge's notes was that the prisoner swore as alleged, except that they did not describe M. P.'s house as in the parish of M. Rolfe, B., held that the allegation might be made out by proving orally that M. P.'s house was in that parish.

(*t*) R. *v.* Westley, Bell. 193 (C. C. R.).

(*u*) R. *v.* Hall, 8 C. & P. 358, Littledale, J.

(*v*) In R. *v.* Taylor, 6 Cox, 58 (decided before that Act), the defendant had, in a County Court action, sworn that the signature to a paper was not his. He had then, on the direction of the judge, written his name on a piece of paper, and the judge had compared this writing with that of the disputed writing. Wightman, J., inclined to think that the second signature was admissible as part of the transaction out of which the charge rose. And, the prisoner not objecting, the paper was handed to the jury.

(*w*) R. *v.* Harrison, 9 Cox, 503.

(*x*) R. *v.* Carr, 1 Sid. 418; 2 Keb. 576. In that case an answer in Chancery had been excepted to as insufficient, and a second answer was put in explaining the generality of the first. Upon a trial at bar, it was held that nothing could be assigned as perjury which was explained by the second answer. 'At which unexpected evidence and resolution the counsel for the prosecution were surprised.'

of witnesses have been abrogated by the statutes set forth, *post*, Book XIII. Chapter V. ('Evidence'). The remaining exceptions relate to infants of tender years, persons of unsound mind, and the husband or wife of the accused.

Where, upon an indictment for perjury committed upon a criminal trial, the alleged perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted and examined as a witness, and the indictment did not state his acquittal, nor did the minute of the verdict produced shew it; it was held that, although the evidence of a shorthand writer, who stated that the defendant was acquitted and then examined, was not any proof of his acquittal, yet it was good proof that he was examined (*y*).

Sect. II.—Perjury under the Statute of Elizabeth.

By 32 Hen. VIII. c. 9, s. 3 (1540), it is *inter alia* provided that 'no person or persons of what estate, degree, or condition soever he or they be do hereafter unlawfully' . . . 'suborn any witness by letters, rewards, promises, or by any other sinister labour or means' . . . 'to the procurement or occasion of any manner of perjury by false verdict, or otherwise in any manner of court aforesaid,' *i.e.* in any of the King's Courts which have authority by the King's Commission, patent, or writ, to hold plea of lands or determine the title to lands. The penalty is forfeiture of £10 by action or information, whereof half goes to the King, half to the person suing.

5 Eliz. c. 9 (1562) (*z*), after reciting the above enactment, provides (sect. 1) that 'all and every such person and persons which . . . shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever now depending, or which hereafter shall depend in suit and variance, by any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts before mentioned (*a*), or in any of the Queen's Majesty's courts of record, or in any leet, view of frank-pledge or law-day, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in the counties of Devon and Cornwall; or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify *in*

(*y*) R. *v.* Brown, M. & M. 315, Tenterden, J., after consulting the other judges of the Court of King's Bench. The acquittal was material only on the question of the competence of such defendant to give evidence on the former trial.

(*z*) Made perpetual by 29 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 28, s. 8. The numbering of the sections in the text follows that of the Revised Statutes (2nd ed.) which differs from the numbering in Ruffhead's edition.

(*a*) *Viz.* (as in 32 Hen. VIII. c. 9), 'the King's Courts of Chancery, the Star Chamber, the Whitehall, or elsewhere within any of the King's dominions of England or Wales, or the marches of the same, where any person or persons have or from thenceforth should have authority by virtue of the King's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine any title of lands, or any matter of witnesses concerning the title, right, or interest of any lands, tenements, or hereditaments.'

perpetuam rei memoriam; that then every such offender or offenders shall for his, her, or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds: and if it happen any such offender or offenders, so being convicted or attainted as aforesaid, not to have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every such person so being convicted or attainted of any the offences aforesaid shall for his or their said offence suffer imprisonment by the space of one half-year, without bail or mainprize, and to stand upon the pillory (*b*) by the space of one whole hour, in some market town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed . . .' (*c*).

Sect. 2. 'If any person or persons . . . either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition (*d*) in any of the Courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds, and to have imprisonment by the space of six months without bail or mainprize' . . . 'and if it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds, that then he or they to be set on the pillory (*b*) in some market-place within the shire, city, or borough, where the said offence shall be committed, by the sheriff, or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their ministers, and there to have both his ears nailed. . . .' (*c*).

Sect. 2 further provides that one moiety of the said forfeitures shall be to the Queen, and the other moiety to such person as shall be grieved, hindered, or molested by reason of any of the offences before mentioned, that will sue for the same, &c.; and sect. 3, that as well the judge and judges of every such of the said Courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the justices of assize and gaol delivery, and justices of the peace at their quarter sessions (*e*), both within the liberties and without, may inquire of, hear, and determine all offences against the said Act. And it is provided (sect. 5) that the said Act shall no way extend to any spiritual or ecclesiastical Court, but that every such offender, as shall offend in term as aforesaid, shall be punished by such usual and ordinary laws as are used in the said Courts. And it is also provided (sect. 7) that the said statute shall not restrain the authority of any judge having absolute power to punish perjury before

(*b*) The pillory was finally abolished in 1837. *Vide ante*, p. 249.

(*c*) The disability to be sworn as a witness until the judgment has been reversed is abrogated by 6 & 7 Vict. c. 85.

(*d*) It would seem that the deposition must be filed or used. Stark. Cr. Pl. 121. And see 3 Stark. Evid. 857, citing R. *v.* Taylor, Skin. 403, that the bare making of an affidavit without producing or using it was not enough.

(*e*) This jurisdiction is taken away by 5 & 6 Vict. c. 38, s. 1. S. 4 is repealed. S. 6 provides penalties for non-attendance of witnesses.

the making thereof; but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said Act (*f*).

The statutes of Henry and Elizabeth did not apply to a witness for the Crown (*g*). They are now seldom if ever resorted to (*h*), the remedy at common law or under other statutes being simpler and more extensive. For the interpretation of the old statutes, see 1 Hawk. c. 69; Bac. Abr. tit. 'Perjury' (B); 2 Hale, 191, 192; 2 Rolle Abr. 77.

Sect. III.—Subornation of Perjury.

Subornation of perjury is a misdemeanor indictable at common law (*i*), and is punishable in the same manner as perjury (*j*). It consists in procuring a man to take a false oath amounting to perjury, who actually takes such oath (*k*). The offence is in substance the same as counselling or procuring the commission of the misdemeanor of perjury, and is punishable in the same manner as the principal offence under sect. 8 of the Accessories, &c., Act, 1861 (*l*).

From the definition of the offence it follows that to justify conviction it must be proved that the perjury was committed and was due to the procurement. The proof cannot be made by putting in the record or certificate of the conviction of the perjury (*l*).

As to the form of the indictment, see 14 & 15 Vict. c. 100, s. 21, *ante*, p 482. A suborner may be indicted and tried with the perjurer, and more than one person may be included in the same indictment for subornation (*m*).

If the person incited to take such an oath does not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, but is guilty of an indictable misdemeanor (*n*), and is liable to be punished by fine and (or) imprisonment (*o*).

An indictment charged that the defendant, an attorney, being retained to defend W. against a charge of picking L.'s pocket, deceitfully procured himself to be employed by L., and persuaded L. to swear before the grand jury that he did not know who picked his pocket, which he did, and no bill was returned. An objection was made that L.'s evidence was not stated to have been false; but, upon a case reserved, the judges thought it unnecessary, as the defendant's crime was the same, unless he knew L.'s evidence to be true, and *that* he should have proved (*p*).

(*f*) As to present punishments, *vide ante*, p. 479.
(*g*) *Re* Rowland ap Eliza, 3 Co. Inst. 164.
(*h*) Buxton *v.* Gouch, 3 Salk. 269.
(*i*) 1 Hawk. c. 69, s. 10.
(*j*) *Ante*, p. 479.
(*k*) 1 Hawk. c. 69, s. 10. 2 Chit. Cr. L. 317.
(*l*) *Ante*, p. 138. 2 Chit. Cr. L 317.
(*m*) R. *v.* Rhodes, 2 Ld. Raym. 886; and *ante*, p. 502n.
(*n*) R. *v.* Reilly, 1 Leach, 454.
(*o*) *Vide ante*, p. 203. 1 Hawk. c. 69, s. 10. 2 Chit. Cr. L. 317. Bac. Abr. tit. 'Perjury.'
(*p*) R. *v.* Edwards, Easter Term, 1764, MS. Bayley, J. As to dissuading witnesses from giving evidence, see *post*, p. 541.

Sect. IV.—False Oaths not Amounting to Perjury.

It has already been stated, *ante*, p. 460, that false oaths (*q*) in merely private matters are not punishable as perjury, *e.g.*, oaths in making a bargain (*r*).

In some cases, relating to matters of public concern, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus it appears to have been held that any person making or knowingly using any false affidavit taken abroad (though perjury could not be assigned on it here), in order to mislead our Courts of justice, is punishable as a misdemeanor (*s*); and Ellenborough, C.J., said, 'that he had not the least doubt that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment' (*t*).

And though a master extraordinary in Chancery had no authority to administer an oath in matters in the Court of Admiralty, a person who made before him an affidavit, with a view to its being received by the Court of Admiralty, knowing at the same time it was false, was held guilty of a misdemeanor at common law (*u*).

The indictment stated that the prisoner, being minded to procure a marriage between himself and A. B., went before a surrogate, and was sworn to an affidavit in writing, that the said A. B. had been residing four weeks in the parish of S., whereas she had not, and so he had committed perjury; and the indictment had all apt allegations of an indictment for perjury. On a case reserved it was held that perjury could not be assigned upon an oath before a surrogate, and that as the indictment did not charge that the defendant took the oath to procure a licence, or that he did procure one, no punishment could be inflicted (*v*).

Where the false oath is taken under circumstances not amounting to perjury at common law, or by statute, the taking is an indictable misdemeanor if done to deceive a public officer, whereby a matter required by law for the accomplishment of an act of a public nature is illegally obtained. In R. *v.* Chapman (*w*), the third count of the indictment

(*q*) *i.e.*, verifying a statement. Breach of promissory oaths, whether public or private, is not perjury in the modern sense of that word.

(*r*) 1 Hawk. c. 69, ss. 3, 4.

(*s*) See now 52 & 53 Vict. c. 10, ss. 6, 7: *ante*, p. 461.

(*t*) O'Mealy *v.* Newell, 8 East, 364. 1 Hawk. c. 69, s. 3. Bac. Abr. tit. 'Perjury' (A). See White *v.* R. [1906], 4 Australian Commonwealth L. R. 152.

(*u*) R. *v.* Stone, Dears. 357; 23 L. J. M. C. 14. Masters extraordinary in Chancery have been superseded by commissioners of oaths (52 & 53 Vict. c. 10).

(*v*) R. *v.* Foster, MS. Bayley, J., and R. & R. 459. In R. *v.* Alexander, 1 Leach, 63, the point was submitted to the judges, and several times considered; but the result was not communicated, as the prisoner died in Newgate. R. *v.* Woodman, 1 Leach, 64, note (*a*). The point appears to have been submitted also in this case to the consideration of the twelve judges; but their opinion was not publicly communicated. See 3 Chit. Cr. L. 713. R. *v.* Foster was decided before 4 Geo. IV. c. 76, s. 14. Cf. R. *v.* Verelst, 3 Camp. 432. Phillimore *v.* Machon, 1 P. D. 481.

(*w*) 18 L. J. M. C. 152; 1 Den. 432; 2 C. & K. 846. In R. *v.* Fairie, 9 Cox, 209, the indictment alleged that the prisoner, intending to procure a marriage to be solemnised between himself and E. A. E., she being under the age of twenty-one years, without the consent of the *natural and lawful* father of the said E. A. E., to wit, without the consent of G. E., he being the person whose consent was by law required before the licence was granted, falsely swore that G. E., the natural and lawful father of the said minor, was consenting.

stated that W. J. was a surrogate having authority to grant licences for marriages, and that the defendant applied to the said W. J. to grant a licence for the solemnization of a marriage between J. B. and S. F., and that the defendant, unlawfully intending to obtain such licence for the said marriage in fraud of the Marriage Act, 1823 (4 Geo. IV. c. 76), for the purpose of obtaining such licence, before the said W. J. as such surrogate (he the said W. J. having competent authority (*x*), as such surrogate, to administer the said oath) did, for the purpose of thereby obtaining such licence for the marriage of the said J. B. and S. F., falsely corruptly, &c., swear, &c., that the name of him, the defendant, was J. B., and that he was one of the parties for whose marriage a licence was then applied for, and that he was a yeoman and widower, and that the said S. F. had had her usual place of abode within the parish of W. in the county of S. for the space of fifteen days then last past. (The count then negatived the matter sworn in the usual manner.) By means of which false oath the defendant did then obtain from the said W. J., so being such surrogate, a licence for the solemnization of a marriage between the said J. B. and S. F. The prisoner having been convicted, upon a case reserved, it was contended (1) that this count charged no offence; (2) that a surrogate had no authority to administer an oath, and at all events not this oath, to the defendant; (3) that the count did not aver that a written licence was obtained, or the marriage celebrated by means of such licence. The Court for Crown Cases Reserved affirmed the conviction, holding that the count charged a misdemeanor, as it distinctly averred that the prisoner swore falsely as to S. F.; and any one material fact falsely sworn to was sufficient to support the charge. Then the only question was as to the surrogate's power to administer the oath; not such an oath as would support an indictment for perjury, but as would make a party guilty of a misdemeanor. By the canon law the surrogate had such power (*y*), and the Marriage Act, 1823, assumed that he was the proper person to administer the oath (*z*). To make a false oath in order to procure a marriage licence from an officer empowered to grant such licence was a misdemeanor, because it was a step toward the accomplishment of a misdemeanor. The actual celebration of the marriage was immaterial. Anything essentially connected with marriage was a matter of public concern, so that any step towards its unlawful accomplishment was a misdemeanor (*zz*).

In R. *v.* Hodgkiss (*a*), the prisoner was indicted for wilful and corrupt perjury in making a false affidavit before a commissioner for taking oaths in the Court of Queen's Bench, for the purpose of getting a bill of sale filed under the Bills of Sale Act, 1854 (*b*). The Court rejected as surplusage

The affidavit sworn by the prisoner contained the statement set out in the indictment; but the prisoner was acquitted for variance between the indictment and the evidence, which proved the girl to be the illegitimate daughter of G. E.

(*x*) Under 4 Geo. IV. c. 76, s. 14.

(*y*) See Canons of 1603 (No. 103).

(*z*) See 7 Will. IV. & 1 Vict. c. 22, s. 30.

(*zz*) R. *v.* Chapman, 18 L. J. M. C. 156, Parke, B., *vide ante*, p. 140. See Anon. Ventris, 370 cit. The offence is now punishable by the penalties of perjury under the Marriage Acts, 1840 (3 & 4 Vict. c. 72, s. 4) and 1856 (19 & 20 Vict. c. 119, ss. 2, 18). R. *v.* Smith, 4 F. & F. 1099.

(*a*) L. R. 1 C. C. R. 212.

(*b*) The offence is now perjury by statute (41 & 42 Vict. c. 31, s. 17).

the words describing the offence as perjury, and held that without those words the indictment sufficiently stated a common law misdemeanor, in taking a false oath for which the defendant could be properly convicted, and was liable to the appropriate common law punishment (*e*).

In the Official Index to the Statutes will be found the numerous enactments punishing as perjury or as a misdemeanor the making of false statements on oath for matters of public concern, *e.g.*, on registering a bill of sale (*d*), or a document of title to land (*e*), or a marriage (*f*), or for the purpose of elections (*g*).

Sect. V.—Fabrication of Evidence.

Steps taken for the manufacture or fabrication of false evidence may be indicted as attempts to commit the misdemeanor of perverting the course of justice. In R. *v.* Vreones (*h*) the defendant was tried and convicted upon a count of an indictment alleging in substance: That by the terms of a contract for the purchase of a cargo of wheat, it was provided that any dispute arising under the contract should be referred to two arbitrators, whose award should be final and conclusive, that the defendant was appointed by the sellers to take samples of the cargo upon the arrival of the ship; that such samples were then taken and placed in bags sealed with the seals of the buyer and seller of the cargo, in accordance with the custom of merchants at the port, and for the purpose of being used as evidence before the arbitrators; that the defendant afterwards, intending to deceive the arbitrators to be appointed under the contract and wrongfully to make it appear to them that the bulk of the cargo was of better quality than it really was, so as to pervert the due course of law and justice, unlawfully and designedly removed the contents of the sealed bags and altered their character, and returned to the bags a quantity of wheat in a different condition, and altered in character and value, with intent thereby to pass the same off as true and genuine samples of the bulk of the cargo; and that afterwards the defendant forwarded the samples so altered to the London Corn Trade Association, with intent that the same should be used as evidence before such arbitrators, and thereby to injure and prejudice the buyer, and to pervert the due course of law and justice. The samples were not in fact used. But on a case reserved after conviction the Court held that the indictment aptly described an attempt to pervert justice, and that arbitrators must be considered as administering public justice (*i*). Under sect. 192 of the India Penal Code, fabrication of false evidence is punishable as a substantive offence (*j*).

(*c*) The only authority cited was R. *v.* Foster, *ante*, p. 528. Martin, B., said (L. R. 1 C. C. R. 213) that what was there held was that no punishment could be inflicted, because the indictment did not state facts sufficient to constitute the offence of taking a false oath.

(*d*) 41 & 42 Vict. c. 31, s. 7.

(*e*) 38 & 39 Vict. c. 87, s. 101 (land transfer); 47 & 48 Vict. c. 54, s. 7 (Yorkshire land registry).

(*f*) *Vide post*, p. 1012.

(*g*) *Vide post*, p. 643.

(*h*) [1891] 1 Q.B. 360: 60 L. J. M. C. 62.

(*i*) Reference was made by Coleridge, L.C.J., to R. *v.* Crossley, 7 T. R. 315 (perjury on an affidavit not in fact used), and by Pollock, B., to 1 East, P. C. c. 18, s. 4 (public cheats levelled against the public justice of the kingdom).

(*j*) See Mayne, Ind. Crim. Law (ed. 1896), p. 513.

Sect. VI.—Of False Statutory Declarations.

This section deals with those solemn declarations which are not, strictly speaking, made on judicial proceedings, but are for the verification of certain matters of public or private concern. The term statutory declaration when found in an Act of Parliament means, unless a contrary intention appears, a declaration made by virtue of the Statutory Declarations Act, 1835 (*k*). That Act (5 & 6 Will. IV. c. 62), 'An Act . . . to make provision for the abolition of unnecessary oaths,' by sect. 2 enacts, 'that in any case where, by any Act or Acts made or to be made relating to the revenues of customs or excise, the post-office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war-office, the army pay-office, the office of the treasurer of the navy, the accountant-general of the navy, or the ordnance, His Majesty's treasury, Chelsea hospital, Greenwich hospital, the Board of Trade, or any of the offices of His Majesty's principal secretaries of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendence of the treasury, or by any official regulation in any department, any oath, solemn affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the treasury, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit which might, but for the passing of this Act, be required to be taken or made; and the person who might, under the Act or Acts imposing the same, be required to take or make such oath, solemn affirmation, or affidavit, shall, in presence of the commissioners, collector, other officer, or person empowered by such Act or Acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, other officer, or person is hereby empowered and required to administer the same accordingly' (*l*).

By sect. 3, the declaration so substituted is to be published in the *Gazette*, and after twenty-one days from the date of the *Gazette* the provisions of this Act are to apply (*m*).

Sect. 4. 'After the expiration of the said twenty-one days it shall not be lawful for any commissioner, collector, officer, or other person to administer or cause to be administered, or receive or cause to be received, any oath, solemn affirmation, or affidavit, in the lieu of which such declaration as aforesaid shall have been directed by the treasury to be substituted.'

Sect. 5. 'If any person shall make and subscribe any such declaration as hereinbefore mentioned in lieu of any oath, solemn affirmation,

(*k*) Interpretation Act, 1889, s. 21.

(*l*) The power given by this section is preserved by s. 14 (9) of the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72).

(*m*) Orders were made in 1835 and 1836, which are printed in Stat. R. & O. Revised (ed. 1904), vol. xi. tit. 'Statutory Declaration.'

or affidavit, by any Act or Acts relating to the revenues of customs (*n*), or excise (*o*), stamps and taxes (*p*), or post-office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statements as to any material particular, the person making the same shall be deemed guilty of a misdemeanor' (*q*).

By sect. 7, 'Nothing in this Act contained shall extend to any oath, solemn affirmation, or affidavit which now is or hereafter may be made or taken, or required to be made or taken in any judicial proceeding, in any court of justice, or in any proceeding for, or by way of summary conviction, before any justice or justices of the peace; but all such oaths, affirmations, and affidavits shall continue to be required and to be administered, taken and made as well, and in the same manner as if this Act had not been passed.'

Corporate bodies.—Sect. 8. 'It shall be lawful for the universities of Oxford and Cambridge, and for all other bodies corporate and politic, and for all bodies now by law or statute, or by any valid usage, authorised to administer or receive any oath, solemn affirmation, or affidavit, to make statutes, bye-laws, or orders authorising and directing the substitution of a declaration in lieu of any oath, solemn affirmation, or affidavit now required to be taken or made: provided always that such statutes, bye-laws, or orders be otherwise duly made and passed according to the charter, laws, or regulations of the particular university, other body corporate and politic, or other body so authorised as aforesaid.'

Churchwardens.—Sect. 9. 'In future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall, in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of this Act, be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly: provided always, that no churchwarden or sidesman shall in future be required to take any oath on quitting office, as has heretofore been practised.'

Local Authorities.—Sect. 10. 'In any case where, under any Act or Acts for making, maintaining, or regulating any highway, or any road, or any turnpike road, or for paving, lighting, watching, or improving any city, town, or place, or touching any trust relating thereto, any oath, solemn affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made by any person whomsoever, no such oath, solemn affirmation, or affidavit, shall in future be required to be or be taken and made, but the person who might under the Act or Acts imposing the same being required to take or make such oath, solemn affirmation, or affidavit, shall in lieu thereof, in the presence of the trustee, commissioner, or other persons before whom he might under such Act or Acts be required to take or make the same, make and subscribe a declaration

(*n*) See 39 & 40 Vict. c. 36, s. 168, *ante*, p. 371.

(*o*) See 32 & 33 Vict. c. 14, s. 25.

(*p*) See 43 & 44 Vict. c. 19, s. 66.

(*q*) S. 6 refers to the oath of allegiance, the taking whereof is now regulated under the Promissory Oaths Acts, 1868 and 1871.

to the same effect as such oath, solemn affirmation, or affidavit, and such trustee, commissioner, or other person, is hereby empowered and required to administer and receive the same' (*r*).

Pawnbrokers.—Sect. 12. 'Where by any Act or Acts at the time in force for regulating the business of pawnbrokers, any oath, affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made, the person who by or under such Act or Acts might be required to take or make such oath, affirmation, or affidavit, shall in lieu thereof make and subscribe a declaration to the same effect; and such declaration shall be made and subscribed at the same time, and on the same occasion, and in the presence of the same person or persons, as the oath, affirmation, or affidavit in lieu whereof it shall be made and subscribed would by the Act or Acts directing or requiring the same be directed or required to be taken or made; and all and every the enactments, provisions, and penalties contained in or imposed by any such Act or Acts, as to any oath, affirmation, or affidavit thereby directed or required to be taken or made, shall extend and apply to any declaration in lieu thereof, as well and in the same manner as if the same were herein expressly enacted with reference thereto' (*s*).

By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 29, 'If any person makes any false declaration under this Act, either as an applicant, or as identifying an applicant, knowing the same to be false, in any material particular, he shall be guilty of a misdemeanor, and shall be liable to the punishment attaching by law to perjury' (*t*).

Bank of England.—By 5 & 6 Will. IV. c. 62, s. 14, 'In any case in which it has been the usual practice of the Bank of England to receive affidavits on oath to prove the death of any proprietor of any stocks or funds transferable there, or to identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stocks or funds, or relating to the loss, mutilation, or defacement of any bank-note or bank post bill, no such oath or affidavit shall in future be required to be taken or made, but in lieu thereof the person who might have been required to take or make such oath or affidavit shall make and subscribe a declaration to the same effect as such oath or affidavit.'

By sect. 15, declarations are substituted in lieu of the oaths required by 5 Geo. II. c. 7, 'An Act for the more easy recovery of debts in His Majesty's plantations and colonies in America' (*v*), and by 54 Geo. III. c. 15, 'An Act for the more easy recovery of debts in His Majesty's colony of New South Wales.'

Wills.—Sect. 16. 'It shall and may be lawful to and for any attesting witness to the execution of any will, or codicil, deed, or instrument in

(*r*) S. 11, as to declarations on obtaining patents, was repealed in 1883 (46 & 47 Vict. c. 37), and is now replaced by s. 1, subs. 4, of the Patents Act, 1907 (7 Edw. VII. c. 29). In patent matters, a declaration is still required, which may be statutory or not, as from time to time prescribed by rules. 7 Edw. VII. c. 29, s. 77.

(*s*) For s. 13, *vide ante*, p. 325.

(*t*) The declaration referred to is made before a magistrate in the form prescribed in sched. 3, No. V. of the Act. The section does not apply to pledges above the value of £10. R. *v.* Tregoning, 63 J. P. 504. The Act of 1872 does not apply to Ireland.

(*v*) 5 Geo. II. c. 7, was repealed in 1887 (S.L.R.), and the portions of 54 Geo. III. c. 15, to which s. 15 relates, were repealed as to all the King's dominions in 1892 (S.L.R.). S. 15 was repealed as to Victoria in 1859 (22 & 23 Vict. c. 12, s. 1).

writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer shall be and is hereby authorised and empowered to administer or receive such declaration.'

Crown Suits in Colonies.—Sect. 17. 'In all suits now depending or hereafter to be brought in any Court of law or equity by or in behalf of His Majesty, his heirs and successors, in any of his said Majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account, that His Majesty, his heirs and successors, shall and may prove his and their debts and accounts, and examine his or their witness or witnesses by declaration, in like manner as any subject or subjects is or are empowered or may do by this present Act' (*w*).

Writings generally.—Sect. 18, reciting that 'it may be necessary and proper in many cases not herein specified, to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters,' enacts that 'it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorised to administer an oath (*x*), to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this Act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor' (*y*).

Punishment.—Sect. 21. 'In any case where a declaration is substituted for an oath under the authority of this Act, or by virtue of any power or authority hereby given, or is directed and authorised to be made and subscribed under the authority of this Act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor' (*z*).

The prisoner was indicted under 5 & 6 Will. IV. c. 62, s. 12 (*a*), for having at S., in the county of G., made a false declaration before E. G. H., a justice of the peace, that he had lost a pawnbroker's ticket. It was stated in the opening of the case that the prisoner told the pawnbroker that he had lost the ticket, and the pawnbroker told him that he must make a declaration of the loss before a magistrate, and for that purpose handed the prisoner a copy of the ticket and a form, to be filled up according to the Act; the prisoner paid for the form, saying he would

(*w*) This section was repealed as to Victoria in 1859 (22 & 23 Vict. c. 12, s. 1), and by s. 2 power was given to colonial legislatures to repeal, alter, or amend the sections, so far as applicable to the colony or possession.

(*x*) See the Commissioners of Oaths Act, 1889 (52 & 53 Vict. c. 10).

(*y*) See *ante*, p. 249, for the punishment. By s. 19, the same fees are payable on declarations as on the oaths in lieu of which they are made. By s. 19, as modified by s. 68 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), the declaration is to be in the form following:—'I, *A. B.*, do solemnly and sincerely declare, that and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.'

(*z*) Ss. 22, 23 were repealed in 1874 (37 & 38 Vict. c. 35). As to punishments, *vide ante*, p. 249.

(*a*) *Ante*, p. 533.

go to a magistrate; he returned the same day with the form properly filled up, and with his name and that of Mr. H. attached. Mr. H. was not able to recollect the fact of the declaration having been made, and therefore was not present; but the pawnbroker identified the declaration. But there was only one witness to prove that the prisoner had not lost the duplicate. Platt, B.: 'As regards the proof of the declaration having been made by the prisoner, I think there may be sufficient evidence to support the indictment, if you can bring home to him a knowledge of its contents (*b*); but I am of opinion that the falsity of that declaration must be proved by the oaths of two witnesses as in a case of perjury, otherwise there would be but oath against oath.'

In R. *v.* Morgan (*c*) the defendant was indicted under the 5 & 6 Will. IV. c. 62, s. 12, for making a false declaration before a justice for the borough of Liverpool that she had lost the pawn ticket of certain goods pledged by her. The clerk to the justice could only speak to the handwriting of the justice on the declaration, and, from the great number of these declarations, he could not remember when or where it was made. It was contended that there was no evidence that the declaration had been made before the justice acting as such or even within the borough; and Gurney, B., held that the objection was good, and that the justice if called might at all events have proved that he had never taken such a declaration out of the borough. No authority was cited, and it is submitted that in view of the authorities above cited the ruling was wrong.

For other false declarations without oath made punishable as perjury or misdemeanor, see Chronological Table of the Statutes, tit. 'Perjury' (*d*).

Courts of Quarter Sessions have no jurisdiction to try indictments for making or suborning another to make a false affirmation or declaration punishable as a misdemeanor (*e*).

Where a prisoner was indicted for making a false declaration before a justice in pursuance of the rules of a benefit society, which required a loss by fire in certain cases to be verified by such a declaration; it was objected that sect. 18 of the Act of 1835 did not extend to any declarations except those mentioned in the preamble of that section; but Erskine, J., held that the section extended to all declarations generally (*f*).

The prisoner was indicted for making a false declaration under sect. 18,

(*b*) R. *v.* Browning, 3 Cox, 437. The ruling of the learned Baron was right on both points; though an idle doubt has been raised on the first point. If a man in writing admitted that he had made a declaration before a justice under the Act, no doubt can exist that such writing would be sufficient evidence against him; and in this case the prisoner produced a declaration in the form under the Act, signed by himself and the justice, and dealt with it, and obtained the goods by it, as a valid declaration; and it is perfectly clear that this was abundant evidence that he had made that declaration in the manner and with the formalities described in it. In R. *v.* Spencer, 1 C. & P. 260, *ante*, p. 520, Tenterden, C.J., said: 'The Courts always give credence to the signature of the magistrate or commissioner; and if his signature to the jurat is proved, that is sufficient evidence that the party was duly sworn, and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place.' And see R. *v.* James, and Brickell *v.* Hulse, *ante*, p. 522, and R. *v.* Westley, Bell, 193, *ante*, p. 524.

(*c*) 1 Cox, 109.

(*d*) In particular, see 32 & 33 Vict. c. 62, s. 14 (Debtors); 50 & 51 Vict. c. 28, s. 8 (3) (Merchandise Marks).

(*e*) 5 & 6 Vict. c. 38, s. 1, *post*, Vol. ii. p. 1932.

(*f*) R. *v.* Boynes, 1 C. & K. 65.

that he had done no act to encumber certain lands, and that he was in possession of those lands, and in receipt of the rents and profits thereof. The declaration was duly made in support of an application to a building society in 1861, for an advance of £150. The mortgage deed of 1861 to the building society was produced, but the attesting witness was not called to prove it. The original conveyance of the property to the prisoner was put in. It was objected that the declaration was confirmatory of the mortgage deed, and as that was not proved, it was not shewn that the matter sworn was material. It was answered that the declaration was made to confirm the original conveyance, and not the mortgage, which was executed after the declaration. Byles, J.: 'I am of opinion that the objection is fatal. The preamble of 5 & 6 Will. IV. c. 62, s. 18 (*g*), must be read with the enacting part; and as the deed, which rendered the declaration necessary, is not proved, this indictment cannot be sustained' (*h*).

An indictment alleged that the prisoner was a member of a benefit society, the rules of which were duly certified, and a transcript of them filed with the clerk of the peace, and that by a rule of the society it was provided that if any free member should have his property destroyed by fire, he should produce a certificate, and if the property was not insured the society would indemnify him to a certain amount if the claim were authenticated by a solemn declaration before a magistrate, and then charged the prisoner with making a false declaration before a magistrate contrary to sect. 18 of the Statutory Declaration Act, 1835 (5 & 6 Will. IV. c. 62), that he had sustained a loss by fire. In order to prove the rules of the society a copy of the rules was produced, and the 24th rule, which was applicable to the allegations in the indictment, was proved to have been examined with the transcript at the clerk of the peace's office; but no other rule had been so examined; and Erskine, J., held that all the rules ought to have been compared. To prove the rules, either the original transcript should have been produced, or an examined copy of the whole of it. It was then objected that the indictment was not proved. But Erskine, J., held that all the statements in the indictment with reference to the society might be rejected as surplusage, if there was enough on the face of the indictment to shew that an offence was committed without any reference to the society or its rules, which appeared to be the case. The making of the declaration was then proved, and it referred to the certificate, which was put in; and Erskine, J., allowed the persons whose names purported to be signed to it, to prove that their names were forgeries, as it might go to shew that the declaration was wilfully false (*i*).

(*g*) *Ante*, p. 534.

(*h*) R. *v.* Cox, 9 Cox, 301.

(*i*) R. *v.* Boynes, 1 C. & K. 65. The declaration mentioned the name of the society, and that the prisoner had 'forwarded to the said society a certificate as required by the 24th rule of the said society.' *Quære* whether this was not sufficient evidence against the prisoner when connected with the 24th rule, proved to have been examined with the transcript, of the allegations in the indictment? See R. *v.* Westley, *ante*, p. 524.

CANADIAN NOTES.

OF PERJURY AND COGNATE OFFENCES.

Sec. 1.—Of Perjury Generally.

Perjury, Definition of.—Code sec. 170.

Subornation of Perjury, Definition of.—Code sec. 170(2).

Evidence, what is Included in.—Code sec. 170(3).

Witnesses Defined.—Code sec. 171.

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Who is Guilty of Perjury.—Code sec. 172.

False Statement Under Oath within Canada.—Code sec. 172(*a*).

False Oath, etc., in Verification of Statement.—Code sec. 172(*b*).

Subscribing an Affirmation, etc., Untrue in Whole or Part.—Code sec. 172(*b*).

Making False Affidavit out of the Province but within Canada.—Code sec. 173.

Penalty for Perjury or Subornation.—Code sec. 174.

False Oaths in Extra Judicial Proceedings.—Code sec. 175.

False Statement in Extra Judicial Proceedings.—Code sec. 176.

Fabricating Evidence.—Code sec. 177.

Perjury on Capital Cases.—Code sec. 253.

Order for Indictment on Perjury before Judge.—Code sec. 870.

Certificate of Former Trial.—Code sec. 979.

Punishment.—Perjury being an offence punishable with imprisonment for more than five years, there is no jurisdiction to impose as the punishment therefor a fine in lieu of imprisonment (Code sec. 1035), but both imprisonment and fine may be awarded. Rex v. Legros, 14 Can. Cr. Cas. 161.

Of Perjury.

Judicial Proceeding.—An examination for discovery is a "judicial proceeding" as defined by this section, but the Court has a discretion to refuse to hear a charge of perjury alleged in respect of civil proceedings while such proceedings are pending. R. v. Thickens (1906), 11 Can. Cr. Cas. 274.

An examination ordered by a Judge to be held before the registrar of the Court in a civil proceeding ceased to be a "judicial proceeding" under the Criminal Code secs. 170 and 171 as to the offence of

perjury, when the examiner after swearing the witness leaves the room in which the examination is being held, although the official stenographer took the depositions in presence of counsel for the parties.

A false statement under oath so made in the absence of the official examiner cannot be made the foundation of a perjury charge. The King v. Rulofson, 14 Can. Cr. Cas. 253.

False Oath before De Facto Legal Tribunal.—It is perjury under the Code to give false testimony before a justice of the peace holding a judicial proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge because he was not a resident of the county in which the alleged offence took place. Drew v. The King, 6 Can. Cr. Cas. 424, 33 Can. S.C.R. 228, affirming Drew v. The King, 6 Can. Cr. Cas. 241.

Materiality.—Under the Code, the giving of false evidence constitutes perjury, whether such evidence is material or not, if the false assertion were known to such witness to be false, and intended by the witness to mislead the Court, jury or person holding the proceeding.

Statutory Declaration.—A false statement, made in a statutory declaration, administered under the "Canada Evidence Act," may be the subject of a charge akin to perjury under Code sec. 175, for the object of sec. 36 of the Evidence Act was to provide a means whereby certain statements not authorized to be made on oath could be verified.

At Common Law.—It has always been an offence at common law for a competent witness upon oath in a judicial proceeding before a Court of competent jurisdiction, to give evidence material to the issue, which he believes to be false. The common law, however, stopped there and took no notice of false statements, whether made upon oath or not, made under other conditions. The perjury had also to be in a judicial proceeding before a competent tribunal. R. v. Row (1864), 14 U.C.C.P. 307. And it was, therefore, formerly the law that false evidence given upon an examination in the absence of the authority competent to hold such examination was not perjury. R. v. Gibson, 7 Revue Legale (Que.) 573.

Perjury, etc.—It is not an essential that an information for perjury should set out the exact words of the false statement in testimony taken *viva voce*, the charge may be properly stated by summarizing what was in effect the false evidence, specifying the tribunal and the time and place at which the same was given, and charging that thereby the accused "unlawfully committed perjury." R. v. Legros, 14 Can. Cr. Cas. 161.

Intent to Mislead.—Although an "intent to mislead" is an essential ingredient of the offence, a charge which does not specifically allege such intent may be sufficient if it gives to the accused notice that he is

charged with having "falsely, wilfully and corruptly" sworn to, or solemnly declared a statement to the effect and in the words set forth. R. v. Skelton (1898), 4 Can. Cr. Cas. 467, 2 N.W.T. Rep. 210, 215; R. v. Dewar, 2 N.W.T. Rep. 194, Cr. Code sec. 852(3).

Joint Affidavit.—A joint affidavit made by the defendant and one D. stated: "Each for himself maketh oath and saith that he this deponent is not aware of any adverse claim to or occupation of said lot." The defendant having been convicted of perjury on this latter allegation, it was held that there was neither ambiguity or doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot. R. v. Atkinson (1866), 17 U.C.C.P. 295. And it has been held that a statutory declaration made jointly by several persons that they know certain alleged facts is to be construed as a statement by each of them severally that he knows the matters alleged. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

Several Charges on One Affidavit.—Upon a "speedy trial" upon several charges of perjury in respect of one affidavit, the trial Judge is bound to regard the whole affidavit as the sworn statement in respect of each charge, and should not treat each paragraph of the affidavit as an entire statement independently of the other paragraphs. The King v. Cohon, 6 Can. Cr. Cas. 386.

Oath to Voter—A person applying for a ballot at a Dominion election in the name of another person entitled to vote may be convicted of perjury in taking the oath of identity with that person, although the Elections Act authorizes the administration of the oath of qualification to an "elector" only, and that term must be held to include, for the purposes of administering such oath and prosecuting the personator, the person representing himself at the polls as an elector. R. v. Chamberlain, 10 Man. R. 261.

Declaration Under Provincial Law.—Perjury is not proved in respect of a solemn declaration that there was "no lawful hindrance" to deponent's proposed marriage by shewing that the deponent knew the girl to be under twenty-one and that her parent's consent had not been obtained as required by the provincial law, if the marriage was valid notwithstanding the absence of such consent. The King v. Moraes (1907), 12 Can. Cr. Cas. 145.

Warrant of Arrest.—A warrant of arrest for perjury is sufficient under Code sec. 1152 if it charges that the accused committed perjury by swearing that he did not do a particular act specified without alleging therein that the statement was sworn with intent to mislead the Court. R. v. Lee Chu, 14 Can. Cr. Cas. 322.

Indictment.—An indictment or charge for perjury in which it is alleged that the accused committed perjury by falsely, wilfully and with intent to mislead the magistrate, swearing to a certain statement,

involves a charge that the accused knew such statement to be false and will not be quashed for failure to more specifically charge such knowledge. R. v. Doyle (1906), 12 Can. Cr. Cas. 69.

Where the statutory form of indictment is not followed but the indictment contains all the averments which the statute requires, the addition of other unnecessary averments does not invalidate it. R. v. Coote (1903), 8 Can. Cr. Cas. 199, 10 B.C.R. 285.

In R. v. Cohon (1903), 6 Can. Cr. Cas. 386, the Supreme Court of Nova Scotia held that a charge of perjury is defective as not disclosing a crime, if it does not allege that the statement was sworn to knowing the same to be false, or if such is not the necessary inference from what is alleged, apart from the declaration in the charge that the accused "thereby committed wilful and corrupt perjury."

But the decision of the Cohon Case is in conflict with the Quebec decisions under the statute preceding the Code. It has been held in the latter province that an indictment following the statutory form is sufficient if it charges that the accused "committed perjury" by swearing that (specifying the false oath), without including a specific statement that it was so done knowing the same to be false. R. v. Bain (1877), Ramsay's Cases (Que.) 192; R. v. Bownes, Ramsay's Cases (Que.) 192. See sec. 862 as to statements now unnecessary in counts for perjury.

Where a prosecutor has been bound by recognizance to prosecute and give evidence against a person charged with perjury in the evidence given by him on the trial of a certain suit, and the grand jury has found an indictment against the defendant, the Court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information. R. v. Broad (1864), 14 U.C.C.P. 168; and see secs. 852-855.

A count charging the accused with having committed perjury at an inquest before a coroner is not invalid by reason of the fact that the tribunal was a coroner and a jury. R. v. Thompson (1896), 4 Can. Cr. Cas. 265, 2 Terr. L.R. 383.

Evidence.—D. being charged with perjury, in the assignments of perjury and in the negative averments certain facts sworn to by D. in answering to *faits et articles* on the contestation of a *saisie arrêt* or attachment were distinctly negatived, in the terms in which they were made. It was held that under the general terms of the negative averments it was competent for the prosecution to prove special facts to establish the falsity of the answers given by D. in his answers on *faits et articles*, and the conviction could not be set aside because of the admission of such proof. Downie v. R. (1888), 15 S.C.R. 358.

In a prosecution for perjury where it appears that the false oath was taken before a justice receiving the complaint of an offence committed within his jurisdiction, and acting in the matter within his jurisdiction, it is unnecessary to offer further evidence that he had authority to administer an oath. R. v. Callaghan (1860), 19 U.C.Q.B. 364.

A charge of perjury cannot be sustained against a boy under fourteen without proof of guilty knowledge of wrong-doing. Code sec. 18 has not changed the common law which presumed against guilty knowledge where the accused was under the age of fourteen. The King v. Carvery, 11 Can. Cr. Cas. 331.

It is not essential to the offence of perjury that the notary or other official should have uttered the words of obligation in administering the oath; such words used by the deponent and accompanied by a request that the affidavit already signed by the deponent should be certified as sworn, will be sufficient. Re Collins (No. 2), 10 Can. Cr. Cas. 73.

A plea of *autrefois acquit* to a charge of perjury in taking the oath of identity at a polling booth is not supported by a record of acquittal on a charge of personating an elector at the same time and place, although the oath of identity and the alleged personation were in regard to the same elector. A verdict for personation could not have been received under an indictment for perjury in taking the oath of identity, although the facts constituting personation must necessarily be shewn in order to prove the perjury. The King v. Quinn, 10 Can. Cr. Cas. 412.

Proof of Judicial Proceedings.—Canada Evidence Act, secs. 23, 28(2), 34, 35.

On a charge of perjury committed at the trial of an indictment such trial and the indictment, verdict, and judgment therein must be proved as matters of record. Such proof may be given either by the production of the original record or of an exemplification thereof, or by a certificate under Code sec. 979 of the substance and effect of the indictment and trial. The *vivâ voce* testimony of the clerk of assize and of the official stenographer with the production of the official book of entry in which the clerk recorded his memoranda of the proceedings and of the stenographer's notes of the evidence, are insufficient as legal proof of the fact of the former trial. Where a conviction has been made without the legal proof required by law of an essential part of the crime, such defect is a "substantial wrong or miscarriage at the trial" and the conviction must be set aside. The King v. Drummond, 10 Can. Cr. Cas. 340, 10 O.L.R. 456.

Upon a charge of perjury in respect of evidence taken by a magistrate on requiring securities to keep the peace under sec. 748(2) of the Code, the false statement may be proved by oral testimony, al-

though not recorded in the minutes of evidence then made by the magistrate. R. v. Doyle (1906), 12 Can. Cr. Cas. 69.

Corroboration is required on a charge of perjury. See sec. 1002 of the Code.

Where perjury is charged as having been committed on a summary trial for an indictable offence under the Code, the formal record of such summary trial must be proved in the perjury case, although the latter is tried summarily by the same magistrate.

A magistrate holding a summary trial for perjury alleged to have been committed in a former trial before himself, must not import into the perjury trial his recollection of the demeanour of the accused and other witnesses at the former trial; he must be guided solely by the evidence of the perjury trial considered in view of the demeanour of the witnesses thereat. R. v. Legros, 14 Can. Cr. Cas. 161.

Trial by Police Magistrate.—A police magistrate in Ontario has jurisdiction with the consent of the accused to try the offence of perjury. R. v. Burns (No. 2) (1901), 4 Can. Cr. Cas. 330 (Ont.); and by sub-sec. (2) of sec. 777, police magistrates of cities and incorporated towns in every other part of Canada have the like jurisdiction.

Perjury in Pending Civil Action.—Where a charge of perjury is brought on for trial during the pendency of the civil action in which it is alleged to have been committed and where the question of fact on which the perjury is alleged is the same as that involved in the civil action, the Criminal Court should exercise its discretion to postpone the criminal trial until after judgment in the civil action. The King v. Cohon, 6 Can. Cr. Cas. 386.

A person charged with perjury committed in a civil action is entitled to have put in evidence those parts of his testimony in the civil action which may explain or qualify the statements in respect of which the perjury is charged. R. v. Coote (1903), 8 Can. Cr. Cas. 199, 10 B.C.R. 285.

But 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. R. v. Ross, 1 Montreal L.R. (Q.B.) 227, 28 L.C.J. 261.

The permission granted by the Canada Evidence Act to certain officials to "receive" the solemn declarations of persons voluntarily making the same in the statutory form includes an authorization to the declarant to make the same, and constitutes him a person "auth-

orized by law to make a solemn declaration." R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

Section 176 does not refer to solemn declarations under the Canada Evidence Act but merely to statements and declarations; the former are covered by sec. 175. It is only in certain cases that statements and declarations other than solemn declarations are specially authorized, and sec. 176 appears to be applicable only to such cases. *Ibid.*

Section 1002 of the Criminal Code 1906, which requires corroboration in certain cases, and specially includes the offence of perjury under Code sec. 174, does not apply to the analogous offence of making a false statutory declaration under sec. 175.

A person is "authorized by law" to make a statutory declaration if the declaration is such as can legally be made under the Canada Evidence Act.

On a charge of making a false statutory declaration, it must be shewn that when the declaration was made the officer receiving the same or the declarant made use of words to the effect that the declaration was in the nature of an oath.

Where a form of statutory declaration was made up by a magistrate from information given by the accused, and after the latter's signature had been obtained the magistrate addressed the accused with the words: "Do you declare it is true?" to which the accused replied, "I do," the declaration has not been legally made in the terms of the Canada Evidence Act and a conviction is not authorized under Code sec. 175, although the allegations in the document are shewn to be wilfully false. Rex v. Phillips, 14 Can. Cr. Cas. 239.

CHAPTER THE SECOND.

OF IMPUGNING OBSTRUCTING DEFEATING AND PERVERTING THE ADMINISTRATION OF JUSTICE.

SECT. I.—OF CONTEMPT OF COURT AND ATTACKS ON THE ACTION OF JUDGES AND JURIES.

CONTEMPTS against the superior Courts or their judges (*a*), and scandalous reflections upon their proceedings (*b*), ('scandalising the court') (*c*), have always been considered criminal; and one of the earliest cases of criminal prosecution for libel appears to have been an indictment for an offence of this kind (*d*).

Generally, any contemptuous or contumacious words spoken *to* the judges of any Court in the execution of their offices are indictable; and when disparaging words are spoken *of* the judges of the superior Courts, the speaker is indictable at common law, whether the words relate to their office or not (*e*). But where the aspersions on the judge do not relate to his judicial conduct, it is now usual to leave him to his ordinary remedies for defamation (*f*). Attempts to intimidate or unduly influence a judge appear to be indictable misdemeanors (*g*). Public attacks on Courts of justice have in some instances been treated as a form of sedition (*h*).

It is now accepted law that it is a misdemeanor to publish invectives or improper attacks on judges or juries, reflecting upon and calumniating their action in the administration of justice (*i*).

An order made by a corporation, and entered in their books, stating that A. (against whom a jury had found a verdict with large damages

(*a*) Vin. Abr. tit. 'Contempt' (A.) 44. Pool *v.* Sacheverel [1720], 1 P. Wms. 675; 24 E. R. 565.

(*b*) R. *v.* Gray [1900], 2 Q.B. 36, where the editor of a newspaper was summarily punished for a scurrilous attack on a judge, in respect of his conduct during a trial recently concluded. Cf. R. *v.* Almon, 5 Burr. 2686; Wilmot's Opinions, 243.

(*c*) *Re* Read and Huggonson, 2 Atk. 469, 471.

(*d*) Holt on Libel, 153.

(*e*) 2 Starkie on Libel, 195. Odgers on Libel (4th ed.), 493 *et seq.* And see 1 Hawk. c. 7 *et seq.* The proceeding by writ of *scandalum magnatum* upon the statutes 3 Edw. I. c. 34; 2 Rich. II. st. 1, c. 5; 12 Rich. II. c. 11, was of a civil, as well as of a criminal nature; and was formerly had recourse to in case of defamation of any of the great officers and nobles. The statutes fell into disuse and were repealed in 1887 (50 & 51 Vict. c. 59).

(*f*) See Macleod *v.* St. Aubyn [1899], A.C. 549.

(*g*) See Lord Macclesfield's case, 16 St. Tr. 767. R. *v.* Gurney, 10 Cox, 550. And as to bribery, *post*, p. 627.

(*h*) O'Connell *v.* R. 5 St. Tr. (N. S.) 1. R. *v.* Gordon, 22 St. Tr. 177 (imputing corruption to judges). R. *v.* Collins, 3 St. Tr. (N. S.) 1149. 9 C. & P. 456. But 'there is no sedition in just criticism on the administration of the law.' R. *v.* Sullivan, 11 Cox, 50, Fitzgerald, J.

(*i*) See R. *v.* Gray [1900], 2 Q.B. 36. R. *v.* Almon, 5 Burr. 2686. Wilmot's Opinions, 243. Macleod *v.* St. Aubyn [1899], A.C. 549, 550. R. *v.* McHugh [1901], 2 Ir. Rep. 569. R. *v.* Hart and White, 30 St. Tr. 1131, 1189.

in an action for a malicious prosecution, and which verdict had been confirmed in the Court of Common Pleas), was actuated by motives of public justice in preferring the indictment, was held to be a libel reflecting on the administration of justice, for which an information should be granted against the members who had made the order. Ashhurst, J., said, that the assertion that A. was actuated by motives of public justice carried with it an imputation on the public justice of the country; for if those were his only motives, then the verdict must be wrong. Buller, J., said: 'Nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made on Courts of justice in this country. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken: when they are, the law has afforded a remedy; and the party injured is entitled to pursue every method which the law allows to correct the mistake. But when a person has recourse either by a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a Court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself' (*j*).

In R. *v.* White (*k*) an information had been filed against the proprietors and printers of a Sunday newspaper for a libel upon Le Blanc, J., and a jury, by whom a prisoner had been tried for murder and acquitted. It was contended on the part of the defendants that they had only made a fair use of their right to comment on the proceedings of a Court of justice. Grose, J., said that 'it certainly was lawful, with decency and candour, to discuss the propriety of the verdict of a jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal: but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper, set out in the information, contained no reasoning or discussion, but only the declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country.'

This doctrine is now fully accepted, and 'when a trial has taken place and the case is over, the judge or jury are given over to criticism' (*l*); but this liberty does not license personal scurrilous abuse of the judge as a judge (*m*).

Offences within this section, if committed with reference to judges of a superior Court, may be dealt with as for contempt of Court (*n*).

The rule as to the criminality of attacks or aspersions on a judge in his judicial capacity was originally applied only to the King's judges of the superior Courts. This expression includes the House of Lords, the

(*j*) R. *v.* Watson, 2 T. R. 199.

(*k*) 1 Camp. 359 n. And see a note of another proceeding by information against the same defendants for a libel on Ellenborough, C.J. Holt on Libel, 170, 171.

(*l*) Macleod *v.* St. Aubyn [1899], A.C. 549, 561. R. *v.* Sullivan, 11 Cox, 50 (Ir.), Fitzgerald, J.

(*m*) R. *v.* Gray [1900], 2 Q.B. 36, 40, Russell, L.C.J.

(*n*) R. *v.* Gray, *ubi sup.* Martin's case, 2 Russ. & My. 374. *Ex parte* Jones, 13 Ves. 237. *Re* Sombre, 1 Macn. & G. 116.

Judicial Committee of the Privy Council, the Courts of Appeal Civil and Criminal, and every branch and judge of the High Court of Justice in England and Ireland (*o*) and superior colonial Courts of record (*p*). The rule has been extended to justices of the peace and judges of inferior Courts while acting in the execution of their office. In such cases the remedy is not by summary proceedings for contempt, but by indictment or criminal information (*q*).

An indictment does not lie for contemptuous words spoken either of or to inferior magistrates, unless they are at the time in the actual execution of their duty, or at least unless the words affect them directly in their office though it may be good cause for binding the offender to his good behaviour (*r*). Where the defendant was indicted for saying of a justice of the peace for the county of Middlesex, in his absence, that he was *a scoundrel and a liar* (*s*), Ellenborough, C.J., said : ' The words not being spoken *to* the justice, I think they are not indictable. This doctrine is laid down by Holt in a case in Salkeld (*t*); and in R. *v.* Pocock (*u*) the Court of Queen's Bench refused to grant an information for saying of a justice, in his absence, that he was a *forsworn rogue*. However, I will not direct an acquital upon this point, as it is upon the record, and may be taken advantage of in arrest of judgment. It will be for the jury now to say whether these words were spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity ; for if they were not, this indictment is not supported ; and it could not by possibility be a misdemeanor to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex ' (*v*). But it has been held to be an indictable offence to say of a justice of the peace, when *in the execution of his office*, ' you are a rogue and a liar ' (*w*). The Court will not, however, grant an information for calling a magistrate a liar, accusing him of misconduct in having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless they tend to a breach of the peace (*x*).

Offences of this kind, though in theory indictable, are dealt with summarily by the High Court when directed against any of its divisions (*y*), and may be dealt with summarily by an inferior *Court of record* if committed *in facie curiæ*. The proceeding in the High Court is by attachment or committal (*z*). The remedy by indictment is rarely used, owing to the inevitable delay and consequent risk of interference with justice (*a*).

(*o*) See Odgers on Libel (4th ed.), 495. *Ex parte* Fernandez, 30 L. J. C. P. 321.

(*p*) *Re* McDermott, L. R. 1 P. C. 260 ; 2 P. C. 341.

(*q*) R. *v.* Rea, 17 Ir. C. L. R. 584, imputation on a resident magistrate.

(*r*) See Odgers on Libel (4th ed.), 496, 497. 1 Hawk. c. 21, *s.* 13. 2 Starkie on Libel, 195.

(*s*) R. *v.* Weltje, 2 Camp. 142.

(*t*) R. *v.* Wrightson, 2 Salk. 698.

(*u*) 2 Str. 1157. And see R. *v.* Penny, 1 Ld. Raym. 153.

(*v*) R. *v.* Weltje, 2 Camp. 142.

(*w*) R. *v.* Revel, 1 Str. 420.

(*x*) *Ex parte* Chapman, 4 A. & E. 773. *Ex parte* Duke of Marlborough, 5 Q.B. 935.

(*y*) Including courts created by commissions of assize, gaol delivery, or oyer and terminer. R. *v.* Parke [1903], 2 K.B. 432. Cf. R. *v.* Payne [1906], 1 K.B. 577.

(*z*) Onslow and Whalley's case, L. R. 9 Q.B. 219. R. *v.* Gray [1900], 2 Q.B. 36. See Short & Mellor, Cr. Pr. (2nd ed.), 342. Oswald on Contempts (2nd ed.).

(*a*) See R. *v.* Tibbits [1902], 1 K.B. 77. R. *v.* Parke [1903], 2 K.B. 432.

Sect. II.—Of Acts Affecting Fair Trial of Pending Cases.

Any publication, exhibition, or representation intended or calculated to interfere with the fair trial of a legal proceeding pending in any Court of justice, is a misdemeanor at common law (*b*). The incriminated publication or exhibition may be described as attempts to pervert the course of justice, or as calculated to produce that effect (*c*).

This rule has been held to apply to a theatrical representation which represented a man in the act of committing an offence for which he was awaiting trial (*d*).

So has the circulation by the defendant to an information immediately before its trial, and in the town where the trial was to be held of a vindication of his conduct and an attack on that of the prosecutor (*e*). and the publication of proceedings before a coroner with comments before the completion of the inquiry (*f*); and the publication of newspaper articles containing statements affecting the character or conduct of persons under accusation of crime, whatever the stage which the proceedings have reached, *i.e.* whether during a preliminary inquiry before justices, or after committal, or during trial or indictment (*g*). In R. *v.* Tibbits and Windust (*h*) the editor and reporter of a weekly paper were indicted and held to have been rightly convicted of publishing articles by a 'Special Crime Investigator' containing a number of statements highly detrimental of two persons under an accusation of attempted murder. Of the statements some were published during the preliminary inquiry, some between committal and trial, and some during the actual trial at the assizes. Where the publication relates to a case which is actually only pending before justices of the peace, but in the due course of justice *may* go for trial before any branch of the High Court, including a Court of assize (*i*), or the Central Criminal Court (*j*), the offence may be dealt with by the High Court summarily by attachment for contempt, whether the publication is by an individual or by a corporation (*k*). The offence is committed if the publication is calculated to interfere with a fair trial, should the result of the preliminary inquiry be the committal of the prisoner for trial (*l*). It would seem that even where the trial will take place at Quarter Sessions or in any inferior Court,

(*b*) R. *v.* Tibbits [1902], 1 K.B. 77.

(*c*) *Vide ante*, p. 142. See the indictment in R. *v.* Tibbits [1902], 1 K.B. 77, where the indictment included charges of (1) attempting to prejudice the mind of the examining magistrate, and so to obstruct and pervert justice; (2) knowingly doing acts calculated to obstruct and pervert justice; (3) devising and intending to injure A. and B. and to deprive them of a fair trial; (4) conspiracy to obstruct and pervert justice. *Vide ante*, p. 163.

(*d*) R. *v.* Williams, 2 L. J. (O. S.) K.B. 30.

(*e*) R. *v.* Jolliffe, 4 T. R. 285.

(*f*) R. *v.* Fleet, 1 B. & Ald. 379: 19 R. R. 344.

(*g*) R. *v.* Tibbits [1902], 1 K.B. 77.

(*h*) *Ubi sup.*

(*i*) R. *v.* Davies [1906], 1 K.B. 32. In this case a woman was in custody on a charge of abandoning a child. A newspaper published reports as to her antecedents, suggesting that she had been a wholesale child farmer.

(*j*) R. *v.* Parke [1903], 2 K.B. 432, 439, Wills, J. In this case former rulings are collected. The publication complained of consisted in statements about a man accused of forgery, and subsequently committed for trial on charges of forgery and murder. Cf. R. *v.* Payne [1906], 1 K.B. 577.

(*k*) R. *v.* 'Freeman's Journal' [1902], 2 Ir. Rep. 82.

(*l*) R. *v.* Davies [1906], 1 K.B. 32-35, Wills, J.

the High Court may intervene *brevi manu* to punish publications calculated to prejudice such trial (*m*).

Sect. III.—Of Interference with Witnesses.

It is an offence at common law to use threats or persuasion to witnesses to induce them not to appear or give evidence in courts of justice, even if the threats or persuasion fail (*n*). The offence is a misdemeanor punishable by fine and (or) imprisonment without hard labour, on indictment or information; or, if committed with reference to a case in a superior Court of record, by summary proceedings for contempt (*o*).

As to conspiracies to do any of these acts, see *ante*, p. 163. In R. *v.* Roderick and Clare (*p*) a conviction was obtained on an indictment for conspiracy to defeat the ends of justice by preventing a girl under sixteen from attending the assizes to give evidence against a man charged with a criminal offence against her.

There is no precedent of proceedings at common law for discharging or damnifying witnesses because of evidence given by them. But in the case of Parliamentary inquiries, witnesses are protected by the Witnesses Protection Act, 1892 (55 & 56 Vict. c. 64), sect. 1. 'In this Act the word "inquiry" shall mean any inquiry held under the authority of any Royal Commission or by any committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any Court of justice.'

By sect. 2, 'Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months.'

By sect. 3, 'A prosecution for any offence under this Act may be heard and determined by a court of summary jurisdiction under the Summary Jurisdiction Acts, provided that should either the complainant or the party charged object to the case being dealt with summarily, the Court shall send such cases for trial to the quarter sessions or assizes, or in cases arising within the metropolitan area to the Central Criminal Court.'

(*m*) Ibid. p. 37, 39, citing 2 Hawk. c. 2, s. 3. See Short & Mellor, Crown Practice (2nd ed.), 345. This jurisdiction is traced to the authority of the Court of King's Bench as *custos morum*, assumed on the extinction of the Court of Star Chamber.

(*n*) 1 Hawk. c. 21, s. 15. 2 Chit. Cr. L. 220, 235. R. *v.* Lawley, 2 Str. 904. R. *v.* Steventon, 2 East, 362. R. *v.* Loughran, 1 Cr. & D. (Ir.) 79. R. *v.* Talley [1875], 82 Cent. Cr. Ct. Sess. Pap. 518. See also R. *v.* Gray [1903], 22 N. Z. L. R. 52. And see indictments for dissuading a witness from giving evidence against a person indicted, 2 Chit. Cr. L. 235; Archb. Cr. Pl. (23rd ed.) 1078; and an indictment for a conspiracy to prevent a witness from giving evidence, R. *v.* Steventon, 2 East, 362. And see R. *v.* Edwards, *ante*, p. 527.

(*o*) R. *v.* Hall, 2 W. Bl. 1110. Onslow and Whalley's cases, L. R. 9 Q.B. 219.

(*p*) Swansea Summer Assizes, 4 Aug., 1906, Jelf, J. The girl had been induced to go to the United States.

By sect. 4, 'It shall be lawful for any Court before which any person may be convicted of any offence under this Act, if it thinks fit, in addition to sentence or punishment by way of fine or imprisonment, to condemn such person to pay the whole or any part of the costs and expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, and, upon the application of the complainant, and immediately after such conviction, to award to complainant any sum of money which it may think reasonable, having regard to all the circumstances of the case, by way of satisfaction or compensation for any loss of situation, wages, status, or other damnification or injury suffered by the complainant through or by means of the offence of which such person shall be so convicted, provided that where the case is tried before a jury, such jury shall determine what amount, if any, is to be paid by way of satisfaction or compensation.'

By sect. 5, 'The amount awarded for such satisfaction or compensation, together with such costs, to be taxed by the proper officer of the Court, shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and be recoverable accordingly.'

Sect. IV.—Of disobeying Judicial Orders.

A. *General.*

Wilful disobedience to the order of a competent Court is in certain cases punishable on indictment or summarily by fine and (or) imprisonment without hard labour. Disobedience by officers of the Court or executive officers to judicial orders will be dealt with under official misconduct (*post*, Book VIII., Chapter I.).

Disobedience by witnesses or parties to lawful orders of a superior Court of record may be dealt with by the Court summarily by committal or attachment for contempt of Court (*q*). Where the order is to pay money the jurisdiction to imprison for disobedience is limited by the Debtors Acts, 1869 and 1878 (*r*). The power is oftenest exercised with reference to persons who disobey injunctions, or who, knowing that an injunction has been made against another, aid and abet him in disobeying it (*s*). A distinction is drawn for purposes of appeal between disobedience to orders of the Court made to enforce a civil right, and those forms of contempt which are regarded as purely criminal, *e.g.*, outside interference with the course of justice (*t*). Such offences can, it would seem, also be dealt with by indictment (*u*). There are few if any precedents of an indictment for disobeying the orders of a superior Court of record. It is said that where the treasurer of a county refuses to comply with an order for payment of the costs of prosecuting an indictment, the remedy is by

(*q*) As to the procedure, see R. S. C. 1883, O. 44. Ann Pr. 1909. p. 629.

(*r*) See Ann Pr. 1909, p. 586. Murch *v.* Loosemore [1906], 1 Ch. 692. Under the Acts of 1869 and 1878, imprisonment for non-payment of money may not exceed one year. 32 & 33 Vict. c. 62, s. 5 (proviso).

(*s*) Seward *v.* Paterson [1897], 1 Ch. 545

(*t*) Att.-Gen. *v.* Kissane, 32 L. R. Ir. 320. O'Shea *v.* O'Shea, 15 P. D. 62.

(*u*) R. *v.* Robinson, 2 Burr. 799, 804. This relates to an order of Quarter Sessions. Cf. R. *v.* Mortlock, 7 Q.B. 459. R. *v.* Brisby, 1 Den. 416.

indictment (*v*). Disobedience to a writ of subpœna, to attend as a witness or produce documents, is enforceable by attachment, if the writ issues out of a superior Court, and apparently by indictment, if the writ issues from a Court of Quarter Sessions (*w*).

B. *Disobedience of Orders made by Justices of the Peace.*

Disobedience to an order of justices of the peace made in due exercise of their powers is a misdemeanor indictable at common law (*x*). It is immaterial whether the order of justices is made at general or quarter sessions (*y*), or at petty sessions (*z*), or out of sessions (*a*), provided that it is one which the justice or justices has jurisdiction to make, and that there is no prescribed and adequate remedy other than indictment for disobedience (*b*). Foster, J., thus stated the rule: 'In all cases where a justice has power given him to make an order, and direct it to an inferior ministerial officer, and he disobeys it, if there be no particular remedy prescribed, it is indictable' (*c*). Thus, a party has been held guilty of an indictable offence, in disobeying an order of sessions for the maintenance of his grandchildren (*d*). In this case it was contended that, as the Poor Law Act, 1601 (43 Eliz. c. 2), s. 7, had annexed a specific penalty, and a particular mode of proceeding, the course prescribed by the Act ought to have been adopted, and that there could be no proceeding by indictment: but it was held that the prosecutor was at liberty to proceed either at common law, or in the method prescribed by the statute; and that an indictment would lie at common law for disobedience to an order of sessions (*e*). And power to remove a pauper being given to two justices by 14 Car. II. c. 12, the not receiving him was held to be a disobedience of that statute for which an indictment would lie (*f*).

Where an order of justices is a nullity on the face of it, another order may be made, and an indictment will lie for disobeying the second order (*g*).

Where an order is made by justices, any person mentioned in it, and required to act under it, must, upon its being duly served upon him, lend his aid to carry it into effect. Thus where, upon a complaint made

(*v*) R. *v.* Jeyes, 3 A. & E. 416, 422. The order was made by a Court of Quarter Sessions. Cf. R. *v.* Jones, 2 Mood. 171. The remedy by mandamus has been applied in such cases. R. *v.* Treasurer of Oswestry, 12 Q.B. 239.

(*w*) R. *v.* Brownell, 1 A. & E. 598. Cf. R. *v.* Ring, 8 T. R. 585.

(*x*) R. *v.* Robinson [1759], 2 Burr. 799.

(*y*) Id. ibid. See R. *v.* Bill, an order of sessions on churchwardens and overseers to account for and pay over money in their hands (2 Burr. 805, cit.), and R. *v.* Boys, an order of sessions to pay costs of an appeal against a poor rate. Ibid.

(*z*) R. *v.* Davis, 2 Burr. 805, cit. 1 Say. 163; 1 Bott. 361, pl. 378.

(*a*) See R. *v.* Balme, 2 Cowp. 650. R. *v.* Fearnley, 1 T. R. 316; 2 Chit. Cr. L. 279.

(*b*) R. *v.* Robinson, 2 Burr. 799, 803, Lord Mansfield. *Vide ante*, p. 13. In R. *v.* Boyall, 2 Burr. 832, 834, Lord Mansfield said: 'I do not approve of indicting where there is another remedy: it carries the appearance of oppression.'

(*c*) Burn's Justice, tit. 'Poor,' s. xvii. 2, i. A mandamus to the inferior officer will not be granted, but the procedure must be by indictment. R. *v.* Bristow [1795], 6 T. R. 168.

(*d*) R. *v.* Robinson, 2 Burr, 799.

(*e*) Id. ibid.

(*f*) R. *v.* Davis, *ubi sup.*

(*g*) R. *v.* Brisby, 1 Den. 416. R. *v.* Marchant, 1 Cox, 203. R. *v.* Cant, 2 Mood. 521. In R. *v.* Ferrall, 2 Den. 51, the question was whether, under a clause in the Annual Mutiny Act, a soldier was freed from an indictment for disobeying a bastardy order; and the Court held that he was not, as it was a 'criminal matter.' See now 44 & 45 Vict. c. 58, ss. 138, 145.

by an excluded member of a friendly society, two persons, A. and B., the then stewards of the society, were summoned, and an order made by two justices that such stewards and the other members of the society should forthwith reinstate the complainant; it was held that though this order was not served upon A. and B. until they had ceased to be stewards, yet it was still obligatory upon them, as members of the society, to attempt to reinstate the complainant; and that their having ceased to be stewards was no justification of entire neglect on their part (*h*). Ellenborough, C.J., said at the trial: 'The order is not confined to the stewards alone, but is made upon all the members of the society; and the defendants were members of the society independently of their being stewards, and were bound, as members, to see that the order was obeyed; or, at least, to have taken some steps for that purpose. As members, they might have done something; as stewards, indeed, they might, with greater facility, have enforced obedience to the order; but each member had it in his power to lend some aid for the attainment of that object.' And on a motion to enter the verdict for the defendants, on the ground that, having ceased to be stewards when the notice was served, they had not been guilty of a criminal default; the Court said, that if the defendants had shown that they did everything in their power to restore the party, in obedience to the order, they might have given it in evidence by way of excuse (*i*).

As a general rule there must be personal service of an order on all persons who are to be proceeded against for disobeying it, and the indictment should so state: and it has been held a fatal objection to an indictment for disobedience and contempt of an order of sessions, that it charged a contempt by six persons of an order, which was only stated to have been served on four of them (*j*).

The entire order of a Court to pay the expenses of a prosecution, under sect. 26 of the Criminal Law Act, 1826 (7 Geo. IV. c. 64), must be served on the treasurer of the county. Where, an order was made to pay an aggregate sum, the details of which were annexed, and the attorney tore off the details, and served the order for the payment of the aggregate sum alone on the treasurer; it was held, on a case reserved, that he was not indictable for refusing to obey the order (*k*).

An indictment for disobeying an order of justices must show explicitly that the order was made; and it is not sufficient to state the order by way of recital (*l*). It is said to be safer to aver that the defendant was requested to comply with the terms of the order (*m*).

(*h*) R. *v.* Gash, 1 Stark. (N. P.) 41. The Acts relating to friendly societies are consolidated by 59 & 60 Vict. cc. 25, 26.

(*i*) Id. ibid. The motion was also made on another ground; namely, a defect in the jurisdiction of the magistrates: two magistrates of the county of Middlesex, where the meetings of the society were held, having made the order, though the society had been originally established in the city of London, and its rules enrolled at the sessions for that city. But the Court decided that the magistrates of Middlesex had jurisdiction. See R. *v.* Wade, 1 B. & Ad. 861.

(*j*) R. *v.* Kingston, 8 East, 41. R. *v.* Gilkes, 3 C. & P. 52.

(*k*) R. *v.* Jones, 2 Mood. 171. This enactment is repealed and replaced by 8 Edw. VII. c. 15, s. 4 (2), *post*, Bk. xii. c.v.

(*l*) R. *v.* Crowhurst, 2 Ld. Raym. 1363.

(*m*) 2 Chit. Cr. L. 279, note (*g*), citing R. *v.* Fearnley, 1 T. R. 316, where an objection was taken to an indictment that it did not contain such statement; but the Court did not find it necessary to give any opinion upon the point.

If the indictment omits to state the service of the order the want of such allegation will not be supplied by an averment that the defendant was requested to perform the duties required by the order (*n*). It seems not to be a matter for the prosecution to aver, but one for the defence to prove that the order has not been revoked (*o*).

An indictment for refusing to obey an order of justices to pay a church-rate, alleged that the rate 'was duly made as by law in that behalf required, and that the same was afterwards duly allowed as by law in that behalf required,' and that 'the defendant was duly rated' in and by the said rate at the sum of sixteen shillings. It was objected that the facts ought to have been stated which constituted a due making and allowance of the rate and a due rating of the defendant. But it was held (1), that these introductory facts were alleged only to shew that the justices had jurisdiction to make the order, and therefore they fell within the description of inducement, in which such a general allegation was allowed; (2) that the rest of the count shewed that the justices had sufficient authority to make the order, as there was a sufficient information by competent persons to give them jurisdiction (*p*). The same indictment stated that a church-rate had been duly demanded of the defendant, and that he had refused and neglected to pay the rate to W. A. and J. C., who *then* were the churchwardens; and it was held that, though it did not state that they were churchwardens when the rate was demanded, it was sufficient that they were shewn to be so at the time of neglect and refusal to pay the rate, for that was the offence (*q*). The same indictment alleged that a justice made his warrant (summons), whereby, 'after reciting as therein recited,' he summoned the defendant, and the indictment did not state to whom the warrant was directed. It was held that it was sufficient, for enough of the warrant was stated without mentioning the recital, and it was sufficiently averred that it was directed to the defendant (*q*). The same indictment averred that a summons was issued on May 30, to appear on June 6, then next, and was 'before the said 6th day of June, to wit, on the 30th of May' personally served on the defendant, who did not appear in pursuance of it; and it was held that it must be assumed that the justices satisfied themselves that it had been served a reasonable time before the day of appearance, otherwise they would have acted unjustly in making the order in the absence of the defendant, and the intendment is always favourable to the validity of an order (*r*). On the same indictment it was also held that it is not necessary to set out the order according to the tenor; it is enough to set out the substance of it correctly (*s*). The same indictment did not aver the church-rate to have been in force when the order to pay it was made, but it was held that, as it averred that the rate continued in force at the time of the indictment, it was quite sufficient (*t*). It was also held that the indictment need not allege the date of the order (*u*), as that was immaterial.

(*n*) R. *v.* Kingston, 8 East, 41, 53.

(*o*) R. *v.* Holland, 5 T. R. 607, 624, where the defendant was indicted for malversation in office as one of the council at Madras.

(*p*) R. *v.* Bidwell, 1 Den. 222, Parke, B. Church rates are not now compulsory (31 & 32 Vict. c. 109).

(*q*) Ibid.

(*r*) Ibid.

(*s*) Ibid.

(*t*) Ibid.

(*u*) Ibid.

An indictment alleged that an appeal was made by the defendants against a rate to the sessions, who dismissed the appeal, and ordered the defendants 'immediately upon service of the said order, or a true copy thereof,' to pay the churchwardens and overseers a sum for costs of the appeal, and that a true copy of the said order was afterwards personally served upon each of the defendants, and each of them had notice of the said order. Nevertheless, the defendants wilfully neglected and refused to pay. Upon the trial the clerk of the peace produced the minutes of the sessions, and read the order, which ordered the defendants 'immediately upon service of this order, or a true copy thereof,' to pay the costs. The clerk of the peace stated that 'the costs were not taxed during the actual sitting of the sessions, but between the time of the Court adjourning and its meeting. I reported to the magistrates what I thought fit and proper costs; and the Court adopted it. I made a verbal statement, which the Court adopted. I gave both parties an opportunity of attending. The defendants did not attend. I wrote a letter to their solicitor. The appeal was dismissed for want of due notice.' The defendants' attorney was the person attending the appeal, and was present when the order was made. There were four or five of the magistrates at the adjournment who were at the original sessions. A witness proved that he served each defendant with a paper, which he told them was a true copy of the order, as in fact it was, and at the time of service read to each the contents of a parchment writing, which was also a true copy of the order, and was produced on the trial. It was objected, first, that as notice to produce the copies served had not been given, evidence could not be given that the copy served was a true copy; but it was held that a notice to produce the paper served would have been notice to produce a notice, which is never required; secondly, that an order to pay 'upon service of the said order, or a true copy thereof,' was bad on the face of it; but it was held to be perfectly sufficient,—that an order of sessions in that form was good. And the service was also good, whether the book of the sessions or the parchment was the order; for if the book was the original, it could not be shewn at the time of the service, and if the parchment was the original, its contents were read over (*v*). And, lastly, that the adjourned sessions had no jurisdiction to fix the amount of costs (*w*). The Court held that the justices must be taken to have ordered in the first instance, in the presence of all the parties, that the defendants should pay such costs as the officer might find to be due; and the result of the evidence being that both parties had an opportunity of attending the taxation, and no objection being made when the amount was stated in Court, a state of things took place which amounted to a consent, and therefore the order was valid (*x*).

The Distress for Rent Act, 1737 (11 Geo. II. c. 19), s. 16 (*y*), enables two justices to put a landlord in possession of premises in any case where one *half-year's* (*z*) rent is in arrear, and the tenant deserts the premises and

(*v*) Coleridge, J., said: 'An order of the quarter sessions is not like an order of justices out of sessions. It is the judgment of the Court, and that cannot be carried about: it is sufficient if a copy be shewn.'

(*w*) This point was not then decided; but it is now settled that costs must be taxed during the sessions, unless the parties consent to taxation out of sessions. Midland Rail. Co. *v.* Edmonton Union [1895], A. C. 495.

(*x*) R. *v.* Mortlock, 7 Q.B. 459.

(*y*) As amended by 57 Geo. III. c. 52, s. 1.

(*z*) The rent must be a rack rent or full

leaves them uncultivated or unoccupied so as no sufficient distress can be had; and sect. 17 empowers the next justice or justices of assize, on the appeal of the tenant, to award restitution to the tenant. Upon an indictment for disobeying the order of the justices of assize to restore possession to the tenant, it is not necessary to prove the proceedings before the magistrates preliminary to the restitution; and that it is sufficient to put in the record made up by the justices of the peace, in which, after reciting the complaint and other proceedings, they declare that they put the landlord into possession; and it is unnecesssary to prove the complaint of the landlord (*a*).

Upon the trial of an indictment for not paying a sum of money pursuant to an order of sessions made on an appeal by the defendant against a certificate of two justices, for stopping up, diverting, and turning a part of a public footway, the record of the order of sessions, together with proof of the service of a copy of the order upon the defendant, and a demand of the sum ordered thereby to be paid, to which the defendant only answered that he did not owe anything, is sufficient evidence to go to the jury, and it is not necessary to prove *aliunde* the existence of the certificate or the fact of the appeal. An order of sessions made upon such an appeal need not show the time at which the certificate of the justices was lodged with the clerk of the peace; for the sessions have no duty to inquire into that fact, unless the objection is raised before them (*b*).

On the trial of an indictment against the stewards of a friendly society for disobeying an order of justices, which recited that the rules of such society had been enrolled; it was held that the recital was not evidence of that fact, which must be proved by other means, in order to shew that the justices had jurisdiction to make the order under 33 Geo. III. c. 54, s. 2 (*c*). Upon the trial of such an indictment, the Court refused to enter into the merits of the original case, and to hear objections to the order which did not appear upon the face of it (*d*). But if it appears on the face of the order that the justices had no jurisdiction to make it, the defendant is entitled to acquittal (*e*).

three-quarters of the value of the demised premises (57 Geo. III. c. 52, s. 1).

(*a*) R. *v.* Sewell, 8 Q.B. 161. The very ground of the appeal might be that the justices of the peace had acted without any complaint, and therefore the proof of the complaint could not be necessary. The Court held in this case that the order of the justices of assize must be made by them as individual justices, and not as a Court, and therefore a certificate of such an order, signed by the deputy clerk of assize in the same way as an order of the Court, is not sufficient. It seems also that the order should be signed by the justices of assize, and that they alone, and none of the other commissioners, have jurisdiction to make such an order. As to form of order, see R. *v.* Traill, 12 A. & E. 761.

(*b*) R. *v.* Thornton, 2 Cox, 493.

(*c*) R. *v.* Gilkes, 8 B. & C. 439. Cf. R. *v.* Kew, Nottingham Assizes, July 15, 1885, Pollock, B. Friendly Society Cases, by Diprose & Gammon, p. 242, where an indictment for embezzlement by the secretary of a friendly society was dismissed for want of proof of the registration of the society. The Act of 1793 was repealed in 1855 (18 & 19 Vict. c. 63). Friendly societies are now governed by two Acts of 1896 (59 & 60 Vict. cc. 25, 26), and certain subsequent statutes making minor amendments. Under modern legislation the rules are submitted with an application to register the society, made to the registrar of friendly societies; and an acknowledgment of registration is conclusive of due registration of the society unless it is proved that the registry has been suspended or cancelled (1896, c. 25, s. 11). Oakes *v.* Turquand, L. R. 2 H. L. 354. Baden Fuller, Friendly Societies (2nd ed.).

(*d*) R. *v.* Mitton, 3 Esp. 200; R. *v.* Gilkes, 3 C. & P. 52, Abbott, C.J.

(*e*) R. *v.* Hollis, 2 Stark. (N. P.) 536, Abbott, C.J. R. *v.* Soper, 3 B. & C. 857. These decisions were given while writs of error were still in use.

CANADIAN NOTES.

Sec. 1.—Of Contempt of Court and Attacks on the Actions of Judges and Juries.

Contempt of Court is a criminal proceeding. Ellis v. The Queen, 22 Can. S.C.R. 7; Re Scaife, 5 B.C.R. 153. It is therefore necessary that the charge should be proved with particularity. Re Scaife, 5 B.C.R. 153.

While a criminal information for libel was pending against one W., H. wrote a letter to a newspaper reflecting upon one of the Judges who delivered judgment on the application for the information, and stating that W. was "as certain to be convicted as a libeller ever was before his trial." It was held that such letter was clearly contempt of Court. R. v. Wilkinson, Re Houston (1877), 41 U.C.Q.B. 42.

In New Brunswick the practice has been to issue an attachment against the person publishing the newspaper comment complained of, the award of the attachment not being a final judgment but a method of bringing the party into Court where he may be ordered to answer interrogations, and by his answers purge his contempt if he can. If he were unable to then purge his contempt the Court would then pronounce sentence. Ellis v. Baird, 16 Can. S.C.R. 147.

An appeal does not lie to the Supreme Court of Canada from a judgment in proceedings for contempt of Court unless it comes within the provisions of the Supreme Court Act as to appeals in criminal cases. Ellis v. The Queen, 22 Can. S.C.R. 7; O'Shea v. O'Shea, L.R. 15 P.D. 59.

Sec. 2.—Of Acts Affecting Fair Trial of Pending Case.

Where the jury disagreed upon the trial of an indictment and a new jury was ordered for another sittings the cause is meanwhile still a pending one and improper and impartial comments thereon published by one of the accused will constitute a contempt of Court by him. The Court imposing sentence upon a newspaper proprietor for a contempt of Court contained in newspaper comment may, in addition to the infliction of a fine and imprisonment, require the accused to find securities to keep the peace and to refrain from publishing further articles reflecting on the pending cause, and may order imprisonment for six months, or until security is sooner given, or until the pending cause is sooner ended. The King v. Charlier, 6 Can. Cr. Cas. 486.

Any publication, whether by parties or strangers, which concerns a cause pending in Court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jury, the witnesses or the counsel may be visited as a contempt. R. v. Wilkinson, Re Houston (1877), 41 U.C.Q.B. 42, citing Bishop on Criminal Law, 5th ed., vol. 2, sec. 259.

Where the respondent in a controverted election case applied for an order *nisi* calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of Court for publishing articles in his newspaper reflecting on and pre-judging the conduct of the respondent and of the returning officer during the currency of the proceedings on the election petition, it was held, although a *primâ facie* case of contempt had been made out, that as it appears on the same material that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and his application was therefore refused. Re Bothwell Election Case, 4 Ont. R. 224.

Where the alleged contempt consisted in the publishing, in a newspaper, comments on a judgment rendered by a Master in Chambers in a cause in which the writer was solicitor for the defendant, but after the proceedings in the cause before the Master were ended, it was held by the Supreme Court of Canada that the relator in the cause could not be prejudiced as a suitor by the publication complained of, and as such prejudice was the only ground on which he could institute proceedings for contempt he had no *locus standi*, and his application should not have been entertained. Re O'Brien, Regina ex rel. Felitz v. Howland, 16 Can. S.C.R. 197, reversing 11 Ont. R. 633, and 14 Ont. App. 184.

Sec. 4.—*Disobeying Orders of Court.*—Code sec. 165.

Disobedience of Orders by Justice of the Peace.—Code sec. 674.

Disobedience of Subpœna.—Code sec. 842.

CHAPTER THE THIRD.

OF OBSTRUCTING OR RESISTING THE EXECUTION OF LEGAL PROCESS.

SECT. I.—OF OBSTRUCTING PROCESS.

OBSTRUCTING the execution of lawful process, whether civil or criminal, is an offence against public justice; and it has even been held that the party opposing an arrest upon criminal process becomes thereby *particeps criminis:* that is, an accessory after the fact in felony, and a principal in high treason (*a*). Where the process, whether civil or criminal, is that of a superior Court of record, the obstruction may be dealt with summarily as contempt of Court (*b*).

Giving assistance to a felon pursued by officers of justice, in order to enable him to avoid arrest, is a misdemeanor, as being an obstruction to the course of public justice (*c*). An indictment was preferred against the defendant for rendering assistance to O. (who had committed forgery and was being pursued by officers of justice), in order to enable O. to avoid arrest. It appeared in evidence that O. had committed a forgery, as stated in the indictment; and had afterwards thrown himself from the top of a house, by which he was greatly hurt; and that the defendant, who was a relation and commiserated his wretched condition, conveyed him secretly on board a barge to Bristol, and was actively employed there in endeavouring to enable him to escape from the country. Advertisements had been printed and circulated, stating the charge against O., and offering a large reward for his apprehension; but it was not proved that any one of these advertisements had come to the knowledge of the defendant or that the defendant was acquainted with the particular charge against O., or knew that he had been guilty of forgery, as alleged in the indictment. Upon this ground the defendant was acquitted: but no other objection was taken to the indictment.

Privilege.—There is not now any privilege in respect of place (*d*) or person against arrest on criminal process (*e*).

(*a*) 2 Hawk. c. 17, s. 1, where Hawkins submits that it is reasonable to understand the books which seem to contradict this opinion to intend no more than that it is not felony in the party himself, who is attacked in order to be arrested, to save himself from the arrest by such resistance: and see 4 Bl. Com. 128.

(*b*) *Vide ante*, p. 542.

(*c*) R. *v.* Buckle [1821], Gloucester Spring Assizes, Garrow, B. The case states that 'Olive had committed forgery,' not that he was 'suspected of felony,' as stated in former editions of this work. C. S. G.

(*d*) At one time there were many pretended privileged places in London and Southwark, in which fugitives from civil and criminal justice claimed freedom from arrest, on pretence that they had been anciently royal palaces. Such were the White Friars and its environs, the Savoy, and the Mint in Southwark. The supposed privilege of such places has been taken away by legislation. See 8 & 9 Will. III. c. 27; 9 Geo. I. c. 28; 11 Geo. I. c. 22. A similar abuse created by the recognition of sanctuary was finally suppressed in 1623, by 21 Jac. I. c. 28.

(*e*) *Re* Freston, 11 Q.B.D. 545. As to arrest of witnesses, *vide post*, Bk. xiii. c. v.

Privilege from arrest *on civil process* continues in favour of members of either House of Parliament while Parliament is sitting, and in favour of barristers, solicitors, police and witnesses *eundo, morando et redeundo* from a case in which they are concerned (*f*), and of ministers of religion, while officiating in a place of worship or in the burial of the dead, or going to or from such service (*g*).

In some proceedings, particularly in those relating to the execution of the revenue laws (*h*), the Legislature has made special provision for the punishment of those who obstruct officers and persons acting under proper authority. But in ordinary cases, where the offence committed is less than felony, the obstruction of officers in the apprehension of the party is only a misdemeanor, punishable by fine and (or) imprisonment (*i*).

An indictment for obstructing the execution of process must state that the arrest was lawful, *i.e.*, made by proper authority (*j*).

But where the process is regular, and is executed by the proper officer, it is not lawful even for a peace officer to obstruct such officer, on the ground that the execution of it is attended with an affray and disturbance of the peace; for if one, having sufficient authority, issues a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command; as that would be to legalise confusion and disorder (*k*). Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected, and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs, having been violently assaulted, struck one of the assailants, a woman, and it was thought for some time that he had killed her; whereupon, and before her recovery was ascertained, the constable was sent for, and invited to arrest the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which the constable proceeded to take them into custody upon a charge of murder, and at first offered to take care also of their prisoner; but their prisoner was soon rescued from them by the surrounding mob. The next morning, the woman having recovered, the bailiffs were released by the constable. Upon these facts, Heath, J., was of opinion that the constable and his assistants were guilty of assault and rescue (*l*).

By the Sheriffs Act, 1887 (*m*), 'if a sheriff finds any resistance on the execution of a writ' (including any legal process, s. 38), 'he shall take with him the power of the county (*n*), and shall go in proper person to do execution, and may arrest the resisters and commit them to prison, and every such resister shall be guilty of a misdemeanor.'

(*f*) See Mather, Sheriff Law, 184. *Re* Gent, 40 Ch. D. 190.

(*g*) See 24 & 25 Vict. c. 100, s. 36. *Ante*, p. 407.

(*h*) *Ante*, Bk. iv. c. iii. pp. 374 *et seq.*

(*i*) 2 Chit. Cr. L. 145, note (*a*).

(*j*) R. *v.* Osmer, 5 East, 304.

(*k*) 1 East, P. C. 304.

(*l*) Anon. [1793], 1 East, P. C. 305.

(*m*) 50 & 51 Vict. c. 55, s. 8 (2), which re-enacts 13 Edw. I. c. 39, Stat. West. 2. This power is independent of the powers of the sheriff and under-sheriffs to disperse rioters. *Ante*, Bk. vi. c. i. p. 431.

(*n*) *Posse comitatus.* See 2 Co. Inst. 194. Dalton, c. 195. Howden *v.* Standish, 6 C. B. 504. Burdett *v.* Colman, 14 East, 188. As to calling in the military, see *ante*, p. 431.

Where the obstruction of process by the rescue of a party arrested is accompanied by violence and assault upon the officer, the offence is indictable; and rescuing, or attempting to rescue a party arrested on a criminal charge is usually punished upon indictment (*o*). The offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to an action in which damages are recoverable (*p*). And the Courts have often granted an attachment against such wrongdoers, it being the highest violence and contempt that can be offered to the process of the Court (*q*).

Sect. II.—Rescue of Property Lawfully Seized.

A. *Property Distrained.*

Distress for Rent.—Rescue of a distress for rent consists in retaking from the distrainor goods legally (*r*) distrained and in the possession of the distrainor by her bailiffs before they have been placed in the custody of the law by being lawfully impounded (*s*). It is a misdemeanor at common law (*s*), if the retaking is forcible and amounts to a breach of the public peace (*t*); but a mere trespass without circumstances of violence is not indictable (*u*).

A lessee who resists with force a distress for rent or forestalls or rescues the distress is guilty of forcible detainer (*v*).

Distress of Animals damage feasant.—Where a hayward had distrained a horse *damage feasant* on a private enclosed piece of pasture, and it was rescued from him on the way to the pound, and before it was impounded; it was held that this was not indictable, for till the horse got to the pound the hayward was merely acting as the servant of the owner of the land (*w*). If the hayward (who was a manorial officer) had distrained the animal while straying on a common or in a lane, the animal would have been in the custody of the law from the moment of seizure and the rescue indictable (*x*).

B. *Property Impounded.*

Pound-breach consists in the wrongful removal, whether with or without force, of cattle or other personal property from a place in which

(*o*) *Post*, p. 567.

(*p*) Bac. Abr. tit. 'Rescue' (C). Com. Dig. tit. 'Rescous' (D).

(*q*) Bac. Abr. ibid. Com. Dig. tit. 'Rescous' (D). In order to ground an attachment for a rescue, it seems there must be a *return* of it by the sheriff; at least, if it was on an arrest of mesne process. Bac. Abr. ibid. 2 Hawk. c. 22, s. 34. Anon. 6 Mod. 141. And see, as to the return of the rescue by the sheriff, Com. Dig. tit. 'Rescous' (D) 4, (D) 5. Bac. Abr. tit. 'Rescue' (E). R. *v.* Belt, 2 Salk. 586. R. *v.* Elkins, 4 Burr. 2129. Anon. 2 Salk. 586. R. *v.* Minify, 1 Str. 642. R. *v.* Ely, 1 Ld. Raym. 35. Anon. 2 Salk. 586. 1 Ld. Raym. 589.

(*r*) R. *v.* Nicholson, 65 J. P. 298, London County Sessions, where McConnell, K.C., ruled that rescuing from the custody of a bailiff goods lawfully seized under a distress for rent, was indictable. An illegal distress may be resisted. See R. *v.* Pigott [1851], Ir. C. L. R. 471, 478, Perrin, B.

(*s*) 1 Co. Inst. 47. See Cro. Circ. Comp. (10th ed.) 198; 2 Starkie, Cr. Pl. (2nd ed.) 644; 2 Chit. Cr. L. 201—for precedents of indictments. Cf. 1 Bishop, Amer. Cr. L. s. 467; 2 Bishop, Amer. Cr. L. s. 111. The usual remedy is by action of trespass at common law (Rich *v.* Woolley, 7 Bing. 651) or under 2 Will. & Mary, c. 5, *post*, p. 552.

(*t*) *Ante*, p. 441. Anon. 3 Salk. 187.

(*u*) *Ante*, p. 16.

(*v*) *Ante*, pp. 441 *et seq.*

(*w*) R. *v.* Bradshaw [1835], 7 C. & P. 233, Coleridge, J. Cf. Green *v.* Duckett, 11 Q.B.D. 275.

(*x*) R. *v.* Bradshaw, *ubi sup.*

they have been lawfully 'impounded,' and thereby placed in the custody of the law (*y*), *e.g.*, by placing cattle seized under a distress for rent in an enclosed field (*z*).

It has been doubted whether a pound-breach (*a*) is an indictable offence, if unaccompanied by a breach of the peace (*b*). But, on the other hand, it had been submitted that, as pound-breach is an injury and insult to public justice, it is indictable *as such* at common law (*c*), and the latter view has been accepted in two recent cases at Quarter Sessions (*d*).

The Pound-breach Act, 1843 (6 & 7 Vict. c. 30), provides for the summary conviction of any person who releases cattle distrained on enclosed land (*e*).

The civil remedy, however, given by 2 Will. & M. c. 5, s. 4, in most cases of pound-breach, or rescue of goods distrained for rent, is the best remedy where the offenders are responsible persons (*f*). That statute enacts that, upon pound-breach, or *rescous* of goods distrained for rent, the person grieved shall, in a special action on the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use (*g*).

C. *Goods Seized under Legal Process.*

It is laid down in the books (*h*) that if rescues are made upon a distress, &c., for the King, an indictment lies against the rescuer (*h*). This rule appears to be applicable to distress levied under the warrant of justices of the peace. Such goods on lawful seizure are at once in *custodia legis* (*i*). Thus, where a defendant was indicted for rescuing goods distrained for a church-rate it seems not to have been doubted that such a rescue was indictable (*j*).

On an indictment in Ireland for rescuing property distrained for poor-rate, it was held unnecessary to prove the making of the rate, or that there was any sum due at the time of making the distress; and that the warrant to collect, if in the form and with the requisites required by the Poor Law Act, was sufficient *prima facie* evidence of the authority of the collector; and that the section which required the sum to be collected

(*y*) 1 Co. Inst. 47. For precedents of indictments, see 2 Chit. Cr. L. 204, 206. Cro. Circ. Comp. (10th ed.) 199.

(*z*) R. *v.* Butterfield [1893], 17 Cox, 598. As to private pounds, see Green *v.* Duckett, 11 Q.B.D. 275.

(*a*) In former editions of this work the Mirror of Justices, c. 2, s. 26, was cited as authority for saying that pound-breach is a greater offence than rescue. The reference is not traceable, and the book is of no authority. See Selden Society Publ. vol. 7, by Maitland.

(*b*) 2 Chit. Cr. L. 204 (*b*), and authorities there cited.

(*c*) Ibid.

(*d*) R. *v.* Butterfield, *ubi sup.*

(*e*) See 14 & 15 Vict. c. 92, s. 19, as to these offences in Ireland. As to liability for supplying impounded cattle with food, see 12 & 13 Vict. c. 92, ss. 5, 6; 17 & 18 Vict. c. 60.

(*f*) Kemp *v.* Christmas [1898], 79 L. T. 233 (C. A.).

(*g*) As to the proceedings upon this statute, see Bullen on Distress (2nd ed.), 171 *et seq.* 244; Bradby on Distress, &c., 282 *et seq.* Bac. Abr. tit. 'Rescue' (C). S. 75 of the Highway Act, 1835 (5 & 6 Will. IV. c. 50), imposes a penalty on persons breaking the pound to rescue cattle, &c., found trespassing on highways.

(*h*) F. N. B. 102-9. Com. Dig. tit. 'Rescous.'

(*i*) See R. *v.* Walshe [1876], Ir. Rep. 10 C. L. 511, 515, Palles, C.B.

(*j*) R. *v.* Williams, 1 Den. 529. The point decided was that the warrant was unlawful.

to be specified in the warrant was satisfied by a reference in the warrant to the collector's book delivered at the time to the collector, and by such reference the book became incorporated with the warrant (*k*). But where on a similar indictment the warrant was in the same form as in the preceding case, but the occupiers were described in the collector's book as 'tenants of commons,' it was held that the collector had no authority to distrain on the actual occupier, as the description in the book was insufficient (*l*).

On a similar indictment it appeared that in the rate-book and distress warrant the occupier was described as J. W. Evidence was given that J. W. was the occupier when the rate was struck, but had died before issue of the warrant. It was held that the distress was lawful as the collector, under 6 & 7 Vict. c. 92, s. 6, was entitled to distrain all goods and chattels, to whomsoever they might belong, found on premises in respect of which any person was rated as occupier (*m*).

In Ireland rescue without actual force from a special bailiff of a cow taken by him under a civil bill decree was held not to be indictable at common law (*n*). In another case a bailiff under a sheriff's warrant addressed to him alone, and not to him and his assistants, seized goods in execution, and left them in charge of keepers and went away. During his absence the goods were rescued by the defendant from the keepers. It was held that on these facts the defendant could not lawfully be convicted of having by threats and violence compelled the bailiff to abandon the seizure (*o*).

For a man to retake from a sheriff's officer his own goods seized under a writ of execution against the goods of another though apparently not larceny (*p*) might perhaps involve the offence of rescue (*q*).

(*k*) R. *v.* Brenan, 6 Cox. 381. The warrant was headed, 'General warrant to collect and levy poor-rate, Gorey Union,' and directed the collector 'to levy the several poor-rates, and arrears of poor-rates, in the annexed book set forth, from the several persons therein rated, or other persons liable to pay the said rates and arrears of rates,' and was signed by the chairman of the guardians, two guardians, and the clerk of the union at a meeting of the board.

(*l*) R. *v.* Boyle, 7 Cox, 428; 6 Ir. C. L. R. 598.

(*m*) R. *v.* Westropp [1851], 2 Ir. C. L. R. 217.

(*n*) R. *v.* Walshe, Ir. Rep. 10 C. L. 511. The decree was against N. Walshe, and the cow was seized on the lands in the occupation of N. Walshe, but belonged to the prisoner, and could not lawfully be taken in pursuance of the decree. Rescue of goods, &c., taken *under* a civil bill decree is a misdemeanor under the Civil Bill Courts (Ireland) Act, 1864 (27 & 28 Vict. c. 99), s. 26.

(*o*) R. *v.* Noonan, Ir. Rep. 10 C. L. 505. The judges were not unanimous. The indictment was apparently framed on 27 & 28 Vict. c. 99, s. 26. Palles, C.B., raised the question whether, on an indictment differently framed, the evidence might have warranted a conviction (p. 508).

(*p*) R. *v.* Knight, 73 J.P. 15.

(*q*) But see Earl of Bristol *v.* Wilsmore, 1 B. & C. 574.

CANADIAN NOTES.

Sec. 1.—*Of Obstructing Process.*

Resisting or Obstructing Public Officer.—Code sec. 168.
For Definition of Public Officer.—See Code sec. 2(29).
Resisting or Obstructing Peace Officer.—Code sec. 169.
For Definition of Peace Officer.—See Code sec. 2 (26).
Summary Trial of Offence.—Code sec. 773.

Where a bystander states to other bystanders in the hearing of a police officer making an arrest for drunkenness, that the person being arrested is not drunk, such does not constitute the offence of obstructing a peace officer, if the statement is made *bonâ fide*, and in the belief of its truth. If, in an unwarranted attempt of the police to arrest the bystander, the latter strikes a policeman, he is not guilty of an assault upon the peace officer in the execution of his duty, for the policeman had no duty to arrest him. The King v. Cook, 11 Can. Cr. Cas. 32.

Where the process of an inferior Court is void by reason of its containing a direction to a peace officer to seize certain goods at a place outside of the territorial jurisdiction of the Court, such process is insufficient upon which to base a conviction for resisting the officer in its execution. R. v. Finlay (1901), 4 Can. Cr. Cas. 539 (Man.).

Where a bailiff obtained possession of goods under a writ of replevin, but at the request of the party in whose possession they were seized they were given by the bailiff into the possession of a third party, the latter giving the bailiff an undertaking or agreement to deliver him the goods on demand, it was held that in attempting to retake the goods in the possession of the third party the bailiff was not acting in the execution of any "process," but merely upon the undertaking. R. v. Carley, 18 C.L.T. 26.

The re-taking of possession by the vendor under a contract for the conditional sale of chattels is not within the term "lawful distress or seizure" as here used, and an obstruction of the vendor's bailiff in regaining possession is not an offence under this section. R. v. Shand (1904), 8 Can. Cr. Cas. 45, 7 O.L.R. 190.

Punishment on Summary Conviction.—Code sec. 781.

As the penalty under Code sec. 169 is imprisonment or fine, and under Code sec. 781 may be both imprisonment and fine, the question

has arisen whether a magistrate with power to do alone such acts as are usually required to be done by two or more justices must not be governed by the provisions of Part XVI, to the exclusion of power to act under Code sec. 169.

In R. v. Crossen (1899), 3 Can. Cr. Cas. 153 (Man.), it was held that the parties accused of resisting a peace officer in the execution of his duty could not be tried summarily by two justices except after compliance with Code sec. 778, notwithstanding Code sec. 169, and this ruling was followed in R. v. Carmichael (1902), 7 Can. Cr. Cas. 167 (N.S.).

In R. v. Nelson (1901), 4 Can. Cr. Cas. 461 (B.C.), it was held by Mr. Justice Drake that the accused can be tried summarily by the magistrate under the summary convictions clauses of the Code, or he can be tried before a magistrate as for an indictable offence.

In R. v. Jack (No. 2) (1902), 5 Can. Cr. Cas. 304, Mr. Justice Walkem, of the Supreme Court of British Columbia held that the offence of obstructing a peace officer in the performance of his duty, where an assault upon the officer is not also charged, may be summarily tried either by two justices of the peace, or a police magistrate under the summary convictions part of the Code by virtue of sec. 169; and that the latter section is not controlled by the provisions of secs. 773 and 781 as to the summary trial of the like offence before a magistrate with the consent of the accused.

In the opinion of Walkem, J., the punishment on summary conviction is limited to that specified in sec. 169. Sec. 781 providing a different punishment on a trial before a magistrate with the consent of the accused would have no application where the procedure under the summary convictions clauses was followed.

Semble, if the charge were for an assault on the officer in the performance of his duty, secs. 773 and 781 would then apply and not sec. 169.

In the Province of British Columbia the magistrate has absolute jurisdiction to proceed under the summary trials' part (XV.) by sec. 784(3) without the consent of the accused, and to award both fine and imprisonment under sec. 776.

It is necessary for the prosecution to prove that rent was due and in arrear before a conviction can be made under this section for the offence of wilfully obstructing a lawful distress. On such a charge evidence is admissible for the defence in proof that no rent was due. R. v. Harron (1903), 7 Can. Cr. Cas. 543, 6 O.L.R. 668.

CHAPTER THE FOURTH.

OF ESCAPES.

A. *General Rule.*

An escape is where one who is arrested gains his liberty before he is delivered by due course of law (*a*). It is distinct from flight from justice before arrest (*b*).

The term 'escape' is usually applied where the liberation of the prisoner is effected either by himself or others, without force. Where it is effected by the prisoner himself with force, it is called *prison-breaking;* and where it is effected by others, with force, it is commonly called a *rescue* (*c*).

Escapes fall into three classes—escape by the prisoner, escape suffered by an officer of the law, and escape suffered by a private person who has the prisoner in custody. But these distinctions, while recognised as to common law offences, cannot be applied with exactness to the statutes regulating offences of these classes.

B. *Escapes by the Party.*

As all persons are bound to submit themselves to the judgment of the law, those who, when lawfully arrested on criminal process, free themselves from custody before they are put in a prison or other legal place of detention, are guilty of a misdemeanor, punishable by fine and imprisonment (*d*). It is also criminal in a prisoner to escape from lawful confinement on a criminal charge though no force or artifice be used on his part to effect such purpose. Thus, a prisoner is guilty of a misdemeanor if he goes out of his prison by licence of the keeper (*e*), without any obstruction, the doors being open by the consent or negligence of the gaoler, or if he escapes in any other manner, without using any kind of force or violence, or if after his prison has been broken by others, without his procurement or consent, he escapes through the breach so made (*f*).

The punishment for escape by the party is fine and (or) imprisonment (*g*). The common law as to escape has been usually regarded as

(*a*) *Termes de la Ley.*

(*b*) Provision is made for the arrest of persons charged with indictable offences, who fly from justice out of the country in which the offence was committed. See 11 & 12 Vict. c. 42, ss. 12, 13, 14, 16; Extradition Acts, 1870–1906; and Fugitive Offenders Act, 1881.

(*c*) 1 Hale, 596. 2 Hawk. cc. 17–21.

(*d*) 2 Hawk. c. 17, s. 5. 4 Bl. Com. 129.

(*e*) Att.-Gen. *v.* Hobert, Cro. Car. 210; 79 E. R. 784.

(*f*) 1 Hale, 611. 2 Co. Inst. 589, 590. Sum. 108. Staundf. 30, 31. 2 Hawk. c. 18, ss. 9, 10. 31 Edw. III. stat. 1, c. 3, *post*, p. 561.

(*g*) 14 & 15 Vict. c. 100, s. 29, authorises the imposition of hard labour for 'escape,' not saying whether escape by the party is meant, or escape suffered by custodians.

applying only to persons in custody on a criminal charge, but in one case it has been held as misdemeanor at common law for a prisoner to escape who was in gaol under the order of a bankruptcy court (*h*).

C. *Escapes suffered by Officers of the Law.*

An escape of this kind must be from lawful custody.

There must have been an *actual arrest;* and if an officer, having a warrant to arrest a man, sees him shut up in a house and challenges him as his prisoner, but never actually has him in custody, and the party gets away from the house, the officer cannot be charged with an escape (*i*).

The custody must be lawful; for, if a man is arrested for a supposed crime, when no such crime was committed, and the party is neither indicted nor charged, or for such a slight suspicion of an actual crime and by such an irregular process as will not justify arrest or detention, the officer is not guilty of an escape by suffering the prisoner to go at large (*j*). But if a warrant of commitment plainly and expressly charges a man with treason or felony, though it be not strictly formal, the custodian suffering an escape is punishable; and where commitments are good in substance, the custodian is as much bound to observe them as if they were made ever so exactly (*k*). Whenever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape (*l*).

It is generally considered that the imprisonment must be for some *criminal matter*. The escape of one committed for petty larceny (*m*) was criminal; and on general principles of law to suffer the escape of a person committed for any other crime whatsoever would also be criminal (*n*). It has been held criminal to assist the escape of a man arrested under order of a bankruptcy court; and this decision would seem to depend for its justification on the conception that escape from lawful custody in a civil matter is a criminal offence (*o*).

A sheriff who allows a prisoner on civil process to escape is liable to attachment or to summary punishment under the Sheriffs Act, 1887 (*p*). The imprisonment must also be *continuing* at the time of the escape; and its continuance must be grounded on that satisfaction which public justice demands for the crime committed.

Voluntary Escape.—According to the older authorities whenever

(*h*) R. *v.* Allan, C. & M. 295, Commissioner Rogers, after consulting Erskine and Wightman, JJ. See 2 Hawk. c. 6; 2 Co. Inst. 589, 590.

(*i*) 2 Hawk. c. 19, s. 1.

(*j*) Ibid. s. 24.

(*k*) Ibid. s. 24. A commitment to a *prison*, and not to a *person*, was held good in R. *v.* Fell, 1 Ld. Raym. 424.

(*l*) Id. ibid. s. 2. And see *post*, pp. 563, 573.

(*m*) The distinction between grand and petit larceny was abolished in 1827 by 78 Geo. IV. c. 29, s. 2, re-enacted in 1861 as 24 & 25 Vict. c. 96, s. 2.

(*n*) 2 Hawk. c. 19, s. 3. 1 Hale, 592.

(*o*) R. *v.* Allan, C. & M. 295.

(*p*) 50 & 51 Vict. c. 55, s. 29. As to escape of civil prisoners from local prisons, see *post*, p. 571. It is said not to have been criminal to let a prisoner go who had been acquitted and detained until he paid his fees. 2 Hawk. c. 19, s. 4. This matter, discussed in the last edition (vol. I, p. 891, and note), is no longer material, as no fees are now payable by prisoners to gaolers or officers of the Court; and penalties are imposed for exacting them or detaining prisoners for non-payment. 55 Geo. III. c. 50, ss. 4, 5, 9, 13; 8 & 9 Vict. c. 114. And see Mee *v.* Cruikshank, 20 Cox, 210.

an officer, having the custody of a prisoner charged with, and *guilty* of, a capital offence, knowingly gives him his liberty with an intent to save him either from trial or execution, such officer is guilty of a *voluntary escape*, and liable to the same punishment as the prisoner whom he has allowed to escape (*q*). Hawkins says that Hale was of opinion (*r*) that in some cases an officer might be guilty of a voluntary escape who had no intention to save the prisoner, but meant only to give him a liberty which, by law, he had no colour or right to give (*s*); but dissents from Hale's opinion, on the ground that it is not sufficiently supported by authorities, and does not seem to accord with the purview of 5 Edw. III. c. 8 (*t*). He considers that a person who has power to bail is guilty only of negligent escape, by bailing one who is not bailable; and that in some cases an officer found to have knowingly given his prisoner more liberty than he ought to have had (as by allowing him to go out of prison on a promise to return; or to go amongst his friends, to find some who would warrant goods to be his own which he is suspected to have stolen), seems to have been only adjudged guilty of a negligent escape (*u*). And suggests that if, in these cases, the officer were only guilty of a negligent escape, in suffering the prisoner to go out of the limits of the prison, without security for his return, he could not have been guilty in a higher degree if he had taken bail for his return; and that it is therefore reasonable to infer that it cannot be a general rule that an officer is guilty of a voluntary escape by bailing his prisoner, whom he has no power to bail, but that the judgment of all offences of this kind must depend upon the circumstances of the case; such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted (*v*).

Under the present law the question of granting bail is for the High Court or for justices of the peace and not for governors of prisons, and all felonies and misdemeanors are bailable. The police have certain powers of releasing on bail, but not in the case of indictable offences. So that the opinions of Hale and Hawkins are now only of abstract interest.

At common law a gaoler was bound to keep persons entrusted to him until delivered under order of a Court or otherwise in due course of law, and could not transfer them to another gaol without judicial directions.

By the Prison Act, 1865 (28 & 29 Vict. 126), ss. 63, 64, and 65, prisoners may under certain circumstances be removed from one prison to another and into different jurisdictions, without the gaoler incurring any liability for escape (*w*).

Negligent Escape.—A *negligent* escape is where the party arrested

(*q*) Staundf. 33. 2 Hawk. c. 19, s. 10. 4 Bl. Com. 129.

(*r*) Sum. 113. 1 Hale, 596, 597.

(*s*) *e.g.*, if a gaoler bailed a prisoner who was not bailable.

(*t*) Relating to improper bailing of persons by marshals of the King's Bench. Repealed in 1887 (S. L. R.).

(*u*) See Att.-Gen. *v.* Hobert, Cro. Car. 210; 79 E. R. 784. The prisoner was in the Gatehouse Prison for misdemeanor, and was allowed out by licence of the gaoler, on the ground of sickness in the prison. Hawkins says that, generally, the old cases on this subject are so very briefly reported that it is very difficult to make an exact state of the matter from them.

(*v*) 2 Hawk. c. 19, s. 10.

(*w*) See also ss. 24–28 of the Prison Act, 1877 (40 & 41 Vict. c. 21), and s. 11 of the Prison Act, 1898 (61 & 62 Vict. c. 41).

or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of (*x*). Where a party so escapes the law will presume negligence in the officer. Thus, if a person in custody on a charge of larceny, suddenly, and without the assent of the constable, kills, hangs, or drowns himself, this is considered as a negligent escape in the constable (*y*). Hale says that if a prisoner charged with felony breaks a gaol, this seems to be a negligent escape, on the ground that the gaol should have been more secure or the officers more vigilant (*z*).

Undoubtedly an escape happening from defects in these particulars would come within the principle of guilty negligence in those responsible in the proper custody of the criminal; but it is submitted that a person charged with a negligent escape under such circumstances would be entitled to shew in his defence that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security (*a*).

If a justice of peace bails a person not bailable by law, it excuses the gaoler, and is not felony in the justice, but is said to render him liable to fine as for a negligent escape (*b*). Whoever *de facto* occupies the office of custodian of a prisoner is liable to answer for a *negligent escape* (*c*). But it seems that an indictment for a negligent escape will only lie against those officers upon whom the law casts the obligation of safe custody. Thus, on an indictment against one of the yeoman warders of the Tower and the gentleman gaoler, for permitting the escape of P. who had been committed for high treason, it appeared that the constable of the Tower had committed P. to the special care of the yeoman warder; but the Court held that the defendants were not such officers as the law took notice of, and therefore could not be guilty of a negligent escape (*d*). But a sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; and the Court may charge either sheriff or bailiff for such an escape (*e*).

(*x*) Dalt. c. 159. Burn's Just. tit. 'Escape,' IV.

(*y*) Dalt. c. 159.

(*z*) 1 Hist. P. C. 600, where it is said that 'therefore it is lawful for the gaoler to hamper them with irons, to prevent their escape.' But see the note (*a*) ibid., where it is said that this liberty can only be intended where the officer has just reason to fear an escape, as where the prisoner is unruly, or makes any attempt for that purpose; but that otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbidden to put their prisoners to any pain or torment. 3 Co. Inst. 34, 35. *Custodes gaolarum pœnam sibi commissis non augeant, nec eos torqueant vel redimant, sed omni sævitia remota pictateque adhibita judicia debite exequantur.* Flet. Lib. 1, cap. 26. Coke in his commentary on 13 Edw. I. (Stat. Westm. 2), c. 11, is express, that by the common law it might not be done. 2 Co. Inst. 381.

(*a*) Neglect to keep gaols in a proper state of repair seems to have been treated as indictable. See the precedents of indictments for this offence, 4 Wentw. 363, Cro. Circ. Comp. 189. Cro. Circ. Ass. 398; 3 Chit. Cr. L. 668, 669. The duty of maintaining 'prisons' in proper condition now devolves on the Prison Commissioners and their staff. The obligation as to the maintenance of lock-ups and cells devolves on the local police authority.

(*b*) At common law, according to Y. B 25 Edw. III. 39 (in the last edition of the year books mispaged 25 Edw. III. 82 *a*). He was also liable to be fined by justices of gaol delivery, by 1 & 2 Ph. & M. c. 13 (repealed 1826, 7 Geo. IV. c. 64, s. 32). See 1 Hale, 596, and as to escapes by admitting to bail or to improper liberty, *ante* p. 557.

(*c*) 2 Hawk. c. 19, s. 28.

(*d*) R. *v.* Hill, Old Bailey, Jan., 1694. Burn's Just. tit. 'Escape,' III. R. *v.* Rich, Old Bailey, Jan., 1694, MS. Bayley, J.

(*e*) 2 Hawk. c. 19, s. 29, and R. *v.* Fell,

The difference between voluntary and negligent escape is important in considering the effect of the *retaking* of a prisoner after he had been suffered to escape.

When an officer has *voluntarily* suffered a prisoner to escape, it is said that he can no more justify retaking him than if he had never had him in custody; because, by his own free consent, he has admitted that he has nothing to do with him; but if the prisoner returns and puts himself again under the custody of the officer, it seems that the officer may lawfully detain him, and take him before a justice to be dealt with according to law (*f*).

An officer who makes fresh pursuit after a prisoner, who has escaped through his *negligence*, may retake him at any time afterwards, whether he finds him in the same or a different county: and it would seem that an officer who has negligently suffered a prisoner to escape, may retake him, wherever he finds him, even without fresh pursuit. For since the liberty gained by the prisoner is wholly owing to his own wrongful act, there seems no reason why he should have any manner of advantage from it (*g*). If the officer pursues a prisoner, who flies from him, so closely as to retake him without losing sight of him, this is not in law an escape; but if the officer once loses sight of the prisoner, it seems that he will be guilty of a negligent escape, even though he retakes him immediately afterwards (*h*). And where he has been fined for the escape he does not purge the offence or avoid the fine by retaking the prisoner (*i*). Nor can he excuse himself by killing a prisoner in the pursuit (*j*), though he could not possibly retake him (*k*).

The offence of suffering an escape is an indictable misdemeanor, but may be proceeded against by attachment of criminal information (*l*).

Where persons present in a Court of record are committed to prison by such Court, the keeper of the prison of the Court is bound to have them already to produce when called for, and if he fails to produce them, may be adjudged guilty of an escape, without further inquiry; unless he has some reasonable excuse; as that the prison was set on fire, or broken open by enemies, &c., for he is precluded by the record of the commitment from denying that the prisoners were in his custody (*m*). It has been said (*n*), that if a gaoler says nothing in excuse of such an escape, it shall be adjudged voluntary: but it seems difficult to maintain that where it is not certain, whether an escape is negligent or voluntary, it ought to be adjudged a crime of so high a nature, without a previous trial (*o*). With respect to prisoners not committed by a Court of

1 Ld. Raym. 424. See the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29.

(*f*) 2 Hawk. c. 19, s. 12; c. 13, s. 9. Dalt. c. 169. Burn's Just. tit. 'Escape.'

(*g*) 2 Hawk. c. 19, s. 12.

(*h*) Staundf. 33. 1 Hale, 602. 2 Hawk. c. 19, ss. 6, 13.

(*i*) 2 Hawk. c. 19, ss. 12, 13.

(*j*) As to the custodian's right to wound or kill an escaped prisoner in the attempt to retake him, see R. *v.* Dodson, 2 Den. 35 (felony); R. *v.* Forster, 1 Lew. 187 (misdemeanor).

(*k*) Staundf. 33. 1 Hawk. c. 28, ss. 11, 12. 2 Hawk. c. 19, ss. 6, 13.

(*l*) In R. *v.* Gaoler of Shrewsbury, 1 Str. 532, the Court refused to grant an attachment against a gaoler for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office, but ordered him to shew cause why there should not be an information.

(*m*) 2 Hawk. c. 19, s. 15. In such cases there is a remedy by attachment for not producing the prisoner.

(*n*) Staundf. 34. 1 Hale, 599, 603.

(*o*) 2 Hawk. c. 19, s. 15.

record, but in the lawful custody of any person, by any other means whatsoever, it seems to be agreed that the custodian is not punishable for an escape, except on indictment (*p*).

According to the older authorities a person who had suffered another to escape could not be arraigned for such escape as for felony, until the principal had been attainted; on the ground that he was only punishable as an accessory to the felony, and that the general rule was, that no accessory ought to be tried until the principal had been attainted (*q*); but that he might be indicted and tried for a misprision before any attainder of the principal offender; for, whether such offender were guilty or innocent, it was a high contempt to suffer him to escape. If, however, the commitment were for high treason, and the person committed actually guilty of it, it was said that the escape was immediately punishable as high treason also, whether the party escaping were ever convicted of such crime or not; and the reason given was, that there are no accessories in high treason (*r*). Under the present law the rules as to the trial of accessories are different (*s*). But the effect of the change on the offence of voluntary escape has not been judicially determined.

Every indictment for negligent or voluntary escape should expressly shew that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion of crime (*t*). Judgment was arrested upon an indictment which stated that the prisoner was in the defendant's custody, and charged with a certain crime, but did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody by reason of such charge (*u*). But where a person was committed to the custody of a constable by a watchman, as a loose and disorderly woman and a street-walker, it was held, upon an indictment against the constable for discharging her, that by an allegation of his being charged with her, '*so being* such loose,' &c., it was sufficiently averred that he was charged with her '*as* such loose,' &c.; and it was also held unnecessary to aver that the constable knew the woman to be a street-walker (*v*). And every indictment should also shew that the prisoner went at large (*w*); and also the time when the offence was committed for which the party was

(*p*) 2 Hawk. c. 19, s. 16. It is laid down as a rule, that though where an escape is finable, the presentment of it is traversable; yet that where the offence is amerciable only, there the presentment is of itself conclusive; such amerciaments being reckoned amongst those *minima de quibus non curat lex* (Staundf. c. 32, p. 36); and this distinction is said to be well warranted by the old books (2 Hawk. c. 19, s. 21): and see *post*, p. 561.

(*q*) As to present rule, *vide ante*, p. 130. A person who has suffered a convicted felon to escape is an accessory after the fact, R. *v.* Burridge, 3 P. Wms. 439; 24 E. R. 1133; and therefore a person who suffers or aids the escape of a felon may be tried for a substantive felony as an accessory after the fact; and see Holloway *v.* R., 17 Q. B. 317. In Cro. Circ. Ass. 338, is an indictment as for a misdemeanor against a gaoler, for wilfully permitting a prisoner to escape who was under sentence of imprisonment for the term of six months, after a conviction of grand larceny; but it seems that it ought to have been laid as a felony. See 2 Stark. Cr. Pl. 600, note (*b*), referring to R. *v.* Burridge, 3 P. Wms. 497; 24 E. R. 1154.

(*r*) 2 Hawk. c. 19, s. 26.

(*s*) *Ante*, p. 130.

(*t*) Id. ibid. s. 14.

(*u*) R. *v.* Fell, 1 Ld. Raym. 424; 2 Salk. 272.

(*v*) R. *v.* Bootie, 2 Burr. 864. As to the sufficiency of such averments, see R. *v.* Boyall, 2 Burr. 832.

(*w*) 2 Hawk. c. 19, s. 14.

in custody; that it may appear that it was prior to the escape (*x*). An indictment for a voluntary escape should allege that the defendant 'feloniously and voluntarily permitted the prisoner to go at large' (*y*); and should state the particular crime for which the party was imprisoned; for it will not be sufficient to say, in general, that he was in custody for felony, &c. (*z*). But it is questionable whether such certainty, as to the nature of the crime, is necessary in an indictment for a negligent escape; as it is not in such case material whether the person who escaped were guilty or not (*a*).

Jurisdiction.—By 3 Edw. I. (*Stat. West. prim.*), c. 3 (*b*), the proceedings and trial for the offence of an escape were to be had before the justices in eyre of assize; but the statute did not affect the jurisdiction of the Court of King's Bench (*c*). 31 Edw. III. stat. 1, c. 14, enacts, that 'the escape of thieves and felons, and the chattels of felons, and of fugitives, and also escapes of clerks convict out of their ordinaries' prison, from thenceforth to be judged before *any of the King's justices*, shall be levied from time to time, as they shall fall as well of the time past as of the time to come' (*d*). The Act seems not to be limited to justices 'in eyre,' and justices of gaol delivery may punish justices of peace for a negligent escape, in admitting persons to bail who are not bailable (*e*).

Punishment.—It is considered that *voluntary escape* amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in custody; whether the person escaping were actually committed to gaol, or under arrest only, and not committed; and whether he were 'attainted,' or only accused but not indicted, of such crime (*f*). No one is liable to the higher degree of punishment for a voluntary escape but the person actually permitting of it; therefore, a principal gaoler was held to be only finable for a voluntary escape suffered by his deputy (*g*).

B. **Negligent Escape.**—Whenever a person is found guilty upon indictment of a *negligent* escape of a criminal actually in his custody, he is liable to a *fine* (*h*). It is said that, by the common law, the penalty

(*x*) And also that it was subsequent to the last general pardon. 2 Hawk. c. 19, s. 14. On an indictment for an escape, a pardon, if relied on as an excuse, must be proved by the defendant. R. *v.* Fell, 1 Ld. Raym. 424.

(*y*) *Felonicè et Voluntariè A. B. ad largum ire permisit.*

(*z*) 2 Hawk. c. 19, s. 14.

(*a*) Id. ibid.

(*b*) Repealed in 1863 (26 & 27 Vict. c. 125).

(*c*) Staundf. c. 32, p. 35. *Eo que le banke le roy est un eire, et plus haut que un eire, car si le eire sea in un county, el le banke le roy veigne la, le eire cessera.*

(*d*) This enactment is not repealed.

(*e*) 2 Hawk. c. 19, s. 19.

(*f*) 2 Hawk. c. 19, s. 22. It does not matter whether the person suffering a voluntary escape was rightfully entitled to keep the gaol if he assumed the custody of the gaol in fact. Ibid. s. 23. Voluntary escape of a felon was within the benefit of clergy, even if the felony of the principal was not clergyable. 1 Hale, 599. A gaoler guilty of voluntary escape was not liable to capital punishment unless the offence for which the party escaping was committed was capital at the time when he escaped. 2 Hawk. c. 19, s. 25.

(*g*) R. *v.* Fell, 1 Ld. Raym. 424; 2 Salk. 272. 1 Hale, 597, 598.

(*h*) 2 Hawk. c. 19, s. 31, where the author says, 'It seems most properly to be called a fine. But this does not clearly appear from the old books; for in some of them it seems to be taken as *a fine*, in others as *an amerciament*; and in others it is spoken of generally as the imposition of a certain sum, and without any mention of either fine or amerciament.' There is probably a misconception as to the nature of a fine in mediæval times. See 2 Pollock & Maitland, Hist. Eng. Law, 512.

for suffering the negligent escape of a person 'attainted' was of course a hundred pounds, and for suffering such escape of a person indicted, and not attainted, five pounds, and that if the person escaping were neither attainted nor indicted, it was left to the discretion of the Court to assess such a reasonable forfeiture as should seem proper. And it seems also, that if the party had escaped twice, these penalties were, as of course, to be doubled; but that the forfeiture was no greater for suffering a prisoner to escape who had been committed on two several accusations, than if he had been committed but on one (*i*).

In 14 & 15 Vict. c. 100, s. 29 (*j*), which allows a sentence of imprisonment with hard labour for escape, it is not stated whether it is meant to apply to escape permitted by the gaoler or escape by the party.

The law with respect to escapes suffered by private persons is in general the same as in relation to those suffered by officers. Wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffers him to go at large before he has delivered him over to some other who by law ought to have the custody of him. If a private person arrests another on suspicion of felony, and delivers him into the custody of another private person, who receives him and suffers him to go at large, it is said that both of them are guilty of an escape; the first, because he should not have parted with him till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him (*k*).

But where a private person, having made an arrest on suspicion of felony, delivers over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody the prisoner escapes, the private person will not be chargeable (*l*).

A private person who voluntarily allows his lawful prisoner to escape is punishable as an officer would be for the same offence (*m*); and for an escape due to his negligence, he is punishable by fine and imprisonment at the discretion of the Court (*n*).

(*i*) 2 Hawk. c. 19, s. 33. As to liability to forfeiture of office, see s. 30. Hawkins states (Bk. ii. c. 19, s. 32, and more fully c. 37, s. 28) that a negligent escape may be pardoned before it happens; but a voluntary one cannot be so pardoned; such pardon would be by way of indemnity. As to pleading a pardon by way of excuse to an indictment, see R. *v.* Fell, 1 Ld. Raym. 424.

(*j*) *Ante*, p. 213.

(*k*) 2 Hawk. c. 20, ss. 1, 2. 1 Hale, 595. Sum. 112.

(*l*) 2 Hawk. c. 20, ss. 3, 4. 1 Hale, 594, 595. Staundf. 34. Sum. 112, 114. The proper course to be pursued by a private person, who has arrested a person on a charge of felony, is, as soon as he reasonably can, to hand him over to the police or take him before a magistrate, to be dealt with according to law. See Reed *v.* Cowmeadow, 7 C. & P. 821, Parke, B.; and Edwards *v.* Ferris, 7 C. & P. 542, Patteson, J.

(*m*) *Ante*, p. 556.

(*n*) 2 Hawk. c. 20, s. 6. See 14 & 15 Vict. c. 100, s. 29, *ante*, p. 213.

CANADIAN NOTES.

ESCAPES BY THE PARTY.

Being at Large.—Code sec. 185.

It may be proved as a defence that the prisoner is at large conditionally under a license or ticket of leave or otherwise, and that the conditions have been observed. R.S.C. (1906) ch. 150. The license issued under the authority of that statute may be revoked by the Governor-General either with or without cause assigned. R. v. Johnson, 4 Can. Cr. Cas. 178 (Que.). The revocation by the Crown without cause assigned does not interrupt the running of the sentence, and the latter terminates at the same time as if no license had been granted. *Ibid.*

Without Lawful Excuse.—Upon a summary conviction of the defendant and the passing of sentence of four months' imprisonment, for breach of a provincial law, the magistrate of his own motion required the defendant to enter into a recognizance to appear when called upon (a procedure not authorized in such cases) and upon doing so the defendant was released. The defendant having been afterwards imprisoned under a warrant issued two months after the date of sentence, held that the term of imprisonment is to be counted from the day of passing sentence and that the defendant was not liable as upon an escape to make up the period for which he was so at liberty, as there was no *mens rea* and the magistrate's action was a "lawful excuse" quoad the defendant. R. v. Robinson (1907), 12 Can. Cr. Cas. 447, per Riddell, J.

The time during which a person under sentence is improperly at liberty through an erroneous order for bail, is not to be counted as part of the term of imprisonment. R. v. Taylor (1906), 12 Can. Cr. Cas. 245, per Stuart, J.

Escapes after Conviction or From Prison.—Code sec. 189.

Escape from Lawful Authority.—Code sec. 190.

Escape from Reformatories.—R.S.C. (1906) ch. 148, sec. 22.

Escape from Industrial Refuge.—R.S.C. (1906) ch. 148, sec. 23.

Additional Term as Punishment.—R.S.C. (1906) ch. 148, sec 24.

Escape by Failure to Perform Legal Duty.—Code sec. 193.

Escape Suffered by Officer of the Law.

Permitting Escape of Prisoner under Sentence of Death or Imprisonment for Life, etc.—Code sec. 191.

Permitting Escape of Prisoner under Sentence for Less than Life, etc.—Code sec. 192.

A prisoner who is charged before justices with an indictable offence and who is verbally remanded, after the examination of witnesses, until the following day in order to procure bail or, in default, be committed, is not in the custody of the officer merely for the purpose of enabling him to procure bail, but under the original warrant, and the officer is liable to conviction if he negligently permits him to escape. R. v. Shuttleworth, 22 U.C.Q.B. 372.

CHAPTER THE FIFTH.

PRISON BREAKING.

Common Law.—Where a person who is lawfully in prison effects his escape *by force* or against the gaoler's will (*a*), the offence is usually called *prison breaking;* and such breach of prison, or even the conspiring to break it, is felony at common law, for whatever cause, criminal or civil, the party was lawfully imprisoned (*b*); and whether he were actually within the walls of a prison or only in the stocks, or in the custody of any person who had lawfully arrested him (*c*). At common law the offender was liable to suffer death on conviction, but the severity of the common law is mitigated by a statute of 1295 (23 Edw. I. (*d*), *De frangentibus prisonam*), which enacts, 'That none, from henceforth, that breaketh prison, shall have judgment of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon, according to the law and custom of the realm, albeit in times past it hath been used otherwise.' Thus though to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at common law; to break prison when lawfully confined upon a lesser charge, is punishable only as a misdemeanor, *i.e.*, by fine and imprisonment (*e*).

Any place whatsoever wherein a person, under a lawful arrest for a supposed crime, is restrained of his liberty, whether in the stocks, or the street, or in the common gaol, or the police cells, or the house of a constable or private person, is a *prison* at common law (*f*) and within the meaning of the above statute; for 'imprisonment' means restraint of liberty (*g*). The statute extends as well to a prison in law as to a prison in deed (*h*).

A person taken upon a *capias*, awarded on an indictment against him for a supposed treason or felony, is within the statute if he breaks prison, whether such crime were or were not committed by him or by any other person; for there is an accusation against him on record, which makes his commitment lawful, though he may be innocent and the prosecution groundless. And if an innocent person be lawfully committed to prison on such a suspicion of felony (actually done by some other) as will justify his imprisonment, though he be not indicted, he is within the statute if he break the prison; for he was legally in custody,

(*a*) Att.-Gen. *v.* Hobert, Cro. Car. 210; 29 E. R. 784.
(*b*) 4 Bl. Com. 129. 1 Hale, 607. Bract. I. 3, c. 9. 2 Co. Inst. 588.
(*c*) 2 Hawk. c. 18, s. 1.
(*d*) Described in the old printed copies and translations as 1 Edw. II. stat. 2.
(*e*) 4 Bl. Com. 130.
(*f*) Att.-Gen. *v.* Hobert, Cro. Car. 210; 79 E. R. 784.
(*g*) 2 Hawk. c. 18, s. 4.
(*h*) 2 Co. Inst. 589.

and ought to have submitted to it until he had been discharged by due course of law (*i*).

But if no felony at all was committed, and the party had not been indicted, no warrant or committal for such supposed crime would make him guilty *within the statute*, by breaking the prison; his imprisonment being unjustifiable. And though a felony were committed, yet if there were no just cause of suspicion either to arrest or commit the party, his breaking the prison will not be felony if the warrant or order of committal is not in such form as the law requires; because the lawfulness of his imprisonment in such case depends wholly on the warrant, &c.; but if the party were taken up for such strong causes of suspicion as would justify his arrest and commitment, it seems that it will be felony in him to break the prison, though he happens to have been committed by an informal warrant (*j*).

The crime for which the party must be imprisoned, in order to make his breaking the prison felony within the meaning of the statute, must be capital at the time of his breaking the prison (*k*). But it is not material whether the offence for which the party was imprisoned were capital at the time of the passing of the statute, or were made so by subsequent statutes; for, since all breaches of prison were felonies by the common law, which is limited by the statute only in respect of imprisonment for offences not capital, when an offence becomes capital, it is as much out of the benefit of the statute as if it had always been so (*l*).

An offender breaking prison, while it is uncertain whether his offence will become capital, is highly punishable for his contempt, by fine and imprisonment (*m*).

If the crime for which the party is arrested, and with which he is charged in the commitment is not capital, and the offence is not in fact greater than the commitment states, breaking the prison will not amount to felony within the statute (*n*). And though the offence as expressed in the commitment is capital, yet if, in the event, it is found not to be capital, it is difficult to maintain that the breaking of the prison on a commitment for it can be felony; as the words of the statute are, 'except the *cause* for which he was taken and imprisoned require such a judgment' (*n*). On the other hand, if the offence which was the cause of the commitment is in fact capital but is expressed in the commitment as one less severely punishable, it is suggested that the breaking of the prison by the party is felony within the statute (*o*). It was not material whether the party who broke prison were under an accusation only, or actually attainted of the crime charged against him; for persons attainted, breaking prison, were as much within the exception of the statute as any others (*p*).

(*i*) 2 Hawk. c. 18, ss. 5, 6. 2 Co. Inst. 590. Sum. 109. 1 Hale, 610, 611.

(*j*) 2 Hawk. c. 18, ss. 7, 15; c. 16, s. 13 *et seq.* 2 Co. Inst. 590, 591. Sum. 109. 1 Hale, 610, 611.

(*k*) 2 Hawk. c. 19, s. 25.

(*l*) Ibid. c. 18, s. 13.

(*m*) Ibid. c. 18, s. 14.

(*n*) See the statute, *ante*, p. 563.

(*o*) 2 Hawk. c. 18, s. 15. Hawkins, after giving his reasons for these conclusions, says that no express resolution of the points appearing, and that as the authors who have expounded the statute (see Co. Inst. 590, 591; Sum. 109, 110; 1 Hale, 609) seem rather to incline to a different opinion, he will leave these matters to the judgment of the reader.

(*p*) Staundf. c. 32. 2 Hawk. c. 18, s. 16.

A person committed for high treason becomes guilty of felony only, and not of high treason, by breaking the prison and escaping singly, without letting out any other prisoner: but if other persons, committed also for high treason, escape together with him, and his intention in breaking the prison is to favour their escape as well as his own, he seems to be guilty of high treason in respect of their escape, because there are no accessories in high treason; and such assistance given to persons committed for felony will make him who gives it an accessory to the felony, and by the same reasoning a principal in the case of high treason (*q*).

The breach of the prison within the meaning of the statute must be *actual*, and not merely a *constructive breaking*. Therefore, if the party go out of a prison without obstruction, the prison doors being open through the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, he seems to be guilty of a misdemeanor only (*r*). But the breaking need not be intentional. Thus where a prisoner made his escape from a house of correction, by tying two ladders together, and placing them against the wall of the yard, but in getting over threw down some bricks which were placed loose at the top (so as to give way upon being laid hold of), the judges were unanimously of opinion that this was a prison breach (*s*). The breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison is broken by others without his procurement or consent, and he escapes through the breach so made, it seems that he cannot be indicted for the breaking, but only for the escape (*t*). And the breaking must not be from the necessity of an inevitable accident happening, without the contrivance or fault of the prisoner; as if the prison should be set on fire by accident, and he should break it open to save his life (*u*). It seems also that no breach of prison will amount to felony, unless the prisoner actually escapes (*v*).

The offence of prison breach differs from those of escape or rescue in that a party may be arraigned for prison breaking before he is convicted of the crime for which he was imprisoned, on the ground that it is not material whether he is guilty of such crime or not, and that he is punishable as a principal offender in respect of the breach of prison (*w*). But if the party has been indicted and acquitted of the felony for which he was committed, he is not to be indicted at common law or under the old statute afterwards for the breach of prison; for though, while the principal felony was untried, it was immaterial whether he were guilty of it or not, or rather the breach of prison raised a presumption of the guilt of the principal offence, yet, upon its being clear that he was not

(*q*) 2 Hawk. c. 18, s. 17. Bensted's case, Cro. Car. 583; 79 E. R. 1101. Limerick's case, Kel. (J.) 77.

(*r*) 1 Hale, 611. 2 Co. Inst. 590.

(*s*) R. *v.* Haswell (1821). R. & R. 458, Richardson, J., thought that if this had been an escape only, it would not have been felony.

(*t*) 2 Hawk. c. 18, s. 10. In Pult. de Pac. 1476, pl. 2, it is said, that if a stranger breaks the prison, in order to help a prisoner committed for felony to escape, who does escape accordingly, this is felony, not only in the stranger who broke the prison, but also in the prisoner that escapes by means of this breach, as he consents to the breach of the prison by taking advantage of it.

(*u*) 1 Hale, 611. Sum. 108. 2 Co. Inst. 590.

(*v*) 2 Hawk. c. 18, s. 12.

(*w*) 2 Co. Inst. 592. 1 Hale, 611. 2 Hawk. c. 18, s. 18.

guilty of the felony, he is in law as a person never committed for felony; and so his breach of prison is no felony (*x*).

An indictment for breach of prison, in order to bring the offender within the statute, must specially set forth his case in such manner that it may appear that he was lawfully in prison, and for such a crime as requires judgment of life or member; and it is not sufficient to say in general 'that he feloniously broke prison' (*y*); as there must be an actual breaking to constitute the offence (*z*). It is necessary that such breaking be stated in the indictment (*a*).

The offence of prison breaking and escape, by a party lawfully committed for treason or felony, is a felony (*b*); but was clergyable even when the felony for which the party was committed was not clergyable (*c*). It is now punishable under 7 & 8 Geo. IV. c. 28, s. 8 (*d*). In this the offence differed from a voluntary escape, which is punishable in the same degree as the offence for which the party suffered to escape was in custody (*e*). Where the prison breaking is by a party lawfully confined upon charge of misdemeanor, it is punishable as a misdemeanor, by fine and (or) imprisonment (*f*).

The prisoner was found guilty upon an indictment, which charged that he had been convicted (*g*) of felony, and sentenced to death; but had received a pardon on condition (*h*) of being imprisoned with hard labour in the house of correction for two years: that he was committed to and confined in a house of correction; and that before the expiration of the two years, he did feloniously break the said house of correction, and make his escape out of it, and go at large. This was held to be punishable as a common-law felony by imprisonment not exceeding a year (*i*), to begin from the passing of the sentence (*j*).

As to escapes, &c., from convict prisons, see *post*, p. 573.

(*x*) 1 Hale, 612, where it is also said that if the party should be first indicted for the breach of prison, and then be acquitted of the principal felony, he may plead that acquittal of the principal felony, in bar to the indictment for the breach of prison. In R. *v.* Waters, 12 Cox, 390, W. was given into custody without a warrant on a charge of felony. He was conveyed before a magistrate, who remanded him in custody without any evidence on oath. W. was removed to a lock-up from which he escaped. The charge of felony made against him was dismissed by the magistrates. Martin, B., held that the dismissal by the magistrates was not equivalent to an acquittal by a jury, that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand, and that these facts were no defence to the indictment for breaking prison.

(*y*) 2 Hawk. c. 18, s. 20. (*z*) *Ante*, p. 565.

(*a*) R. *v.* Burridge, 3 P. Wms. 483; Staundf. 3! *a.* 2 Co. Inst. 589 *et seq.*

(*b*) *Ante*, p. 563. (*c*) 1 Hale, 612.

(*d*) *Vide ante*, p. 246. As to imprisonment, *vide ante*, p. 212.

(*e*) *Ante*, p. 556.

(*f*) 2 Hawk. c. 18, s. 21. As to escape from imprisonment under order of a bankruptcy court, see R. *v.* Allan, C. & M. 295.

(*g*) Certificates of the former conviction were at one time not admissible in evidence. R. *v.* Smith, East. T. 1788. MS. Bayley, J. And neither the production of the calendar of the sentences signed by the clerk of assize, and by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, was sufficient to prove that a prisoner is in lawful custody under a sentence of imprisonment passed at the assizes; the record itself had to be produced; or other proof as provided by statute. R. *v.* Bourdon, 2 C. & K. 366, Maule, J. It would seem that the conviction can now be proved under 34 & 35 Vict. c. 112, s. 18, *post*, Bk. xiii. tit. 'Evidence.' It is, of course, also necessary to prove that the prisoner was in prison, and that the sentence had not been served or reduced.

(*h*) *Vide ante*, p. 252.

(*i*) See 1 & 2 Geo. IV. c. 88, s. 1, *post*, p. 568.

(*j*) R. *v.* Haswell, R. & R. 458. The Court also held that the prisoner might, if it was thought right, be also whipped three times in addition to the imprisonment. *Vide ante*, p. 215.

CANADIAN NOTES.

OF PRISON BREAKING.

Prison Breach.—Code sec. 187.

Attempts to Break Prison.—Code sec. 188.

The expression "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard room or other place in which persons charged with the commission of offences are usually kept or detained in custody. Sec. 2(30).

CHAPTER THE SIXTH.

RESCUE AND AIDING ESCAPE FROM CUSTODY.

RESCUE, or the offence of forcibly and knowingly freeing another from arrest or imprisonment is, in most instances, of the same nature as *prison breaking* (*a*).

Where a prison is such that the party himself would, by the common law, be guilty of felony in breaking from it, a stranger would be guilty of felony in rescuing him from it. But though, upon the principle that wherever the arrest of a felon is lawful rescue of him is a felony, it is not material whether a person arrested for felony, or suspicion of felony, is in the custody of a private person or of an officer; yet if he is in the custody of a private person, it seems that the rescuer should be shewn to have knowledge of the prisoner being under arrest for felony (*b*). Where the imprisonment is so far groundless or irregular, or for such a cause, or the breaking of it is occasioned by such a necessity, &c., that the party himself breaking the prison is, either by the common law or by 23 Edw. I. *De frangentibus prisonam* (*c*), saved from the liability to capital punishment, a stranger who rescues him from such an imprisonment is, in like manner, also excused (*d*).

A stranger who rescues a person committed for and guilty of high treason, knowing him to be so committed, is guilty of high treason (*e*), whether he knew that the party rescued were guilty of high treason or not: and he would, in like manner, be guilty of felony by rescuing a felon, though he knew not that the party was imprisoned for felony (*f*).

As the prisoner himself seems not to be guilty of felony by breaking prison, unless he *actually* goes out of it (*g*), the breaking of a prison by a stranger, in order to free the prisoners who are in it, is said not to be felony, unless some prisoner actually by that means gets out of prison (*h*).

A person cannot be tried for felonious rescue except on indictment. The sheriff's return of rescue is not enough (*i*).

(*a*) *Ante*, p. 563.

(*b*) 1 Hale, 606.

(*c*) *Ante*, p. 563. Sometimes cited as 1 Edw. II. stat. 2.

(*d*) 2 Hawk. c. 21, ss. 1, 2. 2 Co. Inst. 589. Staundf. 30, 31.

(*e*) 2 Hawk. c. 21, s. 7. Staundf. 11, 32. Sum. 109. 1 Hale, 237. As to breaking prison, see *ante*, p. 563.

(*f*) Bensted's case, Cro. Car. 583; 79 E. R. 1101, where it is said that it was so resolved by ten of the judges. And see 1 Hale, 606. But Hawkins (c. 21, s. 7) says that this opinion is not proved by the authority of the case (Y. B. 1 Hen. VI. 5) on which it seems to be grounded. Bensted's case is spoken of in R. *v.* Burridge, 3 P. Wms. 469, as having been cited and allowed to be law at an assembly of all the then judges of England, except the Chief Justice of the Common Pleas, in Limerick's case, Kel. (J.) 77.

(*g*) *Ante*, p. 565.

(*h*) 2 Hawk. c. 18, s. 12; c. 21, s. 3.

(*i*) 1 Hale, 606.

It was considered that he who rescued a person for felony could not be arraigned for such offence as a felony until the principal offender had been attainted (*j*). But it is said that he might be immediately proceeded against for a misdemeanor (*k*). If the prisoner were acquitted or convicted of a non-capital offence, the rescuer could not be indicted for felony, but could be convicted of misdemeanor and subjected to fine and imprisonment or either (*l*).

The indictment for a rescue, like that for an escape (*m*) or for breaking prison (*n*), should specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question (*o*). And the word 'rescued' (*rescussit*), or something equivalent to it, must be used to shew that it was forcible and against the will of the custodian of the prisoner (*p*).

Punishment.—The rescue of one in custody for felony, or suspicion of felony, is felony (*q*). At common law the rescue of a person under commitment for burglary (then a transportable offence) was punishable only as a felony within clergy (*r*). By the Rescue Act, 1821 (1 & 2 Geo. IV. c. 88), s. 1, 'if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, head-borough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year (*s*), it shall be lawful for the Court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven (*t*) years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years' (*u*).

Where the party rescued is in custody for misdemeanor, the rescuer will be punishable as for a misdemeanor; for, as those who break prison are guilty only of misdemeanor, punishable by fine and imprisonment, in cases wherein they are saved from judgment of death by 23 Edw. I. *De frangentibus prisonam*, those who rescue such prisoners in the like cases are punishable in the same manner (*v*). Where a prisoner was indicted for a misdemeanor in aiding and assisting in the rescue of a person, apprehended and in custody under the warrant of a justice of peace,

(*j*) See *ante*, p. 560, note (*q*). It is doubtful whether the old rule has not lapsed with the change of the law as to the trial of accessories, *ante*, p. 130. The rule as to rescue of traitors was different, all being accessories in treason.

(*k*) 2 Hawk. c. 21, s. 8.

(*l*) 1 Hale, 598, 599.

(*m*) *Ante*, p. 555.

(*n*) *Ante*, p. 567.

(*o*) 2 Hawk. c. 21, s. 5. In R. *v.* Westbury, 8 Mod. 357, it was holden that an indictment for a rescue of goods levied must set forth the *fieri facias* at large; and that setting forth *quod cum virtute brevis, &c., de fieri facias*, and a warrant thereon be levied, &c., and that the defendant rescued them, is not sufficient.

(*p*) R. *v.* Burridge, 3 P. Wms. 484.

(*q*) Rescue was clergyable even when the offence of the prisoner was not. 1 Hale, 607.

(*r*) R. *v.* Stanley, R. & R. 432.

(*s*) See R. *v.* Haswell, *ante*, p. 566.

(*t*) Now penal servitude for three to seven years. *Vide* 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212.

(*u*) See 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. 9 & 10 Vict. c. 24, s. 1, which affected 1 & 2 Geo. IV. c. 88, s. 1, was repealed in 1892 (S. L. R.).

(*v*) 2 Hawk. c. 21, s. 6. 4 Bl. Com. 130.

granted upon a certificate of the clerk of the peace of the county, reciting that a true bill for misdemeanor had been found against the party apprehended, and it was objected that the warrant was illegal, as justices of peace had only authority to issue warrants upon oath made of the facts, which authorised the issuing such warrants (*w*), it was held that the warrant was legal, and that the prisoner was guilty of a misdemeanor, in assisting in the rescue of the person apprehended under it (*x*).

It was a misdemeanor at common law to aid a person to escape from custody, who was confined under the remand of Commissioners for the Relief of Insolvent Debtors, and not on any criminal charge (*y*).

The rescue of a prisoner committed by the judges of any of the superior Courts is said to be a great misprision ; for which the party and the prisoner (if assenting) will be liable to be punished by imprisonment for life, forfeiture of lands for life, and forfeiture of goods and chattels, though no stroke or blow was given (*z*).

Aiding and assisting a prisoner to escape out of prison, by whatever means it may be effected, is an offence of a mischievous nature, and an obstruction to the course of justice : and the assisting *a felon* in making an actual escape, is felony (*a*). In a case which underwent elaborate discussion, the Court of King's Bench held, that a person who assisted the escape from prison of a prisoner who had been convicted of felony within clergy, and, having been sentenced to be transported for seven years, was in custody under such sentence, was an accessory after the fact to the felony (*b*). The Court proceeded upon the ground that one so convicted of felony, within the benefit of clergy, and sentenced to be transported for seven years, continued a felon till actual transportation and service pursuant to the sentence ; and that the assistance given amounted, in law, to receiving, harbouring, or comforting, such felon (*c*). But they held the indictment to be defective, in not charging that the defendant knew that the principal was guilty, or convicted, of felony (*d*). The offence of aiding a prisoner to escape out of prison appears also to have been considered as an accessorial offence in cases of piracy (*e*).

By the Prison Escape Act, 1742 (16 Geo. II. c. 31), s. 3 (*f*), it is enacted

(*w*) This form of warrant is now clearly legal under 11 & 12 Vict. c. 42, s. 3.

(*x*) R. *v.* Stokes, Stafford Sum. Ass. 1831, Park and Patteson, JJ. 5 C. & P. 148, and MSS. C. S. G.

(*y*) R. *v.* Allan, C. & M. 295, Erskine and Wightman, JJ.

(*z*) 1 East, P. C. 408, 410. Bac. Abr. tit. 'Rescue' (C). 3 Co. Inst. 141. Y. B. 22 Edw. III. 13.

(*a*) R. *v.* Tilley, 2 Leach, 671.

(*b*) R. *v.* Burridge, 3 P. Wms. 439.

(*c*) The assistance was not particularly specified in the special verdict ; the statement was, that the defendant (who was confined in the same gaol with the party whom he assisted to escape) 'did wilfully aid and assist the said W. P., so being in custody as aforesaid, to make his escape out of the said gaol.' But any assistance given to one known to be a felon, in order to hinder his suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory after the fact. *Ante*, p. 126.

(*d*) 3 P. Wms. 492. The prisoner was charged upon a second indictment as an accessory, knowing the principal to have been under sentence of transportation ; and was tried upon this second indictment, convicted, and sentenced to be transported, id. 499, 503. But such sentence was not warranted by law. See R. *v.* Stanley, R. & R. 432.

(*e*) R. *v.* Scadding, Yelv. 134. 1 East, P. C. 810.

(*f*) Ss. 1, 2 of this Act were repealed in 1823 (4 Geo. IV. c. 64, s. 1), so far as they related to prisons to which that Act applied. The Act of 1823 (repealed by the Prison Act, 1865 (28 & 29 Vict. c. 126, s. 73)) did not apply to Bethlehem Hospital or Bridewell, nor to Millbank and Gloucester Penitentiaries, nor to ships or vessels provided for the reception and employment of convicts sentenced to transportation. 5 Geo.

that 'If any person shall aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, head-borough, tithingman, or other officer or person who shall then have the lawful charge of such prisoner, in order to carry him or her to gaol, by virtue of a warrant of commitment for treason, or any felony (except petty larceny) (*g*), expressed in such warrant; or if any person shall be aiding or assisting to any felon to attempt to make his escape from on board any boat, ship, or vessel, carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered, in order for transportation'; every person so offending, and being convicted, shall be deemed and adjudged to be guilty of felony, and be transported for the term of seven years (*h*).

Sect. 4. 'Provided always, that there shall be no prosecution for any of the said offences, unless such prosecution be commenced within one year after such offence committed.'

By the Murder Act, 1751 (25 Geo. II. c. 37), s. 9 (*i*), 'If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue or set at liberty, any person out of prison who shall be committed for or found guilty of murder, or rescue, or attempt to rescue, any person convicted of murder going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony' (*j*).

By the Criminal Lunatic Asylums Act, 1860 (23 & 24 Vict. c. 75), s. 12, 'any person who rescues any person ordered to be conveyed to any asylum for criminal lunatics during the time of his conveyance thereto or of his confinement therein, and any officer or servant in any asylum for criminal lunatics who through wilful neglect or connivance permits any person confined therein to escape therefrom (*jj*), or secretes, or abets or connives at the escape of any such person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding *four* years (*k*), or to be imprisoned for any term not exceeding two years, with or without hard labour, at the discretion of the Court; and any such officer or servant who carelessly allows any such person to escape as aforesaid shall, on summary conviction before two justices of such offence, forfeit any sum not exceeding twenty pounds nor less than two pounds.'

IV. c. 84, s. 1; c. 85, s. 27. Of the excepted prisons, Millbank and Gloucester, the King's Bench, Fleet, Marshalsea, and Palace Court Prisons have ceased to exist. Since the abolition of transportation, hulks are not used. The present Bethlehem Hospital is not on the site of the old hospital, and is not used as an asylum for criminal lunatics, and Bridewell is used only for apprentices. The repeal of 4 Geo. IV. c. 64, and 5 Geo. IV. c. 85, by 28 & 29 Vict. c. 126, does not revive legislation repealed by those Acts. *Vide ante*, p. 5.

(*g*) Merged in larceny. 24 & 25 Vict. c. 96, s. 2, *post*, Vol. ii. p. 1177.

(*h*) Now penal servitude from three to seven years, or imprisonment with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212.

(*i*) Rep. in 1828 (9 Geo. IV. c. 31, s. 1), 'except so far as relates to rescues and attempts to rescue.' Sect. 10 was repealed in 1867. S. L. R.

(*j*) The punishment of death was abolished and transportation (now penal servitude) for life substituted (7 Will. IV. & 1 Vict. c. 91, s. 1). For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212, 247.

(*jj*) A like provision as to institutions for ordinary lunatics is made by 53 & 54 Vict. c. 5, s. 323.

(*k*) Nor less than three years. *Quære*, whether the maximum is increased to five years, *vide ante*, p. 211.

Naval and Military Prisons.—The Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), ss. 70, 82 (*l*), imposes penalties on persons aiding escape or attempts to escape from a naval prison (*m*). These provisions are not limited to the United Kingdom.

The Army Act (*n*) provides for the punishment on conviction by court-martial of persons subject to military law who wilfully, and without proper authority, release, or wilfully or without reasonable excuse allow the escape of prisoners in their custody or charge (s. 20), or who being in lawful custody escape or attempt to escape (s. 22) (*o*).

Local Prisons.—By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 37, 'Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or other disguise, or any letter, or any other article or thing (*p*), shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years' (*q*).

This section is not limited to criminal prisoners, *i.e.*, prisoners 'charged with or convicted of crime' (s. 4) (*r*).

Certified Reformatories, &c.—Escaping or aiding escape from reformatories and industrial schools is punishable on summary conviction (8 Edw. VII. c. 7, s. 72). As to aiding the escape of prisoners being conveyed under the Fugitive Offenders Act, 1881, see 44 & 45 Vict. c. 69, ss. 25, 28.

The following decisions on the superseded but similar Acts of 1742 and 1823 may be of value in construing sect. 37 of the Act of 1865. The Act of 1742 only applied where an escape was actually made (*s*), and was limited to escapes of prisoners committed to or detained in prison, for treason or felony plainly expressed in the warrant of commitment (*t*).

Delivering instruments to a prisoner, to facilitate his escape from prison, was within the Act of 1742, though the prisoner had been pardoned for the offence of which he was convicted, on condition of transportation (*u*). And a prisoner was within the Act, though there be no evidence that he knew of what specific offence the person he assisted had been convicted (*v*).

(*l*) As amended by 47 & 48 Vict. c. 39.

(*m*) Penal servitude, three to fourteen years, or imprisonment with or without hard labour for not over two years. The prisons are appointed and governed under s. 81 of the Act of 1866, as amended by 47 & 48 Vict. c. 39.

(*n*) 44 & 45 Vict. c. 58.

(*o*) See Manual of Military Law (ed. 1907), c. iv.

(*p*) A crowbar is an article or thing within this section. R. *v.* Payne, L. R. 1 C. C. R. 27.

(*q*) This Act does not extend to Scotland or Ireland, or convict prisons, or any military or naval prison (s. 3). 'Prison' shall mean gaol, house of correction, bridewell, or penitentiary; it shall also include the airing grounds, or other grounds or buildings occupied by prison officers, for the use of the prison and contiguous thereto. 'Gaoler' shall mean governor, keeper, or other chief officer of a prison (s. 4). 'Prisoner' is defined for the purposes of the Prison Act, 1877 (40 & 41 Vict. c. 21), as 'any person committed to prison on remand or for trial, safe custody, punishment, or otherwise.' The Act applies (s. 3) to all prisons belonging to a prison authority as defined by the Act of 1865. The definition of 'prisoner' is wide enough to include penal servitude prisoners for the time being detained in a local prison.

(*r*) Connivance for reward at the escape from prison of a person in civil custody entails liability on the gaoler to loss of office, inability to serve again, and a penalty of £500. 8 & 9 Will. III. c. 27, s. 4.

(*s*) R. *v.* Tilley, 2 Leach, 662.

(*t*) R. *v.* Greenif, 1 Leach, 363. R. *v.* Gibbon, 1 Leach, 98, note (*a*).

(*u*) R. *v.* Shaw, R. & R. 125, 526.

(*v*) Ibid. An indictment at common law for aiding a prisoner's escape should state

When the record of the conviction of the prisoner, whose escape was to have been effected, had been produced by the proper officer, no evidence was admissible to contradict what it stated; nor to shew that it had never been filed among the records of the county; notwithstanding that the indictment referred to it with a *prout patet* as remaining amongst those records (*w*).

Where a count stated that the gaol thereinafter mentioned, situate at the parish of the Holy Trinity, in C., in the county of W., was a gaol to which the provisions of 4 Geo. IV. c. 64 (*x*) extended, and that one T. was a prisoner in the said gaol, and that the defendant, at the parish aforesaid, feloniously did aid and assist T., then and there being such prisoner, in attempting to escape from the said gaol; it was held on error that the count was good, though it did not allege the means by which the defendant aided T. in attempting to escape, and though it did not allege in direct terms that T. did attempt to escape (*y*). Another count stated that T., being a prisoner in the said gaol, so situate as aforesaid, was meditating and endeavouring to effect his escape from the said gaol, otherwise than by due course of law, and in order thereto had procured a key to be made with intent to effect his escape by means thereof, and had made to the defendant, then being a turnkey of the said gaol, overtures to induce him to aid him to escape from the said gaol, and so was endeavouring to procure his escape from the said gaol, and that the defendant whilst T. was such prisoner in the said gaol at the parish aforesaid, &c., feloniously did procure and receive into his possession the said key, being adapted to and capable of opening divers locks in the said gaol, with intent thereby to enable T. to escape from the said gaol, and so the jurors said that the defendant at the parish aforesaid feloniously did aid and assist T. in attempting to escape from the said gaol; and it was held that the introductory part of the count stated an attempt to escape and the means used with sufficient particularity, and sufficiently shewed an offence within 4 Geo. IV. c. 64, and that the count was not bad for want of a more particular venue to the acts charged in the introductory part as an attempt by T. to escape, and that the count was not double (*z*). It was also held, that the general averment of the gaol being a gaol to which the provisions of 4 Geo. IV. c. 64 applied was sufficient, without shewing how it came within them, and that it was not necessary to shew more particularly that the gaol was a gaol for the county within 5 & 6 Vict. c. 110, s. 2 (*a*). It was further held, that aiding an escape was a substantive offence under 4 Geo. IV. c. 64, s. 43 (rep.), and therefore the count was not bad in charging the accessory without including the principal or alleging that he had been convicted, and at all events such an objection was too late after the trial (*b*). It was also held, that it was not necessary to shew that the prosecution was commenced within a year after the offence, as required by sect. 4 of the Act of 1742 (*c*).

that the party knew of his offence. R. *v.* Young, Trin. T. 1801, MS. Bayley, J.

(*w*) R. *v.* Shaw, *supra.*

(*x*) Rep. 1865 (28 & 29 Vict. c. 126, s. 73).

(*y*) Holloway *v.* R., 17 Q.B. 317.

(*z*) Ibid.

(*a*) Repealed.

(*b*) Holloway *v.* R., *ubi supra.*

(*c*) *Ante*, pp. 569, 570. Holloway *v.* R., *ubi supra.*

CANADIAN NOTES.

RESCUE AND AIDING ESCAPE.

Rescue of Person under Sentence of Death or for Life.—Code sec. 191.

Rescue of Person under Other Sentence.—Code sec. 192.

Aiding Escape by Conveying Things into Prison.—Code sec. 194.

Causing Discharge of Prisoners by Pretended Authority.—Code sec. 195.

Remainder of Term.—Code sec. 196.

CHAPTER THE SEVENTH.

OF ESCAPE OR BEING AT LARGE, WHILE UNDER SENTENCE OF PENAL SERVITUDE; AND OF RESCUING OR AIDING THE ESCAPE OF PERSONS UNDER SUCH SENTENCE.

On the substitution of penal servitude for transportation (*a*), certain of the legislation as to transportation was applied *mutatis mutandis* to persons under sentence of penal servitude.

The Transportation Act, 1847 (10 & 11 Vict. c. 67), s. 2, authorises the removal of persons under sentence or order of transportation within Great Britain from the prison in which they are confined to any other of His Majesty's prisons in England (*b*).

By the Convict Prisons Act, 1850 (13 & 14 Vict. c. 39), power is given to a Secretary of State to appoint not less than three fit persons as directors of Parkhurst and Pentonville Prisons, and of the places for the confinement of male offenders under sentence or order of transportation. The directors so appointed took over the powers and duties in England of the superintendent of convicts under the Act of 1824, and of the visitors of Parkhurst Prison (*c*), and the commissioners of Portland (*d*).

The Convict Prisons Act, 1853 (16 & 17 Vict. c. 121), extends to females the provisions of the Act of 1824, as to places of confinement for males (*e*).

By the Prison Act, 1898 (61 & 62 Vict. c. 41), s. 1, the Prison Commissioners appointed under the Prison Act, 1877, for local prisons were made *virtute officii* directors of convict prisons.

By the Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), s. 6, 'Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom, or in any part of his Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of his Majesty's principal secretaries of state may from time to time direct; and such person may during such term be kept to hard labour and otherwise dealt with in all respects as persons

(*a*) By 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3, *ante*, p. 210. As to transportation, *vide ante*, p. 209.

(*b*) The Act also deals with the removal from Ireland of male offenders sentenced to 'transportation.'

(*c*) Escape and rescue from Parkhurst is specially punishable under 1 & 2 Vict. c. 82, ss. 12, 13, 14. The prison is now used for invalid and weak-minded convicts.

(*d*) Escape and rescue from Pentonville is specially punishable under 5 & 6 Vict. c. 29, ss. 24, 25, 28. The prison is not now used as a convict establishment.

(*e*) The Act recites 5 Geo. IV. c. 84; 9 & 10 Vict. c. 28, since rep.; and 13 & 14 Vict. c. 39, *supra*.

sentenced to transportation may now by law be dealt with while so confined.'

Sect. 7. 'All Acts and provisions of Acts now applicable with respect to persons under sentence or order of transportation shall, so far as may be consistent with the express provisions of this Act, be construed to extend and be applicable to persons under any sentence or order of penal servitude under this Act; and all the powers and provisions contained in the Transportation Act, 1824 (5 Geo. IV. c. 82), authorising the appointment by his Majesty from time to time of places of confinement as therein mentioned for male offenders under sentence or order of transportation, and authorising his Majesty to order male offenders convicted in Great Britain and under sentence or order of transportation to be kept to hard labour in any part of his Majesty's dominions out of England, shall extend and be applicable to and for the appointment by his Majesty of like places of confinement in any part of the United Kingdom for offenders (whether male or female) sentenced under this Act in any part of the United Kingdom, and to and for the ordering of such offenders to be kept to hard labour in any part of his Majesty's dominions out of England; and all the provisions of the said Act concerning the removal to or from and confinement in the places of confinement in or out of England, appointed under the said Act, of the offenders therein mentioned, and all Acts and provisions of Acts now in force concerning or relating to the regulation and government of such places of confinement, and the custody, treatment, management, and control of or otherwise in relation to the offenders confined therein, shall, so far as the same may be consistent with the express provisions of the Act, extend and be applicable to and for the removal to and from and confinement in the places of confinement appointed under this Act of the offenders sentenced in any part of the United Kingdom, and otherwise be applicable to and in respect of such places of confinement and the offenders to be confined therein' (*f*).

The Penal Servitude Act, 1857 (20 & 21 Vict. c. 3), s. 3, after reciting that the provisions applicable to persons under sentence of transportation extend to persons under penal servitude only when they are conveyed to and kept in places of confinement appointed under the Transportation Act, 1824, and that it is expedient to extend the provisions, enacts that 'any person now or hereafter under sentence or order of penal servitude may, during the term of the sentence or order, be conveyed to any place or places beyond the seas to which offenders under sentence or order of transportation may be conveyed, or to any place or places beyond the seas which may be hereafter appointed as herein mentioned; and all Acts and provisions now applicable to and for the removal and transportation of offenders under sentence or order of transportation to and from any places beyond the seas, and concerning their custody, management, and control, and the property in their services, and the punishment of such offenders if at large without lawful cause before the expiration of their sentence, and all other provisions now applicable to and in the case of persons under sentence or order of transportation, shall apply to and

(*f*) All powers of a secretary of state are in Ireland to be exercised by the Lord Lieutenant (s. 8). For ss. 9, 10, 11, see *ante*, p. 219.

in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation' (*g*).

Sect. 6. 'Where in any enactment now in force the expression "any crime punishable with transportation," or "any crime punishable by law with transportation," or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude' (*h*).

Army and Navy.—By sect. 58 of the Army Act (*i*), when a person subject to military law is convicted by court-martial and sentenced to penal servitude, such conviction and sentence shall have the same effect as if such person had been convicted in the United Kingdom of an offence punishable by penal servitude and sentenced to penal servitude by a competent civil court, and 'all enactments relating to a person sentenced to penal servitude by a competent civil court shall so far as circumstances admit apply accordingly.' By the Naval Discipline Act (*j*), like provision is made as to persons subject to naval discipline.

The following portions of the Transportation Acts with respect to the escape of convicts appear to be applied by the Acts of 1853 and 1857:

By the Transportation Act, 1824 (5 Geo. IV. c. 84), s. 15, offenders removed under the Act are put in the custody of a superintendent and overseer, who during the term of his custody have 'the same powers over him as are incident to the office of a sheriff or gaoler, and shall in like manner be answerable for any escape of such offender' (*k*).

By sect. 22, 'If any offender who shall have been or shall be so sentenced or ordered to be transported or banished (*l*), or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions (*m*), either for life or any number of years, under the provisions of this or any former Act, shall be afterwards at large within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, *shall suffer death, as in cases of felony, without the benefit of clergy* (*n*): and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any

(*g*) For s. 4, *vide post*, p. 577. S. 5 deals with the re-commitment of convicts at large under licence if their licences are revoked.

(*h*) See enactments as to penal servitude, *ante*, pp. 210, 211.

(*i*) 44 & 45 Vict. c. 58, continued annually by the Army Annual Act.

(*j*) 29 & 30 Vict. c. 109, s. 70, as amended by 47 & 48 Vict. c. 39, ss. 3, 7. As to 'escapes,' &c., see 29 & 30 Vict. c. 109, s. 62.

(*k*) *Vide ante*, p. 556. The duties of superintendent are now vested in the directors of convict prisons, 13 & 14 Vict. c. 39, s. 1.

(*l*) Transportation is superseded by penal servitude. As to banishment, *vide ante*, p. 208.

(*m*) As to fatal variance in describing conditions of mercy, see R. *v.* Fitzpatrick, R. & R. 512. As to terms of pardon, *vide ante*, p. 252.

(*n*) The words italicised were repealed by 4 & 5 Will. IV. c. 67, which substituted transportation for life. Penal servitude was substituted for transportation in 1853 and 1857 (*vide ante*, p. 210). The present punishment under s. 22 is penal servitude for life, or not less than three years, or imprisonment with or without hard labour for not more than two years (54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212). See R. *v.* Lamb, 3 C. & K. 96. 4 & 5 Will. IV. c. 67, except as to the maximum (life), was repealed in 1888 and 1892 (S. L. R.). The punishment of accessories before and after the fact is regulated by the Accessories, &c., Act, 1861, *ante*, p. 130.

person shall rescue, or attempt to rescue, or assist in rescuing or attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff or gaoler, or other person conveying, removing, transporting, or reconveying him or her, or shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison, in the custody of the sheriff (*o*) or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted' (*p*). The word 'feloniously' is essential in an indictment under this section (*q*).

By sect. 23, 'In any indictment against any offender for being found at large, contrary to the provisions of this or of any other Act now made, or hereafter to be made; and also in any indictment against any person who shall rescue, or attempt to rescue, or assist in rescuing, any such offender from such custody, or who shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or of any other Act now made, or hereafter to be made, whether such offender shall have been tried before any Court or judge, within or without the United Kingdom, or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy, or signification thereof, of or against, or in any manner relating to such offender.'

By sect. 24, 'The Clerk of the Court or other officer having the custody of the records of the Court (*r*), where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (*s*) (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment (not taking for the same more than six shillings and eightpence), which certificate shall be sufficient evidence of the conviction and sentence, or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any Court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same (*t*); and every such certificate, if made by the clerk or officer of any Court

(*o*) The sheriff has no longer the custody of any prisoner confined in a prison subject to the Prison Acts. 50 & 51 Vict. c. 55, s. 16.

(*p*) The reward is payable by the county treasurer on the order of the judge before whom the conviction takes place. R. *v.* Emmons, 2 M. & Rob. 279, Coleridge, J. R. *v.* Ambury, 6 Cox, 79. *Vide post*, Bk. xii. c. vi.

(*q*) R. *v.* Horne, 4 Cox, 263, Patteson, J.

(*r*) Including a deputy clerk of the peace acting as such, and having custody of the records. R. *v.* Parsons, 10 Cox, 243. R. *v.* Jones, 2 C. & K. 524.

(*s*) This enactment superseded the similar but not identical provisions of 6 Geo. I. c. 23; 56 Geo. III. c. 27, s. 8, as to which, see R. *v.* Sutcliffe, R. & R. 469, 914. R. *v.* Watson, R. & R. 468. 1 Hawk. c. 47, s. 21.

(*t*) See 8 & 9 Vict. c. 113, s. 1; 14 & 15 Vict. c. 99, s. 13; 34 & 35 Vict. c. 112, s. 18. *Post*, Bk. xiii. c. ii. 'Evidence.'

out of Great Britain, shall be received in evidence, if verified by the seal of the Court, or by the signature of the judge, or one of the judges of the Court, without further proof' (*u*).

In the following cases certificates have been held sufficiently to comply with the terms of sect. 24.

(*a*) A certificate stating that the prisoner had been convicted of two larcenies and sentenced to two several terms of transportation of seven years each for the said larcenies (*v*).

(*b*) A certificate that the prisoner was 'in due form of law convicted of feloniously and burglariously breaking and entering the dwelling-house of T. D. and feloniously and burglariously stealing therein one piece of the current gold coin,' &c., and 'was thereupon ordered to be transported beyond the seas for the term of his natural life' (*w*).

(*c*) A certificate that the prisoner 'at the general quarter sessions of the peace of our Lady the Queen, holden at M. in the county of K., the prisoner was in due form of law tried and convicted' (*x*).

It would seem that even if the certificate states that a sentence was imposed in excess of the powers of the Court of trial, the sentence cannot be treated as a nullity, but must be regarded as valid until quashed or reversed (*y*).

There are several decisions as to the effect of pardons (*z*) conditional on the convict transporting himself (*a*). Under the present law a person sentenced to penal servitude but pardoned on condition of leaving the realm would seem to be liable to conviction under sect. 22, if he returned in breach of the conditions.

Prisoners outside the United Kingdom.—The Penal Servitude Act, 1857 (20 & 21 Vict. c. 3), s. 4, preserves the powers of the Transportation Act, 1824 (*b*), as to appointing places beyond the seas to which offenders under sentence or order of penal servitude may be conveyed. But the powers are not in use as to persons sentenced in the United Kingdom.

By the Convict Prisons Abroad Act, 1859 (22 Vict. c. 25), ss. 13–19, provision is made for the trial and punishment of convicts or others concerned in escapes or rescues. The Act applies to convict prisons at Bermuda and Gibraltar, and other places appointed by His Majesty (sect. 2).

The Colonial Prisoners Removal Act, 1869 (32 & 33 Vict. c. 10), provides for the removal of prisoners under sentence from one colony to another to complete the sentence. The removed prisoner is liable to the laws and regulations of the colony to which he is removed.

The Colonial Prisoners Removal Act, 1884 (47 & 48 Vict. c. 31),

(*u*) See also *post*, Bk. xiii. c. ii.

(*v*) R. *v.* Russell, 1 Cox, 81, Patteson, J.

(*w*) R. *v.* Ambury, 6 Cox, 79, Williams, J. Sufficient as to description of the sentence.

(*x*) R. *v.* Horne, 4 Cox, 263, Patteson, J. Sufficient as to the description of the Court.

(*y*) R. *v.* Finney, 2 C. & K. 774, Alderson, B., who consulted several of the judges. The certificate shewed a sentence of fourteen years' transportation imposed by a Court of Quarter Sessions for larceny.

(*z*) As to pardon, *vide ante*, p. 252.

(*a*) R. *v.* Miller, 1 Leach, 74; 2 W. Bl. 797. R. *v.* Madan, 1 Leach, 223. R. *v.* Aickles, 1 Leach, 391, 396. R. *v.* Thorpe, ibid. 396 *a*. And see 1 Hawk. c. 47, ss. 22, 23.

(*b*) See 5 Geo. IV. c. 84, ss. 3, 13; 6 Geo. IV. c. 69, s. 1; 11 Geo. IV. & 1 Will. IV. c. 39, ss. 2, 5; 10 & 11 Vict. c. 67, s. 1.

provides for the removal of prisoners and criminal lunatics from one colony to another (*c*) or to the United Kingdom. A punishment is provided for escape (sect. 9).

For the Orders in Council made under these Acts as to arrangements between colonies and the Regulations of December 13, 1889, as to removals under the Act of 1884 see Statutory Rules and Orders Revised (ed. 1904), tit. 'Colonial Prisoner,' and the Colonial Prisoners Removal Order in Council, 1907 (St. R. & O. (1907) No. 742).

(*c*) See *Ex parte* Tilonko, K.B.D. Oct. 12, Nov. 25, 1907, 42 L. J. Newsp. 628, 754, unsuccessful applications to quash a deportation order and warrant issued under s. 2 of the Act of 1884.

CHAPTER THE EIGHTH.

OF COMPOUNDING OFFENCES.

AGREEMENTS not to prosecute or to stifle a prosecution for a criminal offence are in certain cases criminal (*a*). This offence is distinct from that of misprision of felony (*b*).

It was said by Lord Westbury in Williams *v.* Bayley (*c*), 'If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself. . . . Now, that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed, and that is what I apprehend the old rule of law intended to convey when it embodied the principle under the words which have now somewhat passed into desuetude, viz., misprision of felony. That was a case where a man, instead of performing his public duty and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and further converted it into a source of emolument for himself.' In the last words Lord Westbury seems to be confusing misprision of felony with *compounding of felony*. That offence (in the earlier books described as *theft-bote*) is committed where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute (*d*). It is said to have been anciently punishable as felony; but is now punished as a misdemeanor by fine and (or) imprisonment, unless it is accompanied with such degree of maintenance given to the felon as to make the party an accessory after the fact (*e*). But merely to take back one's own goods which have been stolen, is no offence at all unless some favour be shewn to the thief (*f*).

The offence of compounding a felony applies to all felonies, and is not limited to larceny.

Where an indictment for compounding felony alleged that after taking a sum of money for compounding, the defendant desisted from prosecuting, and it appeared that he did prosecute to conviction, the defendant was held entitled to be acquitted (*g*). But an indictment

(*a*) It is well recognised that agreements not to prosecute a felony or misdemeanor are illegal and unenforceable. See Fivaz *v.* Nicholls, 2 C. B. 501. Rawlings *v.* Coal Consumers' Association, 43 L. J. M. C. 111. Windhill Local Board *v.* Vint, 45 Ch. D. 351.

(*b*) *Ante*, p. 129.

(*c*) L. R. 1 H. L. 200, 220.

(*d*) 1 Hawk. c. 59, s. 5. 4 Bl. Com. 133.

(*e*) 1 Hawk. c. 59, s. 6. 2 Hale, 400. *Vide ante*, p. 126.

(*f*) 1 Hawk. c. 59, s. 7.

(*g*) R. *v.* Stone, 4 C. & P. 379, Bosanquet, J.

which did not allege that the defendant desisted from prosecution has been held good (*h*). The offence of compounding a larceny may be committed by a person other than the owner of the stolen goods or a material witness for the prosecution (*i*).

By sect. 101 of the Larceny Act, 1861 (24 & 25 Vict. c. 96) (*j*), it is felony to take any reward for helping a person to any property stolen or obtained by false pretences; and by sect. 102 to advertise a reward for the return of things stolen, involves a forfeiture of fifty pounds (*k*).

Compounding Misdemeanors.—It is not certain whether an agreement to stifle a prosecution for misdemeanor is indictable apart from conspiracy (*l*).

An agreement to prevent or put an end to a prosecution for *misdemeanor* is void and unenforceable as impeding the course of public justice (*m*). It is immaterial whether the agreement is made with the defendant or with a third party (*n*). When an indictment has been found the prosecution may be terminated by *nolle prosequi* entered by leave of the Attorney-General, or by leave of the Court (*n*). Sometimes after verdict a prosecution is abandoned, with the sanction of the Court, in cases where the offence principally and more immediately affects an individual; the defendant being permitted *to speak with the prosecutor* before any judgment is pronounced, and a trivial punishment being inflicted if the prosecutor declares himself satisfied (*o*). In a case of an indictment for ill-treating a parish apprentice, a security for the fair expenses of the prosecution given by the defendant after conviction, upon an understanding that the Court would abate the period of his imprisonment, was held good, upon the ground that it was given with the sanction of the Court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him (*p*).

In Keir *v.* Leeman (*q*) it was laid down, that 'the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might recover damages in an action.' But it seems that this proposition should be limited to the 'cases where the private rights of the injured party are made the subject of agreement, and where by the previous conviction of the defendant the rights of the public are also preserved inviolate' (*r*). For 'when a verdict of guilty is taken, and the Court suspend judgment, and allow the questions between the parties to be referred, the matter is very different, for then it is only to enable the Court the better to see what

(*h*) R. *v.* Burgess, 16 Q.B.D. 141.

(*i*) R. *v.* Burgess, *supra*.

(*j*) *Vide post*, Vol. ii. p. 1489, 'Larceny.

(*k*) Ibid.

(*l*) See Dillon *v.* O'Brien, 20 L. R. Ir. 316. Steph. Dig. Cr. L. (6th ed.) 122. Archb. Cr. Pl. (23rd ed.) 1090, 1091.

(*m*) Windhill Local Board *v.* Vint, 45 Ch. D. 351. Collins *v.* Blantern, 2 Wils. (K.B.) 341. Edgecombe *v.* Rodd, 5 East, 294. Cf. Kaufmann *v.* Gerson [1904], 1 K.B. 591.

(*n*) See Archb. Cr. Pl. (23rd ed.) 1089.

(*o*) 4 Bl. Com. 363, 364.

(*p*) Beeley *v.* Wingfield, 11 East, 46. See the observations on this case in Keir *v.* Leeman, 6 Q.B. 320; and see also Baker *v.* Townshend, 7 Taunt. 422; and see *In re* Parkinson, 56 L. T. N. S. 715. Kirk *v.* Strickwood, 4 B. & Ad. 421. But in general any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence, without leave of the Court, is invalid. 1 Chit. Cr. L. 4.

(*q*) 6 Q.B. 308.

(*r*) Keir *v.* Leeman, 9 Q.B. 371, in error.

sentence ought to be given '(*s*). 'But if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it '(*t*). A contract therefore to withdraw a prosecution for perjury, and to give no evidence against the accused, is founded on an illegal consideration and void (*u*).

So where an action was brought on an agreement, by which the defendants, in consideration that the plaintiff, being the prosecutor of an indictment against certain persons for an assault and riot, would not proceed further on such indictment, promised the plaintiff to pay him a certain sum of money, and in pursuance of that agreement the plaintiff did not proceed further with the indictment, and informed the Court, before which the indictment was pending, of the premises, and, by leave of the Court, forbore to give evidence upon the indictment, and thereupon there was an acquittal; it was held that the agreement was illegal; for the offence was not confined to the personal injury, but was accompanied with a riot, which was a matter of public concern, and therefore not legally the subject of compromise (*v*).

In one case an indictment for a nuisance by making an embankment in the Thames, whereby the navigation was obstructed, was referred (*w*); but the question of the legality of the reference was not raised. But where an indictment had been preferred against the defendant for non-repair of a highway, which it was alleged he ought to have repaired *ratione tenuræ;* the prosecutor and defendant before the trial agreed to leave the question of liability to repair to reference; the arbitrator was to make an award on the evidence adduced before him; a verdict was to be entered according to the result of the award, and the arbitrator awarded that the defendant was guilty of the non-repair alleged in the indictment: it was held that the reference was illegal, as the question of liability to repair was of public concern (*x*).

Where indictments for perjury and conspiracy were removed into the Queen's Bench, and on the indictment for perjury coming on for trial, it was agreed, under the advice of counsel, that no evidence should be tendered, a verdict of not guilty taken on both indictments, and that all matters in difference between the prosecutor and defendant should be referred to a barrister; it was held that it would have been illegal to refer the indictment for perjury, and, as it would seem, the indictment for conspiracy; but that the indictments were not referred, and the verdicts of acquittal must at all events stand; and that there was nothing illegal in referring all matters in difference and at the same time consenting to verdicts of acquittal, unless there was a corrupt

(*s*) R. *v.* Hardey, 14 Q.B. 529, an indictment for conspiracy. R. *v.* Roxburgh, 12 Cox, 8, an indictment for common assault.

(*t*) Keir *v.* Leeman, 6 Q.B. 308. Cannon *v.* Rands, 11 Cox, 631.

(*u*) Keir *v.* Leeman, *ubi sup.* citing Collins *v.* Blantern, 2 Wils. (K.B.), 341.

(*v*) Keir *v.* Leeman, *supra.*

(*w*) R. *v.* Dobson, 6 Q.B. 637. See Fallowes *v.* Taylor, 7 T. R. 475, and the observations on this case in Keir *v.* Leeman, 9 Q.B. 393. The Arbitration Act, 1889, excludes 'a criminal proceeding by the Crown' from the powers of the Court to refer causes or matters for inquiry or report (52 & 53 Vict. c. 49, s. 13 (1)). The Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 9, authorises the Court of Criminal Appeal to order reference of certain kinds of matters arising on a criminal appeal to a commissioner for inquiry and report. *Vide post,* Bk. xii. c. iv.

(*x*) R. *v.* Blakemore, 14 Q.B. 544.

agreement to stifle the prosecution, which did not appear to be the fact (*y*).

It is clear that the consent of the Court cannot make an agreement to abandon a prosecution valid, if it would otherwise be unlawful (*z*).

Informations on Penal Statutes.—The compounding of *informations on penal statutes* is a misdemeanor against public justice, by contributing to make the laws odious to the people (*a*). Therefore in order to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it was enacted in 1575 by 18 Eliz. c. 5, s. 4 (*b*), that an informer shall not compound or agree with any person accused of contravening a penal statute without the leave of the Court (sect. 4), and that if any person shall offend in making of composition or other misdemeanor contrary to the true intent and meaning of this statute, or shall 'by colour or pretence or process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward for himself as to the use of any other' without the order or consent of some Court, he shall on lawful conviction stand two hours in the pillory (*c*), be for ever disabled to sue on any popular or penal statute, and shall forfeit ten pounds (sect. 5). This statute extends even to those penal actions where the whole penalty is given to the prosecutor (*d*). But it does not apply to penalties only recoverable by information before justices (*e*).

In a case where it was held that threatening, by letter or otherwise, to put in motion a prosecution by a public officer, to recover penalties for selling *Fryer's Balsam* without a stamped label (*f*), for the purpose of obtaining money to stay the prosecution (not being such a threat as a firm and prudent man might not be expected to resist), was not in itself an indictable offence at common law, though it was alleged that money was obtained, it seems to have been considered that such an offence would be indictable under 18 Eliz. c. 5, s. 5 (*g*). But no indictment for any *attempt* to commit such a statutable misdemeanor can be sustained as a misdemeanor at common law, without bringing the offence intended within, and laying it to be against, the statute. Though if the party so threatened had been alleged to be guilty of the offence imputed, within the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute (which gives the penalty as auxiliary to the revenue, and in furtherance of public justice for the sake of example), might also, upon general

(*y*) R. *v.* Hardey, 14 Q.B. 529. In R. *v.* Bardell, 5 A. & E. 619, an indictment for conspiracy was referred. The lawfulness of the reference was not discussed, and the question argued was whether the reference was revocable under the Arbitration Act of 1833 (3 & 4 Will. IV. c. 42). The Act of 1889, as already stated, does not apply to criminal proceedings *by the Crown*.

(*z*) Keir *v.* Leeman, *supra*.

(*a*) 4 Bl. Com. 136.

(*b*) Made perpetual by 27 Eliz. c. 10.

(*c*) The punishment of the pillory is abolished. For substituted punishments, see *ante*, p. 250.

(*d*) 4 Bl. Com. 136, note (3).

(*e*) R. *v.* Crisp, 1 B. & Ald. 282.

(*f*) *i.e.*, in contravention of the Medicines Stamp Act, 1802 (42 Geo. III. c. 56).

(*g*) R. *v.* Southerton, 6 East, 126. But *quære*, and see R. *v.* Crisp, 1 B. & Ald. 286, 287.

principles, have been deemed a sufficient ground on which to have sustained the judgment at common law (*h*).

A party is liable to the punishment prescribed by 18 Eliz. c. 5, s. 5, for taking the penalty imposed by a penal statute, even if there is no action or proceeding for the penalty. The prisoner applied to one R., and demanded five pounds, as a penalty which R. had incurred under the General Turnpike Act, by suffering his waggon to be drawn on a turnpike road by more than four horses. R. had incurred such a penalty, and the prisoner obtained the money by way of composition to prevent any legal proceedings; no process had been sued out, and no information had been laid before a magistrate. The prisoner having been convicted, judgment was respited, upon a doubt whether the offence was within the statute, so as to subject the prisoner to the specific punishment therein prescribed, inasmuch as no action or proceeding was depending in which the order or consent of any Court in Westminster Hall for a composition could have been obtained. But the judges were all of opinion that the conviction was right, and that the statute applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a Court at Westminster, or without judgment or conviction (*i*).

A person may be convicted under 18 Eliz. c. 5, s. 5, for taking money upon colour or pretence of a party having committed an offence, though in fact no offence liable to a penalty has been committed by the person from whom the money is taken (*j*). As to taking rewards for the recovery of stolen goods, &c., see *post*, Vol. ii. p. 1489.

(*h*) R. *v.* Southerton, 6 East, 126. But *quære*, and see R. *v.* Crisp, 1 B. & Ald. 286, 287.

(*i*) R. *v.* Gotley [1805], R. & R. 84.

(*j*) R. *v.* Best, 2 Mood. 124.

CANADIAN NOTES.

OF COMPOUNDING OFFENCES AND STIFLING PROSECUTIONS.

Corrupting Witnesses, Jurymen, Accepting Bribes and Otherwise Obstructing Justice.—Code sec. 180.

An indictment or charge that the accused paid money to a person not to attend a Court of Revision in connection with an election, does not disclose a "perversion or defeat of justice" under Code sec. 180(*d*), where it does not shew any ground for supposing that the non-attendance would defeat justice, and where the person receiving the money was the person whose right to vote was in question and might therefore abandon his claim. The offence disclosed may properly be charged under sub-sec. (*a*) of Code sec. 180 as an attempt to dissuade a person by a bribe from giving evidence. R. v. Lake, 11 Can. Cr. Cas. 37.

Any attempt to corrupt or influence a jury by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the argument of the counsel in open Court at the trial of the cause, constituted the common law offence of embracery, whether the jurors gave any verdict or not and whether the verdict given were true or false. R. v. Cornellier, 29 C.L.J. 69.

It is provided by the Canada Temperance Act, R.S.C. (1906) ch. 152, sec. 150, that everyone who on any prosecution under that Act or any Act in force in any province in respect of the issue of licenses for the sale of fermented or spirituous liquors, or under the Temperance Act of 1864, tampers with a witness, either before or after he is summoned or appears as such witness, or by the offer of money, or by threats, or in any other way, either directly or indirectly, induces or attempts to induce any such witness to absent himself or to swear falsely shall incur a penalty of fifty dollars for each offence. This special provision is not affected by the Code. R. v. Gibson, 29 N.S.R. 88.

A conviction may be made under this section of the Code for dissuading a person by corrupt means from giving evidence under the Ontario Liquor License Act. R. v. Holland, 14 C.L.T. Notes 294.

It is an offence under Code sec. 180(*a*) to attempt to dissuade a witness by bribery or other corrupt means to give in lieu of the witness's own belief that version of the facts which the person making the corrupt offer believed to be the truth. R. v. Silverman, 14 Can. Cr. Cas. 79.

Compounding Penal Actions.—See Code sec. 181.

The compounding of an information on penal statutes is a misdemeanour against public justice by contributing to make the laws odious to the people. Therefore in order to discourage malicious informers, and to provide that when offences are once discovered they shall be prosecuted, 18 Eliz. ch. 5 was passed, providing a fine upon an informer for taking money to settle the charge. But that statute did not apply to penalties which are only recoverable by information before justices, and an indictment for making a composition in such a case was held bad in arrest of judgment. R. v. Mason, 17 U.C.C.P. 534.

The receipt of money in consideration of the non-prosecution of a charge for the infraction of liquor laws is indictable as compounding a misdemeanour of a public nature. Re Fraser, 1 C.L.J. 326; R. v. Mabey, 37 U.C.Q.B. 248.

If the agreement be upon the understanding that the accused shall be discharged from custody, although not so stated in express terms, it is illegal and void. Leggatt v. Brown, 29 O.R. 530, 30 O.R. 225.

The assent of the magistrate to the charge being withdrawn on being informed of the agreement of settlement does not validate the agreement.

Where the charge is for an offence against the public as distinguished from offences which, although punishable by criminal process are essentially in the nature of private injuries, it is immaterial that the offence charged was not a felony before the abolition of the distinction between felony and misdemeanour by the Criminal Code.

Although a person who has parted with his money or property by means of a fraud practised upon him or who has had it stolen from him, is entitled to take his own property if offered to him, he is not permitted to screen the offender by an agreement not to prosecute nor to drop a prosecution already begun. Morgan v. McFee, 14 Can. Cr. Cas. 308.

Obtaining money by false pretences is a crime committed against the public as well as against the individual defrauded, and an agreement between the latter and the accused to settle the charge pending before the magistrate is void.

A contract between the accused and the complainant made in consideration of the withdrawal of a charge of obtaining money by false pretences in respect of which a preliminary enquiry was pending before a magistrate is not enforceable, although the criminal proceedings were dropped in pursuance of the contract. Morgan v. McFee, 14 Can. Cr. Cas. 308.

Corruptly Taking Reward Without Bringing Offender to Trial.—See Code sec. 182.

Advertising Reward and Immunity for Offender Where Property Stolen.—See Code sec. 183.

A prosecution taken against the proprietor of a "newspaper" for publishing an advertisement offering a reward for the recovery of stolen property under paragraph (*d*) must be commenced within six months from the commission of the offence. Sec. 1140(*d*).

CHAPTER THE NINTH.

OF BARRATRY, MAINTENANCE, CHAMPERTY, AND BUYING AND SELLING PRETENDED TITLES AND EMBRACERY.

SECT. I.—BARRATRY.

THE common law and early legislation were hostile 'to the traffic of merchandising in quarrels, of huckstering in litigious discord' (*a*). One form of such traffic is common barratry, which is a misdemeanor at common law (*b*).

A common barrator is defined to be 'a common mover, exciter, or maintainer of suits, quarrels, in courts of record, or other courts, as the county court, and the like; or in the country, by taking and keeping possession of lands in controversy, by all kinds of disturbance of the peace, or by spreading false rumours and calumnies whereby discord and disquiet may grow among neighbours' (*c*). But one act of this description will not make anyone a common barrator, as it is necessary in an indictment for this offence to charge the defendant with being *a common barrator*, which is a term of art appropriated by law to this crime (*d*). It has been held that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right (*e*); but this is doubted, in case such actions be merely groundless and vexatious, without any manner of colour, and brought only with a design to oppress the defendants (*f*).

The offence is now rarely prosecuted. The most recent instance occurred in 1889, viz., a prosecution for stirring up a series of fraudulent actions for damages against a railway company (*g*).

It is not barratry for a solicitor to maintain a party in a groundless action, to the commencing whereof the solicitor was in no way privy (*h*). It seems to have been held that a feme covert could not be indicted as a common barrator (*i*); but this is doubtful (*j*).

(*a*) Reynell *v.* Sprye, 1 De G. M. & G. 656, 680, Knight Bruce, L.J.

(*b*) See Burton's case, Cro. Eliz. 148, referred to in Bradlaugh *v.* Newdegate, 11 Q.B.D. 1, 6; Chapman's case, Cro. Car. 340; Palfrey's case, Cro. Jac. 527; decisions on the conclusion of the indictment.

(*c*) R. *v.* Urlyn, 2 Wms. Saund. 308, note (1). Case of Barratry, 8 Co. Rep. 36. 1 Hawk. c. 81, ss. 1, 2. Co. Litt. 368, *a*, *b*. See the notes to Bac. Abr. tit. 'Barratry' (A). As to the derivation of the word, see Oxford Dict. *s.v.*

(*d*) Case of Barratry, *ubi sup.* R. *v.* Hardwicke, 1 Sid. 282. R. *v.* Hannon, 6 Mod. 311.

(*e*) Roll. Abr. 355.

(*f*) 1 Hawk. c. 81, s. 3.

(*g*) R. *v.* Bellgrave, Guildford Assizes, Archb. Cr. Pl. (23rd ed.) 1080.

(*h*) 1 Hawk. c. 81, s. 4.

(*i*) Bac. Abr. tit. 'Baron and Feme' (G) in the notes, citing Roll. Rep. 39.

(*j*) 1 Hawk. c. 81, s. 6.

Indictment.—An indictment for this offence may be in a general form, stating the defendant to be a common barrator (*k*), without shewing any particular facts: but it is clearly settled that the prosecutor must, before the trial, give the defendant a note of the *particular acts* of barratry which he intends to prove against him; and that, if he omit to do so, the Court will not suffer him to proceed in the trial of the indictment (*l*). And the prosecutor will be confined to his note of particulars, and will not be at liberty to give evidence of any other acts of barratry than those which are therein stated (*m*).

It seems never to have been necessary to describe the offence as committed at any certain place, as from its nature it involves a repetition of several acts which may have been in different places (*n*).

Jurisdiction.—The statute 34 Edw. III. c. 1, authorises the justices to restrain rioters and all other *barrators*, and to pursue, arrest, take and chastise them according to their trespass and offence, and to cause them to be imprisoned and duly punished, according to the law and customs of the realm, and according to that which to them shall seem best by their discretions and good advisement (*o*), and barratry seems accordingly to be triable at greater sessions (*p*).

Punishment.—The punishment for this offence in common persons is by fine and imprisonment (*q*), and binding them to their good behaviour; and in persons of any profession relating to the law, a further punishment by being disabled to practise for the future (*r*).

Sect. II.—Frivolous Arrests.

To cause any person to be arrested or attached in the name of a fictitious plaintiff or of a person who is ignorant of and has not authorised the proceeding is criminal (*s*). The offence, if committed in respect of proceedings in a superior Court, appears to be punishable as a contempt. If committed in proceedings in inferior local Courts of record, it is punishable summarily by imprisonment (*t*).

(*k*) R. *v.* Cooper, 2 Str. 1246.

(*l*) R. *v.* Grove, 5 Mod. 18. I'Anson *v.* Stuart, 1 T. R. 748, Buller, J. R. *v.* Wylie, 1 B. & P. (N. R.) 95, Heath, J.

(*m*) Goddard *v.* Smith, 6 Mod. 262.

(*n*) Parcel's case, Cro. Eliz. 195. 1 Hawk. c. 81, s. 14. Bac. Abr. tit. 'Barratry' (B).

(*o*) 1 Edw. III. st. 2, c. 16. Possibly the inclusion in the commission of the peace of maintainers of evil barrators (*de malveis baretz en pais*).

(*p*) 5 & 6 Vict. c. 38, s. 1. Barnes *v.* Constantine, Yelv. 46; Cro. Jac. 32, recognised in Busby *v.* Watson, 2 W. Bl. 1050. See R. *v.* Urlyn, 2 Wms. Saund. 308, note (1). In Hawk. c. 81, s. 8, there is a *quære* to this point, as having been ruled differently in Rolle's Reports.

(*q*) See 34 Edw. III. c. 1. 1 Hawk. c. 81, s. 14. Bac. Abr. tit. 'Barratry' (C). 4 Bl. Com. 134. A statute of 1275 (3 Edw. I. Stat. West. prim. c. 3), providing for the grievous punishment by the king of barrators, and of sheriffs permitting them in their shires, was repealed in 1863 (26 & 27 Vict. c. 125).

(*r*) As to punishing in a summary manner, a person convicted of common *Barratry* who shall practise as a solicitor in any suit or action in England, see Frivolous Arrests Act, 1725 (12 Geo. I. c. 29, s. 4; made perpetual by 21 Geo. II. c. 3).

(*s*) This offence would usually involve perjury, *q.v. ante*, p. 451 *et seq.* See 4 Bl. Com. 134.

(*t*) 8 Eliz. c. 2, s. 3. 4 Bl. Com. 134. An action for damages is also given, ss. 3, 4. As to treble costs, the Act was repealed in 1842 (5 & 6 Vict. c. 97).

SECT. III.—MAINTENANCE (*u*).

Earlier and later opinions as to what constitutes maintenance are not in harmony (*v*). According to Coke (*w*), 'maintenance signifieth in law a taking in hand, bearing-up or upholding of a quarrel or side, to the disturbance or hindrance of common right.' This definition seems to be based on 1 Edw. III. stat. 2, c. 14 (1327), which declares that 'because the King desireth that common right be administered to all persons, as well poor as rich, he commandeth and defendeth that none of his counsellors, nor of his house, nor none other of his ministers, nor no great man of the realm by himself nor by other, by sending of letters nor otherwise, nor none other in this land great or small, shall take upon them to maintain quarrels or parties in the country to the let and disturbance of the common law' (*x*).

By 32 Hen. VIII. c. 9, s. 3 (1540), it is enacted, that 'no person or persons of what estate, degree, or condition soever he or they be, do hereafter unlawfully retain for maintenance of any suit or plea any person or persons upon pain of forfeiture of ten pounds, recoverable by penal action' (*y*).

It was considered to be maintenance where a person assisted another in his pretensions to lands, by taking or holding the possession of them for him by force or subtlety, or where a person stirred up quarrels and suits in relation to matters wherein he was in no way concerned (*z*), or it may be where a person officiously intermeddled in a suit depending in a court of justice, and in no way belonging to him, by assisting either party to a suit with money, or otherwise, in such suit (*a*). Where there is no contract to have part of the thing in suit, the party so intermeddling is said to be guilty of *maintenance* generally; but if the party stipulates to have part of the thing in suit, his offence is called *champerty* (*b*).

'Unlawful maintenance is not merely under some circumstances a civil wrong entitling the person injured to damages, but is a wrong

(*u*) As to American law, see 2 Bishop, Cr. L. ss. 130, 131, 136–138. Kent. Comm. Pt. 6, lect. 67. Story, Contracts (4th ed.), s. 578. As to Indian law, see Bhagwat *v.* Debi [1908], L. R. 35 Ind. App. 48.

(*v*) British Cash, &c., Co. *v.* Lamson Store Co. [1908], 1 K.B. 1006, 1013, Moulton, L.J.

(*w*) Co. Litt. 368 *b*. Cf. 2 Co. Inst. 208, 212, 213. 1 Hawk. c. 83, ss. 1, 2. Bac. Abr. tit. 'Maintenance.' Other early definitions are collected in Bradlaugh *v.* Newdegate, 17 Q.B.D. 1, 5, and British Cash, &c., Co. *v.* Lamson Store Co. [1908], 1 K.B. 1006, 1019.

(*x*) Confirmed in 1383 (7 Rich. II. c. 15). 4 Edw. III. c. 11, confirmed by the same Act, was repealed in 1881 (44 & 45 Vict. c. 59).

(*y*) By a common informer. Half the penalty goes to the Crown, half to the informer. The penalty is cumulative on the criminal liability and on civil liability to persons injured.

(*z*) This kind of maintenance is called in the books *ruralis* (*en pais*), in distinction to another carried on in courts of justice, and therefore called *curialis*. It is punishable at the King's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but is said not to be actionable.

(*a*) 1 Hawk. c. 83, s. 3. Bac. Abr. tit. 'Maintenance.' 4 Bl. Com. 134. This kind of maintenance is called *curialis*.

(*b*) Co. Litt. 368. 1 Hawk. c. 83, s. 3, *vide post*, p. 594. The abuse of legal proceedings by oppressive combinations to carry them into effect is said to have speedily appeared upon the establishment of the laws in the time of Edward I. 'Instead of their former associations for robbery and violence, men entered into formal combinations to support each other in law suits; and it was found requisite to check this iniquity by Act of Parliament.' 2 Hume, 320, referring to the ordinance of conspirators. Edw. I. *post*, p. 595.

founded on a prohibition by statute, which makes it a criminal act and a misdemeanor' (*c*). It has been held that the statutes relating to maintenance are declaratory of the common law (*d*). It seems immaterial whether the maintenance is of the plaintiff or of the defendant (*e*), and a corporation seems to be liable for maintenance as much as an individual, unless it is in liquidation (*f*). A maintenance is not limited to civil actions at common law: but it is not maintenance to assist another, and in a criminal proceeding (*g*). But such assistance may amount to malicious prosecution or conspiracy to pervert justice (*h*).

'The substance of the law is that parties shall not by their countenance aid the prosecution of suits of any kind which every person must bring on his own bottom and at his own expense' (*i*).

'All our cases of champerty and maintenance are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce' (*j*).

Whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bearing him out in the whole or part of the expense of the suit, may properly be said to be guilty of an act of maintenance (*k*). It has been said that no one can be guilty of maintenance in respect of any money given by him to another for the purposes of an intended suit, *before* any suit is actually commenced; but it would seem that this, if not strictly maintenance, must be equally criminal at common law (*l*). And a person may be as much guilty of maintenance for supporting another after judgment, as for doing it while the plea is pending, because the party grieved may be thereby discouraged from bringing a writ of error or attaint (*m*).

(*c*) Metropolitan Bank *v.* Pooley, 10 App. Cas. 210, 218, Selborne, L.C.

(*d*) Pechell *v.* Watson, 8 M. & W. 691.

(*e*) See British Cash, &c., Co. *v.* Lamson Store Co. [1908], 1 K.B. 1006, 1021.

(*f*) Ibid. and cf. Metropolitan Bank *v.* Pooley, 10 App. Cas. 210, 218.

(*g*) See Harris *v.* Brisco, 17 Q.B.D. 504.

(*h*) *Ante*, p. 160.

(*i*) Wallis *v.* Duke of Portland, 3 Ves. 49, affirmed. Bro. P. C. Suppl. 161, and approved in Alabaster *v.* Harness [1895], 1 Q.B. 339, 343.

(*j*) Prosser *v.* Edwards, 1 Y. & C. (Ex.) 481, Abinger, C.B., approved in Alabaster *v.* Harness, p. 344, Lopes, L.J. See Bradlaugh *v.* Newdegate, *ubi sup.* Fischer *v.* Kamala Naicker, 8 Moore, Ind. App. 170, 187 ('something against good policy and justice'). *Vide post*, p. 594, note (*f*).

(*k*) 1 Hawk. c. 83, s. 4, and authorities there cited in the margin.

(*l*) Bac. Abr. tit. 'Maintenance.' 1 Hawk. c. 83, s. 12, where it is said, that if it plainly appear that the money was given merely with a design to assist in the prosecution or defence of an intended suit, which afterwards is actually brought, surely it cannot but be as great a misdemeanor in the nature of the thing and equally criminal at common law as if the money were given after the commencement of the suit; though perhaps it may not in strictness come under the notion of maintenance. Where a declaration alleged that the defendant unlawfully and maliciously did procure, instigate, and stir up one T. to commence and prosecute an action against the plaintiff, wherein certain issues were joined, as to which the plaintiff was acquitted; the Court held that no cause of action appeared, the declaration not shewing maintenance (as the action appeared not to have been commenced when the defendant interfered), and not alleging want of reasonable and probable cause for the action. Flight *v.* Leman, 4 Q.B. 883. The distinction between instigating a suit and maintaining one already begun seems too narrow. Bradlaugh *v.* Newdegate, 11 Q.B.D. 1, 8.

(*m*) 1 Hawk. c. 83, s. 13. Bac. Abr. tit. 'Maintenance' (A). The writ of attaint is obsolete, and writs of error are superseded by appeals, *vide post*, Bk. xii. c. iv. Where a declaration alleged that the defendant unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit therein mentioned, instigated and stirred

Judicial opinion as to what constitutes unlawful maintenance from the point of view of criminal and civil liability has gradually changed (*n*). The view now accepted is that of Lord Abinger in Findon *v.* Parker (*o*) : ' The law of maintenance as I understand it upon the modern construction is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others either to bring actions or to make defences which they have no right to make' (*p*), and the tendency of judicial decision is to attempt to carve out of the old law such remnant as is consistent with modern views of public policy and freedom of trade and contract, and to disregard the ancient definitions : but to recognise that there is such a thing as maintenance in cases of ' wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the interest he renders to one or the other party is without justification or excuse ' (*q*).

The following classes of Acts in the nature of maintenance have been held justifiable or excusable or unlawful from the circumstances under which they are done.

Maintenance may be justified by the interest of the maintainer in the suit, *i.e.*, (1) an actual valuable interest in the result of the suit itself as the present, contingent or future, (2) or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or (3) the interest arising from the connection of the parties, *e.g.* as master and servant, or (4) that which charity and compassion (*r*) gives a man on behalf of a poor man, who, but for the aid of his richer helper, could not assert his rights, and would be oppressed and overborne in his endeavour to maintain them (*s*).

In litigation relating to a patent for nickel plating, advertisements inviting persons interested in the nickel plate trade to subscribe towards the expenses of a pending appeal were held not to be open to objection, as the persons invited to subscribe had a common interest with the advertiser (*t*).

1. Interest. – Not only those who have an actual interest in the thing in dispute, *e.g.* those who have a reversion expectant on an estate-tail, or a lease for life or years, &c., but also those who have a bare contingency of an interest in the lands in question, which possibly may never vest in possession, and even those who by the act of God have the immediate possibility of such an interest, such as heirs apparent (*u*), or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands : and if a

up a pauper to commence and prosecute an action against the plaintiff, by reason whereof the pauper did commence and prosecute such action, whereby the plaintiff was put to great trouble and vexation, and obliged to lay out a large sum in the defence of such action ; the Court held the declaration good. Pechell *v.* Watson, 8 M. & W. 691.

(*n*) Thus the purchase of a chose in action which under the old law amounted to maintenance, is not now so regarded. Fitzroy *v.* Cave [1905], 2 K.B. 364.

(*o*) 11 M. & W. 675.

(*p*) Quoted and approved in British Cash, &c., Co. *v.* Lamson Store Co. [1908], 1 K.B. 1006, 1012, 1020. And see p. 1014, Moulton, L.J.

(*q*) [1908] 1 K.B. 1006, 1013, 1014, Moulton, L.J.

(*r*) See 4 Bl. Com. 134. Harris *v.* Brisco, 17 Q.B.D. 504, 513.

(*s*) Bradlaugh *v.* Newdegate, 17 Q.B.D. 1, 11, Coleridge, C.J., approved in Alabaster *v.* Harness [1895], 1 Q.B. 339, 343, Esher, M.R.

(*t*) Plating Co. *v.* Farquharson [1881], 17 Ch. D. 49 (C.A.).

(*u*) See Alabaster *v.* Harness [1895], 1 Q.B. 339, 346, Rigby, L.J.

plaintiff in an action of trespass aliene the lands, the alienee may produce evidence to prove that the inheritance at the time of the action was in the plaintiff, because the title is now become his own (*v*). Also, he who is bound to warrant lands may lawfully maintain the tenant in defence of his title, because he is bound to render other lands to the value of those that shall be evicted. And he who has an equitable interest in lands or goods, or even in a chose in action, as a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in which he has such an equity (*w*). And wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit concerning such thing (*x*).

Where, on the trial of an action brought to recover the amount of an attorney's bill, in which there was a plea of maintenance, it appeared that Jesus College, Oxford, had given notice to set out tithes in kind to all the owners of old inclosures in the parish of Tredington, who had, as far as living memory went, paid certain sums of money in lieu of tithes for the old inclosures, and that, at a meeting of the owners of such old inclosures, it was agreed by them that they should defend any suit or suits which should be instituted by Jesus College, to enforce the payment of tithes, and that the expenses of such defence should be paid by the owners in proportion to their interests, as ascertained by the poor rate; the owners considering that if Jesus College should succeed in one suit as to any part of the old inclosures, that would invalidate the payments as to all. It was held that the agreement to defend the suits was not maintenance; for, although the payments were not the same per acre, and although the interest in each payment was separate, yet all the owners of the old inclosures had an interest in supporting the moduses over all the old inclosures, and consequently the agreement was not *officiously* entered into in order to defend the suits (*y*).

Where a count stated that Y. had deposited a sum of money in plaintiff's hands, which the plaintiff had delivered to the defendant at his request, and that Y., threatening to bring an action against the plaintiff to recover the money, and thereupon, in consideration that the plaintiff, at the request of the defendant, would defend any action Y. should commence, the defendant undertook to save the plaintiff harmless; that Y. brought an action to recover the money, and that the plaintiff defended it with the privity and consent of the defendant; it was held that this was not maintenance (*z*).

Where a member of Parliament procured an informer to sue another member of Parliament for penalties for having sat and voted without being duly qualified, and gave him an indemnity against all costs and expenses, it was held that the member and the informer had no such common interest in the penalty sued for as would be a defence to an action for maintenance (*a*).

(*v*) Bac. Abr. tit. 'Maintenance' (B). 1 Hawk. c. 83, ss. 14, 15, &c.

(*w*) Id. ibid., and see the judgment of Buller, J., in Master *v.* Miller, 4 T. R. 340 *et seq.*

(*x*) 1 Hawk. c. 83, ss. 24, 25. Bac. Abr. tit. 'Maintenance' (B).

(*y*) Findon *v.* Parker, 11 M. & W. 675, and MS. C. S. G.

(*z*) Williamson *v.* Henley, 6 Bing. 229.

(*a*) Bradlaugh *v.* Newdegate, 17 Q.B.D. 1.

H. being interested in certain appliances for the electrical treatment of diseases, employed T. as an expert to report on them, who published a favourable report. H. subsequently instigated T. to sue A. for publishing a newspaper article commenting unfavourably on T.'s report and qualifications. The action failed, and A. sued H. for maintaining it. It was held that H. had no common interest with T. in his action for libel, and was liable for maintenance of that action (*b*).

The action being for libel in point of law could concern only the person who brought it (*c*).

Where the defendants, a trading company, obtained contracts for the hire of an apparatus in which the company dealt from customers of the plaintiffs of a rival trading company, and agreed to indemnify the hirers from claims by the plaintiffs for breach of contract, it was held that their contracts of indemnity were given in lawful defence of the commercial interests of the defendants, and that they were not liable for maintenance (*d*).

At one time not only he who laid out money to assist another in his suit, but even he who by his friendship or interest saved the party an expense which he might otherwise have had to incur, or gave or endeavoured to give any kind of assistance to a party in the management of his suit, was held to be guilty of maintenance (*e*). But this doctrine is not now accepted (*f*).

It has been said that he who gives any *public countenance* to another in relation to his suit is liable for maintenance (*g*); as if a person of great power and interest says publicly that he will spend a sum of money on one side, or that he will give a sum of money to labour the jury, whether in truth he spend anything or not; or where such a person comes to the bar with one of the parties, and stands by him while his cause is tried, whether he says anything or not; for such practices not only tend to discourage the other party from going on with his cause, but also to intimidate juries from doing their duty (*h*). But it seems that a bare promise to maintain another is not in itself maintenance, unless it be either in respect of the power of the person who makes it, or of the public manner in which it is made (*i*). A man is not guilty of an act of maintenance, by giving another friendly advice as to his proper remedy at law, or as to the lawyer likely to do his business most effectually (*j*).

2. Affinity.—Whoever is of kin, or godfather to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir-apparent, to the party, or husband of such an heiress (*k*).

(*b*) Alabaster *v.* Harness [1895], 1 Q.B. 399. Cf. Shackell *v.* Rosier [1836], 2 Bing. N. C. 635. A contract to indemnify the plaintiff against an action for publishing a libel at the defendant's request.

(*c*) See British Cash, &c., Co. *v.* Lamson Store Co. [1908], 1 K.B. 1006, 1021, Buckley, L.J.

(*d*) Id. ibid.

(*e*) Bro. tit. 'Maintenance,' 7, 14, 17, &c. 1 Hawk. c. 83, ss. 5, 6.

(*f*) Master *v.* Miller, 4 T. R. 340, Buller, J.

(*g*) See *post*, p. 598, 'Embracery.'

(*h*) 1 Hawk. c. 83, s. 7. Bac. Abr. tit. 'Maintenance' (A).

(*i*) 1 Hawk. c. 83, s. 8.

(*j*) Ibid. s. 9. Bac. Abr. tit. 'Maintenance' (A).

(*k*) Bac. Abr. tit. 'Maintenance' (B).

3. Tenure.—It seems that a landlord might justify laying out his own money in defence of his tenant's title, where the lands were originally derived from the landlord, but that he could not maintain the tenant in respect of lands not held of himself (*l*).

4. Service.—A master may pray one to be of counsel for his servant, and may go with him, and stand with him, and aid him at the trial: also it is said, that if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service (*m*). And a servant cannot lawfully lay out any of his own money to assist the master in his suit (*n*).

5. Charity.—And one may lawfully give money to a poor man to enable him to carry on his suit (*o*): and anyone may safely go with a foreigner, who cannot speak English, to a counsellor and inform him of his case (*p*).

The gift to be justified must be out of charity or compassion, but it is not necessary to shew that due inquiry was made or that a reasonable belief existed, that the action maintained was well founded (*q*). Charitable aid is none the less within the exception when coupled with interest arising from community of religion in a dispute relating to religious matters (*r*).

6. Lawyer and Client.—It is not maintenance for a lawyer to give professional aid to his client in legal proceedings.

A barrister may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threatening a juror (*s*), than any other person. And a solicitor, when retained, may lawfully prosecute or defend an action, and lay out his own money in the suit (*t*).

Where there was one attorney on the record, and another attorney became before the trial really and substantially the attorney for the client in the conduct of the suit, and the latter, after verdict, but before judgment, *bona fide* purchased from his client the benefit of his verdict, it was held that the transaction, being a purchase of the subject-matter of the suit by the attorney, was void; for the attorney was to be considered as the attorney having the management of the cause, and the purchase was in effect a purchase by the attorney in the cause of the subject-matter of it *pendente lite*, not for the purpose of enabling the client

1 Hawk. c. 83, s. 26. Among the relations specified under this head are brother, son-in-law, and brother-in-law. Bradlaugh *v.* Newdegate, 11 Q.B.D. 1, 11. But in Burke *v.* Greene, 2 Ball & Beatty (Ir.) 517, an advance of money by a first cousin for recovery of an estate was held maintenance. Cf. Hutley *v.* Hutley, L. R. 8 Q.B. 112, a champertous gift between cousins.

(*l*) 1 Hawk. c. 83, s. 29.

(*m*) Bro. tit. 'Maintenance,' 44, 52. 1 Hawk. c. 83, ss. 31, 32, 33, where reference is made to real actions now obsolete. (Writs of right for dower, *de dote unde nil habuit*, and *quare impedit*, have been superseded by writs of summons, under the Judicature Acts and Rules.)

(*n*) 1 Hawk. c. 83, s. 24. But see Bradlaugh *v.* Newdegate, 11 Q.B.D. 1, 11.

(*o*) See the cases from the year books quoted in Harris *v.* Brisco, 17 Q.B.D. 504, 512, Fry, L.J.

(*p*) Bro. tit. 'Maintenance.' Bac. Abr. tit. 'Maintenance.' 1 Hawk. c. 83, ss. 36, 37.

(*q*) Harris *v.* Brisco, 17 Q.B.D. 504.

(*r*) Holden *v.* Thompson [1907], 2 K.B. 489, approved in British Cash, &c., Co. *v.* Lamson Store Co. [1908], 1 K.B. 1006, 1014, Moulton, L.J.

(*s*) *Vide post*, 'Embracery,' p. 598, and *ante*, 'Contempt,' p. 537.

(*t*) 2 Co. Inst. 564. Bac. Abr. tit. 'Maintenance' (B) 5. 1 Hawk. c. 83, ss. 28, 29, 30.

to carry on the suit, but because he wanted money; and independently of the statutes restraining the purchase of property in suit, no attorney could be permitted to purchase anything in litigation, of which litigation he had the management (*u*).

A contract with a solicitor to give him a portion of the profits arising from the successful prosecution of a suit to establish a right to coal mines on being indemnified against the costs of the proceedings is champerty and maintenance (*v*).

A contract whereby a solicitor stipulates with a client to receive, in consideration of the advances requisite to conducting the proceedings to a successful issue, over and above his legal costs, a sum commensurate with his outlay and exertions and with the benefit resulting to the client, is unlawful. The contract would be directly in violation of the laws against maintenance, if the stipulation were that the plaintiff, as solicitor in the action, in consideration of his advancing the funds necessary for carrying on the litigation, should receive a portion of the proceeds or property to be recovered; and the only difference between the two cases is that, in the former, the party would have the security of the property; whereas here he has only the personal security of the client. But if he be a solvent man, he get a share of the property by another mode, viz., by suing him, and obtaining judgment (*w*). An agreement to be carried into effect in this country, which would be void on the ground of champerty if made here, is not the less void because it is made in a foreign country, where such a contract would be legal. Where, therefore, an attorney entered into an agreement in France with a French subject to sue for a debt due to the latter from a person residing here, whereby the attorney was to receive by way of recompense a moiety of the amount recovered; it was held that this agreement was void for champerty (*x*). If any act were done under such an agreement in England, the party doing it would be indictable here (*y*).

But there is a distinction between the assignment by a client to his solicitor of the subject-matter of a suit by way of security, and an absolute sale of the subject-matter of the suit. In the latter case the solicitor might have an opportunity of imposing on his client, from his superior knowledge of the value of that subject-matter, and might after the purchase take improper means to increase the value. But a mere assignment, by way of security, is open to no such danger, and may be very advantageous to the client (*z*). A client having obtained a verdict for recovery of certain land, by deed granted the crop of potatoes then growing upon the land, and all other effects thereon, until payment of £100 due with interest to the attorney (for money lent and professional services), with a proviso that if the client paid the £100 and the interest on a certain day, the deed should be void. The deed also contained a power to the attorney, on default of payment, to enter, carry away, and dispose

(*u*) Simpson *v.* Lamb, 7 E. & B. 84.

(*v*) Hilton *v.* Woods [1867], L. R. 4 Eq. 432. A title to sue arising under such a contract is bad. Ibid. 439. *Vide post*, p. 595, 'Champerty.'

(*w*) Earle *v.* Hopwood, 9 C. B. (N. S.) 566. See Price *v.* Beattie, 32 L. J. Ch. 734.

(*x*) Grell *v.* Levy, 16 C. B. (N. S.) 73.

(*y*) See R. *v.* Brisac, 4 East, 163. A case of conspiracy formed outside England. And *vide ante*, p. 53.

(*z*) Per Campbell, C.J., Anderson *v.* Radcliffe, E. B. & E. 806; citing Wood *v.* Downes, 18 Ves. 120.

of the effects assigned ; provided that, if he sold the property, he should hold the surplus, after paying the expenses and reimbursing himself, in trust for his client. It was held that this deed could not be impeached on the ground of either champerty or maintenance (*a*).

But no barrister or solicitor can justify using deceitful practices in maintenance of a client's clause : and they are liable to be punished for misdemeanors in this respect by the common law, and also by 3 Edw. I. Stat. Westm. 1, c. 29. All fraud and falsehood, tending to impose upon or abuse the justice of the King's courts, are within the purview of the statute (*b*).

It would seem that absence of *mens rea* or honesty of motive is not a defence to an indictment for maintenance (*c*).

Punishment.—By the common law as reinforced by the statutes set out below, all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but may also be indicted and fined, and (or) imprisoned ; and it seems that a Court of record may commit a man for an act of maintenance in the face of the Court (*d*).

By a statute of 1377 (1 Rich. II., c. 4), 'it is ordained and established and the King our Lord straightly commandeth that none of his counsellors, officers, or servants nor any other person within the realm of England, of whatsoever estate or condition they be shall from henceforth take nor sustain any quarrel by maintenance, in the country or elsewhere, on grievous pain ; that is to say, the counsellors and the King's great officers, on a pain which shall be ordained by the King himself, by the advice of the lords of his realm ; and other less officers and servants of the King, as well in the Exchequer and all the other Courts and places as of his own meiny, upon pain to lose their offices and services and to be imprisoned and then to be ransomed at the King's will, every of them according to his degree, estate and desert : and all other persons through the realm upon pain of imprisonment, and to be ransomed as the other aforesaid ' (*e*).

Sect. IV.—Champerty (*f*).

Champerty is a species of maintenance, being a bargain with a plaintiff or defendant *campum partiri*, to divide the land or other matter sued for between them, if they prevail at law ; whereupon the champertor is to

(*a*) Anderson *v.* Radcliffe, *supra*, affirmed in error, E. B. & E. 119, upon the ground that the contract was confined to the payment of a debt already due for costs subject to taxation, and therefore the attorney got nothing but a security for a just debt. See also Cook *v.* Field, 15 Q.B. 460, where an agreement to sell the possibility and expectancy of an estate, in case the vendor became devisee of it, was held lawful.

(*b*) 2 Co. Inst. 215. Bac. Abr. and Hawk. *supra*. The statute enacts that the offender shall be imprisoned for a year and a day, and shall not plead again if he be a pleader. Dy. 362. 1 Hawk. c. 83, *s.* 33 *et seq.* Bac. Abr. tit. 'Maintenance,' in the margin.

(*c*) See Alabaster *v.* Harness [1895], 1 Q.B. 339, 345, Rigby, L.J.

(*d*) 2 Rolle, Abr. 114. 2 Co. Inst. 208. 1 Hawk. c. 83, s. 38. Bac. Abr. tit. 'Maintenance' (C). Hetley, 79.

(*e*) This statute was confirmed in 1383 (7 Rich. II. c. 15), and again in 1540 (32 Hen. VIII. c. 9, s. 1). See 1 Hawk. c. 80, s. 143.

(*f*) The English law of champerty does not extend to India. Kunwar Ram Lal *v.* Nil Kanth [1893], L. R. 20 Ind. App. 112. Cf. Fischer *v.* Kamala Naicker [1860], 8 Moore, Ind. App. 170. Bhagwat *v.* Debi [1908], L. R. 35 Ind. App. 48.

carry on the party's suit at his own expense (*g*). It is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it (*h*).

The *Ordinacio de Conspiratoribus* (1300, 33 Edw. I.) declares that 'champertors be they that move pleas or suits or cause to be moved either by their own procurement or by others and sue them at their proper costs for to have part of the land in variance or part of the gains' (*i*).

The statute of Westminster 1 (1275, 3 Edw. I.), c. 25, enacts, that 'no officers of the King, by themselves nor by others, shall maintain pleas, suits, or matters, hanging in the King's courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth shall be punished at the King's pleasure' (*j*). In this statute 'courts' means courts of record only, and 'covenant' includes all kinds of promises and contracts of this kind. Maintenance in personal actions, to have part of the debt or damages, is as much within the statute as maintenance in real actions for a part of the land. The statute applies to a grant of rent out of the lands in question, but not to a grant of rent out of other lands; nor to a grant of part of a thing in suit, made in consideration of a precedent debt (*k*). The maintenance of a tenant or defendant is as much within the meaning of the statute as the maintenance of a demandant or plaintiff. And it has been held immaterial whether he who brings a writ of champerty did in truth suffer any damage by it, or whether the plea wherein it is alleged be determined or not (*l*).

By 13 Edw. I (Stat. Westm. the second), c. 49 (*m*), it is enacted that 'the chancellor, treasurer, justices, nor any of the King's council, no clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the King's house, clerk ne lay, shall not receive any church, nor advowson of a church, land, nor tenement, in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers; nor shall take no reward thereof. And he that doth any such thing (*ki ceste chose face*), either himself or by another, or make any bargain (*baret y face*) shall be punished at the King's pleasure, as well he that purchaseth as he that doth sell.' This statute extends only to the officers therein named, and not to any other person (*n*). But it so strictly restrains all such officers from purchasing any land, pending a plea, that they cannot be excused by a consideration of kindred or affinity, and they are within the meaning of the statute by barely making such a purchase, whether they maintain the party in his suit or not; whereas such a purchase for good consideration made by any other person, of any terre-tenant, is no offence, unless it appear that he did it to maintain the party (*o*).

(*g*) 4 Bl. Com. 135.
(*h*) Stanley *v.* Jones, 7 Bing. 377, Tindal, C.J.
(*i*) 1 Stat. Rev. (2nd ed.), 77.
(*j*) Said to be declaratory of the common law. Harris *v.* Brisco, 17 Q.B.D. 504, 511 (C. A.).
(*k*) See the authorities collected in 1 Hawk. c. 84, s. 3 *et seq.* Bac. Abr. tit. 'Champerty.'
(*l*) Id. ibid.
(*m*) 1 Stat. Rev. (2nd ed.), 35. The old translations of this and the next Act do not accurately represent the French text.
(*n*) 2 Co. Inst. 484, 485.
(*o*) 1 Hawk. c. 84, s. 12.

28 Edw. I. c. 11 (*p*), reciting that 'the King hath heretofore ordained by statute that none of his ministers should take no plea for champerty (*a champart*), by which statute others than officers (*autres que ministres*) were not bounden before this time,' enacts that 'the King will that no officer, nor any other, for to have part of the thing in plea, shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another; and if any do, and he be attainted thereof, the taker shall forfeit unto the King so much of his lands and goods as doth amount to the value of the part that he hath purchased for such taking upon him (*enprise*). And to attaint him thereof (*pur ceo atteindre*), whosoever will shall be received to sue for the King before the justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of learned men in the law for his fee, or of his parents and next friends.'

It seems to be agreed that champerty in any action at law, and purchase of land, pending a suit in equity concerning it, are within this statute; and a lease for life or years, or a voluntary gift of land, pending a plea, is as much within the statute as a purchase for money. But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain, nor a surrender by a lessee to his lessor, nor a conveyance or promise thereof made by a father to his son, or by an ancestor to his heir-apparent, nor a gift of land in suit, after the end of it, to a counsellor, for his fee or wages, without any kind of precedent bargain relating to such gift, are within the meaning of the statute (*q*). A bargain by a man, who has evidence in his own possession respecting a matter in dispute between third persons, and who at the time professes to have the means of procuring more evidence, to purchase from one of the contending parties, as the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money, which shall be recovered by means of the production of that evidence, is an illegal agreement; and if there be any difference between such a contract, and direct champerty, it is strongly against the legality of such contract; as besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the utmost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct tendency to pervert the course of justice (*r*). But a contract to communicate information on terms of getting a share of any property that might be recovered by means of this information is not champerty (*s*), unless it provides that the person giving the information and to share the property is himself to recover the property (*t*). Where a bill was filed for the purpose, amongst other things, of declaring an agreement void,

(*p*) 1 Stat. Rev. (2nd ed.), 58.

(*q*) Bac. Abr. tit. 'Champerty.' 1 Hawk. c. 84, s. 14 *et seq.* But it is said to be dangerous for a counsellor to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty. 2 Co. Inst. 564.

(*r*) Stanley *v.* Jones, 7 Bing. 369. Potts *v.* Sparrow, 6 C. & P. 749.

(*s*) Sprye *v.* Porter, 7 E. & B. 58.

(*t*) Rees *v.* De Bernardy [1896], 2 Ch. 437, Romer, J. Wedgerfield *v.* De Bernardy [1908], 24 T. L. R. 497: 25 T. L. R. 21.

which had been made by a seaman for the sale of his chance of prize money to his prize agents, who were to carry on the suit, Grant, M.R., expressed an opinion that the agreement was void, as amounting to champerty (*u*). An agreement with a man of straw to support a suit by him for penalties on terms of sharing the penalties recovered is champerty (*v*).

Subscription by strangers of money to maintain litigation for the recovery of property to be repaid out of the property if recovered is both maintenance and champerty (*w*).

In Sprye *v.* Porter (*x*), to a declaration upon an agreement the defendant pleaded that one T. died possessed of personal property, intestate and without any known relation, and that administration had been granted to the Treasury Solicitor, and that the defendant was ignorant of his being related to T., or in any way entitled to the property; and that it was thereupon unlawfully agreed between the parties that the plaintiff and R. should give and supply information and evidence in case of proceedings for recovery of the property, that, by means of such information and evidence, the defendant should successfully recover the property; and that if by means of such information and evidence the defendant should actually recover the property, he would pay each of them one-fifth of the amount; and that for the purpose of carrying this illegal agreement into effect the parties entered into the agreement set out in the declaration, and that it was under the illegal agreement that the property was actually recovered. It was held that this was maintenance in its worst aspect (*y*).

While the mere assignment of the subject of a suit is not maintenance, it is maintenance to agree to give another the benefit of a suit on condition that he prosecutes it (*z*).

Relationship or collateral interest will not justify or excuse champerty (*a*).

Sect. V.—Buying and Selling Pretended Titles.

Buying or selling a pretended title is said in the books to be a high offence at common law, as plainly tending to oppression, for a man to buy or sell at an under rate a doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller does not think it worth his while to do. And it seems not to be material whether the title be good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested (*b*). Offences of this kind were restrained by several statutes. By 13 Edw. I. c. 49 (*c*) no person of the King's house shall buy any title whilst the thing is in

(*u*) Stevens *v.* Bagwell, 15 Ves. 139.

(*v*) Wood *v.* Downes, 18 Ves. 120, Eldon, C. See Bradlaugh *v.* Newdegate, 11 Q.B.D. 1, 13.

(*w*) *Re* Thomas [1894], 1 Q.B. 747. In this case the solicitor for the litigant concerned in the champerty attempted to set up the illegality as an answer to a claim for taxation of costs.

(*x*) 7 E. & B. 58.

(*y*) Stanley *v.* Jones, 7 Bing. 369, was held on express authority to shew that the agreement was illegal.

(*z*) Harrington *v.* Long, 2 My. & K. 590. Cf. Fitzroy *v.* Cave [1905], 2 K.B. 364.

(*a*) Hutley *v.* Hutley, L. R. 8 Q.B. 112.

(*b*) Bac. Abr. tit. 'Maintenance' (E). 1 Hawk. c. 86, s. 1. Moore (K.B.) 751. Hob. 115. Plowd. 80.

(*c*) *Ante*, p. 595.

dispute, on pain of both the buyer and seller being punished at the King's pleasure. The similar but more general provisions of 32 Hen. VIII. c. 9, s. 2 (*d*), were repealed by sect. 11 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65).

SECT. VI.—EMBRACERY.

Embracery consists in such practices as tend to affect the administration of justice by improperly working upon the minds of jurors. It is immaterial whether the jurors are grand jurors or petty jurors (*e*). Any attempt whatsoever to corrupt or influence or instruct a jury in the cause beforehand, or in any way to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of counsel in open court, at the trial, is an act of embracery, whether the jurors on whom such an attempt is made give verdict or not, or whether the verdict given be true or false (*f*). And giving money to another, to be distributed among jurors, is an offence of the nature of embracery, whether the money is or is not actually distributed. It is as criminal in a juror as in any other person to endeavour to prevail with his companions to give a verdict for one side by any means except by arguments from the evidence which may have been produced, and exhortations from the general obligations of conscience to give a true verdict. And all fraudulent contrivances whatsoever to secure a verdict are offences of this nature; as where persons by indirect means procure themselves or others to be sworn on a *tales de circumstantibus* in order to serve on one side (*g*).

It is said that the law will not suffer a mere stranger so much as to labour a juror to appear, and act according to his conscience: but it seems that a person who may justify any other act of maintenance (*h*) may safely labour a juror to appear and give a verdict according to his conscience; but that no other person can justify intermeddling so far. And no one can justify the labouring a juror not to appear (*i*).

Offences of this kind are indictable misdemeanors punished by fine and imprisonment without hard labour (*j*). They have also been dealt with by statute. 5 Edw. III. c. 10 enacted that any juror taking of the one party or the other, and being duly attainted, should not be put in any assizes, juries, or inquests, and shall be commanded to prison, and further ransomed at the King's will.

(*d*) For the construction of this section, see 1 Hawk. c. 86, s. 7. Kennedy *v.* Lyell, 15 Q.B.D. 491. Jenkins *v.* Jones, 9 Q.B.D. 128.

(*e*) Anon. *v.* Rowe (K.B. Ir.), 644, 727. Information for procuring a grand jury to throw out bills of indictment.

(*f*) 1 Hawk. c. 86, ss. 1, 5. 4 Bl. Com. 140.

(*g*) 1 Hawk. c. 85, s. 4. R. *v.* Opie, 1 Wms. Saund. 301, an information for a conspiracy in the nature of embracery to obtain a false verdict in which the overt act alleged was contriving by bribes to get D. and T., two of the conspirators included in the *tales* and sworn of the jury. As to bribing jurors, see also R. *v.* Young, 2 East, 416, cit. The latest precedents of an indictment for this offence were in R. *v.* Baker, 113 Cent. Crim. Ct. Sess. Pap. 374, 589, and R. *v.* Davies [1909], 150 Cent. Cr. Ct. Sess. Pap. 736, in which case the indictment was for attempting to pervert the course of justice by influencing a juror during a criminal trial. As to giving money to a juror after the verdict, see 1 Hawk. c. 85, s. 3.

(*h*) *Ante*, pp. 587 *et seq.*

(*i*) 1 Hawk. c. 85, s. 6.

(*j*) Ibid. s. 7. 4 Bl. Com. 140. In *Re* Dunn [1906], Victoria L. R. 493, the question was discussed whether embracery could be dealt with as contempt of Court.

34 Edw. III. c. 8 (1360) enacted that a juror attainted of such offence should be imprisoned for a year.

The Juries Act, 1825 (6 Geo. IV. c. 50), s. 61, repeals so much of 5 Edw. III. c. 10, 'as relates to the punishment of a corrupt juror,' and so much of 34 Edw. III. c. 8 (*k*), 'as directs the proceedings against jurors taking a reward to give their verdict'; and enacts and declares, by sect. 61, that 'notwithstanding anything herein contained, every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and be punished by fine and imprisonment, in like manner as every such person might have been before the passing of this Act.'

32 Hen. VIII. c. 9, s. 3, enacts that no person shall 'embrace any freeholders or jurors' . . . 'for to maintain any matter or cause, or to the disturbance or hindrance of justice or to the procurement or occasion of any manner of perjury by false verdict or otherwise' . . . 'upon pain of forfeiture for every such offence of £10,' half to the King and half to him that shall sue within a year (*l*).

(*k*) These Acts were repealed as to Ireland in 1833 (3 & 4 Will. IV. c. 93, s. 50). The Juries (Ireland) Act, 1871 (34 & 35 Vict. c. 65), s. 49, is substantially on the same lines as s. 62, *supra*.

(*l*) As to the meaning of this statute, see 1 Hawk. c. 85, s. 11.

CANADIAN NOTES.

OF BARRATRY, MAINTENANCE, CHAMPERTY, ETC.

Sec. 4.—Champerty is a criminal offence, and a champertous contract will not be enforced by the Courts. The English champerty laws were introduced or continued in Ontario and Quebec under the Quebec Act, 1774. Meloche v. Dequire, 8 Can. Cr. Cas. 89; Hopkins v. Smith (1901), 1 O.L.R. 659.

The criminal law of England on this subject was introduced into British Columbia by R.S.C. (1886) ch. 144, sec. 2.

A bargain by which A., a stranger to B., having no interest recognized by law in a given property, agrees to help B. to recover such property in a Court of justice in consideration of getting a portion of the fruits of the suit is champerty and is an indictable offence by the common law of England. Briggs v. Fleutot, 10 B.C.R., at p. 316.

BOOK THE EIGHTH.

OF OFFENCES WITH RESPECT TO PUBLIC OFFICE: AND OF BRIBERY AND CORRUPTION OF AND BY OFFICIALS, AGENTS, PARLIAMENTARY CANDIDATES AND ELECTORS.

CHAPTER THE FIRST.

OF MISCONDUCT IN OFFICE.

SECT. I.—GENERAL COMMON LAW RULE.

WHERE a public officer is guilty of misbehaviour in office by neglecting a duty imposed upon him either at common law or by statute, he commits a misdemeanor and is liable to indictment unless another remedy is substituted by statute (*a*). The liability exists whether he is a common law or a statutory officer (*b*); and a person holding an office of important trust and of consequence to the public, under letters patent or derivatively from such authority, is liable to indictment for not faithfully discharging the office (*c*). Where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well for acts of commission as for omission; and where a public officer is charged with a breach of duty, which duty arises from certain acts which he is bound to take notice of, it is not necessary to state that he had notice of those acts, for he is presumed from his situation to know them (*d*).

In some cases also the offence will involve a forfeiture of his office, if it be beneficial (*e*).

The present chapter will deal with oppression, negligence, fraud, and extortion by officers, and with refusal to take up an office on proper appointment. As to bribery and buying and selling offices, see *post*, pp. 619, 627.

SECT. II.—OPPRESSION.

Judicial Officers.—Although a judge is not indictable for mere error of judgment (*f*) the *oppression* and tyrannical partiality of judges and other magistrates in the administration, and under colour of their offices,

(*a*) See R. *v.* Hall [1891], 1 Q.B. 747. *Vide ante*, p. 11.

(*b*) R. *v.* Wyat, 1 Salk. 380. Anon., 6 Mod. 96.

(*c*) R. *v.* Bembridge [1783], 22 St. Tr. 1, 77, 151: 3 Doug. 327, Lord Mansfield. And see 1 Salk. 380n.

(*d*) R. *v.* Hollond, 5 T. R. 607.

(*e*) 4 Bl. Com 540. 1 Hawk. c. 66, s. 1. Com. Dig. 'Officer' (K. 2) (K. 3), and Earl of Shrewsbury's case, 9 Co. Rep. 42, 50. As to forfeiture by conviction of treason or felony, see 33 & 34 Vict. c. 23, s. 1, *ante*, p. 250.

(*f*) R. *v.* Loggen, 1 Str. 74. Anderson *v.* Gorrie [1895], 1 Q.B. 668. And see R. *v.* Nelson, Cockburn's Report.

may be punished by impeachment in Parliament, or by information or indictment, according to the rank of the offender and the circumstances of the offence (*g*).

High Court.—There are no modern instances of criminal proceedings against judges of the Supreme Court for misconduct in office (*h*). They cannot be removed from office except on address presented by both Houses of Parliament to the King (*i*).

Coroner.—'A coroner' [or deputy-coroner (*j*)] 'who is guilty of extortion or of corruption or of wilful neglect of his duty or of misbehaviour in the discharge of his duty shall be guilty of a misdemeanor, and in addition to any other punishment may, unless his office of coroner is annexed to any other office, be adjudged by the Court before whom he is so convicted to be removed from his office' (*k*). A coroner is also guilty of a misdemeanor if he acts as a solicitor to prosecute or defend a person for an offence of which he is charged on an inquisition taken before such coroner (*l*); or if he refuses on the written request of the majority of the jury to summon as a witness a qualified legal practitioner named by the jury, or to direct such person to make a post-mortem examination of the deceased (*m*). He is also liable to be summarily fined for not returning inquisitions, depositions, &c., in cases of murder and manslaughter, to the proper Court of trial, and for not attending (*n*) the Court in person (*o*).

It would seem to be misbehaviour within the Coroners Act, 1887, to refuse without adequate reason or from improper motives to hold an inquest (*p*), or to take an inquisition without view of the body (*q*), or to use corrupt influence over the jury (*r*), or to take sworn jurors off the panel so as to get from the remaining jurors a verdict of insanity (*s*). A criminal information has been allowed against a coroner who on a jury returning a verdict of accidental death recorded the verdict, but committed a person to prison on a charge of murder (*t*): and it appears to be misconduct for the coroner to enter the jury room when the jurors are deliberating and to take the verdict there (*u*). A coroner is liable to a motion by the Lord Chancellor for inability or misbehaviour in office (*v*).

(*g*) 1 Bl. Com. 141. As to where the judge has absolutely no jurisdiction, *e.g.*, where he pronounces an illegal sentence, see Mayne. Ind. Cr. Law (ed. 1896), p. 342. R. *v.* Nelson, Cockburn's Report, 124, 156.

(*h*) See Anderson *v.* Gorrie, *ubi supra*.

(*i*) 38 & 39 Vict. c. 77, s. 5 (E). 40 & 41 Vict. c. 57, s. 13 (I).

(*j*) 55 & 56 Vict. c. 56, s. 1 (5).

(*k*) 50 & 51 Vict. c. 71, s. 8 (2). A re-enactment of 25 Geo. II. c. 29, s. 6.

(*l*) Ibid. s. 10. (*m*) Ibid. s. 21 (3).

(*n*) Ibid. s. 9. See Lord Buckhurst's Case, 1 Keb. 280.

(*o*) *Re* Urwin [1827], Carr. Supp. 17. The duties of a coroner as to holding inquests are laid down in R. *v.* Kent JJ., 11 East, 229. R. *v.* Price, 12 Q.B.D. 247. R. *v.* Stephenson, 13 Q.B.D. 331. R. *v.* Graham [1905], 21 T. L. R. 576. See precedents of indictments against coroners for refusing to take inquisitions, or for not returning inquisitions according to evidence. 2 Chit. Cr. Law, 255; Cro. Circ. Comp. (10th ed.) 173, and see Jervis on Coroners (6th ed.) 59.

(*p*) *Re* Hull, 6 Q.B.D. 689. *Re* Ward, 30 L. J. Ch. 775. As to exhuming a body too late for an effective view, see R. *v.* Parker, 2 Lev. 140.

(*q*) 2 Hale, 270.

(*r*) R. *v.* Coates, Dickson, J. P. 515.

(*s*) R. *v.* Stukeley, 12 Mod. 493. Cf. R. *v.* Whitcomb, 1 C. & P. 125.

(*t*) R. *v.* Scory, 1 Leach, 43. And see 1 Str. 69.

(*u*) Mitchelstown Inquisition, 22 L. R. Ir. 279. And see Jervis on Coroners (6th ed.) 60. As to intoxication during inquest, see R. *v.* Ward, 30 L. J. Ch. 775. *Ex parte* Pasley [1842], 3 Dr. & W. (Ir.) 34. As to recording an inquisition against three when the jurors' verdict was as to one only, R. *v.* Marsh [1700], 1 Salk. 172. As to examining witnesses before the jury is sworn, see R. *v.* Whitcomb, 1 C. & P. 124.

(*v*) 50 & 51 Vict. c. 71, s. 8 (1).

County Court Judges.—County Court judges, like all other judges of inferior Courts, appear at common law to be liable to indictment for grave misconduct in office. A rule for a criminal information against a County Court judge for misconduct in office was discharged on the ground that the applicant had already elected his remedy by applying to the Lord Chancellor to inquire into the alleged misconduct (*w*).

Colonial Judges.—Judges of a Colonial Court directly appointed by the Crown are liable to amotion for misconduct (*x*).

Justices of the Peace.—Justices of the peace have often been held liable to criminal information for fraud or misconduct in office, which could not be excused by mistake or ignorance of law (*y*). As a general rule justices are not punishable for acts done at general or quarter sessions (*z*), but there are some precedents in respect of such acts (*a*). But with respect to the acts of justices in petty sessions or out of sessions the precedents are numerous (*b*).

Though a justice of the peace should act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill-intention whatsoever, the Court will never punish him by the extraordinary course of a criminal information, but will leave the party complaining to his ordinary remedy by action or indictment (*c*). And whenever the acts or defaults of justices have been challenged, either by way of indictment, or application for a criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive (*d*), 'under which description fear and favour may generally be included,' or from mistake or error. In the former case alone they have become the objects of punishment (*e*).

Precedents of indictments are very rare, it being obviously more seemly and expedient that criminal proceedings against justices should be conducted in the High Court, and allowed only in the cases where the conditions imposed by the Crown Office Rules, 1906, rr. 35–39, are satisfied.

A large number of the precedents of criminal proceedings against justices relate to their conduct in the quasi-judicial functions as to

(*w*) R. *v.* Marshall, 4 E. & B. 475. *Ex parte* Ramshay, 18 Q.B. 173. By the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 15, 50, 51, provision is made for amotion of judges and officers of county courts for misconduct.

(*x*) 22 Geo. III. c. 75. Willis *v.* Gipps, 6 St. Tr. (N. S.) 311. *Re* Sanderson, 6 Moore, P. C. 38. And see 6 Moore, P. C. (N. S.) App. As to Canadian judges, see 30 & 31 Vict. c. 3, s. 99.

(*y*) *Vide* Short & Mellor, Cr. Pr. (2nd ed.) 158.

(*z*) R. *v.* Seton, 7 T. R. 373, Kenyon, C.J. See R. *v.* Colam, 20 W. R. 331, Blackburn, J. R. *v.* Venables, 2 Ld. Raym. 1407; 8 Mod. 378 n.

(*a*) See R. *v.* Shrewsbury JJ., 2 Barnard 272. R. *v.* Eyres, ibid. 250. R. *v.* Seaford JJ., 2 W. Bl. 432. R. *v.* Phelps, 2 Ld. Kenyon, 570. R. *v.* Davie, 2 Dougl. 588. Staundf. P. C. 173.

(*b*) R. *v.* Mather, 2 Barnard. (K.B.) 249 (an obviously illegal order for whipping a woman). R. *v.* Brooke, 2 T. R. 190 (capriciously discharging a vagrant committed by another justice). R. *v.* Webster, 3 T. R. 388. R. *v.* Badger, 4 Q.B. 468, 472 (refusal of bail in wilful defiance of the law). R. *v.* Dodgson, 9 A. & E. 704 (conviction in face of a claim of a right). *Ex parte* Higgins, 10 Jur. 838 (wilful refusal to receive legal evidence).

(*c*) R. *v.* Palmer, 2 Burr. 1162. *Vide* 1 Bl. Com. 354, n. (17).

(*d*) *Ex parte* Fentiman, 2 A. & E. 127, 129, Patteson, J.

(*e*) R. *v.* Borron, 3 B. & Ald. 432, 434, Abbott, C.J. Cf. 1 Bl. Com. 354, n. (17).

granting or refusing licences to sell intoxicants. Though upon this subject the justices have a discretionary jurisdiction, and though discretion means the exercising the best of their judgment upon the occasion that calls for it, wilful abuse of such discretion is criminal (*f*). The High Court can therefore grant an information against justices who refuse, from corrupt and improper motives, to grant such licences (*g*); or for granting such licences improperly (*h*).

Where two sets of justices had concurrent jurisdiction, and one set appointed a meeting to grant ale licences, and, after such appointment, the other set appointed a meeting for the same purpose on a subsequent day, and having met, granted a licence which had been refused by the first set; it was held that the acts of the justices who appointed the second meeting were illegal and indictable. Kenyon, C.J., said that it was proper that the question should be settled whether it were *legal* for two different sets of magistrates, having concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction; and that it was of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. And Ashhurst, J., said that it was a breach of the law to attempt to wrest the jurisdiction out of the hands of the magistrates who first gave notice of the meeting; for what the law says shall not be done, it becomes *illegal* to do, and is therefore the subject-matter of an indictment, without the addition of any corrupt motives (*i*).

Jurors.—Misconduct by jurors sworn to try a civil or criminal cause is an offence usually punished summarily by fine for contempt of Court (*j*), but is apparently indictable if the misconduct is grave or involves actual corruption (*k*). Every juror who shall wilfully or corruptly consent to embracery (*l*) may be proceeded against by indictment or information, and is punishable by fine and imprisonment (*m*). It would seem that evidence of jurors is not admissible to prove misconduct by the jury or any juror in the jury room (*n*).

Executive and Ministerial Officers.—An indictment or criminal information will lie against executive or ministerial officers for oppression or for illegal acts done corruptly or from vindictive or otherwise improper motives, but not for acts done by ignorance or mistake (*o*).

Churchwardens.—By the Vestries Act, 1831 (1 & 2 Will. IV. c. 60), s. 11, 'if any churchwarden, rate-collector, overseer, or other parish officer, shall refuse to call meetings according to the provisions of this Act, or

(*f*) R. *v.* Young, 1 Burr. 556, 560.

(*g*) R. *v.* Williams, 3 Burr. 1317. The licences were refused because the applicants would not give their votes for members of Parliament, as the justices would have had them. Cf. R. *v.* Hann, ibid. 1716, 1786.

(*h*) R. *v.* Holland, 1 T. R. 692.

(*i*) R. *v.* Sainsbury, 4 T. R. 451.

(*j*) R. *v.* Brown [1907], 7 N. S. W. State Rep. 290, 300, 301, where the English authorities are collected and discussed.

(*k*) See 1 Hawk. c. 85, s. 4. See R. *v.* Opie, 1 Wms. Saund. 301. Indictment for a conspiracy to procure certain of the conspirators to be sworn as jurors on the trial of an issue with the object of giving their verdict for the defendant.

(*l*) *Vide ante*, p. 598.

(*m*) 6 Geo. IV. c. 50, s. 61 (E): 34 & 35 Vict. c. 65, s. 49 (1). And see R. *v.* Young, 2 East, 14, 16, cit.

(*n*) *Vide* Jackson *v.* Williamson, 2. T. R. 281, followed in R. *v.* Mullins, 6 Canada Cr. Cas. 363. And see Taylor, Ev. (10th ed.), s. 944. In R. *v.* Brown [1907], 7 N. S. W. State Rep. 296, the Court, after considering all the authorities, held the evidence of fellow jurors inadmissible to establish misconduct by a juror in a criminal case.

(*o*) R. *v.* Friar, 1 Chit. Rep. (K.B.) 702.

shall refuse or neglect to make and give the declarations and notices directed to be made and given by this Act, or to receive the vote of any ratepayer as aforesaid, or shall in any matter whatsoever alter, falsify, conceal, or suppress any vote or votes as aforesaid, such churchwarden, rate-collector, overseer, or other parish officer, shall be deemed and taken to be guilty of a misdemeanor' (*p*).

The civil functions of churchwardens in rural parishes have been transferred to parish councils or to the chairman of the parish meeting, and they are no longer overseers of the poor (*q*). Their remaining functions are mainly, if not solely, ecclesiastical, and they would seem no longer to be public officers in the full sense of the term.

Clergymen.—It would seem that it is not an indictable offence for a clergyman to refuse to marry a couple (*r*). There is specific statutory provision for punishing breaches by clergymen of the Marriage Acts (*s*).

Constables.—An indictment lies at common law against a constable for neglecting the duties required of him by common law or by statute (*t*); and when a statute requires him to do what without requiring had been his duty, it is not imposing a new duty, and he is indictable at common law for the neglect (*u*).

Gaolers.—14 Edw. III. c. 10 (*v*), enacted that if any gaoler, by too great duress of imprisonment, makes any prisoner that he hath in ward become an *approver* against his will; that is, to accuse and turn evidence against some other person; it shall be felony in the gaoler. For it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler to whom the prisoner is committed for safe custody (*w*). And a gaoler may be discharged and fined for voluntarily suffering his prisoner to escape, or for barbarously misusing him (*x*). So, a gaoler is indictable for refusing to receive a prisoner duly committed by a magistrate (*y*).

Poor Law Officers. A. *Misfeasance.*—Overseers and other officers of the poor law are usually punished summarily for offences with regard

(*p*) This section was repealed in 1894 (56 & 57 Vict. c. 73) as to parish meetings, and had previously been repealed as to London in 1855 (18 & 19 Vict. c. 120).

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5, 6, 19.

(*r*) R. *v.* James, 2 Den. 1; 3 C. & K. 167. The indictment seemed open to several objections. It did not aver that the parties might lawfully marry; or that the clergyman was required to perform the ceremony at a lawful time, between the appointed hours. Strong intimations were thrown out that a refusal to marry is merely an ecclesiastical offence. See the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47), s. 1.

(*s*) *Vide post*, p. 1015 *et seq.*

(*t*) R. *v.* Wyat, 1 Salk. 380. Crowther's case, Cro. Eliz. 654; indictment against a constable for refusing to make a hue and cry after notice of a burglary. Neglect of duty by the police created by statute is punished under the Police Acts. See 2 & 3 Vict. c. 93, s. 12; 22 & 23 Vict. c. 32, s. 26 (county); 2 & 3 Vict. c. 47, s. 14 (metropolis); 10 & 11 Vict. c. 89, s. 16 (towns); 45 & 46 Vict. c. 50, s. 194 (municipal boroughs). As to taking gratuities, see Chisholm *v.* Holland, 50 J. P. 197.

(*u*) R. *v.* Wyat, 1 Salk. 380; 2 Ld. Raym. 1189.

(*v*) Repealed in 1863. (S. L. R.)

(*w*) 4 Bl. Com. 128. 3 Co. Inst. 91.

(*x*) 1 Hawk. c. 66, s. 2. *Vide ante*, p. 556, 'Escape.'

(*y*) R. *v.* Cope, 6 A. & E. 226; 1 N. & P. 515; 7 C. & P. 720. See the form of indictment there. The indictment was in substance brought to try the question whether under a gaol Act (4 Geo. IV. c. 64) the Court of Aldermen of the City of London had authority to exclude from Newgate gaol prisoners committed by the Middlesex justices.

to their duties (*z*). But an *overseer* of the poor is indictable for misfeasance in the execution of his office (*a*); if he misuse the poor, as by keeping and lodging several poor persons in a filthy, unwholesome room, with the windows not in a sufficient state of repair to protect them against the inclemency of the weather (*b*) or by exacting labour from them when they are unable to work (*c*). Overseers have been held indictable for neglecting to provide necessaries for the poor (*d*), including medical assistance (*e*). A relieving officer has been held to be indictable for refusing medical assistance to a poor person (*f*). If overseers procure, or contrive by sinister means to prevail upon, a man to marry a pregnant woman, for the purpose of throwing the expense of maintaining her and the issue from themselves upon another parish or township, they may be indicted (*g*). And for most breaches of their duty overseers may be punished by indictment or information (*h*): but with respect to the proceeding by information, as it is an extraordinary remedy, the Court of King's Bench will not suffer it to be applied to the punishment of ordinary offences (*i*).

An indictment against overseers on sect. 47 of the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), for not accounting to the auditor of a union, upon request, on a day appointed by him, is bad, unless it appear that there was some rule, order, or regulation of the Local Government Board that the overseers should account upon such request; and where no such order, &c., is alleged, the indictment cannot be sustained after verdict, merely because it appears, by inference, or by the inducement, that the defendants have not in fact accounted for one whole quarter (*j*).

An overseer of the poor is not indictable if (without force, fraud or menace) he removes a pauper under an order of removal after it has been confirmed on appeal by the sessions, subject to the opinion of the High Court, and before its final determination by that Court. The Court said that the action of the overseers was not a violation of any known rule or law (*k*).

As to wilful neglect by an overseer of his duties under the Registration Acts, see R. *v.* Hall [1891], 1 Q.B. 747, *ante*, p. 11.

B. *Negligence.*—An overseer of the poor is indictable for wilful neglect of duty. Thus overseers have been held indictable for not providing for the poor (*l*); for refusing to account within four days after the appointment

(*z*) Archbold's Poor Law (15th ed., by Brooke Little), 165.

(*a*) Tawney's case, 16 Vin. Abr. 415 (not providing for the poor, or relieving them when there is no necessity). 1 Bott. 358, pl. 371.

(*b*) R. *v.* Wetherill, Cald. 432.

(*c*) R. *v.* Winship, Cald. 72, 76, Lord Mansfield.

(*d*) R. *v.* Booth, R. & R. 47.

(*e*) R. *v.* Meredith, R. & R. 46.

(*f*) R. *v.* Curtis, 15 Cox, 746.

(*g*) R. *v.* Compton, Cald. 246. R. *v.* Tarrant, 4 Burr. 2106; and R. *v.* Herbert, 1 East, P. C. 461.

(*h*) R. *v.* Commings, 1 Bott. 357, pl. 370. R. *v.* Robinson, 2 Burr. 799. R. *v.* Jones, 1 Bott. 360, pl. 377; 2 Nol. 474. From these authorities it appears that an indictment will lie even in some cases where a particular punishment is created by statute and a specific method for recovering the penalty is pointed out. But as to this, see *ante*, p. 11.

(*i*) R. *v.* Slaughter, Cald. 247n.

(*j*) R. *v.* Crossley, 10 A. & E. 132; 2 P. & D. 319. It is left undecided how far disobedience of an order to account made under s. 98 is indictable. 10 A. & E. 138, Patteson, J.

(*k*) R. *v.* Cooper, 3 Sess. Cas. 346.

(*l*) 2 Nolan, 475. Tawney's case, 1 Bott. 358, pl. 371. R. *v.* Winship, Cald. 72.

of new overseers, under the Poor Law Act, 1601 (43 Eliz. c. 2) (*m*); for not making a rate to reimburse constables under the Poor Relief Act, 1662 (14 Car. II. c. 12) (*n*); and for not receiving a pauper sent to them by order of two justices (*o*); or disobeying any other order of justices, where the justices have competent jurisdiction (*p*). There may be cases in which the neglect to provide a pauper with necessaries is indictable. Thus where an indictment stated that the defendant, an overseer, had under his care a poor person belonging to his township, but neglected and refused to provide for her necessary meat, &c., whereby she was reduced to a state of extreme weakness, and afterwards, through want of such reasonable and necessary meat, &c., died, the defendant was convicted and sentenced to a year's imprisonment (*q*). And where an overseer was indicted for neglecting to supply medical assistance when required to a pauper labouring under dangerous illness, it was held that an offence was sufficiently charged and proved, though such pauper was not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief (*r*).

Sheriffs.—By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29—

'(1) If a person being a sheriff, under-sheriff, bailiff, or officer of a sheriff, whether within a franchise or without, does any of the following things, that is to say:—

(*a*) Conceals or procures the concealment of any felon; or

(*b*) Refuses to arrest any felon in his bailiwick; or

(*c*) Lets go at large a prisoner who is not bailable; or

(*d*) Is guilty of an offence against or breach of the provisions of this Act;

He shall (without prejudice to any other punishment under the provisions of this Act) be guilty of a misdemeanor, and be liable on conviction to imprisonment for a term not exceeding one year and to pay a fine, or, if he has not wherewith to pay a fine, to imprisonment not exceeding three years.

(2) If any person being either a sheriff, under-sheriff, bailiff, or officer of a sheriff, or being employed in levying or collecting debts due to the Crown by process of any Court, or being an officer to whom the return or execution of writs belongs, does any of the following things, that is to say:—

(*a*) Withholds a prisoner bailable after he has offered sufficient security; or

(*b*) Takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act; or

(*m*) R. *v.* Commings, 5 Mod. 179; 2 Nol. 453, 476, where it is observed in the note (3) that this case occurred prior to 17 Geo. II. c. 38.

(*n*) R. *v.* Barlow, 2 Salk. 609; 1 Bott. 357, pl. 369.

(*o*) R. *v.* Davis, 1 Bott. 361, pl. 378; Say. 163.

(*p*) *Vide ante*, p. 543. 2 Nol. 476. R. *v.* Boys, Say. 143. But otherwise where the justices have no jurisdiction, R. *v.* Smith, 1 Bott. 415, pl. 461.

(*q*) R. *v.* Booth, R. & R. 47, note (*a*).

(*r*) R. *v.* Warren, *cor.* Holroyd, J., Worcester Lent Assizes, 1820. See Hays *v.* Bryant, 1 H. Bl. 253. R. *v.* Meredith, R. & R. 46. For an indictment against a relieving officer for refusing to supply medical assistance, see R. *v.* Curtis, 15 Cox, 746.

(*c*) Grants a warrant for the execution of any writ before he has actually received that writ; or

(*d*) Is guilty of any offence against or breach of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior court;

He and any person procuring the commission of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable—

(*i*) To be punished by the Court as hereinafter mentioned, and

(*ii*) To forfeit two hundred pounds, and pay all damages suffered by any person aggrieved.

And such forfeiture and damage may be recovered by such person as a debt by an action in his Majesty's High Court of Justice.

(3) Any of the following courts, that is to say, his Majesty's High Court of Justice, any Court of Assize, Oyer and Terminer or gaol delivery, or any judge of any of the said Courts, also where the alleged offence has been committed in relation to any writ issued out of any other court of record than those above mentioned, the Court out of which such writ issued may, on complaint made of any such offence as aforesaid having been committed and on proof on oath given by the examination of witnesses or by affidavit or on interrogatories of the commission of the alleged offence, and after hearing anything which the alleged offender may urge in his defence (which evidence and hearing may be taken and had in a summary matter), punish the offender or cause proceedings to be taken for his punishment in like manner as a person guilty of contempt of the said Court may be punished.

(4) The Court may order the costs of or occasioned by any such complaint to be paid by either party to the other, and an order by the High Court of Justice in any such summary proceeding to pay any costs, damages, or penalty, shall be of the same effect as a judgment of the High Court, and may be enforced accordingly.

(5) Any of the said Courts being a superior Court of record may also proceed for and deal with such offence in like manner as for any contempt of such Court.

(6) If any person not being an under-sheriff, bailiff, or officer of a sheriff, assumes or pretends to act as such, or demands or takes any fee or reward under colour or pretext of such office, he shall be liable to be punished in manner provided by this section as if he were an under-sheriff guilty of a contempt of Court.

(7) Any proceeding in pursuance of this section against a sheriff, under-sheriff, or any other person to whom this section applies shall be taken within two years after the alleged offence was committed, and not subsequently, and if the proceeding is in a summary manner shall be taken before the end of the sittings of the Court held next after the offence was committed and not subsequently.

(8) Nothing in this section shall render a person liable to be punished twice in respect of the same offence, but if any proceeding is taken against a person under this section for any offence the Court or Judge may postpone or stay proceedings and direct any other available proceeding to be taken for punishing such offence.'

A sheriff is indictable for refusing or neglecting to execute a criminal according to his sentence (*s*); but he is not bound to execute a criminal if he be not in his custody, and in such case, if it is intended by the Court which passed the sentence that the sheriff should do execution, there should be a special mandate to the party having the prisoner in custody to deliver him to the sheriff, and another to the sheriff to receive the prisoner and execute him (*t*).

Misconduct by Crown Officials outside Great Britain.

There is a series of statutes providing for the trial in England of officers of the Crown who have committed certain classes of offences in connection with their office *outside Great Britain*.

By an Act of 1698 (11 Will. III. c. 12) entitled 'an Act to punish Governors of Plantations in the Kingdom for crimes by them committed in the plantations,' it is enacted (*u*) that 'If any governor, lieutenant-governor, deputy governor, or commander-in-chief of any plantation or colony within his Majesty's dominions beyond the seas shall . . . be guilty of oppressing any of his Majesty's subjects beyond the seas within their respective Governments or commands or shall be guilty of any other crime or offence contrary to the laws of the realm or in force within their respective governments or commands, such oppressions, crimes and offences shall be inquired of, tried and determined in his Majesty's Court of King's Bench here in England, or before such commissioners and in such county of this realm as shall be assigned by his Majesty's commission and by good and lawful men of the same county and that such punishments shall be inflicted on such offenders as are usually inflicted for offences of like nature committed here in England.' The Act contains no machinery for bringing the offender home nor for collecting evidence in the colony and applies only to governors and commanders-in-chief.

By the Criminal Jurisdiction Act, 1802 (42 Geo. III. c. 85), after reciting the Act of 1698 and Acts of 1773 and 1784 relating to India (*v*), it is enacted (sect. 1) that 'if any person who now (June 22, 1802) is or heretofore has been or shall hereafter be employed by or in the service of his Majesty his heirs or successors in any civil or military station, office, or capacity out of Great Britain, or shall heretofore have had, held or exercised or now has, holds, or exercises, or shall hereafter have, hold, or exercise any public station, office, capacity, or employment, out of Great Britain, shall have committed, or shall commit, or shall have heretofore been, or is, or shall hereafter be, guilty of any crime, misdemeanor, or offence in the execution, or under colour, or in the exercise of any such station office capacity or employment as aforesaid, every such crime offence or misdemeanor may be prosecuted or inquired of, and heard and determined

(*s*) See Sheriffs Act, 1887, s. 13.

(*t*) R. *v.* Antrobus, 2 A. & E. 788, 803, Denman, C.J.

(*u*) The preamble recites that due punishment was not provided for several crimes committed out of the realm of England, and that divers governors, &c., had taken advantage thereof, and had not been deterred from oppressing his Majesty's subjects within their several governments, nor from committing several other great crimes and offences, not deeming themselves punishable for the same here nor accountable therefor to any person within their respective governments.

(*v*) *Post*, p. 610.

in his Majesty's Court of King's Bench here in England, either upon an information exhibited by his Majesty's Attorney-General, or upon an indictment found, on which information or indictment such crime, offence or misdemeanor, may be laid and charged to have been committed in the county of Middlesex, and all such persons so offending, and also all persons tried under any of the provisions of the said recited Act [of 1698, *supra*] or this Act, or either of them, for any offence crime or misdemeanor, and not having been before tried for the same out of Great Britain, shall on conviction be liable to such punishment as may by any law or laws now in force, or any Act or Acts that may hereafter be passed, be inflicted for any such crime, misdemeanor, or offence committed in England and shall also be liable, at the discretion of his Majesty's Court of King's Bench, to be adjudged incapable of serving his Majesty in any station, office, or capacity, civil or military, or of holding or exercising any public employment whatever.'

Sects. 2, 3, 4 make provision for the issue of writs of mandamus to Courts or persons in the country where the offence was committed for the taking of evidence in support of the matters charged against the accused, and for the transmission to the Court of King's Bench of the depositions or answers to interrogatories. Sect. 5 makes provision for punishing wilful and corrupt false evidence as perjury under the law of the kingdom (*w*), island or place in which the evidence is taken.

This statute appears to apply to the whole of the King's dominion outside Great Britain. It has been held not to apply to felonies, but only to misdemeanors (*x*). It has been used to try colonial governors for alleged oppressions and illegalities (*y*), and to try officers for frauds on the Crown (*z*).

India.—There is also a series of statutes applying to official misconduct in India, all passed while that country was still in the hands of the East India Company, but still in force. The statutes are 10 Geo. III. c. 47, s. 4; 13 Geo. III. c. 63, s. 39; 21 Geo. III. c. 70, s. 7; 24 Geo. III. (sess. 2), c. 25, ss. 64–83 (*a*); 33 Geo. III. c. 52, ss. 62, 63–67, 140, 162; 3 & 4 Will. IV. c. 85, s. 80 (*b*). The offences are made triable in the High Court of Justice in Middlesex within a time variously limited after the commission of the offence or the return of the official to England.

The East India Company Act, 1793 (33 Geo. III. c. 52), s. 62, enacts that 'the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the said [East India] Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his Majesty, or the said united Company in the East Indies, shall be deemed to be extortion and a misdemeanor at law, and punished as such. . . .' The offender is also to forfeit to the King the present so received, or its full value; but the Court may order such present to be

(*w*) This apparently refers to Ireland. S. 2 has 'country, island or place.'

(*x*) R. *v.* Shawe, 5 M. & S. 403.

(*y*) R. *v.* Eyre, L. R. 3 Q. B. 487 (Jamaica). Picton's case, 30 St. Tr. 225 (Trinidad).

(*z*) R. *v.* Turner [1889], R. *v.* Hodgkinson [1900], noted in Short & Mellor, Cr. Pr. (2nd ed.) 85.

(*a*) See R. *v.* Hollond, 5 T. R. 607.

(*b*) They are collected and summarised in Ilbert, Government of India (2nd ed.), 255, 258.

restored to the party who gave it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer (sect. 63).

An *ex-officio* information charged that the defendant, a British subject, held for a long time the office of resident at Tanjore, and during all that time resided in the East Indies, and that whilst he held the said office, and within six years before the filing of the information, in the East Indies, he did unlawfully receive from a certain person in the East Indies a sum of 2,000 rupees, as a gift and present, against the statute; whereby he was guilty of extortion and a misdemeanor, and by force of the statute had forfeited the sum of £200, the value of the said rupees; and the Court of Queen's Bench held that it was no ground to arrest the judgment that the count did not state whether the rupees were Bombay, Madras, or Sicca rupees, or state the value of a single rupee; and that Court and the Court of Exchequer Chamber held that the count was good, although it did not aver that the gift was received by way of extortion or under colour of the office: first, because, supposing the statute were confined to such cases, the information was made good after verdict by the sect. 21 of the Criminal Law Act, 1826 (7 Geo. IV. c. 64), as it described the offence in the words of the statute creating it; and secondly, because the Act of 1793 extended to any receipt of a gift by any officer; for the object of the Legislature was to prevent any officer from receiving any gift or present of money in the East Indies absolutely, whatever the reason of the gift might be; and, although the count did not allege for whose use or pretended use the gift was received; for even if an officer received a present under colour of its being a present to the Queen, he would be guilty of an offence within the statute (*c*).

Indictment.—Upon an indictment against an officer for neglect of duty, it is sufficient to state that he was such officer, and it is not necessary to state his appointment (*d*). The indictment need not aver that the

(*c*) R. *v.* Douglas, 13 Q.B. 42. The jury had found a verdict on several counts, charging receipts of sums in rupees as gifts, after which followed a finding as to each count severally that the sum received, as in the count mentioned, was the sum of so many rupees, which sum of rupees, at the time of receiving them, was of the value of so much British money, being at the rate of 1*s.* 11*d.* per rupee, and the Court of Queen's Bench adjudged fine and imprisonment separately upon each count upon which the defendant was convicted; and further, that the defendant, in pursuance of the statute, do also forfeit to the Queen the several sums following (naming the value of the sums in rupees, as found on each count respectively), the said forfeitures amounting together to the sum of (the aggregate of the values); and further, that the defendant be imprisoned until he shall have paid the said fines and forfeitures. And the Court of Exchequer Chamber held, 1st, that this judgment was good, although it did not give the defendant the option of forfeiting the gifts actually received, as the gift itself was money; 2ndly, that it was right to estimate the value at the time of the receipt, and not of the conviction; 3rdly, that imprisonment in default of paying the forfeiture was rightly awarded, as that forfeiture was not arbitrarily imposed by the Court, but fixed by the statute, and superadded, by authority of the statute, to the other punishments of the offence. The Court of Queen's Bench held that the alterations in the Madras Courts made by several statutes did not preclude the issuing of a mandamus under the East India Company Act, 1773 (13 Geo. III. c. 63, s. 40), to examine witnesses, to the Madras Court as finally constituted, and that such a mandamus directed to the Chief Justice and other judges, who were two, of the Madras Supreme Court, requiring them to hold a Court and examine witnesses, was well executed by the Chief Justice and one other judge. See also this case as to what parchment writings are such examinations as are required by the Act to be returned to such a mandamus.

(*d*) R. *v.* Hollond, 5 T. R. 607. This

defendant had notice of all the facts it states, if it was his duty to have known them (*e*). Where some of the charges against the defendant were for disobeying orders, and it was stated that those orders were made and communicated to him, but their continuance in force was not averred, it was ruled that the orders must be taken to continue in force until revoked (*f*).

Sect. III.—Fraud.

General.—A public officer may be indicted for frauds committed in his official capacity. Thus where two persons were indicted for enabling others to pass their accounts with the pay office in such a way as to enable them to defraud the Government, though it was objected that it was only a private matter of account and not indictable, the Court held otherwise, as it related to the public revenue (*g*). And an indictment or criminal information will lie for failing to account for money received *virtute officii* (*h*); for defrauding the Crown in the purchase of stores by means of false vouchers (*i*) and generally for frauds in office (*j*), whether the officer is employed in England or in a British possession (*k*), or even in a foreign country (*l*). As to offences outside the realm and in India, *vide ante*, pp. 609, 610.

Justices' Clerks.—A justices' clerk has been held to be indictable for refusing to pay over to the county treasurer half of the penalty imposed by justices under sect. 26 (now repealed) of the Alehouse Act, 1828 (9 Geo. IV. c. 61) (*m*).

Overseers.—An overseer of the poor who had received from the putative father of a bastard child born within the parish a sum of money as a composition with the parish for the maintenance of the child, was held liable to indictment for fraudulently omitting to give credit for this sum in his accounts with the parish (*n*). It was objected that the defendant was not bound to bring this sum to account, the contract being illegal (*o*); that the whole might have been recovered back, and that the defendant himself would have been personally answerable for it to the putative father; that the money, therefore, was not the money of the parish, and that the parish was neither defrauded nor damnified by its being omitted in the overseer's accounts. But Lord Ellenborough was of opinion, that though the defendant would have been liable to the putative father for so much of the money as was not expended upon the maintenance of the child and the lying-in of the mother, yet having

was an indictment under the East India Company Act, 1784 (24 Geo. III. c. 25). The statute made wilful neglect of duty a misdemeanor; and it was held that the indictment need not aver corruption. Ss. 1–63 of the Act were repealed in 1872 (35 & 36 Vict. c. 63).

(*e*) R. *v.* Hollond, *ubi supra*.

(*f*) Id. ibid.

(*g*) R. *v.* Bembridge, 20 St. Tr. 1, *vide ante*, p. 601. R. *v.* Baxter [1851], 5 Cox, 302, and MS. C. S. G., Patteson, J.

(*h*) R. *v.* Hodgkinson (Q.B.D.), June 26, 1900, Archb. Cr. Pl. (23rd ed.) 1014.

(*i*) R. *v.* Davison, 31 St. Tr. 99.

(*j*) R. *v.* Jones, 8 East, 31. R. *v.* Hedges, 28 St. Tr. 1315. R. *v.* Holland, 5 T. R. 607.

(*k*) R. *v.* Jones, *ubi supra*. R. *v.* Munton, 1 Esp. 62.

(*l*) R. *v.* Turner [1889], 24 L. J. Newsp. 466, 469, 479 (a British official in South America). R. *v.* Hodgkinson, *ubi supra* (the case of a British consul in Germany).

(*m*) R. *v.* Dale, Dears. 47.

(*n*) R. *v.* Martin, 2 Camp. 268.

(*o*) See Townson *v.* Wilson, 1 Camp. 396.

taken the money as overseer for the benefit of the parish, he was bound to bring it to account, and that he was guilty of an indictable offence by attempting to put it into his own pocket.

Wilful disobedience by overseers, assistant overseers, and officers of a parish or union to the *legal* and reasonable orders of justices and guardians in carrying to execution the Poor Law Acts or orders is summarily punishable by statute (*p*).

Wilful neglect of the rules, regulations or orders of the Local Government Board under the Poor Law Acts is also punishable by statute, and on the third offence as a misdemeanor or indictment by fine of not less than £20 and imprisonment (*q*).

Registrars.—By the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 46, 'If any registrar or other person employed in the register office is party or privy to any act of fraud or collusion in relation to the registration of any assurance, will, or other instrument under this Act, or the giving of any certificate or copy, or the making of any search or the taking of any extract or copy under this Act, or any rules made thereunder, he shall be guilty of a misdemeanor and shall upon conviction on indictment be liable to imprisonment with or without hard labour for any period not exceeding two years.

Sect. IV.—Extortion.[1]

Extortion in a large sense signifies any oppression under colour of right: but in a more strict sense signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due (*r*).

The offence of extortion is a misdemeanor at common law punishable by fine and imprisonment: and also by removal from the office in the execution whereof it was committed (*s*). It was regarded of special gravity when officers of the law took money for their judgments or for the release of prisoners in their custody (*t*).

By 3 Edw. I. (*Stat. West. prim.*), c. 26 (1275), it is enacted that 'no sheriff *nor other the King's officer* take any reward to do his office, but shall be paid of that which they take by the King; and he that so doth shall

(*p*) 4 & 5 Will. IV. c. 76, s. 95. Cf. 17 Geo. II. c. 38, s. 14.

(*q*) 4 & 5 Will. IV. c. 76, s. 96.

(*r*) 1 Hawk. c. 68, s. 1. 1 Bl. Com. 141. Beawfage's case, 10 Co. Rep. 100, 102.

(*s*) 1 Hawk. c. 68, s. 5. Bac. Abr. tit. 'Extortion.'

(*t*) See Beawfage's case, *ubi supra*.

American Note.

[1] As to extortion in America, see Williams *v.* Sneed, 160; S. *v.* Brown, 12 Minn. 490; P. *v.* Rust, 1 Caines, 130; C. *v.* Bayley, 7 Pick. 279. There are many statutes in America which deal with this offence. Bishop Amer. Cr. L. ii. s. 404.

It seems that in America a person who is not an officer, but who serves as such and claims to be such, is estopped from denying his official appointment. Bishop, ii. s. 392, citing 1 Gab. Crim. Law, 783; S. *v.* McIntyre, 3 Irel. 171, 174; S. *v.* Sellers, 7 Rich. 368, 372; P. *v.* Cook, 4 Seld. 67, 59 Am. Dec. 451. This is said to follow from the maxim '*omnia presumuntur rite esse acta*' where a man is doing a lawful thing, and it is presumed to be done lawfully; but if a man does an unlawful act it cannot be presumed that he does it lawfully. Some offences are in America called 'extortion' where the defendant cannot be called an officer at all, see Bishop, ii. s. 392.

yield twice as much and shall be punished at the King's pleasure' (*u*). An action lies to recover the double value (*v*). This enactment is repealed as to sheriffs and their officers by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), and replaced by sect. 29 (2) of that Act, *ante*, p. 607, and is superseded as to coroners by sect. 8 (2) of the Coroners Act, 1887 (50 & 51 Vict. c. 71). As to extortion by Indian officials, see 33 Geo. III. c. 52, s. 62, *ante*, p. 610.

Where a *collector of post-horse duty* demanded a sum of money of a person, charging with having let out post-horses without paying the duty, and threatened him with an Exchequer process, and he thereon gave him a promissory note for five pounds, which was afterwards paid and the proceeds handed over to the farmer of the post-horse duties, it was held to be extortion (*w*).

Official Fees.—Justices of the peace are bound by the old form of their oath of office (*x*) to take nothing for the execution of their office but of the King, and fees accustomed, and costs limited by statute. And no public officer may take any other fees or rewards for doing anything relating to his office than some statute in force gives him, or such as have been anciently and accustomably taken; and if he does otherwise, he is guilty of extortion (*y*). All prescriptions contrary to the statute and to the common law have always been held void; as where the clerk of a market claimed certain fees as due time out of mind for the examination of weights and measures (*z*).

The stated and known fees allowed by courts of justice to their respective officers are not restrained by the common law, or by 3 Edw. I. c. 26, *supra*, and at common law may be legally demanded and insisted upon without extortion (*a*). An officer who takes a reward, voluntarily given to him, and usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success (*b*). But it has been always held, that a promise to pay an officer money for the doing of a thing for which the law will not suffer him to take anything is merely void, however freely and voluntarily made (*c*).

The following statutes impose penalties for offences in the nature of extortion by taking excessive or illegal fees:—Officers of the High Court (15 & 16 Vict. c. 73, s. 26, common law; 15 & 16 Vict. c. 87, ss. 3, 4, chancery); bailiffs of inferior Courts (7 & 8 Vict. c. 19, s. 3), or of County Courts (51 & 52 Vict. c. 43, s. 50); clerks of Courts of Assize and Quarter Sessions for taking certain fees as to discharge of recognizances or for drawing indictments (10 Will. III. c. 12, ss. 7, 8), or on discharge of

(*u*) By the 'king's pleasure' is meant by the king's justices before whom the cause depends, and at their discretion, 2 Co. Inst. 210.

(*v*) Com. Dig. 323, tit. 'Extortion' (C).

(*w*) R. *v.* Higgins, 4 C. & P. 247, Vaughan, B.

(*x*) See Burn's Justice (17th ed.), vol. 3, Justice of Peace, p. 21. The penal oath of office contains no express reference to fees. Archbold, Q.S. (6th ed.).

(*y*) Dalt. c. 41. Burn's Just. tit. 'Extortion.'

(*z*) 1 Hawk. c. 68, s. 2. Bac. Abr. tit. 'Extortion.'

(*a*) 1 Hawk. c. 68, s. 3. 2 Co. Inst. 210. Co. Lit. 368. Bac. Abr. tit. 'Extortion.'

(*b*) Bac. Abr. tit. 'Extortion.' 2 Co. Inst. 210; 3 Co. Inst. 149. Co. Lit. 368.

(*c*) Bac. Abr. tit. 'Extortion.'

accused persons (53 Geo. III. c. 50, ss. 4, 5, 9; 8 & 9 Vict. c. 114, s. 1); and clerks of the peace for receiving excessive fees (57 Geo. III. c. 91, s. 2; 11 & 12 Vict. c. 43, s. 30; 45 & 46 Vict. c. 50, s. 164); and clerks of justices for taking excessive fees (26 Geo. II. c. 14, s. 2).

Coroners.—Extortion by a coroner or his deputy is a statutory misdemeanor (*d*). It is extortion for a coroner to accept a bribe under a threat to hold an unnecessary inquest (*e*), or to refuse to view a body until the fees of himself and his clerk have been paid (*f*).

Gaolers.—It is extortion for a gaoler to obtain money from his prisoner by colour of his office (*g*), or to detain the corpse of a prisoner in order to enforce a claim for his charges (*h*). And by the Gaol Fees Abolition Act, 1815 (55 Geo. III. c. 50), s. 13, it is a misdemeanor for a gaoler to exact fees from prisoners for or on account of their entrance, commitment, or discharge, or to detain a prisoner for non-payment of a fee or gratuity. Prison officers incur penalties for taking fees (28 & 29 Vict. c. 126, ss. 20, 66).

Churchwardens.—It has been held extortion in a churchwarden (*i*) to obtain a silver cup or any other valuable thing by colour of his office; and that he is indictable if he take money corruptly *colore officii* and does not account for it (*j*).

Ecclesiastical Officers.—It has been held to be extortion for the chancellor and registrar of a bishop to oblige the executor of a will to prove it in the Bishop's Court and to take fees thereon when they knew that the will had already been proved in the Prerogative Court (*k*).

Franchise Holders.—Where custom has ascertained the toll, if the *miller* takes more than the custom warrants, it is extortion (*l*); and the same if a *ferryman* takes more than his due by custom for the use of his ferry (*m*). And where the *farmer of a market* erected so many stalls, as not to leave sufficient room for the market people to stand and sell their wares, so that for want of room they were forced to hire the stalls of the farmer, taking money for the use of the stalls in such a case was held extortion (*n*).

By sect. 50 of the Turnpike Act, 1823 (4 Geo. IV. c. 95), no person who shall take more toll than he is authorised to take, shall be prosecuted by indictment for extortion, or otherwise (*o*).

Sheriffs.—Extortion by sheriffs and their officers is punishable under 50 & 51 Vict. c. 55, s. 29, set out *ante*, p. 607. It is extortion for an undersheriff to obtain his fees by refusing to execute process till they are

(*d*) 50 & 51 Vict. c. 71, s. 8 (2), *ante*, p. 602. 55 & 56 Vict. c. 56, s. 1 (5).
(*e*) R. *v.* Harrison, 3 Co. Inst. 149.
(*f*) 1 East, P. C. 382.
(*g*) See R. *v.* Broughton, Trem. P.C. 111. 32 Geo. II. c. 28, ss. 11, 12, repealed in 1887 as to sheriffs and their officers.
(*h*) R. *v.* Scott, 2 Q.B. 248 n. R. *v.* Fox, ibid. 246. And see Jones *v.* Ashburnham, 4 East, 455, 460.
(*i*) As to the present position of these officers, see *ante*, p. 604.
(*j*) R. *v.* Eyres, 1 Sid. 307.
(*k*) R. *v.* Loggen, 1 Str. 73.
(*l*) R. *v.* Burdett, 1 Ld. Raym. 149.
(*m*) R. *v.* Roberts, 4 Mod. 101.
(*n*) R. *v.* Burdett, 1 Ld. Raym. 149.
(*o*) This is not repealed, but the unrepealed portion of the Act is now treated as local and personal (see 53 & 54 Vict. c. 51, s. 3. S. L. R.), and all turnpike trusts are now expired. In R. *v.* Hamlyn, 4 Camp. 379, it had been decided that questions of exemption from toll could not be tried by indicting the turnpike keeper for extortion in taking the toll.

paid (*p*) and for a sheriff's officer to bargain for money to be paid him by A. to accept A. and B. as bail for C. whom he has arrested (*q*), or to arrest a man in order to obtain a release from him (*r*).

Indictment.—Two persons may be indicted jointly for extortion where no fee was due. Upon an indictment against the chancellor and the registrar of a bishop, it was objected that the offices of the defendants were distinct, that what might be extortion in one might not be so in the other, and that therefore the indictment ought not to be joint. But Parker, C.J., said: 'This would be an exception if they were indicted for taking more than they ought; but it is only against them for contriving to get money where none is due: and this is an entire charge. For there are no accessories in extortion (*s*): but he that is assisting is as guilty as the extortioner, as he that is party to a riot is answerable for the acts of others' (*t*). And an indictment against three averring that they, *coiore officiorum suorum*, took so much, is good, for they might take so much in gross, and afterwards divide it amongst them, of which the party grieved could have no notice (*u*).

An indictment for extortion is triable in the county where the offence was committed (*v*) and is within the jurisdiction of Courts of Quarter Sessions (*w*). A count for extortion ought to charge a single offence only; because every extortion from every particular person is a separate and distinct offence, and each offence requires a separate and distinct punishment, and therefore a count charging the defendant with extorting divers sums exceeding the ancient rate for ferrying men and cattle over a river was held bad (*x*). The indictment must state a sum which the defendant received: but it is not material to prove the exact sum as laid in the indictment; so that on an indictment for taking extortionately twenty shillings, proof of but one shilling will be sufficient (*y*). An indictment for extortion, where nothing was due, ought to state that nothing was due (*z*); and if it is for taking more than was due, it ought to shew how much was due (*a*). The offence lies in the taking, not in the extortionate agreement, and a pardon after the agreement and before the taking does not pardon the extortion (*b*).

(*p*) Empson *v.* Bathurst, Hutt. 52, where it is said that an obligation made by extortion is against common law, for it is as robbery; and that the sheriff's fee is not due until execution. See Beawfage's case, 10 Co. Rep. 100.

(*q*) Stotesbury *v.* Smith, 2 Burr. 924.

(*r*) Williams *v.* Lyons, 8 Mod. 189.

(*s*) *Vide ante*, p. 138.

(*t*) R. *v.* Loggen, 1 Str. 75. *Quære*, whether this was not an indictment for a conspiracy to defraud, and not for extortion. But as to the rule, that several persons may be jointly indicted for extortion, see R. *v.* Atkinson, Ld. Raym. 1248; 1 Salk. 382.

(*u*) Lake's case, 3 Leon. 268. Com. Dig. tit. 'Extortion.'

(*v*) It was said that under 31 Eliz. c. 5, s. 4, extortion could be tried in any county. 1 Hawk. c. 68, s. 6, note (3). Burn's Justice, tit. 'Extortion.' Starkie, Cr. Pl. 385, note (*k*). But this enactment was repealed in 1879 (42 & 43 Vict. c. 59).

(*w*) 2 Hawk. c. 26, s. 50. 2 Chit. Cr. L. 294n. The old form of commission of the peace contained the word 'extortions.' The present form, coupled with 5 & 6 Vict. c. 38, s. 1, is wide enough to include the offence.

(*x*) R. *v.* Roberts, Carth. 226.

(*y*) R. *v.* Burdett, 1 Ld. Raym. 149. And see R. *v.* Gillham, 6 T. R. 267.

(*z*) R. *v.* Lake, 3 Leon. 268. Com. Dig. tit. 'Extortion.'

(*a*) Ibid.

(*b*) R. *v.* Burdett, 1 Ld. Raym. 149, Holt, C.J.

Sect. V.—Of Refusal to serve a Public Office.

It is a misdemeanor at common law punishable by fine and (or) imprisonment to refuse to serve a public office when duly elected (*c*). And the refusal of persons to execute ministerial offices to which they are duly appointed, and from the execution of which they have no proper ground of exemption (*d*), seems in general to be punishable by indictment. Indictments for this offence have not been presented for many years, and the existing precedents appear to apply only to parochial or corporate offices filled by election, except one, which relates to the refusal of a sheriff to take up his office or appointment (*e*).

The indictment must aver that the defendant had notice of his appointment to the office in question (*f*).

Constables.—It is indictable for a constable, after he has been duly chosen, to refuse to execute the office (*g*), or to refuse to take the oath for that purpose (*h*). But a person is not liable to serve the office of constable unless he is resident in the parish. Where, therefore, a person occupied a house, and paid all parish rates in respect of it, and carried on the trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night at work, but not sleeping in the house, it was held that he was not liable to serve the office of constable in the parish where the house was situated (*i*). But where a person occupied a warehouse in M., and usually slept at a lodging-house in M. from Monday till Saturday, when he returned to his mother's in H., where he also had premises, and he did suit and service to the court-leet of H., the Court thought that he was liable to be appointed a constable of M. (*j*).

Mayors, &c.—In the case of mayors, aldermen and persons elected to serve in municipal office, refusal to serve is punishable by fine, which in practice, if not in law, supersedes the remedy by indictment (*k*).

(*c*) R. *v.* Bower, 1 B. & C. 587. R. *v.* Denison, 2 Ld. Kenyon, 259.

(*d*) For exemption from service in parochial offices, see Archb. Cr. Pl. (23rd ed.) 1251n.

(*e*) R. *v.* Woodrow, 2 T. R. 731.

(*f*) R. *v.* Fearnley, 1 T. R. 316. R. *v.* White, Cald. 183. R. *v.* Winship, Cald. 72. R. *v.* Kingston, 8 East, 41.

(*g*) R. *v.* Lowe, 2 Str. 92. R. *v.* Chapple, 3 Camp. 91. R. *v.* Genge, 1 Cowp. 13. R. *v.* Clerke, 1 Keb. 393. By the Parish Constables Act, 1872 (35 & 36 Vict. c. 92), after the March 24, 1873, no parish constable shall be appointed except as therein provided.

(*h*) R. *v.* Harpur, 5 Mod. 96. Fletcher *v.* Ingram, 5 Mod. 127.

(*i*) R. *v.* Adlard, 4 B. & C. 772; 7 D. & R. 340. See Donne *v.* Martyr, 8 B. & C. 62.

(*j*) R. *v.* Mosley, 3 A. & E. 488. See this case as to what is an excessive fine for refusing to serve the office. It is sufficient, in an indictment for refusing to execute the office of constable, to state that the defendant unlawfully, &c., 'did neglect and refuse to take upon himself the execution of the said office;' and it is not necessary to state that he refused to be sworn. R. *v.* Brain, 3 B. & Ad. 614. Upon such an indictment, proof that he refused to be sworn is sufficient *prima facie* evidence of a refusal to take the office; but if it were proved that, although not sworn, he had acted as constable, the refusal to take the oath would not prove that he refused to take the office. Ibid. Where there is a special custom of swearing in constables, as in the City of London, it is unnecessary to set such custom out in the indictment. Where, if an indictment for refusing to serve the office of constable on being thereto chosen by a corporation did not set forth the prescription of the corporation so to choose, it was bad; for a corporation has no power of common right to choose a constable. R. *v.* Barnard, 1 Ld. Raym. 94.

(*k*) 45 & 46 Vict. c. 50, s. 34; 51 & 52 Vict. c. 41, s. 75; 56 & 57 Vict. c. 73, s. 48; 62 & 63 Vict. c. 14, ss. 7, 34.

Overseers of the Poor.—A person is indictable for refusing to take upon himself the office of overseer of the poor (*l*). For though the Poor Law Act, 1601 (43 Eliz. c. 2), says only that certain persons therein described shall be overseers, and gives no express indictment for a refusal of the office, yet upon the principles of the common law, which are that every man shall be indicted for disobeying a statute, the refusal to serve when duly appointed is indictable (*m*). But there should be previous notice of the appointment, and the indictment should shew that the defendant was bound to undertake the office by setting forth how he was elected (*n*).

(*l*) R. *v.* Jones, 2 Str. 1145. 1 Bott. 360, pl. 377. R. *v.* Poynder, 1 B. & C. 178. R. *v.* Hall, 1 B. & C. 123.

(*m*) R. *v.* Jones, *ubi supra*.

(*n*) R. *v.* Harpur, 5 Mod. 96. In R. *v.* Burder, 4 T. R. 778, it was held that an appointment of an overseer of the poor *for the year next ensuing* must be understood to be for *the overseer's year :* and an indictment, stating that the defendant was appointed 'overseer of the poor of the parish of A.' and that he afterwards refused 'to take the said office of overseer of the parish to which he was so appointed,' was held good on demurrer.

CANADIAN NOTES.

OF OFFENCES WITH RESPECT TO PUBLIC OFFICE, ETC.—OF MISCONDUCT IN OFFICE.

Sec. 1.—*Misconduct of Officers Entrusted with Execution of Writs.*—Code sec. 166.

Amount of Fine.—Code sec. 1029.

Term of Imprisonment.—Code sec. 1052.

Neglect of Duty.—On a trial of an indictment charging a misdemeanour against the principal Registrar of Deeds of a county and his deputy jointly for misfeasance in not recording deeds in their due order, it was objected that they could not be indicted together in one indictment and legally convicted at one and the same time; but it was held by the full Court on the points reserved, that though the principal might perhaps not be indictable for the wrongful act of his deputy committed in his absence and without his knowledge or consent, it is a different thing when he is present and knowing and consenting to the act; that in such a case both are wrong-doers and *particeps criminis*. It was also contended, in the same case, that the deputy registrar could not be legally convicted so long as his principal legally held the office; but it was held that the deputy was liable to be indicted not only while the principal holds office, but even after the deputy himself has been dismissed from his office. R. v. Benjamin (1853), 4 U.C.C.P. 179.

Sec. 3.—*Frauds.*

Frauds upon Government.—Code sec. 158.

Consequences of Conviction.—Code sec. 159.

Breach of Trust by Public Officer.—Code sec. 160.

Sec. 4.—*Extortion.*

In R. v. Tisdale (1860), 20 U.C.Q.B. 272, two justices of the peace were tried before McLean, J., and a jury and found guilty upon an indictment for extortion in exacting from a person charged on a preliminary enquiry before them with a felony 25 shillings as fees due to them as justices and for fees for his arrest. The magistrates had held that the charge was not sustained by the evidence, but had collected the costs above mentioned from the accused as a condition of his discharge.

The offence is not constituted by demand only without actual receipt of the illegal fee. *Ibid;* Parsons v. Crabb, 31 U.C.C.P. 151.

The statute of 1275, 3 Edw. I. ch. 26, which deals with both civil and criminal process therefor, is declaratory of the common law in enacting the offence of extortion by the King's officers to be indictable; the offence is a common law misdemeanour punishable on indictment or information by fine and imprisonment and removal from office. *Ibid.* The repeal of that statute as regards Ontario by Ont. Stat. 1902, 2 Edw. VII. ch. 1, is in terms as well as constitutionally limited to such portions of same as are within the provincial legislative authority. Stat. Law Revision Act (Ont.), 1902, ch. 1, sec. 2.

Evidence of corrupt motive must be adduced in order to obtain leave to exhibit a criminal information against a justice of the peace for malfeasance of office. The King v. Currie, 11 Can. Cr. Cas. 343.

Misbehaviour in office is an indictable offence at common law and it is not essential that pecuniary damage should have resulted to the public by reason of such irregular conduct, nor that the defendant should have acted from corrupt motives. R. v. John R. Arnoldi (1893), 23 O.R. 201. A man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office. R. v. Bembridge, 22 St. Tr. 1, 3 Doug. 327. And where there is a breach of trust, fraud or imposition in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. *Ibid.*

CHAPTER THE SECOND.

OF BUYING AND SELLING PUBLIC OFFICES.

Common Law.—The buying and selling of offices of a public nature has been held a misdemeanor and indictable at common law (*a*). In R. *v.* Vaughan (*b*) Lord Mansfield said that a great officer of the Crown, at the head of the Treasury and in the King's confidence, would be guilty of a misdemeanor in selling his interest with the King on procuring an office (*c*) and 'wherever it is a crime to take it is a crime to give; they are reciprocal.' That case was an attempt, by offering a bribe to the Duke of Grafton, then first Lord of the Treasury and a Privy Councillor, to procure the grant to the defendant of a patent of the reversion to the office of clerk in the Supreme Court of Jamaica. On an indictment for conspiracy to obtain money, by procuring from the Lords of the Treasury the appointment of a person to an office in the customs (*d*), it was proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of coast-waiter. But Ellenborough, C.J., said that if that were to be made a question, it must be debated on a motion in arrest of judgment, or on a writ of error; but that, after reading R. *v.* Vaughan, it would be very difficult to argue that the offence charged in the indictment was not a misdemeanor. And Grose, J., afterwards, in passing sentence, said that there could be no doubt but that the offence charged was clearly a misdemeanor at common law.

Where the defendant, who was clerk to the agent for the French prisoners of war at Porchester Castle, took bribes in order to procure the exchange of some of them out of their turn, it appears to have been made the subject of an indictment (*e*).

Statutes.—The principal statutes against the sale of public office still in force (*f*) are hereunder stated.

(*a*) Stockwell *v.* North, Noy, 102; Moore (K.B.) 781. 1 Hawk. c. 67, s. 3. Bac. Abr. tit. 'Offices and Officers.' 3 Chit. Cr. L. 681.

(*b*) 4 Burr. 2494, 2500.

(*c*) He added: 'I suppose that most of the impeachments against ministers have been for taking money to procure offices grantable by the Crown.'

(*d*) R. *v.* Pollman, 2 Camp. 229n.

(*e*) R. *v.* Beale, cited in R. *v.* Gibbs, 1 East, 183.

(*f*) 12 Rich. II. c. 2 enacted, 'that the chancellor, treasurer, keeper of the privy seal, steward of the King's house, the King's chamberlain, clerk of the rolls, the justices of the one bench and of the other, barons of the Exchequer, and all other that shall be called to ordain, name, or make, justices of the peace, sheriffs, escheaters, customers, comptrollers, or any other officer or minister of the King, shall be firmly sworn that they shall not ordain, name, or make, any of the above-mentioned officers for any gift or brokage, favour, or affection; nor that none which pursueth by himself, or by other, privily or openly, to be in any manner of office, shall be put into the same office, or in any other, but that they make all such officers and ministers of the best and most lawful men, and sufficient to their estimation and knowledge.' This Act was repealed in 1871 (34 & 35 Vict. c. 48). As to its meaning, effect, and extent, see Earl of Macclesfield's case, 16 St. Tr. 767.

The Sale of Offices Act, 1551 (5 & 6 Edw. VI. c. 16) (*g*), for the avoiding of corruption which may hereafter happen to be in the officers and ministers, in places or rooms wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced to the place where justice is to be ministered, &c., should hereafter be preferred to the same and none other, enacts (sect. 1) that if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices or for the deputation of any office or offices, or any part of any of them, or to the intent that any person should have, exercise, or enjoy any office or offices . . . which office or offices, or any part or parcel thereof, shall in anywise concern the administration or execution of justice, or the receipt, controlment, or payment of the King's . . . treasure, rent, revenue, account alneage, auditorship or surveying of any of the King's . . . honours, castles, manors, lands, tenements, woods or hereditaments, or any of the King's . . . customs (*h*) or any other administration, or necessary attendance to be had, done or executed in any of the King's Majesty's custom house or houses, or the keeping of any of the King's towns, castles, or fortresses being used, occupied, or appointed for a place of strength and defence, or which shall concern or touch any clerkship in any court of record wherein justice is to be ministered; the offender shall not only lose and forfeit all his right, interest and estate in or to such office or deputation of office, but also shall be adjudged a person disabled to have, occupy, or enjoy such office or deputation. The statute further enacts (sect. 2) that such bargains, sales, bonds, agreements, &c., shall be void; and provides (sect. 3) that the Act shall not extend to any office whereof any person shall be seised of any estate of inheritance, nor to any office of the keeping of any park, house, manor, garden, chase, or forest. It also provides (sect. 4) that all judgments given or things done by offenders, after the offence and before the offender shall be removed from the exercise of the office or deputation, shall be good and sufficient in law (*i*).

There are many decisions on this Act collected in Chit. Stat. vol. 8, tit. 'Offices (against sale of).'

The following offices have been held to fall within the purview of the Act: Chancellor, registrar, and commissary in ecclesiastical courts and surrogates (*j*); cofferer (*k*), surveyor of the customs (*l*); customer of

(*g*) See Co. Lit. 234 *a*. The Act does not extend to Ireland. Macarty *v.* Wickford, Trin. 9 Geo. IV. K. B. Bac. Abr. 'Offices and Officers' (but *vide* 49 Geo. III. c. 126): nor to the colonies: Blankard *v.* Galdy, 2 Salk. 411; 2 Ld. Raym. 1245. Daws *v.* Pindar, 3 Keb. 26; and see Bac. Abr. 'Offices and Officers' (F). But if the office, though in the plantations, had been granted under the great seal of England, the sale of it would have been held criminal at common law. R. *v.* Vaughan, 4 Burr. 2494, 2500, Lord Mansfield.

(*h*) The Act was repealed in 1825 (6 Geo. IV. c. 105, s. 10), so far as regards the customs or officers in the service of the customs.

(*i*) Ss. 5, 6 were repealed in 1863 (S.L.R.).

(*j*) 12 Co. Rep. 78. 3 Co. Inst. 148. Dr. Tudor's case, Cro. Jac. 269. Robotham *v.* Taylor, 2 Brownl. 11. Tuxton *v.* Morris, 2 Ch. Cas. 42. 1 Hawk. c. 67, s. 4.

(*k*) Sir Arthur Ingram's case, 3 Bulst. 91; Co. Lit. 234, where it is said that the king could not dispense with this statute by any *non obstante*. See also Cro. Jac. 385.

(*l*) 2 And. 55, 107.

a port (*m*); of collector and supervisor of the excise (*n*); clerk of the crown, and clerk of the peace (*o*); gaolers (*p*); and stewards of Courts leet (*q*). But offices in fee have been held to be out of the statute (*r*); nor was the sale of a bailiwick of a hundred within it, for such an office did not concern the administration of justice, nor is it an office of trust (*s*). And for the like reason the office of clerk to the deputy registrar in the prerogative Court of Canterbury was held to be not within the Act (*t*). A seat in the six clerks' office was not within the statute, being a ministerial office only (*u*); the statute did not extend to military officers (*v*). In Purdy *v.* Stacy (*w*), Lord Mansfield said that if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corruptor and corrupted.

One who makes a contract for an office in violation of the Act is absolutely disabled for life from holding the office and his capacity cannot be restored by any grant or dispensation whatever (*x*).

Deputation.—Where an office is within the statute, and the salary is certain, if the principal makes a *deputation* reserving a less sum out of the salary, it is good. And if the profits are uncertain, and arise from fees, if the principal makes a deputation reserving a certain sum out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay unless the profits arise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continuing to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute (*y*).

This Act is recited and much extended by the Sale of Offices Act, 1809 (49 Geo. III. c. 126), which enacts (sect. 1), that 'all the provisions therein contained shall extend to Scotland and Ireland, and to all offices in the gift of the Crown, or of any office appointed by the Crown, and all commissions, civil, naval, or military (*z*), and to all places and employments, and to all deputations to any such offices, commissions, places, or employments, in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer, or commissioners of the Treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral (*a*). . . . The

(*m*) 1 H. Bl. 327.
(*n*) Law *v.* Law, 3 P. Wms. 391.
(*o*) Macarty *v.* Wickford, Trin. 9 Geo. II. K.B. Bac. Abr. 'Offices and Officers' (F). See *post*, p. 626.
(*p*) Stockwith *v.* North, Moore, K.B. 781.
(*q*) Williamson *v.* Barnsley, 1 Brownl. 70.
(*r*) Ellis *v.* Ruddle, 2 Lev. 151.
(*s*) R. *v.* Godbolt, 4 Leon. 33.
(*t*) Aston *v.* Gwinnell, 3 Y. & J. 136.
(*u*) Sparrow *v.* Reynold, Pasch. 26 Car. 2 (C. B.). Bac. Abr. 'Offices and Officers' (F).
(*v*) 1 Vern. 98.
(*w*) 5 Burr. 2698. There is a ruling in 2 Vern. 308; and cas. *temp.* Talbot, 40, that the Act did not apply to pursers, which was described by Lord Loughborough as contrary to an evident principle of law. 1 H. Bl. 326.
(*x*) Hob. 75. Co. Lit. 234. Cro. Car. 361. Cro. Jac. 386. Cas. *temp.* Talb. 107.
(*y*) Bac. Abr. 'Offices and Officers' (F). 1 Hawk. c. 67, s. 5. Salk. 468. 6 Mod. 234. Godolphin *v.* Tudor, Comb. 356.
(*z*) 5 & 6 Edw. VI. c. 16, did not apply to military officers: see note (*v*), *supra*.
(*a*) The parts here omitted were repealed in 1872 (35 & 36 Vict. c. 97).

commander-in-chief . . . and also the principal officers of any other public department (*b*), or office of his Majesty's government in any part of the United Kingdom, or in any of his Majesty's dominions, colonies, or plantations, which now belong or may hereafter belong to his Majesty (*c*); and also to all offices, commissions, places, and employments belonging to or under the appointment or control of the East India Company (*d*), in as full and ample a manner as if the provisions of the said Act were repeated, as to all such offices, commissions and employments, and made part of this Act; and the said Act and this Act shall be construed as one Act, as if the same had been herein repeated and re-enacted.' By sect. 2 in case of forfeiture the right of appointment vests in the Crown.

Sect. 3. '. . . If any person or persons shall sell, or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond or assurance, or shall by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, and also if any person or persons shall purchase, or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance to give or pay any money, fee, gratuity, loan of money, reward or profit, or shall by any ways, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any office, commission, place or employment, specified or described in the said recited Act [of 1551, *ante*, p. 620] or this Act, or within the true intent or meaning of the said Act, or this Act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons, to any such appointment, nomination, or resignation; then and in every such case, every such person, and also every person who shall wilfully and knowingly aid, abet or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor.'

By sect. 4, '. . . If any person or persons shall receive, have or take, any money, fee, reward, or profit, directly or indirectly, or take any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree to receive or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, or pretended to be made, or under any pretence of making, or causing or procuring to be made, any *interest, solicitation, petition, request, recommendation, or negotiation*, in or about

(*b*) *e.g.*, postmasters. Bourke *v.* Blake, 7 Ir. C. L. R. 348.

(*c*) See Grenville *v.* Atkins, 9 B. & C. 462.

(*d*) By the East India Company Act, 1793 (33 Geo. III. c. 52), s. 66, the making or entering into or being a party to any corrupt bargain or contract, for the giving up or obtaining, or in any other manner touching or concerning the trust and duty of any office or employment under the Crown, or the East India Company, by any British subject there resident, is to be deemed a misdemeanor. This Act appears to be superseded by 49 Geo. III. c. 126, *supra*. See the Government of India Act, 1858 (21 & 22 Vict. c. 106).

or in anywise touching, concerning, or relating to, any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment, as aforesaid, or under any pretence for using or having used any interest, solicitation, petition, request, recommendation, or negotiation, in or about any such nomination, appointment, deputation, or resignation, or for the obtaining or having obtained the consent or consents, or voice or voices, of any person or persons, as aforesaid to such nomination, appointment, deputation, or resignation; and also if any person or persons shall give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward, or profit, or make, or cause, or procure to be made, any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree, or give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward or profit, for any solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, that shall in anywise touch, concern, or relate to any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment as aforesaid, or for the obtaining or having obtained, directly or indirectly, the consent or consents, or voice or voices, of any persons or person as aforesaid, to any such nomination, appointment, deputation, or resignation; and also if any person or persons shall, for or in expectation of gain, fee, gratuity, loan of money, reward, or profit, solicit, recommend, or negotiate in any manner, for any person or persons, in any matter that shall in anywise touch, concern, or relate to, any such nomination, appointment, deputation, or resignation aforesaid, or for the obtaining, directly or indirectly, the consent or consents, or voice or voices, of any person or persons to any such nomination, appointment, or deputation, or resignation aforesaid, then and in every such case every such person, and also every person who shall wilfully and knowingly aid, abet, or assist, such person therein, shall be deemed and adjudged guilty of a misdemeanor.'

By sect. 5, '. . . If any person or persons shall open or keep any house, room, office or place for the soliciting, transacting or negotiating in any manner whatever any business relating to vacancies in, to the sale or purchase of, or appointment, nomination, or deputation to, or resignation, transfer, or exchange of any offices, commissions, places, or employment whatever, in or under any further department, then, and in every such case, every such person, and also every other person who shall wilfully and knowingly aid, abet, or assist therein shall be deemed and adjudged guilty of a misdemeanor.'

By sect. 6, any person advertising any office, place, &c., or the name of any person as broker, &c., or printing any advertisement or proposal for such purposes, is liable to a penalty of £50.

Sect. 9 provides that the Act shall not extend to any office excepted from the Act of 1551, nor to any office which was legally saleable before the passing of this Act, and in the gift of any person by virtue of any office of which such person is or shall be possessed under any patent or appointment for his life (*e*).

e) Ss. 7, 8, and the rest of s. 9 were repealed in 1872 (S. L. R. No. 2).

Sect. 10 provides that the Act shall not extend to prevent or make void any *deputation* to any office, in any case in which it is lawful to appoint a deputy, or any agreement, &c., lawfully made in respect of any allowance or payment to such principal or deputy respectively, out of the fees or profits of such office (*f*).

By sect. 11, annual reservations, charges, or payments, out of fees or profits of any office, to any person who shall have held such office, in any commission, or appointment of any person succeeding to such office, and agreements, &c., for securing such reservations, charges, or payments, are also excepted; provided that the amount of the reservations, &c., and the circumstances and reasons under which they shall have been permitted, shall be stated in the commission or instrument of appointment of the successor (*g*).

By sect. 14, offences against the Acts of 1551 and 1809, by any governor, lieutenant-governor, or person having the chief command, civil or military, in his Majesty's dominions, colonies, or plantations, or his secretary, may be prosecuted and determined in the High Court of Justice in London or Middlesex (*h*), in the same manner as any crime, &c., committed by any person holding a public employment abroad may be prosecuted under the provisions of the Criminal Jurisdiction Act, 1802 (42 Geo. III. c. 85) (*i*).

Where by an agreement, reciting that the plaintiff carried on the business of a law stationer, and was sub-distributor of stamps, collector of assessed taxes, and that being desirous of giving up his said business, he had agreed with the defendant for the sale of the same for the sum of £300, it was witnessed that, in consideration of the sum of £300, the plaintiff agreed to sell and the defendant agreed to buy the said business of a law stationer so carried on by the plaintiff, and all his goodwill and interest therein, and that the plaintiff should not at any time afterwards carry on the business of a law stationer, or collect any of the assessed taxes, but would use his utmost endeavours to introduce the defendant to the said business and offices; it was held that the agreement was a contract for the sale of the offices of sub-distributor of stamps and collector of assessed taxes, and illegal within the Acts of 1551 and 1809. It was one entire contract, and the defendant could not be called upon to pay, except upon the performance by the plaintiff of the whole consideration. According to the plain words of the agreement, a part of the consideration was the agreement by the plaintiff to recommend the defendant to the offices, which was prohibited by the statutes (*j*).

Where a British subject, being a lieutenant in a regiment in the East India service, and divers other officers in the said regiment agreed with A. G., that the said lieutenant and other officers should subscribe and pay to the said A. G., being a major and their senior in the said regiment, and that he should accept from them a certain sum of money in consideration of his resigning his said position as major in the said regiment, and creating a vacancy of major therein, and the money was paid to A. G.,

(*f*) *Ante*, p. 621.

(*g*) S. 12 was repealed in 1872 (S. L. R. No. 2).

(*h*) In the place of the Court of King's Bench at Westminster, *vide ante*, p. 31.

(*i*) *Ante*, p. 609. S. 15 was repealed in 1872 (S. L. R. No. 2).

(*j*) Hopkins *v.* Prescott, 4 C. B. 578.

and he resigned his said position in pursuance of the said agreement; it was held that the agreement was illegal, under sect. 4 of the Act of 1809, and that a bond given in pursuance of it was void (*k*).

The sale of an East India Director's nomination to a cadetship was within sect. 3 of that Act, although by the practice of the Company such nomination is given only in the form of a presentation of the party by the director to the Court of Directors, 'provided he shall appear to' them 'eligible for that station,' and he must afterwards be examined by the committee appointed for that purpose, and passed: and although the nomination only gives the party, when examined and passed, a right to go out to India, which he must do at his own expense, and obtain a commission on his landing; but before that time he receives no pay from the Company, and is not under their control. For the object of the enactment was to prevent all corrupt bargains for the sale of patronage in matters of public concernment; and with that view it is immaterial whether that to which the nomination is sold can be described with most critical correctness by any of the terms, 'office, commission, place, or employment.' And a cadetship may be described in an indictment under the Act as an 'office, commission, place, and employment' (*l*).

A., an attorney, who held the offices of clerk of the peace for a liberty, clerk to the commissioners of land and assessed taxes, clerk to the commissioners of sewers, clerk to the magistrates, clerk to the deputy-lieutenants, steward of divers manors, and coroner to the said liberty, entered into articles of partnership with B., by which, after reciting that he held many offices, &c., and that it had been agreed that they should enter into partnership 'in the said business and in the emoluments of the said offices, &c., upon the terms thereinafter expressed,' it was agreed that they should enter into partnership for twenty years, and that 'all the profits and emoluments arising from the said offices,' &c., during the said partnership should be considered as partnership property, and distributed accordingly; it was also agreed that if A. died within the term then, during such period as no son of A. should be a partner in the said business, B. should be interested in one moiety of the said business, and the executors of A. should be entitled to the profits of the other moiety of the said business, to be applied as part of his personal estate; and it was held that the agreement was not a contract for the sale of an office within the Acts of 1551 and 1809 (*m*).

Where a count of an indictment for a misdemeanor in the sale of the office of a chaplain in the East Indies, alleged that the defendants unlawfully and corruptly did contract with D. N. to procure the appointment of a certain office and employment under the appointment and control of the East India Company, to wit, the office and employment of a chaplain in India, of a person duly qualified for the said office to be named by the said D. N. in that behalf; it was held that the count was bad; for the contract or agreement must be to receive money or

(*k*) Græme *v.* Wroughton, 11 Ex. 146.

(*l*) R. *v.* Charretie, 13 Q.B. 447. As to appointments in India, see the Government of India Acts, 1858 (21 & 22 Vict. c. 106), and 1861 (24 & 25 Vict. c. 104). Ilbert, Government of India (2nd ed.), 154.

(*m*) Sterry *v.* Clifton, 9 C. B. 110. It was also held that the latter clause was not a violation of 22 Geo. II. c. 46, s. 11, repealed by 7 & 8 Vict. c. 73.

profit, and the word 'corruptly' is not sufficient to bring it within the Act (*n*).

The Act of 1809 did not extend to purchases and exchanges of commissions in his Majesty's forces, at the regulated prices; or to anything done in relation thereto by authorised regimental agents not advertising and not receiving money, &c., in that behalf. But officers receiving, or paying, or agreeing to pay, more than the regulated prices, or paying agents for negotiating, on conviction by a court-martial, forfeited their commissions, and were cashiered.

By 'The Regimental Exchange Act, 1875' (38 & 39 Vict. c. 16), sect. 2, 'his Majesty may, from time to time, by regulation, authorise exchanges to be made by officers in his Majesty's regular forces from one regiment or corps to another regiment or corps, on such conditions as to his Majesty may for the time being seem expedient, and nothing contained in the Army Brokerage Acts (*o*) shall extend to any exchanges made in manner authorised by any regulation of his Majesty for the time being in force.'

By an Act of 1688 (1 Will. & M. c. 21), it is made unlawful for any *custos rotulorum* or other person who has the right to nominate, elect, or appoint a clerk of the peace (*p*) to sell the place or take any bond or assurance or to have any reward, fee, money, or profit, directly or indirectly, to him or to any other person for nominating, &c. If the appointing authority sells or the clerk buys the place each forfeits his office and double the sum or value of what is given or received, recoverable by action by a common informer, sect. 7 (*p*). The clerk must, on taking office, swear that he has not given nor will give anything for his appointment (sect. 8).

By the Clerk of Assize (Ireland) Act, 1821 (1 & 2 Geo. IV. c. 54), the Act of 1809 (*q*) is extended 'to prevent the sale or brokerage of the office of clerk of assize or *nisi prius* or judges' registrar in Ireland in as full and ample manner as if these offices had been mentioned in the Act of 1809 to all intents and purposes whatsoever' (sect. 7).

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55, s. 19), 'a sheriff shall not let to farm his county or any part thereof.'

By sect. 27, 'A person shall not directly or indirectly by himself or by any person in trust for him or for his use buy, sell, let, or take to farm the office of under-sheriff, deputy sheriff, bailiff, or any other office or place appertaining to the office of sheriff, nor contract for promise or grant for any valuable consideration whatever any such office or place, nor give promise or receive any valuable consideration whatever for any such office or place. Any person acting in contravention of the section not being an under-sheriff, deputy sheriff, bailiff, or sheriff's officer is to be punished as if he were such' (*r*).

(*n*) Samo *v.* R., 2 Cox, 178.

(*o*) Defined by s. 3 as meaning 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, *ante*, pp. 620, 621.

(*p*) The office would seem to be within 5 & 6 Edw. VI. c. 16. The appointment to the office is now made in counties in England by the joint committee of justices and the county council (51 & 52 Vict. c. 41, s. 83), and in boroughs by the town council (45 & 46 Vict. c. 50, s. 154).

(*q*) *Ante*, p. 621.

(*r*) As to punishment, see 50 & 51 Vict. c. 55, s. 29, *ante*, p. 607.

CANADIAN NOTES.

OF BUYING AND SELLING PUBLIC OFFICE.

By Statute—Selling or Purchasing Office.—Code sec. 162.

Receiving or Giving Reward for Interest, etc., About Public Office.—Code sec. 163.

Punishment.—Code sec. 1052.

CHAPTER THE THIRD.

BRIBERY AND CORRUPTION.

SECT. I.—BRIBERY OF PUBLIC OFFICERS.

BRIBERY is the receiving or offering any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity (*a*). 'Whenever a person is bound by law to act without any view to his private emolument, and another by a corrupt contract engages such person on condition of the payment of money or other lucrative consideration to act in a manner which he shall prescribe, both parties are by such contract guilty of bribery' (*b*).

It is an indictable misdemeanor at common law to bribe or to attempt to bribe (*c*) any person holding a public office, and for any person in an official position corruptly to use the power or interest of his position for rewards or promises, by asking for or accepting a bribe. Thus a clerk to the agent for French prisoners of war was indicted for taking bribes from the prisoners in order to obtain the exchange of some of them out of their turn (*d*).

It is immaterial whether the office is an office of the State (*e*), or in a public department (*f*), or is judicial (*g*), or ministerial (*h*), or municipal (*i*), or parochial (*j*).

As to bribery of jurymen, see 'Embracery,' *ante*, p. 598. As to bribery to obtain a public office, see 1 Hawk. c. 67, s. 3, and *ante*, p. 619. As to bribery in connection with elections, see *post*, p. 636. By 31 Eliz. c. 6, penalties are imposed with reference to bribery and corruption in the election, presentation, or nomination of

(*a*) 3 Co. Inst. 149. 1 Hawk. c. 67, s. 2. 4 Bl. Com. 139. 3 Steph. Hist. Cr. L. 250. The older definitions limit the offence to judicial officers: and the old form of the judicial oath expressly bound the judges not to take any gift from any person who had a plea pending before them. See Bodmin case, 10 M. & H. 124, Willes, J.

(*b*) 2 Douglas, Election Cases, 400.

(*c*) 'In many cases, especially in bribery at elections to Parliament, the attempt is a crime if it is completed on his side who offers it.' R. *v.* Vaughan, 4 Burr. 2494, 2500, Ld. Mansfield. *Vide ante*, p. 145.

(*d*) R. *v.* Beale [1798], 1 East, 183, *cit.* And see R. *v.* Vaughan, 4 Burr. 2494. R. *v.* Pollman, 2 Camp. 229.

(*e*) R. *v.* Vaughan, *ubi supra* (attempt to bribe a cabinet minister to give the defendant an office in Jamaica).

(*f*) R. *v.* Cassano, 5 Esp. 231 (Customs). R. *v.* Beale, *ubi supra*.

(*g*) 3 Co. Inst. 147. Earl of Macclesfield's case, 16 St. Tr. 767. R. *v.* Steward, 2 B. & Ad. 12. R. *v.* Vaughan, 4 Burr. 2494, 2500, Lord Mansfield. R. *v.* Harrison, 1 East, P.C. (Coroner).

(*h*) R. *v.* Richardson [1890], 111 Cent. Cr. Ct. Sess. Pap. 612. R. *v.* Lehwess [1904], 140 Cent. Cr. Ct. Sess. Pap. 731 (constables).

(*i*) R. *v.* Plympton, 2 Ld. Raym. 1377. R. *v.* Mayor of Tiverton, 8 Mod. 186. R. *v.* Steward, 2 B. & Ad. 12 (corporate offices).

(*j*) R. *v.* Lancaster, 16 Cox, 737 (assistant overseer). R. *v.* Joliffe, 1 East, 154 n.; 4 T. R. 285 (overseers).

fellows, scholars, &c., in churches, colleges, schools, hospitals, halls, or societies, and to simony and corrupt institution to or resignation of benefices. Bribery is now an extradition crime (*jj*).

Sect. II.—Corruption in Municipal Affairs.

Corruption.—By the Public Bodies (Corrupt Practices) Act, 1889 (52 & 53 Vict. c. 69), sect. 1—

(1) 'Every person who shall, by himself, or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive for himself or for any other person, any gift, loan, fee, reward, or advantage (*k*) whatever, as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body, as in this Act defined (*l*), doing, or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned shall be guilty of a misdemeanor.'

(2) 'Every person who shall by himself or by or in conjunction with any other person, corruptly give, promise, or offer any gift, loan, fee, award, or advantage whatsoever, to any person whether for the benefit of that person, or of another person, as an inducement to, or reward for, or otherwise, on account of any member, officer, or servant of any public body, as in this Act defined, doing, or forbearing to do, anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor.'

Punishment.—By sect. 2, 'Any person, on conviction, for offending as aforesaid, shall, at the discretion of the Court before which he is convicted—

a. be liable to be imprisoned for any period not exceeding two years, with or without hard labour, or to pay a fine not exceeding £500, or to both such imprisonment and such fine; and

b. in addition, be liable to be ordered to pay to such body, and in such manner as the Court directs, the amount or value of any gift, loan, fee, or reward received by him, or any part thereof; and

c. be liable to be judged incapable of being elected or appointed to any public office (*m*) for seven years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction, and

d. in the event of a second conviction for a like offence, he shall, in addition to the foregoing penalties, be liable to be adjudged forever incapable of holding any public office (*m*) and to be incapable for seven years of being registered as being an elector, or voting at an election, either of members to serve in Parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared, by reason of corrupt practices, to be incapable of voting, shall apply to a person adjudged in pursuance of this section to be incapable of voting; and

e. if such person is an officer or servant in the employ of any public body, upon such conviction, he shall, at the discretion of the Court,

(*jj*) 6 Edw. VII. c. 15.
(*k*) Defined s. 7, *post*, p. 629.
(*l*) Ibid.
(*m*) Ibid.

be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.'

Savings as to Offences under Other Laws.—By sect. 3 (1) 'Where an offence under this Act is also punishable under any other enactment or at common law, such offence may be prosecuted and punished either under this Act, or under the other enactment, or at common law, but so that no person shall be punished twice for the same offence' (*n*).

(2) 'A person shall not be exempt from punishment under this Act by reason of the invalidity of the appointment or election of a person to a public office.'

By sect. 4, 'A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General,' *i.e.* the Attorney or Solicitor-General for England or Ireland and the Lord Advocate as respects Scotland (subsect. 2) (*o*).

By sect. 6, 'A Court of general or quarter sessions shall in England have jurisdiction to inquire and hear and determine an offence under this Act.'

By sect. 7, 'The expression "public body" means any council of a county or council of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government or the public health or to poor law, or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom. The expression "public office" means any office or employment of a person as member, officer, or servant of such public body. The expression "person" includes a body of persons, corporate or incorporate (*p*). The expression "advantage" includes any office or dignity and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage as before defined' (*q*).

Sect. III.—Corruption of Agents in Business, &c.

Punishment of Corrupt Transactions with Agents.—By the Prevention of Corruption Act, 1906 (6 Edw. VII. c. 34) (*r*), by sect. 1,

'(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for shewing or forbearing to shew favour or disfavour to any person in relation to his principal's affairs or business; or

(*n*) *Vide ante*, p. 6.

(*o*) S. 5 as to costs is repealed by 8 Edw. VII. c. 15, *post*, Bk. xii. c. v.

(*p*) *Vide ante*, p. 3.

(*q*) S. 8 adapts the Act to Scotland. S. 9 relates to proceedings in Ireland.

(*r*) The Act was passed August 4, 1906, and came into force on January 1, 1907.

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for shewing or forbearing to shew favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

(2) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(3) A person serving under the Crown or under any corporation or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act' (*s*).

Prosecution of Offences.—By sect. 2, '(1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

(2) The Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), as amended by any subsequent enactment (*t*), shall apply to offences under this Act as if they were included among the offences mentioned in section one of that Act.

(3) Every information for any offence under this Act shall be upon oath (*u*).

. . . . . .

(5) A Court of quarter sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act.

(6) Any person aggrieved by a summary conviction under this Act may appeal to a Court of quarter sessions.'

Sea Fishery Apprentices.—By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 398, 'If any person (*a*) receives any money or valuable consideration from the person to whom an apprentice in the sea-fishing service is bound, or to whom a sea-fishing boy (*v*) is bound

(*s*) S. 1 extends to Scotland, subject to a provision that proceedings with a view to summary conviction are to lie before the sheriff (s. 3).

(*t*) See *post*, Bk. ii. p. 1927.

(*u*) Sub-s. 4 as to costs is superseded by 8 Edw. VII. c. 15, *post*, Bk. xii. c. v.

(*v*) *i.e.*, a boy of 13 or under 16 bound by indenture or agreement (s. 393).

by any agreement, or from any one on that person's behalf, or from the apprentice or boy or any one on the apprentice's or boy's behalf in consideration of the apprentice or boy being so bound; or (*b*) makes or causes any such payment to be made, that person shall in respect of each offence be guilty of a misdemeanor whether the apprentice or boy was or was not validly bound.'

CANADIAN NOTES.

BRIBERY AND CORRUPTION.

Sec. 1.—*Bribery of Public Officer.*

Accepting or Obtaining Office Corruptly.—Code sec. 156.
Taking or Giving Bribe.—Code sec. 157.

Sec. 2.—*Corruption in Municipal Affairs.*

Punishment.—Code sec. 161.
Limitation of Prosecution.—Code sec. 1140(*b*).

The receiving of a sum of money from contractors with the municipal corporation by the officer of the corporation having the supervision of the contractors' work as a payment made to corruptly influence him in the performance of his official duties, constitutes the offence of bribery by sec. 161 of the Criminal Code of Canada. Re Cannon, 14 Can. Cr. Cas. 186.

CHAPTER THE FOURTH.

OF OFFENCES WITH REFERENCE TO THE REGISTRATION OF ELECTORS AND VOTING, ETC., AT ELECTIONS.

SECT. I.—OFFENCES IN CONNECTION WITH THE PREPARATION OF ELECTORAL REGISTERS.

WILFUL neglect or breach of duty by officials under the Acts relating to the registration of electors appears not to be indictable (*a*); being in most if not all cases specifically and summarily punishable under the Acts (*b*).

By the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), s. 41, a revising barrister has power to administer an oath to all persons examined before him, 'and all parties whether claiming or objecting or objected to, and all persons whatsoever may be examined on oath touching the matters in question; and every person taking an oath or affirmation under this Act who shall wilfully swear or affirm falsely shall be deemed guilty of perjury.'

By the County Voters Registration Act, 1865 (28 & 29 Vict. c. 36), s. 11, 'Any person falsely or fraudulently signing any such declaration (*c*), in the name of any other person, whether such person shall be living or dead; and every person transmitting as genuine any false or falsified declaration, knowing the same to be false or falsified, and any person knowingly and wilfully making any false statement of fact in such declaration, shall be guilty of a misdemeanor, and punishable by fine or imprisonment for a term not exceeding one year, and the revising barrister shall have power to impound any such declaration.'

By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 25, 'If any person falsely or fraudulently signs any such declaration [as last aforesaid] (*d*), or any declaration either as claimant or witness in respect of a claim to vote as a lodger in the name

(*a*) R. *v.* Hall [1891], 1 Q.B. 747, *ante*, p. 11.

(*b*) See 2 & 3 Will. IV. c. 45, s. 76 (penal action); 6 & 7 Vict. c. 18, ss. 43, 52, 97; 30 & 31 Vict. c. 58, s. 28; 30 & 31 Vict. c. 102, ss. 28, 29; 31 & 32 Vict. c. 58, ss. 28, 29; 32 & 33 Vict. c. 41, s. 10; 41 & 42 Vict. c. 26, ss. 10, 26, 36; 48 & 49 Vict. c. 3, s. 9 (3); 48 & 49 Vict. c. 15, s. 16.

(*c*) As is mentioned in s. 10 of the Act, by a person whose place of abode is not correctly described on the county voters' list, or who has received an objection founded on the second column of the list. The declaration may be made before a commissioner of oaths or a justice of the peace.

(*d*) *i.e.*, in s. 24, viz. a declaration as to misdescription of the name, place of abode, or qualification of the voter, or other errors in the voters' list for a parliamentary borough or burgess list.

of any other person whether that person is living or dead, or in a fictitious name, or sends as genuine any false or falsified declaration knowing the same to be false or falsified, or knowingly and wilfully makes any false statement of fact in any declaration of the nature aforesaid, he shall be guilty of a misdemeanor, and punishable by fine or by imprisonment for a term not exceeding one year, and the revising barrister shall have power to impound such declaration.'

Sect. II.—Official Misconduct with Reference to Elections.

(*a*) *Misconduct by the Returning Officer and his Staff.*

Wilful delay, neglect, or refusal duly to return any person who ought to be returned to Parliament is dealt with under sect. 48 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), without prejudice to any power of Parliament to punish the officer (*e*).

Wilful misfeasance by a returning officer or presiding officer or clerk in the execution of his office would seem to be a misdemeanor indictable at common law; in addition to the penalties incurred under sect. 11 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), and sect. 61 (1) of the Corrupt, &c., Practices Prevention Act, 1883 (46 & 47 Vict. c. 51).

By sect. 50 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), 'No returning officer for any county or borough, nor his deputy, nor any partner or clerk of either of them shall act as agent for any candidate in the management or conduct of his election as a member to serve in Parliament for such county or borough and if any returning officer, his deputy, the partner, or clerk of either of them shall so act, he shall be guilty of a misdemeanor (*f*).

Mayors.—The duties of mayors as to elections for Parliament are prescribed by the Acts above stated. Their duties as to municipal elections are prescribed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50) (*g*). By sect. 75 they incur liability to a fine recoverable by action for neglecting or refusing to conduct or declare an election.

(*b*) *Neglect or Delay in Delivering Parliamentary Election Writs.*

The Parliamentary Writs Act, 1813 (53 Geo. III. c. 89), enacts (s. 1) that the messenger, or pursuivant of the great seal, or his deputy, shall, after the receipt of such writs, forthwith carry such of them as shall be directed to the sheriffs of London or Middlesex, to the respective officers of such sheriffs, and the other writs to the general post-office in London, and there deliver them to the postmaster-general for the time being, or to such other person as the postmaster shall depute to receive the same (which deputation the postmaster is thereby required to make),

(*e*) Rogers on Elections (18th ed.), Vol. ii. p. 81. May, Parl. Pr. (11th ed.). 2 Douglas, Election Cases, (2nd ed.), 177.

(*f*) This section is applied by s. 11 of the Ballot Act, 1872, to any returning officer or officer appointed by him in pursuance of that Act, and to his partner or clerk.

(*g*) These duties were formerly regulated by 11 Geo. I. c. 4, s. 6, on which see R. *v.* Corry, 5 East, 372, where it was held that voluntary absence from an election was not indictable unless presence was necessary to constitute a legal meeting of the corporation for the election. That Act was repealed as to boroughs subject to the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), by s. 5 of that Act; and repealed *in toto* in 1887. (S. L. R.)

who, on receipt thereof, shall give an acknowledgment in writing, expressing therein the time of delivery, and shall keep a duplicate of such acknowledgment signed by the parties respectively to whom and by whom the same shall be so delivered; and that the postmaster or his deputy shall despatch all such writs free of postage, by the first post or mail, after the receipt thereof, under covers directed to the proper officers, to whom the said writs shall be respectively directed, accompanied with proper directions to the postmaster or deputy postmaster of the place, or nearest to the place where such officers shall hold their office, requiring such postmaster or deputy forthwith to carry such writs respectively to such office, and to deliver them there to the officers to whom they shall be respectively directed, or their deputies, who are required to give to such postmaster or deputy a memorandum in writing, acknowledging the receipt of every such writ, and setting forth the day and the hour the same was delivered by such postmaster or deputy, and which memorandum shall also be signed by such postmaster or deputy, who is required to transmit the same by the first or second post afterwards to the postmaster general or his deputy at the general post-office in London, who are required to make an entry thereof in a proper book for that purpose, and to file the memorandum along with the duplicate of the said acknowledgment, signed by the messenger, to the intent that the same may be inspected or produced upon all proper occasions by any person interested in such elections.

The statute, after directing that all persons to whom the writs for the election of members to Parliament ought to be and are usually directed, shall, within a month after the passing of the Act (July 2, 1813) send to the postmaster-general an account of the places where they shall hold their offices, and so from time to time, as often as such places shall be changed; and of the post town nearest to such offices; or in case any such office shall be in the cities of London, Westminster, or the borough of Southwark, or within five miles thereof, shall send such account to the messenger of the great seal (*h*).

By sect. 6, 'Every person concerned in the transmitting or delivery of any such writ as aforesaid who shall wilfully neglect or delay to deliver or transmit any such writ, or accept any fee, or do any other matter or thing in violation of this Act, shall be guilty of a misdemeanor, and may upon any conviction upon any indictment or information in his Majesty's Court of King's Bench be fined and imprisoned at the discretion of the Court for such misdemeanor' (*i*).

(*h*) Ss. 2, 3. The portions omitted from ss. 2, 3 were repealed in 1873 (36 & 37 Vict. c. 91, s. 2). S. 4 was repealed by the Great Seal Offices Act, 1874 (37 & 38 Vict. c. 81), which makes provision for the transfer of the duties of the messenger or pursuivant of the great seal to an officer to be appointed by the Lord Chancellor (ss. 4, 12). S. 5 forbids the messenger of the great seal and his deputies to receive or take any fee or gratuity for conveyance or delivery of the writs. So much of the section as commuted fees formerly payable was repealed in 1873 (36 & 37 Vict. c. 91). S. L. R.

(*i*) This was the rule under the old law. Coombe *v.* Pitt, 1 W. Bl. 523. For old decisions on election petitions, see Douglas, Election Cases (2nd ed.), 1802.

Sect. III.—Corrupt and Illegal Practices at Elections.

(*a*) *Definitions of Corrupt Practices, &c.*

Parliament.—The statute law relating to corrupt and illegal practices at Parliamentary elections is now embodied in the Corrupt and Illegal Practices Prevention Acts, 1883 and 1895, and the enactments scheduled thereto, and in the Public Meetings Act, 1908 (8 Edw. VII. c. 66), s. 1.

Definitions.—By the Corrupt and Illegal Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), s. 38, 'Throughout this Act, in the construction thereof, except there be something in the subject or context repugnant to such construction, . . . the word "election" shall mean the election of any member or members to serve in Parliament; and the words "returning officer" shall apply to any person or persons to whom, by virtue of his or their office under any law, custom, or statute, the execution of any writ or precept doth or shall belong for the election of a member or members to serve in Parliament, by whatever name or title such person or persons may be called; . . . and the word "voter" shall mean any person who has or claims to have a right to vote in the election of a member or members to serve in Parliament.'

By the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 64, 'In this Act unless the context otherwise requires—

The expression "election" means the election of a member or members to serve in Parliament.

The expression "election petition" means a petition presented in pursuance of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), as amended by this Act.

The expression "election Court" means the judges presiding at the trial of an election petition or, if the matter comes before the High Court, that Court.

. . . . . .

The expression "person" includes an association or body of persons corporate or incorporate, and where any act is done by any such association or body, the members of such association or body who have taken part in the commission of such act shall be liable to any fine or punishment imposed for the same by this Act.

. . . . . .

The expression "indictment" includes information.

The expression "costs" includes costs and charges and expenses.'

Corrupt Practice.—By the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 3, 'The expression "corrupt practice" as used in this Act, means any of the following offences: namely, treating (*j*) and undue influence (*k*) as defined in this Act, and bribery (*l*), and personation (*m*) as defined by the enactments set forth in part iii. of the third schedule to this Act, and aiding, abetting, counselling, and procuring the commission of the offence of personation, and every offence

(*j*) *Post*, p. 641.
(*k*) *Post*, p. 642.
(*l*) *Post*, p. 638.
(*m*) *Post*, p. 642.

which is a corrupt practice within the meaning of this Act shall be a corrupt practice within the meaning of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), *supra*.

Municipal Elections.—The law as to corrupt practices in municipal elections is contained in the Municipal Corporations Act, 1882, as amended in 1884.

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), part iv. (Corrupt Practices), s. 77, 'In this part, bribery, treating, undue influence, and personation, include respectively anything done, before, at, after, or with respect to a municipal election which, if done before, or after, or with respect to a parliamentary election, would make the person doing the same liable to any penalty, punishment, or disqualification for bribery, treating, undue influence, or personation as the case may be under any Act for the time being in force with respect to parliamentary elections' (*n*).

By the Municipal Election, Corrupt, &c., Practices Prevention Act, 1884 (47 & 48 Vict. c. 70), s. 2 (1), 'The expression "corrupt practices" means in this Act any of the following offences, namely, bribery, treating, undue influence, and personation, as defined in the enactments set forth in part i. of the third schedule to this Act (*o*), and aiding, abetting, counselling, and procuring the commission of the offence of personation.'

Subsect. (2), 'A person who commits any corrupt practice in reference to a municipal election shall be guilty of a like offence, and shall on conviction be liable to the like punishment and be subject to the like incapacities as if the corrupt practice had been committed at a parliamentary election.'

The statutory provisions as to corrupt practices at municipal elections apply to elections of the mayor, aldermen, or councillors, auditors, &c., of a municipal borough, of improvement commissioners (*p*), to county council elections (*q*), to elections in the City of London (*r*), subject to the provisions of a local Act (50 & 51 Vict. c. xiii.), and of metropolitan borough councillors (*s*), councillors of urban (*t*) and rural (*u*) districts, and of rural parishes (*v*), and guardians of urban districts (*w*), and in London (*x*).

Punishment.—By 46 & 47 Vict. c. 51, s. 6 (1), 'A person who commits any corrupt practice other than personation or aiding, abetting, counselling or procuring the commission of the offence of personation, shall be guilty of a misdemeanor, and on conviction on indictment, shall be liable to be imprisoned, with or without hard labour, for a term not exceeding one year, or to be fined any sum not exceeding £200.'

(2) 'A person who commits the offence of personation, or of aiding, abetting, counselling or procuring the commission of that offence (*y*),

(*n*) Ss. 78–80, 82–84 of part iv. are repealed and replaced by the Municipal Elections Corrupt, &c., Practices Prevention Act, 1884 (*temp.*).

(*o*) The scheduled enactments are those set out under the different offences named, *post*, pp. 638–647.

(*p*) 47 & 48 Vict. c. 70, sched. 1.

(*q*) 51 & 52 Vict. c. 41, s. 75 (1). *Ex parte* Walker, 20 Q.B.D. 384.

(*r*) 47 & 48 Vict. c. 70, s. 36.

(*s*) 62 & 63 Vict. c. 14, s. 2, and Stat. R. & O. February 26, 1903.

(*t*) 56 & 57 Vict. c. 73, s. 48 (3), and Stat. R. & O. (1898) No. 1.

(*u*) Ibid. Stat. R. & O. (1898) No. 2.

(*v*) Ibid. Stat. R. & O. (1901) No. 2.

(*w*) Ibid. ss. 20, 23, 28: 59 & 60 Vict. c. 1: Stat. R. & O. (1898) No. 4. In rural districts the rural district councillors are also guardians of the poor.

(*x*) Ibid. Stat. R. & O. (1898) No. 15.

(*y*) See Rogers on Elections (18th ed.), Vol. ii. p. 371.

shall be guilty of felony, and any person convicted thereof on indictment shall be punished by imprisonment for a term not exceeding two years, together with hard labour.'

Subsect. (3) provides for disqualification for seven years of any person convicted of a corrupt practice, in addition to the punishment above provided.

(*b*) *Bribery at Elections.*

Common Law.—'Bribery at elections for members of Parliament must undoubtedly always have been a crime at common law,' and consequently punishable by indictment or information (*z*).

The offence consists in corruptly and illegally giving rewards or making promises of rewards of money or money's worth in order to procure votes for members to serve in Parliament (*a*). Thus giving refreshments to voters before they vote in order to induce them to vote for a particular candidate, is bribery at common law (*b*).

Bribery in connection with the election to a municipal (*c*) or parochial (*d*) office appears to be a misdemeanor at common law.

Statute.—The statutory definition of bribery (*e*) applies both to parliamentary (*f*) and to municipal elections (*g*).

By the Corrupt and Illegal Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), s. 2 (*h*), 'The following persons shall be deemed guilty of bribery, and shall be punishable accordingly—

(1) 'Every person who shall, directly or indirectly, by himself, or by any other person on his behalf (*i*), give, lend, or agree to give or lend, or shall offer (*j*), promise (*k*), or promise to procure, or to endeavour to procure, any money, or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote, or refrain from voting, or shall

(*z*) R. *v.* Pitt, 3 Burr. 1335, 1338, Lord Mansfield. He added that by 2 Geo. II. c. 24 (rep.), 'the legislature never meant to take away the common law crime but to add a penal action.' See R. *v.* Hollis, 20 St. Tr. 1225, for precedent of an information for bribery at a parliamentary election. And see Rogers on Elections (18th ed.), Vol. ii. p. 294.

(*a*) R. *v.* Pitt, *ubi supra.*

(*b*) Hughes *v.* Marshall, 2 C. & J. 118.

(*c*) R. *v.* Plympton, 2 Ld. Raym. 1377.

(*d*) R. *v.* Lancaster, 16 Cox, 737 (assistant overseer of the poor), Wills, J.

(*e*) In R. *v.* Pitt, 3 Burr. 1335, 1339, it was held that the statute against bribery (2 Geo. II. c. 24) was in aid of the common law and did not supersede it. Cf. Coombe or Combe *v.* Pitt, 3 Burr. 1423, 1586. R. *v.* Heydon, 3 Burr. 1359, 1387. Pugh *v.* Curgerwen, 3 Wils. (K.B.) 35, and cases collected in 1 Hawk. c. 67, s. 13.

(*f*) *Vide infra.*

(*g*) 47 & 48 Vict. c. 70, s. 2, *ante*, p. 637.

(*h*) This section is included in sched. 3 of the Corrupt and Illegal Practices Prevention Act, 1883, which is annually continued by the Expiring Laws Continuance Act (*vide* 8 Edw. VII. c. 18).

(*i*) Where a friend of the candidate gave an elector five guineas to vote, and took from him a note for that sum, but at the same time gave a counter note to deliver up the first note when the elector had voted, the gift was held absolute and to be bribery within 2 Geo. II. c. 24. Sulston *v.* Norton, 3 Burr. 1235. Cf. Cooper *v.* Slade, 6 H. L. C. 746. As to bribery by giving cards to electors which were taken to another person, who paid money to the electors, see Webb *v.* Smith, 4 Bing. (N. C.) 373.

(*j*) Acceptance is not necessary to constitute the offence. Coventry case [1869], 1 O'M. & H. 107.

(*k*) A letter was written to an out-voter, requesting him to come to a borough, and record his vote for S. A postscript added, 'Your railway expenses will be paid.' The voter did come and vote as requested: his travelling expenses were paid. Held, that the promise and payment constituted only one act of bribery within this section. Cooper *v.* Slade, 6 H. L. C. 746.

corruptly (*l*) do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election (*ll*) :

(2) ' Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure, or to endeavour to procure, any office, place, or employment (*m*) to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election :

(3) ' Every person who shall, directly or indirectly, by himself or by any other person on his behalf (*n*), make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in Parliament, or the vote of any voter at any election (*o*) :

(4) ' Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavour to procure the return of any person to serve in Parliament, or the vote of any voter at any election :

(5) ' Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election.' (Here follows a proviso excepting legal expenses *bona fide* incurred.)

Sect. 3 (*p*). ' The following persons shall also be deemed guilty of bribery, and shall be punishable accordingly—

(1) ' Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting, at any election :

(2) ' Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or to refrain from voting, at any election. . . .'

By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102),

(*l*) See Rogers on Elections (18th ed.), Vol. ii. p. 300.

(*ll*) Caldicott *v.* Worcester Election Commissioners, 21 Cox, 404, 409.

(*m*) See Lichfield case, 1 O'M. & H. 27, and Rogers on Elections (18th ed.), Vol. ii. p. 302.

(*n*) See Cooper *v.* Slade, 5 H. L. C. 746.

(*o*) In Henslow *v.* Fawcett, 3 A. & E. 51, an action for penalties under 2 Geo. II. c. 24, s. 7 (rep.), for giving money to induce a man to vote, it was held that the penalty was incurred even if the vote was not given or the recipient of the bribe never meant to vote as desired. In Harding *v.* Stokes [1837], 2 M. & W. 233, an action under 5 & 6 Will. IV. c. 76, s. 54 (rep.), for corrupting a voter in a municipal election, the offence was held to be complete when the bribe was offered and accepted, and the promise made to vote as desired, even if the promise were broken or was never meant to be kept.

(*p*) Also included in sched. 3 of the Corrupt, &c., Practices Prevention Acts, 1883 and 1884, *supra*.

s. 49, 'Any person, either directly or indirectly, corruptly paying any rate on behalf of any ratepayer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election, and any candidate or other person, either directly or indirectly, paying any rate on behalf of any voter for the purpose of inducing him to vote or refrain from voting, shall be guilty of bribery, and be punishable accordingly; and any person on whose behalf, and with whose privity any such payment as in this section is mentioned, is made, shall also be guilty of bribery, and punishable accordingly' (*q*). For punishment see 46 & 47 Vict. c. 51, s. 6, *ante*, p. 637.

Most of the decisions relating to bribery are on election petitions and not on indictments for the offence. Where a test ballot was resorted to in order to determine which of three candidates should stand, it was held that bribery at such test ballot was within sect. 2, subsect. 3 of the Act of 1854 (*r*). It is bribery to make payments to a voter for loss of time while going to deliver his vote (*s*); or corruptly to pay rates for the purpose of enabling a ratepayer to be registered and influencing his vote at a future election (*t*), or to make payment corruptly for attendance at a revising Court (*u*), or to give money to induce a voter to vote under colour of a bet (*v*). It has never been decided that a wager upon an election is bribery *per se*, but if made corruptly there can be little doubt that it would be so (*w*). A corrupt promise of refreshments to voters to induce them to vote is bribery (*x*). And the giving of money ostensibly for the purpose of charity may be an act of bribery if done corruptly, of which the excessive or indiscriminate nature of the gifts may be evidence (*y*). So also it seems payment of money to induce a person to personate a voter is bribery (*z*). A voter may be bribed though he is disqualified (*a*). It is immaterial at what time before the election the act of bribery is committed if it be done with a view to influence a voter at a coming election (*b*).

It seems that payment of money to a voter after the election is over for having voted is not bribery unless there was a corrupt promise before the election to pay him (*c*). In 17 & 18 Vict. c. 102, s. 2 (1), the word 'corruptly' is inserted only as to payments after elections. (*Vide ante*, p. 639.)

(*q*) As to Scotland, see 31 & 32 Vict. c. 48, s. 49; 44 & 45 Vict. c. 40, s. 2 (17).

(*r*) Brett *v.* Robinson, L. R. 5 C. P. 503.

(*s*) Taunton case [1869], 1 O'M. & H. 183. Simpson *v.* Yeend, 38 L. J. Q.B. 313.

(*t*) 30 & 31 Vict. c. 102, s. 49, *supra*. Cheltenham case [1869], 1 O'M. & H. 64.

(*u*) Hastings case [1869], 1 O'M. & H. 219.

(*v*) Under 2 Geo. II. c. 24 (rep.), laying a wager with a voter that he did not vote for a particular candidate was held bribery. 1 Hawk. c. 67, s. 10, note (4), citing *anon.* Lofft, 552, and referring also to Allen *v.* Hearn, 1 T. R. 56, where a wager between two voters, with respect to the event of an election, laid before the poll began, was held to be illegal.

(*w*) See Rogers on Elections (18th ed.), Vol. ii. 321, where Allen *v.* Hearn, 1 T. R. 56, and other cases are collected.

(*x*) Bodmin case [1869], 1 O'M. & H. 124. Montgomery case, 4 O'M. & H. 69.

(*y*) Windsor case, 2 O'M. & H. Boston case, 2 O'M. & H. 161. See Rogers on Elections (18th ed.), Vol. ii. p. 310.

(*z*) Coventry case, 1 O'M. & H. 105.

(*a*) Guildford case, 1 O'M. & H. 14, Willes, J.

(*b*) Hastings case, 1 O'M. & H. 219.

(*c*) See Cooper *v.* Slade, 6 H. L. C. 746. Lord Wensleydale. The election judges have differed on this subject. See Bradford case, 1 O'M. & H. 36, Martin, B. Stroud case, 2 O'M. & H. 184, Bramwell, B., in favour of the proposition in the text. Harwich case, 3 O'M. & H. 71, Lush, J., *contra*. As to the law under 2 Geo. II. c. 24, see Lord Huntingtower *v.* Gardiner, 1 B. & C. 297.

A parliamentary election was about to take place at C.; S. was one of the candidates. In the committee-room of S. the question was discussed whether paying the expense of bringing up out-voters was legal. S., after referring to a law-book, said that it was, but limited it to the payment of expenses out of pocket. A circular had been previously prepared and printed, requesting out-voters to come up and vote for S. Upon S. making this declaration of his opinion, a clerk to an agent of S. (without any express direction from S. or from the agent) wrote at the bottom of each circular, 'Your railway expenses will be paid.' A voter who resided at H. received one of the circulars with this added note; he came to C., voted for S., and afterwards received the sum of 8*s*., the expenses to which he had *bona fide* been put by his journey. It was held, that the words added to the circular must be treated as written by the authority of S.; that the promise and payment were forbidden by 17 & 18 Vict. c. 102, s. 2, *ante*, p. 638, and that for the purposes of that statute they must be treated as 'corruptly' made (*d*). If a man employs an agent to corrupt voters, and that agent in carrying such general instructions into effect employs subordinate agents within the scope of the authority received from the principal, it would seem that the principal, with reference to the express terms of this statute, as well as upon general principles of law, will be guilty of a misdemeanor (*e*).

Bribery is not triable at quarter sessions (17 & 18 Vict. c. 102, s. 10).

Voting by Agents, &c.—By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 11, 'No elector who within six months before or during any election for any county or borough shall have been retained, hired, or employed for all or any of the purposes of the election for reward by or on behalf of any candidate at such election as agent, canvasser, clerk, messenger, or in other like employment, shall be entitled to vote at such election, and if he shall so vote he shall be guilty of a misdemeanor' (*f*).

(*c*) *Treating.*

By the Corrupt, &c., Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 1, (1) 'Any person who *corruptly* by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing any meat, drink, entertainment or provision to or for any person for the purpose of *corruptly* influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting, at such election, shall be guilty of treating.

(2) 'And every elector who *corruptly* accepts or takes any such meat, drink, entertainment or provision, shall also be guilty of treating.' This is extended to municipal elections (47 & 48 Vict. c. 70, s. 2, sched. 3, part i.). For punishment see 46 & 47 Vict. c. 51, s. 6, *ante*, p. 637. The offence is not triable at quarter sessions (17 & 18 Vict. c. 102, s. 10). A corrupt promise of refreshments to voters to induce them to vote has been held bribery (*g*).

(*d*) Cooper *v.* Slade, 6 H. L. C. 746.
(*e*) R. *v.* Leatham, 3 L. T. 504.
(*f*) Adapted to divided boroughs by 48 & 49 Vict. c. 23, s. 15.
(*g*) Bodmin case [1869], 1 O'M. & H. 124, Willes, J. Montgomery case, 4 O'M. & H. 169. Salford case, 1 O'M. & H. 41. See Rogers on Elections (18th ed.), Vol. ii. p. 333.

(*d*) *Undue Influence.*

By the Corrupt, &c., Practices Prevention Act, 1883, sect. 2, 'Every person who shall directly or indirectly, by himself or by any other person on his behalf make use of or threaten to make use of any force, violence, or restraint, or inflict, or threaten to inflict by himself or by any other person any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall by abduction, duress or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce or prevail upon any elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence' (*h*). This section is extended to municipal, &c., elections (47 & 48 Vict. c. 70, s. 2, and sched. 3, part i.). For punishment see 46 & 47 Vict. c. 51, s. 6, *ante*, p. 637. The offence is not triable at quarter sessions (*i*).

(*e*) *Personation.*

It does not seem to be clear whether personation of a voter at an election is an offence at common law (*j*). By the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 24 (*k*), 'the following enactments shall be made with respect to personation at parliamentary and municipal elections:

'A person shall, for all purposes of the law relating to parliamentary (*l*) and municipal elections be deemed to be guilty of the offence of personation who at an election for a county or borough, or at a municipal election (*m*), applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead (*n*), or of a fictitious person (*o*), or who, having voted once at any such election, applies at the same election for a ballot paper in his own name. . . .'

'It shall be the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of

(*h*) It is intimidation to threaten the deprivation of that which it would be bribery to promise the enjoyment of. Westbury case, 1 O'M. & H. 52. It is also intimidation to threaten a withdrawal of custom or dismissal from employment with intent to influence the vote of a voter. R. *v.* Barnwell, 5 W. R. 558. Blackburn case, 1 O'M. & H. 204.

(*i*) 46 & 47 Vict. c. 51, s. 53, *post*, p. 648.

(*j*) In R. *v.* Bent, 1 Den. 157; 2 C. & K. 179, it seems to have been considered that personation at a municipal election was not an offence at common law. This opinion was doubted in R. *v.* Clarke [1900], 2 Ir. Rep. 304, Palles, C.B. See also R. *v.* Thompson, 2 M. & Rob. 355.

(*k*) Included in sched. 3, part iii. of the Corrupt, &c. Practices Prevention Act, 1883, and annually continued (see 8 Edw. VII. c. 18).

(*l*) Including elections of members for universities (s. 31).

(*m*) *i.e.*, an election of any person to serve the office of councillor, auditor, or assessor of a borough subject to the Municipal Corporation Acts, 35 & 36 Vict. c. 33, s. 29; 45 & 46 Vict. c. 50. In R. *v.* Turner, 12 Cox, 313, on an indictment under this section for an offence at a municipal election, it was ruled not to be necessary to produce the charter of the city.

(*n*) Under 14 & 15 Vict. c. 105, s. 13, it was held that there could be no personation of a dead voter. Whiteley *v.* Chapell, 11 Cox, 307.

(*o*) A person may have two names and may vote in that name by which he is described on the register. R. *v.* Fox [1887], 16 Cox, 166.

the offence of personation by any person, at the election for which he is returning officer, [and the costs and expenses of the prosecutor and the witnesses in such case, together with compensation for their trouble and loss of time, shall be allowed by the Court in the same manner in which Courts are empowered to allow the same in cases of felony] ' (*p*).

' The provisions of the Registration Acts (*q*), specified in the third schedule to this Act, shall in England and Ireland respectively apply to personation under this Act in the same manner as they apply to a person who knowingly personates and falsely assumes to vote in the name of another person as mentioned in the said Acts. . . .' By 46 & 47 Vict. c. 51, s. 6, personation is made a felony. As to punishment see *ante*, p. 637. The offence is not triable at quarter sessions (*r*).

By 22 Vict. c. 35, s. 9 (rep.), if, pending or after any election of councillors, auditors, or assessors, any person shall personate, or induce any other person to personate, any person entitled to vote at such election, &c., he might be summarily convicted by two justices. H., pending an annual election of councillors, gave a nomination paper signed by one B. to F., and asked him to take it to a schoolroom and vote. F. said it was not his name that was on it. H. told him to vote for W. and T., and said he was to take the paper and put it down before a gentleman he would see sitting, and that they would not say anything to him. F. took the paper, and put it into the hands of the presiding officer at the schoolroom for the reception of votes for the said ward ; and the officer, being so required, asked F., ' Are you the person whose name is signed as B. to the voting paper now delivered by you ? ' and F. answered, ' No.' B.'s name was at the time on the burgess roll. The voting paper was not filed, nor was the vote of B. recorded in consequence of the paper being so handed in. Two justices convicted H. for inducing F. to personate B. at the said election, and the sessions, on appeal, confirmed the conviction, subject to the opinion of the Court of Queen's Bench, whether H. had, under the above facts, committed the alleged offence ; and it was urged that, as F. did not vote, and on being asked, at once declared that he was not B., he had not been guilty of personation, and therefore H. had not been guilty of inducing him to commit it. But it was held that if a man goes up to a voting place and represents himself as another person, it is a false personation. Here F. gave in a voting paper, and so represented himself to be another person, and thereby the personation was complete (*s*).

(*f*) *False Answers by Voters.*

By sect. 81 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), ' In all elections whatever of a member or members of

(*p*) Words in brackets repealed as to England, by 8 Edw. VII. c. 15, s. 10, *post*, Bk. xii. c. v.

(*q*) 6 & 7 Vict. c. 18, *ss.* 85-89 ; 13 & 14 Vict. c. 69, ss. 92-96, both inclusive. These enactments provide for taking the offender into custody and taking him before a magistrate. The powers of detecting personation and arresting personators are extended to personation at municipal elections by 45 & 46 Vict. c. 50, s. 86.

(*r*) 46 & 47 Vict. c. 51, s. 53, *post*, p. 648.

(*s*) R. *v.* Hague, 9 Cox, 412. The conviction merely alleged that H. ' unlawfully and knowingly did induce F. to personate B. ' : and it was held that it was good, and that it was not necessary to state the means of the inducement.

Parliament for any county, riding, parts, or division of a county, or for any city or borough in England and Wales no inquiry shall be permitted at the time of polling as to the right of any person to vote except only as follows, that is to say, that the returning officer (*t*) or his respective deputy shall if required on behalf of any candidate (*u*), put to any voter at the time of his tendering his vote and not afterwards, the following questions or either of them :—

1. Are you the same person whose name appears as A. B. on the register of voters, now in force for the county of ——— [*or* for the ——— riding, parts or ——— division of the county of ———] or for the city [or borough] of ——— [*as the case may be*] ?

2. Have you already voted either here or elsewhere at this election for the county of ——— [*or* for the ——— riding, parts or ——— of the county of ———] or for the city [or borough] of ——— [*as the case may be*] ?

And if any person shall wilfully (*v*) make a false answer to either of the questions aforesaid he shall be deemed guilty of a misdemeanor and shall and may be indicted and punished accordingly ; and the returning officer or his deputy . . . shall, if required on behalf of any candidate at the time aforesaid administer an oath to any voter in the following form :—

You do swear [or affirm, *as the case may be*] that you are the same person whose name appears as A. B. in the register of voters now in force for the county of ——— [or for the ——— riding, parts or ——— division of the county of ——— or for the city [or borough] of ——— [*as the case may be*], and that you have not before voted either here or elsewhere at the present election for the county of ——— [or for the ——— riding, parts, or ——— division of the county of ——— or for the city [or borough] of ———, [*as the case may be*]. So help you God ' (*w*).

By sect. 59, sub-sect. (1) of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ' At an election of councillors the presiding officer shall, if required by two burgesses, or by a candidate or his agent, put to every person offering to vote at the time of his presenting himself to vote, but not afterwards, the following questions or either of them :—

(*a*) Are you the person enrolled on the burgess [or ward] roll now in force for this borough [or ward] as follows ? [*read the whole entry from the roll*].

(*b*) Have you already voted at the present election ? [*add in case of an election for several wards, in this or any other ward*] ' (*x*).

By sub-sect. (3), ' If any person wilfully make a false answer thereto, he shall be guilty of a misdemeanor ' (*y*).

By sect. 13 (4) of the Redistribution of Seats Act, 1885 (48 & 49 Vict.

(*t*) Or his lawful deputy. 35 & 36 Vict. c. 33, ss. 1, 10.

(*u*) *e.g.*, by his agent or a person acting as such. R. *v.* Spalding, C. & M. 568.

(*v*) See *post*, p. 645.

(*w*) This section takes the place of 2 & 3 Will. IV. c. 45, s. 58. The oath against bribery was abolished in 1854 (17 & 18 Vict. c. 102). The question as to qualification in 2 & 3 Will. IV. c. 45, s. 58, is no longer required. As to that question, see R. *v.* Bowler, C. & M. 559. R. *v.* Ellis, C. & M. 564. R. *v.* Dodsworth, 2 M. & Rob. 72. R. *v.* Irving, 2 M. & Rob. 75, note (*o*). R. *v.* Harris, 7 C. & P. 253. R. *v.* Lucy, C. & M. 310. As to Ireland see 13 & 14 Vict. c. 69, s. 88.

(*x*) This section takes the place of 4 & 5 Will. IV. c. 76, s. 34.

(*y*) This section does not apply to the city of London. As to declaration before polling, see 30 Vict. c. 1, ss. 6, 7.

c. 23), 'In a borough divided into divisions, the election for two or more of such divisions shall be deemed to be the same election within the meaning of the enactments relating to personation (*z*) and to voting, and the question which may be asked of voters at the poll shall be, "Have you already voted here or elsewhere at the election for the borough of ———, either in this or any other division?"'

By sect. 10 of the Ballot Act, 1872 (35 & 36 Vict. c. 33), 'any presiding officer and any clerk appointed by the returning officer to attend at a polling station, shall have the power of asking questions and administering the oath authorised by law to be asked of and administered to voters. . . .'

An indictment against a voter under 2 & 3 Will. IV. c. 45, s. 58 (*a*), for giving a false answer at an election seems to have been insufficient if it merely stated that the voter gave the answer at an election, and did not aver the writ for holding the election, or that the election was duly held (*b*).

On an indictment under 2 & 3 Will. IV. c. 45, s. 58, it was held that the word 'wilfully' must be for giving a false answer at the poll, construed in the same way, and supported by the same sort of evidence, as in an indictment for perjury. To be untrue is not enough; for to be wilful it must have been false to the knowledge of the party at the time (*c*).

The first four counts of an indictment upon sect. 34 of the Municipal Corporations Act, 1835 (*d*), stated that the defendant, upon delivering in a voting paper, in the name of a burgess entitled to vote at the election, was asked by the presiding officer the three questions in the terms of the Act, and then alleged, 'to which questions (each of the two first) the defendant then and there falsely and fraudulently answered, "I am."' Williams, J., after consulting Patteson, J., held that these four counts were bad for omitting the word *wilfully*. 'Wilfully to make a false answer to the question' proposed was the definition of the offence by the legislature itself, and it was a safe and certain rule that the words of the statute must be pursued (*e*). The prisoner was indicted for falsely answering a question at a municipal election under the same section. The prisoner's father, W. G., had been a burgess in St. Albans and those names remained on the overseer's lists; but he had been absent from home for a considerable time; and the prisoner, whose name was also W., resided in the same house, and paid the parish rates, &c. At a municipal election the prisoner offered to vote, and being asked, 'Are you the person whose name appears as W. G. on the burgess roll now in force?' answered 'Yes.' There was only one W. G. on the roll. Wightman, J., held that there was no case against the prisoner (*f*).

(*z*) *Ante*, p. 642.

(*a*) Superseded by the above enactments and repealed by the Ballot Act, 1872 (35 & 36 Vict. c. 33), itself a temporary Act (continued by 8 Edw. VII. c. 18).

(*b*) R. *v.* Bowler, C. & M. 559. R. *v.* Ellis, C. & M. 564.

(*c*) R. *v.* Ellis, C. & M. 564.

(*d*) 5 & 6 Will. IV. c. 76, repealed in 1882 (45 & 46 Vict. c. 50), and replaced by s. 59, *ante*, p. 644.

(*e*) R. *v.* Bent, 1 Den. 157.

(*f*) R. *v.* Goodman, 1 F. & F. 502.

(*g*) *Illegal Practices.*

Sects. 7-12 of the Corrupt and Illegal Practices Prevention Act, 1883, and sects. 1, 2 of the Corrupt Practices Prevention Act, 1895 (58 & 59 Vict. c. 40) (*g*) deal with illegal practices, and sects. 7-13 of the Act of 1883 with illegal payments or hirings (*h*). These are all punishable on summary conviction subject to an appeal to quarter sessions (s. 10) and to the power to convict of an illegal practice on an indictment for a corrupt practice (s. 52, *post*, p. 649). Illegal practices, &c., at municipal elections are dealt with by sects. 4-18 of the Municipal Elections (Corrupt, &c., Practices) Act, 1884 (47 & 48 Vict. c. 70).

(*h*) *Offences Relating to Nomination and Voting Papers.*

By the Ballot Act, 1872 (35 & 36 Vict. c. 33) (*i*), sect. 3, 'every person who

(1) Forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the returning officer any nomination paper, knowing the same to be forged; or

(2) Forges or counterfeits or fraudulently defaces or fraudulently destroys any ballot paper or the official mark on any ballot paper; or

(3) Without due authority supplies any ballot paper to any person; or

(4) Fraudulently puts into any ballot box any paper other than the ballot paper which he is authorised by law to put in; or

(5) Fraudulently takes out of the polling station any ballot paper; or

(6) Without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election;

shall be guilty of a misdemeanor, and be liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour, and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour.'

Any attempt to commit any offence specified in this section shall be punishable in the manner in which the offence itself is punishable.

In any indictment or other prosecution for an offence in relation to the nomination papers, ballot boxes, ballot papers, and marking instruments at an election, the property in such papers, boxes, and instruments may be stated to be in the returning officer at such elections, as well as the property in the counterfoils (*j*).

On the trial of an indictment for fraudulently placing ballot papers

(*g*) This Act makes it an illegal practice to make or publish for the purpose of affecting the return of a candidate at a parliamentary election, a false statement of fact in relation to the personal character or conduct of the candidate.

(*h*) See Rogers on Elections (18th ed.), Vol. ii. c. xiii.

(*i*) Continued annually. See 8 Edw. VII. c. 18.

(*j*) Infringement of the secrecy of the ballot by officials and agents at polling stations is summarily punishable (s. 4). Voters cannot be compelled to disclose how they voted (s. 12).

in a ballot box at a municipal election contrary to sub-sect. 4 of sect. 3 a sealed packet was produced under the order of a county court judge, obtained under sched. 1, rules 40, 41, part ii. r. 64, of the Ballot Act, and the counterfoils and marked register and voting papers produced therefrom were given in evidence and the face of the voting papers inspected: Held, that the evidence was properly admitted (*k*).

Municipal Elections.—By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 74, 'If any person forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the town clerk any forged nomination paper, knowing it to be forged, he shall be guilty of a misdemeanor, and shall be liable to imprisonment for any term not exceeding six months, with or without hard labour.

'(2) An attempt to commit such an offence shall be punishable as the offence is punishable.'

By sect. 58 of that Act, sect. 3 of the Ballot Act, 1872, *supra*, is applied to contested municipal elections (*l*).

(*i*) *Offences After an Election.*

False Declaration as to Election Expenses.—46 & 47 Vict. c. 51, s. 33, provides that a declaration as to expenses shall be made by the candidate, and a return of such expenses by his agent; and by sub-sect. 7, 'If any candidate or election agent knowingly makes the declaration required by this section falsely he shall be guilty of an offence, and on conviction thereof on indictment shall be liable to the punishment for wilful and corrupt perjury; such offence shall also be deemed to be a corrupt practice within the meaning of this Act' (*m*).

Improper Withdrawal of Election Petition.—By 46 & 47 Vict. c. 51, s. 41, sub-sect. 4, 'If any person makes any agreement or terms, or enters into any undertaking in relation to the withdrawal of an election petition, and such agreement, terms or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are (whether lawful or unlawful) not mentioned in the aforesaid affidavits (*n*), he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment for a term not exceeding 12 months, and to a fine not exceeding £200' (*o*).

(*j*) *Indictment and Procedure.*

Wide powers are given to Courts for the trial of election petitions to punish summarily persons guilty at elections of corrupt and illegal practices, which do not fall within the scope of this work (*p*).

By the Corrupt Practices Prevention Act, 1863 (26 & 27 Vict. c. 29), s. 6, 'In any indictment or information for bribery or undue influence,

(*k*) R. *v.* Beardsall, 1 Q.B.D. 452.

(*l*) S. 20 of the Ballot Act, 1872, was repealed by ss. 5, 260 of the Act of 1882.

(*m*) A like provision is made as to municipal elections by 47 & 48 Vict. c. 70, s. 2i (5).

(*n*) To be filed on application to the Election Court for leave to withdraw the petition: s. 41, sub-ss. 1-3, 5. As to election costs and petitions, see Rogers on Elections (18th ed.), Vol. ii. p. 215.

(*o*) A similar provision is made as to municipal elections by 47 & 48 Vict. c. 70, s. 26 (4).

(*p*) See Rogers on Elections (18th ed.), Vol. ii. c. vi.

and in any action or proceeding for any penalty for bribery, treating, or undue influence, it shall be sufficient to allege that the defendant was at the election at or in connection with which the offence is intended to be alleged to have been committed guilty of bribery, treating, or undue influence (as the case may require); and in any criminal or civil proceedings in relation to any such offence the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election (*r*), and of any person therein named having been a candidate thereat.'

This section is extended by 46 & 47 Vict. c. 51, s. 53, *infra*, to indictments for corrupt practices as defined *ante*, p. 636. On an indictment for personation at an election held before this Act, it was ruled that the election writ or an examined copy must be put in evidence (*s*). It is not necessary under the present law to allege in the indictment or prove that the presiding officer at the polling station at which the personation is charged to have occurred was duly appointed (*t*).

An indictment for a corrupt practice which does not specifically describe it is bad for generality if challenged before verdict (*u*).

By 46 & 47 Vict. c. 51, sect. 53 (1), 'Sects. 10, 12 and 13 (*v*), of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), and sect. 6 (*w*) of the Corrupt Practices Prevention Act, 1863, *supra* (which relate to prosecutions for bribery and other offences under those Acts), shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned, and an order under the said sect. 10 may be made on the defendant, but the Director of Public Prosecutions, or any person instituting any prosecution in his behalf or by direction of an election Court, shall not be deemed to be a private prosecutor nor required under the said sections to give any security.'

(2) 'On any prosecution under this Act, whether on indictment or summarily, and whether before an election Court or otherwise, and in any action for a pecuniary forfeiture, under this Act, the person prosecuted or sued, and the husband or wife of such person, may, if he or she think fit, be examined as an ordinary witness in the case' (*w*).

(*r*) See Reed *v.* Lamb [1860], 6 H. & N. 75. R. *v.* Clarke, 1 F & F. 654.

(*s*) R. *v.* Vaile, 6 Cox, 470, Crompton, J.

(*t*) R. *v.* Garvey, 16 Cox, 253.

(*u*) R. *v.* Norton, 16 Cox, 59, Pollock, B. It seems to be good after verdict. R. *v.* Stroulger, 17 Q.B.D. 327.

(*v*) S. 10 denies jurisdiction to quarter sessions. Ss. 10, 12, 13 are repealed as to costs in England by 8 Edw. VII. c. 5, s. 10, *post*, Bk. xii. c. v.

(*w*) *Vide post*, Bk. xiii. c. v. 15 & 16 Vict. c. 57, s. 8, empowers election commissioners to summon any person whose evidence they may deem material to the inquiry, and to require any person to produce books, papers, &c., necessary for arriving at the truth of the things to be inquired into by them; and provides that all persons 'shall answer all questions put to them by the commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds and writings required of them, and in their custody or under their control, according to the tenor of the summons: provided always that no statement made by any person in answer to any questions put by such commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal.' See R. *v.* Leatham, 30

(3) 'On any such prosecution or action as aforesaid it shall be sufficient to allege that the person charged was guilty of an illegal practice, payment, employment, or hiring within the meaning of this Act, as the case may be, and the certificate of the returning officer at an election, that the election mentioned in the certificate was duly held, and that the person named in the certificate was a candidate at such election, shall be sufficient evidence of the facts therein stated.'

By sect. 52, 'Any person charged with a corrupt practice, may, if the circumstances warrant such finding, be found guilty of an illegal practice (which offence shall for that purpose be an indictable offence), and any person charged with an illegal practice may be found guilty of that offence notwithstanding that the act constituting the offence amounted to a corrupt practice, and a person charged with illegal payment, employment, or hiring may be found guilty of that offence notwithstanding that the act constituting the offence amounted to a corrupt or illegal practice.'

In an action for bribery at an election, the register of voters at an election, made in pursuance of 6 & 7 Vict. c. 18, ss. 48, 49, was held to be a document of such a public nature as to be admissible upon its mere production by the returning officer, and an examined or certified copy was held admissible (*x*).

Where a book, which was in writing, and duly signed, contained the register of voters, Byles, J., held, that though there ought to be a copy of the list printed in a book and duly signed, in order to constitute a proper register, yet this register, though irregular, was valid and admissible in evidence (*y*).

15 & 16 Vict. c. 57, s. 8 (p. 648, note (*w*)), does not prevent the putting in evidence on an information for bribery a document produced before commissioners, for the proviso to that section applies only to statements made (*z*).

Trial of Offences.—By 46 & 47 Vict. c. 51, s. 43 (subsects. 1–3), provision is made for the attendance of the Director of Public Prosecutions at the trial of election petitions. Sub-sect. 4 provides for the summary trial by the election Court of any person prosecuted by the Director for corrupt or illegal practices, but in the case of a 'corrupt' practice the Court must give the person charged the option of being tried by a jury.

By sub-sect. 5, 'Where a person is so prosecuted for any such offence, and either he elects to be tried by a jury or he does not appear before the Court, or the Court thinks it in the interests of justice expedient that he

L. J. Q.B. 205. The section is extended by 31 & 32 Vict. c. 125, s. 56, to commissioners to inquire into corrupt practices at elections. By 17 & 18 Vict. c. 102, s. 55, 'On the trial of any action for recovery of any pecuniary penalty under this Act, the parties to such action, and the husbands and wives of such parties respectively, shall be competent and compellable to give evidence in the same manner as parties, and their husbands and wives are competent and compellable to give evidence in actions and suits under the Evidence Act, 1851 (14 & 15 Vict. c. 99), and the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), but subject to and with the exceptions contained in such several Acts, provided always, that any such evidence shall not thereafter be used in any indictment or criminal proceeding under this Act against the party giving it.'

(*x*) Reed *v.* Lamb, 6 H. & N. 75.

(*y*) R. *v.* Clarke, 1 F. & F. 654. R. *v.* Colebourne, ibid.

(*z*) R. *v.* Leatham, 30 L. J. Q.B. 203.

should be tried before some other Court, the Court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted on indictment, or before a Court of Summary Jurisdiction as the case may require for the said offence, and in either case may order him to be prosecuted before such Court as may be named in the order, and for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to have been committed within the jurisdiction of the Court so named' (*a*).

(6) 'Upon such order being made, (a) if the accused person is present before the Court and the offence is an indictable offence, the Court shall commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence.' . . .

(c) 'if the accused person is not present before the Court, the Court shall, as circumstances require, issue a summons for his attendance, or a warrant to apprehend him and bring him before a Court of summary jurisdiction, and that Court, if the offence is an indictable offence (*b*), shall, on proof only of the summons or warrant and the identity of the accused, commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence' . . . (*c*).

Sect. 45 provides for the institution of prosecutions by the Director of Public Prosecutions, and sect. 46 for the removal of any incapacity proved to have been brought about by perjured evidence.

By sect. 50, 'Where an indictment as defined by this Act (*vide ante*, p. 636), for any offence under the Corrupt Practices Prevention Acts, or this Act is instituted in the High Court or is removed into the High Court by a writ of *certiorari* issued at the instance of the Attorney-General, and the Attorney-General suggests on the part of the Crown that it is expedient for the purposes of justice that the indictment should be tried in the Central Criminal Court, or if a special jury is ordered, that it should be tried before a judge and jury at the Royal Courts of Justice, the High Court may, if it think fit, order that such indictment shall be so tried upon such terms as the Court may think just, and the High Court may make such orders as appear to the Court necessary or proper for carrying into effect the order for such trial.'

Limitation of Time.—By sect. 51 (1), 'A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence under the Corrupt Practices Prevention Acts or this Act, shall be commenced within one year after the offence was committed, or, if it was committed in reference to an election with respect to which an inquiry is held by election commissioners, shall be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed, and the time so limited by this section shall, in the case of any proceeding under the Summary Jurisdiction Acts for any such offence whether before an election Court or otherwise, be substituted for any limitation of time contained in the last mentioned Acts.'

(*a*) See R. *v.* Shellard, 23 Q.B.D. 273. R. *v.* Ripley, 17 Cox, 120.

(*b*) See R. *v.* Shellard, *ubi supra*.

(*c*) Provisions identical with this section are made as to municipal elections, 47 & 48 Vict. c. 70, s. 28.

(2) 'For the purposes of this section the issue of a summons, warrant, writ, or other process shall be deemed to be a commencement of a proceeding when the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender, but, save as aforesaid, the service or execution of the same on or against the alleged offender, and not the issue thereof, shall be deemed to be the commencement of the proceeding.'

By sect. 55 (2), 'The enactments relating to charges before justices against persons for indictable offences shall, so far as is consistent with the tenor thereof, apply to every place where an election Court orders a person to be prosecuted on indictment, in like manner as if the Court were a justice of the peace.' (See 11 & 12 Vict. c. 42 : 30 & 31 Vict. c. 35.)

By sect. 56 (1), 'Subject to any rules of Court any jurisdiction vested by this Act in the High Court may, so far as it relates to indictments or other criminal proceedings, be exercised by any judge of the King's Bench Division, and in other respects may either be exercised by one of the judges for the time being on the rota for the trial of election petitions, sitting either in Court or at chambers, or may be exercised by a master of the Supreme Court of Judicature in manner directed by and subject to an appeal to the said judges.'

It is, however, provided that a master shall not exercise jurisdiction to grant exceptions or excuses. The Court has power to make rules regulating procedure and practice.

By sect. 57 (1), 'The Director of Public Prosecutions, in performing any duty under this Act, shall act in accordance with the regulations under the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22) (*d*), and subject thereto, in accordance with the directions (if any) given to him by the Attorney-General, and any assistant or representative of the Director of Public Prosecutions in performing any duty under this Act, shall act in accordance with the said regulations and directions, if any, and with the directions given to him by the Director of Public Prosecutions' (*e*).

Evidence—Certificate of Indemnity.—By sect. 59 (1), 'A person who is called as a witness respecting an election before any election Court shall not be excused from answering any question relating to any offence at or connected with such election on the ground that the answer thereto may criminate or tend to criminate himself, or on the ground of privilege.

Provided that—

(*a*) A witness who answers truly all questions which he is required by the election Court to answer shall be entitled to receive a certificate of indemnity under the hand of a member of the Court stating that such witness has so answered ; and

(*b*) An answer by a person to a question put by or before any election Court shall not, except in the case of any criminal proceeding for perjury in respect of such evidence (*f*) be in any proceeding, civil or criminal, admissible in evidence against him.

(*d*) As amended by the Prosecution of Offences Act, 1908 (8 Edw. VII. c. 3), *post*, Vol. ii. p. 1924..

(*e*) As to costs, see R. *v.* Law [1900], 1 Q.B. 605, and 8 Edw. VII. c 15, *post*, Bk. xii. c. v.

(*f*) A witness before such a commission of inquiry was, after giving his evidence

(2) Where a person has received such a certificate of indemnity in relation to an election, and any legal proceeding is at any time instituted against him for any offence under the Corrupt Practices Prevention Acts or this Act, committed by him previously to the date of the certificate, at or in relation to the said election, the Court having cognizance of the case shall, on proof of the certificate, stay the proceeding, and may in their discretion award to the said person such costs as he may have been put to in the proceeding.

(3) Nothing in this section shall be taken to relieve a person receiving a certificate of indemnity from any incapacity under this Act, or from any proceeding to enforce such incapacity (other than a criminal prosecution).

(4) This section shall apply in the case of a witness before any election commissioners in like manner as if the expression "election Court" in this section included election commissioners.

(5) Where a solicitor or person lawfully acting as agent for any party to an election petition respecting any election for a county or borough has not taken any part or been concerned in such election, the election commissioners inquiring into such election shall not be entitled to examine such solicitor or agent respecting matters which came to his knowledge by reason only of his being concerned as solicitor or agent for a party to such petition.'

By sect. 60, 'An election Court or election commissioners, when reporting that certain persons have been guilty of any corrupt or illegal practice, shall report whether those persons have or not been furnished with certificates of indemnity, and such report shall be laid before the Attorney-General (accompanied, in the case of commissioners, with the evidence on which such report was based), with a view to his instituting or directing a prosecution against such persons as have not waived certificates of indemnity, if the evidence should in his opinion be sufficient to support a prosecution.'

Municipal Elections.—By 47 & 48 Vict. c. 70, s. 30, 'Subject to the other provisions of this Act, the procedure for the prosecution of a corrupt or illegal practice, or any illegal payment, employment, or hiring, committed in reference to a municipal election, and the removal of any incapacity incurred by reason of a conviction or report relating to any such offence, and the duties of the Director of Public Prosecutions in relation to any such offence, and all other proceedings in relation thereto (including the grant to a witness of a certificate of indemnity, shall be the same as if such offence had been committed in reference to a parliamentary election; and sects. 45 & 46 and sects. 50–57, both inclusive, and sects.

before it, indicted for perjury committed before a judge, on the trial of an election petition in respect of the same election with reference to which he was examined before the commissioners. Statements made by such witness, in answer to questions put by the commissioners relative to corrupt practices at such election, were given in evidence against him to prove the indictment for perjury. Held, that the exception in the proviso to 26 & 27 Vict. c. 29, s. 7, which provided an exception in the case of indictments for perjury as to cases of indictments for perjury, must be considered to mean perjury committed in answer to questions put by the commissioners on the inquiry, and not to perjury generally, and therefore that the above evidence was not admissible. R. *v.* Buttle, L. R. 1 C. C. R. 248. The words of 46 & 47 Vict. c. 51, s. 59, are 'except in the case of any criminal proceeding for perjury,' and this would seem to destroy the effect of R. *v.* Slator, 8 Q.B.D. 267.

59 and 60 of the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51) (*g*), shall apply accordingly as if they were re-enacted in this Act, with the necessary modifications, and with the following additions :—

a. Where the Director of Public Prosecutions considers that the circumstances of any case require him to institute a prosecution before any Court other than an election Court, for any offence other than a corrupt practice committed in reference to a municipal election in any borough, he may, by himself or his assistant, institute such prosecution before any Court of summary jurisdiction in the county in which the said borough is situate, or to which it adjoins, and the offence shall be deemed for all purposes to have been committed within the jurisdiction of such Court ;

b. General rules for the purposes of part iv. of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), shall be made by the same authority as rules of Court under the said sections (*h*) ; and

c. The giving or refusal to give a certificate of indemnity to a witness by the election Court shall be final and conclusive' (*i*).

(*g*) *Vide ante*, pp. 651, 652.

(*h*) *i.e.*, by the rule making authority for the Supreme Court, 46 & 47 Vict. c. 51, s. 56. The rules made April 17, 1883, are printed in Stat. R. & O. Revised (ed. 1904), Vol. xii., Supreme Court E., p. 656.

(*i*) See Rogers on Elections (18th ed.), Vol. iii.

CANADIAN NOTES.

OF OFFENCES WITH REFERENCE TO THE REGISTRATION OF ELECTORS AND VOTING, ETC., AT ELECTIONS.

Dominion Elections.

See Revised Statutes of Canada (1906), ch. 6, secs 247-307 inclusive.

Sec. 1.—Offences in Connection with the Preparation of Elections Lists.

Dominion Election Act.

Refusal or omission by provincial officer to record changes on list of voters. See R.S.C. ch. 6, sec. 247.

Refusal of provincial custodian to transmit to clerk of Crown in Chancery copies of lists. See R.S.C. ch. 6, sec. 248.

Sec. 2.—Official Misconduct with Reference to Elections.

(*a*) *Misconduct by Returning Officer and his Staff.*—See R.S.C. ch. 6, sec. 249.

Neglect of duty by officials. See R.S.C. ch. 6, sec. 250.

Refusal to furnish returning officer with documents. See R.S.C. ch. 6, sec. 251.

Election officers acting as agents. See R.S.C. ch. 6, sec. 252.

Improper varying of oath of qualification. R.S.C. ch. 6, sec. 253.

Illegally refusing a ballot to an elector in Prince Edward Island. R.S.C. ch. 6, sec. 254.

Delay, neglect or refusal of returning officer to return election candidate. R.S.C. ch. 6, sec. 257.

Failure to maintain secrecy during poll. R.S.C. ch. 6, sec. 258.

Sec. 3.—Corrupt and Illegal Practices at Elections.

(*a*) *Definition of Corrupt Practices.*—See R.S.C. ch. 6, sec. 278.

(*b*) *Bribery at Elections.*

Giving money, etc., to procure votes. R.S.C. ch. 6, sec. 265; amended, 7 & 8 Edw. VII. ch. 9, sec. 29.

Giving or promising employment. R.S.C. ch. 6, sec. 265.

Gifts or promises. R.S.C. ch. 6, sec. 265.

Advancing money to be used in bribing. R.S.C. ch. 6, sec. 265.

Demanding bribe of candidate or agent. R.S.C. ch. 6, sec. 265.

Bribery at Elections.—Continued.

Receiving money, etc., before, during or after an election. R.S.C. ch. 6, sec. 265.

Bribery of candidates. R.S.C. ch. 6, sec. 265.

Paying for conveyances of voters to polls. R.S.C. ch. 6, sec. 270; amended, 7 & 8 Edw. VII. ch. 9, sec. 30.

Disqualification of voters for receiving payment for conveyances. 7 & 8 Edw. VII. ch. 9, sec. 31.

(*c*) *Treating.*

By candidate. R.S.C. ch. 6, sec. 266.

During election. R.S.C. ch. 6, sec. 267.

On nomination or polling day. R.S.C. ch. 6, sec. 268.

(*d*) *Undue Influence.*

Undue influence. R.S.C. ch. 6, sec. 269.

False pretences. R.S.C. ch. 6, sec. 269.

Personation. R.S.C. ch. 6, sec. 272.

Subornation of. R.S.C. ch. 6, secs. 273, 274.

Voting of prohibited persons. R.S.C. ch. 6, sec. 275.

(*e*) *False Answers by Voters.*—R.S.C. ch. 6, sec. 274.

(*f*) *Illegal Practices.*

Defacing proclamation, etc. 7 & 8 Edw. VII. ch. 9, sec. 24.

Refusal to obey summons of returning officer. R.S.C. ch. 6, sec. 256.

Weapons, carrying, etc. R.S.C. ch. 6, sec. 260.

Weapons, refusing to give up. R.S.C. ch. 6, sec. 259.

Spirituous liquors, selling, etc., on polling day. R.S.C. ch. 6, sec. 261.

Payments, making otherwise than through agents. R.S.C. ch. 6, sec. 262; amended, 7 & 8 Edw. VII. ch. 9, sec. 28.

Making untrue statements as to election expenses. R.S.C. ch. 6, secs. 263, 264.

False statements of withdrawal of candidates. R.S.C. ch. 6, sec. 276.

Canvassing by person not residing in Canada. 7 & 8 Edw. VII. ch. 9, sec. 33.

Printing advertisements, etc., without printer's address. 7 & 8 Edw. VII. ch. 9, sec. 34.

Contributions by companies, etc., to political purposes. 7 & 8 Edw. VII. ch. 9, sec. 36.

(*g*) *Offences Relating to Ballot Papers.*

Ballot papers, forgery of, illegal supplying of, fraudulently putting in box, taking out of polling station, destroying, removing from box, illegally initialling, etc. R.S.C. ch. 6, sec. 255; amended, 7 & 9 Edw. VII. ch. 9, sec. 26.

Offences Relating to Ballot Papers.—Continued.

False statement as to candidate. 7 & 8 Edw. VII. ch. 9, sec. 35.

Displaying or disclosing marked ballots. R.S.C. ch. 6, sec. 258; amended, 7 & 9 Edw. VII. ch. 9, sec. 27.

(*h*) *Offences After an Election.*

Delay, neglect or refusal of returning officer to return elected candidate. R.S.C. ch. 6, sec. 257.

Default of agent in delivering statements of expenses to returning officer. R.S.C. ch. 6, sec. 263.

Furnishing untrue statements of election expenses. R.S.C. ch. 6, sec. 264.

(*i*) *Indictment and Procedure.*

Jurisdiction—

Magistrate having. R.S.C. ch. 6, sec. 300.

Quarter Session's Court incompetent. R.S.C. ch. 6, sec. 306.

Warrants of Arrest, etc.—

Information. R.S.C. ch. 6, secs. 284, 294, 298.

Security for costs. R.S.C. ch. 6, sec. 285.

Allegations necessary. R.S.C. ch. 6, secs. 286, 293.

Detention of offender. R.S.C. ch. 6, sec. 295.

Issue of. R.S.C. ch. 6, sec. 296.

Execution of warrant. R.S.C. ch. 6, secs. 296, 299.

Summons to Offender—

Issue of. R.S.C. ch. 6, sec. 302.

Disobedience to. R.S.C. ch. 6, sec. 303.

Procedure—

Criminal Code to apply. R.S.C. ch. 6, sec. 301.

Determination of action. R.S.C. ch. 6, sec. 304.

Appropriation of fines. R.S.C. ch. 6, sec. 305.

Costs, may be awarded to prosecutor. R.S.C. ch. 6, secs. 291, 292.

Evidence—

Husband and wife, as to. R.S.C. ch. 6, sec. 287.

No privilege or excuse from answering questions. R.S.C. ch. 6, sec. 288.

Production of election writs not required. R.S.C. ch. 6, sec. 289.

Clerk of Crown in Chancery must produce ballots if required. R.S.C. ch. 6, sec. 290.

Limitation of time for prosecutions. R.S.C. ch. 6, sec. 307.

Provincial Election Acts.

Alberta.—See 9 Edw. VII. ch. 3.
Registration offences. Secs. 82-87.
Preservation of peace at elections. Secs. 241-291 and sec. 296.

British Columbia.
Provincial elections. Sec. 3 & 4 Edw. VII. (B.C.), ch. 17, secs. 166-188 and 197-208; see also amendment in 6 Edw. VII. ch. 18.
Municipal elections. 8 Edw. VII. ch. 14, secs. 94-105.

Manitoba.—See R.S.M. (1902), ch. 3, secs. 239-295 and 305-306.

New Brunswick.—Consolidated Statutes (1908), vol. 1, ch. 3.

Nova Scotia.—See 9 Edw. VII. ch. 6; secs. 10 and 83-120 and 123.

Ontario.
Provincial. See 8 Edw. VII. ch. 3, secs. 167-202 and 207.
Municipal. See 3 Edw. VII. ch. 19, secs. 193-197 and 245-258.

Quebec.—See 3 Edw. VII. ch. 9, secs. 156 and 181-229.

Saskatchewan.—See 8 Edw. VII. ch. 2.
Registration offences 83-88.
Preservation of peace, etc. Secs. 209-259 and 264.

BOOK THE NINTH.

OF OFFENCES AGAINST THE PERSONS, STATUS AND REPUTATION OF INDIVIDUALS.

CHAPTER THE FIRST.

OF HOMICIDE.

PART I.—MURDER AND FELO DE SE.

SECT. I.—DEFINITION AND PUNISHMENT OF MURDER.

Definition.—Murder (*a*) is a felony at common law. Its essential elements are not defined by statute except by the provision in sect. 6 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), that 'it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased.'

Murder is the unlawful killing, by any person of sound memory and discretion, of any person under the King's peace, with malice aforethought (*b*), either *express* or *implied by law* (*c*). This malice aforethought which distinguishes murder from other species of homicide (*d*) is not limited to particular illwill against the person slain, but means that the fact 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 (*e*). Any formed design of doing mischief may be called malice; and therefore not only killing from premeditated hatred or revenge against the person killed; but also, in many other cases, killing accompanied with circumstances that shew the heart to be previously wicked, is adjudged to be killing of malice aforethought, and consequently murder (*f*).

(*a*) By 24 & 25 Vict. c. 100, s. 8, every offence which before July 1, 1828, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder. As to petit treason, see Fost. 323, 327, 336, 376; 1 Hawk. c. 32; 4 Bl. Com. 203; 25 Edw. III. st. 5; Pollock & Maitland Hist. Eng. Law, ii. p. 502. The merger of this offence in murder has rendered it unnecessary to repeat the full account of it given in earlier editions of this work. This section was taken from 9 Geo. IV. c. 31, s. 2 (E); and 10 Geo. IV. c. 34, s. 3 (I).

(*b*) Or malice prepensed, *malice prepensée*, *malitia præcogitata*.

(*c*) 3 Co. Inst. 47, 51. 1 Hale, 425, 449, 450. Fost. 256. 1 Hawk. c. 31, s. 3. 4 Bl. Com. 198. 1 East, P. C. 214. R. *v.* Mawgridge, Kel. (J.) 119, 127. R. *v.* Oneby, 2 Ld. Raym. 1487. The older definitions are discussed Stephen Dig. Cr. L. (6th ed.) art. 244, and p. 407; and see Archb. Cr. Pl. (23rd ed.) 782.

(*d*) 4 Bl. Com. 198. R. *v.* Gastineaux, 1 Leach, 417.

(*e*) Fost. 256, 262.

(*f*) 1 Hawk. c. 31, s. 19. Fost. 257. 1 Hale, 451–455.

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 evidenced by external circumstances, which disclose the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the deceased some bodily harm (*g*). And malice is *implied by law* from any deliberate cruel act committed by one person against another, however sudden (*h*). Thus where a man kills another suddenly without any, or without considerable provocation, the law implies malice; considering that no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause (*i*). So if a man wilfully poisons another the law presumes malice, though no particular enmity can be proved (*j*). And in cases of killing by a wilful act of such nature as shews 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 (*k*). As a general rule, all homicide

(*g*) 1 Hale, 451. 4 Bl. Com. 199.

(*h*) 1 East, P. C. 215. R. *v.* Fairbrother, 1 Cr. App. R. 233.

(*i*) 4 Bl. Com. 200.

(*j*) 1 Hale, 455. 4 Bl. Com. 200.

(*k*) 1 Hale, 455. 1 Hawk. c. 29, s. 12. 4 Bl. Com. 200. 1 East, P. C. 231. *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 a particular person: but this is not the legal sense; and Holt, C.J., says: 'Some have been led into mistake 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.' Kel. (J) 126. In the Roman law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it (De Nat. Deor. Lib. 3, s. 30) as '*versuta et fallax nocendi ratio*;' and in another work (De Offic. Lib. 3, s. 18) he says, '*mihi quidem etiam veræ hæreditates non honestæ videntur, si sint malitiosis* (*i.e.* according to Pearce, *a malo animo profectis*) *blanditiis officiorum, non veritate sed simulatione, quæsitæ*.' And see Dig. Lib. 2, Tit. 13, Lex 8, where, in speaking of a banker, or cashier giving his accounts, it is said, '*Ubi exigitur argentarius rationes edere, tunc punitur cum dolo malo non exhibet . . . Dolo malo autem non edidit, et qui malitiose edidit et qui in totum non edidit.*' Amongst us malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Coke, in his comment on the words *per malitiam*, says, 'If one be appealed of murder, and it is found by verdict that he killed the party *se defendendo*, this shall not be said to be *per malitiam*, because he had a *just cause*.' 2 Co. Inst. 384. And where the statutes speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptation of anger or desire of revenge against another. Thus where 25 Hen. VIII. c. 3, says, that persons arraigned of petit treason, &c., standing 'mute of malice or froward mind,' or challenging, &c., shall be excluded from clergy, the word *malice*, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. I., *De malefactoribus in parcis*, trespassers are mentioned who shall not yield themselves to the foresters, &c., but '*immo malitiam suam prosequendo et continuando*,' shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been (as will be seen in the course of the present and subsequent chapters) whether the act were done with or without just cause or excuse; so that it has been suggested (Chapple, J., MS. Sum.) that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense*. Malice, 'in its legal sense, denotes a wrongful act done intentionally without just cause or excuse.' M'Pherson *v.* Daniels, 10 B. & C. 272, Littledale, J., and approved in R. *v.* Noon, 6 Cox, 137, by Cresswell, J., as the more intelligible expression. '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

is presumed to be malicious, and murder, until the contrary appears, from circumstances of alleviation, excuse, or justification (*l*); and 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 (*m*). A defence grounded upon violent provocation will not avail, however grievous the provocation, if there was an interval of reflection, or a reasonable time for the blood to cool before the deadly purpose was effected. And provocation is no answer if *express* malice be proved. Thus if a man, having received provocation, deliberately and advisedly threatens vengeance against the other, as by declaring that he will have his blood, or the like, and afterwards carries his design into execution, he is guilty of murder; although the killing followed so soon after the provocation that the law might, apart from evidence of such express malice, have imputed the act to unadvised passion (*n*). 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 is 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 (*o*). But if it appears 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 (*p*).

Where knowledge of some fact is necessary to make a killing murder, and several persons are concerned in the killing, those who have the knowledge will be guilty of murder, and those who have it not of manslaughter only. Thus if A. assaults B. of malice, and they fight, and A.'s

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 shew 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.' R. *v.* Harvey, 2 B. & C. 268, Best, J. Malice does not mean the same thing in criminal as in civil cases. In criminal cases motive is usually an essential ingredient in the definition of an offence or in determining the appropriate punishment, whereas in civil cases the law is more concerned with the fact of an injury than with the motive for causing it. Quinn *v.* Leathem [1901], A. C. 495. In criminal cases, except of defamation, malice usually denotes intention, deliberation, or wantonness as distinguished from negligence or inadvertence. See R. *v.* Senior [1899], 1 Q.B. 283, and R. *v.* Ellwood, 1 Cr. App. R. 181.

(*l*) 4 Bl. Com. 201. In R. *v.* Greenacre, 8 C. & P. 35, Tindal, C.J., said, 'where it appears that one person's death has been occasioned by the hand of another, it behoves that other to shew from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, or does not amount to the crime of murder.' Coleridge and Coltman, JJ., *præsentibus*.

(*m*) Fost. 255. 4 Bl. Com. 201. 1 East, P. C. 224. On an indictment for murder it appeared that the deceased died of a wound inflicted in her chest with a knife; there was no evidence of any dispute; the prisoner asserted that she had killed herself, and this was his defence. The jury found the prisoner guilty, 'but we believe it was done without premeditation.' Byles, J., refused to receive this verdict, and told the jury that 'to reduce the crime to manslaughter, it must be shewn that there was provocation at the time, and provocation of a serious nature. The prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved, the law presumes malice; and although that may be rebutted by evidence, no such attempt has been made here. The defence is that the woman took her own life. The question for you is, did the prisoner take his wife's life or not? If he did, it was murder.' R. *v.* Maloney, 9 Cox, 6. See R. *v.* Fairbrother, 1 Cr. App. R. 233.

(*n*) 1 East, P.C. 224.

(*o*) 1 Hale, 452. It is not to be presumed in such a case that the parties fought upon the old grudge. 1 Hawk. c. 31, s. 30.

(*p*) 1 Hale, 452.

servant come to aid his master, and B. is killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only (*q*).

Judgment and Execution.—By the Offences against the Person Act, 1861, sect. 1. 'Whosoever shall be convicted of murder shall suffer death as a felon' (*r*). This has been modified by the Children Act, 1908, as to murder by persons under 16 (*s*).

Sect. 2. 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 in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this Act (6 Aug., 1861,) upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon' (*t*).

By the Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24) (*u*), s. 2, judgment of death to be executed on any prisoner sentenced on any indictment or inquisition for murder, shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution. The Act directs that certain persons shall be present at the execution, &c.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 13 (1), 'Where judgment of death has been passed upon a convict at any Court of assize or any sessions of oyer and terminer or gaol delivery held for any county or riding or division or other part of a county (*v*), the sheriff of such county shall be charged with the execution of such judgment, and may carry such judgment into execution in any prison which is the common gaol of his county or in which the convict was confined for the purpose of safe custody prior to his removal to the place where such Court was held, and shall, for the purpose of such execution, have the same jurisdiction and powers over and in the prison in which the judgment is to be carried into execution, whether such prison is or is not situate within his county, and over the officers of such prison, as he has by law over and in the common gaol of his county and the officers thereof, or would have had if the Prison Act, 1865, and the Prison Act, 1877 (*w*), had not passed, and shall be subject to the same responsibility and duties as if the said Acts had not passed.

(2) This section shall be in addition to and not in derogation of any power authorised to be exercised by order in Council under the Winter Assizes Act, 1876 (*x*), and the Spring Assizes Act, 1879 (*y*) or either of them, and of the provisions of the Central Criminal Court (Prisons) Act, 1881 (*z*).

(*q*) 1 Hale, 446. Plowd. 100.

(*r*) Taken from 9 Geo. IV. c. 31, s. 3.

(*s*) See s. 103 of that Act, *ante*, p. 205.

(*t*) This section was new in 1861. As to former law, *vide ante*, p. 206, and Greaves' Crim. Law Cons. Acts (2nd ed.), 30.

(*u*) Which, with certain modifications, extends to Scotland and Ireland (see ss. 13, 14).

(*v*) As to execution of sentences on convictions in a county for offences in a county of a city, see 51 Geo. III. c. 100, s. 1; 14 & 15 Vict. c. 55, s. 23. As to execution of persons sentenced at assizes for Cheshire, see 30 & 31 Vict. c. 36, s. 4.

(*w*) See 40 & 41 Vict. c. 21, s. 30.

(*x*) 39 & 40 Vict. c. 57.

(*y*) 42 & 43 Vict. c. 1.

(*z*) 44 & 45 Vict. c. 64.

In the case of prisoners sentenced to death for murder at the winter or spring assizes, the sentence may be executed in any prison in which the prisoner was confined for safe custody before his removal to the place where the assizes were held at which he was convicted. Sentences of death for murder at the Central Criminal Court are executed at the prison ordered by the judge or if no order is made, at the prison in which the prisoner is confined (*a*).

By 24 & 25 Vict. c. 100, s. 3, 'The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the Court shall so direct' (*b*).

By 31 & 32 Vict. c. 24, s. 6, 'The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, provided that if one of his Majesty's principal Secretaries of State is satisfied on the representation of the visiting justices of a prison that there is not convenient space within the walls thereof for the burial of offenders executed therein, he may, by writing under his hand, appoint some other fit place for that purpose, and the same shall be used accordingly (*c*).

By sect. 15, 'The omission to comply with the provisions of this Act shall not make the execution of the judgment of death illegal in any case in which such execution would otherwise have been legal.'

By sect. 5, 'The coroner of the jurisdiction 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. . . .

Execution under Sentence of the High Court.—On the removal by *certiorari* after conviction of an indictment for murder committed in Pembrokeshire and tried in Herefordshire, the Court of King's Bench, after overruling certain exceptions to the indictment and conviction, held that the prisoner might be sentenced in the Court of King's Bench and executed by the marshal at Kennington (*d*).

In R. *v.* Garside (*e*), the prisoners were convicted of murder at Chester, and sentenced to be executed the next Friday; and were in the custody

(*a*) 42 & 43 Vict. c. 1, s. 3, and Orders in Council under that Act and 39 & 40 Vict. c. 57.

(*b*) Founded on 2 & 3 Will. IV. c. 75, s. 16, and 4 & 5 Will. IV. c. 26, s. 2.

(*c*) By s. 7 power is given to the Secretary of State to make rules, &c., to be observed on the execution of judgment of death. See Regulations of June 5, 1902, Stat. R. & O. (1904 ed.) vol. x, tit. 'Prism' (E), p. 65.

(*d*) R. *v.* Athos, 1 Str. 553. 8 Mod. 136. 1 Hale, 464, note (*r*). Cf. R. *v.* Taylor, 5 Burr. 2793, where the prisoners are stated by the reporter to have been in the custody of the marshal, and executed at St. Thomas a Waterings at the end of Kent-street. Cf. Sissinghurst House case, 1 Hale 461.

(*e*) 2 A. & E. 266. Cf. R. *v.* Antrobus, 2 A. & E. 788. In this case it seems to have been ruled that the Attorney-General as of right could obtain a habeas corpus and certiorari to remove into the King's Bench a conviction and judgment at the assizes for murder and the bodies of the prisoners. The prisoners were also given three days to shew cause why execution should not be awarded. One prisoner pleaded *ore tenus* (as he might, R. *v.* Dean, 1 Leach, 476) that he was not the actual murderer, and was entitled to a pardon for giving information, in accordance with a proclamation in the *Gazette*.

of the constable of Chester Castle in that castle which was within the ambit of the city, but was part of the county of Chester. A question arose, whether, since the passing of the Law Terms Act, 1830 (*f*), the sheriffs of the city or the sheriffs of the county were bound to execute the sentence (*g*); and both parties refusing to do it, the prisoners had been from time to time respited. The Attorney-General moved for a *certiorari* to remove the record of the conviction and the judgment, and for a *habeas corpus* to bring up the prisoners, in order that execution might be awarded by the King's Bench, and said he considered himself entitled to the writs as of right: but from respect to the Court, and for his own justification in the course he adopted, he stated the grounds of his application, and cited many cases to shew that he was entitled to the writs as of course, and that the Court of King's Bench might direct execution to be done by the sheriff of the county of Chester, or the sheriffs of the city, by the sheriff of Middlesex, or by the marshal of the King's Bench; and the writs were forthwith granted by the Court.

The Court refused to hear an application by the sheriff of Middlesex that he should not be ordered to execute the prisoners, but ultimately awarded execution to be done by the marshal of the Marshalsea, assisted by the sheriff of Surrey (*h*).

Sect. II.—Felo de se.

Self-murder has been regarded as a peculiar instance of malice directed to the destruction of a man's own life, by inducing him deliberately to put an end to his existence, or to commit some unlawful malicious act, the consequence of which is his own death (*i*). If one man persuades another to kill himself, the adviser is guilty of murder (*j*). A man who kills another, upon his desire or command, is in the judgment of law as much a murderer as if he had done the killing out of his own head (*k*). It is said that in such a case the person killed is not looked upon as a *felo de se*, inasmuch as his assent, being against the laws of God and man, is void (*l*). But where two persons agree to die together, and one of them at the persuasion of the other, buys poison and mixes it, and both drink of it, and he who bought and made the potion survives by using proper remedies and the other dies; it is said to be the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally

(*f*) 11 Geo. IV. and 1 Will. IV. c. 70. See ss. 13, 14, 15. S. 14, which abolished the jurisdiction of the courts palatine of Chester, was repealed in 1873 (36 & 37 Vict. c. 91).

(*g*) By the Chester Courts Act, 1867 (30 & 31 Vict. c. 36), s. 4, the sheriff of the county of Chester is charged with, and is to carry into effect within the county all sentences of death passed at any assizes for the said county, any statute, law, custom, or usage to the contrary notwithstanding. Previous provision had been made in 1835 by 5 & 6 Will. IV., repealed in 1874 (37 & 38 Vict. c. 35).

(*h*) 2 A. & E. 276, 277. Cf. the Sissinghurst House case, 1 Hale, 461.

(*i*) 1 Hawk. c. 9, s. 4. 4 Bl. Com. 189. Hales *v.* Petit, Plowd. 261 (*b*). See 45 & 46 Vict. c. 19, as to the interment of persons found *felo de se*.

(*j*) If present when the other kills himself. If absent, he is accessory before the fact. R. *v.* Russell, 1 Mood. 356. By a Bill introduced into Parliament in 1908, it was proposed to make persons accessory before the fact to, or aiders and abettors in, suicide not guilty of murder but punishable for a distinct offence.

(*k*) 1 Hawk. c. 27, s. 6. R *v.* Sawyer, Old Bailey, May, 1815, MS. R. *v.* Dyson, R. & R. 523.

(*l*) 1 Hawk. c. 27, s. 6.

owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner (*m*). If a man, attempting to kill another, misses his blow and kills himself (*n*), or intending to shoot at another, mortally wounds himself by the bursting of the gun (*o*), he is considered to be *felo de se;* his own death being the consequence of an unlawful malicious act towards another. It has also been said that if A. strikes B. to the ground, and B. draws a knife and holds it up in his own defence, and A. in haste falling upon B. to kill him, falls upon the knife, and be thereby killed, A. is *felo de se* (*p*); but this has been doubted (*q*).

A husband and wife being in extreme poverty and great distress of mind, the husband said, 'I am weary of my life, and will destroy myself,' upon which the wife replied, 'Then I will die with you.' The man prayed the wife to go and buy ratsbane and they would drink it together. She did so and mixed it with some drink, and they both partook of it. The husband died, but the wife, by drinking salad oil, which caused sickness, recovered, and was tried for the murder of her husband (*r*), and acquitted, but solely on the ground that, being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case, pronounced her not guilty (*s*).

The prisoner was indicted for the murder of a woman by drowning her. The prisoner and the deceased had cohabited for several months and she was pregnant by him. They were in a state of extreme distress, and had no place of shelter. They went to Westminster Bridge to drown themselves in the Thames. They got into a boat, talked together for some time, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water; but whether by actually throwing himself in, or by accident, did not appear. He struggled to get back into the boat again, and then found that the woman was gone; he then endeavoured to save her, but could not get to her, and she was drowned. In his statement before the magistrate he said that he intended to drown himself, but dissuaded the woman from following his example. Best, J., told the jury, that if they believed the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner; but that if both went to the water for the purpose of drowning themselves together, each encouraged the other in the commission of a felonious act, and the survivor was guilty of murder. He also told the jury, that

(*m*) 1 Hawk. c. 27, s. 6. Keilw. 136: 72 E. R. 307.

(*n*) 1 Hale, 413.

(*o*) 1 Hawk. c. 27, s. 4.

(*p*) 3 Co. Inst. 54. Dalt. c. 44.

(*q*) Hale (1 P. C. 413) considers that B. is not guilty at all of the death of A., not even *se defendendo*, as he did not strike, only held up the knife; and that A. is not *felo se de*, but that it is homicide by misadventure. In 1 Hawk. c. 27, s. 5, it seems to be considered that B. should be adjudged to have killed A. *se defendendo*.

(*r*) Anon. [1604] Moore (K.B.) 754; 72 E. R. 884. The report begins, '*en home et se feme ayant longe temps vive incontinent ensemble*,' and states that a special verdict was found, but does not state the decision. In former editions a doubt was expressed whether the two were husband and wife, based on a mistranslation of the word 'incontinent.'

(*s*) The report in Moore does not state any acquittal. The rest of this passage is taken from the statement of the case in R. *v.* Alison, 8 C. & P. 418, Patteson, J.

although the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered as the act of both, and so the case was reached by the indictment. The jury stated that they were of opinion that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. And, upon a case reserved, the judges were clear that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of their previous agreement, he was a principal in the second degree, and was guilty of murder; but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either of them, and the prisoner was recommended for a pardon (*t*). So where upon an indictment for the murder of a woman, it appeared that the prisoner and the deceased, who passed as husband and wife, being in very great distress, both agreed to take poison, and each took a quantity of laudanum, in the presence of the other, and both lay down on the same bed together, wishing to die in each other's arms, and the woman died, but the prisoner recovered; Patteson, J., told the jury that, 'supposing the parties in this case mutually agreed to commit suicide, and one only accomplished that object, the survivor will be guilty of murder in point of law' (*u*).

A person could not formerly be tried as an accessory before the fact, for inciting another to commit *felo de se*, if that person committed *felo de se* (*v*). But 24 & 25 Vict. c. 94, s. 1 (*w*), removes this difficulty, as it abolishes for practical purposes the distinction between principals in the first and second degree and accessories (*x*).

An attempt to commit *felo de se* is not an attempt to commit murder within 24 & 25 Vict. c. 100, s. 15 (*post*, p. 841), but is a misdemeanor at common law (*y*). The question for the jury is whether the defendant had a mind capable of contemplating the act, and whether in fact he did intend to take his own life, and drunkenness, while in this as in other cases no excuse, is a material factor to determine whether the defendant really meant to kill himself (*z*).

Sect. III.—The Party Killing, and the Party Killed.

The Party Killing.—The person committing a crime must be a free agent, and not subject to actual force at the time the act is done. Thus if A. by force takes the arm of B., in which is a weapon, and therewith kills C., A. is guilty of murder, but B. is not. But the use of *moral* force is no legal excuse, *e.g.* by threats of duress or imprisonment to B., or even assault to the peril of B.'s life, in order to compel him to kill C. (*a*). If A. procures B., an idiot or lunatic, to kill C., A. is guilty of the murder

(*t*) R. *v.* Dyson, R. & R. 523.

(*u*) R. *v.* Alison, 8 C. & P. 418, Patteson, J. Cf. R. *v.* Jessop, 16 Cox, 204, Field, J. R. *v.* Stormonth, 61 J. P. 729, Ridley, J. R. *v.* Abbott, 67 J. P. 151, Kennedy, J. R. *v.* Deering, Lincoln Assizes, November 2, 1907.

(*v*) R. *v.* Russell, 1 Mood. 356. R. *v.* Leddington, 9 C. & P. 79, Alderson, B.

(*w*) *Ante*, p. 130.

(*x*) R. *v.* Jessop, 16 Cox, 207, Field, J.

(*y*) R. *v.* Burgess, 32 L. J. M. C. 55 (C. C. R.). *Vide ante*, p. 140. It is punishable by fine and (or) imprisonment (without hard labour) (*ante*, p. 249), and is triable at quarter sessions.

(*z*) R. *v.* Doody, 6 Cox, 463, Wightman, J.

(*a*) 1 Hale, 434. Dalt. c. 145. 1 East, P.C. 225, 294.

as principal, and B. is merely an instrument (*b*). So if A. lays a trap or pitfall for B., whereby B. is killed, A. is guilty of murder, the trap or pitfall being only the instrument of death (*c*).

If a person takes poison himself, not knowing it to be poison at the persuasion of another who knows it is poison, the latter is a principal in the first degree in murder though not present at the taking (*d*).

A girl of thirteen was indicted for the murder of an infant ten weeks old. It was argued that it was not proved that the girl had capacity to commit the crime, or had acted with deliberate malice. Pollock, C. B., said, 'The crimes of murder and manslaughter are, in some instances, very difficult of distinction. The distinction which seems most reasonable consists in the consciousness that the act done was one which would be likely to cause death. No one could commit murder without that consciousness. The jury must be satisfied before they could find the prisoner guilty [of murder] that she was conscious, and that her act was deliberate. They must be satisfied that she had arrived at that maturity of intellect which was a necessary condition of the crime charged' (*e*).

The Party Killed.—Murder may be committed upon any person within the King's peace. Therefore, to kill an alien enemy within the realm except in the actual exercise of war (*f*), is as much murder as to kill a born Englishman (*g*).

An infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder; and if a woman being quick or great with child, takes any potion to cause an abortion, or if another gives her any such potion, or if a person strikes her, whereby the child within her is killed, it is not murder or manslaughter (*h*), but is punishable under 24 & 25 Vict. c. 100, s. 58, *post*, p. 829 (*i*).

Where a child, born alive, afterwards dies by reason of potions or bruises received in the womb, those who administered the potion or caused the bruise seem to be guilty of murder (*i*). On an indictment for manslaughter it appeared that the prisoner, who practised midwifery, was called in to attend a woman in labour, and when the head of the child became visible, the prisoner, being grossly ignorant of the art which he professed, 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. It was argued that the child being *en ventre sa mere* at the time the wound was given, the prisoner

(*b*) 1 East, P. C. 228. 1 Hawk. c. 31, s. 7. *Ante*, p. 104.

(*c*) 4 Bl. Com. 35.

(*d*) 1 Hale, 431. Vaux's case, 4 Co. Rep. 44 *b*; 76 E. R. 992. Mr. Greaves has a note 'provided that the party taking it knew not that it was poison.' The indictment in Vaux has *nesciens, &c.* Where the party knew that the thing taken was poison and voluntarily took it on the persuasion of another, the latter would in such case be at the trial an accessory before the fact. *Vide ante*, p. 116.

(*e*) R. *v.* Vamplew, 3 F. & F. 520.

(*f*) 1 Hale, 433.

(*g*) 4 Bl. Com. 198. To kill one attaint in a *præmunire* was held not homicide, Y. B. 24 Hen. I., B. Coron. 197; but 5 Eliz. c. 1, declared it to be unlawful.

(*h*) 1 Hale, 433.

(*i*) 3 Co. Inst. 50. 1 Hawk. c. 31, s. 16. 4 Bl. Com. 198. 1 East, P.C. 227. *Contra*, 1 Hale, 433, and Staundf. 21; but the reason on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact cannot be considered as satisfactory, unless it be supposed that such fact can never be clearly established. See Exod. c. xxi. v. 22, 23.

could not be guilty of manslaughter; but, upon a case reserved, a conviction of manslaughter was held right (*j*).

Upon an indictment against a woman for the murder of her child, Maule, J., told the jury that if a person intending to procure abortion does an act which causes a child to be born alive so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby into a situation in which it cannot live, is guilty of murder (*k*).

To be the subject of murder, a child must be actually born. On an indictment against a mother for the murder of her child, Littledale, J., told the jury, 'the being born must mean that the whole body is brought into the world, and it is not sufficient that the child respires in the progress of the birth' (*l*). Upon an indictment containing a count for murder by stabbing, and a count charging that before the child was completely born the prisoner stabbed it with a fork, and that it was born, and then died of the stab, it was proved that a puncture was found on the child's skull, but when that injury was inflicted did not appear, and some questions were asked as to whether the child had breathed. Parke, J., said, 'The child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder; there must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose (*m*).

One count charged that the prisoner, being pregnant with a female child, 'did bring forth the same alive,' and then charged the murder of the child by choking it with a handkerchief; and another count charged the murder in the same way of a certain illegitimate child, 'then lately before born of the body' of M. T. There was strong evidence to prove that the child had been wholly produced alive from the prisoner's body, and that she had strangled it; but it was also clearly proved by the surgeon, who examined the body of the child, that it must have been strangled before it had been separated from the mother by the severance of the umbilical cord, and the surgeon further stated that a child has, after breathing fully, an independent circulation of its own, even while still attached to the mother by the umbilical cord, and that in his judgment the child in question had breathed fully after it had been wholly produced, and had therefore an independent circulation of its own, before and at the time it was strangled, and was then in a state to carry on a separate existence. Erskine, J., directed the jury, that if they were satisfied that the child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully strangled the child after it

(*j*) R. *v.* Senior, 1 Mood. 346; 1 Lewin, 183 *n.* See R. *v.* Brown, 62 J. P. 521. The murder of bastard children was specially punished by 21 Jac. I. c. 27, which, with an Irish Act on the same subject, was repealed in 1813 (43 Geo. III, c. 58). Concealment of birth is now punished under 24 & 25 Vict. c. 100, s. 60, *post*, p. 773.

(*k*) R. *v.* West, 2 C. & K. 784; 2 Cox, 500.

(*l*) R. *v.* Poulton, 5 C. & P. 329.

(*m*) R. *v.* Enock, 5 C. & P. 539. R. *v.* Wright, 9 C. & P. 754, Gurney, B. The true test of separate existence in the theory of the law (whatever it may be in medical science) is the answer to the question, 'whether the child is carrying on its being without the help of the mother's circulation.' R. *v.* Pritchard, [1901] 17 T. L. R. 310, Wright, J. R. *v.* Izod, 20 Cox, 690, Channell, J.

had been so produced and while it was alive, and while it had, according to the evidence of the surgeon, an independent circulation of its own, he was of opinion that the charge in the said counts was made out, although the child, at the time it was so strangled, still remained attached to the mother by the navel-string. Upon a case reserved, a conviction of murder was held right (*n*). But if a child is actually wholly produced alive it is not necessary that it should have breathed to make it the subject of murder (*o*). By a bill introduced in the session of 1909 it is proposed to make it felony to destroy an infant during birth under circumstances which would have made the act murder if the child were fully born (*p*).

SECT. IV.—OF THE MEANS OF KILLING; AND OF CAUSING DEATH BY MALICIOUS AND INTENTIONAL NEGLECT OF DUTY (*q*).

The killing may be effected by poisoning (*r*), striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome (*s*). It has been generally considered that there must be some actual *corporal* damage to the party; and that where a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, such killing is not murder (*t*). But on principle there seems no reason for holding that deliberate frightening to death is not at least manslaughter (*u*), and if a man does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no blow is struck by himself, and no killing may have been primarily intended (*v*): as where a person carried his sick father, against his will, in a severe season, from one town to another, by reason whereof he died (*w*); or where a harlot being delivered of a child, left it covered only with leaves in an orchard, where it was killed by a kite (*x*); or where a child was placed in a hogsty, where it was eaten (*y*). In these cases, and also where a child was shifted by parish officers from parish to parish, till it died from want of care and sustenance, it was considered that the acts so done, wilfully and deliberately, were evidence of malice aforethought (*z*).

(*n*) R. *v.* Trilloe, 2 Mood. 260. R. *v.* Crutchley, 7 C. & P. 814. R. *v.* Reeves, 9 C. & P. 25. R. *v.* Sellis, 7 C. & P. 850, where, per Coltman, J., the fact of the child having breathed is not a decisive proof that it was born alive: it may have breathed, and yet died before birth. R. *v.* Handley, 13 Cox, 79.

(*o*) R. *v.* Brain, 6 C. & P. 349.

(*p*) *Vide post*, p. 829.

(*q*) For cases of manslaughter by neglect of duty, see *post*, 789 *et seq.*

(*r*) See 11 Co. Rep. 32 *a*. Kel. (J) 32, 125; Fost. 68, 69. 1 East, P. C. 225, 251. 1 Hale, 455. Barr. Obs. on Stat. 524.

(*s*) 4 Bl. Com. 196. 1 Hale, 432. 1 Hawk. c. 31, s. 4. *Moriendi mille figuræ.*

(*t*) 1 Hale, 429. 1 East, P. C. 225. R. *v.* Murton, 3 F. & F. 492. Byles, J.

(*u*) See Mayne, Ind. Cr. L. (ed. 1896) p. 588. In R. *v.* Towers, 12 Cox, 530, an indictment for manslaughter of an infant, it appeared that the prisoner had assaulted a woman carrying the infant, and had so frightened the infant that it died in about six weeks. Denman, J., held that frightening a child to death would be manslaughter, but apparently considered that this would not be so as to an adult. He left it to the jury to say whether the assault on the woman was the direct cause of the death of the infant. The prisoner was acquitted. See R. *v.* Evans, *post*, p. 666n.

(*v*) 4 Bl. Com. 197.

(*w*) 1 Hawk. c. 31, s. 5. 1 Hale, 431, 432.

(*x*) 1 Hale, 431. 1 Hawk. c. 31, s. 6.

(*y*) 1 East, P. C. 226.

(*z*) Palm. 545.

In R. *v.* Evans (*a*) the indictment charged that the prisoner killed his wife (1) by beating; (2) by throwing her out of the window; and (3 and 4) that he beat her and threatened to throw her out of the window and to murder her; and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and the bruises received by the fall died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall: but Heath, Gibbs, and Bayley, JJ., were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner however was acquitted; the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats (*b*).

In R. *v.* Curley (*bb*), the prisoner and the deceased woman were in a small flat together; quarrelling was heard to take place, and the deceased was heard to call for help from the window of the back room. She fell out of the window and was killed: Phillimore, J., directed the jury (*inter alia*): 'If fearing or reasonably fearing violence or further violence from this man she went to the window to call for assistance . . . if she without any intention of jumping out overbalanced and fell then the man would be responsible, but that would be manslaughter. A conviction on this direction was affirmed on appeal.

Upon a trial for manslaughter it appeared that the prisoner and the deceased had some dispute, and the deceased's boat being alongside the schooner in which the prisoner was, the prisoner pushed it with his foot, and the deceased stretched out over the bow of the boat to lay hold of a barge, to prevent the boat drifting away, and losing his balance fell

(*a*) Old Bailey, 1812. MS. Bayley, J. See Steph. Dig. Cr. Law (6th ed.), art. 241. Where an indictment for manslaughter alleged that the deceased was riding on horseback, and that the prisoner assaulted and struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, whereby it became frightened, and threw the deceased, &c., and it was proved that the prisoner struck the deceased with a small stick, and that he rode away, the prisoner riding after him, and on the deceased spurring his horse it winced and threw him: it was held, on the authority of the above case, that the case was proved. R. *v.* Hickman, 5 C. & P. 151, Park, J. See R. *v.* Grimes, 15 N. S. W. Law, 209, in which the prisoners were held to have been rightly convicted of murdering a man whom they brutally assaulted in a railway carriage, who, thinking his life in danger, jumped out and was killed.

(*b*) In R. *v.* Donovan, 4 Cox, 399, on an indictment for causing a bodily injury dangerous to life by casting the prosecutrix out of a window upon the ground, she stated that she fell out of the window accidentally; that the prisoner beat her with his fists, and was about to inflict other injuries upon her, when she went to the window to call for assistance, and fell out of it on to the ground. In opening the case, it was stated that the evidence would be conflicting, whether the prosecutrix was thrown or jumped out of the window, but that it would be immaterial, for if the prisoner, by his violence, compelled her to throw herself out, he would be guilty. Alderson, B., said, 'I do not think it will be sufficient to prove that she jumped from the window to escape from his violence. You must go further than that, and satisfy the jury that he intended at the time to make her jump out.' See the cases in note (*a*).

(*bb*) Cent. Cr. Ct. 4 March, 1909; 2 Cr. App. R. 109. The direction is taken from the shorthand notes of the trial.

overboard, and was drowned. Park, J., after consulting Patteson, J., said, that they were of opinion that, if the case had rested on this evidence, it would not have amounted to manslaughter (*c*). Upon an indictment for murder by drowning, by the deceased slipping into the water in endeavouring to escape from an assault made with intent to murder or rob, it was proved that the body was found in the river, and it bore marks of violence, but not sufficient to occasion death, which appeared to have been caused by drowning, and there were marks of a struggle on the banks of the river. Erskine, J., told the jury that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or the mind; and it then became the guilty act of him who compelled the deceased to take the step, but the apprehension must be of immediate violence, and well grounded from the circumstances by which the deceased was surrounded; and that the jury must be satisfied not that there was no other way of escape, but that it was such a step as a reasonable man might take (*d*).

By Neglect of Duty.—The prisoner had delivered herself of a child by night upon a road, and had left it on the side of the road without any clothing or covering to protect it from the inclemency of the weather, where it died from the cold, and she had wholly concealed the birth of the child till she was apprehended. Coltman, J., told the jury, 'If a party so conduct himself with regard to a human being, which is helpless and unable to provide for itself, as must necessarily lead to its death, the crime amounts to murder. But if the circumstances are not such that he must have been aware that the result would be death, the crime would be manslaughter, provided the death were caused by an unlawful act, but not such as to imply a malicious mind. There have been cases where it has been held that persons leaving a child exposed, and without any assistance, and under circumstances where no assistance was likely to be rendered, were guilty of murder. It will be for you to consider whether the prisoner left the child in such a situation that to all reasonable apprehension she must have been aware that the child must die, or whether there were circumstances that would raise a reasonable expectation that the child would be found by some one else, and preserved; because then it would only be the crime of manslaughter. If a person were to leave a child at the door of a gentleman, the probability would be so great that it would be found, that it would be too much to say that it was murder, if it died; if, on the other hand, a child were left in an unfrequented place, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, and therefore it is for you to say whether the prisoner had reasonable ground for believing that the child would be found and preserved (*e*).

(*c*) R. *v.* Waters, 6 C. & P. 328, Park and Patteson, JJ. It afterwards appeared that the prisoner was not the man who pushed the boat away.

(*d*) R. *v.* Pitts, C. & M. 284.

(*e*) R. *v.* Walters, C. & M. 164, and MS. C. S. G. See R. *v.* Stockdale, 2 Lew. 220. In one case a prisoner was convicted of manslaughter for assaulting her infant female child, and throwing it upon a heap of dust and ashes, and leaving it there exposed to the cold air, by means of which exposure the child became frozen and died. R. *v.* Waters, 1 Den. 356. The point in this case was, that it was consistent with all that was stated in the count that the child might be capable of taking care of itself; but it was held that if she had been sufficiently old, or strong enough so to do, the death could not have arisen from the

A man and his wife were indicted for the murder of a boy who was bound as a parish apprentice to the man. Both the prisoners had used the apprentice in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment: but the surgeon who opened the body deposed that in his judgment the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received. Lawrence, J., considered the case defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty and executed (*f*).

The prisoner, upon his apprentice, who had been sent to Bridewell for misbehaviour, returning to him in a lousy and distempered condition, did not take such care of him as his condition required, and which he might have done; the apprentice not having been suffered to lie in a bed, on account of the vermin, but being made to lie on the boards for some time without covering, and without common medical care. The medical witnesses were of opinion that the boy's death was most probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home; and inclined to think, that if he had been properly treated when he came home, he might have recovered. But, though some harsh expressions were proved to have been spoken by the prisoner to the boy, yet there was no evidence of any personal violence having being used by the prisoner; and it was proved that the apprentice had had sufficient sustenance; and the prisoner had a general good character for treating his apprentices with humanity, and had made application to get this boy into the hospital. Under these circumstances, the Recorder left it to the jury to consider whether the death of the boy was occasioned by the ill-treatment he received from his master, after returning from Bridewell, and whether that ill-treatment amounted to evidence of malice, in which case they were to find him guilty of murder. At the same time they were told, with the concurrence of Gould, J., and Hotham, B., that if they thought otherwise, yet, as it appeared that the prisoner's conduct towards his apprentice was highly blamable and

act of the prisoner, and therefore the defect was cured by the verdict. It is a novel doctrine in criminal cases that a defective indictment is cured by verdict. Hale says (2 P. C. 193), 'None of the statutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict, and no authority is known for such a doctrine in other cases' (but *vide post* Bk. xii. c. ii.). The indictment was right; for it alleged the acts of the prisoner which caused the death, and that is all that it ever was necessary to do in such an indictment. C. S. G.

(*f*) R. *v.* Squire, Stafford Lent Assizes, 1799, MS. After the surgeon had deposed that the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received, the learned judge was proceeding to inquire of him whether, in his judgment, the series of cruel usage the boy had received, and in which the wife had been as active as her husband, might not have so far broken his constitution as to promote the debility, and co-operate along with the want of proper food and nourishment to bring on his death, when the surgeon was seized with a fainting fit, and, being taken out of court, did not recover sufficiently to attend again upon the trial. The judge, after observing that, upon the evidence, as it then stood, he could not leave it to the jury to consider, whether the wounds, &c., inflicted on the boy, had contributed to cause his death, said, that if any physician or surgeon were present who had heard the trial, he might be examined as to the point intended to be inquired into; but no such person being present, he delivered his opinion to the jury, as stated in the text.

improper, they might, under all these circumstances, find him guilty of manslaughter; which they accordingly did (*g*). And upon the question being afterwards put to the judges, whether the verdict were well found, they all agreed that the prisoner should be burned in the hand and discharged (*h*).

On an indictment for the manslaughter of an apprentice by neglecting to provide him sufficient meat and drink, &c., it appeared that the deceased was bound to the prisoner by indenture, by which he covenanted to find him clothes and victuals; and, according to the evidence of some medical men, that his death was produced by uncleanliness and want of food. Patteson, J., told the jury that, 'by the general law the master was not bound to provide medical advice for his servant (*i*); yet that the case was different with respect to an apprentice, and that a master was bound during the illness of his apprentice to provide him with proper medicines; and that if they thought that the death of the deceased was occasioned, not by the want of food, &c., but by want of medicines, then, in the absence of any charge to that effect in the indictment, the prisoner would be entitled to be acquitted' (*j*). An indictment for manslaughter alleged in one count that the deceased was the apprentice of the prisoner, and that it was his duty to provide sufficient food for her as such apprentice, and that he neglected to do so, &c., by means of which she died; and (in another count) that the deceased was the servant of the prisoner, and that it was his duty to provide her with food, &c. An invalid indenture of apprenticeship was put in, and it appeared that the deceased had always been treated as an apprentice by the prisoner, and had performed such duties as an apprentice would have performed, but the prisoner being a farmer these duties were the same as those performed by ordinary farmer's servants. It was objected that the first count was not proved, as the indenture was invalid; and that the relation of master and servant never existed, for an invalid contract of apprenticeship could not be converted into a hiring and service; that the foundation of this indictment was that the prisoner was legally bound to provide maintenance for the deceased, and here it was clear he could neither have been compelled to support her as an apprentice or as a servant. Patteson, J., held, that the prisoner, having treated the deceased as his servant, could not turn round and say she was not his servant at all (*k*). Where the first count stated that the deceased

(*g*) R. *v.* Self, O. B. 1776, MS., Gould, J. 1 East, P. C. 226.

(*h*) Upon this case, East (1 P. C. 227 *n*) says: 'I have been the more particular in stating the ground of the decision in this case, because Gould, J.'s, note of the case, from whence this is taken, is evidently different from another report (1 Leach 137) of the opinion of the judges in this case, from whence it might be collected, that there could be no gradation of guilt in a matter of this sort, where a master, by his ill-conduct or negligence, had occasioned or accelerated the death of his apprentice, but that he must either be found guilty of murder or acquitted; a conclusion, which, whether well or ill founded, certainly cannot be drawn from this statement of the case. The same opinion, however, is stated in the Old Bailey Sessions Papers, to have been thrown out by the Recorder in Wade's case.'

(*i*) See Sellen *v.* Norman, 4 C. & P. 80.

(*j*) R. *v.* Smith, 8 C. & P. 153. See 24 & 25 Vict. c. 100, s. 26; 38 & 39 Vict. c. 86, s. 6, *post*, p. 910.

(*k*) R. *v.* Davies, Hereford Summer Assizes, 1831, MS. C. S. G. In support of this decision it may be observed, that although a son could not be punished for the murder of his father as for petit treason, under 25 Edw. III. s. 5, c. 2, unless by a reasonable construction he came under the word servant, yet if he were bound apprentice to his

was the apprentice of the prisoner, and it was his duty to provide the deceased with proper and necessary nourishment, medicine, medical care and attention, and charged the death to be from neglect, &c.; and the second count that charged the deceased 'so being such apprentice as aforesaid,' was killed by the prisoner by over-work and beating; and the only evidence given to shew that the deceased was an apprentice was that the prisoner had stated that he was his apprentice; Patteson, J., held that there was sufficient evidence to support the second count, but not the first (*l*).

If a mistress culpably neglects to supply proper food and lodging to her servant, when the servant is so enfeebled in body or mind as to be helpless and unable to take care of herself, or is so under the dominion and restraint of the mistress as to be unable to withdraw herself from her control; and the death of the servant is caused or accelerated by such neglect, the mistress is liable to be convicted of manslaughter (*m*).

In R. *v.* Saunders (*n*), a married woman was charged with the murder of her illegitimate child, aged three years, by omitting to give it proper food. The prisoner had married J. S.; the deceased was her illegitimate child, born before the marriage. In the judgment of medical witnesses the death had proceeded from the want of proper food. For the prosecution reference was made to R. *v.* Squire (*o*), and to sect. 71 of the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76); and it was submitted that the mother of an illegitimate child was bound to take care of her child, and might be guilty of murder if its death arose from neglect. Alderson, B., said, 'The prisoner is indicted as a married woman: if her husband supplied her with food for this child, and she wilfully neglected to give it to the child, and thereby caused its death, it might be murder in her (*o*). In these cases the wife is in the nature of the servant of the husband: it does not at all turn upon the natural relation of mother: to charge her you must shew that the husband supplied her with food to give to the child, and that she wilfully neglected to give it. There is no distinction between the case of an apprentice and that of a bastard child, and the wife is only the servant of the husband, and, according to the case before Lawrence, J., (*p*), can only be made criminally responsible by omitting to deliver the food to the child, with which she had been

father or mother, or was maintained by them, or did any necessary service for them, though he did not receive wages, he might have been indicted by the description of servant. 1 Hawk. c. 32, s. 2. 1 East, P. C. 336; and a near relation, as a sister, might be a servant within the statute, if she acted as such. R. *v.* Edwards, Stafford Assizes. MS. coram Lawrence, J. C. S. G.

(*l*) R. *v.* Crumpton, C. & M. 597.

(*m*) R. *v.* Smith, 34 L. J. M. C. 153, Erle, C.J., said: 'It is undisputed law that if a person who has the custody of another who is helpless, leaves that other with insufficient food, and so causes his death, he is criminally responsible. But it is also clear that if a person having the exercise of free will, chooses to stay in a place where he receives insufficient food, and his health is injured, and death supervenes, the master is not criminally responsible.' The facts of this case would have supported an indictment on 24 & 25 Vict. c. 100, s. 26, *post*, p. 910. It seems very well worthy of consideration whether, where death results from the commission of an offence within that section, the case is not one of manslaughter, on the principle laid down in R. *v.* Senior [1899], 1 Q.B. 293, *post*, p. 674.

(*n*) 7 C. & P. 277. In a note to this case it is suggested that a statute, 18 Eliz. c. 3, s. 2 (now repealed), would hardly have been needed if a mother were liable at common law for the entire maintenance of her child.

(*o*) *Ante*, p. 668.

(*p*) In R. *v.* Squire, *ante*, p. 668.

supplied by her husband (*q*). 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*).

Under the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), s. 41, the mother of an illegitimate child, so long as she is unmarried or a widow, is bound to maintain this child as part of her family until the child is 16; and by sect. 57, a man who marries a woman who has legitimate or illegitimate children is liable to maintain them as part of his family till they are 16. So that the marriage, while it continues, suspends the liability of the mother (*s*). But the marriage does not extinguish affiliation orders made on the putative father of any such child (*t*).

The obligation to maintain legitimate children is recognised at common law and enforceable by statute (*u*).

In R. *v.* Bubb (*v*), an indictment for murder alleged that M. H., an infant of tender age, was a daughter of R. H., and was living with R. H. and E. B., and under their care and control, and unable to provide for or take care of herself, and that it was the duty of the prisoners to provide for and administer to M. H. sufficient food for the support of her body, and that the prisoners feloniously, &c., did refuse and neglect to give and administer to M. H. sufficient food for the support of her body; whereby she became mortally sick and died (*v*). B. was the sister of H.'s deceased wife, and on her death had gone to live with H., and became the manager of his household. H. was absent from home except from Saturday night until Monday morning, but always provided ample food for the whole family. H.'s children were healthy till B. undertook their management, but she

(*q*) In R. *v.* Bubb, 4 Cox, 457, Williams J., considered this statement too wide, as it was not limited to cases where death or serious bodily injury was contemplated. See 8 Edw. VII. c. 67, s. 12, *post*, p. 913.

(*r*) The decision was given upon the opening statement of counsel. It did not appear whether the wife was living with the husband, nor whether he had the means of maintaining the child. In R. *v.* Forsyth (Chester Assizes, July 25, 1899; Archb. Cr. Pl. 23rd ed. 784), Kennedy, J., following this case and R. *v.* Squire, ruled that where husband and wife are living together, the legal obligation to maintain is on the husband, and that the wife cannot be convicted of manslaughter by neglect to supply food or medical aid. As to the liability of a husband living apart from his wife, see R. *v.* Connor [1908], 1 K.B. 26. (C. C. R.)

(*s*) This seems to be the *ratio decidendi* in R. *v.* Saunders, *ante*, p. 670. See now 45 & 46 Vict. c. 75, s. 21.

(*t*) Sotheran *v.* Scott, 6 Q.B.D. 518. Hardy *v.* Atherton, 7 Q.B.D. 264; which override Lang *v.* Spicer, 1 M. & W. 129. As to the obligation at common law to maintain bastard children, see 1 Bl. Com. 446, 448. Harris *v.* Jeffel, 1 Ld. Raym. 68; *Comb.*, 356.

(*u*) Poor Law Act, 1601 (43 Eliz. c. 2), s. 6. Poor Relief (Deserted Children) Act, 1718 (5 Geo. I. c. 8). Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 3. 45 & 46 Vict. c. 75, s. 21. There may be cases where a wife may be liable to maintain her children during her husband's lifetime, as where the husband has deserted her, or she has a separate maintainance (see Christian's note to 1 Bl. Com. 448), and it may be worthy of consideration whether where the husband is incapable of work, but she is capable of maintaining her children, she is not legally bound so to do; and as the overseers of every parish are bound by law to provide necessary support in cases of emergency, it may well be doubted whether cases may not occur where the wife would be *legally bound* to apply for relief to the parish officers. Suppose a husband were ill in bed, but the wife were well, and the children starving for want of food, could it be fairly contended that she was under no legal obligation to apply for relief for them, and that if one of them died for want of food, she was not criminally responsible? See Urmston *v.* Newcomen, 4 A. & E. 899, and R. *v.* Mabbett, *post*, p. 673, C. S. G.

(*v*) 4 Cox, 457. The grand jury returned a bill for murder against E. B., and for manslaughter against R. H., and a bill for manslaughter in the same form, *mutatis mutandis*, as the bill for murder was then preferred against the latter, and B. was tried first.

systematically neglected them, especially the deceased, and, notwithstanding the remonstrances of the neighbours, persisted in withholding sufficient food, for want of which the child gradually wasted away, and died of actual starvation. Williams, J., told the jury that 'the indictment alleges, first, a duty on the part of the prisoner to supply the necessaries of life to the child; it alleges, secondly, a malicious neglect or omission to perform that duty; and it alleges, thirdly, that the omission or neglect caused the death of the child. Now, first, with respect to the proposition that it was the duty of the prisoner to provide food necessary to sustain the life of the child. It is quite clear that the circumstance of the prisoner being aunt of the child, or being resident in the same house with the child, was not sufficient to cast upon her the duty of providing food for it. But if the prisoner undertook the charge of attending to the child, and of taking that care of it which its tender age required, a duty then arose to perform those duties properly; and if the prisoner, being in the capacity, as it were, of a servant or nurse, and having the charge of attending and taking care of the child, was furnished with the means of doing so properly, then the duty arose, which is charged in this indictment, of giving it sufficient food, and if the prisoner neglected to perform that duty, beyond all question she is criminally responsible. It remains for me to explain to what extent she is responsible. If the omission or neglect to perform the duty was malicious, then the indictment would be supported, and the crime of murder would be made out against the prisoner; but if the omission or neglect were simply culpable, but not arising from a malicious motive on the part of the prisoner, then it would be your duty to find her guilty of manslaughter only. And here it becomes necessary to explain what is meant by the expression malicious, which is thus used. If the omission to supply necessary food was accompanied with an intention to cause the death of the child, or to cause some serious bodily harm to it, then it would be malicious in the sense imputed to it by this indictment, and in a case of this kind it is difficult, if not impossible, to understand how a person who contemplated doing serious bodily injury to the child by the deprivation of food, could have meditated anything else than causing its death. You will, therefore, probably consider that the question resolves itself into this: Did the prisoner contemplate, by the course she pursued, the death of the child? If she did, and death was caused by the course she pursued, then she is guilty of murder. But if you are not satisfied that she contemplated the death of the child, then, although guilty of a culpable neglect of duty, it would amount only to the crime of manslaughter. If, on the other hand, you should think either that she did not undertake the duty of supplying the child with proper food, or that she did not culpably neglect that duty, then you will acquit her' (*w*).

On the trial of H. for the manslaughter of the same child, in addition to the facts proved on the trial of B., it was proved that when H. was at

(*w*) 'The indictment also alleged the duty to provide clothing and the neglect thereof; but as the child is alleged to have died of "actual starvation" all relating to the clothing has been omitted. This and the next case underwent the most careful consideration, and the law on the subject was fully discussed between Williams, J., Campbell, C.J., and Mr. Greaves, on a review of the previous cases.' C. S. G. See R. *v.* Conde, 10 Cox, 547. R. *v.* Macdonald [1904], Queensland St. Rep. 151. R. *v.* Brooks [1902], 5 Canada Cr. Cas. 372.

home B. treated the children better than on other occasions; and that he had uniformly behaved kindly to them, and especially to the deceased. Williams, J., told the jury that 'this case differs from the last in this very essential particular, that here there is a duty directly cast upon the prisoner to provide sufficient food for the child if he has sufficient means for doing so, and inasmuch as it is proved that the prisoner had such means, there can be no doubt but that the law threw upon him the duty of preserving the child's life by providing it with proper food. But the peculiarity of the case is this, that inasmuch as we must take it that B. was guilty, she could not have been so, unless the prisoner had provided her with sufficient means for feeding the child, and it must be taken as an admitted fact in this case that the prisoner did take such steps as, but for B.'s misconduct, would have preserved the child's life. Then the question is how is the charge shaped against the prisoner? If B. neglected her duty by depriving the child of food for any purpose, and the prisoner was conscious of it, and nevertheless chose to let her persevere in that course, he thus became himself an instrument, as it were, of depriving the child of sufficient food, and he would be guilty upon this indictment. If, therefore, you think he was conscious that B. deprived the child of food to such an extent as to render it dangerous to the child's life, and, being so conscious, instead of preventing her from continuing in this course, he allowed her to do so, and was culpably negligent of the obvious duty cast upon him, then he is guilty of manslaughter, because then substantially he would have neglected to provide the child with proper food' (*x*).

Where parent, child, and servant reside in the same house, the duty of the parent is to provide food for the child, and the duty of the servant is to supply the food, when so provided by the parent, to the child, an indictment therefore charging both with the same duty cannot be supported; but there ought to be separate indictments charging each in respect of the duty incumbent on each (*y*).

Upon an indictment against husband and wife for the murder of their infant child, it appeared that the child's death was produced by English cholera, and that insufficient food had a tendency to produce that complaint; the husband was in work, but he spent the money he obtained on himself; and the wife did not appear to have any money or food to give to the child. Martin, B., consulted Erle, J., and they were of opinion that it was the duty of all persons having children, when they themselves cannot support them, to endeavour to obtain the means of getting them support, and if they wilfully abstain from going to the union, where by law they have a right to support, and their children die in consequence, they are criminally responsible for it: but there ought to be a distinct abstaining to go for several days; and if a married woman neglects for four or five days to go to the union for the purpose of getting support for a child, she knowing that such neglect would be likely to produce the death of the child, it is manslaughter (*z*).

(*x*) R. *v.* Hook, 4 Cox, 457.

(*y*) 'This was agreed between Williams, J., and Mr. Greaves in R. *v.* Bubb, *ante*, p. 671, on an indictment before 14 & 15 Vict. c. 100. But *qu.*, whether one indictment in the present form would not suffice.' C. S. G. See 8 Edw. VII. c. 67, s. 12 (4), *post*, p. 912.

(*z*) R. *v.* Mabbett, 5 Cox, 339. See the latter part of note (*u*), *ante*, p. 671.

By sect. 12 (1) of the Children Act, 1908 (8 Edw. VII. c. 67), that section is to apply in the case of a parent, who, being without means to maintain the child, fails to provide for its maintenance under the Poor Law, in like manner as if the parent had otherwise neglected the child (*a*).

Where a woman took charge of the illegitimate child of her dead daughter, and the child died for want of proper nourishment, Brett, J., told the jury that mere negligence would not be sufficient to convict the prisoner. There must be negligence so great that they must be of opinion that the prisoner was reckless whether the child died or not. Her omission to send the child to the workhouse would not be sufficient. The question was whether she was wickedly careless. She might have been very careless, and ought to have done more than she did, but the case must be judged according to the state and condition of life of the prisoner, and the jury must say whether she had let the child die by *wicked* negligence or not (*b*).

Medical Aid.—By sect. 37 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122) (*c*), when any parent wilfully neglected to provide medical aid for his child, being in his custody and under the age of fourteen years, whereby the health of such child was seriously injured, he was guilty of an offence punishable summarily before justices. Where from a conscientious religious conviction that in answer to prayer God would heal the sick, and in obedience to the tenets of a sect called the Peculiar People, and not from any intention to avoid the performance of his duty to his child or to break the law, the parent of a sick child, being one of such sect, while furnishing it with all necessary food and nourishment, refused to call in medical aid though well able to do so, and the child in the opinion of the jury died from not having such medical aid, it was held manslaughter (*d*). But in order to convict of manslaughter, it was necessary to prove that the neglect caused or accelerated the death and not merely that it might have done so (*e*).

In R. *v.* Senior (*f*), which arose, after the repeal of sect. 37 of the Poor Law Amendment Act, 1868, and under sect. 1 of the Prevention of Cruelty to Children Act, 1894 (*g*), the prisoner was charged with the manslaughter of his infant child, of which he had the custody. He was one of the Peculiar People, and objected on religious grounds to calling in medical

(*a*) In R. *v.* Connor [1908], 2 K.B. 26, a man living apart from his wife and earning wages, did not send any money to his wife. His children living with the wife were partly provided for by an aunt. Upon a case reserved, the Court held that the omission on the husband's part to send any money for his children was wilful neglect within s. 1 of the Prevention of Cruelty to Children Act, 1904. See also Cole *v.* Pendleton, 60 J. P. 359, and see 8 Edw. VII. c. 67 s. 38 (2), *post*, p. 921.

(*b*) R. *v.* Nicholls, 13 Cox, 75.

(*c*) This section was repealed in 1889, and is now represented by 8 Edw. VII. c. 67 s. 12 (1) *post*, p. 913.

(*d*) R. *v.* Downes, 1 Q.B.D. 25: 13 Cox, 111. There Bramwell, B., said: 'The statute referred to has imposed a positive and absolute duty, whatever the conscientious or superstitious opinions of people may be, to provide medical aid for their children. It is found that the prisoner thought it was irreligious to do it, but the law does not allow him to break its provisions; he must obey it whatever his opinions about the law may be;' *et per* Mellor, J. 'The statute by "wilfully neglect" means intentionally, or purposely omit to call in medical aid.' See R. *v.* Senior [1899], 1 Q.B. 283, 291.

(*e*) R. *v.* Morby, 8 Q.B.D. 571.

(*f*) [1899] 1 Q.B. 283. See also R. *v.* Cook, 62 J. P. 712.

(*g*) Repealed, but re-enacted 1904 (4 Edw. VII. c. 15, s. 1), and now embodied in 8 Edw. VII. c. 67, s. 12, *post*, pp. 913, 921.

aid or to the use of medicine, and he had wilfully and deliberately abstained from providing medical aid for his child, though he knew it to be dangerously ill, but otherwise he had done all that he could for the child. The prisoner had the necessary means to provide medical aid, and it would have prolonged, and probably saved, the child's life. Upon a case reserved it was held that the prisoner had wilfully neglected the child in a manner likely to cause injury to its health, within the meaning of sect. 1 of the Prevention of Cruelty to Children Act, 1894 (*gg*), and having thereby caused or accelerated its death, he was guilty of manslaughter (*h*).

The prisoner was tried for the murder of her daughter: the case for the prosecution was that the prisoner, having great ill-will against the deceased, had purposely neglected to procure a midwife, or other proper person, to attend her daughter when she was taken in labour, and that by reason thereof she died in childbirth; she was about eighteen years of age and unmarried. The prisoner had married a second husband, and after the marriage the daughter had lived with them for some time, and then went out to service, occasionally returning to live with them when she was out of place; at last she returned to her step-father's house on a Tuesday, and continued there till the Saturday following, when she died. It was objected that the prisoner was under no legal obligation to procure or try to procure the attendance of a midwife. Williams, J., directed the jury to consider whether it was established by the evidence that the death was attributable to the prisoner's neglect to use ordinary diligence in procuring the assistance of a midwife, or other proper attendant, and if it was so established, then to consider whether by so neglecting she intended to bring about the death of her daughter; and if so, the jury were to convict her of murder; but if not, of manslaughter. The jury convicted her of manslaughter; and it was held that there was not an omission of any duty rendering the prisoner liable to be convicted. Assuming that if she had used ordinary care she would have procured the attendance of a midwife; that she knew where a midwife could be found; and that if the midwife had been summoned she would have attended; her skill must have been paid for, and there was no evidence that the prisoner had the means at her command of paying for that skill. The midwife would probably have attended without being paid. Yet the prisoner could not be criminally responsible for not asking for that aid, which, perhaps, might have been given without compensation. Aid of this kind was not always required in childbirth, and sometimes no ill consequences resulted from its absence (*i*).

The mere failure on the part of a woman to make proper provision for her expected confinement, resulting in the complete birth and

(*gg*) Repealed, but re-enacted 1904 (3 Edw. VII. c. 15, s. 1), and now embodied in 8 Edw. VII. c. 67, s. 12, *post*, p. 913.

(*h*) Russell, L.C.J., said he was not satisfied that there was not sufficient evidence at common law to justify a conviction.

(*i*) R. *v.* Shepherd, L. & C. 147. In R. *v.* Jones, 19 Cox, 678, where a woman was indicted for the manslaughter of an infant she had taken to nurse for a lump sum paid down, Kennedy, J., held that it was not necessary to shew that the prisoner actually had money at the time she failed in her duty to provide food and medicine, if it was shewn that she had previously received money, and that under the circumstances she would naturally be expected to have some of the money still unspent at the time when the child was alleged to have been neglected.

subsequent death of a child, is not sufficient in itself to warrant a conviction of manslaughter.

Where on an indictment of a woman for the murder of her infant it appeared that the infant was found dead in a bag and that the mother had not made any preparation for its birth, she was held not guilty of manslaughter, although she knew she was about to be delivered, and wilfully abstained from taking the necessary precautions to preserve the life of the child after its birth, and the child died in consequence of that neglect (*j*).

In R. *v.* Handley (*k*), the prisoner was indicted for the wilful murder of her new-born child, and Brett, J., directed the jury (1) that if the prisoner either before or after the birth of the child had made up her mind that the child should die, and, after it was born alive, left it to die, and it did so in consequence, she would be guilty of murder; or (2) that if she made up her mind to conceal the birth, and did attempt to conceal it by methods which would probably end in its death, and they did end in death, she would be guilty of murder, even though she did not intend murder; or (3) that she would be guilty of manslaughter if she had determined that none but herself should be present at its birth, for the purpose of temporary concealment, and had caused the death of the child by wicked negligence after its birth.

In R. *v.* Izod (*l*), Channell, J., refused to accept the proposition that failure on the part of a woman to make proper provision for her expected confinement, resulting in the complete birth and subsequent death of a child, rendered her guilty of manslaughter, and he directed the jury that to support a verdict of manslaughter there must be some evidence of neglect after the child had been completely born.

The prisoner was indicted for the manslaughter of her child, and it appeared that she had been delivered of the child whilst on the seat of a privy, and that the child had breathed. The prisoner was seventeen years old, subject to epileptic fits, and this was her first child. Erle, J., told the jury, 'The question in this case is, whether there was any negligence on the part of the mother in not providing for the safety of her offspring. It is but reasonable to presume that the child dropped from her whilst she was on the privy. Now, if you think that she had the means and the power of procuring such assistance as might have saved the life of the child, by neglecting to do so she would be clearly guilty of manslaughter. But it is proper that you should take into your consideration that the prisoner is very young; that this was her first child; that she was subject to epileptic fits, and that the probability is that the child could have survived but a few moments after its immersion in the soil' (*m*).

Where a child is very young and not weaned, the mother is criminally responsible if the death arose from her not suckling the child when she was capable of doing so (*n*).

If a person, who stands in the place of a parent, inflicts corporal

(*j*) R. *v.* Knights, 2 F. & F. 46, Cockburn, C.J., and Williams, J.

(*k*) 13 Cox, 79, Brett, J. See R. *v.* Pritchard [1901], 17 T. L. R. 310, Wright, J.

(*l*) R. *v.* Izod, 20 Cox, 690.

(*m*) R. *v.* Middleship, 5 Cox, 275.

(*n*) R. *v.* Edwards, 8 C. & P. 611, Patteson, J.

punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies of a disease hastened by such ill-treatment, it will be murder if the treatment was of such a nature as to indicate malice; but if such person believed that the child was shamming illness, and was really able to do the work required, it will only be manslaughter, although the punishment were violent and excessive (*o*).

A person is criminally responsible if, having undertaken to provide necessaries for another, who is so aged and infirm that he is incapable of doing so for himself, he neglects such undertaking, with the result that death ensues; or if having confined another he neglects to supply him with necessaries, whereby the other dies. An indictment for murder stated that the deceased was of great age, and was residing in the house and under the care and control of the prisoner, and that it was his duty to take care of and find her sufficient meat, &c., and then alleged her death to have been caused by confining her against her will, and not providing her with meat and other necessaries. It appeared that the deceased was seventy-four years of age, and that upon the death of her sister, with whom she had lived, was taken away by the prisoner, he saying she was going home to live along with him till affairs were settled, and he would make her happy and comfortable; and that on another occasion the prisoner had said that in consideration of a transaction, which he mentioned, he had undertaken to keep the deceased comfortable as long as she lived. After some time the deceased was waited on by the prisoner and his wife, and remained locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together; and on several occasions had complained of being confined. In the cold weather no fire was discernible in the kitchen, and for some time before her death the deceased was continually locked in the kitchen, and not out of it at all. An undertaker's man stated that, from the appearance of the body, he thought she had died from want and starvation. A surgeon proved that the immediate cause of death was water on the brain; that the appearance of all parts of the body betokened the want of proper food and nourishment, that there was great emaciation of the body, and that the water on the brain might have been produced by exhaustion. Patteson, J., told the jury, 'If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of the deceased, then he will be guilty of murder (*p*); if, however, you think only 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. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty, which she, from age and infirmity

(*o*) R. *v.* Cheeseman, 7 C. & P. 455, Vaughan, J., *post*, p. 769.

(*p*) This position is too narrow. If the prisoner intends either death, or grievous injury to the health, or body of the party, it is murder; as Williams, J., and Mr. Greaves agreed in R. *v.* Bubb, *ante*, p. 671. C. S. G.

was incapable of doing.' After reading the evidence as to the contract, the learned judge added, 'This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; and though, if he broke that contract, he might not be liable to be indicted during her life (*q*), yet if by his negligence her death was occasioned, then he becomes criminally responsible' (*r*).

The prisoner, a woman of full age, who had no means of her own, lived with and was maintained by her aged aunt, and no one else lived with them. For the last ten days of her life the deceased was quite unable to attend to herself or to move about or do anything to procure assistance. During this time the prisoner lived in the house at the cost of the deceased, and took in the food supplies by the tradesmen, but apparently did not give any to the deceased, nor did she promise for her any nursing or medical attendance or inform any one of the condition of the deceased, although she could easily have done so, and no one but the prisoner had any knowledge of the condition in which her aunt was. The prisoner was convicted of manslaughter, and upon a case reserved it was held that it was the duty of the prisoner, under the circumstances, to supply her aunt with sufficient food to maintain life; and that the death of her aunt having been accelerated by neglect of this duty, she was properly convicted (*s*).

Upon an indictment for manslaughter it appeared that the prisoner four years previously had separated from his wife, by mutual consent, the prisoner allowing her 2*s*. 6*d*. a week, which had been in general regularly paid, and the last payment was on the Sunday preceding her death. On the Tuesday she was turned out of her lodgings, being at that time suffering from diarrhœa. On the Wednesday she was in a house in a state of great illness, when the prisoner passed by, and was told he must take his wife away, as she could not shelter there. The prisoner replied, 'Turn her out; I won't be pestered with her,' and then walked away. The same evening, which was wet and dark, she was seen by a constable wandering about seeking shelter. He took her to the house where the prisoner lodged, and told him the state of his wife, who was ill and without lodging, and explained to him that it was incumbent on him to provide her with lodging and relief. He replied that he had no lodging for her; that she was a nasty beast, and he could not live with her. He shut the window and went away. On the Thursday the prisoner offered to pay for a bed for her at a public house, and she went to bed. On the Friday she died. The deceased was labouring under a complication of diseases, which must have speedily resulted in death. The surgeon stated that he considered the period of her existence had been abridged in consequence of her not having had shelter on the Wednesday night. Gurney, B., told the jury that there was no ground for any charge against the prisoner for having caused her death from want of food, as he had regularly paid her

(*q*) In R. *v.* Pelham, 8 Q.B. 959, Patteson, J., said as to this dictum, 'I was speaking of the particular facts before me; certainly I did not mean to lay down that there could be no indictment at all if there was no death.'

(*r*) R. *v.* Marriott, 8 C. & P. 425, Patteson, J.

(*s*) R. *v.* Instan [1893], 1 Q.B. 450. Cf. per Russell, C.J., in R. *v.* Senior, [1899], 1 Q.B. 283, 292, *ante*, p. 675, note (*h*).

allowance to her, and he might have been compelled to pay her a larger sum if that had not been sufficient. Under ordinary circumstances he might have refused to have anything to do with her, but when she was ill and without shelter on a cold and wet night, the question assumed a different aspect, and it was whether they could certainly conclude that his refusal to give her shelter at that time had the effect of causing her death to occur sooner than that event would have happened in the ordinary course of nature (*t*).

As to neglect, abandonment, or ill-treatment of the helpless not followed by fatal results, see *post*, Chapter VIII. p. 907.

By Perjury.—It has been said that at common law, it was murder to bear false witness against another with an express premeditated design to take away his life, if the innocent person was condemned and executed (*u*). But this proposition is of doubtful authority. In 1692 a bill was introduced in Parliament to make it a capital offence to commit or suborn perjury in a capital case, but the bill did not pass into law (*v*). In the last instance of a prosecution for murder by perjury, the prisoners having been convicted, judgment was respited, in order that the point of law might be more fully considered upon a motion in arrest of judgment (*w*). The Attorney-General, however, declining to argue the point, the prisoners were discharged of that indictment; but it seems that there are good grounds for supposing that the Attorney-General declined to argue this point from prudential reasons, and principally lest witnesses might be deterred from giving evidence upon capital prosecutions if it must be at the peril of their own lives, but not from any apprehension that the point of law was not maintainable (*x*).

By Savage Animals.—If a man has a *beast* that is used to do mischief, and he, knowing it, suffers it to go abroad, and it kills a man, this has been considered by some as manslaughter in the owner (*y*); and it is agreed by all that such a person is guilty of a very gross misdemeanor (*z*); and if a man purposely turns such an animal loose, knowing its nature, it is as much murder (*a*) as if he had incited a bear or a dog to worry people; and this, though he did it merely to frighten them, and make what is called sport (*b*).

(*t*) R. *v.* Plummer, 1 C. & K. 600. The prisoner was acquitted, otherwise the question whether he was bound to provide shelter for his wife would have been reserved. Cf. R. *v.* Connor, *ante*, p. 674 note (*a*).

(*u*) Britt. c. 52. Bract. lib. 3, c. 4. 1 Hawk. c. 31, s. 7. 3 Co. Inst. 91. 4 Bl. Com. 196.

(*v*) 19 St. Tr. 813.

(*w*) R. *v.* Macdaniel, Berry, and Jones, [1756], Fost. 131. 19 St. Tr. 746, 810–814. 1 Leach, 44. This trial took place in 1756. The prisoners were indicted for murder upon a conspiracy of the kind mentioned in the text against one Kidden, who had been convicted and executed for a robbery upon the highway, upon the evidence of Berry and Jones.

(*x*) 4 Bl. Com. 196, note (*g*), where Blackstone, J., says, that he had good grounds for such an opinion, and that nothing should be concluded from the waiving of that prosecution; and in 1 East, P. C. 333, note (*a*), the author states that he had heard Lord Mansfield make the same observation, and say, that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment. See also 19 St. Tr. 810, and Deut. c. xix., v. 16 *et seq.*

(*y*) 4 Bl. Com. 197.

(*z*) 1 Hawk. c. 31, s. 8.

(*a*) Cf. the Jewish law. Exod. c. xxi. v. 29.

(*b*) 4 Bl. Com. 197. Hale (1 P. C. 431) says, that he had heard that it had been ruled to be murder, at the assizes held at St. Albans for Hertfordshire, and the owner hanged for it; but that it was but an hearsay.

On an indictment for manslaughter it appeared that the deceased, a child about eight years old, was killed by a kick from the prisoner's horse which had been in his possession about four years, and was a very vicious and dangerous animal, and had kicked and injured several persons, and some of these instances had been brought to the prisoner's knowledge, and he otherwise knew of the propensities of the horse. The deceased, with some other children, was on a common, and when on or very near a public path crossing the common, a vicious horse belonging to the prisoner and turned loose by him to graze on the common, kicked at the deceased, struck her on the head, and killed her. It was a question whether the deceased was on the path at the time she was kicked. The question was left to the jury whether the death of the child was caused by the culpable negligence of the prisoner, and they were told that they might find culpable negligence if the evidence satisfied them that the horse was so vicious and accustomed to kick as to be dangerous, and that the prisoner knew that it was so, and with that knowledge turned it loose on the common, through which there were to his knowledge open paths on which the public had a right to pass. The jury found the prisoner guilty of having caused the death by his culpable negligence, but that the evidence did not satisfy them one way or the other whether the child at the time she was kicked was on the path or beyond it. Upon a case reserved, Erle, C.J., said, 'I am of opinion that this conviction should be affirmed. The prisoner turned upon a common where there was a public footway a very dangerous animal, knowing what its propensities were, and it is found by the jury that the prisoner was guilty of culpable negligence in so doing, and that the death of the child was caused by the culpable negligence of the prisoner. That under ordinary circumstances would be sufficient to sustain a conviction for manslaughter; but the point contended for by the prisoner is, that the child was not on the path at the time when she was kicked, and her death caused thereby; and the jury were unable to say whether she was on the footway or beyond at the time. For the purpose of the judgment I assume that the child was not on the footway, but very near it. In point of reason I think that the prisoner ought to be held responsible in this case, and that it is not a ground of acquittal that the child had strayed off the pathway.' (After citing *Barnes* v. *Ward*, 9 C. B. 414), he continued, 'The principle of that case extends to a case like this, where a child walking on a public highway accidentally deviated into the neighbouring land, and met with her death from the kick of a vicious horse close to the public way.' . . . 'The public take a highway on the terms on which it is granted to them by the grantor, and, as between them and the grantor, must use the way subject to its risks; but the public are entitled to use the way without being subject to dangers like that in the present case. It was injurious to persons using the pathway in question to turn on the common a vicious animal of this kind. The judgment is confined to the fact of the child being near to the path at the time, and that, having accidentally strayed from the pathway, but being very near to it, her death was caused by the culpable negligence of the prisoner. I do not wish to sanction the notion that, because a person may not be civilly liable for an act of negli-

gence, he is therefore not criminally liable. It is not necessary to discuss that proposition now; however, I do not accede to it' (*c*).

By Want of Medical or Surgical Skill.—If a physician or surgeon, even though he is not a regular or licensed one (*d*), acting with due care and skill, gives his patient a potion or plaster, intending to do him good, and, contrary to the expectation of such physician or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure (*e*).

Upon an indictment for manslaughter by causing the death by thrusting a round piece of ivory against the rectum, and thereby making a wound through the rectum, it appeared that upon examination of the body after death, a small hole was discovered perforated through the rectum. The prisoner had attended the deceased, but there was no evidence to shew how the wound had been caused, and questions were put in order to shew that it might have been the result of natural causes, and it was proposed to shew that the prisoner had had a regular medical education, and that a great number of cases had been successfully treated by him. Hullock, B. (stopping the case), 'This is an indictment for manslaughter, and I am really afraid to let the case go on, lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion that it makes no difference whether the party be a regular or irregular surgeon; indeed, in remote parts of the country, many persons would be left to die, if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law-books (*f*) have said has been read to you, but they do not state any decisions, and their silence in this respect goes to shew what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord Coke, he merely details an authority, a very old one, without expressing either approbation or disapprobation; however, we find that Lord Hale has laid down what is the law on this subject. That is copied by Blackstone, J., and no book in the law goes any further. It may be that a person not legally qualified to practise as a surgeon may be liable to penalties, but surely he cannot be liable to an indictment for felony. It is quite clear you may recover damages against a medical man for want of skill; but as my Lord Hale (*g*) says, "God forbid that any mischance of this kind should make a person guilty of murder or manslaughter." Such is the opinion of one of the greatest judges that ever adorned the Bench of this country; and his proposition amounts to this, that if a person, *bona-fide* and honestly exercising his best skill to cure a

(*c*) R. *v.* Dant, L. & C. 567. As to liability of the owners of animals, see 1 Beven, Negligence (3rd ed.), pp. 517–540.

(*d*) 1 Hale, 429. See cases cited, *infra*. But see Britton, c. 5. 4 Co. Inst. 251. R. *v.* Simpson, Lancaster, 1829; Wilcock's L. Med. Prof. Append. 227; 1 Lew. 172; 4 C. & P. 407, note (*a*).

(*e*) 4 Bl. Com. 197. 1 Hale, 429. And see R. *v.* Macleod, 12 Cox, 534.

(*f*) 4 Bl. Com. 197. 1 Hale, 429. 4 Co. Inst. 251.

(*g*) 1 Hale, 429.

patient, performs an operation, which causes the patient's death, he is not guilty of manslaughter. In the present case no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. L. has himself told us that he performed an operation, the propriety of which seems to have been a sort of *vexata quæstio* among the medical profession; but still it would be most dangerous for it to get abroad that, if an operation performed either by a licensed or unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter' (*h*).

In R. *v.* Williamson (*i*), the prisoner, who was indicted for the murder of Mrs. D., was not a regularly educated accoucheur, but was a person who had been in the habit of acting as a man-midwife among the lower classes of people. Mrs. D. had been delivered by the prisoner on a Friday, and on the Sunday following an unusual appearance took place, which the medical witnesses stated to be a *prolapsus uteri;* this the prisoner mistook for a remaining part of the *placenta,* which had not been brought away at the time of the delivery: he attempted to bring away the prolapsed *uterus* by force, and in so doing he lacerated the *uterus,* and tore asunder the mesenteric artery; this caused the death of the patient; and it appeared, from the testimony of a number of medical witnesses, that there must have been great want of anatomical knowledge in the prisoner. It was proved that the prisoner had safely delivered many other women. Ellenborough, C.J., said, 'There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder, but still it is for you to consider whether the evidence goes as far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill' (*j*).

In R. *v.* St. John Long (*k*), upon an indictment for manslaughter by feloniously rubbing Miss C. with a dangerous liquid, it appeared that two of the family had died of consumption, but that Miss C. had enjoyed good health. Mrs. C. having heard that the prisoner had said that unless Miss C. put herself under his care she would die of consumption in two or three months, placed her under his course of treatment. The prisoner rubbed a mixture on different parts of the bodies of his patients, and this was applied to Miss C. by the prisoner's direction. A wound appeared on Miss C.'s back, to which the prisoner's attention was directed, and he

(*h*) R. *v.* Van Butchell, 3 C. & P. 629, Hullock, B., and Littledale, J.

(*i*) 3 C. & P. 635.

(*j*) In addition to the facts above stated, it was proved that the prisoner had attended the deceased in seven previous confinements with perfect success, and that the deceased wished him to attend her in her last confinement. See 4 C. & P. 407 (n).

(*k*) 4 C. & P. 398.

stated that this proceeded from the inhaling, and that unless those appearances were produced he could expect no beneficial result. Miss C. was suffering much from sickness, and the prisoner said it was of no consequence, but a benefit; and that those symptoms, combined with the wound, were proof that his system was taking due effect. Miss C. having got worse, the prisoner said that in two or three days she would be better in health than she had ever been in her life. At this interview the wound, which had extended, was shewn to the prisoner. He also stated on that day, and on Monday, the 16th, that Miss C. was doing uncommonly well. On Tuesday, the 17th, she died. An eminent surgeon proved that on the Monday her back was extensively inflamed, and in the centre was a spot, as large as the palm of the hand, black, and dead, and in a mortified state, and he thought that some very powerfully stimulating liniment had been applied to her back; that applying a lotion of a strength capable of causing the appearances he saw, to a person of the age and constitution of the deceased, if in perfect health, was likely to damage the constitution and produce disease and danger. The appearances on the back were quite sufficient to account for her death. On the most careful examination of the body, after death, no latent disease or seeds of disease were discovered. It was submitted, for the defence, that, in point of law, this was nothing like a case of manslaughter, and 1 Hale, P. C. 429, 4 Bl. Com. b. 4, c. 14, and R. *v.* Van Butchell (*l*), were cited and relied on. Park, J., said, 'I am in this difficulty; I have an opinion, and my learned brother differs from me; I must, therefore, let the case go to the jury.' Garrow, B., said, 'In R. *v.* Van Butchell the learned judge had very good ground to stop the case, as there was no evidence as to what had been done. I make no distinction between the case of a person who consults the most eminent physician, and the cases of those whose necessities or whose folly may carry them into any other quarter. It matters not whether the individual consulted be the president of the College of Physicians, the president of the College of Surgeons, or the humblest bone-setter of the village; but be it one or the other, he ought to bring into the case ordinary care, skill, and diligence. Why is it that we convict in cases of death by driving carriages? Because the parties are bound to have skill, care, and caution. I am of opinion that, if a person, who has ever so much or so little skill, sets my leg, and does it as well as he can, and does it badly, he is excused; but suppose the person comes drunk, and gives me a tumbler full of laudanum, and sends me into the other world, is it not manslaughter? And why is that? Because I have a right to have reasonable care and caution.' Park, J., in summing up, said, 'The learned counsel truly stated in the outset that whether the party be licensed or unlicensed is of no consequence, except in this respect, that he may be subject to pecuniary penalties for acting contrary to charters or Acts of Parliament; but it cannot affect him here.' (After citing 1 Hale, 429, as an authority in point, the learned judge proceeded), 'I agree with my learned brother that what is called *mala praxis* in a medical person is a misdemeanor; but that depends upon whether the practice he has used

(*l*) *Supra*, pp. 681, 682.

is so bad that everybody will see that it is *mala praxis*. The case at Lancaster (*m*) differs from this case. I have communicated with Tindal, C.J., who tried that case, and he informed me that the man was a blacksmith, and was drunk, and so completely ignorant of the proper steps, that he totally neglected what was absolutely necessary after the birth of the child. That certainly was one of the most outrageous cases that ever came into a court of justice. I would rather use the words of Lord Ellenborough in R. *v.* Williamson' (*n*). (His lordship read them.) 'And this is important here, for though he be not licensed, yet experience may teach a man sufficient; and the question for you will be, whether the experience this individual acquired does not negative the supposition of any gross ignorance or criminal inattention?' (After setting the authority of Hale, P. C. 429, against the dictum of Lord Coke, 4 Inst, 251, and citing the observations of Hullock, B., in R. *v.* Van Butchell (*o*) with approbation, his lordship proceeded), 'With respect to the application of the mixture, if he commanded the servant to use it, it is the same as if he used it himself. Perhaps from the evidence you will think that the act caused the death; but still the question recurs as to whether it was done either from gross ignorance or criminal inattention. No one doubts Mr. B.'s skill, but that is not quite the question; it is not whether the act done is the thing that a person of Mr. B.'s great skill would do, but whether it shews such total and gross ignorance in the person who did it, as must necessarily produce such a result. On the one hand, we must be careful and most anxious to prevent people from tampering in physic, so as to trifle with the life of man; and, on the other, we must take care not to charge criminally a person who is of general skill, because he has been unfortunate in a particular case.' 'If you think there was gross ignorance or scandalous inattention in the conduct of the prisoner, then you will find him guilty; if you do not think so, then your verdict will be otherwise' (*p*).

Upon a similar indictment against the same person (*q*) for causing the death of Mrs. L., it appeared that she put herself under his care on October 6, at which time she was in very good health, to be cured of a complaint she had in her throat. On the 3rd she had applied a small blister to her throat, but the wound occasioned by it was nearly well on the 6th. On the 7th, 8th, 9th, and 10th she went to the prisoner's, and on the evening of the 10th complained to her husband of a violent burning across her chest, in consequence of which he looked at it, and found a great redness across her bosom, darker in the centre than at the other parts; she also complained of great chilliness, and shivered with cold, and passed a very restless and uncomfortable night. On the 11th she was very unwell all the day, the redness was more vivid, and the spot in the centre darker, round the edges white and puffed up, and there was a dirty white discharge from the centre. Cabbage leaves had been applied. On the 12th the redness on the breast and chest was, if anything, greater.

(*m*) Probably R. *v.* Ferguson, 1 Lew. 181.

(*n*) *Supra*, p. 682.

(*o*) *Supra*, pp. 681, 682.

(*p*) For the defence twenty-nine witnesses were called, who had been patients of the prisoner, and were satisfied with his skill and diligence. Verdict guilty.

(*q*) R. *v.* St. John Long (No. 2), 4 C. & P. 423, Bayley and Bolland, BB., and Bosanquet, J.

In consequence of the symptoms, the husband went to the prisoner, who asked why Mrs. L. had not come to inhale and go on with the rubbing; the husband replied it was impossible, she was so ill; she had been constantly unwell since the night of the 10th, and was suffering a great deal of pain and sickness. The prisoner said it would soon go off, it was generally the case. He was told of the shivering and chilliness, and that some hot wine and water had been given to relieve her; he said hot brandy and water would have been better, and to put her head under the bed-clothes. He was told that her chest and breast looked very red and very bad; he said that was generally the case in the first instance, but it would go off as she got better, and that the husband need not be uneasy about it, as there was no fear or danger. In the course of the day the cabbage leaves had been removed, and a dressing of spermaceti ointment put on the chest instead. In the evening the prisoner came and saw Mrs. L. and looked at her breast, and observing the dressing said those greasy plasters had no business there, and she ought to have continued the cabbage leaves. He then asked for a towel, and began dabbing it on the breast, particularly in the centre, where the discharge came from. He said that old linen was the best thing to heal a wound of that kind. But she might use the dressing if she liked it, he saw no objection, and when it skinned over he would rub it again. He never saw her afterwards; she died on the 8th of November. A surgeon proved that on October 12 he found a very extensive wound covering the whole anterior part of the chest, which, in his opinion, might be produced by any strong acid: the skin was destroyed; the centre of the wound was darker, and in a higher state of inflammation than the other parts; he considered the wound very dangerous to life when he first saw it: the centre spot, and the upper part became gangrenous in about a week; and in his opinion Mrs. L. died of the wound, and according to his judgment it was not necessary or proper to produce such a wound to prevent any difficulty in swallowing, and he did not know of any disease in which the production of such a wound would be necessary or proper. The body was internally and externally in perfect health, except a little narrowness at the entrance of the *œsophagus*. Another surgeon stated that he thought that a man of common prudence or skill would not have applied a liquid which in two days would produce such extensive inflammation, though all irritating external applications sometimes exceeded the expectations of the medical attendant; but he should say that such conduct was a proof of rashness and of ignorance. It was submitted that this was not manslaughter, but homicide *per infortunium;* that where the mind is pure, and the intention benevolent, and there are no personal motives, such as a desire of gain, if an operation be performed which fails, the party is not responsible; and that the indictment, which in substance charged that the death was occasioned by the external application, was not supported. There was no count imputing ignorance or want of skill, or hastiness, or roughness of practice. Bayley, B., 'I agree with Lord Hale (*r*), and do not think that there is any difference between a licensed and unlicensed surgeon. It does not follow that in the case of either, an act done may not amount

(*r*) 1 Hale, 429.

to manslaughter. There may be cases in which a regular medical man may be guilty; and that is all that Lord Hale lays down. And that may be laid out of the question in this case. But the manner in which the act is done, and the use of due caution, seem to me to be material. Foster, J., p. 263, speaking of a person who happens to kill another by driving a cart or other carriage, says, "If he might have seen the danger, and did not look before him, it will be manslaughter *for want of due circumspection*." And there is also a passage in Bracton to the like effect. But all that I mean to say now is, that there being conflicting authorities, and the impression on our minds not being in your favour, I propose to reserve the point. As to the indictment not being supported by the evidence, one of the allegations is that the prisoner *feloniously* applied a noxious and injurious matter. And there is no doubt, if the jury should be of opinion against the prisoner, that the facts proved will be sufficient to warrant their finding that the prisoner *feloniously* did the act; for if a man, either with gross ignorance or gross rashness, administers medicine and death ensues, it will be clearly felony.' It was then objected that in this case, as in larceny, there must be a trespass proved. It was not proved that any fraud had been practised by the prisoner to get the patient under his care; nor had there been any avaricious seeking after fees: if there had been it might have been evidence to shew the existence of trespass. In *R.* v. *Van Butchell* (*s*), the case was stopped because there was no evidence of how the operation was performed, and here there was not any evidence to shew the mode in which the application was made. Bayley, B., 'In this case we may judge of the thing by the effect produced, and that may be evidence from which the jury may say whether the thing which produced such an effect was not improperly applied.' Bolland, B., 'When you pass the line which the law allows, then you become a trespasser.' Bayley, B., 'If I had a clear opinion in your favour, or if my brothers had, or if we had any reason to think that other judges were of a different opinion, it would become our duty to give our opinion here, and prevent the case from going to the jury: but feeling as I do, notwithstanding all I have heard to-day, and myself and my brothers having had our attention directed to the law before we came here, I think it right that the case should go to the jury; I think that if the jury shall find a given fact in the way in which I shall submit it to them, it will constitute the crime of *feloniously* administering, so as to make it manslaughter. I do not charge it on ignorance merely, but there may have been rashness; and I consider that rashness will be sufficient to make it manslaughter. As for instance, if I have a toothache, and a person undertakes to cure it by administering laudanum, and says, "I have no notion how much will be sufficient," but gives me a cup full, which immediately kills me; or if a person prescribing James's powder says, "I have no notion how much should be taken," and yet gives me a tablespoonful, which has the same effect; such person acting with rashness will, in my opinion, be guilty of manslaughter. With respect to what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and the willingness

(*s*) *Supra*, pp. 681, 682.

of the patient cannot take away the offence against the public.' In summing up, Bayley, B., said, 'The points for your consideration are, first: whether Mrs. L. came to her death by the application of the liquid; secondly, whether the prisoner, in applying it, has acted feloniously or not. To my mind it matters not whether a man has received a medical education or not; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to conviction for manslaughter.' 'If you shall be of opinion that the prisoner made the application with a gross and culpable degree of rashness, and that it was the cause of Mrs. L.'s death, then, heavy as the charge against him is, he will be answerable on this indictment for the offence of manslaughter. There was a considerable interval between the application of the liquid and the death of the patient; yet if you think that the infliction of the wound on the 10th of October was the cause of the death, then it is no answer to say that a different course of treatment by Mr. C. might have prevented it. You will consider these two points: first, of what did Mrs. L. die? You must be satisfied that she died of the wound, which was the result of the application made on the 10th of October; and then, secondly, if you are satisfied of this, whether the application was a felonious application; this will depend upon whether you think it was gross and culpable rashness in the prisoner to apply a remedy which might produce such effects in such a manner that it did actually produce them. If you think so then he will be answerable to the full extent' (*t*).

Any person, whether he is a properly qualified medical practitioner or not, who professes to deal with the life or health of others, is bound to have competent skill to perform the task that he holds himself out to perform, and bound to treat his patients with care, attention, and assiduity, and if a patient dies for want thereof, is guilty of manslaughter (*u*).

Where a herb doctor was charged with causing death by improperly

(*t*) The prisoner was acquitted. There was no negligence or inattention in the prisoner after the applications, as he did not know where Mrs. L. was until October 12, and after that time she was attended by Mr. C. See R. *v.* Macleod, 12 Cox, 534, where the prisoner administered morphia without weighing it; and R. *v.* Zeifert, 148 C. C. C. Sess. Pap. 630, where a prisoner administered cocaine to a woman who, unknown to him, was suffering from a weak heart.

(*u*) R. *v.* Spiller, 5 C. & P. 333, Bolland, B., and Bosanquet, J. In Lanphier *v.* Phipos, 8 C. & P. 475, Tindal, C.J., said, 'Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill; there may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable, and competent degree of skill. See R. *v.* Ferguson, 1 Lew. 181. R. *v.* Spilling, 2 M. & Rob. 107. R. *v.* Noakes, 4 F. & F. 920, where a chemist made a mistake, and, under the circumstances, it was held not to be negligence. *Vide* 1 Beven, Negligence (3rd ed.), 7, 1150.

administering medicines, Pollock, C.B., told the jury that 'it is no crime for any one to administer medicine, but it is a crime to administer it so rashly and carelessly as to produce death; and in this respect there is no difference between the most regular practitioner and the greatest quack' (*v*). An unskilled practitioner is guilty of negligence if he prescribes dangerous medicines of the use of which he is ignorant (*w*).

Where the deceased had once been operated upon for cancer, and the disease again appeared in his face, and the prisoner, a blacksmith, told him he could cure him, and the deceased consented to place himself in his hands, and he put some kind of oil on his face, and then applied some kind of powder which caused the greatest agony, and death ensued in nine days. After the prisoner had been employed there was a line of demarcation around the tumour, and all the tissues were destroyed, as if some powerful caustic had been applied, and the general symptoms shewed poisoning by some irritant poison. On a post-mortem examination marks were found of extensive inflammation in the bowels and numerous ulcerations, which were the effects of mercury applied to the tumour; and the deceased died from the effects of corrosive sublimate, which was sometimes applied to wounds, but not to cancer. The deceased must have died of the cancer, but his death was accelerated by the application of the sublimate. Watson, B., directed the jury to find the prisoner guilty if they considered he took upon himself the responsibility of attending to a patient suffering under cancer, when he was not qualified for the purpose. If he used dangerous applications, he was bound to bring skill in their use; and he thought that the prisoner's education and employment made the use of these dangerous substances almost amount to want of skill. The jury must, however, say whether what the prisoner did produced or accelerated the death; or (and) whether the prisoner in their opinion had acted with neglect in using such remedies (*x*).

A prisoner, formerly a butcher, who had practised as a surgeon for many years without any legal qualification, was indicted for the manslaughter of a man on whom he had performed an operation for a disease in the bone. The only question was whether the practice of the prisoner in the particular case amounted to gross and culpable negligence. Several medical men having proved that the treatment pursued by the prisoner exhibited the grossest and most culpable ignorance, it was proposed for the defence to call witnesses to prove that the prisoner had treated them for similar complaints successfully, and R. *v.* Williamson (*y*) was relied upon. Maule, J., refused to allow the witnesses to be examined, saying, 'In R. *v.* Williamson the witnesses were asked generally *causa scientiæ*. Neither on the one hand nor the other can other cases be gone into. The

(*v*) R. *v.* Crick, 1 F. & F. 519. See R. *v.* Webb, 1 M. & Rob. 405: 2 Lew. 196, where Lyndhurst, C.B., said, 'I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a 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.'

(*w*) R. *v.* Markuss, 4 F. & F. 356. R. *v.* Chamberlain, 10 Cox, 486. R. *v.* Bull, 2 F. & F. 201, where Cockburn, C. J., said, 'If a person takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care, and if he does it with negligence, he is guilty of manslaughter.'

(*x*) R. *v.* Crook, 1 F. & F. 521.

(*y*) *Supra*, p. 682.

attention of the jury must be confined to the present case.' And in summing up the learned judge said, 'If a medical or any other man caused the death of another *intentionally*, that would be murder; but where a person not intending to kill a man, by his gross negligence, unskilfulness, and ignorance caused the death of another, then he would be guilty of culpable homicide; and the question for the jury is, whether the deceased died from the effects of the operation performed on him by the prisoner, and whether the treatment pursued by the prisoner in the case of the deceased was marked by negligence, unskilfulness, and ignorance' (*z*).

In R. *v.* Noakes (*a*), 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 the customer internally with fatal results, was held not to amount to such criminal negligence as to warrant a conviction for manslaughter, the mistake having been made under circumstances which rather threw the prisoner off his guard.

On an indictment for manslaughter against a medical man by administering poison in mistake for another drug the prosecution must shew that the poison got into the mixture in consequence of his gross and culpable negligence, and it is not sufficient to shew merely that the prisoner, who dispensed his own drugs, supplied a mixture which contained a large quantity of poison (*b*).

By Infection.—The question is raised by Hale, whether, if the person infected with the plague should go abroad with the intention of infecting another, and another should thereby be infected and die, this would not be murder; but it is admitted that, if no such intention should evidently appear, it would not be felony, though a great misdemeanor (*c*).

Persons who go about in public when suffering from infectious disease may be indicted at common law (*d*), or summarily punished under the Public Health Acts (*e*).

By Rape.—In R. *v.* Ladd (*f*), the question was raised but not decided, whether an indictment for murder could be maintained for killing a female infant by *ravishing* her; but there is no doubt that it may. The prisoner was indicted for the murder of a child under ten, and it appeared that he had had connection with her and given her the venereal disease; and Wightman, J., told the jury that if they were of opinion that the prisoner had had connection with her, and she died from its effects, then the act being, under the circumstances of the case, a felony in point of law, this would of itself be such malice as would justify them in finding him guilty of murder (*g*).

(*z*) R. *v.* Whitehead, 3 C. & K. 202.
(*a*) 4 F. & F. 920.
(*b*) R. *v.* Spencer, 10 Cox, 525.
(*c*) 1 Hale, 432. See R. *v.* Greenwood, *infra*.
(*d*) R. *v.* Vantandillo, 4 M. & Sel. 73; 16 R. R. 389.
(*e*) See Bk. xi. c. iii. *post*, Vol. ii. p. 1843.
(*f*) 1 Leach, 96: 1 East, P. C. 226. The judges to whom the case was referred gave no opinion upon the point, as the indictment was defective.
(*g*) R. *v.* Greenwood, 7 Cox, 404. The report proceeds, 'The jury retired, and, after some time, returned into Court, saying that they were satisfied that he had had connection, and that her death resulted therefrom, but were not agreed as to finding him guilty of murder. Wightman, J., told them that, under these circumstances, it was open to them to find the prisoner guilty of manslaughter, and that they might ignore the doctrine of constructive malice if they thought fit. The jury found a verdict of manslaughter.' *Sed quære.* C. S. G.

SECT. V.—TIME OF DEATH—TREATMENT OF WOUNDS—KILLING PERSON LABOURING UNDER DISEASE.

Time of Death.—No person can be convicted of the murder or manslaughter of another, who does not die within a year and a day after the stroke received, or cause of death administered, in the computation of which the whole day upon which the hurt was done is to be reckoned the first (*h*).

Treatment of Wounds.—Questions occasionally arise as to the treatment of the wound or hurt received by the party killed. On an indictment for murder it appeared that the deceased had been waylaid and assaulted by the prisoner and severely cut across one of his fingers by an iron instrument, and the surgeon urged him to submit to amputation, but he refused, though he was told that his life would be in great hazard; and it was dressed day by day for a fortnight; when lockjaw came on, induced by the wound in the finger, and the finger was then amputated, but too late; and the lockjaw ultimately caused death. The surgeon thought it most probable that the life would have been saved if the finger had been amputated in the first instance; and it was contended that it was the obstinate refusal to submit to amputation that was the cause of the death. Maule, J., told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted the wound, which was ultimately the cause of the death, he was guilty of murder; that it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question was whether in the end the wound was the cause of death (*i*). This ruling accords with the judgment and dictum given in the earlier authorities (*j*).

On an indictment against a principal in the second degree for murder by shooting in a duel, after the examination of the first medical witness, who stated his opinion that the operation (of which no account is given in the report) was the only chance of saving the life of the deceased; counsel for the prisoner were proceeding to cross-examine him as to the nature and seat of the wound, to shew that the opinions he had expressed of its danger and the necessity of the operation were not correct. Erle, J., said: 'I presume you propose to call counter-evidence and impeach the propriety of the operation; but I am clearly of opinion that if a dangerous wound is given, and the best advice is taken, and an operation performed under that advice, which is the immediate cause of death, the party giving the wound is criminally responsible.' It was proposed to shew that the opinion formed by the medical men was grounded upon erroneous premises, and that no operation was necessary at all, or at least that an easier and much less dangerous operation ought to have been adopted; and it was submitted that a person is not criminally responsible where the death is caused by consequences which are not physically

(*h*) R. *v.* Dyson [1908], 2 K. B. 454, accepting the law as laid down in 1 Hawk. c. 31, s. 9; 4 Bl. Com. 197; and 1 East, P. C. 343, 344.

(*i*) R. *v.* Holland, 2 M. & Rob. 351. See R. *v.* Wall, 28 St. Tr. 51, 145, MacDonald, C.B. Stephen Dig. Cr. L. (6th ed.) art. 241.

(*j*) 1 Hale, 428. Rew's case, Kel. (J), 26. See Stephen Dig. Cr. L. (6th ed.) art. 241, and R. *v.* Ryan, 16 W. R. 319.

the consequences of the wound, but can only be connected with the first wound by moral reasonings; as here that which occasioned death was the operation, which supervened upon the wound, because the medical men thought it necessary. Erle, J., said, 'I am clearly of opinion, and so is my brother Rolfe, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and the treatment which they *bona fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible, and of course those who aided and abetted him in it. I so rule on the present occasion; but it may be taken, for the purpose of future consideration, that it having been proven that there was a gunshot wound, and a pulsating tumour arising therefrom, which, in the *bona fide* opinion of competent medical men, was dangerous to life, and that they considered a certain operation necessary, which was skilfully performed, and was the immediate and proximate cause of death; the counsel for the prisoner tendered evidence to shew this opinion was wrong, and that the wound would not have inevitably caused death, and that by other treatment the operation might have been avoided, and was therefore unnecessary. I will reserve this point for the consideration of the judges, although I have no doubt upon the subject. To admit this evidence would be to raise a collateral issue in every case as to the degree of skill which the medical men possessed' (*k*).

Where the deceased had been severely kicked on the stomach, and brandy had been given her by a surgeon to restore her, and part of it had gone the wrong way into the lungs, and might, perhaps, have caused the death, the prisoner was convicted of manslaughter, and Coleridge, J., said the case was like that where a dangerous wound was given, and an operation was performed (*l*).

The prisoner had a fight with the deceased and struck him on the jaw, breaking it in two places, which rendered an operation necessary. Chloroform was administered, and the patient died under its administration. It was not disputed that if the chloroform had not been administered the man would not have died. Mathew, J., after consulting Field, J., held that since the chloroform had been properly administered by a regular medical practitioner, the fact that the death primarily resulted from its use could not affect the criminal responsibility of the accused, and told the jury that if an injury was inflicted by one man on another which compelled the injured man to take medical advice, and if death ensued from or in the course of an operation advised by the medical man, the assailant was responsible in the eye of the law. The jury must be satisfied that the prisoner injured the deceased; that he rightly consulted a competent medical man; that an operation was recommended for which the administration of chloroform was necessary; and that the deceased died from that administration (*m*).

Death from Disease supervening upon Blows.—It would seem that where a fatal disease is set up by a felonious act, the person who did the act may be guilty of homicide. In Brintons, Ltd., *v.* Turvey (*n*), Lord

(*k*) R. *v.* Pym, 1 Cox, 339.
(*l*) R. *v.* McIntyre, 2 Cox, 379.
(*m*) R. *v.* Davis, 15 Cox, 174.
(*n*) [1905] A. C. 230, 235.

Halsbury said, 'An injury to the head has been known to set up septic pneumonia, and many years ago, I remember when that incident had in fact occurred, it was sought to excuse the person who inflicted the blow on the head, from the consequences of his crime, because his victim had died of pneumonia and not as it was contended of the blow on the head. It does not appear to me that by calling the consequences of an accidental injury a disease, one alters the nature of the consequential results of the injury that has been inflicted' (*o*).

Killing a Person labouring under Disease.—If a man is sick of some disease, which, by the course of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently and speedily, this is murder or other homicide, according to the circumstances, in the party by whom such hurt or wound was given. For the person wounded does not die simply *ex visitatione Dei*, but his death is hastened by the hurt which he received; and the offender is not allowed to apportion his own wrong (*p*).

Where a husband was indicted for the manslaughter of his wife by accelerating her death by blows, and it appeared that she was at the time in so bad a state of health that she could not possibly have lived more than a month or six weeks under any circumstances: Coleridge, J., told the jury that if a person inflicted an injury upon a person labouring under a mortal disease, which caused that person to die sooner than he otherwise would have done, he was liable to be found guilty of manslaughter, and the question for them was whether the death of the wife was caused by the disease under which she was labouring, or whether it was hastened by the ill usage of the prisoner (*q*).

Sect. VI.—Provocation.

As the indulgence which is shewn by the law in some cases to the first transport of passion is a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders a man deaf to the voice of reason; so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed (*r*). All the circumstances of the case must lead

(*o*) Cf. R. *v.* Dyson [1908], 2 K.B. 454 C. C. R., an indictment for manslaughter, where it was proved that the deceased (a child) died of meningitis supervening on cruel treatment.

(*p*) Hale (1 P. C. 428) says that thus he had heard that learned and wise judge, Rolle, J., frequently direct. In R. *v.* Johnson, 1 Lew. 164, on an indictment for manslaughter in causing a death by a blow on the stomach, on a surgeon stating that a blow on the stomach in this state of things, arising from passion and intoxication, was calculated to occasion death, but not so if the party was sober, Hullock, B., is said to have directed an acquittal, saying, 'that where the death was occasioned partly by a blow, and partly by a predisposing circumstance, it was impossible so to apportion the operations of the several causes as to be able to say with certainty that the death was immediately occasioned by any one of them in particular.' This ruling is questioned in Roscoe Cr. Ev. (13th ed.) 616, and as it would seem with very good reason, as it is contrary to the other authorities upon this point. C. S. G. See R. *v.* Martin, 5 C. & P. 128, Parke, B., and Stephen Dig. Cr. L. (6th ed.) art. 241.

(*q*) R. *v.* Fletcher, Gloucester Spr. Ass. 1841. MSS. C. S. G. See R. *v.* Murton, 3 F. & F. 492. R. *v.* Webb, 1 M. & Rob. 405; 2 Lew. 196.

(*r*) Fost. 315.

to the conclusion that the act done, though intended or calculated to cause death or great bodily harm, was not the result of cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity (*s*). For there are many trivial, and some considerable provocations, which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead.

Words of Provocation.—In R. *v.* Taylor (*t*), Lord Mansfield said: 'It is settled that words are not a sufficient provocation, but blows are a sufficient provocation to lessen the crime into manslaughter.' In R. *v.* Rothwell (*u*), where the prisoner was indicted for the wilful murder of his wife, Blackburn, J., in summing up, said: '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 a 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 had no idea of such a thing before, were thereupon to kill her, 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." 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?' (*v*).

In R. *v.* Jones (*w*), the prisoner was charged with the murder of his wife by cutting her throat with a razor. The prisoner and his wife had been living apart, and the prisoner asked her to come and live with him, but she refused, saying, 'No. If I want 3*s*. I can get it off K., and I can sleep with him.' Bucknill, J., after referring to R. *v.* Rothwell, *supra*, told the jury that the great majority of the authorities were agreed that words were not a sufficient provocation, but that they could, if they thought fit, find that these words amounted to a provocation.

The earlier authorities indicate some uncertainty on the question how far, if at all, words are sufficient provocation, and the question is involved with the further question as to the nature of the weapon used, and the character of the blow given.

In Lord Morley's case (*x*), where it was decided that if A. gave slighting words to B., and B. thereupon immediately killed her, such killing would be murder in B., it is also stated to have been held, that words of *menace or bodily harm* would amount to such a provocation as would reduce the offence of killing to manslaughter. But in another report of the same

(*s*) 1 East, P. C. 232.
(*t*) 5 Burr. 2793, 2796.
(*u*) 12 Cox, 145.
(*v*) And see 1 East, P. C. 233. In Foster's Crown Law, p. 290, it is stated, 'words of reproach, how grievous soever, are not a provocation, sufficient to free the party killing from the guilt of murder. Nor are indecent provoking actions or gestures expressive of contempt or reproach, without an assault upon the person.'
(*w*) [1908] 148 Cent. Crim. Ct. Sess. Pap. 673: 72 J.P. 215.
(*x*) 1 Hale, 456. 6 St. Tr. 769.

case this latter position is not to be found (*y*); and it has been stated that such words ought at least to be accompanied by some act, denoting an immediate intention of following them up by an actual assault (*z*).

A woman called a man, who was sitting drinking in an alehouse, '*a son of a whore*,' upon which the man took up a broomstaff, and at a distance threw it at her and killed her; and it was propounded to the judges whether this was murder or manslaughter. Two questions were made, 1. Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the fact into manslaughter. 2. Admitting that they would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword or shooting with a pistol; yet whether this striking, so improbable to cause death, would not alter the case. The judges were not unanimous upon this case; and a pardon was recommended (*a*).

A., passing by the shop of B., distorted his mouth, and smiled at him, and B. killed him: this was held murder; for it was no such provocation as would abate the presumption of malice in the party killing (*b*).

D. was sentenced for a gross libel to be flogged from Newgate to Tyburn, and as he was returning from Tyburn, F., a barrister, asked him, in a jeering way, whether he had run his heat that day; he replied in scurrilous words; whereon F. ran him into the eye with a small cane in his hand, and of this wound D. died, and F. was executed for his murder (*c*)

If, on a quarrel between husband and wife, the husband strikes his wife thereupon with a pestle, so that she dies presently, it is murder; and the wife's chiding will not be a provocation to extenuate it to manslaughter (*d*).

If A. is passing along the street, and B., meeting him (there being a convenient distance between A. and the wall), takes the wall of him, and thereupon A. kills B., this is a murder; but if B. had jostled A., his jostling would have been a provocation, reducing the offence to manslaughter (*e*).

If a party, being provoked by another making use of contemptuous or insulting actions or gestures, gives the other a box on the ear, or strikes him with a stick or other weapon not likely to kill, and kills him unluckily and against his intention, it will be only manslaughter (*f*).

It seems that if A. uses indecent language to B., and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and then B. kills A., the stroke by A. is a new provocation, and the conflict a sudden falling out; and on those grounds the killing is only manslaughter (*g*).

(*y*) Kel. (J) 55.

(*z*) 1 East, P. C. 233.

(*a*) 1 Hale, 456.

(*b*) Brain's case, 1 Hale, 455. Cro. Eliz. 778. Kel. (J) 131.

(*c*) R. *v.* Francis, 3 Mod. 68, in R. *v.* Dangerfield.

(*d*) Crompt. f. 120 (*a*). Kel. (J) 64. 1 Hale, 457. Because the pestle is an instrument likely to endanger life. 1 East, P. C. 235.

(*e*) 1 Hale, 455. This case supposes considerable violence and insult in the jostling.

(*f*) Fost. 291. 1 East, P. C. 233. 1 Hawk. c. 31, s. 33. 1 Hale, 456. R. *v.* Woodhead, 1 Lew. 163. These authorities also include words, but the *ratio decidendi* depends on the weapon used.

(*g*) 1 Hale, 456, where it is said, that this was held to be manslaughter, according to the proverb, 'the second blow makes the affray;' and Hale says that this was the opinion of himself and some others.

Provocation by Assault.—Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter (*h*), yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow (*i*). Violent acts of resentment, bearing no proportion to the provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often make malice (*j*).

Upon an indictment for murder it appeared that upon the evening before the death the prisoner and the deceased had been quarrelling, and that the deceased had used very aggravating language, as well as very indecent and insulting gestures to the prisoner. The deceased was found dead the next morning with a wound in the throat, which had caused her death, and had been inflicted by some sharp instrument, such as a razor. Within a short distance of the deceased there was lying a sweeping-brush in such a position that it might be supposed to have fallen from the hand of the deceased, supposing that a scuffle had taken place before the fatal wound had been inflicted. Pollock, C.B., in summing up, said, 'It is true that no provocation by words only (*k*) will reduce the crime of murder to that of manslaughter, but it is equally true that every provocation 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' (*l*).

There being an affray in the street, S., a soldier, ran hastily towards the combatants. A woman seeing him run in that manner, cried out, 'You will not murder the man, will you?' S. replied, 'What is that to do with you, you bitch?' The woman thereupon gave him a box on the ear, and S. struck her on the breast with the pommel of his sword. The woman then fled; and S., pursuing her, stabbed her in the back. Holt, C.J., thought that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner, after S. had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially. But it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, the killing was held to be no more than manslaughter (*m*), as the smart of the man's wound, and the

(*h*) Kel. (J.) 135. 4 Bl. Com. 191. 1 East, P. C. 233. Lanure's case, 1 Hale, 456.

(*i*) See R. *v.* Lynch, 5 C. & P. 324, per Lord Tenterden, C.J., *post*, p. 708.

(*j*) Per Lord Holt in Keate's case, Comb. 406.

(*k*) *Vide ante*, p. 693.

(*l*) R. *v.* Sherwood, 1 C. & K. 556. R. *v.* Smith, 4 F. & F. 1066.

(*m*) Stedman's case, Fost. 292. MS. Tracy and Denton, 57. 1 East, P. C. 234.

effusion of blood, might possibly have kept his indignation boiling to the moment of the fact (*n*).

Upon an indictment for murder by strangling, it appeared that the prisoner had said, 'We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down; he got up, and I knocked him down again, and kicked him, and then I put a rope round his neck, and dragged him into the ditch.' Patteson, J., said to the jury, 'If you even believe the prisoner's statement, that will not prevent the crime from being murder, and reduce it to manslaughter. If two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope round his neck, and strangles him, that is murder. The act is so wilful and deliberate that nothing can justify it' (*o*).

Where a sergeant in the army laid hold of a fifer, and insisted upon carrying him to prison: the fifer resisted, and whilst the sergeant had hold of him to force him, he drew the sergeant's sword, plunged it into his body, and killed him. The sergeant had no right to make the arrest, except under the articles of war; and the articles of war were not given in evidence. Buller, J., considered it in two lights: first, if the sergeant had authority; and, secondly, if he had not, on the account of the coolness, deliberation, and reflection with which the stab was given. The jury found the prisoner guilty (*p*).

A drummer and a private soldier were pressed by one M. to enlist him, and gave him a shilling for that purpose; but they had no authority to enlist anybody. M. wanted afterwards to go away; but they would not let him, and a crowd collected. The drummer drew his sword, stood in the doorway of the room where they were, and swore he would stab any one who offered to go away. The landlord, however, got by him; and the landlord's son seized his arm in which the sword was, and was wresting the sword from him, when the private, who had been struggling with M., came behind the son, and stabbed him in the back. He was indicted for stabbing with intent to murder, &c., and it was urged for the prisoner, that the soldiers had a right to enlist M., and to detain him; and that if death had ensued, the offence would not have been murder; but, upon the point being saved, the judges were all of a contrary opinion (*q*).

Two soldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refused. An hour and a half later, when the door was opened, one of them rushed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the same answer; and on his refusing to depart, and insisting on having beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door, where when the landlord came he received a violent blow

(*n*) Fost. 292. See R. *v.* Tranter, 16 St. Tr. 1; 1 Str. 499.

(*o*) R. *v.* Shaw, 6 C. & P. 372, Patteson, J.

(*p*) R. *v.* Withers [1784], MS. Bayley, J., and 1 East, P. C. 233. The judges, on being consulted, were unanimous that the articles of war should have been produced, and for want of proof of this, held the conviction wrong. See Holt's case, 2 Leach, 593. See Buckner's case, Sty. 467; 82 E. R. 867. The articles of war are now judicially noticed, 44 & 45 Vict. c. 58, ss. 69, 70.

(*q*) R. *v.* Longden, R. & R. 228, MS. Bayley, J.

on the head with some sharp instrument from the other soldier, who had remained without, which occasioned his death a few days afterwards. Buller, J., held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken; more especially as there was reasonable evidence of the prisoners having come the second time with a deliberate intention to use personal violence, in case their demand for beer was not complied with (*r*).

In cases of provocation, not amounting to assault, the material question is, whether malice must be inferred from the sort of punishment inflicted, from the nature of the instrument used, and from the manner of the chastisement (*s*); for if, on any sudden provocation of a slight nature, one person beats another in a cruel and unusual manner, so that he dies, it is murder by express malice; though the person so beating the other did not intend to kill him (*t*).

One F., a soldier, was in a public-house, and asked a girl to drink with him: upon which one A. S., with whom he had cohabited, seized his pot, abused him very much, and threw down his beer. F. then caught the pot from her, and struck her twice on the head with it: the blood gushed out, and she was taken to a hospital, where the wound was examined, and did not appear dangerous, being about a quarter of an inch deep: but it produced an erysipelas, which caused an inflammation of the brain, and the woman died. The witness, who saw the blows, did not think the prisoner intended to do the woman any grievous bodily harm. Gibbs, C.B., after telling the jury that if the disease which caused the death originated from the wound, it was the same as if the wound had caused the death; that the primary cause was to be considered (*tt*); went on to say that the aggravation, though not constituting a provocation which would extenuate the giving a deadly blow, would palliate the giving a moderate blow; and left it to the jury whether those blows were such as were likely to be followed by death, or by a disease likely to terminate in death. The jury thought that the blows were not of this kind, and the prisoner was found guilty of manslaughter only (*u*).

If, without adequate provocation, a person strikes another with a deadly weapon, likely to occasion death, although he had no previous malice against the party, yet he is to be presumed to have had such malice at the moment from the circumstances, and he is guilty of murder (*v*). Where, therefore, a boy, twelve years old, who had been in the habit of going to a cooper's shop and taking away chips, was told one morning by the cooper's apprentice not to come again; he however went again in the afternoon, and the apprentice spread his arms out to prevent his reaching the spot where he usually gathered the chips, on which the boy started off, and in passing a work bench, took up a whittle (a sharp-

(*r*) R. *v.* Willoughby [1791], MS. and 1 East, P. C. 288; and see R. *v.* Brennan, 4 Canada Cr. Cas. 41.

(*s*) 1 East, P. C. 235, 238, 239.

(*t*) 4 Bl. Com. 199. See the pestle case, *ante*, p. 694.

(*tt*) *Vide ante*, p. 691.

(*u*) R. *v.* Freeman, O. B. January, 1814, MSS. Bayley, J.

(*v*) R. *v.* Langstaffe, 1 Lew. 162, Hullock, B.

pointed steel knife with a long handle) and threw it at the apprentice, and the blade of the whittle entered his body, to the depth of four inches, and caused his death; the jury having found him guilty upon an indictment for manslaughter, Hullock, B., observed, that had he been indicted for murder, the evidence would have sustained the charge (*w*). So where on an indictment for wounding it appeared that W. and two women met the prisoner at midnight on the highway, and some words passed between them, when W. struck the prisoner, who then made a blow with a knife, it was held that unless the prisoner apprehended robbery or some similar offence, or danger to life or some serious bodily harm, not simply being knocked down, he would not be justified in using the knife in self-defence (*x*).

Nature of the Instrument used.—The nature of the *instrument used* was much considered in Rowley's case (*y*): The prisoner's son fought with another boy, and was beaten; he ran home to his father all bloody, who presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died (*z*). This was ruled manslaughter, because done in a sudden heat of passion; but upon this case Foster, J., makes the following remarks (*a*):—'Surely the provocation was not very grievous. The boy had fought with one who happened to be an over-match for him, and was worsted; a disaster slight enough, and very frequent among boys. If upon this provocation the father, after running three quarters of a mile, had set his strength against the child, had despatched him with a hedge stake, or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder; since any of these circumstances would have been a plain indication of malice; but with regard to these circumstances, with what weapon, or to what degree, the child was beaten, Coke is totally silent. But Croke (*b*) sets the case in a much clearer light, and at the same time leads his readers into the true grounds of the judgment. His words are, "Royley struck the child with *a little cudgel*, of which stroke he *afterwards* died." I think it may be fairly collected from *Croke's* manner of speaking and *Godbolt's* report (*c*), that the accident happened *by a single stroke with a cudgel not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. I observe that Lord Raymond lays great stress on this circumstance: *that the stroke was with a cudgel, not likely to kill*' (*d*).

And where the prisoner had struck a boy, his servant, with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the prisoner could not, from the instrument he had used, have had any intention to take the boy's life (*e*).

(*w*) R. *v.* Langstaffe, *supra*.

(*x*) R. *v.* Hewlett, 1 F. & F. 91, Crowder, J.

(*y*) 12 Co. Rep. 87; 77 E. R. 1364.

(*z*) In 1 Hale, 453, the words are, 'and strikes C. that he dies.' Foster, J., in citing the case, says, that the father, after running three-quarters of a mile, beats the other boy, 'who dieth of this beating.' Fost. 294.

(*a*) Fost. 294.

(*b*) Cro. Jac. 296; 79 E. R. 254.

(*c*) Godb. 182; It is there said to have been a 'rod,' meaning probably a small wand or switch.

(*d*) 2 Ld. Raym. 1498. *Ante*, p. 694, note (*f*). See R. *v.* Welsh, 11 Cox, 336, and R. *v.* Hazel, 1 Leach, 368; 1 East, P. C. 236, *post*, p. 700.

(*e*) R. *v.* Turner, cited in Comb. 407, 408, and 1 Ld. Raym. 143, 144. 2 Ld. Raym. 1498. The clog was small; and Holt,

On an indictment for wounding with a tin can, with which the prisoner had struck the prosecutor four times on the head, Alderson, B., directed the jury to consider, 'whether the instrument employed was, in its ordinary use, likely to cause death; or, though an instrument unlikely, under ordinary circumstances, to cause death; whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise? A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but if the prisoner struck the prosecutor repeated blows on the head with it, you will say, whether he did this merely to hurt the prosecutor, and give him pain, as by giving him a black eye or a bloody nose, or whether he did it to do him some substantial grievous bodily harm. When a deadly weapon, such as a knife, a sword, or gun, is used, the intent of the party is manifest; but where an instrument like the present is used, you must consider, whether the mode in which it was used satisfactorily shews that the prisoner intended to inflict some serious or grievous bodily harm with it' (*f*).

Upon an indictment for murder, it appeared that a body of persons were committing a riot, and the constables interfering for the purpose of dispersing the crowd, and apprehending the offenders, the mob offered resistance, and one of the constables was beaten severely. The prisoners all took part in the violence used; some by beating him with sticks, some by throwing stones, and others by striking him with their fists; of this aggregate violence, the constable afterwards died. Alderson, B., said, 'The principles on which this case will turn, are these:—If a person attacks another without justifiable cause, and from the violence used death ensues, the question which arises is, whether it be murder or manslaughter? If the weapon used were a deadly weapon, it is reasonable to infer that the party intended death; and if he intended death, and death was the consequence of his act, it is murder. If no weapon was used, then the question usually is, was there excessive violence? If the evidence as to this be such as that the jury think there was an intention to kill, it is murder; if not, manslaughter. Thus, if there were merely a blow with a fist, and death ensued, it would not be reasonable to infer that there was an intention to kill; in that case, therefore, it is manslaughter. But if a strong man attacks a weak one, though no weapon be used, or if, after such injury by beating, the violence is still continued, then the question is whether this excess does not shew a general brutality, and a purpose to kill, and if so, it is murder. Again, if the weapon used be not deadly, *e.g.* a stick, then the same question as above will arise as to the purpose to kill; and in any case if the nature of the violence, and the continuance of it be such, as that a rational man would conclude that death must follow from the acts done, then it is reasonable for a jury to infer that the party who did them intended to kill, and to find him guilty of murder. Again, it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The

C.J., said, that it was an unlikely thing to kill the boy. See R. *v.* Wiggs, 1 Leach, 378 (n), *post*, p. 768. If, however, the instrument used is so improper as manifestly to endanger life, it seems that the intention of the party to kill will be implied from that circumstance.

(*f*) R. *v.* Howlett, 7 C. & P. 274.

act, however, must be in pursuance of the common intent. Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done. Here, therefore, in considering this case, you must determine, whether all these prisoners had the common intent of attacking the constables; if so, each of them is responsible for all the acts of all the others done for that purpose; and if all the acts done by each, if done by one man, would together shew such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such purpose, you ought to find them guilty only of manslaughter' (*g*).

Slight Provocation.—In some instances slight provocations have been considered to extenuate the guilt of homicide, upon the ground that the conduct of the party killing upon such provocations may fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But it must appear that the punishment was not administered with brutal violence, nor greatly disproportionate to the offence; and that the instrument was not such as, from its nature, was likely to endanger life (*h*).

If it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill, or to do some great bodily harm, such homicide will be murder. Accordingly, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, and running away, the boy was dragged on the ground till his shoulder was broken, whereof he died; it was ruled murder: for it was not only an illegal, but a deliberate and dangerous act; the correction was excessive and savoured of cruelty (*i*).

Where a person whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, the offence was ruled to be only manslaughter (*j*).

Where A. finding a trespasser upon his land, in the first transport of his passion, beat him and unluckily killed him, and it was held to be manslaughter (*k*), it must be understood that he beat the trespasser, not with a mischievous intention, but merely to chastise him, and to deter him from repeating the 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 (*l*). M. having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot anyone who did so, and at length discharged a pistol at a trespasser, and wounded him in the thigh, which led to erysipelas, and the man died: M. was convicted of murder (*m*).

(*g*) R. *v.* Macklin, 2 Lew. 225.
(*h*) Fost. 291.
(*i*) Halloway's case, Cro. Car. 131. Palm. 545. 1 Hawk. c. 31, s. 42. W. Jones, 198. Kel. (J) 127. 1 East, P. C. 237. Fost. 292.
(*j*) R. *v.* Fray, Old Bailey, 1785. 1 Hawk. c. 31, s. 38. 1 East, P. C. 236.
(*k*) 1 Hale, 473. 1 East, P. C. 237.
(*l*) Fost. 291.
(*m*) R. *v.* Moir, Roscoe Cr. Ev. (13th ed.) 647, Tenterden, C. J. See this case as

As trespass against the property of another is not such provocation as will warrant the owner in making use of a deadly or dangerous weapon; more particularly if such violence is used after the trespass has ceased. But if the beating is with an instrument, or in a manner not likely to kill, it will only amount to manslaughter: and it is lawful to use against a trespasser, who comes without any colour, to take the *goods* of another, such force as is necessary to make him desist (*n*).

A man is not authorised to fire a pistol on every forcible and nocturnal intrusion or invasion of his dwelling-house. In R. *v.* Meade (*o*) M., who was indicted for murder, had made himself obnoxious to some boatmen, by giving information of smuggling transactions, in which some of them had been engaged; and they, in revenge, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police; the boatmen, however, as he was going away, called to him that they would come at night, and pull his house down. In the middle of the night a great number of persons came about his house, singing songs of menace, and using violent language, indicating that they had come with no friendly or peaceable intention. M., under apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Holroyd, J., said to the jury, 'A civil trespass will not excuse the firing a pistol at a trespasser, in sudden resentment or anger. If a person take forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters into the dwelling of another; but a man is not authorised to fire a pistol on every intrusion or invasion of his house: he ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity: but the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle: and, therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorise an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence: if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person, in the heat of blood, kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up, by way of making an attack, and, without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If you are of opinion that the prisoner was really attacked, and that the deceased and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he was, perhaps, justified in firing as he did' (*p*).

stated in R. *v.* Price, 7 C. & P. 178. Moir had gone home to fetch his pistols after he found the deceased trespassing, and the deceased persisted in trespassing, and some angry words passed before the pistol was discharged.

(*n*) 1 Hale, 474, 486. 1 East, P. C. 288.

(*o*) 1 Lew. 184.

(*p*) In R. *v.* Symondson, 60 J. P. 645, on an indictment for manslaughter, Kennedy, J., told the jury 'With reference to the defence that the prisoner was acting in

A person must only use so much force as is reasonably necessary in order to turn a mere trespasser out of his house. Upon an indictment for manslaughter, it appeared that the prisoner, upon returning home, found the deceased in his house, and desired him to withdraw, but he refused to go: upon this, words arose between them, and the prisoner, becoming excited, proceeded to use force, and, by a kick which he gave to the deceased, caused his death. Alderson, B., said: 'A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited, and gives another a kick, it is an unjustifiable act. If the deceased would not have died but for the injury he received, the prisoner, having unlawfully caused that injury, is guilty of manslaughter' (*q*).

Upon an indictment for manslaughter, it appeared that a man and his servant had insisted upon placing corn in the prisoner's barn, which she refused to allow; they exerted force: a scuffle took place, in which the prisoner received a blow on the breast, whereon she threw a stone at the deceased, the master, which killed him. Holroyd, J., said: 'The case fails, as it appears the deceased received the blow in an attempt to invade the prisoner's barn against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose; and she is not answerable for any unforeseen accident that may have happened in so doing' (*r*).

Where a man finds another in the act of adultery with his wife, and kills him or her (*s*) in the first transport of passion, he is only guilty of manslaughter (*t*), for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But, killing an adulterer deliberately, and upon revenge, would be murder (*u*). 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 be only manslaughter; but if he only hears of it from others, and goes in search of the person afterwards, and kills him, when there has been time for the blood to cool, it will be murder (*v*).

Upon an indictment for murder, Rolfe, B., in summing up, said, 'To take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder' (*w*).

Where a man was charged with the murder of his son-in-law, who had assaulted the prisoner's daughter in his presence in a violent manner, although not in a manner to endanger life, Cockburn, C.J., seemed to think that the offence might be reduced to manslaughter, and the prisoner was found guilty of that offence only (*x*).

defence of his property, in my judgment, the infliction of death must be to prevent no ordinary crime, it must be a crime of a serious and also felonious nature. You must not shoot a trespasser merely because he is a trespasser. If he shews an intention to accomplish a *felonious* purpose *by force*, extreme measures may be used.' See R. *v.* Dennis, 69 J. P. 256.

(*q*) R. *v.* Wild, 2 Lew. 214. R. *v.* Brennan, 4 Canada Cr. Cas. 41.

(*r*) R. *v.* Hinchcliffe, 1 Lew. 161.

(*s*) R. *v.* Pearson, 2 Lew. 216, Parke, B.

(*t*) Manning's case, T. Raym. 212. 1 Ventr. 158. The Court directed the burning in the hand to be inflicted gently, because there could not be a greater provocation.

(*u*) *Post*, p. 706.

(*v*) R. *v.* Fisher, 8 C. & P. 182, Park, J., Parke, B., and Law, Recorder.

(*w*) R. *v.* Kelly, 2 C. & K. 814.

(*x*) R. *v.* Harrington, 10 Cox, 370.

On the indictment of a husband for murdering his wife, it appeared that words had passed between them, and that the husband took a knife, and in a struggle stabbed the wife. For the defence, witnesses were called to shew that the wife had been in the habit of making violent attacks upon her husband, seizing him by the neckerchief and twisting it tight so as almost to strangle him, and cause the bystanders to interfere and also that the prisoner had abscesses on his neck, which would render him particularly sensitive to such assaults. Byles, J., after consulting Bramwell, B., admitted the evidence, but said it must be confined to explaining the nature of this particular attack (*y*).

Provocation no Defence where Express Malice.—The plea of provocation will not avail where *express malice* is proved (*z*).

The prisoner, with the deceased, who was his brother, and some neighbours, were drinking in a friendly manner at a public-house; till, growing warm in liquor, but not intoxicated, the prisoner and the deceased played at cudgels by agreement. The prisoner in the cudgel-play gave the deceased a smart blow on the temple. The deceased thereupon grew angry; and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good earnest: but the company interposing they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, he was heard to say, 'Damnation seize me if I do not fetch something, and stick him!' And being reproved for using such expressions, he answered, 'I 'll be damned to all eternity if I do not fetch something and run him through the body!' In about half an hour the prisoner returned. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right. The deceased invited him into the company; but the prisoner answered, 'I will not come in.' 'Why will you not?' said the deceased. The prisoner replied, 'Perhaps you will fall on me and beat me.' The deceased assured him he would not; and added, 'Besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me.' The prisoner answered, 'I am not afraid to do so, if you will keep off your fists.' Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, 'Damn you, stand off, or I 'll stab you;' and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward toward the deceased and stabbed him to the heart, and he instantly died. The judges unanimously agreed that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him?* Every circumstance

(*y*) R. *v.* Hopkins, 10 Cox, 229. *ante*, p. 656.
(*z*) See R. *v.* Sattler, D. & B., 539, and

in the case shewed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon: but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off: but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second: but he advanced as fast, and took the revenge he had vowed. The circumstance of the blows before the sword was produced, which probably occasioned the doubt, did not alter the case, nor did the precedent quarrel; because, all circumstances considered, he appeared to have returned with a deliberate resolution to take a deadly revenge for what had passed: and the blows were plainly a provocation sought of his part, that he might execute the wicked purpose of his heart with some colour of excuse (*a*).

It was considered that the blows with the cudgel were a provocation sought by the prisoner, to give occasion and pretence for the dreadful vengeance which he meditated: and where the provocation is sought by the party killing, and induced by his own act, in order to afford him a pretence for wreaking his malice, it will in no case extenuate the killing (*b*). Thus where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him; upon which B. did strike, and A. killed him, it was held to be murder (*c*). So where A. and B. were at some difference; A. bade B. take a pin out of his (A.'s) sleeve, intending to take the occasion to strike or wound B.; B. accordingly took out the pin, and A. struck him and killed him; and this was ruled murder: first, because it was no provocation when B. did it by the consent of A.; and, secondly, because it appeared to be a malicious and deliberate artifice, by which to take occasion to kill B. (*d*).

Where upon an indictment for maliciously wounding under 9 Geo. IV. c. 31 (rep.), it appeared that some words passed between the prisoner and a third person, after which he walked up and down the passage of the house with a sword-stick in his hand, with the blade open, and was heard to say, 'If any man strikes me I will make him repent it.' He was desired to put up the stick, which he refused to do; and shortly after the prosecutor, ignorant of what had occurred, but perceiving the prisoner was creating a disturbance, struck the prisoner twice with his fists, when the prisoner stabbed him. Parke, B., told the jury, 'If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation; for anger is a passion to which good and bad

(*a*) Mason's case, Fost. 132. 1 East, P. C. 239.
(*b*) 1 East, P. C. 239.
(*c*) 1 Hawk. c. 31, s. 24.
(*d*) 1 Hale, 457.

men are both subject. But the law requires two things: first that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation (*e*). There is no doubt here, but that a violent assault was committed; but the question is, whether the blow given by the prisoner was produced by the passion of anger excited by that assault? If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms "malice," in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder. And so, if you find that before the stroke is given, there is a determination to punish any man, who gives a blow, with such an instrument as the one which the prisoner used: because if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such wound to the passion of anger excited by that blow; for no man who was under proper feelings, none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument' (*f*).

On a trial for murder, where the deceased had died from a stab given by the prisoner, in a contest with the deceased, Bosanquet, J., told the jury, 'The question for you, on a careful consideration of the whole evidence, will be, whether the prisoner was guilty of either murder or manslaughter, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of murder or manslaughter, or whether his act was justifiable or excusable. Upon the question of whether it amounts to murder you have to consider this; did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? For if he did, it will amount to murder. But if he did not enter into the contest with an intention of using it, then the question will be, did he use it in the heat of passion in consequence of an attack made upon him? If he did, then it will be manslaughter. But there is another question, did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give 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 case, if he retreated as far as he could, he will be justified' (*g*).

This direction was followed in R. *v.* Symondson (*h*), an indictment for manslaughter, where one of the defences was that the prisoner was acting in defence of his own life.

(*e*) R. *v.* Kirkham, 8 C. & P. 115. Coleridge, J. Cf. R. *v.* Eagle, 2 F. & F. 827.

(*f*) R. *v.* Thomas, 7 C. & P. 817, Parke, B.

(*g*) R. *v.* Smith, 8 C. & P. 160, Bosanquet and Coltman, JJ., and Bolland, B.

(*h*) 60 J. P. 645, Kennedy, J.

On an indictment for murder it appeared that the prisoner and his wife, who had been to look for him, came home about midnight; he was not sober, and she upbraided him for staying out so late: he took some money out, and she said he could treat other persons and not her; he then took down a sword from a shelf, pulled it out of the sheath, and struck her on the back with the flat part of it; her daughter ran to the door; the mother attempted to follow her, and her daughter took hold of her hand to pull her through; the father, according to the daughter's first account, went to his wife at the door, and ran the sword into her left side; but it appeared that she could not see the actual thrust: a wound nine inches long was found in the left side which caused the death. She stated in her husband's presence that he had done it with a sword. The authorities cited *ante*, p. 656, having been referred to, Cresswell, J., after referring to them said: 'This is expressed more intelligibly by Littledale, J., who says that "malice, in its legal sense, denotes a wrongful act, done intentionally, without just cause or excuse" (*i*). Therefore, if you think the prisoner used the weapon wilfully, then that is such malice as the law requires. The great question for your consideration is whether the wound was given wilfully. If done by the accident of the woman rushing on the sword, the prisoner would not be responsible. If you can find any evidence that he used the sword carelessly, and that, without intending to inflict a wound, he caused it, then he is guilty of manslaughter; but if he used it intending to inflict a wound, then he is guilty of murder. When there is a contest the law makes great allowances for blows and a personal encounter, but not for words (*j*). If, therefore, in consequence of words, the prisoner was provoked, and intended to do the deceased a grievous injury, that is no justification or alleviation of the offence. There is no evidence of any conflict or of any provocation in law. If the prisoner used the sword intending to do a serious injury, that is such evidence of malice as the law holds to be murder. If the deceased rushed upon it, then it was an accident, and he is not guilty. If the wound was inflicted in a struggle without any intention on the part of the prisoner to use it, then there was such a careless use of it as to make him guilty of manslaughter' (*k*).

Provocation will not Avail if there is time for Cooling.—In every case of homicide upon provocation, how great the provocation may have been, if there has been sufficient time for passion to subside and reason to interpose, such homicide will be murder (*l*). Thus even where a man finds another in the act of adultery with his wife, though it would be only manslaughter if he should kill the adulterer in the first transport of passion, yet if he kills him deliberately, and upon revenge after the fact and sufficient cooling time, it would undoubtedly be murder (*m*). '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:

(*i*) See note (*k*), *ante*, p. 656.
(*j*) *Vide ante*, p. 693.
(*k*) R. *v.* Noon, 6 Cox, 137.
(*l*) Fost. 296.
(*m*) Fost. 296. 1 East, P. C. 234, 251. See *ante*, p. 49, and R. *v.* Fisher, note (*v*), p. 702.

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' (*n*). With respect to the interval of time to be allowed for passion to subside, it is much more easy to lay down rules for determining what cases are without the limits, than how far exactly those limits extend (*o*). The immediate question is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if from any circumstance whatever it appears that the party reflected, deliberated, or cooled at any time before the fatal stroke was given; or if in legal presumption there was time or opportunity for cooling; the killing is murder, as being attributable to malice and revenge, rather than to human frailty (*p*). It was at one time held that the question whether the blood has had time to cool or not was a question for the Court and not for the jury (*q*). But doubt is thrown on this view by the following cases:—

On an indictment for murder, it appeared that the prisoner and the deceased, who had been upon terms of intimacy for three or four years, had been drinking together at a public-house till about twelve o'clock at night; about one they were together in the street, and had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and on a policeman coming, went away; he, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen: the knife, a common bread-and-cheese knife, was one that the prisoner was in the habit of carrying about with him, and he was rather weak in his intellect, but not so much so as not to know right from wrong. Tenterden, C.J., said to the jury: 'It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter; but it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent; the witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain; the prisoner may have been absent less than five minutes; there is no evidence that he went anywhere for the knife. The father says it was a knife he carried about with him; it was a common knife, such as a man in the prisoner's situation in life might have; for aught that appears he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other; if there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they

(*n*) Fost. 296.
(*o*) 1 East, P. C. 251.
(*p*) R. *v.* Oneby, 2 Ld. Raym. 1485; 17 St. Tr. 29–48; 2 Str. 766.
(*q*) R. *v.* Fisher, 8 C. & P. 182, Park. J., Parke, B., and Law, Recorder.

had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious and diabolical mind (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder' (*r*).

The prisoner and the deceased, who were strangers, met at a public-house with others, and sat there drinking and wrangling until midnight, when they were all turned out. In consequence of some trivial quarrel about a game, the deceased struck the prisoner a blow on the face with his open hand, saying, 'that if he did not like it he might return it.' The prisoner said he was not in a fit state to fight, and the men stood wrangling some interval of time, which was described by some of the witnesses as 'about ten minutes.' Then the two men shook hands and parted, the prisoner going towards home. When he had gone about thirty yards he stopped, turned round, and cried out, 'Now I am on the highway; if anybody wants anything I am ready for him.' The deceased appeared to have taken this as a kind of challenge to himself, and at all events accepted it as such, and went after the prisoner, who had stood still. Almost immediately afterwards the deceased was heard to cry out, 'I am stabbed,' and was found lying on the ground, his jacket off, and in the hands of the prisoner who was standing by; and a mortal wound in his abdomen, which was no doubt inflicted by the prisoner, who said, 'I shouldn't have done it if he hadn't hit me on the face.' When the dying deposition of deceased was taken, he declared that on the second occasion he had not struck the prisoner; and when the prisoner said to him, 'Didn't you knock me down?' the dying man denied it. Hannen, J., in the course of his summing up to the jury, said: 'In the present instance the evidence as to the time which had elapsed is left in some uncertainty; but several witnesses say it was "about ten minutes." It is for you to form your own conclusion as to what took place in the interval, as to which you can only draw inferences from the circumstances; and though there is no express evidence of a renewal of the aggression on the part of the deceased (and the evidence is rather against the supposition, especially as the prisoner did not accuse him of it at the time), it is beyond a doubt that he followed the prisoner with the intention of renewing the attack, and his jacket was found off. It is for you to draw such inferences from this as you think warranted by the evidence. If you come to the conclusion that the prisoner, after the blow had been given, had time for his blood to cool, and that when he stopped on the road he had the intention in his mind to use the knife in the event of the deceased following him, and uttered the words he used with the object of inducing the deceased to follow him, there would be evidence of implied malice to sustain the charge of murder. But if you come to the conclusion that the prisoner had not such intention in his mind, and that he did not utter the words with such intention, that they were idle words of bravado,

(*r*) R. *v.* Lynch, 5 C. & P. 324.

not of challenge, and that he used the knife on some fresh and sudden provocation, ensuing from the deceased following him and renewing the assault upon him, then there is evidence to reduce the crime to manslaughter' (*s*).

The deceased was requested by his mother to turn the prisoner out of her house, which after a short struggle with the prisoner he effected, and in doing so he gave him one kick. The prisoner said he would make him remember it, and instantly went to his own lodgings, from two to three hundred yards distant, passed through his bedroom and a kitchen into a pantry, and returned thence hastily back again. Within five minutes after the prisoner had left the deceased, the latter followed him to give him back his hat, which had been left behind, and they met about ten yards from the prisoner's lodgings. They stopped for a short time, when they were heard talking together, but without any words of anger; after they had walked on together for about fifteen yards, the deceased gave the prisoner his hat, when the latter exclaimed with an oath, that he would have his rights, and instantly stabbed the deceased with a knife or some sharp instrument, in two places, giving him a mortal wound. As soon as he had stabbed him the second time, he said he had served him right, and instantly ran back to his lodgings, passed hastily through his bedroom and the kitchen to the pantry, and thence back to his bedroom, where he undressed himself and went to bed. Shortly afterwards he was apprehended, and no knife or other instrument found upon him. In the pantry the prisoner had four. The several knives were found the next morning in their usual places in the pantry. Tindal, C.J., told the jury that the question for them was, whether the wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding: or whether there had been time for the blood to cool, and for reason to resume its seat, before the wound was given. That in determining this question, the most favourable circumstance for the prisoner was the shortness of time between the original quarrel and the stabbing; but, on the other hand, the weapon was not at hand when the quarrrel took place, but was sought for from a distant place. It would be for them to say whether the prisoner had shewn thought, contrivance, and design in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion (*t*).

From the cases which have been stated in the former part of this section, it appears that malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature; for the law supposes that a party capable of acting in so outrageous a manner upon a slight provocation must have entertained a general, if not a particular malice, and have previously determined to inflict such vengeance upon any pretence that offered (*u*).

(*s*) R. *v.* Selten, 11 Cox, 674.
(*t*) R. *v.* Hayward, 6 C. & P. 157.
(*u*) 1 East. P. C. 252.

Sect. VII.—Mutual Combat (*v*).

Where words of reproach or other sudden provocations have led to blows and mutual combat, and death has ensued, the important question is, whether the occasion was altogether sudden, and not the result of preconceived anger or malice; for the killing, though in mutual combat, will not admit of alleviation, if the fighting were upon malice (*w*).

Thus a person who killed another in a deliberate duel is guilty of murder; for wherever two in cold blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder (*x*), and cannot extenuate the killing by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his intent only to vindicate his reputation (*y*); or that he meant not to kill, but only to disarm his adversary (*z*). He was deliberately engaged in an act, highly unlawful, in defiance of the law, and he must at his peril abide the consequences. Upon this principle, wherever two persons quarrel overnight and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder (*a*). And where, upon a quarrel happening at a tavern, M. objected to fighting at that time, on account of the disadvantage he should have by reason of the height of his shoes, and presently afterwards went into a field and fought, the circumstance was relied on as shewing that he did not fight in the first passion (*b*). So wherever there is an act of deliberation, and a meeting by compact, such mutual combat will not excuse the party killing from the guilt of murder; as where B. challenged A., and A. refused to meet him, but in order to evade the law, told B. that he should go the next day to a certain town about his business, and accordingly B. met him the next day in the road to the same town and assaulted him, whereupon they fought, and A. killed B., it is said that A. seems guilty of murder; but the same conclusion would not follow, if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting (*c*). Upon the same principle, if A. and B. meet deliberately to fight, and A. strikes B., and pursues B. so closely that B., in safeguard of his own life, kills A., this is murder in B.; because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done (*d*).

(*v*) Many of the earlier cases under this head were decided by reference to what was called chance medley or *chaude mêlée*. See 22 Hen. VIII. c. 14, s. 4, repealed in 1828 by 9 Geo. IV. c. 31. 1 Hawk. c. 30, s. 1. Fost. 275. 1 Hale, 453.

(*w*) 1 East, P. C. 241.

(*x*) R. *v.* Young, 8 C. & P. 644, Vaughan, J., and Alderson, B. R. *v.* Cuddy, 1 C. & K. 210. Barronet's case, 1 E. & B. 1.

(*y*) As where he had been threatened that he should be posted for a coward. 1 Hale, 452, and see R. *v.* Rice, 3 East, 581.

(*z*) 1 Hawk. c. 31, s. 21.

(*a*) 1 Hawk. c. 31, s. 22. 1 Hale, 453.

(*b*) Bromwich's case, 1 Lev. 180. 1 Sid. 277. 82 E. R. 1103. Bromwich was indicted for aiding and abetting Lord Morley in the murder of Hastings.

(*c*) 1 Hawk. c. 31, s. 25.

(*d*) 1 Hale, 452, 480, who says, 'Thus is Mr. Dalton, c. 93, p. 241 (new ed. c. 145, p. 471) to be understood.' But a *quære* is added in 1 Hale, 452, whether if B. had really and truly declined the fight, run away as far as he could, and offered to yield, and yet A., refusing to decline it, had attempted his death, and B. after this

Not only the principal in a duel in cold blood who actually kills the other, but also his second, and the second of the person killed are guilty of murder (*e*). On an indictment charging M. with the murder of F. and, the prisoner as present, aiding and assisting in the murder, the death was shewn to have occurred in a duel, in which M. was one of the principals and the prisoner was said to have acted as second to the deceased. The jury were directed that where two persons go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion, encouraging or promoting the death, will be guilty of abetting the principal offender, and that, without giving them any particular name, all persons who were present aiding, assisting, and abetting that deliberate duel were within the terms of the indictment (*f*).

Mere presence is not sufficient; but if those present sustain the principals by their advice or presence, or if they go for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present and assisting and encouraging at the moment when the pistol is fired, they are guilty of murder (*g*).

If, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into a field and fight, and one of them is killed, it will be but manslaughter, because it may be presumed that the blood never cooled (*h*). And it has been observed, with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard: therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence (*i*).

P. with one party, and W. with another party, dined at a tavern; and on coming out P. and W. quarrelled and drew their swords, and W. ran P. through the body, and he died. There was no evidence of any unfair advantage taken by W.; nor could the witnesses say more than that they heard them quarrelling, saw their swords drawn, and the sword through P.'s body; and it appeared that the parties did not know each other before. When P. fell, W. took him by the nape of the neck,

had killed A. in his own defence, it would excuse him from the guilt of murder; admitting clearly that if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it would be murder. This *quære* of Hale's is discussed in 1 East, P. C. 284, *et seq.*, and it is observed that Blackstone (4 Bl. Com. 185) expressly puts the same case of a duel as Hale, but without subjoining the same doubt; and that it was considered as settled law in Major Oneby's case. 2 Str. 766; 17 St. Tr. 29; 2 Ld. Raym. 1485, 1489. East, after reasoning in favour of the extenuation of the crime of the duellist so declining to fight, proceeds thus: 'Yet still it may be doubtful whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity in self-defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon, in defiance of the law.' 1 East, P. C. 285.

(*e*) 1 Hale, 442, 453. 1 Hawk. c. 31, s. 31. R. *v.* Young, 8 C. & P. 641, Vaughan J., and Alderson, B. Hale (1 P. C. 443, 453), referring to 22 Edw. III. Coron. 262, considered that the law was strained too far in the case of the second of the person killed.

(*f*) R. *v.* Cuddy, 1 C. & K. 210, Williams, J., and Rolfe, B.

(*g*) R. *v.* Young, *supra*. Cf. R. *v.* Coney, 8 Q.B.D. 534.

(*h*) 1 Hale, 453. 1 Hawk. c. 31, s. 29. 3 Co. Inst. 51.

(*i*) Fost. 138, 296.

dashed his head upon the ground, and said, 'Damn you, you are dead!' Jenner, B., told the jury that this was only manslaughter: the jury, however, were disposed to find it murder, because of the dashing the head against the ground, &c.: but Allibone, J., repeated to them that it was manslaughter only, and they found accordingly (*j*).

B. and C. differed at a club as to the best means of procuring game. C. said, 'If you have anything more to say, you will find me in Berkeley Row.' The conversation then dropped, and they stayed together at least half an hour; and B. during that time conversed with a gentleman who sat next him: C. settled the bill, but made a mistake which might arise from agitation. C. then went out, and D. followed him, of whom C. asked if he had been short with B. in what he said last to him; to which D. answered, 'No.' B. then came out and said to C., 'I want to speak to you'; upon which they both called the waiter, and were shewn into a small room, and the waiter left a candle in the room. B. asked C. if he meant the conversation upon game to Sir C. or to him; upon which C. said, 'If you have anything to say we had better shut the door, or we shall be heard,' and he shut the door. On turning from the door he saw B.'s sword half drawn, and B. said, 'Draw, draw!' C. drew, and thrust at B.; and after one or two thrusts, C. received a mortal wound, of which he died. An indictment was preferred for murder; but upon the trial the peers (123) were unanimous that it was manslaughter only (*k*).

The deceased, a French prisoner, had stolen a tobacco-box from one of a party of French prisoners who were gambling, and was chastised by some of the party for his conduct, and a clamour was raised against him. As he passed the prisoner, who was sitting at a table and much intoxicated, the prisoner got up, and with great force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his doubled fist in the face, and one blow in the eye; upon which the prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay on his back upon the ground, two or three stamps with great force with his right foot on the stomach and belly; and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick in the face; the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps upon the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by heat of blood: but on a case reserved the offence was held to be manslaughter only (*l*).

If A. uses provoking language or behaviour towards B., and B. strikes him, upon which a combat ensues, in which A is killed, this is manslaughter; for the affray was sudden and the fight upon equal terms; and in combats, upon sudden quarrels, it matters not who gave the first blow (*m*). But even in such cases malice may be inferred. Yet if the party killing began the attack with circumstances of undue advantage (*n*). The party assaulted must be put on an equal footing in point of

(*j*) R. *v.* Walters, 12 St. Tr. 113. Bayley, J.
(*k*) R. *v.* Lord Byron [1765], 19 St. Tr. 1177.
(*l*) R. *v.* Ayes, R. & R. 166, and MS.
(*m*) Fost. 295. 1 Hale, 456.
(*n*) Fost. 295.

defence; at least at the onset: and this more particularly where the attack is made with deadly or dangerous weapons (*o*). Thus if B. draw his sword and make a pass at A., the sword of A. being then undrawn, and thereupon A. draw his sword and a combat ensue, in which A. is killed, this will be murder; for B., by making the pass, while his adversary's sword was undrawn, shews that he sought his blood: and A.'s endeavour to defend himself, which he had a right to do, will not excuse B. (*p*); but if B. had forborne till his adversary had drawn too it had been no more than manslaughter (*q*).

In Mawgridge's case (*r*), words of anger happening, M. threw a bottle with great force at the head of C., and immediately drew his sword. C. returned a bottle at the head of M., and wounded him; whereupon M. stabbed C. This was ruled to be murder; for M., in throwing the bottle, shewed an intention to do some great mischief; and his drawing immediately shewed that he intended to follow his blow; and it was lawful for C., being so assaulted, to return the bottle.

Even if the parties are upon an equal footing when the combat begins, malice may be implied from the violent conduct which the party killing pursued in the first instance; more especially where there is time for cooling, and such expressions are used as manifest deliberation; as in the case of Major Oneby (*s*).

He was indicted for the murder of G.; and a special verdict was found, containing the following statement. The prisoner being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time, began playing at hazard; when R., one of the company, asked if one would set him three half-crowns; whereupon the deceased, in a jocular manner, laid down three half-pence, telling R. he had set him three pieces; and the prisoner at the same time set R. three half-crowns, and lost them to him. Immediately after which, in an angry manner, he turned about to the deceased, and said, it was an impertinent thing to set half-pence, and that he was an impertinent puppy for so doing, to which the deceased answered, whoever called him so was a rascal. Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head; but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased in return immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword; but the prisoner was prevented from drawing his by the company. The deceased thereupon threw away his sword; and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner: 'We have had hot words, but you were the aggressor; but I think we may pass it over'; and at the same time offered his hand to the prisoner, who made

(*o*) 1 East. P. C. 242.
(*p*) Fost. 295. 1 Hawk. c. 31, s. 27.
(*q*) 1 Hawk. c. 31, s. 28. Fost. 295.
(*r*) R. *v.* Mawgridge, Kel. (J) 119, 128, 129. 1 East, P. C. 276; cited in Fost. 295, 296, where it is said that the judgment in this case was holden to be good law by all the judges of England, at a conference in the case of Major Oneby, *infra*.
(*s*) 2 Str. 766; 2 Ld. Raym. 1485; 17 St. Tr. 29.

answer, 'No, damn you; I will have your blood.' After which, the reckoning being paid, all the company, except the prisoner, went out of the room to go home; and he called to the deceased, saying, 'Young man! come back; I have something to say to you'; whereupon the deceased returned into the room, and the door was closed, and the rest of the company excluded; but they heard a clashing of swords, and the prisoner gave the deceased the mortal wound. It was also found, that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight; and that the deceased, being asked upon his death-bed, whether he received his wound in a manner among sword-men called fair, answered, 'I think I did.' It was further found that, from the throwing of the bottle, there was no reconciliation between the prisoner and the deceased. Upon these facts all the judges were of opinion that the prisoner was guilty of murder; he having acted upon malice and deliberation, and not from sudden passion. It should probably be taken, upon the facts found in the verdict and the opinion of the Chief Justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, was the evidence of *express malice*, after the interposition of the company, and that the parties had all sat down again for an hour. Under those circumstances the Court were of opinion that the prisoner had had reasonable time for cooling; after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. And again, the prisoner remained in the room after the rest of the company retired, and calling back the deceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether shewed such strong proof of deliberation and coolness as precluded the presumption of passion having continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances; for it must have been implied, according to Mawgridge's case, that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of G., made a deadly assault upon him.

If, after an interchange of blows on equal terms, one of the parties, suddenly, 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 be only manslaughter. But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, and kills the other party with such weapon; or if, at the beginning of the contest he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon; the killing in both these cases will be murder. The prisoner and L. quarrelled and went out to fight. After two rounds, which occupied little more than two minutes, L. was found to be stabbed in a great many places; and of one of those stabs he almost instantly died. It appeared that nobody

could have stabbed him but the prisoner, who had a clasped knife before the affray. Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning; or if before they began to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder (*t*).

Upon an indictment for maliciously cutting, it appeared that the prisoner had cut the prosecutor in a fight that took place between them, but no instrument was seen either before or at the time in the prisoner's hands; Bayley, J., said: 'When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. If you are of opinion that the prisoner entered into the contest, being unduly armed with an instrument calculated to produce the effects charged in the indictment, and with the instrument ready in this hand, in order that he might resort to it with any of the alleged intents, then he is guilty. For if death had ensued it would have been murder' (*u*).

J. T., a Scotch soldier, and two other Scotchmen, were drinking together in an alehouse, when some servants to the owner of the house, who were also drinking in another box, abused the Scotch nation, and used several provoking expressions towards T. and his company, on which T. struck one of the servants with a small rattan cane, not bigger than a man's little finger, and another of the Scotchmen struck the same servant with his fist; the servant who was struck went out of the room into the yard, to fetch his fellow-servants to turn T. and his company out of the room; and, in the meantime, an altercation ensued between T. and the deceased, who was the owner of the house, but not the occupier, and who had come into the room after the servant went into the yard. He insisted that T. should pay for his liquor and go out of the house; and T., after some further altercation, was going away, when the deceased laid hold of him by the collar, and said he should not go away till he had paid for the liquor; and then threw him down against a settle. T. then paid for the liquor; whereupon the deceased laid hold of him again by the collar, and shoved him out of the room into the passage; and T. then said that he did not mind killing an Englishman more than eating a mess of crowdy. The servant, who had been originally struck with the cane, then came and assisted the deceased, who had hold of T.'s collar; and together they violently pushed him out of the door of the alehouse; whereupon T. instantly turned round, drew his sword, and gave the deceased the mortal wound. This was adjudged manslaughter (*v*).

(*t*) R. *v.* Anderson, O. B. December, 1816. Richards, B., and the Recorder, thought the direction right. MS. Bayley, J. See R. *v.* Kessal, 1 C. & P. 437, 1 East, P. C. 243.

(*u*) R. *v.* Whiteley, 1 Lew. 173, Bayley, J.

(*v*) R. *v.* Taylor, 5 Burr. 2793, an appeal of murder. 1 Hawk. c. 31, s. 39.

The prisoner, a shoemaker, lived near the deceased. One afternoon the prisoner, very drunk, passed accidentally by the house of the deceased's mother, while the deceased was thatching an adjacent barn. They entered into conversation; but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house; and in a few minutes came out again, and sat himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a shoe. The deceased, having finished his thatching, was returning, in his way home, by the prisoner's house; and on passing the prisoner, as he sat on the bench, the deceased called out to him, 'Are not you an aggravating rascal?' The prisoner replied, 'What will you be, when you are got from your master's feet?' On which the deceased seized the prisoner by the collar, and dragging him off the bench, they both rolled down into the cartway. While they were struggling and fighting, the prisoner underneath, and the deceased upon him, the deceased cried out, 'You rogue, what do you do with that knife in your hand?' and made an attempt to secure it; but the prisoner kept striking about with one hand, and held the deceased so hard with the other hand, that the deceased could not disengage himself. He made, however, a vigorous effort, and by that means drew the prisoner from the ground; and during this struggle the prisoner gave a blow, on which the deceased immediately exclaimed, 'The rogue has stabbed me to the heart; I am a dead man'; and expired. Upon inspection, it appeared that he had received three wounds, one very small on the right breast; another on the left thigh, two inches deep, and half an inch wide; and the mortal wound on the left breast. The jury found implied malice, and convicted of murder. But on a case reserved the judges seem to have thought that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that colour, to revenge his former quarrel, by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by, neither provoked him by word nor gesture. The deceased began first by ill language, and afterwards by collaring and dragging him from his seat, and rolling him in the road. The knife was used openly before the deceased came by, and not concealed from the bystanders; though the deceased in his passion did not perceive it till they were both down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, the judges thought that the offence only amounted to manslaughter (*w*).

Upon an indictment for maliciously cutting, it appeared that a quarrel arose between the prisoner and the prosecutor, both being intoxicated; the prosecutor struck the first blow, and they fought for a few minutes,

(*w*) R. *v.* Snow, 1 Leach, 151; 1 East, P. C. 245, citing Serjeant Foster's MS.

when the prisoner ran back a short distance, and the prosecutor pursued, and overtook him, on which the prisoner, who had taken out his knife in his retreat, gave the prosecutor a cut across the abdomen. J. A. Park, J., said: 'The question I shall leave to the jury is this, whether the prisoner ran back with a malicious intention of getting out his knife to inflict an injury on the prosecutor, and so to gain an advantage in the conflict? For if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, I am of opinion that if death had ensued, the crime would have been murder; or whether the prisoner, *bona fide*, ran away from the prosecutor with intention to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself? As in this latter case, if the prosecutor had been killed, the crime would have been manslaughter only' (*x*).

Upon an indictment for manslaughter the evidence was that the prisoner and deceased were 'fighting up and down,' and that the deceased died of the injury he sustained in the fight. Bayley, J., to the jury, 'Fighting up and down is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of that description it is murder, and not manslaughter.' The prisoner having been convicted, Bayley, J., told him that if he had been charged with murder, the evidence adduced would have sustained the indictment (*y*).

Though, where there has been an *old* quarrel between A. and B., and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kills B., this is not murder; yet if upon the circumstances it appears that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, it is murder (*z*).

On an indictment for manslaughter it appeared that the prisoner, a blind man, and the deceased were at a public-house, and a dispute arose between them. The prisoner went to lay hold of the deceased, who pushed him away; they then got hold of each other and there was a struggle, and they pushed about from one side to another; no blows were struck, but there were three falls, and the deceased fell undermost each time, and the third time the prisoner's knees came upon the lower part of the stomach of the deceased, and ruptured the intestines, which rupture caused the death. Patteson, J., told the jury that 'All struggles in anger, whether by fighting, or wrestling, or any other mode—all kinds of contests in anger, are unlawful. And if you think the deceased's death was occasioned by an act of the prisoner in the struggle of that kind, I cannot tell you that it does not amount to manslaughter. If the prisoner was struggling, but did not attempt to throw him, I should tell you it is not a case of manslaughter; but it is for you to say whether that is the fact or not. If the prisoner laid hold of the deceased in anger,

(*x*) R. *v.* Kessal, 1 C. & P. 437. R. *v.* Taylor and R. *v.* Snow, *supra*, had been cited for the prisoner.

(*y*) R. *v.* Thorpe, 1 Lew. 171. 'Fighting up and down' is described in Roscoe Cr. Ev. (13th ed.) 634, as 'a brutal and savage practice in the north of England, as late as 1835.'

(*z*) 1 Hale, 452. 1 Hawk. c. 31, s. 30.

and struggled with him and threw him, then it is a case of manslaughter. If you can collect from the circumstances that the prisoner was pulled down against his will, and, in consequence, fell upon the deceased, then he will not be guilty. But there does not seem anything in the evidence to shew that the prisoner evinced any disposition to give up the contest; on the contrary, it appears that the contest was continued till the fall, which occasioned the death. You have been told by the counsel for the prisoner that you must be satisfied that the death was occasioned by the wilful act of the prisoner. In one sense of the word "wilful" I agree with him. I take it for granted he does not mean by it malicious or intending to do injury, but that it must be an act of the will, and that it must be shewn that the prisoner attempted to throw the deceased. They had no right to struggle in this way; if it had been an amicable contest in wrestling, to see who was the best man, that would be quite a different matter' (*a*).

A man seems to be guilty of manslaughter, who, seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other (*b*). If a master, maliciously intending to kill another, takes his servants with him without acquainting them with his purpose, and meets his adversary, and fights with him, and the servants, seeing their master engaged, take part with him, and kill the other, they would be guilty of manslaughter only, though the master would be (it seems) guilty of murder (*c*). From this it follows, *a fortiori*, that if a servant or friend, or even a stranger, coming suddenly, and seeing A. fighting with another man, sides with A., and kills the other man, or seeing A.'s sword broken sends him another, wherewith he kills the other man, such servant, friend, or stranger will be only guilty of manslaughter (*d*). But this supposes that the person interfering does not know that the fighting is upon malice; for though if A. and B. fight upon malice, and C., the friend or servant of A., not being acquainted therewith, comes in and takes part against B., and kills him, this (though murder in A.) is only manslaughter in C.; yet it would be otherwise, if C. had known that the fighting was upon malice, for then it would be murder in both. If A., having been assaulted, retreats as far as he can, and then his servant kills the assailant, it will be only homicide *se defendendo*; but if the servant had killed him before the master had retreated as far as he could, it would have been manslaughter in the servant. The law is the same in the case of the master killing a man in defence of the servant (*e*).

Where F. C. and O. were in a field fighting upon a quarrel, and M. C. casually riding by, and seeing them in fight, and his kinsmen one of them, rode in, drew his sword, thrust O. through and killed him; Coke, C.J., and the rest of the Court agreed that this was clearly but manslaughter in

(*a*) R. *v.* Canniff, 9 C. & P. 359.
(*b*) 1 Hawk. c. 31, s. 35.
(*c*) 1 Hawk. c. 31, s. 55. 1 Hale, 438. R. *v.* Salisbury, Plowd. 100 *a*. 75 E. R. 158.
(*d*) Hawk c. 31, s. 56 .1 East, P. C. 290.
(*e*) 1 East, P. C. 292, and the authorities there cited. 1 Hale, 484. Plowd. 100 *a*. 75 E. R. 158. So Tremin says that a servant may kill a man to save the life of his master, if he cannot otherwise escape. Y. B. 21 H. vii. c. 39. Plowd. 100. 1 MS. Sum.

him, and murder in the other; for the one may have malice and the other not; he may come in by chance, and so kill the other (*f*).

If two persons are fighting, and another interferes with intent to part them, but does not signify such intent, and is killed by one of the combatants, this is but manslaughter (*g*). And if a third person takes up the cause of one who has been worsted in mutual combat, and attacks the conqueror, and is killed by him, the killing would, it seems, be manslaughter. A. and B. were walking together in Fleet-street, and B. gave some provoking language to A., who, thereupon, gave B. a box on the ear, upon which they closed, and B. was thrown down, and his arm broken. Presently B. ran to his brother's house, which was hard by; and C., his brother, taking the alarm, came out with his sword drawn, and made towards A., who retreated ten or twelve yards; and C. pursuing him, A. drew his sword, made a pass at C., and killed him. On an indictment of A. for murder the jury were directed to find it manslaughter, because it was upon a sudden falling out, not *se defendendo*, partly because A. made the first breach of the peace by striking B.; and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C., than to avoid him; and accordingly, at last, it was found manslaughter (*h*).

Upon an indictment for wounding (under 9 Geo. IV. c. 31) (rep.), it appeared that the prisoner and the prosecutor's brother were fighting, and the prosecutor laid hold of the prisoner in order to prevent him from beating his brother, and held him down on a locker, but did not strike him, and the prisoner then stabbed him. Park, J., directed the jury, that if they were of opinion that the prosecutor did nothing more than was necessary to prevent the prisoner from beating his brother, the crime, if death had ensued, would have been murder; but if they thought that the prosecutor did more than was necessary to prevent the prisoner from beating the brother, or that he struck any blows, then it would have been manslaughter (*i*).

A party of men were playing at bowls, when two of them fell out and quarrelled; and a third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died. This was held manslaughter, because it happened upon a sudden motion in revenge of his friend (*j*). The two men who fell out were actually fighting together at the time; for if words only had passed between them, it would have been murder; nothing but an open affray of striving being such a provocation to one person to meddle with an injury done to another as will lessen the offence to manslaughter, if a man is killed by the person so meddling (*k*).

Though Hale and others appear sometimes to draw a distinction

(*f*) R. *v.* Cary, 3 Bulst. 206: S. C. 1 Rolle, R. 407, as R. *v.* Carew.
(*g*) 1 East, P. C. 292. Kel. (J.) 66.
(*h*) 1 Hale, 483. A case at Newgate, 1671.
(*i*) R. *v.* Bourne, 5 C. & P. 120.
(*j*) 12 Co. Rep. 87.
(*k*) See the opinion of the judges in R. *v.* Huggett, Kel. (J.) 59, and 1 East, P. C. 328, 329.

between the interference of servants and friends, and that of a mere stranger, yet the limits of such distinction do not appear to be anywhere actually defined. And the nearer or more remote connection of the parties with each other seems to be more a matter of observation to the jury as to the probable force of the provocation, and the motive which induced the interference, than as furnishing any precise rule of law (*l*).

As a blow aimed with malice at A., and by mistake or accident falling upon B. and killing him, is murder (*m*); so if a blow aimed at A. and lighting on B. was given in such a transport of sudden passion as, in case A. had died by it, would have reduced the offence to manslaughter, this extenuation applies equally if the blow should happen to kill B. (*n*).

A widow finding that one of her sons had not prepared her dinner as she had directed him to do, began to scold him, upon which he made her some very impertinent answers, which put her in a passion, and she took up a small piece of iron used as a poker, intending to frighten him, and seeing she was very angry he ran towards the door of the room, when she threw the poker at him, and it happened that the deceased was just coming in at the moment, and the iron struck him on the head, and caused his death. Park, J., told the jury, 'No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a blow is aimed at an individual unlawfully —and this was undoubtedly unlawful, as an improper mode of correction —and strikes another and kills him, it is manslaughter, and there is no doubt, if the child at whom the blow was aimed had been struck, and died, it would have been manslaughter, and so it is under the present circumstances' (*o*).

A quarrel arose between some soldiers and a number of keelmen; and a violent affray ensuing, one of the soldiers was stripped, and cruelly beaten. The prisoner, who was a soldier, had before driven part of the mob down the street with his sword in the scabbard; and on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying, he would sweep the street; and, on their pressing on him, he struck at them with the flat side of the sword several times; upon which they fled, and he pursued them. The soldier who was stripped got up, and ran into a passage to save himself. The prisoner returned, and asked if they had murdered his comrade; and the people came back, and assaulted him several times, and then ran from him. He sometimes brandished his sword; and then struck fire with the blade of it upon the stones of the street, calling out to the people to keep off. At this time the deceased, who had a blue jacket on, and might be mistaken for a keelman, was going along about five yards from the soldier; but, before he passed, the soldier went to him and struck him on the head with his sword, of which blow he almost immediately expired. It was the opinion of two witnesses that, if the soldier had not drawn his sword, they would both of them have been murdered. The offence was ruled to be manslaughter (*p*).

(*l*) 1 East, P. C. 292.
(*m*) *Post*, p. 755.
(*n*) Fost. 262.
(*o*) R. *v.* Conner, 7 C. & P. 438, Park and Gaselee, JJ.
(*p*) R. *v.* Brown, 1 Leach, 148. 1 East, P. C. 245, 246.

SECT. VIII.—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.

'When a constable, or other person properly authorised, acts in the execution of his duty (*q*), the law casts a peculiar protection round him, and consequently, if he is killed in the execution of his duty, it is in general murder, even though there be circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter' (*r*). In the earlier authorities such killing is described as of malice aforethought, as being an outrage wilfully committed in defiance of the justice of the kingdom (*s*).

The protection extends to justices when acting as conservators of the peace, to sheriffs and their bailiffs, and to constables and other peace officers (*t*), and prison officers (*u*), whether they are acting under the authority of the common law or of a statute. The officer is under this protection not only at the scene of action but *eundo, morando, et redeundo;* and if he comes to do his office, and meeting with great opposition, retires and is killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. Upon the same principle, if he meets with opposition by the way, and is killed before he comes to the place, such killing is murder (*s*).

The most important of the earlier cases on the subject is the Sissinghurst House case (*v*). A great number of persons assembled in a house called *Sissinghurst*, in Kent, issued out and committed a great riot and battery upon the possessors of a wood adjacent. The name of one, A., was known, the rest were not known; and a warrant was obtained from a justice of peace to apprehend A., and divers others persons unknown, who were all together in Sissinghurst House. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and told some of the persons within that he was the constable, and came with the justice's warrant, and demanded A. with the rest of the offenders that were then in the house. One of the persons within came, and read the warrant, but refused admission to the constable, or to deliver A. or any of the malefactors; but, going in,

(*q*) On indictments for assaulting or killing them, proof that they were so acting is enough without producing their appointment. Butler *v.* Ford, 1 Cr. & M. 622, 662. M'Gahey *v.* Alston, 2 M. & W. 206.

(*r*) R. *v.* Allen, per Blackburn, and Mellor, JJ. 17 L. T. (N. S.) 222: Stephen Dig. Cr. Law (6th ed.) 421. The rule is thus stated in a recent Canadian case, in which a constable had been killed in an attempt by prisoners under trial for felony to escape while being conveyed back to prison. 'Homicide is murder whether the offender means or does not mean that death should ensue, or knew or did not know that it was likely to ensue, if the slayer meant to inflict grievous bodily injury for the purpose of facilitating escape or rescue from prison or lawful custody or lawful arrest.' R. *v.* Rice, 4 Ontario L. R. 233.

(*s*) 4 Co. Rep. 40. 3 Co. Inst. 56. Fost. 318. 1 Hale, 457, 460, 494. 2 Hale, 117, 118.

(*t*) Including special constables, until their services are determined or suspended. R. *v.* Porter, 9 C. & P. 778, Coleridge, J. 1 & 2 Will. IV. c. 31, s. 7.

(*u*) 61 & 62 Vict. c. 41, s. 10. The protection applies to them while acting as prison officers.

(*v*) 1 Hale, 461.

commanded the rest of the company to stand to their staves. The constable and his assistants, fearing mischief, went away; and being about five rods from the door, B., C., D., E., F., &c., about fourteen in number, issued out and pursued the constable and his assistants. The constable commanded the peace, yet they fell on, and killed one of the assistants of the constable, and wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said A. and one G., that read the warrant, were two. For this A., B., C., D., E., F., G., and others, were indicted of murder, and tried at the King's Bench bar, when these points were unanimously determined:—

1. That although the indictment were, that B. gave the stroke, and the rest were present aiding and assisting, though in truth C. gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment; for in law it was the stroke of all that party, according to the resolution in Mackalley's case (*w*).

2. That in this case all who were present and assisting to the rioters were guilty of the death of the party slain, though they did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled the riot, were in law present aiding and assisting, and were principals as well as those who issued out and actually committed the assault; for it was but within five rods of the house, and in view thereof, and all done as it were in the same instant (*x*).

4. That there was sufficient notice that it was the constable, before the man was killed. (1) Because he was the constable of the same vill. (2) Because he notified his business at the door before the assault, viz., that he came with the justice's warrant. (3) Because, after his retreat, and before the man was slain, the constable commanded the peace; and, nevertheless, the rioters fell on and killed the man.

5. That the killing of the assistant of the constable was as much murder as would have been killing the constable himself.

6. That those who come in to the assistance of the constable, though not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That although the constable retired with his company upon the not delivering up of A., yet the killing of the assistant of the constable in that retreat was murder. (1) Because the retreat was one continued act in pursuance of his office; being necessary, when he could not attain the object of his warrant, and being in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. (2) Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace.

It seems that even if the constable had not commanded the peace, yet as he and his company came about what the law allowed them, and, when they could not effect it fairly, were going their way, the rioters

(*w*) 9 Co. Rep. 65, an indictment for killing a serjeant at mace of the City of London, when attempting to make an arrest by night on civil process.

(*x*) See Lord Dacre's case, 1 Hale, 439. Crompt. 25 *a*. Dalt. c. 145, p. 472. Y.B. 34 Hen. VIII. B. Coron. 172. See also Moore (K.B.) 86; 72 E. R. 458; Kel. (J.) 56.

pursuing them and killing one made the offence murder in them all; for the act was done without provocation, and the constable and his company were peaceably retiring; but this point was not relied upon, because there was enough upon the former points to convict the offenders.

In the conclusion, the jury found nine guilty, and acquitted those within, not because they were absent, but because there was no clear evidence that they consented to the assault as the jury thought; and therefore judgment of death was given against the nine.

In time past peace officers have occasionally taken opposite sides in an affray and the death of one has ensued. Where the officers act as partisans they lose their protection as officers (*y*), and where constables interfere with the sheriff or his officers in the execution of writs and slay a sheriff's officer the killing would be murder, as they are not entitled to obstruct the sheriff in the execution of the King's writ (*z*).

Authority of the Officers.

Justices of the Peace.—The powers and duties of justices of the peace as conservators of the peace are not now exercised by personal interposition or making arrests in dealing with breaches of the peace, except in the case of riot, as to which *vide ante*, Book VI. Chapter I. p. 431, but by the judicial act of issuing warrants or other process for the arrest of offenders.

Sheriffs and Bailiffs.—The sheriff has powers and duties as to pursuit and arrest of felons (*a*), and as to suppression of riots (*b*). But in modern practice the functions of the sheriff and his bailiffs are restricted to the execution of writs, &c., issued by the High Court of Justice (*c*). If he is resisted in the execution of a writ he is to take with him the *posse comitatus* and go himself to do execution, and may arrest the resisters, whose resistance is a misdemeanor (*d*). The powers and duties of bailiffs and officers of County Courts (*e*), and other inferior civil Courts of Record are analogous to those of the sheriff and his officers. And all are within the same special protection as constables.

In civil cases the authority of the sheriff, and his bailiffs, &c., to arrest or imprison is regulated and limited by the writ or process which he is empowered to execute and the extent of the district in which he is privileged to act (*e*). He is protected if the process, though erroneous, is not void (*f*), but not if it is void on the face of it.

Constables and Police Officers.—The common-law constables, headboroughs and bors-holders are now rarely, if ever, appointed, but the following statutory peace officers are by the statutes under which they are appointed given the powers, privileges, and immunities, and made liable for the duties of a constable within his constablewick.

1. A special constable duly appointed by justices within the area for

(*y*) 1 Hale, 460. 2 East, P. C. 304.
(*z*) 1 Hale, 460. 2 East, 305.
(*a*) 50 & 51 Vict. c. 55, ss. 8, 29.
(*b*) *Ante*, Bk. vi. c. i. p. 431.
(*c*) Mather, Sheriff Law. No private person can lawfully arrest in a civil suit without authority of a writ or process of a competent Court. 1 Hawk. c. 28, s. 19.
(*d*) 50 & 51 Vict. c. 55, s. 8 (2). *Ante*, p. 550.
(*e*) 51 & 52 Vict. c. 43, ss. 35, 48, 49, 50, 52.
(*f*) 1 Hawk. c. 32, ss. 61–62. Cf. 51 & 52 Vict. c. 43, s. 52, as to county court process.

which those justices have jurisdiction until his services are suspended or determined (*g*).

2. Local constables appointed for parishes within the county for which they are appointed and the adjoining county (*h*).

3. Officers of the statutory county police, throughout the county (*i*), and in every borough situate wholly or in part within the county (*j*).

4. Officers of the statutory police of a municipal borough (which has a separate police force) within the borough or within seven miles of it (*k*).

5. Constables appointed under the Town Police Clauses Act, 1847, within the limits of the special Act relating to the town and in any place not more than five miles beyond such limits (*l*).

6. Officers of the Metropolitan Police Force (*m*), and the City of London Police Force (*n*).

7. Prison officers in convict or local prisons (*o*).

8. Constables appointed for canals (*p*).

Constables, and other peace officers, are invested with large powers and duties at common law, for the purpose of preserving the peace, preventing the commission of criminal offences, apprehending offenders, and executing the warrants of justices of the peace. Every constable, within the limits of his district, is a conservator of the peace at common law (*pp*). It is his duty, therefore, to do all that he can to preserve the peace within his constablewick (*q*). And in order the better to enable peace officers to preserve the peace, they have authority to command all other persons to assist them, in endeavouring to appease such disturbances as take place in their presence (*r*).

Arrest without Warrant.—The powers of a constable or like peace officer to make arrests without warrant depend (1) on the common law, (2) on numerous statutes.

(1) COMMON LAW.—At common law a constable may arrest a person whom he finds committing a *felony*, or may arrest upon reasonable suspicion that a felony has been committed by the person arrested, although no felony has, in fact, been committed (*s*), and whether the

(*g*) 1 & 2 Will. IV. c. 41, ss. 1, 5, 9, 11; 5 & 6 Will. IV. c. 43, s. 1. They are only appointed on emergency. See R. *v.* Porter, 9 C. & P. 778.

(*h*) 3 & 4 Vict. c. 88, s. 16; 5 & 6 Vict. c. 109, s. 15. They are now appointed only when quarter sessions deems it necessary. 35 & 36 Vict. c. 92. Archbold, Quarter Sessions (6th ed.), 145.

(*i*) 2 & 3 Vict. c. 93, s. 8; 3 & 4 Vict. c. 88.

(*j*) 19 & 20 Vict. c. 69. They are not to be *required* to act within a municipal borough, which has a separate police force, except in executing warrants of the county justices. 22 & 23 Vict. c. 32, s. 2.

(*k*) 45 & 46 Vict. c. 50, ss. 191, 193, 195; 46 & 47 Vict. c. 44, s. 2. And see R. *v.* Borton, 12 A. & E. 470. R. *v.* Cumpton, 5 Q.B.D. 341. Maberley *v.* Titterton, 7 M. & W. 540. As to assaults on them, see 45 & 46 Vict. c. 50, s. 188, and *post*, p. 893.

(*l*) 10 & 11 Vict. c. 89, s. 8. No towns which are not municipal boroughs now have their own police. As to assaults on them, see s. 20.

(*m*) 10 Geo. IV. c. 29, s. 4; 2 & 3 Vict. cc. 47, 71. Their powers extend to the river Thames up to the boundaries of Bucks and Berks, and to these counties and the counties of London, Middlesex, Hertford, Essex, Kent, and Surrey: and they act in royal palaces and dockyards. Their powers as to the execution of warrants extend to all England. As to assaults on them, see 2 & 3 Vict. c. 47, s. 18; 24 & 25 Vict. c. 51, s. 53.

(*n*) 2 & 3 Vict. c. xciv., a local Act.

(*o*) 61 & 62 Vict. c. 41, s. 10. Cf. Prison Act, 1877 (40 & 41 Vict. c. 21), s. 28, as to legal custody of prisoners within or without the walls of the prison.

(*p*) 3 & 4 Vict. c. 50, s. 1.

(*pp*) Dalton, c. 1.

(*q*) 1 Hale, 463. 1 Hawk. c. 31, s. 54. Fost. 310, 311. 1 East, P. C. 303.

(*r*) R. *v.* Sherlock, L. R. 1 C. C. R. 20, Dalton, c. 1.

(*s*) This is an addition to his power as

reasonable grounds of suspicion are matters within the constable's knowledge, or are derived from facts stated to him by others (*t*).

A constable is not as a general rule entitled to arrest for misdemeanor *after* it has been committed, whether the offence be fraud, breach of the peace, &c. ; nor to arrest on suspicion of misdemeanor (*u*).

He may arrest any person who in his presence commits a misdemeanor or breach of the peace (*v*), if the arrest is effected at the time when, or immediately after, the offence is committed (*w*), or while there is danger of its renewal (*x*), but not after the breach, or danger of its renewal, has ceased (*y*). He may arrest or start in immediate pursuit if the misdemeanor is a breach of the public peace (*z*). And he may take into his custody persons given in charge to him by persons who have witnessed a breach of the peace, if there is danger of its immediate renewal (*a*), but not if the affray is over and peace restored (*b*).

The common law power of arrest extends to persons who *threaten* to kill, beat, or hurt another, or to break the peace in his presence, if complaint is at once made to the constable by the person threatened (*c*).

There are statements in the early authorities as to the right of peace officers to arrest persons reasonably suspected of being night walkers (*d*), or disorderly persons, and persons unduly armed (*e*), which appear to have been made with reference to a statute now repealed (*f*), and the arrest of idle and disorderly persons and suspected persons and reputed thieves, frequenting or lying or loitering in public places, is now regulated by statute (*g*).

Where a policeman saw the prisoner playing the bagpipes in a street at half-past eleven o'clock at night, by which he collected a large crowd around him, among whom were prostitutes and thieves, and the policeman told him he could not be allowed to play at that time of night, and he must go on, but he said he would be damned if he would, and the

a citizen to pursue and take felons when a felony has actually been committed, or to arrest a person attempting to commit felony.

(*t*) Beckwith *v.* Philby, 6 B. & C. 635. Davis *v.* Russell, 5 Bing. 354. Hogg *v.* Ward, 27 L. J. Ex. 443. Marsh *v.* Loader, 14 C. B. (N. S.) 535. See 2 Hale, 79, 80, 91–93.

(*u*) See Griffin *v.* Coleman, 28 L. J. Ex. 134.

(*v*) Timothy *v.* Simpson, 1 Cr. M. & R. 757, approved in Price *v.* Seeley, 10 Cl. & F. 38. Derecourt *v.* Corbishley, 5 E. & B. 188.

(*w*) See Fox *v.* Gaunt, 3 B. & Ald. 798. Bowditch *v.* Balchin, 5 Ex. 378.

(*x*) R. *v.* Light, 27 L. J. M. C. 1.

(*y*) R. *v.* Walker, 23 L. J. M. C. 123. Cook *v.* Nethercote, 6 C. & P. 741. R. *v.* Bright, 4 C. & P. 387.

(*z*) See R. *v.* Hunt, *post*, p. 727. R. *v.* Howarth, *post*, p. 727.

(*a*) Timothy *v.* Simpson, *ubi supra*.

(*b*) 1 East, P. C. 305, 306. 2 Co. Inst. 52. 2 Hawk. c. 12, s. 20. Strickland *v.* Pell, Dalton, c. 1, s. 7. 2 Hale, 90.

(*c*) 2 Hale, 88. Dalton, cc. 1, 116. And see East, P. C. 306. The object of this power is to enable the constable to take the offender before a justice and have him sworn to keep the peace, &c.

(*d*) To be a common night-walker is said to be an indictable misdemeanor. 2 Hawk. c. 12, s. 20. Latch, 173. Popham, 208. As to the meaning of night-walker, see Watson *v.* Carr, 1 Lew. 6, Bayley, J.

(*e*) Tooley's case, 2 Ld. Raym. 1296. 2 Hale, 89, 97. 1 East, P. C. 303. Cf. R. *v.* Dadson, 2 Den. 35. Lawrence *v.* Hedger, 3 Taunt. 14.

(*f*) 5 Edw. III. c. 15, repealed in 1856 (19 & 20 Vict. c. 64). 2 Edw. III. c. 3, which prohibits riding or going armed in affray of the peace, is in force and appears specifically to authorise arrest for breach of its provisions, *vide ante*, p. 428.

(*g*) See 5 Geo. IV. c. 83, s. 4, amended by 34 & 35 Vict. c. 112, s. 15, and 54 & 55 Vict. c. 69, s. 7 ; and as to the metropolis, 10 Geo. IV. c. 44, s. 7, and 2 & 3 Vict. c. 47, s. 66. As to the meaning of the word frequenting, see R. *v.* Clark, 14 Q.B.D. 92. As to the meaning of suspicious character, see Cowles *v.* Dunbar, M. & M. 37.

policeman took hold of him by the shoulder, and slightly pushed him, on which the prisoner wounded him with a razor; it was held, that if the prisoner was collecting a crowd of persons at that time of night, and the policeman desired him to go on, and laid his hand upon his shoulder with that view only, he did not exceed his duty, and if the prisoner then wounded him, it would have been murder if he had died; but if the policeman gave the prisoner a blow and knocked him down, he was not justified in so doing (*h*).

Riot.—The general and special powers and duties of justices, sheriffs, under-sheriffs, constables, and other peace officers, as to the suppression of riots are stated *ante*, Book VI. Chapter I. sect. 6, p. 431 (*i*).

(2) STATUTE.—Power to arrest without warrant is given by many statutes as to many misdemeanors and petty offences, *e.g.*, persons found lying or loitering in a highway, yard, or place during the night, whom the constable reasonably suspects of having committed or being about to commit any *felony* against the Larceny, Malicious Damage, or Offences against the Person Acts of 1861 (*j*).

The powers of a peace officer to arrest upon the warrant of a judicial officer depend on the competence of the judicial officer to issue the warrant, the person or persons to whom it is addressed, the district in which the execution of the warrant is attempted, and the mode adopted for executing it.

Persons acting in Aid of Officers of Justice.—The protection which the law affords to ministers of justice extends also to every person coming to their aid and lending his assistance for the keeping of the peace, &c., or attending for that purpose, whether commanded or not, provided that the slayer has knowledge or notice that they are so acting in assistance (*k*).

In R. *v.* Phelps (*l*), the deceased having been required by a policeman to aid him in taking a man, whom he had apprehended on suspicion of stealing potatoes, to the station-house, did so for some time, and then was going away, when he was attacked and beaten to death. It was objected that he was not at the time aiding the policeman. Coltman, J.: 'He is entitled to protection *eundo, morando, et redeundo*' (*m*).

In R. *v.* Porter (*n*), the indictment was for the murder of D., who had been called upon by a police constable to aid in apprehending the prisoner and another man charged with stealing money. Brett, J., in summing up, said: 'The men had been given into custody of a police constable, who had legal authority to take them into custody, and to call upon others to assist him, and they had no right to resist him, and in resisting him they were doing what was illegal. If the prisoner kicked the man, intending to inflict grievous harm, and death ensued from it, he is guilty of murder. If the prisoner inflicted the kick in resistance of his lawful

(*h*) R. *v.* Hagan, 8 C. & P. 167, Bolland, B., and Coltman, J.

(*i*) And see 1 Hawk. c. 31, ss. 48, 49, 50, 54. Fost. 272.

(*j*) 24 & 25 Vict. c. 96, s. 104; c. 97, s. 57; c. 100, s. 66. Cf. as to offences on highways, &c., 5 & 6 Will. IV. c. 50, ss. 58, 59. For a complete list of such statutes, see Chronological Index of Statutes (ed. 1909), tit. 'Arrest.'

(*k*) Sissinghurst case, *ante*, p. 721. Fost. 309, 310, 311.

(*l*) C. & M. 180, and MS. C. S. G.

(*m*) *Vide ante*, p. 721.

(*n*) 12 Cox, 444.

arrest, even although he did not intend to inflict grievous injury, he is equally guilty of murder. But if in the course of the struggle he kicked the man, not intending to kick him, then he is only guilty of manslaughter.'

In case of a riot, if a constable sees a breach of the peace committed, he may call upon any one present for his assistance if there is a reasonable necessity therefor. If the person called upon, without any physical impossibility or law excuse refuse to do so, he is liable to be indicted, and it is no defence that in consequence of the number of rioters the single aid of the person called upon would have been of no use. R. *v.* Brown, C. & M. 314. *Vide ante*, Book VI. Chapter I. sect. 6, p. 431.

Private Persons.—The protection extends also under certain limitations to private persons who interpose to keep the peace and suppress an affray by parting or arresting the combatants, whether the combat arises from a sudden or premeditated quarrel (*o*), or endeavour to arrest and bring to justice felons or persons who have given a dangerous wound. As they are discharging duties or exercising powers imposed and given by law, they are in a sense engaged in the public service and for the advancement of justice, though not specially appointed (*p*). If such a person is resisted and killed, the slayer is guilty of murder if he had express notice of the purpose for which the deceased came, *e.g.*, by his commanding the peace or otherwise shewing that his interposition was in the interests of peace and justice, or with friendly intent (*q*). Where express notice is not given the purpose of the private intervention may be misunderstood and the violence offered may be extenuated (*r*).

At common law a private person may, on his own initiative, without warrant, apprehend and detain, until they can be carried before a magistrate, all persons found committing or attempting to commit a felony (*s*): and where a felony has actually been committed may arrest any person reasonably suspected of having committed it (*t*). He is also justified in using force to prevent the commission of felony (*u*), and in arresting persons committing a breach of the public peace, or in giving them into the custody of a peace officer at the time of the breach or while there is danger of its renewal (*v*).

Foster says (Crown Law, p. 318): 'In the case of private persons using their endeavours to bring felons to justice, these cautions ought to be observed: That a felony hath been actually committed (*w*). For if no felony hath been committed, no suspicion, how well soever grounded, will bring the person so interposing within the protection of the law in the sense I have already stated and explained.'

(*o*) 1 Hawk. c. 31, ss. 48, 54.

(*p*) Fost. 318.

(*q*) Fost. 272, 311. 1 East, P. C. 304. 1 Hawk. c. 31, ss. 48, 54. The other parties to the affray are not responsible for the killing unless they join in the attack on the intervener.

(*r*) Fost. 310, 311.

(*s*) R. *v.* Hunt, 1 Mood. 93. R. *v.* Howarth, 1 Mood 207. Eighth Report, Cr. L. Commissioners, p. 246.

(*t*) Fost. 318, *infra*.

(*u*) Handcock *v.* Baker, 2 B. & P. 260, Chambré, J.

(*v*) As to arrest by private persons for misdemeanor, see 1 Hawk. c. 63, ss. 11, 14, 21, 23; 2 Hawk. c. 12, s. 30. R. *v.* Pinney, 3 St. Tr. (N. S.) 11, *ante*, p. 431. Holyday *v.* Oxenbridge, Cro. Car. 234; 79 E. R. 805. Fox *v.* Gaunt, 3 B. & Ad. 798. Timothy *v.* Simpson, 1 Cr. M. & R. 757; approved in Price *v.* Seeley, 10 Cl. & F. 28. Grant *v.* Moser, 5 M. & G. 123. Baynes *v.* Brewster, 2 Q.B. 375.

(*w*) See Beckwith *v.* Philby, 6 B. & C. 635. Allen *v.* L. S. W. R., 6 Q.B.D. 65.

Sect. 16. 'Supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavouring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he killeth, or on the other hand to make the killing of him amount to murder. I think it would be felonious homicide, but not murder, in either case; the one not having used due diligence to be apprised of the truth of the fact; the other not having submitted and rendered himself to justice, since, if his case would bear it, he might have resorted to his ordinary remedy for the false imprisonment.'

Hale says (1 H. P. C. 490): 'If A. be suspected by B. to commit a felony, but in truth he committed none, neither is indicted, yet upon the offer to arrest him by B. he resists or flies, whereby B. cannot take him without killing him, and B. kills him, if in truth there were no felony committed, or B. had not a probable cause to suspect him, this killing is at least manslaughter, but if there were a felony committed, and B. hath cause to suspect A., but in truth A. is not guilty of the fact, though upon this account B. may justify the imprisonment of A., yet *quære*, if B. kills A. in the pursuit, whether this will excuse him from manslaughter' (*x*).

He says further (2 H. P. C. 82): 'But if a felony be committed, and A. upon probable cause suspects B. to have been the felon, though the law permits him to arrest B., though in truth innocent, yet he cannot justify the killing of him upon his flight and refusing to submit, *justiciari se permittere nolens*; but if he kills him, it is at his peril; for if B. be innocent it is at least manslaughter (3 Co. Inst. 56, 221; 22 Assiz. 55), and the reason is because B. is not bound to take notice of A. as authorised to arrest him, as being no officer, nor having any warrant. It is true, a constable arresting in the king's name, or offering so to do, the party is bound to take notice and submit, as hath been said (part 1, cap. 37), but a mere stranger offering to do it, a man is not bound to take notice of his authority, and therefore may fly from him if innocent, for possibly he may think he came to rob him. Yet farther, if an innocent person be actually arrested upon suspicion by a private person, all circumstances being duly observed, and he breaks away from the arrest, yet I do not think the person arresting can kill him, though he cannot be otherwise taken, for the person arrested is not bound to take notice of that authority that the law gives to a private person in this case.'

Upon an indictment for unlawful wounding, it appeared that the prisoner had asked and obtained permission to take a basket of ashes from the prosecutor's ash-pit. As he was carrying away the ashes the prosecutor's apprentice saw among the ashes the spout of a new tea-kettle which had stood on a shelf near the ash-pit, and gave the alarm. The prosecutor then seized the prisoner to detain him while a constable was sent for. The prisoner resisted, and in the struggle both fell, and the prisoner cut the prosecutor with a knife; a rattle of copper had been heard while the prisoner was at the ash-pit. It was objected that the prosecutor had no right to detain the prisoner. Alderson, B., said: 'That will depend on

(*x*) See also 2 Co. Inst. 52, 172. Coxe *v.* Wirrall, Cro. Jac. 193.

whether the jury are satisfied that the prisoner had in fact stolen the tea-kettle. If he had stolen the tea-kettle, the prosecutor had a right to detain him, and this wounding will be felony' (*y*).

Hue and Cry.—If a felony is committed, and the felon flies from justice, or a dangerous wound is given, it is the duty of every man to use his best endeavours to prevent an escape; and in such cases, if fresh suit be made, and *a fortiori*, if hue and cry is raised (*z*), all who join in aid of those who began the pursuit, are under the same protection of the law (*a*). Thus, where upon a robbery committed by several, the person robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry raised, are authorised by law to pursue and apprehend the malefactors; and that, although there was no warrant of a justice of the peace to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and that, therefore, the killing of any of the pursuers was murder (*b*).

The question is raised by the earlier writers whether a private person is *bound* to arrest a person indicted for felony if no warrant is produced, and whether, if a private person kills a person accused of felony in endeavouring to arrest him, the slayer's justification depends on the guilt or innocence of the person arrested. Knowledge that an indictment had been found or a warrant issued might create a reasonable suspicion of guilt, but would not justify the slaying; and the arrest by a private person without warrant is a trespass if no felony had in fact been committed (*c*).

Statutes.—The following statutes authorise arrest without warrant by private persons, as well as by peace officers (*d*):—

Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 103: Of any person 'found committing' any offence against the Act whether punishable on indictment or summary conviction (*e*), except angling in the day time (*f*).

Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), s. 31: Of any person found committing any indictable offence against the Act.

Prevention of Offences Act, 1851 (14 & 15 Vict. c. 19), s. 11: Of any person found committing any indictable offence in the night, *i.e.* between 9 p.m. and 6 a.m.

(*y*) R. *v.* Price, 8 C. & P. 282, Alderson, B.

(*z*) By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 7, which re-enacts 3 Edw. I. c. 9, 'Every person in a county shall be ready and apparelled at the command of the sheriff and at the cry of the county to arrest a felon whether within franchise or without, and in default shall on conviction be liable to a fine.'

(*a*) 1 Hale, 489, 490. 1 Hawk. c. 28, s. 11. Fost. 309. 1 East, P. C. 298.

(*b*) Jackson's case, 1 Hale, 464.

(*c*) 2 Hale, 79, 80, 85, 86, 91, 92, 93. 3 Co. Inst. 221. 1 East, P. C. 301. Dalt. c. 170, s. 5. R. *v.* Turner, 1 Mood. 347, *sed vide*, 1 Hale, 489, 490. Hawkins, in alluding to the power of arrest by officers in this case, gives as a reason that there is a charge against the party on record. 1 Hawk. c. 28, s. 12. But upon this it is remarked that it does not readily occur why officers only can take notice of the charge on record. 1 East, P. C. 300.

(*d*) For other enactments, see Metropolitan Police Guide (4th ed.), 550, and Official Index to Statutes (ed. 1908), tit. 'Arrest.'

(*e*) See R. *v.* Sherriff, 20 Cox, 334, Darling, J., an indictment for murder of a policeman who was trying to arrest the prisoner for having in his possession a ferret knowing it to be stolen.

(*f*) Barnard *v.* Roberts, [1907] 96 L. T. 648: 21 Cox, 425.

Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 6: Of any person found offending against the Act.

Persons 'found committing' any offence against the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), may be arrested without warrant by a peace officer or the owner of the property injured or his servant, or any person authorised by him (sect. 61) (*ff*).

In the event of arrest of an offender by a person other than a peace officer it is his duty at common law or under the particular statute to convey or deliver his prisoner to a peace officer (*g*), in order that he may be conveyed as soon as reasonably may be before a justice of peace, &c., to be dealt with according to law, or to take him with all convenient speed before a justice.

Statutes authorising arrest without warrant have been construed somewhat strictly. The arrest will be illegal if not in close accordance with the words of the statute, *e.g.* if it is not immediate or if on arrest the prisoner is detained in private custody (*h*), instead of being handed over to officers of the law. The words 'found committing' used in many of these statutes are not limited to 'caught in the act.'

In Hanway *v.* Boultbee (*i*), the plaintiff, a pedlar, went to the house of Mr. B., and a small dog of Mr. B.'s ran out at the plaintiff, who with a stick gave the dog a blow, which stunned and permanently blinded it. The plaintiff then went away, and Mrs. B. immediately sent a boy to fetch a constable. The boy returned with the constable, and Mrs. B. directed them to go after the plaintiff and apprehend him for the injury done to the dog. They went in pursuit of the plaintiff, and found him at a public-house about a mile from Mr. B.'s, and the constable apprehended him and took him before the magistrate. Tindal, C.J. (in summing up), said: 'The jury will have to consider first, whether the plaintiff had committed a wilful injury to the dog; and secondly, whether he was found committing that offence and immediately apprehended. With respect to the second question, the words of 7 & 8 Geo. IV. c. 30 certainly differ materially from those in 1 Geo. IV. c. 56 (*j*), and were obviously meant to restrict the powers

(*ff*) See also the power of arrest by pawnbrokers (35 & 36 Vict. c. 93, s. 34: Howard *v.* Clarke, 20 Q.B.D. 558), and by owners of property, their servants and agents in case of offences against the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47, s. 16) or Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89, s. 157), and the Night Poaching Act, 1828 (9 Geo. IV. c. 69, s. 2), and by water bailiffs under the Fisheries Acts (36 & 37 Vict. c. 71, s. 38; 47 & 48 Vict. c. 11, s. 3).

(*g*) See R. *v.* Curran, 3 C. & P. 397.

(*h*) R. *v.* Curran, 3 C. & P. 397, where a man found in a field adjoining one from which turnips had been stolen, was apprehended by a servant of the owner of the turnips, under the owner's directions, and taken to the owner's house, and then to the constable, instead of being taken forthwith before a justice as directed by 7 & 8 Geo. IV. c. 29, s. 63 (rep.). In R. *v.* Phelps (C. & M. 180), an indictment for murder of a person acting in aid of a constable, the constable had arrested a man at night, and had found potatoes concealed on his person, which appeared to have been recently dug: but he had not seen him steal, dig up the potatoes, nor was there any evidence that any gardens had been robbed, or that the prisoner had been near any garden. It was held that the arrest of the prisoner was not authorised by 7 & 8 Geo. IV. c. 29, s. 63 (rep.), nor at common law, as stealing potatoes out of a garden is not an offence at common law. Cf. Ballinger *v.* Ferris, 1 M. & W. 628. Reed *v.* Cowmeadow, 6 A. & E. 661, and Beachey *v.* Sides, 9 B. & C. 806, cases of illegal arrest under 7 & 8 Geo. IV. c. 30, s. 28, now incorporated in 24 & 25 Vict. c. 97, s. 61.

(*i*) 1 M. & Rob. 15; 4 C. & P. 350.

(*j*) The words of 1 Geo. IV. c. 56, s. 3 (repealed by 7 & 8 Geo. IV. c. 27), were: 'Any person or persons who shall have actually committed, or be in the act of committing,' any offence. The words of 7 & 8 Geo. IV. c. 30, s. 28 (rep.), on which this case turned, were the same as those in 7 & 8 Geo. IV. c. 29, s. 63, repealed

given by that Act. The object of the legislature seems to have been to allow the immediate apprehension of a party taken in the commission of a crime of this nature, because otherwise such offences would frequently be committed by persons passing through or having no fixed domicile in the place, and they would therefore entirely escape, if the party injured were obliged to wait for the formalities of a charge before a magistrate, or a warrant. Where the offender is fixed in the country, so that he can be found and apprehended at a subsequent time, there is no reason why that apprehension should not be after a regular proceeding; and the statute therefore differs from 1 Geo. IV. c. 56, and does not allow a stale apprehension on an old charge, without a warrant. Still the words of the present statute must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit to be made: I think that would be sufficient. So, in this case, the party is actually seen in the commission of the act complained of: as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case, I think it must be treated as an "immediate apprehension" for an offence which the plaintiff, supposing under the circumstances that it was an offence at all, was "found committing," and this was the imprisonment complained of.'

But arrest at 10 p.m. of a person who committed an offence at 1 a.m. has been held not to be within sect. 103 of the Larceny Act, 1861, on the ground that the word 'immediately' in that section means immediately after the commission of the offence, not immediately after the discovery that it has been committed (*k*).

In R. *v.* Fraser (*l*), where a policeman found the prisoner in a garden at night, stooping down close to the ground, and the prisoner ran away, and the policeman ran after him and caught him; and it appeared that the prisoner was plucking some carnations in the garden, and the jury found that the prisoner had wilfully and maliciously plucked flowers from plants in the garden with intent to steal them, and that he was found by the policeman committing that offence, but that the policeman did not inform the prisoner by word of mouth that he belonged to the police force. On a case reserved, it was held that the policeman had authority to apprehend the prisoner.

In actions for illegal arrest in intended exercise of the powers given by sect. 103 of the Larceny Act, 1861, it has been held that the defendant was entitled to notice of action if he acted in *bona fide* belief, in circumstances which, if they had really existed, would have amounted to a justification (*m*). It would seem that the arrest would be justified if the person arrested was seen in a position justifying the belief that he had committed the offence and the prisoner is arrested then and there or after fresh pursuit (*n*).

In R. *v.* Howarth (*o*), upon an indictment for malicious wounding,

in 1861 and re-enacted as 24 & 25 Vict. c. 96, s. 103.

(*k*) Downing *v.* Capel, L. R. 2 C.P. 461.

(*l*) 1 Mood. 419.

(*m*) Griffith *v.* Taylor, 2 C.P.D. 194. Notice of action is abolished. 56 & 57 Vict. c. 61.

(*n*) Downing *v.* Capel, *ubi supra*, Keating and Smith, JJ. Cf. Roberts *v.* Orchard, 33 L. J. Ex. 65.

(*o*) 1 Mood. 207.

it appeared that near midnight two men were seen near a board-house belonging to O.; on two persons going up to the board-house, they heard a noise, and they found the door half open, and saw the prisoner inside and heard a noise among the boards, and the prisoner said 'Bring the board'; the two persons then went to O.'s house to call him up; one of them then went to the bottom of the road, which was about one hundred yards from the board-house, and in a quarter of an hour O. came up, with a carving knife in his hand, and having also got another person to assist him, they went to the board-house, the door of which was then closed; the hasp was over the staple, and the padlock was in the staple, but not locked; nobody was in the board-house, they went in, and O. found two planks removed from the place, where he had seen them four days before, to another part of the board-house, nearer the door; they then went on from the board-house, and after searching in several places found the prisoner in the garden of another person, crouched down with a drawn sword in his hand; the prisoner was asked twice what he did there, he made no answer, and then he started off; one of the witnesses ran and caught hold of him, but the prisoner compelled him to leave hold of him; the prisoner fell over something, and then the other witnesses came up; the prisoner struck O. on the side with his sword, but did not cut him; then the prisoner again attempted to get away, but was prevented by some paling; the prisoner then turned round and struck O. with his sword, cut through O.'s hat into his head, and produced a slight wound on his head; up to that time O. had not struck the prisoner any blow; the jury negatived the felony in removing the boards from one part of the board-house to another; and it was objected that the prosecutor had no right to apprehend either at common law or under the Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 6; for at common law the power to arrest for offences inferior to felony was confined to the time of committing the offence, and it was the same under the Vagrancy Act; that the prisoner was not found by the prosecutor committing the offence, but, on the contrary, had ceased from the attempt and abandoned the intention, which distinguished this case from R. *v.* Hunt (*p*). On a case reserved, it was held that the prisoner might lawfully be apprehended, for as he was seen in the board-house, and was taken on fresh pursuit before he had left the neighbourhood, it was the same as if he had been taken in the outhouse, or in running away from it (*q*).

In R. *v.* Gardiner (*r*), upon an indictment for maliciously wounding, it appeared that the prisoner, with several other persons, was found by J., a constable, playing at thimblerig and betting with the people at a fair (*s*), in the afternoon. J. having received verbal instructions from the magistrates to apprehend such offenders, tried, with the assistance of another person, to apprehend the prisoner and his companions, and succeeded in taking one, but the prisoner and two others of the company fell upon J.,

(*p*) 1 Mood. 93, *ante*, p. 727.

(*q*) 1 Mood. 207. See the remarks of Denman, C.J., in Baynes *v.* Brewster, Q.B. 375.

(*r*) 1 Mood. 390.

(*s*) By the Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 4, 'every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game, or pretended game of chance, shall be deemed a rogue and vagabond.'

rescuing their companion, and got away themselves. About nine o'clock in the evening, J., not having been able to find the prisoner before, saw him with several of his companions in a public-house, and said to him, 'You are my prisoner.' The prisoner asked 'For what?' and J. replied, for what he had been doing in the fair; the prisoner resisted, and a scuffle ensued; the prisoner escaped and concealed himself in a privy in the garden. J. called another constable to his assistance, and they together broke open the privy door and endeavoured to take the prisoner, upon which he took a knife out of his pocket and stabbed the other constable. The jury found that the prisoner knew that the constable was endeavouring to take him for the offence committed at the fair; but upon a case reserved, the judges held that the attempt to apprehend was not lawful under the Vagrancy Act, as it was not made on fresh pursuit (*t*).

Poaching Cases.—There have been several decisions arising out of the exercise or attempted exercise of the powers given by the Night Poaching Act, 1828 (9 Geo. IV. c. 69), to arrest poachers when three or more are found in the night committing an offence under that Act (*u*). The powers may be exercised by the owner or occupier of the land on which the poachers are found committing the offence (*v*), or persons having rights of free warren or free chase thereon or the lord of the manor wherein the land lies, and by the gamekeepers (*w*), or servants of such persons or any person, assisting them (sect. 2), and if the offence is indictable, *e.g.*, under sect. 9, as to three or more persons armed poaching by night (*x*), by any person whether a constable or not (14 & 15 Vict. c. 19, s. 11). The power of

(*t*) See s. 6 of the Act.

(*u*) *Post*, vol. ii. p. 1338.

(*v*) R. *v.* Warner, 1 Mood. 380. In this case the prosecutor, being out on duty at night as gamekeeper with his assistant on his master's manor, heard shots towards a wood not belonging to his master, and shortly afterwards saw the prisoners coming along a road in the direction from the wood; the prisoners were armed with a gun, gun-barrel, and bludgeons; they stopped when they saw the prosecutor and his assistant; the prosecutor and his assistant advanced towards the prisoners, when the prosecutor said: 'So, you have been knocking them down; you are a pretty set of people to be out so late at night'; they were then about three yards off; the prosecutor said to his assistant, sufficiently loud for the prisoners to hear, 'Mind him with the gun'; the assistant took hold of the gun gently, one hand on the stock the other on the barrel, and took off the cap gently; there was no struggle; the man did not seem angry at the assistant's holding the gun; the prosecutor saw one of the prisoners, and advanced to look at the faces of the other two, but they bounced off. The prosecutor then turned back towards his assistant and the man who had the gun, and called out as loud as he could: 'Forward, G.' G. was the keeper of the manor in which the wood was situate, but he was not there. Three of the men ran in upon the prosecutor, knocked him down and stunned him; when he recovered himself he saw all the men coming by him, and one said, 'Damn 'em, we have done 'em both'; they had got two or three paces beyond him, and one of them turned back and struck the prosecutor a violent blow on the left leg with what he thought was a stick, which wounded him in the leg; the prosecutor had committed no assault on either of the four men. The assistant took hold of the gun to prevent the man's running away, but did not tell him so; he took hold of it to let the keeper see if he knew the men; the manor, in which the wood was, extended more than 200 yards beyond where the prisoners were seen. It was objected that the prisoners were on the high road, and the prosecutor and his assistant had no right to obstruct them. Bollond, B., overruled the objection, and directed the jury that if the prisoners acted in concert, all were equally guilty. They were found guilty, and upon a case reserved, the conviction was upheld. Cf. R. *v.* Edmeads, 3 C. & P. 390.

(*w*) This includes a person appointed, even without written authority, to watch for night poachers. R. *v.* Price, 7 C. & P. 178.

(*x*) *i.e.*, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise (s. 12). R. *v.* Tomlinson, 7 C. & P. 183.

arrest under the Act of 1828 extends in case of pursuit to any other place to which the offender escapes (*y*), or on the road on which he is found (*z*). Persons seeking to arrest in lawful exercise of these powers are within the special protection of the law, and if a gamekeeper is killed in a lawful attempt to apprehend, the offender will be guilty of murder, though the keeper had previously struck the offender or one of his party, if he struck in self-defence only, and to diminish the violence illegally used against him, and not vindictively to punish (*a*).

But if a keeper is killed in an attempt to arrest a poacher without lawful authority, the offence is only manslaughter (*b*), and the same would be the case if the keeper was servant of the owner of the game, but not of the owner of the land, &c. (*c*).

Notice of the Authority and Business of the Officer.—To make the killing of an officer of the law or person acting in aid or execution of the law murder under the circumstances dealt with in this section, the person whose liberty is interfered with and those who interfere to resist such officer or person must have actual knowledge or express or implied notice (*d*) of the officer's status and business (*e*). Where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning to arrest him without announcing his business or using words of arrest, and the gentleman in the first surprise snatched down a sword and killed the bailiff, not knowing him to be an officer of the law, the killing was ruled manslaughter (*f*). But where a man said to a bailiff, who came to arrest him: 'Stand off, I know you well enough, come on at your peril,' and on the bailiff taking hold of him, ran the bailiff through and killed him, it was held murder (*g*). Where, of a number of persons concerned in killing an officer in the execution of his duty, some have notice of his status and others have not, the former may be guilty of murder and the latter of manslaughter (*h*), unless they deliberately engaged in the fray meaning to make common cause and maintain it by force (*i*).

In some cases the circumstances of the case render notice unnecessary, *e.g.*, where an attempt is made to arrest a man while committing an offence or on fresh pursuit (*j*).

(*y*) R. *v.* Price, *ubi supra*, where the prisoner who on pursuit had escaped from a wood within a manor (not in the ownership or occupation of the lord of the manor), but being hard pressed, fled back into the manor and there attempted to fire a loaded gun at his pursuers.

(*z*) 9 Geo. IV. c. 69, s. 2; 7 & 8 Vict. c. 29, s. 1. As to the powers of constables to take poachers, see 25 & 26 Vict. c. 114.

(*a*) R. *v.* Ball, 1 Mood. 330; *vide* R. *v.* Payne, 1 Mood. 378. R. *v.* Taylor, 7 C. & P. 266.

(*b*) R. *v.* Addis, 6 C. & P. 388, Patteson, J. R. *v.* Davis, 7 C. & P. 785, Parke, B. R. *v.* Wesley, 1 F. & F. 528.

(*c*) R. *v.* Price, 5 Cox, 277. R. *v.* Wood, 1 F. & F. 470.

(*d*) 1 East, P. C. 316. In some of the earlier books it is said that if the servant or friend of a person sought to be arrested by an officer of the law, takes part against the officer and slays him, it is murder, though he knew him not. 1 Hawk. c. 31, s. 57. 1 Keb. 87. Young's case, 4 Co. Rep. 40 *b*. If the party to be arrested had notice of the officers' authority, the theory is that the slayer is liable because he set himself against the justice of the realm. But implied notice at least seems necessary, though not actual knowledge. See 1 Hale, 438.

(*e*) 1 Hale, 458. 1 Hawk. c. 31, ss. 49, 50. Fost. 310. Mackalley's case, 9 Co. Rep. 65 *b*, 69 *b*.

(*f*) 1 Hale, 470. Case at Newgate [1667], Kel. (J.) 136.

(*g*) Pew's case, Cro. Car. 183. 1 Hale, 458.

(*h*) 1 Hale, 438, 446, 461. Kel. (J.) 115, 116.

(*i*) *Vide ante*, p. 112.

(*j*) R. *v.* Howarth, 1 Mood. 207, *ante*, p. 732. R. *v.* Woolmer, 1 Mood. 334.

The same principle applies where persons other than officers of the law are seeking to make an arrest which by common law or statute they are empowered to make.

Thus where upon an indictment for malicious wounding, it appeared that the assistant to the head keeper of Sir R. S. went with five or six assistants towards a covert of Sir R. S., where they heard guns; they then went towards the place, and rushed in at the poachers to take them; the prosecutor saw six persons in the wood, and he ran after them; they got into a field about six yards off; they then ranged themselves in a row, the prosecutor being five or six yards from them, on the edge of the plantation, and he heard one of them say: 'The first man that comes out I'll be d——d if I don't shoot him'; upon which the prosecutor drew his pistol, cocked it, and ran out: they all ran away together; the prosecutor followed them, and when they had all run about fifty yards they stood; they had all turned round; one of them shot at the prosecutor, who was running to him; the prosecutor was wounded; the men said nothing to the prosecutor before he was shot, nor he to them; it was objected, that, inasmuch as the prosecutor's authority to apprehend them was derived from the act creating the offence, it was incumbent upon him to give notice to them: the objection was overruled: and, upon a case reserved, the judges were of opinion that the circumstances constituted sufficient notice (*k*). So where a servant of Sir T. W. was out with his gamekeeper at night, and they heard two guns fired, and went towards the place, and got into a covert, and saw some men there who ran away, and the servant pursued them, and got close up to one of them, and made a catch at his legs, and was immediately shot in the side; Parke, B., said: 'Where parties find poachers in a wood, they need not give any intimation by words that they are gamekeepers, or that they come to apprehend; the circumstances are sufficient notice. What can a person poaching in a wood suppose when he sees another at his heels?' (*l*).

Where officers of the law intervene to preserve the peace or make arrests, their functions may be indicated by their uniform or production of their official staves, or any other known ensign of authority (*m*), *e.g.* warrant cards, or by their commanding the peace, or declaring their office and saying that they arrest in the King's name (*n*), or by producing a warrant or writ from a Court or magistrate or in some other way indicating their status and the purpose of their intervention. Where the officer is in his own district and his official capacity is known, or generally acknowledged, or if he is in uniform, the law will readily presume notice of his capacity and the purpose of his intervention (*o*).

Notification by implication of law is held to have been given where the officers have warrants directed to them as such. Thus, where a warrant

(*k*) R. *v.* Payne, 1 Mood. 378. See R. *v.* Fraser, 1 Mood. 419, *ante*, p. 731.

(*l*) R. *v.* Davis, 7 C. & P. 785, Parke, B. See R. *v.* Taylor, 7 C. & P. 266, Vaughan, J.

(*m*) Fost. 311.

(*n*) 1 Hale, 583.

(*o*) Fost. 310, 311. Sissinghurst House case, *ante*, p. 721. A public bailiff *juratus et cognitus* (*i.e.*, known in the district, not necessarily to the party) acting in his own district is said not to be bound to shew his warrant of appointment. 1 Hale, 458, 462, 583. 9 Co. Rep. 65 *b*, 69 *a*. But he must shew his writ or warrant against the party to be arrested if he needs one to justify the arrest. See 6 Co. Rep. 54 *a*. 9 Co. Rep. 69 *a*. 1 East, P. C. 319.

had been granted against the prisoner by a justice of peace for an assault, and directed *to the constable of Pattishal*, and delivered by the person who had obtained it to the deceased, to execute as constable of the parish, and it appeared that the deceased went to the prisoner's house in the daytime to execute the warrant, had his constable's staff with him, and gave notice of his business, and further, that he had before acted as constable of the parish, and was generally known as such: this was held sufficient evidence and notification of the deceased being constable, although there was no proof of his appointment, or of his being sworn into the office (*p*).

To make it murder to kill a *private or special bailiff or officer* in resisting arrest the party must know or be notified of the officer's status and his warrant of appointment should be shewn, but need not be parted with as it is his justification (*q*) and information given as to the legal process which he is seeking to execute (*r*). In the night-time further notification is necessary, but commanding the peace or using words notifying his business are sufficient, whether the officer is acting in execution of civil or criminal process, &c. (*s*).

Mode of executing Legal Authority.—*Ex hypothesi*, the authority which the officer, &c., seeks to exercise must be one given by law, whether it be exerciseable without judicial warrant at common law or by statute, or be given by judicial warrant: and it must be executed in a regular and lawful manner, whether as to the arrest, detention, or treatment of the persons whose liberty is interfered with. If an officer attempts to make an arrest out of a district in which he is authorised to act, or out of the jurisdiction of the Court from which the process issued, or without any legal warrant or justification and a struggle ensues in which he is killed, the killing is manslaughter only (*t*). Instances of this are where process is executed out of the jurisdiction of the Court which issued it (*u*), or an arrest is made on a Sunday, or an attempt is made to execute in an exclusive liberty a writ not containing a *non omittas* clause (*v*), or in a case where it is not permitted by law (*w*). Execution of process within the jurisdiction of the issuing Court is sufficient at common law, though it is outside the district of the officer to whom it is directed by name (*x*), and process may

(*p*) R. *v.* Gordon [1789], 1 East, P. C. 315.

(*q*) 1 Hale, 458, 459, 461, 483. Mackalley's case, 9 Co. Rep. 65, 69 *b*. 1 East, P.C. 319.

(*r*) 1 Hale, 458, note (*g*). 6 Co. Rep. 54 *a*. Mackalley's case, *ubi supra*.

(*s*) Mackalley's case, *ubi supra*.

(*t*) 1 Hale, 457, 458, 459. 1 Hawk. c. 31, ss. 27, 30. Fost. 312. 1 East, P. C. 312, 314. Thus a search warrant headed Wilts to wit, and directed to the constable of Dauntsey was held not to have been lawfully executed by a county police officer appointed under 2 & 3 Vict. c. 93, s. 8, and attached to the district in which Daintrey lay. Freegard v. Barnes, 7 Ex. 827. See R. *v.* Saunders, L. R. 1 C. C. R. 75, where a warrant directed to a parish constable was held not to authorise arrest by an officer of the county police.

(*u*) 1 Hale, 458, 459. 1 East, P. C. 314. R. *v.* Cumpton, 5 Q.B.D. 341, *post*, p. 740.

(*v*) R. *v.* Mead, 2 Stark. (N. P.) 205.

(*w*) 1 East, P. C. 324, 325. Rawlins *v.* Ellis, 16 M. & W. 672. The only warrants which may be *executed* on Sunday are for treason felony or other indictable offences: 29 Car. II. c. 7. Warrants for indictable offences and search warrants may be issued on Sunday, 11 & 12 Vict. c. 42, s. 4.

(*x*) 1 Hale, 459. 2 Hawk. c. 13, ss. 27, 30. 1 East, P. C. 314. At common law, if it was addressed to a man as constable of C. he could execute it only in C. R. *v.* Chandler, 1 Ld. Raym. 545. R. *v.* Weir, 1 B. & C. 288. Under 11 & 12 Vict. c. 42, s. 10, and 11 & 12 Vict. c. 43, a constable may execute a warrant out of his precinct at any place in the jurisdiction of the magistrate who granted it.

be executed by night as well as by day (*y*). The execution of justices' warrants by police officers, &c., is now in the main regulated by 11 & 12 Vict. c. 42, ss. 10, 11, as to indictable offences, and by 11 & 12 Vict. c. 43, s. 3, as to offences punishable on summary conviction (*z*). These enactments provide for the execution of warrants out of the county in which they are issued, after backing by a justice of the county in which they are to be executed (*a*).

Execution of Warrants.—Arrest on a warrant for misdemeanor is not legal unless it is effected by or in the presence of (*b*) the person named or designated thereon and he has the warrant with him (*c*) for production if required (*d*).

Upon an indictment for maliciously wounding, it appeared that a constable having a warrant to apprehend P, gave it to his son, who went in pursuit of P. in company with his brother; the father staying behind. They found P. lying under a hedge, and when they first saw him he had a knife in his hand running the blade of it into the ground. He got up from the ground to run away, and the son laid hold of him, and he stabbed the son with the knife; the father was in sight at about a quarter of a mile off. Parke, B., said: 'The arrest was illegal, as the father was too far off to be assisting in it; and there is no evidence that the prisoner had prepared the knife beforehand to resist illegal violence. If a person receives illegal violence, and he resists that violence with anything he happens have in his hand, and death ensues, that would be manslaughter. If the prisoner had taken out this knife on seeing the young man come up, it might be evidence of previous malice, but that is not so, as we find that the knife was in his hand when the young man first came in sight' (*e*).

Where a warrant for felony has been issued, an officer who knows of its issue may effect arrest though he has not the warrant (*f*). Where several persons are named or designated in a warrant any one of them may execute it (*g*). It has been held that a warrant directed to a constable of G. could not legally be executed by a county police officer (*h*).

As no time is usually prescribed for the execution of a warrant it continues in force till fully executed (*i*), even if the issuing justice dies (*j*),

(*y*) 9 Co. Rep. 66 *a*. 1 Hale 457. 1 Hawk. c. 31, s. 62.

(*z*) C. 43 repeals 5 Geo. IV. c. 18, which altered the common law as declared in R. *v.* Weir, 1 B. & C. 288. Neither Act applies to warrants issued by judges of the High Court: Gladwell *v.* Blake, 5 Tyrw. 186.

(*a*) 11 & 12 Vict. c. 42, ss. 12–14; 11 & 12 Vict. c. 43, ss. 3, 37; 14 & 15 Vict. c. 55 s. 8; 14 & 15 Vict. c. 93, s. 27 (1); 30 & 31 Vict. c. 19, s. 1 (1); 44 & 45 Vict. c. 24, s. 4 (E, S). See R. *v.* Campton, 5 Q.B.D. 341.

(*b*) Actual or constructive presence of a person named or designated is necessary. R. *v.* Whalley, 7 C. & P. 245. In Blatch *v.* Archer, 1 Cowp. 63, Aston, J., said: 'It is not necessary that the bailiff should be actually in sight, but he must be so near as to be near at hand, and acting in the arrest.'

(*c*) R. *v.* Chapman, 12 Cox, 4. R. *v.* Carey, 14 Cox, 214. Codd *v.* Cabe, 1 Ex. D. 352, a warrant for trespass in pursuit of rabbits.

(*d*) In Galliard *v* Laxton, 2 B. & S. 363, there was a warrant of arrest for disobeying a bastardy order. Arrest by a constable on the warrant was held illegal, the warrant at the time of the arrest being at the police station. The Court erroneously referred to 5 Geo. IV. c. 18 as still in force.

(*e*) R. *v.* Patience, 7 C. & P. 775.

(*f*) Creagh v. Gamble, 24 L. R. Ir. 458. In such a case he is really exercising his common-law power to arrest on suspicion of felony.

(*g*) 1 Hale, 459.

(*h*) R. *v.* Saunders, L. R. 1 C. C. R. 75. Parish constables are now rarely designated to execute warrants for offences.

(*i*) Dickenson *v.* Brown, Peake, 234. Kenyon, C.J.

(*j*) 42 & 43 Vict. c. 49, s. 37.

and on an indictment for maliciously wounding A. with intent to resist lawful apprehension, it appeared that the prisoner had been arrested on a warrant on a charge of assault and had been brought before a magistrate and ordered to find bail, which he refused to do. An order was then made for his commitment. While the commitment was being made out the prisoner escaped, and on A. following him by verbal direction from the justices and their clerk, the prisoner cut A. with a knife. Gaselee, J., ruled that the warrant continued in force and a conviction was upheld on a case reserved (*k*).

Where the warrant is good on the face of it, and for an offence within the jurisdiction of the issuing magistrate, the officer executing it is protected irrespective of the truth or falsity of the charge upon which the warrant was granted (*l*). Warrants issued by magistrates, &c., acting by special statutory authority and out of the course of the common law ought to shew on the face of them by direct averment or reasonable intendment the authority of the magistrate (*m*).

Where an officer endeavouring to execute process is resisted and killed, the crime will not amount to murder, unless the *process is legal;* but by this is to be understood only that the process, whether by writ or warrant, must not be defective in the frame of it, or bad on the face of it, and must issue in the ordinary course of justice from a Court or magistrate having jurisdiction in the case (*n*). Therefore, though there may have been error or irregularity in the proceeding previous to the issuing of the process, it will be murder if the sheriff or other officer should be killed in the execution of it; for the officer to whom it is directed must at his peril obey it (*o*).

If a *capias ad satisfaciendum, fieri facias,* writ of assistance, or any other writ of the like kind is issued, directed to the sheriff, and he or any of his officers are killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant (*p*), without producing the judgment or decree (*q*). Upon an indictment for assaulting E. in the execution of his office of sub-bailiff of a County Court, it appeared that the prisoner was arrested by E. under a warrant issued in the form authorised by 19 & 20 Vict. c. 108, s. 61 (*r*) for not having satisfied a judgment and costs. On a case reserved, it was held that the previous proceedings in the County Court need not be proved; for the process of

(*k*) R. *v.* Williams, 1 Mood. 387. According to Hawkins (Bk. 2, c. 13, s. 9), if a constable, having arrested a man on a warrant, lets him go at large on a promise to return, he cannot re-arrest on the same warrant, but can lawfully hold him under the warrant if he voluntarily returns into custody.

(*l*) Shergold *v.* Holloway, 2 Str. 1002. See 1 East P. C. 310.

(*m*) The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court acting according to the course of the common law but that which specially appears to be so, and that nothing shall be intended to be within the jurisdiction of an inferior Court but that which is expressly so alleged. See Howard *v.* Gossett, 10 Q.B. 452, Parke, B., and cases there cited.

(*n*) Fost. 311. R. *v.* Baker, 1 Leach, 112. 2 Hawk. c. 13, s. 10. Though the magistrate may be liable to action for issuing the process, the constable may still be protected.

(*o*) Fost. 311. 1 Hale, 457.

(*p*) It would seem that the writ must be produced as well as the sheriff's warrant to the bailiff. R. *v.* Mead, 2 Stark. (N. P.) 205, an arrest on mesne process.

(*q*) Roger's case, 1735, Lord Hardwicke. Fost. 311, 312.

(*r*) Repealed by the County Courts Act, 1888 (51 & 52 Vict. c. 43).

the County Court was as much a justification to the officer by virtue of the Act, as a writ of execution out of a superior Court to a sheriff (*s*). And on an indictment for assaulting B., a messenger of a district Court of Bankruptcy, it appeared that B., in consequence of information that certain ironstone belonging to J. and O. who were bankrupts was lying in a boat, obtained a warrant from two justices to search for the property of J. and O., and went with this warrant to search the boat, whereupon the assault was committed. Erle, J., held that it was unnecessary to shew the validity of the proceedings prior to the grant of the justices' warrant (*t*). So, even if the warrant of a justice of peace is not in strictness lawful, *e.g.*, if it does not express the cause with sufficient particularity; yet, if the matter is within his jurisdiction, the killing of the officer executing the warrant will be murder (*u*). In all cases of process, both civil and criminal, the falsity of the charge contained in such process does not excuse or extenuate killing the officer; for every man is bound to submit himself to the regular course of justice (*v*). Thus the person executing an escape warrant was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it (*w*).

A sergeant at mace in the City of London having authority, according to the custom of the city, by entry in the porter's book at one of the counters (*x*), to arrest M. for debt, arrested him between five and six in the evening of November 8, saying at the same time, 'I arrest you in the King's name, at the suit of R.'; but he did not produce his mace. M. resisted, and one of his companions killed the officer. Upon a special verdict it was urged that the arrest in the night was illegal, that the sergeant should have shewn his mace, and that a custom stated in the verdict to arrest without process first against the goods was illegal: but the objections were overruled (*y*).

A justice for the county of Herts issued his warrant, directing a constable to arrest J. H., charged with stealing a mare. Armed with this warrant the constable went to Smithfield in the City of London, and there arrested R. H., who was the party against whom information had been given, and against whom the magistrate intended to issue his warrant and who was supposed to be called J. H.; his name, however, was really R. H., J. H. being the name of his father. There was no proof that a felony had been committed. The person who made the charge before the justice pointed out R. H. as the man who had stolen the mare, and a person present said that his name was J. H., and there was clearly evidence to go to the jury that R. H. was the man intended to be taken up. Coltman, J., told the jury that the law would not justify the constable's

(*s*) R. *v.* Davis, L. & C. 64, Williams, J.

(*t*) R. *v.* Roberts, 4 Cox, 145. His ruling was based on 6 Geo. IV. c. 16, s. 29, repealed in 1849 (12 & 13 Vict. c. 106).

(*u*) 1 Hale, 460. It is said, however, that this must be understood of a warrant containing all the essential requisites of one. 1 East, P. C. 310, and see R. *v.* Hood, *post*, p. 740 note (*z*). 1 Hale, 457. 1 Hawk. c. 31, s. 64. Fost. 312. 1 East, P. C. 310. Sir Henry Ferrers' case, Cro. Car. 371.

(*v*) 1 East, P. C. 310.

(*w*) Curtis's case, Fost. 135. And see Fost. 312.

(*x*) Prisons attached to the Sheriff's Courts for the City, courts now represented by the City of London Court.

(*y*) Mackalley's case, 9 Co. Rep. 65 *b*.

act, the warrant being against J. and not against R., although R. was the party intended to be taken; that a person cannot be lawfully taken under a warrant in which he is described by a name that does not belong to him, unless he has called himself by the wrong name. The direction was held right (*z*).

Where a constable of the county of Worcester apprehended a man in the city of Worcester under a warrant issued by county justices and not backed by any justice for the city (which has a separate commission), and not after a pursuit out of the county, it was held that the arrest was illegal (*a*).

A warrant which commanded the constable to apprehend a prisoner, and bring him before a justice 'to answer to all such matters and things as on Her Majesty's behalf shall be objected against him on oath by M. A. W., for an assault committed on her'; was held bad, for it did not state any information on oath that any assault had been committed (*b*). And where a warrant of a judge of the Court of Queen's Bench directed certain officers to apprehend a person 'and him safely keep, to the end that he may become bound and find sufficient sureties to answer' an indictment for a conspiracy, 'and to be further dealt with according to law'; it was held bad for not directing that the party should be taken before some judge or justice for the purpose of finding sureties (*c*).

Resisting Arrest or Detention Effected without Warrant.—An arrest unlawfully made without warrant is not made lawful by a warrant taken out afterwards (*d*).

A prisoner had produced a forged bank note; and his conduct created a suspicion that he knew it to be forged, he was apprehended, and delivered with the note to a constable on a charge that 'he had a forged note in his possession' (*e*). While thus in custody he shot and wounded the constable. On an indictment under 43 Geo. III., c. 58 (rep.), it was argued that the charge imported no legal offence, and the arrest illegal, and that killing the officer (if that had taken place) would have been only manslaughter. But it was held that in such a charge the same precision was not required as in an indictment; and that the charge must be considered as imputing to the prisoner a guilty possession (*f*).

On an indictment of B. for wounding with intent to prevent his lawful apprehension, Talfourd, J., held, that to support this charge it was enough

(*z*) Hoye *v.* Bush, 1 M. & Gr. 775. He also directed them that his powers as constable to arrest without warrant were limited to the district for which he was chosen. As there was no authority to apprehend Richard H. under the warrant, and the constable was out of his district, he was in the same situation as a private individual. He might have defended himself by proving that the felony had been committed by Richard H., see p. 780, Tindal, C.J. In R. *v.* Hood, 1 Mood. 281, a warrant which directed the arrest of —— Hood for assault was held bad for omitting the Christian name without assigning any reason for the omission, or giving some particulars whereby the person intended could be distinguished. In a civil action a writ of execution must correspond with the judgment in the name of the defendant, although he is therein misnamed and the sheriff is bound notwithstanding to execute the writ. Reeves *v.* Slater, 7 B. & C. 486. Fisher *v.* Magnay, 6 Scott (N. R.) 588.

(*a*) R. *v.* Cumpton, 5 Q.B.D. 341.

(*b*) Caudle *v.* Seymour, 1 Q.B. 889.

(*c*) R. *v.* Downey, 7 Q.B. 281.

(*d*) 2 Hawk. c. 13, s. 9.

(*e*) It does not state that the prisoner knew the note to be forged, which is an essential element in the offence.

(*f*) R. *v.* Ford, R. & R. 329, and MS. Bayley, J.

that B. was lawfully apprehended, and that the apprehension was in fact lawful; and that the question whether or not B. believed it to be lawful, was irrelevant (*g*).

In R. *v.* Thompson (*h*), on an indictment for stabbing with intent to murder, it appeared that the prisoner, a journeyman shoemaker, applied to his master for some money, which was refused until he should have finished his work; and that he applied again subsequently, was again refused, and became abusive, upon which his master threatened to send for a constable. The prisoner then refused to finish his work; and said that he would go up stairs and pack up his tools, and that no constable should stop him. He went up stairs, came down again with his tools, and drawing from the sleeve of his coat a naked knife, said he would do for the first constable that offered to stop him; he was ready to die, and would have a life before he lost his own. He then made a flourishing motion with the knife, put it up his sleeve again, and left the shop. The master then applied to the constable to take the prisoner into custody; making no charge further than saying that he suspected the prisoner had tools of his, and was leaving his work undone. The constable said he would take him if the master would give charge of him; and they proceeded together to the yard of an inn, where they found the prisoner in a public privy, as if he had occasion there; the privy had no door to it. The master said, 'That is the man, and I give you charge of him'; upon which the constable said to the prisoner, 'My good fellow, your master gives me charge of you, you must go with me.' The prisoner, without saying anything, presented the knife, and stabbed the constable under the left breast, and attempted to make several other blows, which the constable parried with his staff. The prisoner having been found guilty, upon a case reserved, the majority of the judges (*i*) held, that as an actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only; and that therefore the conviction was wrong (*j*).

Upon an indictment for maliciously stabbing with intent to do grievous bodily harm, it appeared that the prisoners had attempted to push a man into a ditch, upon which a scuffle ensued. The prisoners walked on, and a man complained to H., a watchman, that they had attempted to rob him, desired him to arrest them, followed them till H. came up to them, and then said, sufficiently loud for them to hear, 'That's them.' There was no evidence of any attempt by the prisoners to rob the man, and the only person who saw the transaction negatived it. When H. came up to the prisoners, all he said to them was, 'You must go back and come along with me.' He did not explain why, nor was any charge against the prisoners stated. He was dressed in a watchman's coat, and had his lantern. W., one of the prisoners, said, 'Keep off,' and drew a

(*g*) R. *v.* Bentley, 4 Cox, 408.

(*h*) 1 Mood. 80.

(*i*) Abbott, C.J., Graham, B., Bayley, J., Park, J., Garrow, B., Hullock, B., Littledale, J., and Gaselee, J.

(*j*) Holroyd and Burrough, JJ., thought otherwise. See Rafferty *v.* The People, 69 Ill. 111; 12 Cox, 617.

sharp instrument from his side; the watchman said, 'It's of no use, you must go back.' A third man put himself in a position as if to strike the watchman, and W. made a spring at him, and caught one of the skirts of his coat; the watchman pulled out his staff, and turned at the prisoners, and they came at him. The watchman struck at W., and hit him on the thick part of the arm with his staff; W. immediately stabbed the watchman, and another of the prisoners followed the watchman, and made another blow at him with another knife. The place where the prisoners attempted to push the man into the ditch was within the limits of the hamlet, for which H. was watchman, but the place where he overtook the prisoners did not appear to be within those limits. The jury found that the prisoners knew H. to be a watchman. On a case reserved nine of the judges held that the watchman could legally arrest the prisoners without saying that he had a charge of robbery against them, though the prisoners had in fact done nothing to warrant the arrest; and that, had death ensued, it would have been murder (*k*).

Upon an indictment for maliciously cutting W., it appeared that a man travelling upon the highway told the constable that a man coming along the road had been ill-using him, and charged the constable, in the prisoner's hearing, to take the prisoner before a magistrate for so misusing him; on which the constable ordered the prisoner to stop for insulting a man on the road, laid hold of him, tapped him on the shoulder, said he was his prisoner, and that he should take him to a magistrate, and ordered W. to assist him, which W. did, and to which the prisoner submitted. No particulars of what the supposed ill-usage or insult consisted of appeared in evidence, nor did they pass in the constable's view or hearing, and therefore the apprehension and detainer appeared clearly thus far to have been unlawful. Afterwards, and whilst the prisoner was thus in custody, and before they found a magistrate, the prisoner, in the constable's presence, struck the man who had made the charge against him, and the constable then also told the prisoner he should take him before a magistrate. Some time afterwards, as they were proceeding along to a magistrate's, the prisoner ran away, and attempted to escape, but was pursued by W. by the constable's order; and being overtaken by him, refused to stop, asking W. where his authority was, who said it was in his hand, alluding to a stick, which W. then had in his hand, and which the prisoner had given up to him at the commencement of the detainer; and without further information, when W. was going to take hold of him, the prisoner told him if he would not let him go he would stab him, and then gave him the cut in the face, for which he was indicted. On a case reserved the judges held that the original arrest was illegal, and that the recaption would have been illegal, and therefore the case would not have been murder if death had ensued (*l*).

Where on an indictment for wounding with intent to disable, it appeared that the prosecutor was a sergeant of police and the prisoner a constable under him, and that the prosecutor went, as it was his duty,

(*k*) R. *v.* Woolmer, 1 Mood. 334. Four judges were of a contrary opinion, viz., Bayley, B., Park, Littledale, and Bosanquet, JJ.

(*l*) R. *v.* Curvan, 1 Mood. 132.

to the house of the prisoner to see that he was correct in the discharge of his duty, and the prisoner had some altercation with him, and the prosecutor left the house, the prisoner followed and struck him, and fell when attempting to strike him a second time, and the prosecutor then went away for assistance, and returned to the prisoner's house with two police constables, when the prisoner was not at home: they returned again in two hours and saw him, and the prosecutor told him he must go with him to the station; the prisoner said he would not stir an inch that night; the prosecutor attempted to take hold of him, whereupon the prisoner inflicted a severe wound upon him; and the jury found him guilty of wounding with intent to prevent his apprehension. Upon a case reserved, it was held, that the apprehension was not lawful; for the assault was committed at another time, and there was no probability of its being renewed (*m*).

Upon an indictment for assaulting a police officer in the execution of his duty, it appeared that the officer was informed that a disturbance was going on at P., and going there found the prisoner's wife sitting crying under a hedge opposite their cottage and went with her into the cottage, and found the prisoner intoxicated, but sufficiently sober to know what he was doing. In his hearing, the wife stated to the officer that the prisoner had knocked her down and beaten her shamefully. One C. was present and stated that (as was the fact) he had seen the prisoner knock his wife down and jump upon her. The prisoner said nothing on hearing these statements. The officer left the cottage, and the prisoner and his wife in it. The prisoner then closed the shutters and locked the door. The officer heard the prisoner using threatening language to his wife, and saw her run out of the cottage. The prisoner said he would lock her out all night, and thereupon she returned to the cottage. The officer heard the prisoner again use very violent language and opened the shutters, and saw the prisoner take up a shovel and hold it in a threatening attitude over his wife's head, and heard him say, 'If it was not for the bloody policeman outside I would split your head open, for 'tis you that sent for the policeman.' The prisoner was near enough to have struck his wife when he raised the shovel. Shortly afterwards he desired her to go to bed, and she replied, 'I can't go up stairs in this state; I don't know one hour from another when I might be murdered.' Prisoner said with an oath, 'I'll leave you altogether,' and went out. This was about twenty minutes after he had raised the shovel. He went on the highway towards his father's house, and when he had walked about seventy yards from his cottage, the officer took him into custody. He had no warrant. C. had been with the officer all the time these things occurred, and insisted upon his taking the prisoner into custody, because he thought it would not be safe to let him go back to his wife that night. The prisoner, on being taken into custody, assaulted the officer. And, upon a case reserved, it was held that the officer was in the execution of his duty when he was assaulted. It is not necessary that a policeman should arrest a man at the very moment he sees an assault committed; it is quite sufficient if he arrests recently after the right to do so arises.

(*m*) R. *v.* Walker, Dears, 358. Cf. R. *v.* Marsden, L. R. 1 C. C. R. 131.

It could not be said that because the prisoner was going away from the house the constable was bound to come to the conclusion that the danger was over. As a conservator of the peace, he had authority to take the prisoner into custody, having so recently witnessed the commission of an assault. Here there was a continuing danger and a continuing pursuit, and it was the duty of the officer to exercise his authority in this case in order to prevent a further breach of the peace, and also that the prisoner might be dealt with according to law in respect to the assault he had so recently committed (*n*).

Disturbances on Private Premises.—In the execution of their duties as peace officers constables are not confined to disturbances, &c., on highways or in public places. If a person goes into a house or is in it and makes a noise or disturbs the peace of the family, even if no assault or battery has been committed, the master of the house may call in a policeman to turn the disturber out (*o*): *à fortiori* if a serious fight or attempt at fighting is going on in the house. The police have power under statute to enter licensed refreshment houses (*p*) and to enter licensed public-houses to prevent or detect any violation of the Licensing Acts (*q*), 1872 and 1874, if he has reasonable grounds of suspicion (*r*). Apart from these statutes, if a police officer hears a disturbance in a public house at night and the door is open he may enter (*s*), but has no authority to turn anyone out of a public-house unless he has committed an offence punishable by the law (*t*): nor to prevent a guest from going to a room in the house unless a breach of the peace is likely to occur (*u*). He may, however, turn out a person who in a public-house makes a noise and disturbance calculated to alarm the neighbourhood (*v*), and if he will not go quietly away may arrest him (*v*).

A policeman between eleven and twelve o'clock at night was called upon to clear a beer-house, which he did, and then went into the street where the prisoner and many others were standing near the door. The prisoner refused to go home, and used very abusive and violent language, and the policeman laid his hand on his shoulder gently, and told him to go away, on which the prisoner immediately stabbed him with a knife in the throat. It was held that if the policeman had died, this would have been murder; for if a policeman had heard any noise in the beer-house at such a time of night, he would have acted within the line of his duty if he had gone in and insisted that the house should be cleared; and

(*n*) R. *v.* Light, Dears & B. 332.

(*o*) See Shaw *v.* Chairitie, 3 C. & K. 21, Campbell, C.J. In this case the butler in a house had quarrelled with the coachman, and abused and assaulted the master of the house. Cf. Wheeler *v.* Whiting, 9 C. & P. 262, Patteson, J. Howell *v.* Jackson, 6 C. & P. 723, Parke, B. These were cases of turning quarrelsome persons out of public-houses.

(*p*) 23 & 24 Vict. c. 27, *s.* 18.

(*q*) 37 & 38 Vict. c. 49, *s.* 16, under which any constable may for the purpose of preventing and detecting the violation of any of the provisions of the Licensing Acts, 1872 and 1874, which it is his duty to enforce, at all times enter any licensed premises or any premises in respect of which an occasional licence is in force, and penalties are incurred by refusing or failing to admit a constable who in the execution of his duty demands to enter. See also Sealey *v.* Tandy [1902], 1 K. B. 296.

(*r*) Duncan *v.* Dowdie [1897], 1 Q.B. 575.

(*s*) R. *v.* Smith, 6 C. & P. 136, Tindal, C.J. See 35 & 36 Vict. c. 94, ss. 18, 25: 37 & 38 Vict. c. 49, *s.* 16.

(*t*) Wheeler *v.* Whiting, *ubi supra*.

(*u*) R. *v.* Mabel, 9 C. & P. 474.

(*v*) Howell *v.* Jackson, 6 C. & P. 723, Parke, B.

much more so, if he was required by the landlady; and after that was done, if a knot of people remained in the street, and the crowd increased in consequence of their attention being drawn to the clearing of the house, and if anything was saying or doing likely to lead to a breach of the peace, the policeman was not only bound to interfere, but it would have been a breach of his duty if he had not done so, and if in so doing he ordered the people to go away, and any one was unwilling, and defied the policeman, and used threatening language, the policeman was perfectly justified in insisting upon that person going off; and if he had warned him several times, and he would not go away, and used threatening language if anyone ventured to touch him, the policeman was entirely justified in using a degree of violence to push him from the place, in order to get him to go home; and therefore anything that he did would not be in the nature of an assault, but would be an act in the discharge of his duty, and therefore any blow that was given afterwards with a cutting instrument would be precisely the same as if it had been given without anything being done by the policeman (*w*).

Upon an indictment for assaulting a policeman in the execution of his duty, it appeared that the policeman was called into a public-house to put an end to a disturbance which the defendant was making; he and the landlady were at high words; W. L. interfered, and the defendant was in the act of squaring at him when the policeman desired the defendant not to make a disturbance; the defendant, who was at the side of the bar, then attempted to go into the parlour, in which a person was sitting; as the defendant attempted to go into the parlour, the policeman collared him, and prevented him going in; he then struck the policeman; neither the landlord or landlady had desired the policeman to turn the defendant out of the house. Parke, B.: 'The policeman had a right to be in the house without being called upon either by the landlord or landlady to interfere, but under the circumstances he had no authority to lay hold of the defendant, unless you are satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlour; and if you think it was not, it was no part of the policeman's duty to prevent the defendant from going into the parlour' (*x*).

Breaking Doors or Windows.—The right of officers of the law and others to break the doors and windows of dwelling houses or other buildings in order to make an arrest, execute process, or preserve the peace, may be thus stated. Where the right exists it may not be exercised unless there has been a notice of the business on which the officers are come, a demand to enter and a refusal to admit (*y*). No precise words are needed but enough to give notice that entry is sought under proper authority (*z*).

A. *Criminal Cases.*—Where treason or felony has been committed, or a dangerous wound given, the offender's house is no sanctuary for him;

(*w*) R. *v.* Hems, 7 C. & P. 312, Williams, J.

(*x*) R. *v.* Mabel, 9 C. & P. 474, Parke, B.

(*y*) Fost. 320. 2 Hawk. c. 14, s. 1. 1 East, P. C. 324. The rule applies in misdemeanors and apparently in all criminal cases. Launock *v.* Brown, 2 B. & Ad. 592. Burdett *v.* Abbott, 14 East, 157.

(*z*) Cf. R. *v.* Curtis, Fost. 135. In this case two officers went with an escape warrant to the workshop of A. to arrest him. They told him of the warrant, demanded entrance, and on their breaking in, one was killed.

and the doors may be forced, after notification, demand, and refusal (*a*). And, where a minister of justice comes armed with process, founded on a breach of the peace, doors may be broken (*b*). And in the case of any insults to a Court of justice, on which process of contempt is issued, the officer charged with the execution of the process may break open doors, if necessary, in order to execute it (*c*). And the officer may act in the same manner upon a *capias utlagatum*, or *capias pro fine* (*d*), or upon a *habere facias possessionem* (*e*). The same force may be used where a forcible entry or detainer is found by inquisition before justices of the peace, or appears upon their view (*f*); and also where the proceeding is upon a warrant of a justice of peace, for levying a penalty on a conviction grounded on any statute which gives the whole or any part of such penalty to the King (*g*).

Though a felony has actually been committed, breaking doors to arrest a person suspected of the crime cannot be justified unless the officer comes armed with a justice's warrant (*h*), or if the officer acts without warrant he does so at his peril (*i*).

A plea justifying the entering a house without warrant, *the door being open*, on suspicion of felony, ought distinctly to shew the purpose for which the house was entered, viz., either in search for the stolen property or to arrest the plaintiff, as well as that there was reason to believe that the stolen property, or the plaintiff, was there (*j*).

If there is a quarrel or fight in a house, the doors of which are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demands entrance, and is refused by those within, who continue the fight, the constable may break open the doors to keep the peace, and prevent the danger (*k*); and if there is disorderly drinking or noise in a house at an unseasonable time at night, especially in inns, taverns, or alehouses, the constable on demanding, and being refused entrance, may break open the doors to see and suppress the disorder (*l*). Where a quarrel or fight is going on in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers in either case, he may justify breaking open the doors (*m*).

(*a*) Fost. 320. 1 Hale, 459. And see 2 Hawk. c. 14, s. 7, where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant by a constable or private person.

(*b*) Fost. 320. 1 Hale, 459. 2 Hawk. c. 14, s. 3. Curtis's case, Fost. 135.

(*c*) Burdett *v.* Abbott, 14 East, 1, 157, where the process of contempt proceeded upon the order of the House of Commons. Harvey *v.* Harvey, 26 Ch.D. 644, a writ of attachment for non-compliance with an order to deliver over deeds; and see Willes, 459; Semayne's case, 9 Co. Rep. 91; Cro. Eliz. 909; 78 E. R. 1131; and Briggs' case, 1 Rolle Rep. 336; 81 E. R. 526.

(*d*) 1 Hale, 459. 2 Hawk. c. 14, s. 4. These writs and other writs wherein the King has interest contain a *non omittas* clause. Harvey *v.* Harvey, 26 Ch.D. 649, 655.

(*e*) 1 Hale, 458. 5 Co. Rep. 95 *b*.

(*f*) 2 Hawk. c. 14, s. 6

(*g*) 2 Hawk. c. 14, s. 5. See s. 43 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

(*h*) Fost. 321. 2 Hawk. c. 14, s. 7. According to earlier authorities the constable could break in without warrant on reasonable suspicion of felony. 1 Hale, 583. 2 Hale, 92. Y. B. 13 Edw. IV. 9 *a*.

(*i*) 1 East, P. C. 322.

(*j*) Smith *v.* Shirley, 3 C. B. 142.

(*k*) 2 Hale, 95.

(*l*) Id. ibid.

(*m*) 2 Hawk. c. 14, s. 8.

B. *Civil Suits.*—In civil suits, on the principle that a man's house is his castle, an officer cannot in general justify the breaking open of an outer door or window to execute the process, *e.g.* a *fieri facias* (*n*). If he does so, he will be a trespasser; and if the occupier of the house resists him, and in the struggle kills him, the offence will be only manslaughter (*o*); or if the occupier of the house does not know him to be an officer, and has reasonable ground of suspicion that the house is broken with a felonious intent, the killing will not be felony (*p*).

The maxim above stated is limited (*q*) in its application (1) to the breach of outward doors or windows; (2) to a breach of the house for the purpose of arresting the occupier or any of his family; and (3) to arrests in the first instance.

1. *Outward* doors or windows are those intended for the security of the house against persons from without endeavouring to break in (*r*). If the officer finds the outward door open, or it is opened to him from within, he may then break open the *inward* door, if he finds that necessary to execute his process (*s*). Thus, an officer, having entered peaceably at the outer door of the house, has been held justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest him (*t*). And it has been held that a sheriff's officer in execution of *mesne process*, who had first gained peaceable entrance at the outer door of the house of A., might break open the windows of the room of B., a person residing in such house, who had refused to open the door of the room after being informed by the officer that he had a warrant against him (*u*). But if the party, against whom the process is issued, is not within the house at the time, the officer can only justify breaking open inner doors in order to search for him, after having first demanded admittance (*v*). If the person or the goods of the defendant are in the house which the officer has entered, he may break open any door within the house without further demand (*w*). If, however, the house is the house of a stranger, and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within before he breaks open any inner door; as, if they are not, he will not be justified (*x*). Where an outward door was in part open (being divided into two parts, the lower hatch of which was closed, and the upper part open), and the officer put his arm over the hatch to open the part which was closed, upon which a struggle ensued between him and a friend of the prisoner, and, the officer prevailing, the prisoner shot at and killed him; it was held to be murder (*y*).

(*n*) R. *v.* Cook, Cro. Car. 537. Fost. 319. But the sheriff may, if necessary, in order to execute a writ of *habere facias possessionem*, break open the outer door if he be denied entrance by the tenant. Semayne's case, 5 Co. Rep. 91. Harvey *v.* Harvey, 26 Ch.D. 655.

(*o*) Cro. Car. 537.

(*p*) 1 Hale, 458. 1 East, P. C. 321, 322.

(*q*) Fost. 319, 320, says that the rule has been carried as far as the true principles of political justice will warrant, and that it will not admit of any extension.

(*r*) Fost. 320.

(*s*) 1 Hale, 458. 1 East, P. C. 323.

(*t*) Lee *v.* Gansel, 1 Cowp. 1.

(*u*) Lloyd *v.* Sandilands, 2 Moore (C. P.), 207; 8 Taunt. 250. See Hodgson *v.* Towning, 5 Dowl. P. R. 410.

(*v*) Ratcliffe *v.* Burton, 3 B. & P. 223.

(*w*) Hutchinson *v.* Birch, 4 Taunt. 619, Gibbs, J.

(*x*) Cook *v.* Birt, 5 Taunt. 765. Johnson *v.* Leigh, 6 Taunt. 246.

(*y*) R. *v.* Baker, 1 Leach, 112. 1 East, P. C. 323. There was proof of a previous

The privilege only extends to the *dwelling house*, including it would seem all buildings within the curtilage, and considered as parcel of the dwelling-house at common law (*z*).

2. The privilege in respect to outer doors or windows is confined to cases where the breach of the house is made in order to arrest *the occupier or any of his family*, who have their ordinary residence there: for if a stranger, whose ordinary residence is elsewhere, upon pursuit, takes refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary (*a*). But where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him there; unless (it would seem) the parties act under a magistrate's warrant (*b*).

If a sheriff's officer enters the house of the defendant for the purpose of arresting him or taking his goods, he is justified if he has reasonable grounds for believing that the party or his goods are there (*c*).

3. The privilege is also confined to *arrests in the first instance*. For if a man who has been legally arrested (*d*) escapes from the officer, and takes shelter (though in his own house) the officer may, upon fresh pursuit, break open doors in order to retake him, having first given due notice of his business, and demanded admission, and been refused (*e*). If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant,

resolution in the prisoner to resist the officer, whom he afterwards killed in attempting to attach his goods in his dwelling-house, in order to compel an appearance in the County Court. The point reserved related to the legality of the attachment, *Vide ante*, p. 738.

(*z*) See Penton *v.* Brown, 1 Sid. 186. See the authorities as to what is comprehended under the term dwelling-house at common law, under the titles of 'Burglary' and 'Arson,' *post*, Vol. ii. pp. 1075, 1783.

(*a*) Fost. 320. 5 Co. Rep. 93. In 1 Smith's Leading Cases (11th ed.) p. 112, in the notes to Semayne's case, after citing the observations of Lord Loughborough in Sheere v. Brookes, 2 H. Bl. 120, it is said that 'it seems to follow from this that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal.'

(*b*) 2 Hale, 103. Fost. 321. 1 East, P. C. 324. Mr. Smith, in the same note, says: 'There may, perhaps, be another case in which the sheriff might justify entering the house of a stranger, upon bare suspicion viz., if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house for the purpose of favouring his escape, while the officers should be detained in searching or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff who entered under the false supposition thus induced as a trespasser; or, perhaps, such conduct might be held to amount to a licence to the sheriff to enter.' It certainly is reasonable in such a case that the party should not be permitted to shew that in fact the defendant was not concealed in his house, and this would be in accordance with the principles established by Pickard *v.* Sears, 6 A. & E. 469. Heane *v.* Rogers, 9 B. & C. 577, 586. Kieran *v.* Sanders, 6 A. & E. 515, and Gregg *v.* Wells, 10 A. & E. 90, in which last case it was held that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact, which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.' C. S. G.

(*c*) Johnson *v.* Leigh, 6 Taunt. 246. In Morrish *v.* Murray, 13 M. & W. 52, officers were held not justified in entering and searching the house of a stranger to arrest a man on *capias ad satisfaciendum* if he was not in the house at the time, though he had resided there, and the officers had reasonable cause to suspect that he was there.

(*d*) Laying hold of the prisoner and pronouncing the words of arrest, is an actual arrest. Fost. 320. But bare words will not make an arrest; the officer must actually touch the prisoner. Genner *v.* Sparkes, 1 Salk. 79; 91 E. R. 74. Berry *v.* Adamson, 6 B. & C. 528.

(*e*) Fost. 320. Genner *v.* Sparkes, *ubi supra*. 1 Hale, 459. 2 Hawk. c. 14, s. 9.

and the officer will not be authorised to break open doors in order to retake a prisoner where the first arrest has been illegal (*f*). Therefore, where an officer had made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistants, who attempted to force the door, when the party within shot one of the assistants: the killing was ruled to be only manslaughter (*g*).

Where an officer or his assistants, having entered a house in the execution of their duty, are locked in, they may break open the doors to regain their liberty (*h*). So where a sheriff being lawfully in a house makes a lawful seizure of the goods of the owner of the house, and cannot take the goods out of the house without opening the outer door, and neither the owner or anyone else is there so that he can request them to open the door, he may break the door open to take out the goods (*i*).

Where officers in order to execute process illegally break open doors or windows, it is not clear whether to kill them is murder or manslaughter. In Cook's case (*j*) a bailiff having a warrant to arrest a person upon a *capias ad satisfaciendum*, came to his house, and gave him notice; upon which the person threatened to shoot him if he did not depart; the bailiff did not depart, but broke open the window to make the arrest, and the person shot him, and killed him. This was held not to be murder, because the officer had no right to break the house; but manslaughter, because the party knew the officer to be a bailiff.

In Curtis' case (*k*), upon some officers breaking open a shop door to execute an escape warrant, the prisoner, who had previously sworn that the first man that entered should be a dead man, killed one of them immediately by a blow with an axe. A few of the judges to whom this case was referred were of opinion that this would have been murder, even if the warrant had not been legal, and the officers could not have justified the breaking open the door, upon the grounds of the brutal cruelty of the act, and of the deliberation manifested by the prisoner, who, looking out of a window with the axe in his hand, had sworn, before any attempt to enter the shop, that the first man that did enter should be a dead man.

The latter opinion seems correct; for the status of the officers was known and the breaking was at most a trespass and not in the nature of burglary or felonious house-breaking, and the previous threats afforded evidence of deliberation.

The fact that a warrant is illegal (*l*) may make an attempt to execute it a provocation: but does not necessarily reduce the offence of killing the officer in resisting execution from murder to manslaughter. If the execution can be resisted without proceeding to extremity of violence (*m*), use of great and unnecessary violence unsuited to the provocation given, or proof of premeditated previous threats or express malice would seem

(*f*) 1 East, P. C. 324.
(*g*) Stevenson's case, 19 St. Tr. 846.
(*h*) 2 Hawk. c. 14, s. 11. 1 East, P. C. 324.
(*i*) Pugh *v.* Griffith, 7 A. & E. 827.
(*j*) 1 Hale, 458. Cro. Car. 537. W. Jones, 429.
(*k*) [1758] Fost. 135.
(*l*) Where the warrant is for felony the officer could apparently justify at common law. See Hoye *v.* Bush, 1 M. & Gr. 775, Tindal, C.J. Beckwith *v.* Philby, 6 B. and C. 635.
(*m*) See R. *v.* Thompson, 1 Mood. 80.

to make killing in such a case murder (*n*). The true principle seems to be that stated in East that the illegality of an attempt to arrest merely puts the officer on the same footing as any other wrongdoer (*o*).

When due execution of the law by its known officer is resisted or the officers are attacked to prevent their executing the law, as by arresting or detaining in custody a person when they are legally entitled to take and hold, the persons actually concerned in the resistance or attack are guilty of murder. The person arrested or held is not liable if he yields himself and takes no part in the resistance or attack: but is liable if he does an act in aid or countenance of the attackers or in execution of a common scheme of resistance to the law (*p*). Questions have arisen as to the law where a stranger intervenes in a struggle to rescue an offender from officers of the law or to resist arrest. It would seem that to kill the stranger would be murder if he intervened with the object of preserving the peace, aiding the officers of the law, and preventing mischief; but that if he intervened in aid of the rescuers and killed an officer of the law in the struggle, it would be murder by the stranger (*q*).

Every person who wilfully engages in a breach of the peace by assaulting another is bound at his peril first to satisfy himself of the justice of the cause which he espouses; and if he happens to take the part of those resisting the law and to kill an officer of the law or a person acting in his aid or a person lawfully acting in support of the law, it is difficult to extenuate the offence by proof that the slayer had not knowledge or notice of the status of the party killed (*r*).

When the warrant or other authority under which a peace officer is acting is not sufficient to justify him in arresting or detaining the person whom he has taken or is holding, the officer is not entitled to the peculiar protection afforded by the law to officers acting in the execution of their duty, and if he is killed the crime may be reduced to manslaughter when

(*n*) See R. *v.* Patience, 7 C. & P. 775, Parke, B.; R. *v.* Curvan, 1 Mood. 132, and the observations in Roscoe, Cr. Ev. (13th ed). 644 on Stockley's case; and Curtis' case, Fost. 356.

(*o*) 1 East, P. C. 328. As to the Scots law *vide* Alison, Cr. L. Sc. 25, 28; 1 Hume, 250. In the Illinois case of Rafferty *v.* The People (69 Ill. 111; 12 Cox, 617), it was held that where the unlawful arrest of any person is attempted he may kill his assailant deliberately.

(*p*) See Sir Charles Stanley's case, Kel. (J.) 86; 1 Sid. 159. 1 East, P. C. 296. R. *v.* Whithorne, 3 C. & P. 394. R. *v.* Rice [1902], 4 Ontario L. R. 233, *post*, p. 754, note (*l*). 1 East, P. C. 318. See Jackson's case, 1 Hale, 464, where of four robbers being pursued upon hue and cry one turned on his pursuers and, refusing to yield, killed one of them. It was considered that the resistance was part of a common scheme of resistance, and that the other robbers were liable as principals in murder, though they were at some little distance. One of the gang arrested before the killing was held not responsible unless it could be proved that after his arrest he encouraged the other to kill the pursuers.

(*q*) Holt, C.J., and Rooksby, J., at Hertford, *temp.* Will. III. *ad incipium* MS. Tracey, 53; 1 East, P. C. 296; and see Fost. 353. In R. *v.* Willis, 1 Salk. 334, it was ruled that if a man began a riot in which an officer was killed he would be liable as a principal murderer if present at the time of the slaying, though he did not commit the fact. This depends on how far the killing was part of or a natural consequence of the concerted action which led to the riot; *vide ante*, Bk. i. c. v.; Bk. vi. c. i.

(*r*) The older authorities and dicta on this subject are collected and discussed, 1 Hawk. c. 31, s. 59; 1 East, P. C. 316, 317. In Sir C. Stanley's case (Sid. 159; Kel. (J.), 86; East, P. C. 318) intervention against a bailiff with the object only to keep the peace was held manslaughter; but in the report in Keble, 584, it is said that it was adjudged, that if any *casually* assist against the law, and kill the bailiff, it is murder, especially if he knew the cause of the bailiff's action.

the killing is sudden and without premeditation and is attended by circumstances affording reasonable provocation (*s*). The proposition above stated is now accepted as correctly declaring the law, and as reconciling the divergences of opinion among former judges upon the question how far the person arrested, or third persons, especially mere strangers interfering on behalf of a person illegally arrested or detained, are entitled to rely on the illegality of the arrest to extenuate their guilt in killing the officer.

In Ferrers' case (*t*), Sir Henry Ferrers being arrested for debt, upon an illegal warrant, his servant, in seeking to rescue him, as was pretended, killed the officer; but, upon the evidence, it appeared clearly that Sir Henry Ferrers, upon the arrest, obeyed, and was put into a house before the fighting between the officer and his servant: wherefore he was found not guilty of murder or manslaughter.

In Hugget's case (*u*), B. and two other constables impressed a man without a warrant for so doing; to which the man quietly submitted, and went along with them. The prisoner, with three others, seeing them, instantly pursued them, and required to see their warrant; on which B. shewed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at B.; whereupon B. and his two companions drew their swords, and a fight ensued, in which Hugget killed B. But this case is stated very differently by Lord Hale, as having been under the following circumstances:—A press-master seized B. for a soldier; and, with the assistance of C., laid hold of him. D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C.; and by the advice of eight judges against four, it was ruled that this was but manslaughter.

In R. *v.* Tooley (*v*) B., who was a parish constable, came into another parish, where he was no constable, and consequently had no authority (*w*); and there arrested a woman, under suspicion of being a disorderly person, but who had not misbehaved herself, and against whom B. had no warrant. The prisoners came up; and though they were all strangers to the woman drew their swords, and assaulted B., for the purpose of rescuing the woman from his custody; upon which he shewed them his constable's staff, declared that he was about the Queen's business, and intended them no harm. The prisoners then put up their swords; and B. carried the woman to the round-house in Covent Garden. A short time afterwards, the woman being still in the round-house, the prisoners drew

(*s*) Opinion of Blackburn and Mellor, J.J., in R. *v.* Allen, 17 L. T. (N. S.) 222; Steph. Dig. Cr. L. (6th ed.) 421.

(*t*) Cro. Car. 371. The *ratio decidendi* was that the warrant was bad for misdescribing a baronet as a knight. In the report in W. Jones the ruling is said to have been that the offence was not murder either in master or servant, because the warrant was bad.

(*u*) The fullest report is in Kel. (J.) 59, and see 1 Hale, 465. The minority considered the offence murder. The judges who held it manslaughter put the point as an endeavour to rescue, and that undue arrest or restraint of the liberty of any person is a provocation to all men of England. In R. *v.* Mawgridge, Kel. (J.) 136, Hugget's case is treated as having settled the law.

(*v*) 2 Ld. Raym. 1296: 92 E. R. 349.

(*w*) One judge only thought that Bray acted with authority, as he showed his staff, and that, with respect to the prisoners, he was to be considered as constable *de facto*.

their swords again, and assaulted B., on account of her imprisonment, and to get her discharged. B. called some persons to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners; upon which a person named D. came to his assistance; and before any stroke received, one of the prisoners gave D, while assisting the constable, a mortal wound. This case was elaborately argued, and the judges were divided in opinion; seven of them holding that the offence was manslaughter only, and five that it was murder. The seven judges who held that it was manslaughter thought that it was a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman and to rescue her who was unlawfully restrained of her liberty; and that it could not be murder, if the woman was unlawfully imprisoned (*x*); and they also thought that the prisoners, in this case, had sufficient provocation on the ground that if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, and much more where it is done under a colour of justice; and that, where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five judges who differed thought that, the woman being a stranger to the prisoners, it could not be a provocation to them; otherwise if she had been a friend or servant; and that it would be dangerous to allow such a power of interference to the mob. The majority of the judges relied on Hugget's case and Ferrers' case (*y*).

In R. *v.* Osmer (*z*) a man was arrested on a good warrant by a person described as sergeant at mace, who had no authority to execute it. The defendant was convicted of assaulting the sergeant, but the conviction was held bad, Ellenborough, C.J., saying: 'If a man without authority attempts 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 the purpose.'

In R. *v.* Phelps (*a*), on an indictment for the murder of a person who was assisting a police officer to take P. to the station house it appeared that P. was arrested on suspicion of having stolen potatoes from a garden. As the police had not found P. committing the offence, and it was not a felony, Coltman, J., ruled that the arrest was illegal and the killing manslaughter only.

The conclusions of the majority of the judges in Tooley's case were severely criticised by Foster, J., who considered that they were not warranted by Hugget's case or Ferrers' case, and carried the law in favour of private persons officiously interfering in cases of illegal arrest further than was warranted by sound reason or true policy (*b*). After observing that in Hugget's case (*c*) swords were drawn, a mutual combat ensued, the blood was heated before the mortal wound was given, and a rescue seemed to be practicable at the time the affray began; whereas, though in Tooley's case, the prisoners had, at the meeting, drawn their swords

(*x*) For this Yong's case, 4 Co. Rep. 40, and Mackalley's case, 9 Co. Rep. 65, were cited.

(*y*) *Ante*, p. 751.

(*z*) 5 East, 304.

(*a*) C. & M. 180, *ante*, p. 726. This case turned chiefly on 7 & 8 Geo. IV. c. 29, s. 63, re-enacted as 24 & 25 Vict. c. 96, s. 103.

(*b*) Fost. 312 *et seq.*

(*c*) *Ante*, p. 751.

against the constable unarmed, they had put them up again, appearing to be pacified, and cool reflection seeming to have taken place; and it was at the second meeting that the deceased received his death wound, before a blow was given or offered by him or any of his party; and also in that case there was no possibility of rescue, the woman having been secured in the round-house; he says, that the second assault on the constable seems rather to have been grounded upon resentment, or a principle of revenge, for what had before passed, than upon any hope or endeavour to assist the woman. He then proceeds: 'Now, what was the case of Tooley and his accomplices, stript of a pomp of words, and the colourings of artificial reasoning? They saw a woman, for aught appears, a perfect stranger to them, led to the round-house under a charge of a criminal nature. This, upon evidence at the Old Bailey, a month or two afterwards, comes out to be an illegal arrest and imprisonment, a violation of Magna Charta; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for Magna Charta (*d*) and the laws; and in this frenzy to have drawn upon the constable, and stabbed his assistant. It is extremely difficult to conceive that the violation of Magna Charta, a fact of which they were totally ignorant at the time, could be the provocation which led them into this outrage. But, admitting for argument sake that it was, we all know that words of reproach, how grating and offensive soever, are in the eye of the law no provocation in the case of voluntary homicide; and yet every man who hath considered the human frame, or but attended to the workings of his own heart, knows that affronts of that kind pierce deeper, and stimulate the veins more effectually, than a slight injury done to a third person, though under colour of justice, possibly can. The indignation that kindles in the breast in one case is instinct, it is human infirmity; in the other it may possibly, be called a concern for the common rights of the subject; but this concern, when well founded, is rather founded in reason and cool reflection, than in human infirmity; and it is to human infirmity alone that the law indulges in the case of a sudden provocation.' He then proceeds further: 'But if a passion for the common rights of the subject, in the case of individuals, must, against all experience, be presumed to inflame beyond a personal affront, let us suppose the case of an upright and deserving man, universally beloved and esteemed, standing at the place of execution, under a sentence of death manifestly unjust. This is a case that may well rouse the indignation, and excite the compassion, of the wisest and best men; but wise and good men know that it is the duty of private subjects to leave the innocent man to his lot, how hard soever it may be, without attempting a rescue; for otherwise all government would be unhinged. And yet, what proportion doth the case of a false imprisonment, for a short time, and for which the injured party may have an adequate remedy, bear to that I have now put?' (*e*)

In R. *v.* Adey (*f*), the prisoner, who cohabited with a person named F.,

(*d*) Holt, C.J., in delivering the judgment in Tooley's case, had said: 'Sure a man ought to be concerned for Magna Charta and the laws; and if any one against the law imprison a man, he is an offender against Magna Charta.'

(*e*) Fost. 315, 316, 317.

(*f*) 1 Leach, 206. At p. 212 it is said that the prisoner lay eighteen months in gaol, and was then discharged; but the following note is added: 'It is said, that the judges held it to be manslaughter only,

killed an assistant of a constable, who came to apprehend F., as an idle and disorderly person, under 19 Geo. II. c. 10. (*g*), though he was not an object of the Act, and did not himself make any resistance to the arrest; but the prisoner, immediately upon the constable and his assistant requiring F. to go along with them, without making use of any argument to induce them to desist, or saying one word to prevent the intended arrest, stabbed the assistant. Hotham, B., with whom Gould, J., and Ashhurst, J., concurred, held the offence to be murder. A special verdict, however, was found (*h*): and the case was argued in the Exchequer Chamber, before ten of the judges; but no opinion was ever publicly delivered.

The opinion of Foster seems to have been accepted by Alderson, B., who said in R. *v.* Warner (*i*) that Tooley's case was overruled, and by Pollock, C.B., in R. *v.* Davis (*j*), and is approved by Sir James Stephen (*k*), and appears to be established as the accepted rule by R. *v.* Allen (*l*). In that case K. and D. had been arrested on suspicion of felony (*m*), and were from time to time remanded on a warrant charging them generally with felony but not specifying any particular offence. While they were being driven in a police van to prison a rescue was attempted—in the course of which a constable was killed. On an indictment of A. and

but no opinion was ever publicly given; and *qu.*, whether the prisoner did not escape pending the opinion of the judges, when the gaol was burnt down in 1780, and was never retaken.' And see also 1 East, P. C. 329, note (*a*), where it is said: 'Upon inquiry, however, it appears that, pending the consideration of the case by the judges, she escaped during the riots in 1780, and was never retaken.' In R. *v.* Porter (reported as to another point, 9 C. & P. 778), upon an indictment for murder, it appeared that the deceased, who was a watchman, and another were taking a person towards a station-house on a charge of robbing a garden, and were proceeding quietly along a road, the prisoner making no resistance, when they were attacked and the deceased beaten to death. In opening the case it was asserted, that even if the prisoner were not lawfully in custody, the offence was murder; for if a person were illegally in custody, and was making no resistance, no person had any right to attack the persons who had him in custody, and that if they did, and death ensued in consequence of the violence used to release the prisoner, it was murder; and that, although there might be old cases to the contrary, they were no longer considered as binding authorities. The point, however, did not ultimately become material, as it was held that the party was in lawful custody; but the above position was neither controverted by the very learned judge who tried the case, nor by the prisoner's counsel; and it would seem that it could not be successfully disputed, for it is difficult to discover upon what principle any individual can be justified in interfering to prevent what apparently is the due execution of the law, and that the question, whether he is guilty of murder or manslaughter, if death ensue, is to depend upon whether the custody is legal or illegal, of which, probably, at the time, he was perfectly ignorant, and which, consequently, could in no respect influence his conduct. C. S. G. See *ante*, p. 729.

(*g*) A local Act.

(*h*) The Court advised the jury to find a special verdict, on the ground of the difference of opinion which had been entertained in Tooley's case, and Hugget's case, *ante*, p. 751.

(*i*) 1 Mood. 385.

(*j*) L. & C. 64, 71.

(*k*) 3 Steph. Hist. Cr. L. 71; Steph. Dig. Cr. L. (6th ed.) and see Mayne, Ind. Cr. L. (ed. 1896), p. 424.

(*l*) See 17 L.T. (N. S.) 222, and the facts of this case (known in Ireland as that of the Manchester Martyrs), analysed out in Steph. Dig. Cr. L. (6th ed.), pp. 414 *et seq.* It is reported as R. *v.* Martin, *Times*, Nov. 7, 1867. See R. *v.* Rice [1902], 5 Canada Cr. Cas. 509; 4 Ontario, L. R. 233. There R. and two others, being under trial for burglary, were during the trial being reconveyed in a cab to gaol in the lawful custody of two constables. A parcel containing revolvers was thrown by an unknown person into the cab, a struggle with the constables in charge ensued in which one was killed by a shot fired by one of the three prisoners, it was not ascertainable by which. Held that the act being done by one of the three acting in concert, R. was guilty of murder.

(*m*) Steph. Dig. Cr. L. (6th ed.) 421.

others for the murder of the constable it was contended that K. and D. were not in legal custody and that consequently the killing of the constable in the attempt to rescue them was manslaughter only. Blackburn and Mellor, JJ., directed the jury to convict of murder, and on a conviction, after consulting the other judges, refused to reserve a case. In giving the reasons for their refusal they laid down the rule stated *ante* pp. 721, 759, and distinguished the cases of Ferrers, Hugget and Tooley, relied on for the defence as applying only in the case of a sudden or unpremeditated affray where the fact of unwarranted arrest might be a sufficient provocation and the parties might act without any previous malice or design of doing hurt (*n*). And they added that the convicts had formed a deliberate prearranged conspiracy to attack the police with fire-arms and shoot them if necessary for the purpose of rescuing K. and D., and well knew that the police were acting in obedience to the commands of a justice who had full power to remand K. and D. to gaol if he made a proper warrant for the purpose. 'We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it would justify the slaughter of an officer in charge of the prisoners or reduce that slaughter to the crime of manslaughter.'

Sect. IX.—Of Killing in the Prosecution of some Criminal, Unlawful, or Wanton Purpose.

As a general principle, subject to the qualifications presently to be stated, if an action, unlawful in itself, is done deliberately, and with intent to cause mischief or great bodily harm to particular individuals, or indiscriminate mischief, and some person is killed in consequence of the act, even against or beside the original intention of the slayer, he is in law guilty of murder (*o*).

Under this head fall cases in which particular malice directed against one person falls by mistake or accident upon another. Though the death caused under such circumstances may in a loose way be called accidental, the law does not so regard it. Thus if B. is killed by means which were in fact intended to kill or injure A., whether by poison, blow, or any other means, the killing of B. is murder if the killing of A. would have been so (*p*). Thus, if C., having malice against A., strikes at and misses him, but kills B., this is murder in C. (*q*); and, if A. and B. engage in a deliberate duel, and a stranger coming between them to part them is killed by one of them, it is murder in the party killing (*r*). And where A.

(*n*) See Tooley's case, 2 Ld. Raym. 1300, Holt, C.J., *ante*, p. 751.

(*o*) Fost. 261.

(*p*) Id. ibid. 1 Hale, 441. R. *v.* Williams, 1 Hale, 469. See R. *v.* Mawgridge, Kel. (J.). 131; 17 St. Tr. 57.

(*q*) 1 East, P. C. 230.

(*r*) 1 Hale, 441. Dalt. c. 145, p. 472. It appears to have been held where the combat was by malice prepense, that the killing of the person who came to part them was murder in both combatants, Y. B., 22 Edw. III. Coron. 262. Lambard. out of Dallison's Report, p. 217. But Hale thinks that it is not murder in both, unless both struck him who came to part them, and says that by the book of 22 Ass. 71, Coron. 180 (which seems to be the case more at large) he only that gave the stroke had judgment, and was executed. 1 Hale, 441, to which this note is subjoined: 'The other does not appear to have been before the Court; but, upon putting the case, the Court said he that struck is guilty of felony, but said nothing as to him who did not strike.'

had malice against D., the master of B., and assaulted him, and upon B. the servant coming to the aid of his master, A. kills B., it was held murder in A. as much as if he had killed the master (*s*). 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, endeavoured to dissuade his wife from giving the apple to the child (*t*). Where A. mixed poison in an electuary sent by an apothecary to her husband, with intent to poison him, which did not kill him, but afterwards killed the apothecary who to vindicate his reputation tasted it himself, having first stirred it about, some doubt was entertained, because the apothecacy, of his own hand, without incitement from anyone, not only partook of the electuary, but mingled it together, so as to incorporate the poison, and make its operation more forcible than the mixture as made by the wife of A. But ultimately the judges resolved that A. was guilty of murder, for the putting the poison into the electuary was the cause of the death: and if a person prepares poison with intent to kill any human being, such person is guilty of the murder of any one who is killed thereby (*u*). So if A. puts poison into wine, with intent to kill B., and C. drinks the wine and dies, A. is guilty of the murder of C.; and it makes no difference that the wine, unless stirred up, would not have killed C., and that C., thinking there was sugar in it, stirred it up (*v*).

So, where a person gave medicine to a woman to procure abortion (*w*), and where a person put skewers into the womb of a woman for the same purpose (*x*), by which in both cases the women were killed, these acts were held murder; for though the death of the woman was not intended, the acts were deliberate and malicious, and necessarily attended with great danger to the person on whom they were practised.

Where the prisoner was indicted for the wilful murder of a woman, and it appeared that the woman had died as a result of the prisoner having injected mercury or used other means upon her with the intention of procuring abortion, Bigham, J., told the jury: 'If you are of opinion that the girl died as a result of the prisoner's unlawful operation, he is guilty of murder . . . I do not mean to say that there are not some cases where this rule of law is not applicable. There may be cases where death is so remote a contingency that no reasonable man could have taken it into his consideration. . . . If you can think that though the prisoner may have administered the injection, he nevertheless could not have contemplated that it could have resulted in death, then he is not guilty of the graver charge, but is guilty of the lesser crime of manslaughter' (*y*).

Even where no mischief is intended to any particular individual, if there is a general malice or depraved inclination to mischief, fall where it may; the act itself being unlawful, attended with probable serious danger, and done with a mischievous intent to hurt people, the killing is

(*s*) 1 Hale, 438.
(*t*) R. *v.* Saunders, Plowd. 473. 1 Hawk. c. 31, s. 45. 1 Hale, 436.
(*u*) R. *v.* Core, 9 Co. Rep. 81. 77 E. R. 853. 1 Hawk. c. 31, s. 45. 1 Hale, 436.
(*v*) 9 Co. Rep. 81. See R. *v.* Michael, 2 Mood. 120.
(*w*) 1 Hale, 429.
(*x*) R. *v.* Tinckler, 1 East, P. C. 230, 354; 1 Den. v.
(*y*) R. *v.* Whitmarsh, 62 J. P. 711, Bigham, J.

in law murder (*z*). Thus, if a man deliberately, and with intent to do mischief, rides upon a horse used to kick, or coolly discharges a gun, among a multitude of people, and death results, it will be murder (*a*). So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice (*b*). Upon the same principle, if a man, knowing that people are passing along the street, throws a stone likely to do injury, or shoots over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of the previous malice, though not directed against any particular individual; for it is no excuse that the party was bent upon mischief generally (*c*).

It has been said that whenever an unlawful act (an act *malum in se*), is done in prosecution of a *felonious* intention, and death ensues, it will be murder: as if A. shoots at the poultry of B. intending to steal the poultry, and by accident kills a man, this will be murder by reason of the felonious intention of stealing (*d*). But Holt, C.J., said that the dictum of Coke (3 Inst. 56), was too large and that 'there must be a design of mischief to the person, as to commit a great riot' (*e*). And upon an indictment for murder against a man who had set fire to his house with intent to defraud his insurers, and had thereby caused the death of an imbecile son of his, Stephen, J., said: 'I think that, instead of saying that an act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder' (*f*). And it has been held, that if such offenders as were mentioned in 21 Edw. I., st. 2 (*h*) (*De malefactoribus in parcis*), killed the keeper, &c., it was murder in all, although the keeper ordered them to stand, assaulted them first, and they fled, and did not turn till one of the keeper's men had fired and hurt one of their companions (*i*).

(*z*) 1 Hale, 475. 1 East, P. C. 231.

(*a*) 1 Hale, 476. 4 Bl. Com. 200. 1 Hawk. c. 29, s. 12. 1 East, P. C. 231. Hawkins, speaking of the instance of the person riding a horse used to kick amongst a crowd, says, it would be murder, though the rider intended no more than to divert himself by putting the people into a fright. 1 Hawk. c. 31, s. 68, and see *ante*, p. 679.

(*b*) 4 Bl. Com. 200.

(*c*) 1 Hale, 475. 3 Co. Inst. 57. 1 East, P. C. 231. See remarks by Blackburn, J., in the course of the argument in R. *v.* Pembliton, L. R. 2 C. C. R. 119, and R. *v.* Latimer, 17 Q.B.D. 359. See also R. *v.* Martin, 8 Q.B.D. 54, and R. *v.* Faulkner, 13 Cox, 550.

(*d*) Fost. 258, 259. Coke (3 Inst. 56) says: 'If the act be unlawful it is murder; as if A., meaning to steal a deer in the park of B., shoots at the deer, and by the glance of the arrow kills a boy that is hidden in a bush, this is murder; for that the act is unlawful,' and he cites Bract. Lib. 3. 120b. And then he draws the distinction between shooting wild fowl and shooting at any tame fowl, and says, if the arrow by misadventure kills a man, it is murder; and cites for the latter position 3 Edw. III. Coron. 354, 2 Hen. IV. 18, and 11 Hen. VII. 23. Hale (1, 38) cites 11 Hen. VII. 23, Br. Coron. 229, Proclamation, 12. 22 Ass. pl. 71, and see 1 Hale, 568. R. *v.* Woodburn, 14 St. Tr. 53, 80. In R. *v.* Plummer, Kel. (J.) 109, 117, the question is discussed in the judgment of C.J., and Coke's dictum is explained to mean that if two men have a design to steal a hen, and one shoots at the hen for the purpose, and a man be killed, it is murder in both, because the design was felonious; and it is said that with that explanation the books cited do warrant that opinion. Foster, 258–9, cites 3 Co. Inst. 56, and Kel. (J.) 117.

(*e*) R. *v.* Keates, Comb. 406, 409.

(*f*) R. v. Serné, 16 Cox, 311, 313.

(*h*) Repealed in 1827 (7 & 8 Geo. IV. c. 27). 1 Hale, 491.

(*i*) 1 East, P. C. 256, citing 1 MS. Sum. 145, 175. Sum. 37, 46. Palm. 546. 2 Roll. Rep. 120. The reason is, the Act provides that, if after hue and cry made to

It has been shewn, that where death ensues from an act done in the prosecution of a *felonious intention*, it will be murder (*j*); but a distinction is taken in the case of an act done with the intent only of committing a *bare trespass;* as if death ensues from such act, the offence will be only manslaughter (*k*). Thus, if A. shoots at the poultry of B., intending to steal them, and by accident kill a man, it will be murder; yet, if he shoots at them wantonly, and without any such felonious intention, and accidentally kills a man, the offence will be only manslaughter (*l*). And any one, who voluntarily, knowingly, and unlawfully, intends hurt to the person of another, though he does not intend death, yet, if death ensues is guilty of murder or manslaughter, according to the circumstances or the nature of the instrument used, and the manner of using it, as calculated to produce great bodily harm or not (*m*). And if a man is doing an unlawful act, though not intending bodily harm to any one (as if he is throwing a stone at another's horse), and hits a person and kills him, it is manslaughter (*n*).

Incendiarism.—Where a man set fire to a house whereby a person was burnt to death it was held murder (*o*). On an indictment for murder it appeared that the prisoner had set fire to a stack of straw, in an enclosure in which was an outhouse or barn, but not adjoining to any house. While the fire was burning, the deceased was seen in the flames, and his body was afterwards found in the enclosure. There was no evidence who he was, or how or when he came there, nor whether he had been in the outhouse or merely lying on or beside the stack: nor was there evidence that the prisoner had any idea that any one was, or was likely to be, there, and when he saw the deceased, he wanted to save him. It did not exactly appear how long the fire had been kindled before it was discovered, but very soon after it was discovered the deceased was seen in the flames. Bramwell, B., told the jury that '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 though that may appear unreasonable, yet, as it is laid down as the law, it is our duty to act upon it. The law, however, is that a man is not answerable except for the *natural and probable* result of his own act; and therefore, if you should not be satisfied that the deceased was in the farm or enclosure at the time the prisoner set fire to the stack, but came in afterwards, then, as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act. And in that view he ought to be acquitted on the present charge' (*p*).

Grievous Bodily Harm.—Where the intent is to do some great *bodily*

stand, they will not yield, but flee or defend themselves, and the keepers kill them in taking them, they shall not be troubled in any way for it. Therefore all that the keepers did in this case was lawful, and consequently the killing was the killing of a party in the due execution of his duty.

(*j*) *Ante*, p. 757.

(*k*) Fost. 258. Coke seems to think otherwise, 3 Inst. 56.

(*l*) Fost. 258, 259. 1 Hale, 475.

(*m*) 1 East, P. C. 256, 257. 1 Hale, 39.

(*n*) 1 Hale, 39.

(*o*) R. *v.* Smithies, 5 C. & P. 332. See R. *v.* Serné, 16 Cox, 311, *ante*, p. 757.

(*p*) R. *v.* Horsey, 3 F. & F. 287. The question in such a case would be whether the prisoner in firing the stack had committed a felony within 24 & 25 Vict. c. 97, s. 7. See R. *v.* Child, L. R. 1 C. C. R. 307, 310, Blackburn, J.

harm to another, and death ensues, it will be murder; as if A. intends only to *beat* B. in anger, or from preconceived malice, and happens 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 (*q*). So if a large stone is thrown at one with a deliberate intention to hurt, though not to kill him, and by accident it kills him, or any other, this is murder (*r*). If a wrongful act (an act which the party who commits it can neither justify nor excuse) is done under circumstances which shew an intent to kill, or to do any serious injury, or any general malice, the offence is murder (*s*). But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in all such cases (*t*).

Practical Jokes.—Upon an indictment for murder it appeared that the deceased, being in liquor, had gone at night into a glass-house, and laid himself down upon a chest; and that while he was there asleep the prisoners covered and surrounded him with straw, and threw a shovel of hot cinders upon his belly; the consequence of which was that the straw ignited, and he was burnt to death. There was no evidence of express malice, but the conduct of the prisoners indicated an entire recklessness of consequences, hardly consistent with anything short of design. Patteson, J., adverted to the fact of there being no evidence of express malice, but told the jury that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport it was manslaughter (*u*).

Where Several join to do an Unlawful Act.—Where several persons come to a resolution *to resist all opposers* in the commission of a breach of the peace, and to execute it in a manner naturally tending to create riot or tumult, *e.g.* by going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, at their peril, abide the event of their actions. And therefore if in doing any of these acts they happen to kill a man, they are *all* guilty of murder (*v*). But in order to make the killing by any, murder in all, of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or unlawful enterprise, or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened (*w*).

The fatal act must appear to have been committed strictly in prosecution of the purpose for which the party was assembled; and therefore, if several persons be engaged in an unlawful act, and one of them takes the opportunity to kill one of his companions against whom he bears deliberate malice, the rest are not concerned in the guilt of that act,

(*q*) Fost. 259.

(*r*) 1 Hale, 440, 441.

(*s*) R. *v.* Fenton, 1 Lew. 179, Tindal, C.J. *post*, p. 785. As to bodily harm *vide post*, p. 852.

(*t*) Kel. (J.) 133. 1 East, P. C. 257.

(*u*) R. *v.* Errington, 2 Lew. 217. See R. v. Fenton, 1 Lew. 179, and R. *v.* Franklin, 15 Cox, 163, *post*, p. 785.

(*v*) 1 Hawk. c. 31, s. 51. Staundf. 17. 1 Hale, 439 *et seq.* 4 Bl. Com. 200. 1 East, P. C. 257. And see *ante*, p. 112.

(*w*) 1 East, P. C. 259.

because it had no connection with the crime in contemplation (*x*). Two men were beating another man in the street, and a stranger made some remark upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife. On an indictment of both men as principals in the murder; the judge held that although both were doing an unlawful act in beating the man, yet as the death of the stranger did not ensue upon that act, and as it appeared that only one of them intended any injury to the person killed, the other could not be guilty either as principal or accessory (*y*).

Where a party of smugglers were met and opposed by an officer of the Crown, and during the scuffle which ensued a gun was discharged by a smuggler, which killed one of his own gang, the question was, whether the whole gang were guilty of this murder. The Court agreed that if the King's officer, or any of his assistants, had been killed by the shot, it would have been murder in all the gang; and also, that if it had appeared that the shot was levelled at the officer, or any of his assistants, it would also have amounted to murder in the whole of the gang, though an accomplice of their own were the person killed (*z*). The point upon which the case turned was, that it did not appear from any of the facts found that the gun was discharged in prosecution of the purpose for which the party was assembled (*a*). In another case the prisoners had been hired by a tenant to assist him in carrying away his household furniture in order to avoid a distress. They accordingly assembled for this purpose armed with bludgeons and other offensive weapons; and a violent affray took place between them and the landlord of the house, who, accompanied on his part by another set of men, came to prevent the removal of the goods. The constable was called in and produced his authority, but could not induce them to disperse: and, while they were fighting in the street, one of the company, but which of them was not known, killed a boy who was standing at his father's door looking on, but totally unconcerned in the affray. The question was raised whether this was murder in all the company; but the majority of the judges held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act (*b*). This opinion seems to have been based on the view that there was no evidence to shew that the stroke by which the boy was killed was either levelled at any of the opposing party, or was levelled at him upon the supposition that he was one of the opponents, and therefore that it was not given in prosecution of the purpose for which the party was assembled (*c*).

(*x*) 1 Hawk. c. 31, s. 52. Fost. 351. And see the charge of Foster, J., in R. *v.* Jackson, 9 Harg. St. Tr. 715.

(*y*) Anon. 8 Mod. 164. 1 Hawk. c. 31, s. 52.

(*z*) R. *v.* Plummer, Kel. (J.), 109.

(*a*) Fost. 352, and see Mansell and Herbert's case, 2 Dy. 128 b: 73 E. R. 279.

(*b*) R. *v.* Hodgson, 1 Leach 6, cited as R. *v.* Hubson, 1 East, P. C. 258. Holt, C.J., and Pollexfen, C.J., considered the offence murder, as all were engaged in an unlawful act by continuing the affray after the constable had commanded the peace. They cited Staundf. 17, 40; Fitz. Corone, 350; Crompt. 244. See R. *v.* Plummer, *ubi supra*, and 12 Mod. 629. Thompson's case, Kel. (J.) 66; and Anon. 8. Mod. 165. See also Keilw. 161; and Borthwick's case, 1 Dougl. 207.

(*c*) 1 East, P. C. 258, 259; and see the remarks of Hale, upon the case of Mansell and Herbert 2 (Dy. 128 b.) in 1 Hale, 440, 441.

The prisoners, eight in number, each having a gun, upon being found poaching by some keepers, who went towards them for the purpose of apprehending them, formed into two lines, and pointed their guns at the keepers, saying that they would shoot them. A shot was then fired which wounded a keeper, but no other shot was fired. It was objected that it was clear that there was no common intent to shoot this man, because only one gun was fired instead of the whole number. Vaughan, B., said: 'That is rather a question for the jury, but still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the gamekeepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shewn that either of them separated himself from the rest, and shewed distinctly that he would have no hand in what they were doing, the objection would have much weight in it' (*d*). Two private watchmen seeing the prisoner and another man with two carts laden with apples, which they suspected had been stolen, went up to them, and one walked beside the prisoner, and one beside the other man, at some distance from each other, and while they were so going along, the prisoner's companion stepped back, and with a bludgeon wounded the watchman he had been walking with. Garrow, B., said: 'To make the prisoner a principal the jury must be satisfied that when he and his companion went out with a common illegal purpose of stealing apples, they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavour to apprehend them; but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal (*e*).

Where the whole of a party of poachers set upon and beat a keeper till he was senseless, and having left him lying on the ground, one of them after they had gone a little distance returned, and stole his money, it was held that he alone was guilty of larceny (*f*). Where two poachers were apprehended by some gamekeepers, and being in custody called out to one of their companions, who came to their assistance and killed one of the gamekeepers, it was held that this was murder in all, though the blow was struck while the two were actually in custody, but that it would not have been so if the two had acquiesced and remained passive in custody (*g*).

Where four poachers were met by a keeper and his assistant, and after some words had passed, three of them ran in upon the keeper, knocked him down and stunned him; and when he recovered himself, he saw all of them coming by him, and one said, 'Damn 'em we've done 'em'; and when they had got two or three paces beyond him, one of them turned back and wounded the keeper in the leg, and then the men set off and ran away; Bolland, B., told the jury if they thought the

(*d*) R *v.* Edmeads, 3 C. & P. 390.
(*e*) R. *v.* Collison, 4 C. & P. 565. See R. *v.* Howell, 9 C. & P. 437, 450, Littledale, J. R. *v.* Lee, 4 F. & F. 63.
(*f*) R. *v.* Hawkins, 3 C. & P. 392, Park, J.
(*g*) R. *v.* Whithorne, 3 C. & P. 394, MSS. C. S. G. Vaughan, B. See *ante*, p. 750.

prisoners were acting in concert, they were all equally guilty of inflicting the wound (*h*).

Where, upon an indictment for maliciously cutting, the question was, how far one prisoner was concurring in the act of the other; Park, J., told the jury that 'If three persons go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out' (*i*).

Where on an indictment for murder it appeared that the deceased was found tied hand and foot with string, and something forced into her throat, by which she had been suffocated, and the house in which she was had been forcibly entered, and the object evidently had been robbery; the jury were told that if they were satisfied that the deceased met with her death from violence by any person or persons to enable them to commit a burglary or any other felony, although they who inflicted the violence might not have intended to kill her, all who were parties to that violence were guilty of murder (*j*).

The prisoner was indicted for manslaughter. A. began a quarrel with the deceased, and called C. out of a public-house, and both went after the deceased into a cellar and began to beat him with their fists. In the course of the fight the deceased received from one or other of the men a blow from a piece of timber which was in the cellar. A. was tried and convicted of manslaughter, and Cleasby, B., is reported to have ruled that A., having invited C. down into the cellar to beat the deceased, was answerable for whatever was done afterwards. Lush, J., is reported to have said that might be so, and yet that C. would not be responsible for all that A. did. If two men concerted together to fight two other men with their fists, and one struck an unlucky blow causing death, both would be guilty of manslaughter. But if one used a knife or other deadly weapon, such as this piece of timber, without the knowledge or consent of the other, he only who struck with the weapon would be responsible for the death resulting from the blow given by it (*k*).

(*h*) R. *v.* Warner, 1 Mood. 380.

(*i*) R. *v.* Duffey, 1 Lew. 194. See R. *v.* Macklin, 2 Lew. 225, Alderson, B.

(*j*) R. *v.* Franz, 2 F. & F. 580. 'In R. *v.* Luck, 3 F. & F. 483, the marginal note is not warranted by the case, and the case is very inaccurately stated. Byles, J., is reported to have directed the grand jury that, "as the poachers were not engaged in a felony, the use of the flail with violence might reduce the offence to manslaughter." It is perfectly clear that there is no such distinction known to the law as to the manner of arrest between cases of felony and misdemeanor, where the right to arrest at the time and place, and by the person attempting it, exists; and an attack with such a dangerous instrument as a flail, in order to arrest any one for a felony, would clearly reduce the offence to manslaughter; it is plain there was no reason for drawing any such distinction, and therefore the report is probably erroneous.' C. S. G. See R. *v.* Skeet, 4 F. & F. 931.

(*k*) R. *v.* Caton, 12 Cox, 624. See R. *v.* Turner, 4 F. & F. 339, where Channell, B., ruled that it was otherwise on a charge of manslaughter. The ruling of Lush, J., seems correct. In R. *v.* Price, 8 Cox, 96, Byles, J., directed the jury as to the responsibility for homicide in a case where a sailor, who was being maltreated by a gang of six other sailors, was stabbed with a knife by one of them. But the report of the case is too inaccurate to make the case of any value as an authority.

SECT. X.—OF KILLING IN CONSEQUENCE OF SOME LAWFUL ACT BEING CRIMINALLY OR IMPROPERLY PERFORMED, OR OF SOME ACT PERFORMED WITHOUT LAWFUL AUTHORITY.

Officers of Justice Acting Improperly.—The special protection given by the law to *ministers of justice*, in the execution of their duties, has already been stated (*l*), but it is lost if they misconduct themselves in the discharge of their duty. Thus, though in cases civil or criminal, an officer may repel force by force, where his authority to arrest or imprison is resisted, and will be justified in so doing even if death should be the consequence (*m*); yet he ought not to proceed to extremities upon every slight interruption, nor without reasonable necessity (*n*). And if he should kill where no resistance is made, it will be murder: and it is presumed that the offence would be of the same magnitude if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled (*o*). Again, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken (*p*); yet where a party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him, though there is a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he does kill him, it will in general be murder (*q*); but, it may amount only to manslaughter, if it appears that death was not intended (*r*).

So, in civil suits, if the party against whom the process is issued, flies from the officer endeavouring to arrest him, or if he flies after being arrested or taken in execution, and the officer not being able to overtake him makes use of any deadly weapon, and by so doing, or by other means, intentionally kills him in the pursuit, it will amount to murder (*s*). But if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence (*t*).

Where a collector, having distrained for a duty, laid hold of a maid-servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the Court held her opposition to the officer to be a sufficient provocation to extenuate the homicide, yet they were clearly

(*l*) *Ante*, p. 721 *et seq.*

(*m*) *Post*, p. 813.

(*n*) 4 Bl. Com. 180.

(*o*) 1 East, P. C. 297. The crime will at least be manslaughter. MSS. Burnet, 37.

(*p*) 1 Hale, 481. 4 Bl. Com. 179. Fost. 271. 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 inquire whether it were done of necessity or not. 1 East, P. C. 298.

(*q*) Fost. 271. 1 Hale, 481.

(*r*) Fost. 271. 1 East, P. C. 302.

(*s*) 1 Hale, 481. Fost. 271. 1 East, P. C. 306, 307. Laying hold of the prisoner and pronouncing words of arrest, is an actual arrest; or it may be made without actually laying hold of him, if he submit to the arrest. Horner *v.* Battyn and another, Bull. (N. P.) 62, and see 1 East, P. C. 300. But see Arrowsmith *v.* Le Mesurier, 2 B. & P. (N. R.) 211, and Berry *v.* Adamson, 6 B. & C. 528.

(*t*) Fost. 271.

of opinion that he was guilty of manslaughter in so far exceeding the necessity of the case (*u*).

An officer in the impress service put one of his seamen on board a boat belonging to C., a fisherman, with intent to bring it under the stern of another vessel, in order too see if there were any fit objects of the impress service on board. The boat steered away in another direction; and the officer pursued in another vessel for three hours, firing several shots at her, with a musket loaded with ball, for the purpose of hitting the halyards, and bringing the boat to, which was found to be the usual way, and one of the shots unfortunately killed C. The Court said it was impossible for it to be more than manslaughter (*v*). It is presumed that this decision proceeded on the grounds that the musket was not levelled at the deceased, nor any bodily hurt intended to him: but that as such an act was calculated to breed danger, and not warranted by the law, though no bodily hurt were intended, the killing was manslaughter (*w*). By the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36) it is provided, s. 181, that 'If any ship or boat liable to seizure or examination under the Customs Acts shall not bring to on being required so to do the master of such ship or boat shall forfeit the sum of £20: and on such ship or boat being chased by any vessel or boat in His Majesty's navy, having the proper pendant and ensign of His Majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person, having the charge or command of such vessel in His Majesty's navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into such vessel or boat; and such captain, master, or other person, acting in his aid, or by his direction, shall be, and is hereby indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing (*x*).

If an officer makes an arrest out of his proper district (except under authority of statute), or if an officer has no warrant or authority at all, he is not entitled to the special protection of the law; and if he purposely kills the party for not submitting to such illegal arrest, it will be murder in all cases, at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent (*y*).

So if a court-martial orders a man to be flogged where it has no jurisdiction, and the flogging kills the man, the members who concurred in that order are guilty of murder (*z*).

It is no excuse for killing a man that he was out at night as a ghost dressed in white for the purpose of alarming the neighbourhood. The neighbourhood of H. had been alarmed by what was supposed to be a ghost; the prisoner went out with a loaded gun to take the ghost; and upon meeting with a person dressed in white, immediately shot him. M'Donald, C.B., Rooke and Lawrence, JJ., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor; and no one might kill him, though he could not otherwise

(*u*) Goffe's case, 1 Ventr. 216.
(*v*) R. *v.* Phillips, 2 Cowp. 830.
(*w*) 1 East, P. C. 308.
(*x*) This replaces 16 & 17 Vict. c. 107, s. 218, *vide ante*, p. 373, *et seq.*
(*y*) 1 East, P. C. 312.
(*z*) Warden *v.* Bailey, 4 Taunt. 67, Heath, J.

be taken. The jury, however, brought in a verdict of manslaughter; but the Court said that they could not receive that verdict; and told the jury that if they believed the evidence they must find the prisoner guilty of murder; and if they did not believe the evidence, they should acquit the prisoner. The jury then found the prisoner guilty (*a*).

Upon a trial for murder, it appeared that the prisoner, an excise officer being in the execution of his office, had seized with the assistance of another person, two smugglers in the act of landing whiskey, contrary to law. The deceased had surrendered himself quietly into the hands of the prisoner, but shortly afterwards, when the prisoner was off his guard, he assaulted him violently with an ash stick, which cut his head severely in several places, and he lost much blood, and was greatly weakened in the struggle which succeeded. The officer, fearing the deceased would overpower him, and having no other means of defending himself, discharged a pistol at the deceased's legs, in the hopes of deterring him from any further attack, but the discharge did not take effect, and the deceased prepared to make another assault. Seeing this, the prisoner warned him to keep off, telling him that he must shoot him if he did not; but the deceased disregarded the warning, and rushed towards him to make a fresh attack; he thereupon fired a second pistol and killed him. Holroyd, J., told the jury, 'An officer must not kill for an escape, where the party is in custody for a misdemeanor; but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of such weapon by the previous violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons used in heat, and death ensues although the party may have been at the commencement in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is, whether, under all the circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself, as any reasonable man might fairly and naturally be expected to resort to' (*b*).

Gaolers and their officers are under the same special protection as other ministers of justice; but in regard to the great power which they have over their prisoners, the law watches their conduct with a jealous eye, and they must not exceed the necessity of the case in the execution of their duty. The coroner must hold an inquest upon the body of every person who dies in prison (*c*). If the death was owing to cruel and oppressive usage upon the part of the officer of the prison, or, to speak in the language of the law, to *duress of imprisonment*, it will be deemed wilful murder in the person actually guilty of such duress (*d*).

A gaoler, knowing that prisoner infected with the small-pox lodged in a certain room in the prison, confined another prisoner against his will

(*a*) R. *v.* Smith, O. B. Jan. 1804, MS. Bayley, J. The prisoner was reprieved. 4 Bl. Com. 201 n.

(*b*) R. *v.* Forster, 1 Lew. 187.

(*c*) Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 3 (1).

(*d*) Fost. 321, 322. 1 Hale, 466. R. *v.* Huggins, 2 Str. 882. See R. *v.* Allen, 7 C. & P. 153, and R. *v.* Green, 7 C. & P. 156, *post*, p. 799.

in the same room. The second prisoner, who had not had the disease, of which fact the gaoler had notice, caught the disease, and died of it; this was held to be murder (*e*).

H., the warden of the Fleet prison, appointed one G. as his lawful deputy, G. had a servant, B., whose business it was to take care of the prisoners, and particularly of one A.; and B. put A. into a new-built room, over the common sewer, the walls of which were damp and unwholesome, and kept him without fire, chamber pot, or other necessary convenience, for forty-four days, when he died. It appeared that B. knew the unwholesome situation of the room, and that H. knew the condition of the room fifteen days at least before the death of A., as he had been once present at the prison, and seen A. under such duress of imprisonment, and turned away; at which time B. shut the door of the room, in which A. continued till he died. It was found that A. had sickened and died by duress of imprisonment, and that during the time G. was deputy, H. sometimes acted as warden. Upon these facts the Court were clearly of opinion that B. was guilty of murder. But they thought that H. was not guilty, as it could not be inferred, from merely seeing the deceased once during his confinement, that H. knew that his situation was occasioned by the improper treatment, or that he consented to the continuance of it; and they said, that it was material that the species of duress, by which the deceased came to his death, could not be known by a bare looking-in upon him. H. could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessaries of life: and it was likewise material that no application was made to H., which perhaps might have altered the case. And the Court seemed also to think that as B. was the servant of G., and G. had the actual management of the prison, the accidental presence of the principal would not amount to a revocation of the authority of the deputy (*f*).

An assault upon a gaoler, which would warrant him (apart from personal danger) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent (*g*).

Execution of Sentence.—In the execution of sentence upon criminals, *the execution ought not to vary from the judgment;* for if it does, the officer will be guilty of a felony at least, if not of murder (*h*). And in conformity to this rule, it has been held, that if the judgment were to be hanged, and the officer beheaded the party, it was murder (*i*); and that even the King could not change the punishment of the law by altering the hanging or burning into beheading, though, when beheading was part of the sentence, the King might remit the rest (*j*). But others have thought,

(*e*) Fost. 322, referring to Castell *v.* Bambridge, 2 Str. 854, an appeal of murder.

(*f*) R. *v.* Huggins, 2 Str. 882; 2 Ld. Raym. 1574; 92 E. R. 518; 9 St. Tr. 111. Fost. 322. 1 East, P. C. 331.

(*g*) 1 East, P. C. 331, citing 1 MS. Sum. 145, *semb.* Pult. 120, 121. In 1 Hawk. c. 28, s. 13, it is said that if a criminal in trying to break the gaol assaults the gaoler he may be lawfully killed by him in the affray.

(*h*) 1 Hale, 501. 2 Hale, 411. 3 Co. Inst. 52, 211. 4 Bl. Com. 179. See R. *v.* Antrobus, 2 A. & E. 788.

(*i*) 1 Hale, 433, 454, 466, 501. 2 Hale, 411. 3 Co. Inst. 52. 4 Bl. Com. 179.

(*j*) 3 Co. Inst. 52. 2 Hale, 412. In the case of treason the mode of execution can now be altered from hanging to beheading, 54 Geo. III. c. 146, s. 2.

more justly, than this prerogative of the Crown, founded in mercy and immemorially exercised, was part of the common law (*k*); and that though the King could not by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he might mitigate the pain of infamy: and accordingly that an officer, acting upon a warrant from the Crown for beheading a person under sentence of death for felony, would not be guilty of any offence (*l*). But the rule may apply to an officer varying from the judgment of his own head, and without warrant or the colour of authority (*m*). And if an officer, whose duty it is to execute a sentence of whipping, should exceed all bounds of moderation, and thereby cause the party's death, it is said that he will at least be guilty of manslaughter (*n*).

Discipline at Sea.—Persons on board ship are necessarily subjected to something like a despotic government, and it is extremely important that the law should regulate the conduct of those who exercise dominion over them (*o*). In vessels belonging to the Royal Navy the correction of seamen is regulated by the Naval Discipline Act (29 & 30 Vict. c. 109) and the King's Regulations and Admiralty Instructions (*p*). The discipline of British merchant ships is governed by sects. 220–228 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). In a case of manslaughter against the captain and mate of the vessel, by accelerating the death of a seaman really in ill health, but whom, they allege, they believe to be a skulker, that is, a person endeavouring to avoid his duty, the question is (in determining whether it is a slight or aggravated case), whether the phenomena of the disease were such as would excite the attention of humane and reasonable men; and, in such a case, if the deceased is taken on board after discharge from a hospital it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman (*q*).

Domestic and Scholastic Correction.—Parents, masters, and other persons having authority *in foro domestico*, may inflict resonable chastisement on those under their care, such as children, pupils, or apprentices, and if death ensues without their fault, it will not be felony (*r*). In the case of a schoolmaster the right is said to exist by delegation from the parent or guardian of the child: and the delegation is not limited to acts of the child within four walls of the school, even in a day school (*s*). But if the correction exceeds the bounds of due moderation, either in the measure of it, or in the instrument used, the death ensuing will be either murder or manslaughter, according to the circumstances of the case. Where the fact is done with a dangerous weapon, improper for correction, and likely

(*k*) Fost. 270. F. N. B. 144 h. 19 Rym. Fœd. 284.

(*l*) Fost. 268. 4 Bl. Com. 405. 1 East, P. C. 335.

(*m*) Female traitors used in mercy to be strangled before they were burnt (Fost. 268). They are now liable to be hanged, and not to be burnt. 30 Geo. III. c. 48, s. 1.

(*n*) 1 Hawk. c. 29, s. 5. As to mode of executing sentences of whipping, *vide ante*, p. 215.

(*o*) See *The Agincourt*, 1 Hagg. Adm. 271. Lamb *v.* Burnett, 1 Cr. & J. 291.

(*p*) See official edition of 1906.

(*q*) R. *v.* Leggett, 8 C. & P. 191, Alderson, B., Williams and Coltman, JJ.

(*r*) This right is expressly saved by the Children Act, 1908 (8 Edw. VII. c. 67), s. 37, *post*, p. 921. See Halliwell *v.* Counsell, 38 L. T. (N. S.) 176.

(*s*) Cleary *v.* Booth [1893], 1 Q.B. 465, 469, Cave, J. As to the authority of undermasters to inflict chastisement, see Mansell *v.* Griffin [1908], 1 K.B. 160, Phillimore and Walton, JJ.

(the age and strength of the party being duly considered) to kill or maim; such as an iron bar, a sword, a pestle, or great staff, or where the party is kicked to the ground, his belly stamped upon, and so killed, it will be murder (*t*). Thus, where a master had employed his apprentice to do some work in his absence, and on his return found it had been neglected, and thereupon threatened to send the apprentice to Bridewell, to which the apprentice replied, 'I may as well work there, as with such a master'; upon which the master struck the apprentice on the head with a bar of iron which he had in his hand, and the apprentice died of the blow; it was held murder: for if a father, master, schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as will probably kill them; otherwise, under pretence of correction, a parent may kill his child; and a bar of iron is no instrument of correction (*u*).

The prisoner having employed her stepdaughter, a child of ten, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool which struck her on the right temple, and caused her death. The stool was of sufficient size and weight to give a mortal blow: but the prisoner did not intend when she threw it to kill the child. These facts were stated in a special verdict, but the matter was considered of great difficulty, and no opinion was ever delivered by the judges (*v*).

In R. *v.* Wiggs (*w*), a shepherd boy had suffered some of the sheep, which he was employed in tending, to escape from their pen. The boy's master, the prisoner, seeing the sheep get out, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died. Nares, J., after stating that every master had a right moderately to chastise his servant (*x*), but that the chastisement must be on just grounds, and with an instrument properly adapted to the purposes of correction, desired the jury to consider, whether the stake, which, lying on the ground, was the first thing the prisoner saw, in the heat of his passion, was, or was not, under such circumstances, and in such a situation, an improper instrument. For that the using a weapon from which death is likely to ensue, imports a mischievous disposition; and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder. Therefore, if the jury should think the stake was an improper instrument, they would further consider whether it was probable that it was used with an intent to kill; that

(*t*) 1 Hawk. c. 29, s. 5. 1 Hale, 454, 473. R. *v.* Keite, 1 Ld. Raym. 138, 144: 91 E. R. 989.

(*u*) R. *v.* Grey, Kel. (J.) 64. Fost. 262. See R. *v.* Wall, 28 St. Tr. 51, 145, MacDonald, C.B.

(*v*) R. *v.* Hazel, 1 Leach, 368. *Ante*, p. 698.

(*w*) 1 Leach, 378 n. See also R. *v.* Conner, 7 C. & P. 438, *ante*, p. 720.

(*x*) In Combe's case, 9 Co. Rep. 76 a, it is said to have been held in 33 Edw. III. Trespass 253, that 'the lord may beat his villein for cause or without cause and the villein shall not have any remedy.' In R. *v.* Mawgridge, (12 St. Tr. 57; Kel. (J.) 133) it was held that 'If a parent or a master be provoked to a degree of passion by some miscarriage of the child or servant, and the parent or master shall proceed to correct the child or servant with a moderate weapon, and shall by chance give him an unlucky stroke, so as to kill him, that is but a misadventure. But if a parent or master shall use an improper instrument in the correction, then if he kills the child or servant it is murder.'

if they thought it was, they must find the prisoner guilty of murder; but if they were persuaded it was not done with an intent to kill, the crime would then at most amount to manslaughter. The jury found it manslaughter. In this case it is presumed that the learned judge must be understood as meaning, that if the jury should think the instrument so improper as to be dangerous, and likely to kill or maim, the age and strength of the party killed being duly considered, the crime would amount to murder; as the law would in such case supply the malicious intent; but that if they thought that the instrument, though improper for the purpose of correction, was not likely to kill or maim, the crime would only be manslaughter, unless they should also think that there was an intent to kill (*y*).

Though the correction exceeds the bounds of moderation, the Court will pay regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must, in all probability, occasion death, though the party were hurried to great excess. A father, whose son had frequently been guilty of stealing, and who, upon complaints made to him of such thefts, had often corrected the son for them; at length, upon the son being charged with another theft, and resolutely denying it, though proved against him, beat him in a passion with a rope, by way of chastisement for the offence, so much that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The judge, by whom the father was tried, consulted his colleague in office, and the principal counsel on the circuit, who all concurred in opinion that it was only manslaughter; and so it was ruled (*z*).

The deceased, a girl about fifteen, with her younger sister, had been placed, after their mother's death, under the care of an aunt, who employed them in stay-stitching fourteen or fifteen hours a day, and, when they did not do the required quantity of work, severely punished them with the cane and the rod. The deceased was in consumption, and did not do so much work as her sister, and, in consequence, was much oftener and more cruelly punished by the aunt, who accompanied her corrections with very violent and threatening language, and said that she was sure that the girl was acting the hypocrite and shamming illness, and that she had a very strong constitution. The surgeon said she died from consumption, but that her death was hastened by the treatment she had received. Under these circumstances, the counsel for the prosecution thought there was not proof of malice sufficient to constitute the crime of murder, as the aunt always alleged that she believed the girl was shamming illness, and was really able to do the work required, and which it appeared her younger sister actually did, and the Court concurred in that opinion (*a*).

On an indictment for manslaughter, it appeared that the prisoner, a schoolmaster, having the care of the deceased, a boy of thirteen or

(*y*) See R. *v.* Turner, Comb. 407–408, cited *ante*, p. 698.
(*z*) Anon. Worcester Spr. Ass. 1775, Serjt. Forster's MS. 1 East, P. C. 261.
(*a*) R. *v.* Cheeseman, 7 C. & P 455, Vaughan, J.

fourteen, wrote to his father, stating that the boy was obstinate, and that, were he his own child, he should, after warning him, as he had done, subdue his obstinacy, by chastising him severely, and, if necessary, he should do it again and again, and continue it again even if he held out for hours. The father replied, 'I do not wish to interfere with your plan.' The prisoner took the boy into a room downstairs, and beat him for about two hours, between ten and twelve, with a thick stick; using also a skipping-rope. About midnight the prisoner beat him again, until about half-past twelve, when the beating and crying suddenly stopped. About seven the next morning, the prisoner said he had found the boy dead, and almost stiffening. A medical examination shewed that the thighs and other parts of the body were covered with bruises, and that there had been profuse bleeding and extravasation of blood caused by excessive and protracted beating, and that the immediate cause of death was exhaustion arising therefrom. The medical witnesses stated that upon the evidence, coupled with the prisoner's statement, the boy at seven o'clock in the morning must have been dead about six hours; so that their evidence went to shew that he died about the time when the beating was heard suddenly to cease. The prisoner had not avowed the beating until its effects had been discovered by a post-mortem examination, and had sent the body home so closely wrapped up that the bruises were not detected until the coverings were removed in consequence of rumours prevailing. There was no post-mortem examination prior to the inquest, at which the surgeon, who was called in by the prisoner at seven o'clock and who had only seen the boy's face, was examined, and the prisoner, who suggested that the boy had died of disease of the heart. The stick was at one end an inch thick; at the other it was edged with brass about the circumference of a sixpence, and there were holes in the shins of the deceased corresponding therewith, and which the medical witness thought must have been produced by poking therewith. The prisoner and his wife had been for some time going up and down stairs engaged in washing out the stains of blood in the night. Cockburn, C.J., said: 'By the law of England, a parent or a schoolmaster, who for this purpose represents the parent, and has the parental authority delegated to him, may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature and degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if death ensues it will be manslaughter' [at least]; and (after commenting on the evidence) 'It is true that the father authorised the chastisement, but he did not, and no law could, authorise an excessive chastisement. There can be no doubt that the prisoner thought the boy obstinate, but that did not excuse extreme severity and excessive punishment' (*b*).

(*b*) R. *v.* Hopley, 2 F. & F. 202. 'The indictment was for manslaughter: it certainly ought to have been for murder.' C. S. G.

In R. *v.* Griffin (*c*), where the father of a child two and a half years old had beaten it with a strap, Martin, B., after consulting Willes, J., said: 'The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable; and the only question for the jury to decide is whether the child's death was accelerated or caused by the blows inflicted by the prisoner.'

Careless Performance of Ordinary Duties.—If persons, in pursuit of their lawful and common occupations, see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of the danger, and cause death, such killing seems in law to be murder. Thus, if workmen throwing stones, rubbish, or other things from a house, in the ordinary course of their business, happen to kill a person underneath, the question will be, whether they deliberately saw the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, the act will amount to murder from its gross impropriety (*d*). So, if a person driving a cart or other carriage happens to kill another, and it appears that he saw, or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder (*e*). Such acts are deliberate, and manifest a heartless disregard of social duty (*f*).

Where persons employed about a lawful occupation, from which danger may probably arise to others, neglect the ordinary precautions, it will be manslaughter, at least, on account of such negligence (*g*). Thus, if workmen throw stones, rubbish, or other things from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and there was even a small probability of persons passing by, it will be manslaughter (*h*). It was a lawful act, but done in an improper manner. It has, indeed, been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution used (*i*). But this must be understood with some limitation. If it is done early in the morning, when few or no people are stirring, and ordinary caution is used, the party may be excusable; but when the streets are full, such ordinary caution will not suffice; for, in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it (*j*).

On an indictment for the manslaughter of a lunatic, it appeared that the prisoner, who was an attendant at a lunatic asylum, turned on the

(*c*) 11 Cox, 402.

(*d*) 3 Co. Inst. 57. 4 Bl. Com. 192. 1 East, P. C. 262.

(*e*) 1 Hale, 476. Fost. 263. 1 East, P. C. 262.

(*f*) Fost. 263. As to when a person causing death by negligently driving a vehicle is guilty of manslaughter, see *post*, tit. 'Manslaughter,' p. 794.

(*g*) Fost. 262. 1 East, P. C. 262.

(*h*) Fost. 262. 1 Hale, 475. *Item si putator, ex arbore ramo dejecto, servum tuum transeuntem occiderit, si prope viam publicam aut vicinalem id factum est, neque proclamavit, ut casus evitari posset, culpæ reus est; sed si proclamavit, nec ille curavit præcavere, extra culpam est putator. Æque extra culpam esse intelligitur si seorsum a via forte, vel in medio fundo cædebat, licet non proclamavit, quia in eo loco nulli extraneo jus fuerat versandi.* Just. Inst. L. iv. tit. iii. s. 5.

(*i*) R. *v.* Hull, Kel. (J.) 40.

(*j*) Fost. 263.

hot-water tap by mistake into a bath in which accidentally a lunatic had remained after having been told by the prisoner to get out. The prisoner thought the man had got out of the bath, and his attention being called away for the moment, he did not observe that the man was still there. Lush, J., directed the jury that if they took this view of the case it was an accident (*k*).

Persons using Dangerous Articles or Instruments.—As the degree of caution to be employed depends upon the probability of danger, it follows that persons using articles or instruments, in their nature peculiarly dangerous, must use such caution as the particular circumstances may require. Thus, though where one lays poison to kill rats, and another takes it and dies, this is misadventure: yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food; for to lay it where it might be mistaken for food would be grossly negligent, and might in some cases amount to manslaughter (*l*).

A., having deer frequenting his cornfield, which was not within the precincts of any forest or chase, set himself in the night-time to watch in a hedge, and set B., his servant, to watch in another corner of the field, with a gun charged with bullets, giving him orders to shoot, when he heard any bustle in the corn by the deer. The master afterwards improvidently rushed into the corn himself, and the servant, supposing it to be the deer, shot and killed the master. Hale, C.J., ruled this to be misadventure, on the ground that the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. He thought, however, that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter, because of the want of due caution in the servant to shoot before he discovered his mark (*m*). But it is suggested by East that if, from all other circumstances of the case, there appeared a want of due caution in the servant, it does not seem that the command of the master could supply it, much less could excuse him in doing an unlawful act: and that the excuse of having used ordinary caution can only be admitted where death happens accidentally in the prosecution of some lawful act (*n*). On the same principle as to due caution it was ruled to be misadventure, where a commander coming upon a sentinel in the night, in the posture of an enemy, to try his vigilance, is killed by him as such; the sentinel not being able to distinguish his commander, under such circumstances, from an enemy (*o*).

The caution which the law requires, is not the utmost caution that can be used: reasonable caution is sufficient, such as is usual and ordinary in similar cases; such as has been found, by long experience in the ordinary

(*k*) R. *v.* Finney, 12 Cox, 625.

(*l*) 1 Hale, 431. 1 East, P. C. 266. The laying of poisoned grain and meat for the purpose of killing animals is unlawful unless it is done in a dwelling-house or enclosed land attached thereto for rats, mice or small vermin. 1 & 2 Will. IV. c. 32, s. 3 (ground game); 26 & 27 Vict. c. 113 (poisoned grain or seed); 27 & 28 Vict. c. 115 (poisoned flesh). If the death of a human being resulted from infraction of these Acts it would seem to be manslaughter.

(*m*) 1 Hale, 476. The learned author seems to think that the offence amounted to manslaughter (1 Hale, 40); but considers the question as of great difficulty. The case was, however, determined at Peterborough, as stated in the text.

(*n*) 1 East, P. C. 266.

(*o*) 1 Hale, 42.

course of things to answer in the end (*p*). But in order to create criminal liability for homicide it is necessary to prove a grosser neglect of proper caution than would suffice to create a civil liability (*q*).

PART II.—CONCEALMENT OF BIRTH.

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 60, 'If *any woman* shall be delivered of a child, every person who shall, *by any secret disposition* of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if any person tried (*r*) for the murder of any child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour 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 the birth' (*s*).

Under the former enactments (*t*) the mother only could be tried for the offence, and cases sometimes occurred where endeavours had been made to conceal the birth of children, and there was no evidence to prove that the mother participated in those endeavours, though there was sufficient evidence that others did so, and under such circumstances, all must have been acquitted (*u*). The above section is so framed as to include every person who uses any such endeavour; and it is quite immaterial under it whether there be any evidence against the mother or not.

(*p*) R. *v.* Hughes, 26 L. J. M. C. 102.

(*q*) R. *v.* Lowe, 3 C. & K. 123, Campbell, C.J. R. *v.* Franklin, 15 Cox, 163, Field, J. Hammack *v.* White, 31 L. J. C.P. 131; 11 C. B. (N. S.) 588, Willes, J.

(*r*) Whether on indictment or on the coroner's inquisition. R. *v.* Cole, 2 Leach, 1095; 3 Camp. 371. R. *v.* Maynard, R. & R. 240.

(*s*) Framed from 9 Geo. IV. c. 31, s. 14 (E); and 10 Geo. IV. c. 34, s. 17 (I). The words 'by any secret disposition' have been substituted for 'by secret burying or otherwise disposing of the dead body,' and it is no longer material whether the secret disposition was temporary or permanent.

(*t*) 43 Geo. III. c. 58, which repealed 21 Jac. I. c. 27, provided that trials, in England and Ireland, of women charged with the murder of any issue of their bodies, which would by law be bastard, should proceed by the like rules of evidence and presumption as were allowed to take place in respect to other trials for murder; and that the jury, by whose verdict any prisoner charged with such murder aforesaid should be acquitted, might find, 'that the prisoner was delivered of issue of her body, male or female, which, if born alive, would have been bastard; and that she did, by secret burying, or otherwise, endeavour to conceal the death thereof.' This provision could only be acted upon where the child was a bastard and where the party was charged with murder by an inquisition or an indictment. It was repealed by 9 Geo. IV. c. 31. In Scotland the enactment 49 Geo. III. c. 14 differs from 43 Geo. III. c. 58, and does not make that concealment a matter which can only be found by the jury upon the trial of an indictment for murder, but enacts (s. 2) 'that if any woman in Scotland shall conceal her being with child during the whole period of her pregnancy, and shall not call for and make use of help or assistance in the birth, and if the child be found dead or be missing, the mother, being lawfully convicted thereof, shall be imprisoned for a period not exceeding two years, in such common gaol or prison as the Court before which she is tried shall direct and appoint.'

(*u*) R. *v.* Waterage, 1 Cox, 338. R. *v.* Skelton, 3 C. & K. 119.

A person assisting the mother in concealing a birth will come within the terms of this section as a principal (*vide ante*, Book I. Chapter V.).

Secret Disposition.—Whether there is any evidence of a secret disposition within the statute is a question which depends upon the circumstances of each particular case. The most public exposure may be a secret disposition, as, for instance, in the middle of Dartmoor, or on the top of a mountain in Scotland in winter. It is for the jury to consider (*v*). The prisoner put the dead body of her child over a wall which was four and a half feet high, and divided a yard from a field. The yard was at the back of a public-house, and entered from the street by a narrow passage. The prisoner did not live at the public-house, and must have carried the body from the street up the passage to the yard. The field was grazed by the cattle of a butcher, and the only entrance to it was through a gate leading from the butcher's own yard. There was no path through the field, and a person in the field could only see the body in case he went up to the wall, close against which the body lay. A little girl, picking flowers in the field found the body of the child, twenty yards from the gate. There was nothing on or over the body to conceal it. Upon a case reserved it was held that there was evidence to go to the jury of a secret disposition of the dead body of the child, and a conviction for endeavouring to conceal the birth of the child, by secretly disposing of its dead body, was confirmed (*w*).

But where the dead body of a child was put into a box, and this box was put into a larger box, neither being locked or fastened, but both being closed, and the boxes were left in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room, the jury were directed that this was not a secret disposition of the body (*x*).

Where on an indictment for endeavouring to conceal the birth of her child, it was proved that, the prisoner appearing ill, her mistress sent for a doctor, who asked the prisoner if she had been confined, and she said she had been; and the doctor asked her what she had done with the child, and she said it was in a box in her bedroom, and he went to the room and found the child in an open box, having the cover lifted; Byles, J., told the jury that 'there must be a secret disposition for the purpose of concealing the birth. The concealment must be by a secret disposition of the body, and a disposition could only be secret by placing it where it was not likely to be found. Secrecy was the essence of the offence. Could they say that an open box in the prisoner's bedroom was a secret disposition? It was for them to say, but in his opinion it was not' (*z*).

But where the body is placed in an unlocked box, all the attendant circumstances must be taken into consideration to determine whether or not an offence has been committed (*a*). Where the body was taken out of the house, and was placed in a locked pound which was open to the sky and surrounded by a wall five feet high along which there was a public

(*v*) Bovill, C.J., in R. *v.* Brown, L. R. 1 C. C. R. 244.

(*w*) R. *v.* Brown, *ubi supra*.

(*x*) R. *v.* George, 11 Cox, 41, Bovill, C.J.

(*z*) R. *v.* Sleep, 9 Cox, 559. But Martin, B., held that it was a question of law for the judge, whether there has been a secret disposition of the body, *i.e.*, a disposing of it in such a place as that the offence may have been committed. See R. *v.* Clarke, 4 F. & F. 1040, Martin, B.

(*a*) R. *v.* Cook, 11 Cox 542, Lush, J.

footway, it was held that there was no secret disposition of the body (*b*). Where the prisoner put the dead body of her child on the bed and covered it with a petticoat, Jelf, J., held that there was no secret disposition and directed an acquittal (*c*).

Under 21 Jac. I. c. 27 (rep.), evidence was always allowed of the mother's having made provision for the birth, as a circumstance to shew that she did not intend to conceal the death (*d*). So, under 9 Geo. IV. c. 31, s. 14 (rep.), where the body of a child was found among the feathers of a bed, but it did not appear by whom it had been placed there, and the prisoner had prepared clothes for the child, and sent for a surgeon at the time of her confinement, an acquittal was directed (*e*). But the fact that the prisoner may have previously allowed the birth to be known to some persons is not conclusive evidence negativing concealment (*f*).

The prisoner and one T. were indicted under 43 Geo. III. c. 58 (rep.) for the murder of the prisoner's bastard child; it was a seven months' child, and from the state in which it was found the probability was that it was stillborn. T., when questioned immediately after the child's birth, wholly denied it, though she must have known it. The prisoner threw the child down the privy; and the jury found this an endeavour to conceal the birth. On a case reserved, it was held that this was evidence of an endeavour to conceal the birth (*g*).

The sending for a female to attend at the beginning of the labour, and the fact of its being known to the mother of the woman and others that she was pregnant, were no bar to a conviction for concealing the birth, under 9 Geo. IV. c. 31, s. 14 (rep.), but only evidence for the consideration of the jury. If the dead body of the child were buried, or otherwise disposed of by an accomplice of the mother in her absence, the accomplice acting as her agent in so doing, she might be convicted under the last-mentioned Act of endeavouring to conceal the birth (*h*).

In order to bring a case within 9 Geo. IV. c. 31, s. 14, the disposition of the body of the child must have been complete. The prisoner was found going across a yard in the direction towards a privy with a bundle of cloth sewed up, with the body of a child in it, and was stopped; Gurney, B., interposed and said, that the prisoner could not be convicted under that Act, the offence not being complete; 'the body must be buried or otherwise disposed of, to bring the case within the Act. Here she was interrupted in the act, probably, of disposing of the body, but the act was incomplete' (*i*). So where it appeared that the alleged concealment was the taking of the body immediately after the birth to a sister, living at a distance, for the purpose of having it buried in a churchyard, Erle, J., considered this did not amount to a concealment (*j*). But it was afterwards held that any concealment of

(*b*) R. *v.* Nixon, 4 F. & F. 1040n., Martin, B. Where the naked dead body of a child was exposed in a public street where many persons were certain to pass and repass, and the exposure was calculated to outrage public decency, Denman, J., held that this was a nuisance at common law, but that there was no secret disposition of the dead body within this section. R. *v.* Clark, 15 Cox, 171.

(*c*) R. *v.* Rosenberg, 70 J. P. 264, Jelf, J.

(*d*) 1 East, P.C. 228, 229.

(*e*) R. *v.* Higley, 4 C. & P. 336, Park, J.

(*f*) R. *v.* Douglas, 1 Mood. 480; 7 C. & P. 644.

(*g*) R. *v.* Cornwall, R. & R. 336, and MS. Bayley, J.

(*h*) R. *v.* Bird, 2 C. & K. 817.

(*i*) R. *v.* Snell, 2 M. & Rob. 44.

(*j*) R. *v.* Waterage, 1 Cox, 338.

the body, whether intended to be final or temporary, was within that Act (*k*).

Where on an indictment under 9 Geo. IV. c. 31, s. 14, for endeavouring to conceal the birth of a child, it appeared that the prisoner was delivered in a privy; that the child dropped from her there into the soil, and that there she left it, and the jury thought that she went into the privy for the purpose of being delivered there, and for the purpose thereby of concealing the birth; upon a case reserved, the judges thought, upon the wording of the section, it was necessary something should be done by the prisoner after the birth to bring the case within that section (*l*). So in a similar case, where the prisoner had denied her pregnancy and the birth, and the body of the child was found in a privy; Patteson, J., told the jury that the offence was not merely the endeavouring to conceal the birth of a child, but that the prisoner, to come within 9 Geo. IV. c. 31, s. 14, must have endeavoured to conceal the birth by secret burying, or otherwise disposing of the dead body of the child; and it was essential to the commission of this offence that she should have done some act of disposal of the body after the child was dead. If she had gone into the privy for another purpose, and the child came from her unawares, and fell into the soil and was suffocated, she must be acquitted, notwithstanding her denial of the birth of the child, because she did not come within the provisions of the Act, unless she had done something with the child after it was dead. If there had been evidence that the child was born elsewhere, and was, after it was dead, carried by her to this place, and thrown in, that would be a disposing of the body within the Act (*m*). It is a question for the jury in such a case whether the prisoner threw the dead body into the privy, or whether it fell from her into it (*n*).

A woman delivered of a child born alive endeavoured to conceal the birth thereof by depositing the child while alive in the corner of a field, leaving the infant to die from exposure, which it did, and the dead body was afterwards found in the corner. Upon a case reserved it was held that she could not be convicted of concealing the birth of the child (*o*).

On an indictment for murder it appeared that the child was discovered

(*k*) R. *v.* Farnham, 1 Cox, 349, Patteson, J., where the body was placed in the bottom of a bonnet-box in the middle of some linen, and was wrapped in a petticoat with a bonnet on the top. R. *v.* Goldthorpe, 2 Mood. 244, where the body was placed between the bed and mattress. R. *v.* Perry, Dears. 471: 24 L. J. M. C. 137: 6 Cox, 531, where the body was placed under a bolster upon which the prisoner was partly lying. R. *v.* Gogarty, 7 Cox, 107 (Ir.), where the body was on a bed covered by a quilt, the prisoner being seated on the side of the bed. But in R. *v.* Opie, 8 Cox, 332, where the body was found behind a door of a privy in a tub covered with a cloth, Martin, B., stopped the case and expressed his agreement with the dissenting judgment of Pollock, C.B., in R. *v.* Perry, *supra*.

(*l*) R. *v.* Wilkinson, M. T. 1829. MSS. Bayley, J. 3 Burn's Justice (ed. by D. & W.), 348.

(*m*) R. *v.* Turner, 8 C. & P. 755, Patteson, J. Where the evidence strongly tended to shew that the child had been born in a privy, and there was no evidence to shew any act done to it by the prisoner after its death, Coleridge, J., approved of the preceding case, and counsel for the prosecution offered no evidence, as the case could not be distinguished from R. *v.* Turner; R. *v.* Nash, Hereford Spr. Ass. 1841. MSS. C. S. G. Cf. R. *v.* Derham, 1 Cox, 56, Coleridge, J.

(*n*) R. *v.* Coxhead, 1 C. & K. 623, Platt, B.

(*o*) R. *v.* May, 10 Cox, 448. R. *v.* Bell, Ir. Rep. 8 C. L. 542.

in an outhouse, alive, but concealed from view by four bundles of rick-pegs lying horizontally in front and partly over it, but not touching it: the child was left as it was found, and about an hour afterwards the rick-pegs were found to have been partially removed, and placed on one side of the child, which was dead, and there was evidence to shew that the prisoner alone had been in the outhouse during the hour. For the prosecution it was urged that if the prisoner after the death of the child re-covered it, that would be a secret disposal of the body. Lord Campbell, C.J.: 'I have carefully examined the statute (9 Geo. IV. c. 31, s. 7) and the facts with reference to the point suggested by the counsel for the prosecution. Any objection that might have arisen, that there was no attempt to conceal the dead body of the child, is, I think, removed in the manner suggested; for there cannot be any reasonable doubt that the prisoner visited the outhouse after the child was dead, and although she did not remove it, any replacing of the clothes or other things by which the body was concealed from view, would, I think, be an endeavour to conceal by a secret disposal of the dead body within the statute' (*p*).

But where the dead body was found on the floor of an attic, wrapped in bed-sheets which had been removed from the room below; the head of the child separated from the body, and a knife lying near it, and the body was in the middle of the room, Talfourd, J., held that there was no evidence of an endeavour to conceal (*q*).

Where on an indictment for murder, it appeared that the prisoner had denied that she was in the family way; but in consequence of a stain of blood having been discovered in her bedroom she was questioned, and then said that she had taken the child away, and put it in a sheet of water in a park and she accompanied the constable thither, and pointed out where she had thrown in the body, and it was found wrapped in a towel and dressed in a cap and shirt; and she afterwards stated that she had put away the body in a box in her room for two days, after which she threw it into the water, and she said she should have had it buried in the churchyard only she was afraid of provoking her father: Coltman, J., told the jury that the offence contemplated by the Act (9 Geo. IV. c. 31, rep.) was the endeavour to conceal the birth from the world at large, and not from any individual. The statute did not apply to individuals, but to society in general. If, therefore, the secret disposal of the dead body arose from an endeavour to conceal the birth from some private individual, and not from the world at large, then the offence contemplated by the statute had not been committed; and if the jury believed that the prisoner was really actuated by the dread of provoking her father's displeasure, she was not guilty of this offence (*r*).

Where on an indictment under the Act (9 Geo. IV. c. 31, rep.) for concealing the birth, a surgeon stated that the remains were those of a child of which the mother must have gone from seven to nine months; 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. It is not necessary that it should have

(*p*) R. *v.* Hughes, 4 Cox, 447. *Sed quære.*

(*q*) R. *v.* Goode, 6 Cox, 318.

(*r*) R. *v.* Morris, 2 Cox, 489.

been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity; and if she had miscarried at a time when the fœtus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins; but it may, perhaps, be safely assumed that, under seven months, the great probability is that the child would not be born alive'(*s*).

In a case under 21 Jac. I. c. 27 (rep.), it appeared from the view of the child and by apparent probabilities, that it had not arrived at its *debitum partus tempus*, as it wanted hair and nails, the case was considered as not being within that statute, on account of there being presumptive evidence that the child was born dead; but under such circumstances it was left to the jury upon the evidence, as at common law, to say whether the mother was guilty of the death (*t*).

The dead body of the child must be found and identified on an indictment for attempting to conceal the birth. A woman apparently pregnant took a room at an inn in Stafford. On August 28 she received a Rugby newspaper by post with the Rugby postmark on it. On the same day her appearance and the state of her room seemed to shew that she had been delivered of a child. She left the inn next day for Shrewsbury, carrying a parcel. In the afternoon of that day a dead body of a child was found at Stafford railway station, wrapped in a Rugby newspaper dated August 27. There is a railway from Stafford to Shrewsbury, but no evidence was given that the prisoner had been at Stafford station. It was held that this evidence was not sufficient to identify the body of the child found as the child of the prisoner (*u*).

An indictment for concealing the birth of a child must expressly allege the child to be dead, for it is only an offence to conceal the dead body (*v*).

An indictment under 9 Geo. IV. c. 31, s. 14 (rep.), stated that the prisoner endeavoured to conceal the birth of her child 'by secretly disposing of the dead body'; and it was objected that the mode of disposal ought to be stated to enable the Court to see whether it amounted to the complete disposition contemplated by the statute, one mode was specified in the Act, and any other ought to be stated; and Maule, J., expressing a strong opinion that the objection was good, counsel for the prosecution declined to press the case (*w*).

(*s*) R. *v.* Berriman, 6 Cox, 388. According to Martin, B., a *fœtus* not bigger than a man's finger, but having the shape of a child, is a child within the statute. R. *v.* Colmer, 9 Cox, 506, *sed quære*. In R. *v.* Hewitt, 4 F. & F. 1101, Montague Smith, J., left it to the jury to say whether what the prisoner concealed was a child, or was only a *fœtus*.

(*t*) 2 Hale, 289.

(*u*) R. *v.* Williams, 11 Cox, 684, Montague Smith, J. See R. *v.* Bate, 11 Cox, 386.

(*v*) R. *v.* Davis, Hereford Spr. Ass. 1829, Parke, J. MSS. C. S. G. R. *v.* Perkin, 1 Lew. 44, Parke, J.

(*w*) R. *v.* Hounsell, 2 M. & Rob. 292. But as the present clause has the words 'any secret disposition,' it should seem that an indictment in this form would be good; for every secret disposition is included. See Holloway *v.* R., 17 Q.B. 317, where it was held that a count for aiding an escape was good, though it did not state the means used, because the words of 4 Geo. IV. c. 64, s. 43 (rep.) were '*shall, by any means whatever*, aid.'

An indictment under the above enactment, alleging that the prisoner did cast the dead body of her child into the waters and filth in a privy, and 'did thereby then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof,' was held sufficient; for the word 'thereby' applied both to the disposal and to the endeavour; and the indictment need not allege that the child died before, at, or after its birth (*x*).

PART III.—OF MANSLAUGHTER.

SECT. I.—DEFINITION AND PUNISHMENT.

The felony of manslaughter consists of the killing of man by man without malice aforethought (*y*), but without legal justification or excuse (*z*), *i.e.*, under circumstances rendering the killing unlawful or legally culpable. The death must ensue within a year and a day of the culpable act or issue assigned as its cause (*a*). It is not defined by any statute, and the nearest approach to a statutory definition is the declaration in sect. 6 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), that 'it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased' (*b*).

By sect. 5 of that Act, 'whosoever shall be convicted of manslaughter shall be liable at the discretion of the Court to be kept in penal servitude for life . . . (*c*) or to pay such fine as the Court shall award, in addition to or without any other such discretionary punishment as aforesaid' (*c*). Where the person convicted is under sixteen, he is dealt with under sects. 102, 104 of the Children Act, 1908 (*d*).

Accessories.—In order to make an abettor to manslaughter a principal in the felony, he must be present aiding and abetting the fact committed (*e*). It was formerly considered that there could not be any accessories before the fact in any case in manslaughter, because it was presumed to be altogether sudden, and without premeditation (*f*): 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 (*g*). But the position ought to be limited to those cases where the killing is sudden and unpremeditated; for there

(*x*) R. *v.* Coxhead, 1 C. & K. 623, Platt, B.

(*y*) *Ante*, pp. 655 *et seq.* Fost. 290. 1 Hale, 466. In R. *v.* Taylor, 2 Lew. 215, Taunton, J., said: 'Manslaughter is homicide, not under the influence of malice, but where the blood is heated by provocation, and before it has time to cool.' This definition does not cover homicide by neglect or want of skill, or in doing an unlawful act.

(*z*) *Post*, p. 807.

(*a*) R. *v.* Dyson [1908], 2 K. B. 454–456 (C. C. A.).

(*b*) *Vide post*, 818.

(*c*) Or not less than three years, or to imprisonment with or without hard labour for not over two years. 54 & 55 Vict. c. 69, s. 1; *ante*, pp. 211, 212. The words omitted from s. 5 were repealed in 1892 (S. L. R.).

(*d*) *Ante*, p. 231.

(*e*) 1 Hale, 438, 439, and see *ante*, pp. 108, 114 *et seq.* as to what will be a presence aiding and abetting.

(*f*) 1 Hale, 437. 1 Hawk. c. 30, s. 2.

(*g*) 1 Hale, 450. This is clearly Bibithe's case, 4 Co. Rep. 43 *b*. Moore (K.B.) 461. See the observations on it, Greaves' Cr. Cons. Acts, 43 (2nd ed.).

are cases of manslaughter where there may be accessories (*h*). 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 (*i*). Where two men fought with fists and the one was killed, and before fighting, by agreement, they each deposited a pound with the defendant, upon the terms that after the fight he was to hand over the two pounds to the winner, the defendant, who was not present at the fight, and took no further part in the circumstances attending it than to hold the money and to hand it over afterwards to the survivor, was held not liable to be convicted of being accessory before the fact to the manslaughter (*j*). There may be accessories after the fact in manslaughter (*k*).

Provocation and Mutual Combat.—Whenever death ensues from the sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, the offence will be manslaughter (*l*). 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 decisions as to the line to be drawn between murder and manslaughter in cases of killing in mutual combat have been already discussed *ante*, p. 710.

Resistance to Officers of Justice, &c.—It has been before mentioned as a general rule, that where persons who have authority to arrest or imprison, and use the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance (*m*). This protection of the law extends only to persons who have proper authority and do use that authority in a proper manner (*n*); wherefore questions of nicety and difficulty have frequently arisen upon the points of authority, legality of process, notice, and regularity of proceeding. The consequence of defects in any of these particulars, is in general that the offence of killing the person resisted is extenuated to manslaughter (*o*).

Sect. II.—Killing in the Prosecution of some Unlawful or Wanton Purpose.

Where death is caused by an act unlawful in itself, done heedlessly or incautiously, but without deliberation or mischievous intention (*p*), the killing is manslaughter (*q*). Where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have

(*h*) R. *v.* Gaylor, Dears. & B. 288; *vide ante*, pp. 114 *et seq.*

(*i*) Ibid.

(*j*) R. *v.* Taylor, L. R. 2 C. C. R. 147.

(*k*) 1 Hale, 450. 1 East, P. C. 353. R. *v.* Greenacre, 8 C. & P. 35, Tindal, C.J., Coleridge and Coltman, JJ. 24 & 25 Vict. c. 94, s. 3; 24 & 25 Vict. c. 100, s. 67. *Ante*, p. 126. There were doubts on the subject before the Act 1 Anne, st. 2, c. 4 (see 2 Hawk. c. 29, s. 24).

(*l*) 1 Hale, 466. 1 Hawk. c. 30. Fost. 290. 4 Bl. Com. 191. 1 East, P. C. 232.

(*m*) *Ante*, p. 721.

(*n*) Fost. 319, and *ante*, p. 763.

(*o*) *Ante*, p. 656.

(*p*) As to deliberate intention, *vide ante*, pp. 655 *et seq.*

(*q*) Fost. 261.

been murder or manslaughter. For if a blow, intended against A., and lighting on B., arose from a sudden transport of passion, which, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it shall have caused the death of B. (*r*).

There are so many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief: and the party committing them, and causing death by such conduct, will be guilty of manslaughter. As if a person, who is breaking an unruly horse, rides him amongst a crowd of people, and death ensues from the viciousness of the animal, and it appears clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter (*s*). And if a man knowing that people are passing along the streets, throws a stone or shoots an arrow over a house or wall, and a person be thereby killed, this will be manslaughter, though there was no intention to do hurt to anyone, because the act itself was unlawful (*t*). So where a gentleman came to town in a chaise, and, before he got out of it, fired his pistols in the street, which, by accident, killed a woman, it was ruled manslaughter; for the act was likely to breed danger, and was manifestly improper (*u*).

A party who causes the death of a child by giving it spirituous liquors, in a quantity quite unfit for its tender age, has been held guilty of manslaughter (*v*).

On an indictment for manslaughter it appeared that the deceased was in possession of the goods of one of the prisoners under a warrant from the sheriff, and the three prisoners plied him with drink, themselves drinking freely also, and when he was very drunk, put him into a cabriolet, and caused him to be driven about the streets, and about two hours after he was put in the cabriolet he was found dead. Parke, B., after directing the jury to dismiss from their consideration that part of the indictment which alleged that the prisoners knew that the quantity of liquor taken was likely to cause death, of which there did not appear to be any evidence, and which, if proved, would make the offence approach to murder, told the jury that if they were of opinion that the prisoners put the deceased in the cabriolet, then the questions would be: first, whether they or any of them were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose; or, whether, when he had taken it, they put him into the cabriolet for an unlawful purpose. If they thought that the three prisoners, or one of them, made him excessively drunk, to enable the prisoner, whose goods were seized, to prevent the completion of the execution; or if they were satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple fact

(*r*) Fost. 262.

(*s*) 1 East, P. C. 231.

(*t*) 1 Hawk. c. 31, s. 68. But it is said that in such a case if the rider had intended to divert himself with the fright of the crowd the offence would be murder. 1 Hale, 475. 1 Hawk. c. 29, s. 9.

(*u*) R. v. Burton, 1 Str. 481.

(*v*) R. v. Martin, 3 C. & P. 211. It is now an offence to give intoxicating liquor to a child under five except on the order of a fully qualified medical practitioner or nurse, or in case of sickness or other urgent cause (8 Edw. VII. c. 67, s. 119).

of persons getting together to drink, or one pressing another to do so, was not an unlawful act; or, if death ensued, an offence that could be construed into manslaughter. Upon the first question stated, it would be essential to make out that the prisoners administered the liquor with the intention of making the deceased drunk, and then getting him out of the house; and if that were doubtful, still if, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case would be a case of manslaughter. If, however, they all got drunk together, and afterwards he was put into the cabriolet with an intention that he should take a drive only, that was not an unlawful object, such as had been described, and the prisoners would be entitled to an acquittal. And to a question put by the jury, the learned baron answered, that if the prisoners, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter (*w*).

If death ensues from an act which is a mere trespass the offence will be only manslaughter, not murder. Where a carman was in the front part of a cart loading it with sacks of potatoes, and a boy pulled the trapstick out of the front of the cart, but not with intent to do the man any harm, as he had seen it done several times before by others; and in consequence of the trapstick having been taken out, the cart tilted up, and the deceased was thrown out on his back on the stones, and the potatoes were shot out of the sacks, and fell on and covered him over, and he died in consequence of the injuries then received, it was held that the boy was guilty of manslaughter (*x*). Where an indictment for manslaughter alleged that the prisoners in and upon one L. H. did make an assault, and that L. H. then lying in a certain cart containing divers bags of nails of great weight, the prisoners did with their hands force up the shafts of the said cart, and throw down the body of the said cart in which L. H. was so as aforesaid lying, and him the said L. H. by such forcing up of the shafts and throwing down of the body of the said cart as aforesaid, did cast and throw upon the ground under the said bags of nails; by means whereof the said bags of nails were thrown and forced against over and upon the breast of L. H., L. H. then being upon the ground, and the said bags of nails then and there did press and lie upon the breast of L. H., thereby giving, &c., Taunton, J., held that it was not necessary to allege in the indictment that the prisoners knew the deceased to be in the cart, as malice was not an ingredient in the crime (*y*).

On an indictment for manslaughter, the following statement of the prisoner was proved: 'As I was going home about four o'clock this afternoon I heard the report of a gun. Shortly afterwards I saw the deceased with a gun, and I went to him to take his gun from him. We had a scuffle together for about ten minutes, and there were blows exchanged on both sides; the deceased struck me, and knocked me down with his gun; at the same time the gun went off, and shot the deceased.

(*w*) R. *v.* Packard, C. & M. 236.

(*x*) R. *v.* Sullivan, 7 C. & P. 641. Gurney, B., and Williams, J.

(*y*) R. *v.* Lear and Kempson, Stafford Spring Assizes, 1832. MSS. C. S. G.

I was insensible for a short time, and when I came round found the deceased was dead, and had the barrel of the gun in his hand.' The prisoner was a gamekeeper of a gentleman who had permission by parol to shoot over the land where this scuffle took place. It was contended that, admitting that the prisoner had no right to take the gun away, and that he was guilty of an assault in attempting to do so, the death was not the result of that assault, but of the excess of violence of the deceased himself. Lord Campbell, C.J., told the jury that the case was one of manslaughter. The struggle between the prisoner and the deceased was to be considered as one continuous illegal act on the part of the prisoner, and death resulting from that act (*z*).

The defendant kept a gun loaded with printing types, in consequence of several robberies having been committed in the neighbourhood, and sent a mulatto girl, his servant, of the age of about thirteen, for the gun, desiring the person in whose house he lodged to take the priming out. This he did, and told the girl so, and delivered the gun to her, and she put it down in the kitchen, resting on the butt, and soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a young boy, saying she would shoot him, and drew the trigger, and the gun went off, and wounded the boy. It was held that the defendant was liable to an action for the injury. Ellenborough, C.J., said: 'The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Leman was not sufficient; consequently, as by this want of care the instrument was left in a state capable of doing mischief, the law will hold the

(*z*) R. *v.* Wesley, 1 F. & F. 528. 'Lord Campbell refused to reserve the point; and yet it seems well deserving of better consideration. If the prisoner had died from the excess of violence inflicted by the deceased, it cannot be doubted that the deceased would have been guilty of manslaughter, and it is not a little startling to hold that that excess of violence which caused the gun to explode is to make the prisoner guilty of manslaughter. Suppose the deceased had pulled the trigger intending to shoot the prisoner, and in the struggle he had shot himself instead, it would be startling to hold the prisoner guilty of manslaughter. The reason why an excess of violence is punished is, that it is not in point of law attributable to the assault committed, but to the wrongful act of the party assaulted, and to hold the party assaulting guilty of the result of an excess of violence is to hold him guilty of the consequence of an act, of which the law not only holds him not to be guilty, but holds the other party to be guilty, or, to put it in still simpler terms, to hold him responsible for an act which the law holds not to be his act at all, but to be wholly the act of another person.'—C. S. G. In R. *v.* Archer (1 F. & F. 351) the deceased had deposited a gun with A. to secure a loan of money, and in A.'s absence called at his house and took away the gun without repaying the money. A. went to the deceased and demanded the gun back, and on his refusal to give it up began to wrestle with him. The deceased said that the gun was loaded; the prisoner, however, persisted in his attempt to take it away, and after a violent struggle succeeded in doing so; but, falling on the ground as he was in the act of wrenching the gun away, the gun went off accidentally, and killed the deceased. Campbell, C.J., told the jury that, though the prisoner had a right to the possession of the gun, to take it away from the deceased by force was unlawful; and that as the discharge of the gun was this result of the unlawful act, it was their duty to find the prisoner guilty of manslaughter. The decision in Blades *v.* Higgs, 11 H. L. C. 621, 10 C. B. (N. S.) 713, seems to render this ruling of no authority.

defendant responsible' (*a*). It has been suggested in former editions that this ruling would have justified the conviction of the defendant for manslaughter if death had ensued: but it is very doubtful whether it can safely be pressed so far.

Where a person fires at another a firearm, 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 he does not know that it is loaded, and has taken no pains to ascertain, the crime is manslaughter (*b*).

A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer: he carried it home, and shewed it to his wife; and she standing before him, he pulled up the cock, and touched the trigger; and the pistol went off and killed the woman. This was ruled manslaughter (*c*). But the legality of the decision has been doubted, on the ground that the man examined the pistol in the common way, and used the ordinary caution deemed to be effectual in similar cases (*d*). And Foster, J., after stating his reasons for disapproving of the judgment, says, that he had been the longer upon the case, because accidents of this lamentable kind may be the lot of the wisest and best of mankind, and most commonly fall amongst the nearest friends and relations; and then proceeds to state a case of a similar kind, in which the trial was had before himself. On a Sunday morning a man and his wife went to take dinner at the house of a friend. He carried his gun with him, but before dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church; and in the evening, returned home with his wife, bringing his gun with him. He taking it up, touched the trigger; and the gun went off and killed his wife. It came out in evidence, that, while the man was at church, another person took the gun, charged it, and went after some game; and returned it, loaded, to the place whence he took it, and the defendant, who was ignorant of all that had passed, found it, to all appearance as he had left it. 'I did not inquire,' says Foster, J., 'whether the poor man had examined the gun before he had carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury that, if they were of the same opinion, they should acquit him: and he was acquitted' (*e*).

An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine,

(*a*) Dixon *v.* Bell, 5 M. & S. 198. See 1 Beven on Negligence (3rd ed.), p. 97.

(*b*) R. *v.* Campbell, 11 Cox, 323. R. *v.* Jones, 12 Cox, 628.

(*c*) Rampton's case, Kel. (J.) 41.

(*d*) Fost. 264, where it is said, that perhaps the rammer, which the man had not tried before, was too short, and deceived him. But, *qu.*, whether the ordinary and proper precaution would not have been to have examined the pan, which in all probability must have been primed. The rammer of a pistol, or gun, is so frequently too short, from having been accidentally broken, that it would be very incautious in a person previously unacquainted with the state of the instrument to rely upon such proof as he could receive from the rammer, unless it were passed so smartly down the barrel as clearly to give the sound of the metal at the bottom. However, there is a *qu.* to the case in the margin of the report, and it appears that the learned Editor (Holt, C.J.) was not satisfied with the judgment; and that it is one of the points which, in the Preface, he recommends for further consideration.

(*e*) Foster, Cr. L. 265.

broke the scaffolding; and that in consequence of the scaffolding being so broken, a corf, in which the deceased was descending the mine, struck against a beam, on which the scaffolding had been supported, and by such striking the corf was overturned, and the deceased precipitated into the mine and killed. It was proved that scaffolding was usually found in mines in the neighbourhood, for the purpose of supporting the corves, and enabling the workmen to get out and work the mines; that the stones were of a size and weight sufficient to knock away the scaffolding, and that if the beam only was left, the probable consequence would be that the corf striking against it would upset, and occasion death or injury. Tindal, C.J., said: 'If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death but manslaughter. If the wrongful act was done under circumstances which shew an intent to kill, or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance, the act was one of mere wantonness and sport, but still the act was wrongful—it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death' (*ee*).

But where a person wrongfully and wantonly threw a large box from a pier into the sea and accidentally struck and killed a man who was swimming under the pier, Field, J., after consulting Mathew, J., said that the question of negligence must be left to the jury and not the mere question whether the death was caused by the wrongful act of the prisoner. The mere fact that the prisoner had committed a civil wrong ought not to be used as an incident which was a necessary step in a criminal case (*f*).

Unlawful Games.—Where sports are unlawful in themselves, or productive of danger, riot, or disorder, so as to endanger the peace, and death ensue in the pursuit of them, the party killing is guilty of manslaughter (*g*). Prize-fighting, public boxing matches (*h*) or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have been considered unlawful (*i*). For in these cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided that the promised reward or applause be obtained; and meetings of this kind have also a strong tendency to cause a breach of the peace (*j*). Therefore, where the prisoner had killed his opponent in a boxing match, it was held that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden (*k*).

(*ee*) R. *v.* Fenton, 1 Lew. 179, Tindal, C.J.

(*f*) R. *v.* Franklin, 15 Cox, 163.

(*g*) Fost. 259, 260. 1 East, P. C. 268.

(*h*) But not sparring matches with proper gloves and fairly conducted. R. *v.* Young, 10 Cox, 371.

(*i*) Fost. 260.

(*j*) 1 East, P. C. 270.

(*k*) Ward's case, O. B. 1789, *cor.* Ashhurst, J. 1 East, P. C. 270.

Prize-fights are altogether illegal; as illegal as duels with deadly weapons, and it is not material which party strikes the first blow (*l*).

In R. *v.* Coney (*m*), two men fought with each other in a ring formed by ropes supported by posts and in the presence of a large crowd. Amongst the crowd were the prisoners, who were not proved to have taken any active part in the management of the fight, or to have said or done anything. They were tried and convicted of aiding and abetting an assault. Upon a case reserved the conviction was quashed by eight judges against three, the majority holding that mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of aiding and abetting an assault, although the mere presence unexplained may, it would seem, afford some evidence for the consideration of a jury.

In R. *v.* Murphy (*n*), at a fight at which many were assembled the ring was several times broken by persons carrying sticks, which they used with great violence, and the deceased died of blows then received; Littledale, J., directed the jury: 'You ought to consider whether the deceased came by his death in consequence of blows he received in the fight itself; for if he came by his death by any means not connected with the fight itself, that is, if his death was caused by the mob coming in with bludgeons, and taking the matter as it were out of the hands of the combatants, then persons merely present encouraging the fight would not be answerable, unless they are connected in some way with that particular violence. If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of manslaughter; but if the death ensued from violence unconnected with the fight itself, that is, by blows given not by the other combatant in the course of the fight, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter.'

Killing another by throwing stones at another wantonly in play, being a dangerous sport without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, will be manslaughter (*o*).

Lawful Sports.—Such sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends without any intention to cause bodily harm, such as playing at cudgels, or foils, or sparring with gloves (*p*), wrestling by consent, or football (*q*), are deemed lawful; and if either party happens

(*l*) R. *v.* Coney, 8 Q.B.D. 535, approving R. *v.* Perkins, 4 C. & P. 537, Patteson, J. R. *v.* Lewis, 1 C. & K. 419, Coleridge, J. R. *v.* Billingham, 2 C. & P. 234, Burrough, J. See R. *v.* Hargrave, 5 C. & P. 170, where Patteson, J., ruled that persons present at a prize-fight were not such accomplices as to need corroboration.

(*m*) 8 Q.B.D. 534, per Denman, J., Huddlestone, B., Manisty, Hawkins, Lopes, Stephen, Cave, and North, JJ. (Coleridge, C.J., Pollock, B., and Mathew, J., *diss.*). This decision appears to overrule R. *v.* Murphy, 6 C. & P. 103; R. *v.* Perkins, 4 C. & P. 537; and R. *v.* Billingham, 2 C. & P. 234, if and so far as they decided that mere presence at a prize-fight is encouragement. Cf. R. *v.* Young, 8 C. & P. 644, where mere presence at a duel was held not enough to warrant conviction for aiding and abetting in the murder of one of the combatants.

(*n*) 6 C. & P. 103.

(*o*) 1 Hawk. c. 29, s. 5. Cock-throwing at Shrovetide was held unlawful, and a person who in throwing at a cock missed his aim and killed a child was held guilty of manslaughter by Foster, J. Fost. 261.

(*p*) R. *v.* Young, 10 Cox, 371.

(*q*) R. *v.* Bradshaw, 14 Cox, 83. R. *v.* Moore, 14 T. L. R. 229.

accidentally to be killed in such sports, it is excusable homicide by misadventure (*r*).

Though it cannot be said that such sports are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. Proper caution and fair play should, however, be observed, and illegal violence avoided, and, though the weapons used be not of a deadly nature, yet, if they may breed danger, there should be due warning given, that each party may start upon equal terms. For if two are engaged to play at cudgels, and the one make a blow at the other, likely to hurt, before he is upon his guard, and without warning, from whence death ensues, the want of due and friendly caution will make such act amount to manslaughter, but not murder, the intent not being malicious (*s*).

In R. *v.* Young (*t*) seven men were indicted for manslaughter. They had been sparring with gloves on, and the deceased was with them. After several rounds the deceased fell and struck his head against a post, whilst he was sparring with the prisoner. The men were all friendly, but as the deceased and the prisoner came up to the last round they were 'all in a stumble together.' The medical testimony was to the effect that sparring might be dangerous, but that death would be unlikely to result from such blows as had been given. The danger would be where a person was able to strike a straight blow, but the danger would be lessened as the combatants got weakened. Bramwell, B., said, the difficulty was to see what there was unlawful in this matter. It took place in a private room; there was no breach of the peace. No doubt if death ensued from a fight, independently of its taking place for money, it would be manslaughter; because a fight was a dangerous thing and likely to kill; but the medical witness here had stated, that this sparring with the gloves was not dangerous, and not a likely thing to kill. After consulting Byles, J., Bramwell, B., said, that he retained the opinion he had previously expressed. It had, however, occurred to him that supposing there was no danger in the original encounter, the men fought on until they were in such a state of exhaustion that it was probable they would fall, and fall dangerously, and if death ensued from that, it might amount to manslaughter, and he proposed, therefore, so to leave the case to the jury and reserve the point if necessary. The prisoners were acquitted.

In R. *v.* Orton (*u*) it was held upon a case reserved that if persons meet to fight intending to continue till they give in from injury or exhaustion, the fight is unlawful whether gloves are or are not used.

On a trial for manslaughter it appeared that the prisoner came into a shop and pulled a young lad by the hair off a cask where he was sitting, and put his arm round his neck and spun him round, and they came together out of the shop, and the prisoner kept spinning him round, and the lad broke away from him, and in consequence, and at the moment of his so doing, the prisoner, being intoxicated, reeled into the road, and against the deceased who was passing and knocked her down, and she

(*r*) Fost. 259, 260. 1 East, P. C. 268. A different view seems to have been held by Hale, 1 P. C. 472, but his view is contested by Foster (Cr. L. 260).

(*s*) 1 East, P. C. 269.

(*t*) 10 Cox, 371.

(*u*) 14 Cox, 226 (C. C. R.).

died shortly afterwards. The lad said he did not resist the prisoner—he thought the prisoner was only playing with him, and was sure that it was intended as a joke throughout. Erle, J., told the jury: 'Where the death of one person is caused by the act of another, while the latter is in pursuit of any unlawful object, the person so killing is guilty of manslaughter, although he had no intention whatever of injuring him who was the victim of his conduct. Here, however, there was nothing unlawful in what the prisoner did to this lad, and which led to the death of the woman. Had this treatment of the boy been against his will, the prisoner would have been committing an assault—an unlawful act—which would have rendered him amenable for any consequences resulting from it; but as everything that was done was with the boy's consent, there was no assault, and consequently no illegality. It is in the eye of the law an accident, and nothing more' (*v*).

Ordinarily the weapons made use of upon such occasions are not deadly in their nature. In some sports the instruments used are of a deadly nature; yet, if they are not directed by the persons using them against each other, and therefore no danger is reasonably to be apprehended, the killing which may casually ensue will be only homicide by misadventure. Such will be the case, therefore, where persons shoot at game, or butts, or any other lawful object, and a bystander is killed (*w*).

Even in lawful sports, if the weapons used are of an improper and deadly nature, the party killing will be guilty of manslaughter. Sir John Chichester in playing with his manservant made a pass at the servant with the sword in the scabbard, and the servant parried it with a bedstaff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard; and the thrust not being effectually broken, the servant was killed by the point of the sword (*x*). This was adjudged manslaughter: and Foster, J., thinks, in conformity with Lord Hale, that it was rightly so adjudged, on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm (*y*).

The deceased met with his death in the course of a game of football played according to the Association rules. The deceased was kicking the ball when the prisoner in charging him struck him with his knee in the stomach, inflicting injuries which proved fatal. Bramwell, L.J., told

(*v*) R. *v.* Bruce, 2 Cox, 262.

(*w*) 1 Hale, 38, 472, 475. 1 Hawk. c. 29, s. 6. 1 East, P. C. 269. Shooting at game without a licence, or under the old law without a qualification, is not so unlawful as to render accidental killing manslaughter. 1 Hale, 475. Fost. 259. Where one of two poachers accidentally kills another, it has been ruled manslaughter. R. *v.* Holt, Lancaster Assizes, 25 Jan. 1907, Sutton, J., 42 L. J. (Newsp.) 67. *Sed quære.*

(*x*) Sir John Chichester's case, Allen 12; Keilw. 108; 72 E. R. 723; 1 Hale, 472, 473.

(*y*) 1 Hale, 473. Fost. 260. 1 East, P. C. 269. But see in Hale, 473, the following note: 'This seems a very hard case; and, indeed the foundation of it fails; for the pushing with a sword in the scabbard, by consent, seems not to be an unlawful act; for it is not a dangerous weapon likely to occasion death, nor did it so in this case, but by an unforeseen accident, and therein differs from the case of jousting, or prize-fighting, wherein such weapons are made use of as are fitted and likely to give mortal wounds.'

the jury : ' If a man is playing according to the rules and practice of the game and not going beyond, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But if the prisoner intended to cause serious hurt to the deceased, or if he knew that in charging as he did he might produce serious injury, and was indifferent and reckless as to whether he did so or not, then the act would be unlawful ' (*z*). The jury acquitted the prisoner.

Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent ; and therefore if a bystander is killed by the shot, such killing will be manslaughter (*a*).

In one case, where rioters, having forcibly gained possession of a house, afterwards killed a partisan of the person whom they had ejected, as he, in company with a number of others, was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty only of manslaughter (*b*). The *ratio decidendi* seems to have been that the person slain was so much in fault himself (*c*). But the decision is an exception from the general rule already stated as to the liability of rioters in case of homicide (*d*).

Sect. III.—Killing in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Lawful Authority.

An act, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder (*e*). And as the circumstances of the case may vary, the party so killing another may be guilty only of manslaughter (*f*).

(*z*) R. *v.* Bradshaw, 14 Cox, 83.

(*a*) 1 Hale, 475.

(*b*) Drayton Basset case, Fitzh. (ed. Crampton, 1606), f. 26. 1 Hale, 440.

(*c*) 1 Hawk. c. 31, s. 53.

(*d*) *Ante*, p. 759.

(*e*) *Ante*, pp. 763 *et seq.* ; cf. R. *v.* Moore, 14 T. L. R. 229, Hawkins, J.

(*f*) In R. *v.* Tranter (as reported 1 Str. 449), L., being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as L. pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which L. refused to give, and he went upstairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, ' he did not intend to hurt the officers, but he would not be ill-used.' The officer who had been sent for the attorney's bill soon returned to his companion at the lodgings ; and, words of anger arising, L. struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him ; one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them ; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. This is said to have been held manslaughter, by reason of the first assault with the cane. This decision is criticised as extraordinary by Foster (293, 294), who mentions additional circumstances as reported 16 St. Tr. 1. 1. L. had a sword by his side, which, after the affray was over, was found drawn and broken. 2. When L. laid the pistols on the table, he declared that he brought them down because he would not be forced out of his lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot (for both

Where an inquisition alleged that the defendants were trustees under an Act of Parliament, and that it was their duty to contract for the repair of a road, and also to repair the road, and that they did feloniously neglect to contract for the reparation of the said road, and did feloniously neglect to repair the same, and that W. B. being riding in a barrow along the said road, the defendants by their neglect to contract for the reparation of the said road, and by their neglect to repair the same, did cause one wheel of the said barrow to fall into a large hole in the said road, and the said W. B. to be thereby thrown with great violence from the said barrow upon the ground, whereby he was killed; it was held that the inquisition was bad: not only must the neglect, to make a party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect, and here the death was not the direct consequence of the neglect charged (*g*).

Negligence in Business.—Upon an indictment for the manslaughter of a child, it appeared that the child being ill, the mother sent to a chemist for a pennyworth of paregoric; the chemist's apprentice delivered a phial, with a paregoric label on it, but with laudanum in it; and the mother, supposing it to be paregoric, gave the child six or seven drops, which killed it. The laudanum bottle and the paregoric bottle stood side by side. Bayley, J., told the jury: 'If you think there was negligence on the part of the prisoner, you will find him guilty; if not, you must acquit him' (*h*).

The prisoner was indicted for manslaughter, in having, by negligence in the manner of slinging a cask, caused the same to fall and kill two females, who were passing along the causeway. It appeared that there were three modes of slinging casks customary in Liverpool: one by slings passed round each end of the cask; a second by can hooks; and a third which the prisoner employed, by a single rope round the centre of the cask. The cask was hoisted up to the fourth storey of a warehouse, and on being pulled endways towards the door, it slipped from the rope as soon as it touched the floor of the room. Parke, J., told the jury: 'The double slings are undoubtedly the safest mode; but, if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him' (*i*).

pistols were discharged in the affray), and slightly wounded on the wrist by some sharp-pointed weapon, and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching L. begging for mercy was not that he was on the ground begging for mercy, but that on the ground he held up his hands as if he was begging for mercy. Upon these facts Pratt, C.J., directed the jury, that if they believed L. endeavoured to rescue himself, which he seemed to think was the case, and which very probably was the case, it would be justifiable homicide in the officers. And as L. gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done, if the debt had not been paid or bail given, he declared it would be no more than manslaughter.

(*g*) R. *v.* Pocock, 17 Q.B. 34; cf. R. *v.* Hilton, 2 Lew. 214, *post*, p. 801. R. *v.* Clerk of Assizes of Oxford Circuit [1897], 1 Q. B. 370, where an inquisition for manslaughter by neglect to fence a quarry was quashed as insufficiently setting out the necessary particulars.

(*h*) R. *v.* Tessymond, 1 Lew. 169, and *vide ante*, pp. 681 *et seq.* The directions of Bayley, J., as to criminal negligence in this case are criticised in Beven on Negligence (3rd ed.), Vol. i. p. 7.

(*i*) R. *v.* Rigmaidon, 1 Lew. 180.

The prisoner, who was an ironfounder, was employed to make twelve cannon. Four of them were sent home and tried, and one of them burst under the touch-hole, and was sent back to the prisoner, with orders to have it melted up. The prisoner returned it nailed down to a carriage, and there was some lead in it, which must have been put there to stop up the part which had burst, as it matched the former aperture. The cannon was loaded, with an ordinary charge, burst, and thereby killed the deceased. It was held that the prisoner was guilty of manslaughter (*j*).

The prisoner had a firework shop in the Westminster Road, where he had for some time carried on the business of selling fireworks. No fireworks were made there except as follows:—First, the finishing the smaller rockets, and making stars for them of combustible matter; secondly, making fireworks called serpents; thirdly, making cases and filling them with combustible matter, called red, blue, and green fires (*k*). The fire was employed for filling coloured cases used to imitate revolving lights in fireworks called wheels. These cases affixed were not used by themselves, but in connection with those fireworks, to add to their effect. The contents of the cases of fire made at the Westminster Road were combustible, and the red fire would explode if struck hard. Five or six pounds of fire were made every day in the house in Westminster Road, and filled there in the back room into cases with a rammer and mallet by persons employed for the purpose. At the time of the fire there was a quantity of the red and blue fire in the house, in the room where it was to be put into cases, in order to be used in the course of the business, and a quantity of fireworks for the evening. The prisoner being out of the house and not personally interfering, a fire broke out in the red and blue fire, which communicated to the fireworks which were kept in the shop, causing a rocket to cross the street and set fire to a house, in which the deceased was consequently burnt to death. It was contended that the fire was accidental in the sense of not being wilful or designed; that it did not happen through any personal interference or negligence of the prisoner; that he was entitled to the benefit of any distinction between its happening through negligence of his servants, or by pure accident without any such negligence; that the cases of red, &c., fire, were only parts of the fireworks, and not within 9 & 10 Will. III. c. 7; that it did not appear that it was by reason of making the fireworks that the mischief happened, and that the death was not the direct and immediate result of any wrong or omission on the prisoner's part. Willes, J., held that the prisoner was guilty of a misdemeanor in doing an act with intent to do what was forbidden by the statute, and that, as the fire was occasioned by such misdemeanor, and without it would not have taken place, or could not have been of such a character as to cause the death, a case was made out; but, upon a case reserved, the conviction was held wrong. Cockburn, C.J., said, 'The keeping of the fireworks in the shop by the prisoner caused the death only by the superaddition of the negligence of some one else. By the negligence of the prisoner's servants the fireworks ignited, and the house in which the deceased was, was set on fire and

(*j*) R. *v.* Carr, 8 C. & P. 163, Bayley and Gurney, BB., and Patteson, J.

(*k*) To this last part of the business the particular attention of the judges was directed.

death ensued. The keeping of the fireworks may be a nuisance; and if, from the unlawful act of the prisoner, death had ensued as a necessary and immediate consequence, the conviction might be upheld. The keeping of the fireworks, however, did not alone cause the death: *plus* that act of the prisoner there was the negligence of the prisoner's servants' (*l*).

H. was commandant of the forces at the garrison of Plymouth. A target was placed in the Sound, under the general directions of the Horse Guards, and the artillerymen were accustomed to practise by firing at it with ball. One day while such practice was proceeding a ball missed the target, and, striking the waves, ricochetted and hit a boatman, who was taking a boat across the Sound in the lawful and proper exercise of his vocation, and in a place where he might lawfully be. Byles, J., after stating that the depositions were extremely long and vague, so that he hardly knew in what shape the charge would be presented, is said to have told the grand jury that 'manslaughter was when one man was killed by the culpable negligence of another' (*m*). A slight act of negligence was not sufficient—all men and women were negligent at some time; it would depend on the degree of negligence. A slight deviation from proper care and skill was not sufficient. By way of illustration: suppose a man were to fire a gun in a field where he saw no one, and as he fired another man suddenly raised his head from a ditch; he could not say that that man would be guilty of manslaughter; it would be held not to be culpable negligence (*n*). But supposing a man were to fire down the High Street of Exeter because he saw no one, and some one was suddenly to appear, and he was killed, that would be culpable negligence in the man who fired the gun. It would seem, and the results shewed it, that the

(*l*) R. *v.* Bennett, Bell, 1: 28 L. J. M. C. 27. 'The case stated that the question of a nuisance, independent of the statute, was disposed of upon the facts in favour of the prisoner. Not a single authority or case was referred to in the argument, or by the Court: and this case seems deserving of reconsideration. The death would not have happened except for the unlawful act of the prisoner; for, unless the combustibles had been where they were, the death would not have occurred. If they had spontaneously ignited, or a stranger had accidentally ignited them by striking his nailed boots on the floor, it cannot be doubted that the prisoner would have been guilty of manslaughter; but it is said that the negligence of the servant exonerates the master. It is submitted that, in point of law, it has no such effect. A master may be criminally responsible for the *wilful* acts of his servants, where they are done in the course of their employment and for his profit. R. *v.* Dixon, 3 M. & S. 11; and *à fortiori*, he ought to be held to be criminally responsible for the negligence of his servants in his employment, where that employment is a dangerous one, and carried on unlawfully in a place where it is perilous to the public. "The law takes notice that occasional carelessness may be reckoned upon, and forbids that to be done which, on the recurrence of carelessness, will, in all probability, prove destructive to life," R. *v.* Lister, Dears. & B. 209: and therefore a person, who carries on such an employment in such a place, must be taken to contemplate the carelessness of his servants as one of the natural consequences of his carrying it on, and ought to be held criminally responsible for it. See the principles laid down in R. *v.* Lister.' C. S. G. 9 & 10 Will. III. c. 7 was repealed in 1860 by 23 & 24 Vict. c. 139, and the latter Act was repealed by the Explosives Act, 1875 (38 & 39 Vict. c. 17), under which the manufacture and storage of gunpowder and other explosives is now regulated.

(*m*) This is only one form of manslaughter; *vide ante*, p. 780.

(*n*) 'It is clear this would be no negligence at all. The case as put is of a man lawfully shooting in a lawful place, where he had no reason to suppose any other person was.' C. S. G.

boat was within the range of fire; but that was no defence. If the man had not been killed, and had brought an action for damages, or if his wife or family had brought an action, or 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 therefore it was no defence that the boat was in danger (*o*). He could only speculate upon the negligence imputed in this case. First he did not know that it would be said that it was an improper place whether to fire from or to fire over. The gun was fired from one of the batteries kept on purpose for practice. It was said that this battery was too low; but that was not the point of defence. Therefore, subject to their better judgment, nothing could be imputed to the defendant as to the place whence the gun was fired. Then as to the place over which it was fired. Had the defendant the selection of it? Then in using the place, although an improper one, was he obeying military orders? If so, he would not be guilty (*p*). Common danger did not make the place improper. He was a man performing a most important duty. Supposing, therefore, that the defendant had been personally engaged in the firing: if he thought that the place from which the gun was fired was not improper, and that the place to which the firing was directed was not improper, assisted by additional precautions, which might be used, he would not be responsible, because acting under the direction of superior authority. It seemed that complaints had been made by a great many persons residing in Plymouth and Devonport, and he must beg their attention to the orders the defendant had given. The major-general would impress upon the officers in command to see with the utmost diligence that the range was free before the firing. Then there was a second order. The major-general impresses upon the officers the necessity of seeing that all was free, as he should hold them personally responsible. He had hitherto presumed that the defendant had personally to do with the firing; and, if he had, he would not be guilty of manslaughter. But the next question was, did he personally superintend the firing or did he not? They would see whether he did or not. Was he guilty of a breach of duty in not personally superintending the firing? He could not see that he was. Again, it might be said, that if he issued orders it was his duty to see that proper persons were appointed to keep a proper look-out; and if proper persons were nominated by him, it did not appear whether they were properly disciplined, and it might be a question whether there was any negligence in them. There were persons with flags, but whether a proper look-out was kept might possibly be doubtful; whether means were taken for keeping a proper look-out they

(*o*) See *post*, p. 806.

(*p*) 'With all deference, this seems to be an error. The commission of a felony can never be excused by the order of any superior, except in cases where the circumstances are such as to warrant the act that is done, as in case of rebellion, &c. In other cases the law acknowledges no distinction between the soldier and the private individual. See the charge of Tindal, C.J., *ante*, p. 432. And the command of the master is no defence to the servant. See R. *v.* James, 8 C. & P. 131. If the military authorities gave an order to practise at a particular place, that order would only justify practising in a careful and proper manner.' C. S. G.

would have to determine. Under these circumstances it would be for them to say whether negligence was brought home to the defendant (*q*).

A., B., and C. went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it. B. placed a board, which was handed to him by A., in the presence of C., in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one, though it was not proved by which one of them, killed a boy in a tree in a garden near the field at a spot distant 393 yards from the firing point. A., B., and C. were all found guilty by a jury of manslaughter. On a case reserved it was held that all three had been guilty of a breach of duty in firing at the spot in question without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter (*r*).

Vehicles.—It is the duty of every man who drives a vehicle on a public highway to drive it with such care and caution as to prevent, as far as is in his power, any injury to any person (*s*).

A foot passenger, though he may be infirm from disease, has a right to walk on the carriage-way, although there be a footpath, and he is entitled to the exercise of reasonable care on the part of persons driving carriages along the carriage-way (*t*).

On an indictment for manslaughter, it appeared that the deceased was walking along a road, in a state of intoxication: the prisoner was driving a cart drawn by two horses, without reins; the horses were cantering, and the prisoner was sitting in front of the cart; on seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and one of the cart wheels passed over him, and he was killed; it was held, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if, from the rapidity of the driving, or from any other cause, the person cannot get out of the way in time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man, who drives any carriage, to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur (*u*).

Upon an indictment for manslaughter, the evidence was, that the prisoner, being employed to drive a cart, sat in the inside instead of attending at the horse's head, and while he was sitting there, the cart went over a child, who was gathering up flowers on the road. Bayley, B., held that the prisoner, by being in the cart, instead of at the horse's head, or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter (*v*).

(*q*) R. *v.* Hutchinson, 9 Cox, 555. This report is manifestly imperfect, and, as counsel are never present as counsel when the grand jury are charged, is not likely to be the report of any barrister.

(*r*) R. *v.* Salmon, 6 Q.B.D. 79: 50 L. J. M. C. 25.

(*s*) Fost. 263. Anon., Old Bailey, 1704: 1 East, P. C. 263, 264.

(*t*) Boss *v.* Litton, 5 C. & P. 407, Denman, C.J. R. *v.* Grout, 6 C. & P. 629, Bolland, B., Park, J.

(*u*) R. *v.* Walker, 1 C. & P. 320, Garrow, B.

(*v*) R. *v.* Knight, 1 Lew. 168. This rule applies as much to bicycles, motor-cars,

Upon an indictment for manslaughter, it appeared that there were two omnibuses, which were running in opposition to each other, galloping along a road, and that the prisoner was driving that on which the deceased sat, and the witnesses for the prosecution stated that the prisoner was whipping his horses just before his omnibus upset. The defence was, that the horses in the omnibus driven by the prisoner took fright and ran away. Patteson, J., said: 'The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses; and that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable: for a man is not to say, "I will race along a road, and when I am got beyond another carriage I will pull up." If the prisoner did really race, and only when he had got past the other omnibus endeavoured to pull up, he must be found guilty; but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace, that he could not control them? If you are of that opinion you ought to convict him' (*w*).

S. and O. were indicted for the manslaughter of D. The prisoners, who were each driving a cart and horse, were seen two miles and a half from the place where the deceased was killed. S. there paid the toll. Both prisoners then appeared to be intoxicated. They were next seen at a bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving; this was 990 yards from the place where the deceased was killed. They were next seen forty-seven yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. At a turnpike-gate a quarter of a mile from that place S., who appeared all along to have been driving the first cart, told the toll-gate keeper, 'We have driven over an old man'; and desired him to bring a light, and look at the name on the cart, on which O. pushed on his cart, and told S. to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which S. said he had sold his concern to O. The surgeon stated that the deceased had a mark on his body, which would correspond with the wheel of a cart, and also several other bruises, and although he could not say that both carts had passed over the body, it was possible that both might have done so. For the prosecution it was contended, that it was perfectly immaterial in point of law whether one or both carts had passed over the deceased. The prisoners were in company, and had concurred in jointly driving

and mechanically propelled vehicles as to vehicles drawn by animals or propelled by hand. For convictions of manslaughter by furiously riding a bicycle see R. *v.* Parker, 59 J. P. 793; R. *v.* Thirgood, 63 J. P. 442. As to motor-cars, see R. *v.* Davis, Old Bailey, Jan. 9, 1908, Pigham, J., 43 Law Journal (Newsp.) 38, and R. *v.* Gylee, 1 Cr. App. R. 242; 73 J.P. 72, and R. *v.* Dalloz, 1 Cr. App. R. 258.

(*w*) R. *v.* Timmins, 7 C. & P. 499, Patteson, J.

furiously along the road; that was an unlawful act, and as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. For the prisoners it was urged that the evidence only proved that one of the prisoners ran over the deceased, and that the other was entitled to be acquitted. Pollock, C.B.: 'I think that is not so. I think the counsel for the Crown is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man, whether he be the first or the last, he would be equally liable. The person who runs over the man would be a principal in the first degree, and the other a principal in the second degree.' And in summing up, 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 he 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 (*x*). 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 or negligence of any one person has contributed to the death of another person.' He then directed the jury on the other point in the manner above mentioned (*y*).

On an indictment for manslaughter it appeared that the two prisoners were in a state of partial intoxication, and drove a gig along a road at a very rapid pace, and met three men, and at that time they were driving rapidly down a hill, and when the three men got to the top, which was thickly shaded with trees, they found the deceased lying insensible in the middle of the road, presenting all the appearance of having just been run over by some vehicle, and he shortly afterwards died. He had been deaf from his childhood, and had contracted an inveterate habit of walking all hours in the middle of the road, though he had been frequently warned of the probable consequences of doing so. It was contended that the prisoners ought to be acquitted, as the deceased had contributed to his own death. Rolfe, B., said: 'Whatever may have been the negligence of the deceased I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion, that if any one should drive so rapidly along a great thoroughfare leading to a large town, as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which amounts to an illegal act in the eye of the law, and, if death ensues from the injuries then inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased. There is a very wide distinction between a civil action for pecuniary compensation for

(*x*) But see R. *v.* Birchall, 4 F. & F. 1087, R. *v.* Mastin, 6 C. & P. 396, and R. *v.* Gylee, 1 Cr. App. R. 242.

(*y*) R. *v.* Swindall, 2 C. & K. 230. As to contributory negligence, see *post*, p. 807.

death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, amounting to illegality; and there is no balance of blame in charges of felony; but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished. If the jury should be of opinion that the prisoners were driving along the road at too rapid a pace, considering the time and place, and were conducting themselves in a careless and negligent way in the management of the horse and gig, I am of opinion that such conduct amounts to illegality, and that the prisoners must be found guilty on this indictment, whatever may have been the negligence of the deceased himself' (*z*).

Upon a trial for manslaughter it appeared that the prisoner was standing up in a spring cart; the reins were not in his hands, but lying on the horse's back; while the horse was trotting down a hill with the cart, the deceased, a child about three years old, ran across the road before the horse, and the wheel of the cart knocked it down and killed it. It did not appear that the prisoner saw the child before the accident. Erle, J., told the jury, that if the prisoner had had the reins, and by using them could have saved the child, he was guilty of manslaughter; but if they thought he could not have saved the child by pulling the reins or otherwise by their assistance, they must acquit him (*a*).

Where on an indictment for manslaughter, it appeared that the deceased was knocked down by a car driven by the prisoner, and great numbers were in the street at the time: Perrin, J., told the jury, that this unusual concourse of people, instead of offering any extenuation for the prisoner, or diminishing the criminality of his careless driving, if they found it to have been such, would but be a circumstance to add to it, and that it was his duty, as well as of all driving upon such occasions, to take more than ordinary precautions against accidents, and to use more than ordinary diligence for the safety of the public (*b*).

A person driving a carriage is not bound to keep on the ordinary side of the road; but if he does not do so, he is bound to use more care and diligence, and keep a better look-out, that he may avoid collision, than would be requisite if he were to keep to his proper side of the road (*c*).

Vessels (*d*).—An inquisition charged that the prisoner did 'propel and force' a vessel against a skiff, whereby the deceased was drowned. The counsel for the prosecution, in opening the case, said, that he apprehended that the rule as to traversing the river Thames was the same as that applicable to the mode of passing along any of the Queen's common highways: therefore, if the speed at which, or the manner in which, the prisoners were navigating the vessel, and were proceeding before they saw the skiff, was such as to prevent them, after they did see it, from

(*z*) R. *v.* Longbottom, 3 Cox, 439.

(*a*) R. *v.* Dalloway, 2 Cox, 273.

(*b*) R. *v.* Murray, 5 Cox, 509 (Ir.).

(*c*) Pluckwell *v.* Wilson, 5 C. & P. 375, Alderson, B. See 5 & 6 Will. IV. c. 35, s. 78. In Christian's note, 1 Bl. Com. 74, it is said 'that the law of the road is that horses and carriages should respectively keep the left side of the road, and consequently in meeting should pass each other on the whip hand.' See Leame *v.* Bray, 3 East, 593. 1 Beven, Negligence (3rd ed.), 541.

(*d*) As to defaults of master and crew of a ship causing danger to life, see 57 & 58 Vict. c. 60, s. 225.

stopping in time to prevent mischief to the person in it, they would be responsible for the offence of manslaughter, if his death happened in consequence; if, on a misty night, the prisoners were proceeding at such a rate that they could not stop in time, their so proceeding was illegal, and, as death ensued, they were responsible. Parke, B.: 'You have stated the law most correctly. There is no doubt that those who navigate the Thames improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway, either by furious driving or negligent conduct' (*e*).

On an indictment for manslaughter it appeared that the prisoner was a pilot, and was on board a Portuguese barque sailing down the Thames; the barque was manned entirely by Portuguese, who did not understand English or nautical directions. The deceased was shrimping in a small boat, and while such occupation is going on the boat is kept motionless by the shrimp net. When the barque was about a quarter of a mile distant the boat made a signal to her, and when she was within twenty yards the deceased hailed her. The prisoner called to the Portuguese helmsman to turn the vessel to the starboard, but the helmsman, not understanding the prisoner's directions, steered to the larboard (*i.e.* port); the barque struck the deceased and killed him. Denman, C.J., after consulting Alderson, B., told the jury: 'The law is, that if the prisoner has produced the death by any conduct of his, he is guilty of manslaughter. It appears to me that he was the person guiding and directing the vessel, and that he is responsible for its management. It is extremely unfortunate that he did not, in the first instance, make the foreigners understand such simple directions as starboard and larboard. You will consider whether there was some negligence upon the part of the prisoner in not making the foreigners understand thoroughly. I take your opinion whether he was guilty of negligence in this respect, and whether that negligence caused the death. If you think so, you will find him guilty' (*f*).

The captain and pilot of a steamer were indicted for manslaughter in causing a death by running down a smack, and it appeared that at the time the steamer started there was a man forward in the forecastle to keep a look-out, but at the time when the accident happened, which was about an hour afterwards, the captain and pilot were both on the bridge which communicates between the paddle-boxes; the night was dark, and it was raining hard; the steamer had a light at each end of the topsail yard; an oyster smack, on board which the deceased was, was

(*e*) R. *v.* Taylor, 9 C. & P. 672. Parke, B., also said: 'The allegation in the inquisition is, that the defendants forced and propelled the vessel against the skiff: evidence against those who gave the immediate orders will be necessary to sustain this allegation.' In R. *v.* Lloyd, 1 C. & P. 301, Garrow, B., where an indictment for manslaughter stated that the prisoner 'did compel and force A. B. and C. D. to leave' a windlass, by means of which the death was occasioned, and it appeared that the prisoner, who was working one handle of the windlass, went away, and A. B. and C. D., then finding they were not strong enough to hold the windlass without him, let go their hold, by reason of which the deceased was killed, it was held that the words 'did compel and force' must be taken to mean personal affirmative force applied to A. B. and C. D., and therefore the prisoner must be acquitted. These decisions turn on pleading points.

(*f*) R. *v.* Spence, 1 Cox, 352.

coming up the Thames without any light on board; the deceased was below: a boy who was on board the smack stated that when the steamer struck the smack he got on board the steamer, and found nobody forward; other witnesses were present to shew that no person was forward on the look-out at the time. Park, J., said, 'Then the captain is not responsible in felony; it is the fault of the person who ought to be there, and who may have disobeyed orders; if the captain leaves the pilot on the paddle-box, as he did here, he is not criminally responsible. In a criminal case every man is answerable for his own acts; there must be some personal act; these persons may be civilly responsible.' Alderson, B.: 'If you could shew that there was a man at the bow, and that the captain had said, "Come away, it 's no matter about looking out," that would be an act of misconduct on his part. If you can shew that the death of the deceased was the result of any act of personal misconduct on the part of the captain, you may convict him.' Park, J., said, 'Supposing he had put a man there, and had gone to lie down, and the man had walked away, do you mean to say he would be criminally responsible? And you must carry it to that length, if you mean to make anything of it.' Alderson, B.: 'I think this case has arrived at its termination; there is no act of personal misconduct or personal negligence on the part of these persons at the bar' (*g*).

On a trial for manslaughter of a person who was burnt in a ship, where the prisoner had struck a light with a match, and lighted a candle, in a part of the ship forbidden by the ship's regulations, and had thrown down the match before it was extinguished, but a period of six hours elapsed without sign of fire by sight or smell; Bramwell, B., thought the evidence too slight to justify a conviction (*h*).

Mines.—Where an indictment for manslaughter alleged that the prisoner was employed to superintend and keep in motion the working of an engine at a colliery for pumping out the water from the colliery, and thereby keeping a clear course for the passage of air and the dispersing of foul air, and that the prisoner neglected to superintend and keep in motion the working of the engine, and did thereby prevent a clear course being left for the passage of the air, and did cause noxious gases to accumulate, and then went on to state that an explosion took place and death ensued; which allegations were proved. It was objected that the charge in the indictment was of non-feasance only and not of misfeasance and that mere non-feasance did not make a man criminally responsible. Wightman, J., ruled that the facts as charged did not constitute an indictable offence, observing that the indictment contained no direct allegation that it was the duty of the prisoner to do that which he was alleged to have neglected to do (*i*).

An indictment for manslaughter alleged that it was the duty of the prisoner to cause to be ventilated a coal mine, and to cause it to

(*g*) R. *v.* Allen, 7 C. & P. 153. *Quære*, whether this case amounts to more than this, that the captain had placed a proper person forward, who had left his post without the captain perceiving it? See Fost. 322. R. *v.* Green, 7 C. & P. 156.

(*h*) R. *v.* Gardner, 1 F. & F. 669.

(*i*) R. *v.* Barrett, 2 C. & K. 343. But see R. *v.* Lowe, *post*, p. 800, and R. *v.* Hughes, *post*, p. 802.

be kept free from noxious gases, and that the prisoner feloniously omitted to cause the mine to be ventilated, and that noxious gases accumulated and exploded, whereby the deceased was killed. It appeared that the deceased was killed by the explosion of fire damp in a colliery, of which the prisoner was a sort of manager, and it was imputed on the part of the prosecution that this explosion would have been prevented if the prisoner had caused an air-heading to have been put up, as it was his duty to have done. For the defence it was attempted to be proved that it was the duty of one of the persons killed to have reported to the prisoner that an air-heading was required, and that he had not done so. In summing up, Maule, J., said: 'The questions for you to consider are, whether it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the plain and ordinary duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have done it, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter. It has been contended that some other persons were, on this occasion, also guilty of neglect; still, assuming that to be so, their neglect will not excuse the prisoner; for if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one, who was negligent, to say that another was negligent also, and thus, as it were, to try to divide the negligence among them' (*j*).

Upon an indictment for manslaughter it appeared that the prisoner was an engineer, and his duty was to manage a steam engine employed for the purpose of drawing up miners from a coal pit; and when the skip containing the men arrived at the pit's mouth his duty was to stop the revolution of the windlass, so that the men might get out. On the day in question he deserted his post, leaving the engine in charge of an ignorant boy, who, before the prisoner went away, declared himself to the prisoner to be utterly incompetent to manage such a steam engine as the one entrusted to him. The prisoner neglected this warning, and threatened the boy, in case he refused to do as he was ordered. The boy superintended the raising of two skips from the pit with success; but on the arrival at the pit's mouth of the third, containing four men, he was unable to stop the engine, and the skip being drawn over the pulley, one of the men was thrown down the shaft of the pit, and killed on the spot. The engine could not be stopped, 'in consequence of the slipper being too low,' an error which any competent engineer could have rectified, but which the boy in charge of the engine could not. For the prisoner it was contended that a mere omission or neglect of duty could not render a man guilty of manslaughter (*k*). Campbell, C.J., said: 'I am clearly of opinion that a man may, by a neglect of duty, render himself liable to be convicted of manslaughter, or even of murder' (*l*).

(*j*) R. *v.* Haines, 2 C. & K. 368. See R. *v.* Swindall, 2 C. & K. 230, *ante*, p. 796, as to the last point.

(*k*) R. *v.* Green, and R. *v.* Allen, *ante*, p. 799.

(*l*) R. *v.* Lowe, 3 C. & K. 123. Lord Campbell discussed this case with Mr. Greaves, Q.C., and they fully concurred that a man might render himself equally culpable by neglecting to do his duty as by a wilful act. *E.g.*, it is the duty of a pointsman to turn the switches on the approach

Upon a trial for manslaughter, it appeared that it was the prisoner's duty to attend to a steam engine, but on the occasion in question he had stopped the engine and gone away, and that, during his absence, a person came and put it in motion, and being unskilled was unable to stop it again, and in consequence of the engine being thus put in motion, the deceased was killed. Alderson, B., stopped the case, saying that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after the prisoner had gone away; that it is necessary in order to a conviction for manslaughter, that the negligent act which causes the death should be that of the party charged (*m*).

Upon an indictment for manslaughter it appeared that the prisoner was a banksman at the top of a shaft of a colliery, where there were an engine and ropes to send down bricks and materials in a bucket, and draw up the empty baskets. It was his duty to send down materials, and to superintend the proper letting down of the buckets, and to place the stage hereinafter mentioned. The buckets were run on a truck on to a movable stage over half of the area of the top of the shaft, and there the bucket was attached and lowered down, the stage being removed. The prisoner on the occasion in question had omitted to put or cause to be put the stage on the mouth of the shaft, and in the absence of the stage a bucket with a truck and bricks ran along the tram-road, into the shaft, fell down the pit and killed the deceased. It did not appear that the prisoner was directing or driving the waggon at the time. It was left to the jury to say whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of omission or commission, and they found that the death arose from the negligent omission of the prisoner in not putting the stage on the mouth of the pit; and, upon a case reserved, Lord Campbell, C.J., delivered judgment: 'We are of opinion that this conviction ought to be affirmed. It was the duty of the prisoner to place the stage on the mouth of the shaft; the death of the deceased was the direct consequence of the omission of the prisoner to perform this duty; if the prisoner, of malice aforethought, and with a premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common-law form of an indictment for murder by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the law would infer this duty (*n*). But it has never been

of a train, and if he wilfully neglects to do so, whereby an accident happens and a man is killed; another man wilfully turns some points with which he has nothing to do, and a death occurs; the offence of the one is precisely the same as that of the other. A man who wilfully neglects to feed his infant child is just as guilty of murder as if he poisoned it. In Lynch *v.* Nurdin, 1 Q.B. 29, Denman, C.J. said, that 'between wilful mischief and gross negligence the boundary line is hard to trace; I should rather say, impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice.' 'There must be negligence so great as to satisfy a jury that the offender had a wicked mind in the sense of being reckless and careless whether death occurred or not.' See R. *v.* Nicholls, 13 Cox, 75, Brett, J. R. *v.* Handley, 13 Cox, 79. R. *v.* Elliott, 16 Cox, 710.

(*m*) R. *v.* Hilton, 2 Lew. 214; Cf. R. *v.* Waters, 6 C. & P. 328, *ante*, p. 667.

(*n*) R. *v.* Edwards, 8 C. & P. 611. R. *v.* Goodwin [1832], MS. C.S.G.: 1 Russ. C. & M. (3rd ed.) 562.

doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child) (*o*), this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter (*p*).

Railways.—The prisoner (who was indicted for manslaughter of G.) was employed by H., a colliery proprietor, who was also owner of a tramway crossing a turnpike road. It was the prisoner's duty to give warning to any persons when any trucks might cross the said road. The tramway was in existence before the road, and in the Act by which the road was made there was no clause imposing on H. the duty of placing a watchman where the tramway crossed the road. The deceased was crossing the tramway, having received no warning that any trucks were about to cross the road. As he was crossing, however, he was knocked down by some trucks, and was killed. On inquiry, it appeared that the prisoner was absent from his post at that time, although he had strict orders never to be absent. Lush, J., said, that there being no clause in the Act compelling H. to place a watchman where the tramway crossed the road, the prisoner was merely the private servant of H.; and that, consequently his negligence did not constitute such a breach of duty as to make him guilty of manslaughter (*q*).

The prisoner was a porter at the Brighton Station, and it was his duty to start the trains. It being an excursion day, three up trains came in succession, all of them late, so that none of them could be started at the proper time. There was a rule of the company, that under such circumstances no train should be started at intervals of less than five minutes after the preceding one. The case against the prisoner was that he had started the three trains so that there was only an interval of three or four minutes between the second and third. The first train arrived safely at the Clayton Tunnel (seven miles from Brighton), and passed safely through and the man at the Brighton end of the tunnel, when it entered, telegraphed 'train in'; but, owing to some improper working of the signal at his end, became confused, and on the arrival of the second train, not feeling certain that he had received the signal which authorised him to send on the second train, again telegraphed 'train in' just as the second train had gone into the tunnel. Fearing that the signal might be misunderstood, he shewed the red flag, which he supposed the second train had not seen, but which had the effect of pulling up the second train in the tunnel. He again telegraphed to ask 'is that train out?' upon which

(*o*) The neglect on the part of the mother to provide for the child must be subsequent to the birth: thus mere failure on the part of the mother to make proper provision for her expected confinement resulting in the complete birth and subsequent death of a child does not amount to manslaughter (R. *v.* Izod, 20 Cox, 690, Channell, J.), though if the jury are satisfied that the mother, having made up her mind to be alone at the time of the birth, caused its death by wicked negligence after its birth, they should return a verdict of guilty. R. *v.* Handley, 13 Cox, 79, Brett, J., at p. 81.

(*p*) R. *v.* Hughes, Dears. & B. 248.

(*q*) R. *v.* Smith, 11 Cox, 210. Query whether this case is accurately reported. In all probability the facts proved at the trial shewed that the prisoner had only neglected his duty to his employer by being absent from his post, and that the other servant managing the traffic, knowing he was absent, allowed the truck to cross the road. To have proved the prisoner guilty it must have been shown that he neglected some duty which he owed to the deceased as one of the public using the highway.

the man at the north end of the tunnel, supposing that this referred to the first train, telegraphed 'train out,' whereupon the porter at the Brighton end of the tunnel sent the third train into the tunnel, and this ran into the second, which had come to a standstill in consequence of seeing the red flag. Erle, C.J., is reported to have told the grand jury that 'they must be satisfied before they found the bill that there was a *prima facie* case of such criminal negligence as had been the proximate and efficient cause of the catastrophe. The negligence imputed appeared to be the sending of one train after another in a shorter interval of time than, according to the rules, he ought to have done. A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared not to have been the proximate cause of the catastrophe, the bill for manslaughter ought not to be found; and if it appeared that other causes had intervened, the prisoner's negligence would not have been the proximate and efficient cause of the deaths which had occurred. That this was in entire accordance with the authorities will appear from the most recent cases. The case is to be clearly distinguished from that of joint negligence. It is indeed well settled, that it is no defence in a case of manslaughter that the death was caused by the negligence of others as well as by that of the prisoner; for if the death of the deceased be caused partly by the negligence of others, the prisoner and all those others are guilty of manslaughter (*r*).

(*r*) R. *v.* Ledger, 2 F. & F. 857. Erle, C.J., referred to R. *v.* Haines, *supra*, p. 799, and R. *v.* Barrett, *supra*, p. 800. The great importance of placing the culpability of railway officials in a clear light has caused the following remarks, in which the words 'neglect' and 'negligence' are always used as importing such a degree of culpability as, if death ensued from it, the offence would amount to manslaughter at least. First, then, a clear distinction exists between negligence and a wilful act—a distinction well illustrated by the numerous cases, in which the rule has been established, that a master is answerable for the *negligent*, but not for the *wilful* act of his servant. And it should seem that if a railway official deliberately starts a train in direct opposition to the orders he has received, this is a wilful act, and that, as it is an intentional violation of his duty, it ought to be considered precisely in the same light as if it were done by a person who had no authority whatever to interfere with the train. Next, where a train is started before its proper time, and it runs into another train and kills a person, it seems that, whether the starting of the train be considered as a wilful or negligent act, the starter of the train is guilty of manslaughter. If the accident would not have happened if the train had not been started till its proper time the case seems clear from doubt, for there the too early starting of the train is manifestly the cause of the death; and supposing the accident would have happened had the train been started at the proper time, still the death was caused at the time when it occurred by the culpable conduct of the starter of the train; in other words, the death arose from the culpable act of the starter of the train, and sooner than it otherwise would have done, and the case seems to be very similar to those where the death of a person is accelerated by violence (*ante*, p. 692), and which establish the principle that if a man is caused by a wrongful act to die at any time earlier than he otherwise would have done, it is a case of manslaughter, and if the accelerating the death of a sick man be such an offence, it is not easy to suggest a reason why the accelerating the death of a healthy man is not so also. It must also be observed, that in such a case all that is certain is what has actually happened; it is mere speculation what might have happened if the train had been started at its proper time: the mere shifting of the deceased from one seat to another might have saved his life. Nor is it any excuse that the train which was run into was met with at a place at which it would not have been but for the wilful or negligent act of some other person: the answer to this excuse is, that the time for starting having been fixed expressly for the purpose of preventing the *possibility* of such accidents, whether they might arise from the preceding train being met with on the line through negligence or otherwise, it does

On an indictment for manslaughter against an engine-driver and fireman, it appeared that by the general rules of the railway company the fireman was always to follow the directions of the engine-driver, but both of them had the duty of looking out, the engineman being directed to attend to and act upon signals, the fireman obeying his directions. There was a regular system of signals, in which a red flag by day shewed that the train must stop instantly. On Ascot race day special instructions were issued, which materially differed from the regular rules, and by them the red signal did not mean, as it usually did, 'Stop,' but only 'Danger,' and that meant that the engine should proceed with caution. The rules prohibited engines from running tender foremost; but there was no turn-table at Ascot, and the engines consequently returned with their tenders foremost. The return trains were started at irregular intervals of about five minutes by the station-master and traffic manager at Ascot. One of them stopped at Egham, and about five minutes afterwards another was started from Ascot. The prisoners who had charge of it, did not know that the preceding train would stop at Egham; the stoppage delayed it two or three minutes; when the prisoners' train passed the two stations before Egham the signal was red. There was contradictory evidence as to the pace their train went; but, after passing the auxiliary

not lie in the starter's mouth to excuse his own wrongful act by such a wilful or negligent act of another. Lastly, it is submitted that the clear rule of the law is, that every one who contributes by his wilful or negligent act to the death of a man is guilty of manslaughter, although there be no community of purpose or action between them, and although the act of the one may be proximate to, and the acts of the others remote from, the immediate cause of death; and that the only correct question in these cases is, whether the act did in any way whatever contribute to the death. In R. *v.* Haines, the prisoner's duty was to cause an air-heading to be put in a mine; and it was alleged to be the duty of another person to report to the prisoner that an air-heading was wanting—such totally different duties that the neglect of either could not possibly be the joint neglect of the two parties. Now Maule, J., said: 'It has been contended that some other persons were also guilty of neglect; still, assuming that to be so, their neglect will not excuse the prisoner, for if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one who was negligent to say that another was negligent also, and thus as it were, try to divide the negligence among them.' The decision is directly against there being any limitation to joint negligence or proximate negligence, and, as far as it goes, entirely supports the position above laid down. Suppose three railway officials each negligently turned three different sets of points at A., B., and C., and that the result was an accident and death, it is submitted that all of them would be guilty of manslaughter, provided the act of each contributed in any degree to the accident. So again, suppose A. and B. each negligently turned the points for two different trains, so that the trains were caused thereby to run into each other, can it admit of doubt that both would be responsible for the result? In R. *v.* Barrett, *ante*, p. 799, the decision turned on the defect in the indictment, which, being in the old form, contained no allegation that it was in the prisoner's duty to do that which he was alleged to have neglected to do. See also R. *v.* Swindall, *ante*, p. 796; and R. *v.* Longbottom, *ante*, p. 797, as to the negligence of the deceased forming no excuse.—C. S. G. 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 duty of the foreman of plate-layers to direct when the work should be done, and also to direct effective signals to be given: Held, that though he was under the general control of an inspector of the district, the inspector was not liable; and that the foreman was so, assuming his negligence to have been a material and substantial cause of the accident, even although there had also been negligence on the part of the engine-driver, in not keeping a sufficient look-out. R. *v.* Benge, 4 F. & F. 504.

signal before reaching Egham, the speed was slackened. The prisoners' train, not having to stop at Egham, went right through the station; a minute or two afterwards the engineer saw the preceding train, and tried to stop his train, but did not succeed in stopping the train before it ran into the other train, and caused the death of several persons. Willes, J., held that in a criminal prosecution an inferior officer must be held justified in obeying the directions of a superior not obviously improper or contrary to law; that is, if an inferior officer acted honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he would not be guilty of culpable negligence, these orders not appearing to him, at the time, to be improper or contrary to law. It appeared that the prisoners had nothing to do with the general management or regulation of the traffic, and their duty was to obey the special instructions issued to them as well as they could, presuming there was no apparent illegality in them; and in that case, provided they put the best construction they could upon them, and acted honestly in the belief that they were carrying them out, they were not criminally responsible for the result. In a civil case they might be responsible, but not criminally. As to the fireman, as he was bound to follow the direction of the engineman, there was no case. The jury then interposed, and said that they were all of opinion that there was no case of culpable negligence against either of the prisoners. Willes, J., said he was quite of the same opinion, and thought that the prisoners ought not to be convicted on a criminal charge. They had instructions of an unusual kind, and were doing their best at the time to prevent an accident; that is, they were trying to put on the brake so near to the time when, according to any view, they could be expected to have done so, that they can hardly be deemed guilty of culpable negligence. They only saw a red signal, and that, according to their special instructions, did not mean 'Stop.' There was no symptom of danger; they did not know that the other train had stopped at Egham, and they had no instructions to do so; and so they went right on, although a minute afterwards they did their best to stop the train. The arrangement was such as could not but cause imminent danger of the second train running into the first, which had passed only five or six minutes before, and had stopped three minutes at Egham. He therefore concurred in the verdict. In the course of the case, Willes, J., also held that a witness could not be asked to give an explanation as to his construction of the effect of the rules. The rules were in writing, and must speak for themselves, and the judge must declare their meaning. The special rules, if not consistent with the general rules, must override them, but their construction was for the judge. And that an officer of the Board of Trade could not be asked his opinion on the mode of conducting the traffic (which rather affected the company than the prisoners), nor whether in his judgment, as a man of experience, the driver of the engine ought to be convicted of negligence, nor (it seems) whether, in his opinion, the driver had kept a sufficient look-out ahead; but that he might be asked whether, supposing the train was going about forty miles an hour, it could have been stopped (*s*).

(*s*) R. *v.* Trainer, 4 F. & F. 105.

Steamships.—Where on a trial for manslaughter a steam tug, of which the prisoners were the captain and engineman, had exploded and killed the deceased whilst the prisoners, with the deceased, the stoker, were the only persons on board. The lever of the safety valve was found to have been so tied down by weights that it could not act as a safety valve. There was therefore considerably more pressure on the boiler plates than they could bear. There was a government valve, one of the keys to the lock of which was kept by a government inspector, and the other ought to have been in possession of the captain; but there was no proof that he had the key at the time of the explosion, and this valve was in such a state that it could not work. If it had been working, no mischief could have occurred. At the time of the explosion the tug was racing with a steamer, and had been so for some time. Against the captain it was urged that he had the control of the tug, and that he was guilty of culpable neglect in not seeing that the government valve was put into working order, or in allowing the other valve to be in a state in which it could not work. As to the engineer, it was his duty to attend to the working of the engine, and he was bound to see that too much steam was not generated. Hill, J., held that there was no case for a conviction. There was a difficulty in shewing that either of the prisoners were in a position to see that the government valve was out of order; and there was nothing inconsistent with the assumption that the deceased himself could see it to be out of order; and it was perfectly possible that he might have put the valve in order without the intervention of either of the prisoners; if so, it was clear that a felony could not be made out (*t*).

On an indictment for manslaughter it appeared that thirteen persons embarked in a boat, besides two watermen, of whom the prisoner was one; two witnesses proved, that by the swell of a steamer in motion the boat was carried against the bows of another steamer, and that as soon as it struck the prisoner called out to the passengers to sit still, but they all jumped up and tried to lay hold of the steamer, and in consequence the boat was upset. Had the passengers remained quiet, the witnesses believed the accident would not have happened. Another witness was of opinion that the fault lay in the prisoner's pushing off the boat from the stairs with one of the oars, he standing upright at the time, instead of being seated and having the command of the sculls; he ought to have known the danger under such circumstances of crossing the strong tide that rushed through the arch of the bridge; but for his pushing off as he did, the boat would have cleared the steamer. He thought the same thing might have happened to the boat if there had been only three persons in it or only one. Williams, J.: 'If the circumstance of the passengers jumping up really caused the accident, the overloading of the boat was immediately productive of such a result, and thus the prisoner is answerable; for he should have contemplated the danger of such a thing happening. If the fact of the prisoner standing up in the boat was the cause of the catastrophe, then it may be gross negligence on his part to have done so; because he is supposed to be acquainted with the force and

(*t*) R. *v.* Gregory, 2 F. & F. 153. The deceased might himself have weighted the other safety valve, or at least might have seen that it was so weighted.

velocity of the tide, and the danger of crossing it under the circumstances. On the whole it is a question for the jury, whether the deceased met his death either by the gross carelessness of the prisoner in the management of the boat, or in taking on board a greater number of passengers than it was capable of safely carrying' (*u*).

Contributory Negligence.—It has been generally held that it is no defence that the deceased was guilty of contributory negligence. The sole question for the jury is, did the negligence of the prisoner materially contribute to the death of the deceased (*v*). In R. *v.* Birchall (*w*), Willes, J., is reported to have said that a man was not criminally responsible for negligence for which he would not be responsible in an action, but on this case being cited in R. *v.* Jones (*x*), Lush, J., said that it was quite at variance with what he had always heard, and he ruled that there was no contributory negligence in merely getting into a vehicle and allowing himself to be driven, even though the driver was obviously drunk (*y*).

In R. *v.* Dant (*z*), it was held that if a commoner turns out on a common, across which there are public footpaths, a horse which he knows to be vicious and dangerous, and the horse kicks and kills a child, the commoner is liable to be convicted of manslaughter, even though the child has strayed on to the common a little way off the path (*a*).

In former editions reference was made to a local and personal Act (7 & 8 Geo. IV., c. 75), (*b*) making it a misdemeanor to take on board wherries, &c., more persons than by law allowed, if any such persons should be drowned. The Act was repealed in 1859 (22 & 23 Vict., c. 133), and the particular portion was not re-enacted.

PART IV.—OF EXCUSABLE AND JUSTIFIABLE HOMICIDE.

Preliminary.

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 7, 'No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner, without felony' (*c*).

(*u*) R. *v.* Williamson, 1 Cox, 97, Gurney, B., and Williams, J.

(*v*) See per Pollock, C.B., in R. *v.* Swindall, *ante*, p. 796; R. *v.* Haines, *ante*, p. 800; R. *v.* Walker, 1 C. & P. 320. Per Byles, J., in R. *v.* Kew, 12 Cox, 355, and in R. *v.* Hutchinson, 9 Cox, 555; and see R. *v.* Dant, L. & C. 567, *infra*.

(*w*) 4 F. & F. 1087.

(*x*) 11 Cox, 544. See Archb. Cr. Pl. (23rd ed.) 800.

(*y*) It has been suggested in a colonial case that evidence which would be admissible to establish contributory negligence might in a criminal case be admitted to show that the death was not due to the culpable negligence of the defendant. See R. *v.* Bunney [1894], 6 Queensland L. J. 80, Griffith, C.J. See 1 Beven, Negligence (3rd ed.) 149.

(*z*) L. & C. 567; 34 L. J. M. C. 119.

(*a*) Blackburn, J., said: 'I by no means mean to say that the conviction might not have been supported if the child had been killed by the horse at the time when she was straying upon the common far from the public path.'

(*b*) It was observed upon 10 Geo. II. c. 31 (rep.), containing a more severe punishment for an offence of this kind, that it might serve as a caution to stage coachmen and others, who overload their carriage for the sake of lucre, to the great danger of the lives of their passengers, the number of whom are regulated by Act of Parliament. 1 East, P.C. 264.

(*c*) This section re-enacts 9 Geo. IV. c. 31, s. 10, which Act by s. 1 repealed the Statute of Gloucester, 6 Edw. I. c. 9, under which the offender might be put to sue out a pardon. See Pollock and Maitland, Hist. Eng. Law, vol. ii, p. 477.

Excusable homicide is of two kinds: either *per infortunium*, by misadventure; or *se et sua defendendo*, upon a principle of self-defence. The term *excusable* homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony. *Justifiable homicide* is of several kinds: as it may be occasioned by the performance of acts of unavoidable necessity, where no shadow of blame can be attached to the party killing; or by acts done by the permission of the law, either for the advancement of public justice, or for the prevention of some atrocious crime.

Sect. I A.—Of Excusable Homicide by Misadventure.

Homicide by misadventure is where in doing a lawful act, without any intention of bodily harm, and using proper precautions to prevent danger, one man unfortunately happens to kill another (*d*). The act must be lawful; for if it is unlawful, the homicide will amount to murder, or manslaughter, according to the attendant circumstances (*e*), and it must not be done with intent to inflict great bodily harm; for then the legality of the act, considered in the abstract, would be no more than a mere cloak, or pretence, and consequently would avail nothing. The act must also be done in a proper manner, and with due caution to prevent danger (*f*).

Thus, if people, in following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately, to kill any one, such killing is homicide by misadventure (*g*). Thus where a person, driving a cart or other carriage, happens to drive over another and kill him, if the accident happen 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 (*h*). Where a person was riding a horse, and the horse, being whipped by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadventure in the rider, but manslaughter in the person who whipped the horse (*i*).

It has been shewn (*j*), that where parents, masters, and other persons, having authority *in foro domestico*, are giving to those under their care reasonable and moderate correction, if by the struggling of the party corrected, or by some other misfortune death ensue, the killing will be only misadventure (*k*).

As to accidental killing whilst engaged in a lawful sport, see *ante*, p. 786.

The punishment of excusable homicide seems never to have gone beyond forfeiture of some or all of the goods of the slayer (4 Bl. Com. 188. 1 Hale, 425. 1 Hawk. c. 29, s. 20. Fost. 281), and pardon and writ of restitution were granted as of course on paying the expense of suing them out. To prevent this expense it became usual to direct acquittal where the killing was obviously by misadventure or in self-defence (4 Bl. Com. 188. Fost. 288. 1 East, P.C. 222), and such practice is established as law by the enactment in the text.

(*d*) 1 East, P.C. 221, 260, 261. Fost. 258. 1 Hawk. c. 29, s. 1.

(*e*) *Ante*, pp. 656, 780.

(*f*) 1 East, P.C. 261.

(*g*) *Ante*, p. 789. 1 Hale, 472, 475. 1 Hawk. c. 29, ss. 2 & 4. Fost. 262. 1 East, P.C. 262.

(*h*) Fost. 263. 1 Hale, 476. O. B. Sess. before Mich. T. 1704. MS. Tracy, 32. 1 East, P.C. 263.

(*i*) 1 Hawk. c. 29, s. 3.

(*j*) *Ante*, p. 767.

(*k*) 1 Hale, 454, 473, 474. 4 Bl. Com. 182. As to abuse of the power to correct, *vide ante*, p. 767.

Sect. I B.—Of Excusable Homicide in Self-Defence.

Homicide in self-defence is homicide committed *se et sua defendendo*, in defence of a man's person or property, *upon some sudden affray*, considered by the law as in some measure blameable, and barely excusable (*l*).

When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defence. But, in order to entitle himself to this plea, he must shew first, that before a mortal stroke given he had declined further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death (*m*). Under such circumstances, the killing will be excusable self-defence, sometimes expressed in the law by the word chance medley or casual affray (*n*).

Homicide upon chance medley borders very nearly upon manslaughter, and, in fact and experience, the boundaries in some instances are scarcely perceivable, though in consideration of law they have been fixed (*o*). In both cases it is supposed that passion has kindled on each side, and blows have passed between the parties; but in the case of manslaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death (*p*). The true criterion between them is stated to be this: when both parties are actually combating, at the time the mortal stroke was given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or, having begun, endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence (*q*).

In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and, from the doctrine which has been above laid down, it appears that the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. For in no case will a retreat avail, if it be feigned, in order to get an opportunity or interval to enable the party to renew the fight with advantage (*r*). The party assaulted must therefore flee, as far as he conveniently can, either

(*l*) Fost. 273. 'Self-defence culpable, but through the benignity of the law excusable.'

(*m*) 1 East, P.C. 280. Fost. 273.

(*n*) Or *chaude mêlée*, an affray in the heat of blood, or passion. Both of them are pretty much of the same import: but the former has, in common speech, been often erroneously applied to any manner of homicide by misadventure; whereas it appears by 22 Hen. VIII. c. 5 (rep.), 24 Hen. VIII. c. 5 (rep.), and the ancient books (Staundf. 16; 3 Co. Inst. 57; Kel. (J.) 67) that it is properly applied to such killing as happens in self-defence upon a sudden rencounter. 4 Bl. Com. 184. Fost. 275.

(*o*) Fost. 276.

(*p*) Fost. 277.

(*q*) 4 Bl. Com. 184.

(*r*) 1 Hale, 481, 483. Fost. 277. 4 Bl. Com. 185.

by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or great bodily harm, and then, in his defence, he may kill his assailant instantly (*s*). 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 that defence was necessary; that he did all he could to avoid it; and that it was necessary 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. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified (*t*).

Where the prisoner levelled a gun at the deceased, and it was a question whether the gun went off accidentally or not, Cockburn, C.J., left the following questions to the jury:—1. Was the discharge of the gun intentional or accidental? (a) If intentional, was it from ill feeling to the deceased, or desire to get rid of him? in which case it would be murder. (b) If it was not so done, was it done by the prisoner in self-defence, and to protect himself from death or serious bodily harm intended towards him by the deceased? or (c) from the reasonable apprehension of it induced by the words and conduct of the deceased, though the latter may not, in fact, have intended death or serious injury? (d) If not so, was it done after an assault made by the deceased on the prisoner, though short of an assault calculated to kill or cause serious bodily injury? or (e) was it done under such a degree of alarm and bewilderment of mind, caused by the conduct of the deceased, as to deprive the prisoner, for the time, of his reason and power of self-control? or (f) was the effect of the language and conduct of the deceased such as to provoke the angry passions of the prisoner so as to deprive him of his reason and power of self-control? 2. If the discharge of the gun was accidental, in which case the prisoner cannot be convicted of murder, but may be of manslaughter. (a) Was the gun levelled by the prisoner at the deceased in self-defence against an attack of the deceased endangering life or limb, or reasonably apprehended by the prisoner as likely to do so, in either of which cases the prisoner would be entitled to an acquittal, or (b) was the gun levelled by the prisoner at the deceased unnecessarily under the circumstances, but without the intention of discharging it, in which case it would be manslaughter (*u*).

If A. challenges B. to fight, and B. declines the challenge, but lets A. know that he will not be beaten, but will defend himself; and then B., going about his business and wearing his sword, is assaulted by A., and killed; this is murder in A. But if B. had killed A. upon that assault, it had been *se defendendo*, if he could not otherwise have escaped; or bare manslaughter, if he could have escaped and did not (*v*).

The law appears to be that if the blow, from the effect of which the deceased died, was given purely in self-defence, as distinguished from a desire to fight, it is excusable, and it is a question for the jury whether

(*s*) 1 Hale, 483. 4 Bl. Com. 185.

(*t*) R. *v.* Smith, 8 C. & P. 160, per Bosanquet, J., *præsentibus*, Bolland, B., and Coltman, J. See R. *v.* Bull, 9 C. & P. 22.

(*u*) R. *v.* Weston, 14 Cox, 346.

(*v*) 1 Hale, 453.

the prisoner struck the blow in self-defence, or whether he really desired to fight (*w*).

As in the case of manslaughter upon sudden provocation, where the parties fight upon equal terms, all malice apart, it matters not who gave the first blow: so in the case of excusable self-defence, it will seem that the first assault in a sudden affray, all malice apart, will make no difference, if either party quit the combat and retreat, before a mortal wound be given (*x*). According to this doctrine, if A., upon a sudden quarrel, assaults B. first and upon B.'s returning the assault A. really and *bona fide* flies, and being driven to the wall, turn again upon B. and kills him, this will be *se defendendo* (*y*); but some writers have thought this opinion too favourable, inasmuch as the necessity to which A. is at last reduced originally arose from his own fault (*z*). With regard to the nature of the necessity, it may be observed that the party killing cannot, in any case, substantiate his excuse, if he kill his adversary even after a retreat, unless there were reasonable ground to apprehend that he would otherwise have been killed himself (*a*).

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 excused; the act of the relation assisting being considered the same as the act of the party himself (*b*). So where a son shot and killed his father, who was assaulting his mother, Lopes, J., told the jury that if the accused had reasonable grounds for believing, and honestly believed that his mother's life was in imminent peril, and that the shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused from the consequences of the homicide (*c*).

If A., in defence of his house, kills B., a trespasser, who is endeavouring to enter it, A. is guilty of manslaughter; at least unless his life was in danger. But if B. enters the house, and A., having first requested him to depart, gently lays his hands upon him to, turn him out, and then B. turns upon him and assaults him, and A. then kills him, it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault, or retain his lawful possession (*d*). In such a case A., being in his own house, is not under an obligation to retreat as in other cases of self-defence, as that would be to give up the protection of his house to his adversary by his flight (*e*).

(*w*) R. *v.* Knock, 14 Cox, 1.

(*x*) Fost. 277.

(*y*) 1 Hale, 482.

(*z*) 1 Hawk. c. 29, s. 17. Hale seems also to distinguish the case of him who is first attacked from the assailant, with respect to the point of retreating, 1 Hale, 482. Upon this subject East (1 P. C. 281, 282), says: 'At any rate I think there is great difficulty in applying the distinction taken by Hale and Hawkins against him who makes the first assault, to the case of mutual combat by consent, though upon a sudden occasion, where neither of the parties makes an attack till the other is prepared; because in these cases it matters not who gives the first blow; it forms no ingredient in the merits of the question.'

(*a*) Fost. 273, 275, 289. 4 Bl. Com. 184.

(*b*) 1 Hale, 484. 4 Bl. Com. 186.

(*c*) R. *v.* Rose, 15 Cox, 540.

(*d*) 3 Edw. III. Coron. 35. Crompt. 27 *b*. 1 Hale, 486.

(*e*) *Vide post*, p. 815. 1 Hale, 486. In R. *v.* Dakin, 1 Lew. 166, where the prisoner was a lodger at a house, to which there was a back-way, of which the prisoner was ignorant, it being the first

Necessity.—At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners, D. and S., seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat, that the boat was drifting on the ocean, and was probably more than a thousand miles from land; that on the twentieth day, when they had been nine days without food, and seven without water, D., with the assent of S., killed the boy, and both D. and S. fed on his flesh for four days; that at the time of the act there was no sail in sight, nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then, or very soon, fed upon the boy, or one of themselves, they would die of starvation: On a special verdict finding these facts it was held that there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder (*f*).

According to Hale, a man cannot even excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life if he does not comply; so that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance (*g*). But if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion (*h*), there seems to be no reason why homicide may not also be mitigated upon the like consideration, of human infirmity: though, where the party might have recourse to the law for his protection from the threats used against him, his fears would certainly furnish no excuse for committing the murder (*i*).

As the excuse of self-defence is founded on necessity, it can in no case extend beyond the actual continuance of that necessity, by which alone it is warranted (*j*): for if a person assaulted falls upon the aggressor, after the affray is over, or when he is running away, this is revenge, and not defence (*k*).

night he had lodged at the house, and some persons split open the door of the house in order to get the prisoner out and ill-treat him; Bayley, J., is reported to have said: 'If the prisoner had known of the back-way, it would have been his duty to have gone out backwards, in order to avoid the conflict.' 'But it is submitted that the protection of the house extends to each and every individual dwelling in it.' In R. *v.* Cooper, Cro. Car. 544, it was held that a lodger might justify killing a person endeavouring to break into the house where he lodged with intent to commit a felony in it; and see 1 East, P.C. 289. 289. Fost. 274; and Ford's case, Kel. (J.) 51. *Post*, p. 816. C. S. G.

(*f*) R. *v.* Dudley, 14 Q.B.D. 273. The case was tried at the Exeter Assises, and a special verdict returned. The Assizes were then adjourned to the Royal Courts of Justice. The record was brought into court, and filed, and the arguments were heard by the judges not as commissioners of assize but as judges of the High Court. The prisoners were sentenced to death by the Court, but the sentence was commuted by the Crown to six months' imprisonment. See the comments of Sir J. F. Stephen on this case, Stephen, 'Digest Cr. Law (6th ed.), 25. The Court considered, but did not follow, the case cited by Bacon of two shipwrecked persons getting on the same plank. Bac. Elem. c. 5; Cf. 1 Hawk. c. 28, s. 26. 4 Bl. Com. 186.

(*g*) 1 Hale, 51, 434.

(*h*) 1 East, P.C. 70, and the authorities there cited.

(*i*) 1 East, P.C. 294. Hale says that in the most extreme case, where there could be no recourse to law, the person assailed ought rather to die himself than kill an innocent person. 1 Hale, 51.

(*j*) 1 East, P.C. 293.

(*k*) 4 Bl. Com. 293.

Sect. II.—Of Justifiable Homicide.

Justifiable homicide is of several kinds, as it may be occasioned by the performance of acts required by law, or done by the *permission* of the law (*l*).

The execution of criminals under a lawful sentence of death is an act required by the law, and, therefore, justifiable (*m*). But acts not required by law are not justifiable; and, therefore, wantonly to kill the greatest of malefactors, would be murder; and all acts of official duty should, in the nature of their execution, be in conformity with the judgment by which they are directed (*n*).

Amongst the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable (*o*). This rule is founded in reason and public utility; for few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest were obliged to desist, and leave the business undone; and a case in which the officer was held guilty of manslaughter, because he had not first given back, as far as he could, before he killed the party who had escaped out of custody, in execution for a debt, and resisted being retaken (*p*), seems to stand alone, and has been mentioned with disapprobation (*q*). As to the authority of constables and others to arrest, see *ante*, pp. 723 *et seq.* (*r*).

The protection above stated does not extend to sentries in the navy or army. The prisoner was sentinel on board a ship in the Royal Navy, when she was paying off. The orders to him from the preceding sentinel were, to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed; upon which he called repeatedly to them to keep off; but one of them persisted and came close under the ship; and he then fired at a man who was in the boat, and killed him. The jury found that the sentinel fired

(*l*) *Ante*, p. 808.

(*m*) Fost. 267. 1 Hale, 496, 4 Bl. Com. 178.

(*n*) *Ante*, p. 765, and see 1 Hale, 501. 2 Hale, 411.

(*o*) 1 Hale, 494. 2 Hale, 117, 118. 3 Co. Inst. 56. 1 Hawk. c. 28, ss. 17, 18, 19. Fost. 270, 271. 4 Bl. Com. 179. 1 East, P.C. p. 307.

(*p*) 1 Rolle Rep. 189.

(*q*) Fost. 271. 1 East, P.C. 307.

(*r*) It has been said, that if peace officers meet with night-walkers, or persons unduly armed, who will not yield themselves, but resist or fly before they are apprehended, and who are upon necessity slain, because they cannot otherwise be overtaken, it is no felony in the officers or their assistants, though the parties killed were innocent (2 Hale, 89, 97). But it is doubtful whether nowadays so great a degree of severity would be either justifiable or necessary (especially in the case of bare flight), unless there was a reasonable suspicion of felony. See 1 East, P.C. 303. R. *v.* Dadson, 2 Den. 35. The old statute 2 Edw. III. c. 3, as to night-walkers is repealed, and the right to arrest misdemeanants by night rests on statutes, *vide ante*, pp. 729 *et seq.*

under the mistaken impression that it was his duty. On a case reserved, the judges were unanimous that the killing was, nevertheless, murder; but were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified (*rr*).

An officer of justice may justify the killing of a person flying from arrest for treason or felony (*s*). In the case of a riot or rebellious assembly, peace officers and their assistants, endeavouring to disperse the mob, are justified, both at common law and by the Riot Act, in proceeding to the last extremity, in case the riot cannot otherwise be suppressed (*t*). And it has been said, that perhaps the killing of dangerous rioters may be justified by any private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorised by the law to arm himself for the preservation of the peace (*u*).

On an indictment for shooting, with intent to do grievous bodily harm, it appeared that the prisoner was a constable and employed to guard a copse, from which wood had been stolen, and for this purpose carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner having no other means of bringing him to justice fired, and wounded him in the leg. It was further alleged that the prosecutor was actually committing a felony, he having been before convicted repeatedly of stealing wood (*v*); but these convictions were unknown to the prisoner, nor was there any reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences. Erle, J., told the jury that shooting with intent to wound amounted to the felony charged, unless from other facts there was a justification; and that neither the belief of the prisoner, that it was his duty to fire, if he could not otherwise apprehend the prosecutor, nor the alleged felony, it being unknown to him, constituted such justification; and upon a case reserved, it was held that the conviction was right; for the prisoner was not justified in firing, because the fact that the prosecutor was committing a felony was unknown to him at the time (*w*).

Prison officers are under the same special protection as constables (*x*) and other ministers of justice; and, therefore, if in the necessary discharge of their duty they meet with resistance, whether from prisoners in civil or criminal custody, or from others in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force by force; and the killing of the party so resisting

(*rr*) R. *v.* Thomas, 1816, MS. Bayley, J. The prisoner was tried at Nisi Prius, 4 M. & S. 441.

(*s*) *Ante*, p. 763.

(*t*) 1 Hale, 53, 494, 495. MS. Tracy, 36, cited 1 East, P.C. 304. *Vide ante*, p. 431 *et seq.*

(*u*) 1 Hawk. c. 28, s. 14, and see Fost. 272; Poph. 121. It was so resolved by all the judges in Easter Term, 39 Eliz., though they thought it more discreet for every one in such a case to attend and assist the King's officers in preserving the peace. And certainly, if private persons interfere to suppress a riot, they must give notice of their intention.

(*v*) These previous convictions rendered the prosecutor's act a felony under 7 & 8 Geo. IV. c. 29, s. 39, now replaced by 24 & 25 Vict. c. 96, s. 33.

(*w*) R. *v.* Dadson, 2 Den. 35; *sed contra*, R. *v.* Bentley, 4 Cox, 406, and see The Abby, 5 Chr. Rob. (Adm.) 254, a case of shooting at an Englishman and killing an alien enemy.

(*x*) 61 & 62 Vict. c. 41, s. 10.

the gaoler, or his officer, or any person coming in aid of him, will be justifiable homicide (*y*).

H., being weary of life, and willing to be rid of it by the hand of another, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law, came himself into his park at night as if with the intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, he was shot by the keeper. This was decided to be excusable homicide within 21 Edw. I. st. 2, *De malefactoribus in parcis* (*z*).

A man is justified in repelling force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours, by violence or surprise, to commit a felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable (*a*). But the rule does not apply to any crime unaccompanied with force, such as pocket picking (*b*). The intent to murder, ravish, or commit a felony attended with force or surprise, should be apparent, and not be left in doubt; so that if A. makes an attack upon B., it must plainly appear by the manner of the assault, the weapon, &c., that the life of B. is in imminent danger; otherwise his killing the assailant will not be justifiable self-defence (*c*). There must be an intention on the part of the person killed to rob, or murder, or to cause some serious bodily injury to the person killing; or the conduct of the party must be such as to render it necessary on the part of the party killing to do the act in self-defence (*d*). The rule extends only to felony; for if one comes to beat another, or to take his goods merely as a trespasser, though the owner may justify assaulting him so far as to make him desist, yet if he kills him, it is manslaughter (*e*). But if a house is broken open, though in the day-time, with a felonious intent, it will be within the rule (*f*). A person who was set to watch a yard or garden by his master, was held not to be justified in shooting anyone who came into it in the night, even if he saw him go into his master's hen-roost, and some dead fowls and a crow-bar be found near him; but if from the conduct of the

(*y*) Fost. 321. 1 Hale, 481, 496.

(*z*) 1 Hale, 40. By 21 Edw. I. st. 2, if a forester, parker, or warrener, found any trespassers wandering within his liberty, intending to do damage therein, who would not yield, after hue and cry made to stand unto the peace, but continued their malice, and disobeying the King's peace, did flee or defend themselves with force and arms, if such forrester, parker, or warrener, or their assistants, killed such offenders, either in arresting or taking them, they should not be troubled for the same, nor suffer any punishment. 21 Edw. 1, st. 2, was repealed by 7 & 8 Geo. IV. c. 27 (E) and 9 Geo. IV. c. 53 (I). 3 & 4 Will. & M. c. 10, was repealed by 16 Geo. III. c. 30, and 4 & 5 Will. & M. c. 23, by 7 & 8 Geo. IV. c. 27, and 1 & 2 Will. IV. c. 32. C. S. G. See *ante*, p. 772.

(*a*) Fost. 273. Kel. (J.) 128, 129. 1 Hale, 445, 481, 484, *et seq.* 1 Hawk. c. 28, ss. 21, 24. R. *v.* Bull, 9 C. & P. 22.

(*b*) 1 Hale, 488. 4 Bl. Com. 180. 'But if one pick my pocket, and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons.' 1 East, P.C. 273.

(*c*) 1 Hale, 484.

(*d*) R. *v.* Bull, 9 C. & P. 22, Vaughan and Williams, JJ. See R. *v.* Symondson, 60 J. P. 645, *ante*, p. 701, note (*p*).

(*e*) 1 Hale, 485, 486. 1 Hawk. c. 28, s. 23. Kel. (J.) 132. 1 East, P.C. p. 272.

(*f*) 1 East, P.C. 273. In 4 Bl. Com. 180, it is said that the rule reaches not to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery also. But it will apply where the breaking is such as imports an apparent robbery, or an intention or attempt of robbery. 1 Hale, 488.

trespasser he had fair ground to believe his own life in actual danger, he would be justified in shooting him (*g*).

In cases of this kind it is essential to ascertain the grounds which the slayer had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed. One L. was indicted for killing F., under the following circumstances:—L. being in bed and asleep, his servant, who had procured F. to help her about the work of the house, and had gone to the door about twelve o'clock at night to let F. out, conceived that she heard thieves about to break into the house: upon which she ran to L., and told him of what she apprehended. L. arose immediately, took a drawn sword, and with his wife, went downstairs; when the servant, fearing that her master and mistress should see F., hid her in the buttery. L. with his sword searched the entry for thieves, when his wife spying F. in the buttery and not knowing her, conceived her to be a thief, and cried out to her husband in great fear, 'Here they be that would undo us;' when L., not knowing that it was F. in the buttery, hastily entered with his drawn sword, and being in the dark, and thrusting before him with his sword, thrust F. under the left breast, and gave her a mortal wound, of which she instantly died (*h*). This was ruled to be misadventure. Foster, J., appears to have thought that it would have been better ruled manslaughter; due circumspection not having been used (*i*). But in the view of East (*j*), upon the peculiar facts and circumstances of the transaction, the case is more properly one of those mentioned by Hale (*k*), where the ignorance of the fact excuses the party from all sort of blame. Hawkins mentions the case as one in which the defendant might have justified the fact under the circumstances, on the ground that it had not the appearance even of a fault (*l*).

Questions sometimes arise as to what is enough to establish that the deceased intended to commit such felony as would justify the slayer in killing him. M. on words of anger, threw a bottle with great force at the head of C., and immediately drew his sword, upon which C. returned a bottle with equal violence (*m*); and it was held that this was lawful and justifiable on the part of C., on the ground that he that has manifested malice against another, is not fit to be trusted with a dangerous weapon in his hand (*n*). There seems to have been good reason for C. to suppose that his life was in danger: and it was probably on the same ground that the judgment in Ford's case proceeded. F. being in possession of a room at a tavern, several persons insisted upon having it, and turning him out, which he refused to submit to; thereupon they drew their swords upon F. and his company, and F. drew his sword, and killed one of them; and this was adjudged justifiable homicide (*o*). For if several attack a

(*g*) R. *v.* Scully, 1 C. & P. 319, Garrow, B. '24 Hen. VIII. c. 5, by which persons killing those who were attempting to rob or murder, or commit burglary, were not to suffer any forfeiture of goods, &c., but to be fully acquitted, and which was referred to in the second edition of this work was repealed 9 Geo. IV. c. 31, in 1828.' C. S. G.

(*h*) Levet's case, Cro. Car. 538. 1 Hale, 42, 474.

(*i*) Fost. 299.

(*j*) 1 East, P.C. 274, 275.

(*k*) 1 Hale, 42; and *vide ante*, p. 101.

(*l*) 1 Hawk. c. 28, s. 27.

(*m*) Mawgridge's case, Kel. (J.) 119, 128, *ante*, p. 713.

(*n*) Kel. (J.) 128, 129, Holt, C.J.

(*o*) Ford's case, Kel. (J.) 51.

person at once with deadly weapons, as may be supposed to have happened in this case, though they wait till he be upon his guard, yet it seems (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat (*p*). But no assault, however violent, will justify killing the assailant under the plea of necessity, unless there be a plain manifestation of a felonious intent (*q*). And it may be further observed, that a man cannot, in any case, justify killing another by a pretence of necessity, unless he were wholly without fault in bringing that necessity upon himself; for, if he kills any person in defence of an injury done by himself, he is guilty of manslaughter at least; as in the case where a body of people wrongfully detained a house by force, and killed one of those who attacked it, and endeavoured to set it on fire (*r*).

Foster, J., was of opinion, that upon the same principle upon which Mawgridge's case was decided, and possibly upon the rule touching the arrest of a person who has given a dangerous wound, the legislature, in the case of the Marquis de Guiscard, who stabbed Mr. Harley sitting in Council, discharged the parties who were supposed to have given the Marquis a mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action (*s*).

Where an act obviously felonious is attempted upon anyone, not only may the party assaulted repel force by force, but his servant attending him, or any other person present, may interpose to prevent the mischief; and if death ensues, the party so interposing will be justified (*t*).

But, in cases of mutual combats or sudden affrays, a person interfering should act with much caution. Where, indeed, a person interferes between two combatants with a view to preserve the peace, and not to take part with either, giving due notice of his intention, and is under the necessity of killing one of them in order to preserve his own life or that of the other combatant, it being impossible to preserve them by other means, such killing will be justifiable (*u*); but, in general, if there is an affray and an actual fighting and striving between persons, and another runs in, and takes part with one party, and kills the other, it will not be justifiable homicide, but manslaughter (*v*).

It should be observed, that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified, unless the necessity continues up to the time when the party is killed. Thus, though the person upon whom a felonious

(*p*) 1 East, P.C. 276; and see 1 East, P.C. 243, where Ford's case is observed upon, and it is said that the memorandum in the margin of Kelyng to inquire of this case, and the *quære* used by Foster, J., in citing it, were probably made on the ground of the reason suggested in the margin of Kelyng for the judgment, namely, that the killing by Mr. Ford in defence of his own possession of the room was justifiable, which, under those circumstances, might be fairly questioned: as, on that ground, it might have been better ruled to be manslaughter.

(*q*) 1 East, P.C. 277.

(*r*) 1 Hawk. c. 28, s. 22. 1 Hale, 440, 441.

(*s*) 9 Anne, c. 16, repealed in 1828 (9 Geo. IV. c. 31). Fost. 275.

(*t*) 1 Hale, 481, 484, Fost. 274. R. *v.* Rose, *ante*, p. 811. In Handcock *v.* Baker, 2 B. & P. 265, Chambre, J., said: 'It is lawful for a private person to do anything to prevent the perpetration of a felony.' *Vide ante*, pp. 727, 815.

(*u*) 1 Hale, 484. 1 East, P.C. 290.

(*v*) 1 East, P.C. 291, *Vide ante*, pp. 427, 718.

attack is first made is not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon is killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder; though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter on account of the high provocation (*w*).

PART V.—OF INDICTMENTS AND EVIDENCE ON TRIALS FOR HOMICIDE, &c.

SECT. I.—INDICTMENT.

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 6, '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 (*x*) but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant 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 defendant as an accessory in the manner heretofore used and accustomed' (*y*).

Where several join in a murder, both the principal in the first degree and the principal in the second degree may be charged that they feloniously, wilfully, and of their malice aforethought murdered the deceased (*z*).

A count for being accessory after the fact to murder may be joined with a count for murder, and according to the preponderance of authority the Court will not in such case put the prosecution to elect on which count they will proceed (*a*).

And as 24 & 25 Vict. c. 94, s. 1 (*b*) has made accessories before the fact liable to be indicted as principals, an indictment may charge an accessory before the fact and a principal in the same manner in which two principals may be charged. And on such an indictment it is quite immaterial which

(*w*) 1 East, P.C. 293. 4 Bl. Com. 185. 1 Hale, 485.

(*x*) This applies equally where the death is due to a culpable omission. R. *v.* Smith, 11 Cox, 210.

(*y*) Taken from the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 4, which applied only to indictments for murder or manslaughter. A serious doubt was entertained whether in an indictment against an accessory to murder or manslaughter, where the accessory was charged as an accessory and not as a principal, it might not still be necessary to adopt the old form of indictment, and in order to render that course unnecessary, the new parts of this section were introduced. S. 6 renders it unnecessary to refer to the old decisions as to the sufficiency of indictments for homicide.

The word 'indictment' includes a coroner's inquisition whereby any person is charged with murder or manslaughter, or as an accessory before the fact to either of those offences. R. *v.* Ingham, 33 L. J. Q.B. 183; 9 Cox, 508; *post*, p. 821. See R. *v.* G. W. Ry. Co., 3 Q.B. 333. R. *v.* King, 2 Cox, 95. 2 Co. Inst. 32, 550. 4 Co. Inst. 271.

(*z*) This gets rid of the difficulties of pleading which existed at common law.

(*a*) 24 & 25 Vict. c. 94, s. 6, *ante*, p. 131. R. *v.* Blackson, 8 C. & P. 43, Parke, B., and Patteson, J. R. *v.* Tuffin, 12 July, 1903, Darling, J. 19 T. L. R. 640. In R. *v.* Brannon, 14 Cox, 394, Cockburn, J., required the prosecution to elect in such a case.

(*b*) *Ante*, p. 130.

of the prisoners was principal in the first degree in the one case, or whether the party were accessory before the fact or a principal in the other case, and consequently the jury will be relieved from considering these questions (*c*).

Names.—Where the name of the person killed is known it should be correctly stated in the indictment: but errors and mis-descriptions can be amended. In the case of an infant or of an unknown person the proper description is a certain infant (male or female) child not named (*d*), or a certain person whose name is to the jurors unknown (*e*).

Time and Place.—It would seem to be unnecessary for the indictment to contain allegations of time and place (*f*). If a time is laid it would seem that the date of the striking the blow should be given. If from the evidence it appears that the deceased died more than a year and a day from this date the prisoner will be entitled to be acquitted of homicide (*g*) and in this sense no doubt the date is material.

Venue.—At common law murder, like all other offences, must be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt 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 (*h*).

By 2 & 3 Edw. VI. c. 24, s. 2 it was enacted, that the trial should be in the county where the death happened. That enactment was repealed in 1826 (7 Geo. IV., c. 64, s. 32) but under ss. 12, 13, of the repealing Act (*i*) the prosecution may take place either in the county where the injury was given or in that in which the death took place. The venue, as stated in the margin of the indictment, is a sufficient allegation of the place (*j*).

In R. *v.* Bexley (*k*) the prisoner was indicted at the Central Criminal Court for the murder of her child aged eight weeks. She was seen one afternoon at Willesden, within the jurisdiction of the Central Criminal Court, and she there had the child with her and said she was going to see her parents in Suffolk. She arrived that night at a house in Suffolk, outside the jurisdiction of the Central Criminal Court; she there had a parcel with her, but apparently no child. She returned next day to

(*c*) See R. *v.* Downing, 1 Den. 52; *ante*, p. 148.

(*d*) R. *v.* Waters, 1 Den. 356; 2 C. & K. 864.

(*e*) R. *v.* Stroud, 2 Mood. 270; 1 C. & K. 187. See R. *v.* Campbell, 1 C. & K. 82, where the description of a deceased woman as of a name unknown was quashed on the ground that there was evidence that she was the wife of the prisoner. In R. *v.* Hicks, 2 M. & Rob. 302, Coleridge, C.J., and Maule, J., an indictment for murder was held bad, because it neither named the child nor stated that its name was unknown, it was held that the prisoner could not be convicted of endeavouring to conceal the birth of the child; for the indictment being bad for its professed purpose was bad altogether. This decision is right in principle, but the indictment if defective could now be amended under 14 & 15 Vict. c. 100, s. 1, *post*, Vol. ii. p. 1972 *et seq.*

(*f*) See 14 & 15 Vict. c. 100, ss. 1, 24, *post*, Vol. ii. p. 1935.

(*g*) 2 Hawk. c. 25, s. 77. R. *v.* Dyson [1908] 2 K.B. 454 (C. C. A.).

(*h*) 1 Hawk. c. 25, s. 36. 1 East, P.C. 361.

(*i*) *Ante*, p. 19; Cf. R. *v.* Ellis [1899], 1 Q.B. 320.

(*j*) 14 & 15 Vict. c. 100, s. 23, *post*, Vol. ii. p. 1937. See R. *v.* Riley or Ripley, 17 Cox, 120.

(*k*) [1906] 70 J. P. 264, Grantham, J. As to the payment of the costs of the prosecution where the injury is given in one place and the death takes place in another, see R. *v.* Brown, 62 J. P. 521, and *post*, Vol. ii. p. 2039 *et seq.*

Willesden, taking the parcel with her. The parcel on being opened at Willesden was found to contain the dead body of the child. It was objected that there was no evidence that the death of the child took place within the jurisdiction of the Court, but Grantham, J., held that as the child was last seen alive within the jurisdiction and that the dead body was found within the jurisdiction in the prisoner's custody, the inference might be drawn that the murder was committed within the jurisdiction.

As to the trial of homicide committed abroad or in the Admiralty jurisdiction, *vide ante*, pp. 27, 32.

Describing Offence.—In an indictment for murder it has always been necessary to state that the act by which the death was occasioned was done feloniously, and of *malice aforethought* (*l*), and it must also be stated, that the prisoner *murdered* the deceased (*m*). If the averment respecting *malice aforethought* is omitted, and the indictment only alleges that the stroke was given *feloniously*, or that the prisoner *murdered*, &c., or *killed*, or *slew* the deceased, the conviction can only be for manslaughter (*n*).

Where the grand jury return the bill of indictment only a true bill for manslaughter, and *ignoramus* as to murder, it is stated to have been the usual course to strike out, in the presence of the grand jury, the words, 'maliciously' and 'of malice aforethought,' and 'murder,' and to leave only so much as makes the bill to be one for manslaughter (*o*); but it has been thought to be safer to present a new bill to the grand jury for manslaughter (*p*). And a learned judge has ordered this to be done where the grand jury have returned manslaughter upon a bill for murder, saying he thought it the better course to prefer a new bill, although the usual course on the circuit had been to alter the bill for murder, on the finding of the grand jury (*q*). Though the same indictment may charge one with murder and another with manslaughter, yet if it charges both with murder, the grand jury cannot find it a true bill against one, and manslaughter as to the other; but a finding against one for murder will be good, and there ought to be a new bill against the other for manslaughter (*r*). And where the grand jury returned a true bill for murder against one, and for manslaughter against another, the one was tried for murder on that indictment, but a new bill for manslaughter was preferred against the other (*s*).

If, as is very commonly the case, there be an indictment for murder, and a coroner's inquisition for the same offence against the same person, at the same sessions of gaol delivery, the usual practice is to arraign and try the prisoner upon both, in order to avoid the plea of *autrefois acquit* or *convict*; and to endorse his acquittal or conviction upon both presentments (*t*).

(*l*) 2 Hale, 186, 187. Staundf. 130. Bradley *v.* Banks, Yelv. 204. *Vide ante*, p. 655.

(*m*) 2 Hawk. c. 23, s. 77. Anon. Dy. 304.

(*n*) 1 East, P.C. 345, 346. 2 Hale, 186.

(*o*) 2 Hale, 162.

(*p*) By Hale (2 H., P.C. 162), on the ground that the words of the endorsement do not make the indictment, but only evidence the assent or dissent of the grand jury, and that the bill itself is in the indictment when affirmed. See R. *v.* Ford, Yelv. 99.

(*q*) R. *v.* Turner, 1 Lew. 176, Parke, B.

(*r*) 1 East, P.C. 347.

(*s*) R. *v.* Bubb, 4 Cox, 455, *ante*, p. 671, after consultation between Williams, J., Lord Campbell, C.J., and Mr. Greaves, Q.C. See R. *v.* Cary, 3 Bulst. 206. 1 Rolle R. 407, as R. *v.* Carew. C. S. G.

(*t*) 1 East, P.C. 371.

And where the coroner's jury have found a verdict of manslaughter, and the grand jury a bill for murder, the prisoner has been arraigned and tried on both the inquisition and indictment at the same time (*u*). So where the grand jury have found a bill for manslaughter, and the coroner's jury a verdict of wilful murder (*v*). So where the grand jury have found a bill against more prisoners for murder than the coroner's jury (*w*).

Sect. II.—Coroner's Inquisition.

Coroner's Inquisition.—By the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 3 (1), 'Where a coroner is informed that the dead body of a person is lying within his jurisdiction, and there is reasonable cause to suspect that such person has died either a violent or an unnatural death, or has died a sudden death of which the cause is unknown, or that such person has died in prison or in such place or under such circumstances as to require an inquest in pursuance of any Act (*x*), the coroner, whether the cause of death arose within his jurisdiction or not, shall, as soon as practicable, issue his warrant for summoning not less than twelve nor more than twenty-three good and lawful men to appear before him at a specified time and place, there to inquire as jurors into the death of such person as aforesaid.'

By sect. 4 (2), 'It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner.'

By sect. 4 (3), 'After viewing the body and hearing the evidence the jury shall give their verdict and certify it by an inquisition in writing, setting forth . . . who the deceased was, and how and where the deceased came by his death, and if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to such murder (*y*).

(*u*) R. *v.* Walters, Hereford Sum. Ass. 1841, Coltman, J. MSS. C. S. G. R. *v.* Powell, Hereford Sum. Ass. Erskine, J. MSS. C. S. G. See R. *v.* Harding, 1 Cr. App. R. 219.

(*v*) R. *v.* Smith, 8 C. & P. 160. Bosanquet and Coltman, JJ., and Bolland, B.

(*w*) R. *v.* Dwyers, Gloucester Sum. Ass. 842, Erskine, J., MSS. C. S. G.

(*x*) It is a misdemeanor to burn or otherwise dispose of a dead body, upon which an inquest ought to be held, with intent to prevent the coroner holding an inquest; R. *v.* Price, 12 Q.B.D. 247, Stephen, J. And see R. *v.* Stephenson, 13 Q.B.D. 331 (C. C. R.). R. *v.* Byers, 71 J. P. 205, Kennedy, J.

(*y*) The inquisition must be under the hands and in the case of murder or manslaughter under the seals of the jurors who concur (s. 18 (1)). Such an inquisition amounts to an indictment, R. *v.* Ingham, 5 B. & S. 257. See *ante*, p. 818. Although the prisoner may be charged with murder or manslaughter by the inquisition of the coroner, it is usual also to prefer an indictment against him. By 50 & 51 Vict. c. 71, s. 20, if in the opinion of the Court having cognizance of the case, an inquisition finds sufficiently the matters required to be found thereby, and, where it charges a person with murder or manslaughter, sufficiently designates that person and the offence charged, it shall not be quashed for any defects, but may be amended by the proper officer of the Court. The jurisdiction of the King's Bench Divison to quash an inquisition for irregularity on the face of it is left untouched by this section. R. *v.* G. W. Ry. Directors, 20 Q.B.D. 410; 16 Cox, 410. If particulars are set out professing to show facts justifying the verdict the inquisition may be quashed if they are

By sect. 4 (5), 'In case twelve at least of the jury do not agree on a verdict the coroner may adjourn the inquest to the next sessions of oyer and terminer or gaol delivery held for the county or place in which such inquest is held, and if, after the jury have heard the charge of the judge or commissioner holding such sessions, twelve of them fail to agree on a verdict, the jury may be discharged by such judge or commissioner without giving a verdict.'

By sect. 6, power is given to the High Court of Justice, on application by or under the authority of the Attorney-General, to order an inquest to be held if the coroner refuses or neglects to hold one, or where it is necessary in the interests of justice that another inquest should be held.

By sect. 7 (1), 'The coroner only within whose jurisdiction the body of a person upon whose death an inquest ought to be holden is lying shall hold the inquest, and where a body is found dead in the sea or any creek, river, or navigable canal within the flowing of the sea, where there is no deputy coroner for the jurisdiction of the Admiralty of England, the inquest shall be held only by the coroner having jurisdiction in the place where the body is first brought to land.

(2). 'In a borough with a separate Court of quarter sessions, no coroner, save as is otherwise provided by this Act, shall hold an inquest belonging to the office of coroner except the coroner of the borough or a coroner or deputy coroner for the jurisdiction of the Admiralty of England.'

By subsect. 3, in a borough having no separate Court of quarter sessions, only the county coroner or the coroner or deputy coroner for the jurisdiction of the Admiralty shall hold an inquest.

By sect. 40 (1), 'For the purpose of holding coroners' inquests, every detached part of a county shall be deemed to be within the county by which it is wholly surrounded, or where it is partly surrounded by two or more counties, within the county with which it has the longest common boundary.'

Sect. III.—Evidence.

The evidence, in cases of murder, will consist of the proof of the particular facts and circumstances which shew the killing, and that it was committed by the party accused of malice aforethought. It should be observed, however, that when the fact of killing is proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily shewn by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to have been founded in malice until the contrary appears (*z*).

Corpus delicti.—It has been considered a rule, that no person should be convicted of murder unless the body of the deceased has been found; and Hale says, 'I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body be found dead' (*a*). But this rule or caution must be taken with some

insufficient in law to constitute the offence found. R. *v.* Clerk of Assize of Oxford Circuit [1897], 1 Q.B. 370.

(*z*) Fost. 255. *Ante*, p. 657.

(*a*) 2 Hale, 290. This is only a caution, not a rule for every case. R. *v.* Burton, Dears. 282, Maule, J. R. *v.* Kersey, 1 Cr. App. R. 260.

qualifications; and circumstances may be sufficiently strong to shew the fact of the murder, though the body has never been found. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood; the Court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted, and (the conviction being unanimously approved by the judges) was afterwards executed (*b*).

And where the mate of a ship was seen to seize the captain from behind, and throw him into the sea, and the captain fell striking a boat, and leaving marks of blood upon it, but was never seen again, Archibald, J., allowed the case to go to the jury, and the prisoner was convicted of manslaughter (*c*).

But where upon a indictment against the prisoner for the murder of her bastard child, it appeared that she was seen, with the child in her arms, on the road from the place where she had been at service to the place where her father lived, about six in the evening, and between eight and nine she arrived at her father's, without the child, and the body of a child was found in a tide-river, near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to shew that it was not the body of such a child; it was held that she was entitled to be acquitted; the evidence rendered it probable that the child found was not the child of the prisoner; and with respect to the child, which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was, unless there were evidence to shew that her child was actually dead (*d*).

The true principle seems to be that the rule is properly applicable only in cases where it is sought to presume death from the disappearance of the person said to be deceased (*e*).

(*b*) R. *v.* Hindmarsh, 2 Leach, 569. It was argued at the trial that the prisoner was entitled to be acquitted, on the ground that it was not proved that the captain was dead; and that as there were many ships and vessels near the place where the transaction was alleged to have taken place, the probability was that he was taken up by some of them, and was then alive. And counsel mentioned a case before Gould, J., in which the mother and reputed father of a bastard child were observed to take the child to the margin of the dock at Liverpool, and after stripping it, cast it into the dock. The body of the infant was not afterwards seen; and as the tide of the sea flowed and reflowed into and out of the dock, the learned judge, upon the trial of the father and mother for the murder of their child, observed that it was possible the tide might have carried out the living infant; and upon this ground the jury, by his direction, acquitted the prisoners. But *qu.* the form of the indictment in this case.

(*c*) R. *v.* Armstrong, 13 Cox, 184.

(*d*) R. *v.* Hopkins, 8 C. & P. 591. Abinger, C.B. R. *v.* Cheverton, 2 F. & F. 833, Erle, C.J. R. *v.* Perry, 14 St. Tr. 1312.

(*e*) See Upington, *v.* Solomon, 9 Buchanan (Cape, S.C.), 240, 276, de Villiers,

A question has sometimes been raised whether a prisoner can be convicted of murder where it is impossible for any evidence to be given of the cause of death, in consequence of the state in which the body was found, but it would seem that it is a question for the jury, taking all the circumstances into consideration, whether the death was caused by violence or not, and whether that violence was the act of the prisoner (*f*).

On a trial for murder, in order to prove the state of the health of the deceased prior to the day of his death, a witness was asked in what state of health the deceased seemed to be when he last saw him, and he began to state a conversation which had then taken place between the deceased and himself on this subject. Alderson, B., held that what the deceased said to the witness was reasonable evidence to prove his state of health at the time (*g*).

Upon an indictment for murder by the explosion of certain grenades, a novel kind of explosive instrument, evidence of other deaths and wounds caused by the explosion at the same time and place was held admissible for the purpose of proving the character of the grenades (*h*). Where in the same case a witness was called to prove that he made the grenades, it was held that the name of the person who gave the order for them might be proved, as a fact in the transaction, even though he had not then been shewn to be connected with the prisoner (*i*).

It has already been shewn that if A. is indicted as having given the mortal stroke, and B. and C. as present aiding and assisting, and upon the evidence it appeared that B. gave the stroke, and A. and C. were aiding and assisting, or it be not proved which gave the stroke, the charge is proved, for in law it is the stroke of all (*j*). So if a prisoner is indicted for strangling the deceased with her own hands, and upon the evidence it turns out that the deceased was strangled by someone else in the presence of the prisoner, who was privy to it, and so near as to be able to assist, that is sufficient (*k*).

An indictment for murder, 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 the deceased, and that A. neglecting to do so, it was accidentally given to the deceased by a child, the prisoner's intention to murder continuing. Upon an indictment for murder, which alleged that the prisoner feloniously, &c., did administer a large quantity of laudanum to a child, it appeared that the prisoner delivered to one S., with whom the child was at nurse, about an ounce of laudanum, telling her that it was proper medicine for the child, and directing her to administer to the child every night a tea-spoonful thereof, which was quite a sufficient quantity to kill the child; the prisoner's intention in so doing, as shewn by the finding of the jury, was to kill the child. S. took home

C.J. Cf. R. *v.* King, 9 Canada Crim. Cas. 436. R. *v.* Kenniff [1903], Queensland State Rep. 17.

(*f*) R. *v.* Macrae, Northampton Winter Assizes, Dec. 23, 1892, Kennedy, J.

(*g*) R. *v.* Johnson, 2 C. & K. 354.

(*h*) R. *v.* Bernard, 8 St. Tr. (N. S.), 887, 922. But surely the evidence was admissible as proof of what the single act of the principals effected, just as in a case of arson, if one rick is set fire to and several others burnt, evidence of all is always admitted.

(*i*) Ibid. 8 St. Tr. (N. S.) 926.

(*j*) *Ante*, pp. 114, 759. 1 Hale, 463.

(*k*) R. *v.* Culkin, 5 C. & P. 121, Park, J., Parke and Bolland, BB.

the laudanum, and thinking the child did not require medicine, did not intend to administer it all, and left it on the mantel-piece of her room A few days afterwards a little boy of S., during her accidental absence, removed the laudanum from its place and administered a much larger dose than a tea-spoonful to the child, in consequence of which the child died. The jury were directed that if the prisoner delivered the laudanum to S. with intent that she should administer it to the child, and thereby produce its death, the quantity so directed to be administered being sufficient to cause death; and that, if the laudanum was afterwards administered by an unconscious agent, while the prisoner's original intention continued, the death of the child, under such circumstances, was murder by the prisoner, and that if the tea-spoonful was sufficient to produce death, the administration of a much larger quantity by the little boy would make no difference. The jury found the prisoner guilty, and, upon a case reserved for the opinion of the judges, whether the facts above stated constituted an administering of the poison by the prisoner to the child, they were unanimously of opinion that the administering of the poison by the child was, under the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had actually administered it with her own hand (*l*).

Upon an indictment, alleging that the prisoner did an act which caused the death, it is sufficient to prove that the prisoner caused and procured the act to be done by an innocent agent. An indictment charged that the prisoner feloniously did place and fix upon the head of the deceased a certain plaster made by the prisoner of certain dangerous ingredients. The prisoner was proved to have applied two plasters to the head of the deceased, but a third, which was the last applied before the deceased died, was applied by the child's mother, in the absence of the prisoner, it being made with materials which had been given by the prisoner to the mother for that purpose; it was objected that the indictment was not proved; but it was held that, though indictments often go on to say that the prisoner 'caused and procured' the thing to be done, yet if the plaster was made by the direction of the prisoner, that was enough (*m*).

One important species of evidence occasionally resorted to in cases of homicide, namely, the dying declaration of the party killed, is dealt with *post* tit. 'Evidence,' Vol. ii. p. 2084.

Where the facts of the case amount only to excusable homicide, it is usual for the judge to direct a general verdict of acquittal, unless some criminal culpability appears to attach to the conduct of the party (*n*). And several persons present at a homicide may be found guilty in different degrees, one of murder, the other only of manslaughter (*o*).

In every case where the point turns upon the question whether the homicide was committed wilfully and maliciously, or under justifying,

(*l*) R. *v.* Michael, 2 Mood. 120; 9 C. & P. 356. 'If A. gives poison to B., intending to poison him, and B., ignorant of it, gives it to C., a child, or other near relation of A., against whom he never meant harm, and C. takes it and dies, this is murder in A., and a poisoning by him. R. *v.* Saunders, Plowd. 473; 75 E. R. 706; Dalt. c. 93; but B., because ignorant, is not guilty.' 1 Hale, 431. *Vide ante*, p. 104.

(*m*) R. *v.* Spiller, 5 C. & P. 333, Bolland, B., and Bosanquet, J.

(*n*) Fost. 279, 289, and *ante*, pp. 808–812.

(*o*) *Ante*, p. 114.

excusing, or alleviating circumstances, the matter of fact, namely, whether the facts alleged by way of justification, excuse, or alleviation, are true is the proper and only province of the jury. But whether, upon a supposition of the truths of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the Court; for the construction which the law puts upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the Court (*p*). In cases of doubt and real difficulty, the jury may be directed to state facts and circumstances in a *special verdict* (*q*). But where the law is clear, the jury, under the direction of the Court in point of law, matters of fact being still left to their determination, may find a general verdict, conformably to such direction (*r*). On a trial for murder, if the jury cannot agree, the presiding judge may discharge them and the prisoner may be tried again at the same or later assizes (*s*). Where it is deemed inexpedient or unjust to retry the prisoner, a *nolle prosequi* may be entered by the Attorney-General and the prisoner released without requiring him to be re-arraigned (*t*).

Sect. IV.—Convictions of Offences not Specifically Charged.

A person may be convicted of manslaughter on an indictment for murder (*u*). And where the indictment is for the murder of a newly-born child the defendant may be acquitted of the murder and convicted of concealment of birth (*v*).

A person indicted as accessory after the fact to murder, may be convicted as accessory after the fact to manslaughter, if the offence of the principal turns out to be manslaughter (*w*). Either assisting the party to conceal the death, or in any way enabling him to evade the pursuit of justice, will render a party who knows the offence to have been committed, an accessory after the fact (*w*). A conviction as accessory *after* the fact to homicide upon an indictment as a principal, or as an accessory *before* the fact is bad (*x*).

On an indictment for the manslaughter of a person under 16 by a person over 16 who had the custody, care, or charge of the deceased, the jury may acquit of manslaughter and convict of cruelty (*y*).

It has not been determined whether under 14 & 15 Vict. c. 100, s. 9 (*z*),

(*p*) See R. *v.* Foster, 8 C. & P. 182.

(*q*) *e.g.* in R. *v.* Dudley, 14 Q.B.D. 273, where the question raised was whether homicide and cannibalism were excusable by necessity.

(*r*) Fost. 255, 256. See R. *v.* Smith, *ante*, p. 765, where the Court refused to receive a verdict. R. *v.* Slaughterford, 18 St. Tr. 326: 2 Str. 1204.

(*s*) Winsor *v.* R., L. R. 1 Q.B. 289.

(*t*) R. *v.* M'Guire, *Times*, June 29, 1908, 43 L.J. (Newsp.) p. 423. 1 Chit. Cr. L. 479.

(*u*) R. *v.* Mackalley, 9 Co. Rep. 67 *b*. R. *v.* Greenwood, 7 Cox, 404. The cases of R. *v.* Chatburn, 1 Mood. 403. R. *v.* Rushworth, 1 Mood. 404, and R. *v.* Berry, 1 M. & Rob. 463, Parke, B., merely decide that it made no difference that the indictment for murder did not contain the now immaterial conclusion *contra formam statuti*.

(*v*) 24 & 25 Vict. c. 100, *s.* 60, *ante*, p. 773.

(*w*) R. *v.* Greenacre, 8 C. & P. 35. Tindal, C.J., Coleridge and Coltman, JJ.

(*x*) Richards *v.* R., 61 J.P. 389, and see R. *v.* Bubb, 70 J.P. 143 (C. C. R.).

(*y*) 8 Edw. VII. c. 67, s. 12 (4). See R. *v.* Dyson [1908], 2 K.B. 454, a decision on the corresponding enactment, 4 Edw. VII. c. 15, s. 1 (rep.): and R. *v.* Petch, 2 Cr. App. R. 71: 25 T. L. R. 401.

(*z*) *Post*, Vol. ii. p. 1967.

a person indicted for murder might be convicted of an attempt to murder, *e.g.* where the death was after a year and a day from the felonious act, or was due to some other cause than the felonious act. In one case it was ruled that a previous acquittal of murder was no bar to an indictment for attempting to commit murder on the ground that 14 & 15 Vict. c. 100, s. 9, applies only to an attempt which is a misdemeanor (*a*). But this case is of doubtful authority (*b*).

(*a*) R. *v.* Connell, 6 Cox, 178, Williams and Talfourd, JJ.

(*b*) See R. *v.* Cook [1899], 20 N. S. W. Rep. Law, 264.

CANADIAN NOTES.

OF HOMICIDE.

Sec. 1.—*Of Murder and Felo De Se.*

Homicide, Definition of.—Code sec. 250.
Homicide, What is not.—Code sec. 253.
Homicide, Consent to.—Code sec. 67.
When Child Becomes a Human Being.—Code sec. 251.
Homicide, When Culpable.—Code sec. 252.
Murder, Definition of.—Code sec. 259.
Murder in Certain Cases.—Code sec. 260.
Punishment for Murder.—Code sec. 263.
(See notes to ch. VII. on the Execution of Sentences.)

Sec. 2.—*Felo De Se.*

Aiding and Counselling.—Code sec. 269.
Attempt to Commit Suicide.—Code sec. 270.

Sec. 3.—*The Party Killing and the Party Killed.*

Criminal Liability of Corporation.—A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.). Sections 247 and 252, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. *Ibid.*

Although a corporation cannot be guilty of manslaughter, it may be indicted under Code sec. 222 and possibly also under sec. 284, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.), affirmed, 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

Under sec. 247 a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact

that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. Union Colliery Co. v. R. (1900), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

As the Criminal Code provides no punishment for the offence as against a corporation, the common law punishment of a fine may be imposed on a corporation indicted under it. *Ibid.*

The manager of a corporation is not criminally liable as for wilful disobedience of a statute under Code sec. 164 in respect of the corporation's neglect not due to any active participation on his part, to perform a statutory duty imposed upon it. R. v. Hays (1907), 12 Can. Cr. Cas. 423.

There are offences such as assaults which it is physically impossible for a corporation to commit, but for such offences as they can commit, whether of misfeasance or malfeasance, and for which the prescribed punishment is one which they can be made to endure, they are as amenable to the criminal law as are natural persons. R. v. Central Supply Association (1907), 12 Can. Cr. Cas. 371.

"If it were the fact that the Board of Directors or the general manager of the defendants' company, or anyone responsible directly or indirectly for the system carried on in the transportation of explosives, resided within the jurisdiction of this Court, I should have recommended their being indicted as well as the company. It is right and just that employees of whatever grade shall be placed upon trial when any negligence of theirs caused wounds or death, and the higher officers through whom a defective system is put on or kept in operation should not escape." Per Riddell, J. R. v. Michigan Central Ry. (1907).

In Ex parte Brydges (1874), 18 Lower Canada Jurist 141, the application was upon the return of rules *nisi* to quash a coroner's inquisition (which then had an effect similar to an indictment) and for the discharge of Mr. Brydges' recognizance, under the following circumstances:—A man named Cauchon had been killed by a G.T.R. train at a level crossing. Mr. Brydges was the managing director of the railroad and on complaints made that the crossing was particularly dangerous, had admitted the fact and promised the Attorney-General that he would have a watchman placed there. He did not place a watchman as promised and the fatality to Cauchon resulted. The finding of the coroner's jury was quashed because it was insufficient in form and did not sufficiently charge a criminal offence.

The Party Killed.

When a Child Becomes a Human Being.—Code sec. 251.

Killing an Unborn Child.—Code sec. 306.

Where the accused, a member of a tribe of pagan Indians, killed that which he believed was an evil spirit, called a Wendigo, embodied in human flesh, but which was in fact his own foster-father, the trial Judge directed the jury that "as a matter of law there is here no justification for the killing, and culpable homicide without justification is manslaughter." The jury found the prisoner guilty of manslaughter, and a cause was reserved for the consideration of the Court of Appeal, which said: "Upon the case reserved, if there was evidence upon which the jury could find the prisoner guilty of manslaughter it is not upon us to reverse that finding, and the question we have to decide is whether there was such evidence. We think there was, and therefore do not see how we can say that the prisoner was not properly convicted of manslaughter." Machekequonabe v. The Queen, 2 Can. Cr. Cas. 140.

Sec. 4.—Of the Means of Killing and of Causing Death by Malicious and Intentional Neglect of Duty.

Acceleration of Death.—Code sec. 258.

Neglect of Duty.

Duty of Persons.

(*a*) In charge of another to provide necessaries of life. Code sec. 241.
(*b*) In charge of family to provide necessaries. Code sec. 242.
(*c*) Of masters, to provide necessaries. Code sec. 243.
(*d*) Undertaking acts dangerous to life. Code sec. 246.
(*e*) To avoid omissions dangerous to life. Code sec. 248.
(*f*) In charge of dangerous things. Code sec. 247.
(*g*) Act or omission accelerating death. Code sec. 256.
(*h*) Neglect of proper means. Code sec. 257.

Medical Aid.

A person who engages the services of a child under sixteen years, placed out with him by his legal guardian under a contract for the child's services for a fixed period, whereby the party with whom he is placed engages to furnish the child with board, lodging, clothing, and necessaries, is not as to such child a "guardian or head of a family" so as to become criminally responsible as such, under sec. 242 for omitting to provide "necessaries" to such child while a member of his household. The relationship in such case is that of master and servant, and comes within the provisions of sec. 243, under which

the master is criminally responsible only in respect of a failure to provide "necessary food, clothing or lodging." R. v. Coventry, 3 Can. Cr. Cas. 541. Sec. 243 of the Code does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine.

Medical attendance and remedies are necessaries within the meaning of Code secs. 241 and 242 and also at common law, and anyone legally liable to supply such is criminally responsible for neglect to do so. R. v. Brooks (1902), 5 Can. Cr. Cas. 372, 9 B.C.R. 13; R. v. Lewis (1903), 7 Can. Cr. Cas. 261, 6 O.L.R. 132. Conscientious belief that it is against the teaching of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. *Ibid.*

If a person having the care and custody of another who is helpless, neglects to supply him with the necessaries of life and thereby causes or accelerates his death he was guilty of a criminal offence even before the statute. R. v. Nasmith (1877), 42 U.C.Q.B. 242. But if a person over the age of sixteen (see sec. 243) and having the exercise of free will, chooses to stay in a service where bad food and lodging are provided and death is thereby caused, the master is not criminally liable.

By Influence of Mind.—Code sec. 255.

By Want of Medical or Surgical Skill.

A woman practising "Christian Science" and not called in as a medical attendant was held not guilty of manslaughter where the only treatment by her was to sit silently by the patient, a child ill of diphtheria, although the child's life might have been saved or prolonged had proper medical aid been called in. R. v. Beer, 32 C.L.J. 416. But the aiding and abetting the person charged with the duty of providing necessaries is punishable in like manner as the principal offence. See Code sec. 69. R. v. Brooks (1902), 5 Can. Cr. Cas. 372, 9 B.C.R. 13; R. v. Lewis (1903), 7 Can. Cr. Cas. 261, 6 O.L.R. 132.

By Perjury.—Code sec. 174(2).

By Infection.—The theory of the defence in an indictment for murder, was that the death was caused by the communication of smallpox virus by Dr. M., who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. Dr. M. had not in his examination in chief or cross-examination been asked anything on this subject; it was held that he was properly allowed to be called in reply, to state that precautions had been taken by him to guard against the infection. R. v. Sparham and Greaves, 25 U.C.C.P. 143.

By Rape.—A practising physician who kept an hospital for the sick, on three successive days forced the person of B. a patient then under his control in such hospital, she being in a condition of health that rendered sexual intercourse dangerous even with her consent. B. died on the sixth day after the last occasion on which she had been ravished, and her death was hastened if not caused thereby. It was held that there was sufficient evidence to justify A.'s surrender under the Ashburton Treaty for extradition on a charge of murder. Re Weir, 14 Ont. R. 389.

Sec. 5.—Time of Death. Treatment of Wounds. Killing Persons Labouring Under Disease.

Time of Death.—Death within a year and a day. Code sec. 254.

The prisoner was convicted of manslaughter in killing his wife, who died on November 10th, 1881. The immediate cause of her death was acute inflammation of her liver which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death the prisoner had knocked his wife down with a bottle; she fell on the floor and remained 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. On questions reserved, whether the evidence was properly received of assaults and violence committed by the prisoner upon the deceased prior to the date of death or prior to the occasion on which he had knocked her down with the bottle, and whether there was any evidence to leave to the jury to sustain the charge, it was held by the Supreme Court of Canada, 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. The Queen, 7 Can. S.C.R. 397.

Sec. 6.—Provocation.

All questions as to motive, intent, heat of blood, etc., must be left to the jury, and should not be dealt with as propositions of law. R. v. McDowell (1865), 25 U.C.Q.B. 108, 115.

Although by sec. 229(3) no one shall be held to give provocation to another by doing that which he had a legal right to do, it is for the jury and not for the Judge to determine any preliminary question of fact upon which the alleged legal right depends. R. v. Brennan (1896), 4 Can. Cr. Cas. 41, 27 Ont. R. 659.

On a trial for murder if the trial Judge directs the jury that imminent peril of the prisoner's own life, or of the lives of his family,

is a ground for justification for killing, in defence of his household, one of a party committing an unprovoked assault upon him, but does not direct them that a reasonable apprehension of immediate danger of grievous bodily harm to the prisoner or to his wife and family is an equal justification, such omission constitutes a substantial wrong or miscarriage occasioned on the trial (Cr. Code sec. 1019) where the circumstances shewn in evidence are such as to point much more to the latter ground of justification than to the former, and a new trial should be ordered. R. v. Theriault (1894), 2 Can. Cr. Cas. 444 (N.B.); Code secs. 53 and 55.

In the case of a sudden quarrel, where the parties immediately fight, there may be circumstances indicating malice in the party killing, which killing will then be murder. R. v. McDowell (1865), 25 U.C.Q.B. 108.

Treatment of Wounds.—Code sec. 258.

Sec. 9.—Killing in Prosecution of Criminal, Unlawful, Wanton Purpose.

Where Several Join to do an Unlawful Act.—Where a package of revolvers was thrown into a carriage in which three prisoners conjointly charged with a crime were being conveyed under lawful arrest and the prisoners all struggled to obtain revolvers, two of them succeeding in doing so, whereupon all of them attempted to effect a forcible escape, during which one of the peace officers was shot dead by one of the prisoners, but by which of them is unknown, proof that the defendant had one of the revolvers in the melee, and had ordered another of the peace officers to "give up" immediately after another of the prisoners had told the defendant to "give it to him," is with such facts, sufficient evidence of a conspiracy by the three prisoners for an unlawful purpose, to wit, the escape, and of a common design to use for its accomplishment any amount of violence or force, and a conviction of the defendant for murder is, therefore, proper without proof that he fired the fatal shot. It was proper for the trial Judges to instruct the jury that "where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, that if by reason of such resolution one of the party is guilty of homicide, his companions would be liable to the penalty which he had incurred." The shooting of the constable by one of the conspirators, in the prosecution of such common purpose, was an act which was or ought to have been known to be a probable consequence of prosecuting such purpose, and each of the conspirators became, under Cr. Code sec. 69(2), a party to the homicide. R. v. Rice (1902), 5 Can. Cr. Cas. 509.

Constructive murder, as it is called, is a phrase which has no legal meaning, but is a common and convenient way of describing a homicide committed under circumstances which in law constitutes the offence of murder, though the particular act which occasioned it may not have been actually done or directly authorised by the accused. R. v. Rice (1902), 5 Can. Cr. Cas. 509, per Osler, J.A.

Manslaughter.—Where a person strikes another wantonly and unlawfully, but without any intention of doing him bodily harm, and thereby caused the other to fall and dislocate his spine, and death results therefrom, the assaulting party is guilty of manslaughter, although death would not ordinarily result either from the blow or from the fall. R. v. Chisholm, 14 Can. Cr. Cas. 15.

Sec. 1.—Of Manslaughter.

Culpable Homicide, which would Otherwise be Murder, may be Reduced to Manslaughter by Provocation.—Code sec. 261.

Culpable Homicide not Amounting to Murder is Manslaughter.—Code sec. 262.

Neglect to Guard Hole in Unused Ice or Mine.—Code sec. 287.

Punishment for Manslaughter.—Code sec. 268.

Provocation.—See Notes to Part 1, sec. 6.

Accessories.—See Notes to Bk. 1, ch. 5.

Corporations Cannot be Guilty of Manslaughter.—(See preceding note on Criminal Liability of Corporations.)

Resistance to Officers of Justice.—(1) The question whether a peace officer, on reasonable and probable grounds, believed that an offence for which the offender might be arrested without a warrant had been committed by the fugitive fleeing to escape arrest, is one for the jury, and not for the Judge to decide.

(2) If a person with intent to steal something out of a shop or store, opens a door leading into it by lifting the latch or turning the knob and then enters the store, although during business hours, for the purpose of carrying out his intention, he may be convicted of shopbreaking under sec. 461 of the Code.

(3) When a peace officer, pursuing a fugitive, whom he had a right to arrest without a warrant, found that the fugitive was, in his opinion, likely to escape for the time being owing to superior speed, it is a question for the jury, on the trial of the officer for manslaughter in killing the fugitive by a shot from his revolver, intended only to wound and so stop his flight, whether, under all the circumstances, the officer was justified under section 41 of the Code in such shooting in order to prevent the escape of such fugitive, or whether such escape could not have been prevented by reasonable means in a less violent way. R. v. Smith, 17 Man. R. 282, 13 Can. Cr. Cas. 326.

Lawful Acts Improperly Performed.—On a charge of manslaughter against the master of a ship in respect of a collision resulting in loss of life, such recklessness must appear as will amount to a wilful attempt upon the lives of people in putting them to danger, and not merely an error of judgment. R. v. Delisle (1896), 5 Can. Cr. Cas. 210 (Que.).

Striking a person unlawfully, but without intention to do him bodily harm, is manslaughter, if the act results in death. R. v. Chisholm, 14 Can. Cr. Cas. 15.

Sec. 1.—Indictment.

Where two persons are jointly indicted for murder and one pleads guilty, and the other not guilty, and the trial upon the latter plea results in an acquittal, leave should be granted the other defendant to change his plea of guilty to one of not guilty, if the circumstances of the case are such that the verdict of acquittal already given in respect of the one would be absolutely inconsistent with the guilt of the other who had pleaded guilty. The King v. Herbert, 6 Can. Cr. Cas. 214.

In a criminal trial as in a civil case, only the issues presented by the evidence need be submitted to the jury.

On a trial for murder by shooting, where the evidence for the prosecution was of a deliberate shooting, and the accused giving evidence on his own behalf claimed that the shooting was accidental, and there was no evidence of provocation, a verdict of guilty will not be set aside on the ground that the trial Judge withdrew from the jury the question of manslaughter by instructing them that their verdict on the evidence must be one of either guilty of murder or one of acquittal. The King v. Barrett, 14 Can. Cr. Cas. 464.

Sec. 4.—Conviction of Offences not Specifically Charged.

When only Part Proved of Offence Charged.—Code sec. 951.

Conviction of Manslaughter on Charge of Murder.—Code sec. 951(2).

Indictment for Same Offence with Averment of Intention after Previous Acquittal.—Code sec. 909(1).

Previous Conviction, or Acquittal, Effect of.—Code sec. 909(2).

An acquittal on a charge of manslaughter is not a bar to a charge of inflicting bodily harm based upon the same circumstances. R. v. Shea, 14 Can. Cr. Cas. pt. 3, page 319.

It is not necessary that the lesser offence should be expressly charged on the face of the indictment. It will be sufficient if the charge must of necessity include it. Per Richards, C.J., R. v. Smith (1874), 34 U.C.Q.B. 552, following R. v. Bird (1850), 5 Cox C.C. 1; 2 Den. C.C. 94.

On an indictment for murder in the statutory form, the prisoner, under 32-33 Vict. ch. 29, sec. 51 (Canada), cannot be convicted of an assault, and his acquittal of the felony is, therefore, no bar to a subsequent indictment for the assault, R. v. Smith, 34 U.C.Q.B. 552; R. v. Ganes, 22 U.C.C.P. 185; R. v. Dingman, 22 U.C.Q.B. 283.

Upon an indictment for shooting with felonous intent, the prisoner if acquitted of the felony, may be convicted of common assault. R. v. Cronan, 24 U.C.C.P. 106.

An acquittal on a charge of manslaughter is not a bar to a charge of inflicting bodily harm based upon the same circumstances. The King v. Shea, 14 Can. Cr. Cas. 319.

CHAPTER THE SECOND.

OF PROCURING OR ATTEMPTING ABORTION.

An infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder (*a*). But an unsuccessful attempt to effect the destruction of such an infant appears to have been treated as a misdemeanor at common law (*b*). As to the liability for killing the mother by attempts to procure miscarriage or causing by such attempts the death of the child after actual birth, *vide ante*, p. 663.

By the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 58 (*c*), '*Every woman, being with child, who, with intent to procure her own miscarriage* (*d*), *shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent*, and whosoever, with intent to procure the miscarriage of any woman, *whether she be or be not with child*, shall unlawfully (*e*) administer to her or cause to be taken by her any poison or other noxious thing (*f*), or shall unlawfully (*g*) use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*gg*).

Sect. 59 (*h*), 'Whosoever shall unlawfully supply or procure 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 be or be not with child, shall be guilty of a misdemeanor, and

(*a*) *Ante*, p. 663.

(*b*) 1 Hawk. c. 3, s. 13. 3 Co. Inst. 51. See a precedent of an indictment for this offence as a misdemeanor at common law in 3 Chit. Cr. L. 798, procured from the Crown Office, Mich. T. 42 Geo. III.

(*c*) Framed on 7 Will. IV. and 1 Vict. c. 85, s. 6, with the additions indicated by italics. 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, or R. *v.* Goodchild, 2 C. & K. 293.

(*d*) See Taylor, Med. Jurisprudence (5th ed.), ii. 149.

(*e*) The word 'maliciously' was in 9 Geo. IV. c. 31, s. 13.

(*f*) The words of 43 Geo. III. c. 58, in s. 1, were 'any deadly poison or other noxious and destructive substance or thing'; in s. 2, 'any medicines, drug or other substance or thing whatsoever. The words in 9 Geo. IV. c. 31, where the woman was quick with child, were, 'any poison or other noxious thing.' Where the woman was not quick with child, 'any medicine or other thing.' See note (*o*), *post*, p. 830.

(*g*) 'Unlawfully' was not in 9 Geo. IV. c. 31, s. 13.

(*gg*) Or for not less than three years, or to be imprisoned with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1. *Ante*, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*h*) This section was new in 1861, and intended to check the obtaining of poison, &c., for the purpose of causing abortion.

being convicted thereof shall be liable . . . (*i*) to be kept in penal servitude.

The word 'unlawfully' excludes from the section acts done in the course of proper treatment in the interest of the life or health of the mother (*j*).

In the case of an indictment against the mother under sect. 58 it is necessary to prove that she was with child, but not that she was quick with child (*k*), and in the case of any other person, it is immaterial whether the woman were or were not with child.

On an indictment against a woman for being present aiding and abetting the use of an instrument upon her to commit an offence against sect. 58, it was held that the woman was properly convicted on proof that she consented to the use of the instrument with the intent, &c., and that she was with child though the indictment did not allege that she was with child (*l*). Apparently the mother could be found guilty of aiding and abetting an offence under the second part of the section even if she was not with child (*m*).

Where a woman, being with child, with intent to procure abortion, takes a thing which she believes to be noxious, but which is, in fact, harmless, she may be convicted of an attempt to commit an offence within sect. 58 (*n*).

Drugs.—An indictment upon 43 Geo. III. c. 58, s. 2, (rep.) charged the prisoner with having administered to a woman a decoction of a certain shrub called *savin:* and it appeared upon the evidence that the prisoner prepared the medicine which he administered by pouring boiling water on the leaves of a shrub. The medical men who were examined stated that such a preparation is called an *infusion*, and not a *decoction* (which is made by boiling the substance in the water), upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed. But Lawrence, J., overruled the objection, and said, that infusion and decoction are *ejusdem generis*, and that the variance was immaterial (*o*).

(*i*) The words omitted were repealed in 1892 (S. L. R.). The present punishment under 54 & 55 Vict. c. 69, s. 1 is penal servitude for not more than five nor less than three years, or imprisonment with or without hard labour for not more than two years. *Vide ante*, pp. 211, 212.

(*j*) See Taylor, Medical Jurisprudence (5th ed.) ii. 154, 155.

(*k*) The repealed enactments 43 Geo. III. c. 58 and 9 Geo. IV. c. 31 drew a distinction between cases in which a woman was quick with child and cases where she was not, even if she believed herself to be so. R. *v.* Scudder, 1 Mood. 216. On this subject see R. *v.* Phillips, 3 Camp. 77. In R. *v.* Wycherley, 8 C. & P. 262, where a jury of matrons was empanelled to determine whether a woman convicted of murder was quick with child, it was ruled that quick with child meant pregnant. See Taylor, Med. Jurisp. (5th ed.), ii. 35.

(*l*) R. *v.* Sockett, 24, T. L. R. 893; 72 J. P. 428.

(*m*) Ibid.

(*n*) R. *v.* Brown, 63 J. P. 790, Darling, J. As to inciting to commit such offence, *vide ante*, p. 203.

(*o*) He added that the question was whether the prisoner administered any matter or thing to the woman to procure abortion. R. *v.* Phillips, 3 Camp. 74. In R. *v.* Coe, 6 C. & P. 403, where the prisoner was indicted on 9 Geo. IV. c. 31, s. 13, for administering saffron to a female, and his counsel was cross-examining her as to her having taken something else before the saffron, and also as to the innoxious nature of the article; Vaughan, B., said: 'Does that signify? It is with the intention that the jury have to do; and if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient.' It is not stated upon which branch of the section this indictment was framed; if upon the latter, which used the words 'any medicine or *other thing*,'

On an indictment for administering feverfew and other drugs to procure abortion, it appeared that the prisoner gave the woman, who was alleged to be with child by him, two powders, with directions to take one on each of two successive nights, and said that the effect would be to cause miscarriage. She took one of the powders, with the feverfew, which brought on violent sickness. The other powder was examined by a physician, and he could not discover any mineral substance in it; as far as he could judge from the taste, smell, and appearance, it was a mixture of savin and fenugreek, the latter being the larger ingredient. The fenugreek would scarcely produce any effect at all; savin, in that quantity, might produce a little disturbance in the stomach for the time, but would do no further injury. Feverfew (*p*) is an herb very similar to camomile: it is a tonic in common use among the peasantry, and has nothing noxious in it. A mixture of the powder and decoction of this herb would not alter the properties of either. The prisoner upon two or three subsequent occasions had brought the woman other medicines to take for the same purpose, some of which she had taken, but not the rest. Wilde, C. J., held that the evidence was not sufficient to prove that the drugs administered came within the meaning of the words 'poison or other noxious thing' (*q*).

Where the prisoner caused half an ounce of oil of juniper to be administered, and it was proved that quantities considerably less may be taken without any ill effect, but that half an ounce produces ill effects and is dangerous to a pregnant woman, it was held that there was evidence of the administering of a 'noxious thing' within the section (*r*).

In order to bring a case within sect. 59 of the Act of 1861, it is not necessary that the intention of using the noxious substance should exist in the mind of any other person than the person supplying it. In R. *v.* Hillman (*s*),

perhaps the dictum was right. But neither this dictum, nor that of Lawrence, J., in R. *v.* Phillips, apply to s. 58, *supra*, which uses the words 'any poison or other noxious thing' only in the case of administering or causing to be taken; and although a doubt is suggested in a note to R. *v.* Coe as to whether the words 'other means' might not be applied to other substances than such as are poisonous or noxious; it would seem that the words 'other means whatsoever' cannot be so applied in s. 58: firstly, because they are in an entirely distinct sentence; secondly, because they are governed by the word 'use,' and not by 'administer.' C. S. G. See Rose. Cr. Evid. (13th ed.), 232.

(*p*) Or *Featherfew Matricaria*, so called from its supposed use in disorders of the womb.

(*q*) R. *v.* Perry, 2 Cox, 223. Wilde, C.J., also held that the other transactions were admissible as showing the intent with which the particular drugs referred to in the indictment were administered. See *post*, Vol. ii. p. 2108 *et seq.* As the prisoner administered the drugs with intent to procure a miscarriage, and as savin is unquestionably in its nature a noxious drug, the decision in this case seems open to grave doubt. It is submitted that the true meaning of the words 'poison or other noxious thing' is such things as in their nature are poisonous or noxious; and that it is a misapprehension to suppose that the statute requires such a quantity of a poison or other noxious thing to be administered as shall be noxious. If a person administers any quantity of a poison, however small, it has never yet been doubted, that, if it were done with intent to murder, the offence of administering poison with intent to murder was complete; and R. *v.* Cluderay, 1 Den. 514, shews that if poison be administered in such a way that it cannot injure, the offence is nevertheless complete. Wilde, C.J., there said: 'The act of administering poison with intent to kill is proved. The effect of that act is beside the question.' It is submitted, therefore, that if there be an intent to procure abortion, it is quite immaterial how small the quantity be of the poison or other noxious thing that is administered.' C. S. G.

(*r*) R. *v.* Cramp, 5 Q.B.D. 307; 49 L. J. M. C. 144.

(*s*) L. & C. 343; 33 L. J. M. C. 60.

the prisoner was indicted for supplying savin, knowing that it was intended to be unlawfully used to procure a miscarriage, and it was contended that there was no case against him, because it was necessary that he should know that the savin was intended to be used with intent to procure the miscarriage, whereas it was not intended, except by the prisoner himself, to be so used ; the jury found that the case was in other respects proved, but that the prosecutrix did not intend to take the savin, nor did any other person, except the prisoner, intend that she should take it. Upon a case reserved, it was held that the intention of any other person than the prisoner was not necessary to the commission of the offence. The statute is directed against the supplying of any substance with the intention that it shall be employed in procuring abortion. The prisoner, in this case, supplied the substance, and intended that it should be employed to procure abortion. He knew of his own intention that it should be so employed, and was therefore within the words of the statute. He was also within the mischief of the statute, and was rightly convicted.

In R. *v.* Titley (*t*), on an indictment under sect. 59, it appeared that the defendant supplied a mixture of ergot of rye and perchloride of iron with intent that it should be used by a certain woman to produce abortion (*u*). It was ruled that the defendant was liable, although the woman for whom it was intended was not pregnant, and that the enactment applied 'whether there is a woman in a state fit to be the subject of the operation or not' (*v*).

The thing supplied with intent to procure abortion must be noxious in its nature, 'according to the form, quality, or frequency with which it is administered' (*w*). Where, therefore, an indictment charged the prisoner with supplying a certain noxious thing with intent to procure abortion, and a surgeon proved that the liquid was some vegetable decoction of a harmless character, and such as would not procure a miscarriage ; but if taken with the belief that it would produce it, it might, by acting on the imagination, produce that effect ; it was held that this liquid was not within the clause, although the woman proved that, after taking a wine-glassful, she felt dizzy in the head when she went to bed, and felt stupid in the head the next morning (*x*).

But it need not be shewn what the noxious thing is ; it is sufficient if something is administered that produces miscarriage (*y*).

To constitute an administering, or causing to be taken, it is not necessary that there should be a delivery by the hand. Where, therefore, on an indictment for administering poison and causing poison to be taken, it appeared that the prisoner had mixed poison with coffee, and had told her mistress that the coffee was for her, and the mistress took it, and drank some of it ; it was held that this was sufficient (*z*). In R. *v.* Cadman (*a*),

(*t*) 14 Cox, 502, Stephen, J.

(*u*) The indictment as originally framed charged an intent to procure the miscarriage of a certain woman not named. On objection it was amended to 'a woman to the jurors unknown.'

(*v*) For criticisms on these cases see R. *v.* Hyland [1898] 24 Victoria L. R. 101 ; R. *v.* Sculley [1903], 23 N. Z. L. R. 380.

(*w*) Taylor, Med. Jurisp. (5th ed.), ii. 183, where numerous instances of trials for administering particular drugs are collected.

(*x*) R. *v.* Isaacs, L. & C. 220.

(*y*) R. *v.* Hollis, 12 Cox, 463 (C. C. R.).

(*z*) R. *v.* Harley, 4 C. & P. 369, Park, J.

(*a*) 1 Mood. 114 ; Carr. Supp. 237.

a mere delivery to the woman, however, was held insufficient, and it was said that the poison must be taken into the mouth to constitute an administering. But in R. *v.* Walford (*b*), it was held unnecessary for proving administration to shew that the poison had been taken into the stomach.

Upon an indictment for unlawfully administering to, and causing to be taken by, C., poison, with intent to procure her miscarriage, it appeared that she, being and believing herself to be pregnant, applied to the prisoner to get her something to procure her miscarriage, and that the prisoner accordingly purchased some preparation of mercury, which he gave to her, directing her to take one half of the quantity in gin; C. accordingly procured the gin, and, in the absence of the prisoner, took the dose, which produced a miscarriage. The jury found these facts, and that the mercury was both given by the prisoner to C., and taken by her, with intent to procure the miscarriage; and, upon a case reserved, it was held that the prisoner was properly convicted; as there was a 'causing to be taken' within the meaning of the statute (*c*). So where on a similar indictment it appeared that the prisoner had talked with C. about her being with child, and brought her a bunch of savin, and told her, if she put it in some gin, and took from half a glass to a glass two or three times a week, it would destroy her child, and she took the savin and gin three or four times accordingly; and the prisoner afterwards induced C. to get some blue pills from a chemist, which the prisoner made up with some flour and tea into pills, of which C. took twenty or thirty, and was very ill from the time of taking the pills till she was confined; it was held, upon a case reserved, that there was no distinction between this and the preceding case (*d*).

Under the Act of 1861, in such cases as the two last, the woman being with child would be a principal, and the man an accessory before the fact; but where the woman is not with child these cases will still apply; for there the woman's criminality will be exactly the same as it was under the former Act.

On an indictment for administering savin with intent to procure abortion, the administration of savin on one day was proved, and it was proposed on the part of the prosecution to prove the administration of similar drugs on many subsequent days for the purpose of shewing the intent, and also as part of the same felony, and it was urged that the substance of the felony was the administration of drugs for the purpose of procuring abortion, and if that were done by homœopathic doses, taken for a long period, all would form part of one felony; but Cresswell, J., held that other matters of the same description might be proved for the purpose of shewing the intent, but that the administration of

(*b*) [1899] 34 L. J. (Newsp.) 116, Wills, J. who questioned the accuracy of the report in R. *v.* Cadman.

(*c*) R. *v.* Wilson, D. & B. 127. Cheney, though culpable, was not guilty of felony, and therefore not guilty of the felony created by the statute, and the prisoner was, therefore, the only person coming within the words as the principal; and this distinguishes the case from R. *v.* Williams, 1 Den. 39.

(*d*) R. *v.* Farrow, D. & B. 164. It is not stated expressly whether the savin and pills were taken in the absence of the prisoner, but the inference from the facts stated is that they were. See also R. *v.* Gaylor, D. & B. 288. R. *v.* Fretwell, L. & C. 161.

other savin on other days could not be given in evidence as part of the offence (*e*).

Instruments or other Means.—The decisions on criminal use of instruments within sects. 58, 59, are to be found in medical rather than in legal treatises (*f*).

In R. *v.* Dale (*g*), where an instrument or appliance is used which might be properly employed for innocent treatment of the woman, Charles, J., ruled that evidence that the accused had by similar means caused or attempted to cause miscarriages was admissible to prove that the act was done with a guilty intent. In R. *v.* Bond (*h*), it was pointed out that the evidence was not in fact admitted; and that it would not be admissible when the only question at issue was whether the instrument was in fact used (*i*). But in that case, after full discussion, it was held by the majority of the Court (*j*), that on an indictment under sect. 58 against a medical man, to shew guilty intention, evidence might be admitted to prove the use by him of instruments with the avowed intention of producing the miscarriage of another woman, and of his then using expressions indicating that he was in the habit of performing similar operations for the same illegal purpose.

As to advertisements, &c., inciting to or advising the procuring of miscarriage, see *ante*, p. 203, note (*c*).

A woman who wrongly believing herself to be with child conspires with others to procure her miscarriage is liable to conviction for criminal conspiracy (*k*).

Evidence.—As to the medical aspects of the evidence see Taylor, Med. Jurisp. (5th ed.), ii. 180. Dying declarations are not admissible on indictments for offences within this chapter (*l*). A statement made before her death by the woman operated upon, tendered in evidence on an indictment under sect. 58, was rejected on the ground that though made in the presence and hearing of the accused, he had not a sufficient opportunity of explaining or denying it (*m*).

Where the woman with respect to whom an offence against sects. 58, 59 is alleged to have been committed or attempted is a witness for the Crown, her evidence requires corroboration as that of an accomplice (*n*), in a material particular implicating the accused (*o*). But this rule does not apply where the woman has acted as a police spy with a view to detect an abortionist (*p*).

(*e*) R. *v.* Calder, 1 Cox, 348. See R. *v.* Perry, *ante*, p. 831, note (*q*).

(*f*) See the cases noted in Taylor, Medical Jurisprudence (5th ed.), ii. 159–166.

(*g*) 16 Cox, 703.

(*h*) [1906] 2 K.B. 389.

(*i*) *Ibid.* p. 420, A. T. Lawrence, J.

(*j*) Kennedy, Darling, Jelf, Bray and A. T. Lawrence, JJ. Alverstone, C.J. and Ridley, J., dissented.

(*k*) R. *v.* Whitchurch, 24 Q.B.D. 420, *ante*, p. 151.

(*l*) *Post*, Vol. ii. p. 2084, 'Evidence.'

(*m*) R. *v.* Smith [1897], 18 Cox, 470, Hawkins, J.

(*n*) R. *v.* M——, 72 J. P. 214, Bucknill, J.

(*o*) R. *v.* Everest, 73 J. P. 269.

(*p*) R. *v.* Bickley, 73 J. P. 239; 2 Cr. App. R. 53.

CANADIAN NOTES.

OF PROCURING OR ATTEMPTING ABORTION.

Advertising or Having Drugs to Cause Abortion, etc.—Code sec. 207.

Administering Drugs or Using Instruments to Procure Abortion.—Code sec. 303.

Attempt by Woman to Procure Abortion.—Code sec. 304.

Supplying Drugs or Instruments.—Code sec. 305.

Killing an Unborn Child.—Code sec. 306.

The statute 32-33 Vict. ch. 20, sec. 59, as well as the later Act R.S.C. 1886, ch. 162, sec. 47, used the phrase "any poison or other noxious thing." It was laid down under that statute that while poisons are not noxious things when taken as medicine in ordinary treatment, that if taken or administered in undue and immoderate quantities the excess of the article becomes noxious, and it is not essential to support a conviction that the article should be noxious in itself. R. v. Stitt (1879), 30 U.C.C.P. 30, 33.

An indictment under sec. 304 of the Code charging accused "with unlawfully using on her own person . . with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient. Rex v. Holmes, 9 B.C.R. 294, 6 Can. Cr. Cas. 402.

Counselling a woman in Canada to submit in a foreign country to an operation to procure miscarriage is not indictable in Canada, even if the operation be actually performed as counselled. R. v. Walkem, 14 Can. Cr. Cas. 122.

In extradition proceedings for abortion alleged to have been committed by a physician at the instigation of the accused, it is necessary to produce evidence to prove both that the physician's operation was unnecessary and unlawful, and that the accused procured or abetted such unlawful operation. The King v. McCready, 14 Can. Cr. Cas. 481.

CHAPTER THE THIRD.

OF CONSPIRACY, INCITEMENT AND ATTEMPTS TO MURDER: AND OF WOUNDING AND CAUSING GRIEVOUS BODILY HARM.

SECT. I.—OF CONSPIRACY AND INCITEMENT TO MURDER.

BY 24 & 25 Vict. c. 100, s. 4 (*a*), 'All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of His Majesty or not, and whether he be within the King's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of His Majesty or not, and whether he be within the King's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not more than ten years . . . (*b*).

As regards conspiracy or incitement to murder within the realm or within the Admiralty jurisdiction, this enactment does no more than prescribe the punishment for an offence already recognised by the common law.

In R. *v.* Macdaniel (*c*), a number of persons, in order to procure rewards offered by Acts of Parliament for apprehending highway robbers, concocted a false charge of robbery against one Kidden, who was convicted and executed for it upon the evidence of two of the conspirators. Macdaniel and others were first tried and convicted on an indictment for conspiring to procure Kelly and Ellis to go to Deptford, in Kent, and there take money from Salmon on the King's highway, who should be waiting there for that purpose, with intent to cause Kelly and Ellis to be apprehended and convicted of highway robbery from Salmon, and so unjustly and wickedly to procure to themselves the rewards (*d*). Macdaniel and Berry were also indicted and convicted for the wilful murder of one Kidden, in maliciously causing him to be unjustly apprehended, falsely accused, tried, convicted, and executed, well knowing him to be innocent, and with intent to share the reward (*e*). On this indictment a verdict of

(*a*) In Ireland, under 10 Geo. IV. c. 34, ss. 8, 9, the offences mentioned in this section were capital felonies; and in the Bill, as it passed the House of Lords, the offences were continued as felonies, but made punishable by penal servitude for life; the House of Commons, however, altered them to misdemeanors, punishable with ten years' penal servitude, and as all the offences specified in this clause appear to be misdemeanors at common law the effect of this clause is merely to alter the punishment.

(*b*) The words omitted were repealed in 1892 (S. L. R.), as superseded by 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212, under which the minimum term of penal servitude is three years and imprisonment with or without hard labour for not more two years may be awarded.

(*c*) Fost. 121; 19 St. Tr. 746.

(*d*) On their conviction they were sentenced *inter alia* to the pillory, and one of them while in the pillory was killed by the populace. 19 St. Tr. 809.

(*e*) 19 St. Tr. 810.

guilty was returned, but judgment was respited to allow a motion in arrest of judgment, and the law officers declined to argue the point and the prisoners were discharged on that indictment (*f*).

Conspiracy.—The words 'whether he be a subject of His Majesty or not, and whether he be within the King's dominions or not,' were introduced in order to make it perfectly clear that sect. 4 included cases where the conspiracy was to murder a foreigner in a foreign country (*g*).

It is not essential that the conspiracy should have been formed in England or Ireland. The Act, by sect. 68 (*h*) includes conspiracies within the jurisdiction of the Admiralty of England or Ireland; and even if that section did not exist, British subjects who conspire on the high seas are triable according to the course of the common law in any county in England where any act in furtherance of such conspiracy is done by any one of them, or by their innocent agent; for the crime of conspiracy, amounting only to a misdemeanor, may, like high treason, be tried wherever one distinct overt act of conspiracy is in fact committed (*i*).

Although at common law the criminal jurisdiction of counties was local (*j*), yet in conspiracy the jury could, as we have seen, at common law take cognisance of acts done on the high seas or in another county, provided there were an overt act done in the county where the indictment was preferred: and it would therefore seem that if there were a conspiracy on land abroad, a jury might try it in any place in England where any overt act in pursuance of it was done. Lastly, suppose A. in England

(*f*) 19 St. Tr. 813; *vide ante*, p. 679.

(*g*) And to do away with questions which had previously arisen see Y. B. (13 Edw. IV.), f. 9, pl. 5. The matter was much discussed in R. *v.* Bernard, 1 F. & F. 240; 8 St. Tr. (N. S.) 857, an indictment for conspiracy to murder the Emperor Napoleon III. Mr. Greaves' view on the subject were as follows: 'The words were introduced *ex abundanti cautela* only, and this section cannot be cited as a legislative declaration that a conspiracy in England to murder a foreigner in a foreign country is not a conspiracy indictable at common law, or that the killing of a foreigner in a foreign country, under such circumstances as would amount to murder if the killing were in England, is not murder in contemplation of the law of England. The introduction of the words in question makes it unnecessary to discuss either of those questions; but, having with no small care examined all the authorities to be found on the subject, I may be pardoned for saying it is perfectly clear to me that the killing of any person anywhere in the world, whether on land or sea, under such circumstances that if the killing had been in England it would have amounted to the crime of murder, has ever been murder in contemplation of the law of England. Wherever a murder has taken place in England or on the narrow seas, the Court of King's Benc'h, or Courts of Oyer and Terminer or Gaol Delivery, have had jurisdiction to try it by a jury. Wherever a murder has taken place on the high seas, the Court of Admiralty had jurisdiction to try it according to the civil law; and wherever a murder has taken place on land abroad, the Court of the Constable and Marshal had jurisdiction to try it according to the civil law. By sundry statutes in and since the time of Henry VIII. the jurisdiction to try murders committed on the high seas and on land abroad, has been conferred on certain tribunals with the aid of a jury; but none of these statutes either alters, or professes to alter, the nature of the offence; on the contrary, they all treat it as murder, and only provide a different mode of trial. The doubt which has arisen, and not unnaturally, seems to have sprung from supposing that, because the Common Law Courts, trying all offences by the aid of a jury, had only jurisdiction over offences committed in England or on the narrow seas, therefore murder and other offences against the law of nature and nations were no offences at all in the eye of the law of England. The answer is, that the Courts of Admiralty and of the Constable and Marshal did try such offences from the earliest times; and, therefore, it is clear that they always were offences in the eye of the law of England.' See Greaves, Crim. L. Cons. Acts (2nd ed.) 34.

(*h*) *Ante*, p. 40.

(*i*) See R. *v.* Brisac, 4 East, 166, *ante*, p. 53. R. *v.* Bowes, cited in R. *v.* Brisac.

(*j*) R. *v.* Weston, 4 Burr. 2507, Lord Mansfield, C.J.; *vide ante*, p. 19.

conspired with B. abroad to commit a murder, and A. did some overt act in England, it would seem that both A. and B. might be tried in England, if B. was a British subject; and that if B. was not a British subject, A. might, nevertheless, be tried where he did that overt act; for such an act would be an act coupled with a criminal intent, and as such indictable, within the principle laid down in R. *v.* Higgins (*k*), even if it should be objected that a conspiracy between A. in England and B., a foreigner, abroad, was not a conspiracy within the criminal law of England. And as a letter written and sent, but intercepted, is an overt act in treason (*l*); so a letter may be an overt act in conspiracy. The provisions of the section apply to the overt acts of aliens within the realm or within the jurisdiction of the Admiralty of England or Ireland (*m*).

If a question should be raised whether, if one of the conspirators were to commit the murder, and the others were indicted as accessories before the fact, it might not be objected that they could only be tried for a misdemeanor under this clause; the answers are, first, that this clause has only altered the punishment, and created no new offence; and at common law the power to prosecute for a misdemeanor was not only never suggested as in any way preventing a prosecution for felony, but the best authorities always held that the misdemeanor merged in the felony. But, secondly, nothing can be clearer than that if a statute create a misdemeanor, and something be done in pursuance of, and in addition to, that misdemeanor, which amounts to a felony, all persons who have done acts which would make them accessories before the fact to that felony, may be indicted as such (putting aside merger altogether), on the plain ground that they are totally different offences. It has never been suggested, that because wounding with intent to murder is made a felony, therefore a man who killed another by wounding him could not be indicted for murder. There is no such thing as merger of one felony by another; and when, as is often the case, the same acts constitute several felonies, either at common law or by statute, the prosecutor may indict for any of them (*n*). Thus, in cases of real murder, indictments for manslaughter have often been preferred, and so also indictments for administering poison where death has ensued.

Where on an indictment against three prisoners and others unknown, for a conspiracy to murder, one of them was tried first, because they severed in their challenges, and the evidence tended to affect him and the others named in the indictment, and made a case to go to the jury as to a conspiracy by the three: but there was no evidence to shew that any other person was engaged in the conspiracy: and the jury found the prisoner guilty, and on his being brought up for judgment it was objected that the

(*k*) 2 East, 5. Cf. R. *v.* Bull, 1 Cox, 281, *ante*, pp. 810, 815.

(*l*) R. *v.* Hensey, 19 St. Tr. 1341; 1 Burr. 642.

(*m*) *Vide ante*, pp. 45, 103. By 32 Hen. VIII. c. 16 (rep. 1863, 26 & 27 Vict. c. 125,) all aliens who come into the realm shall be bounden by and unto the laws and statutes of this realm and to all and singular the contents of the same. Statutes speaking of the King's subjects extend to aliens within the realm (*ex parte* Barronet, 1 E. & B. 1), for while there they are subjects by local allegiance. 1 Hale, 542. Courteen's case, Hob. 270: 80 E. R. 416. And see De Jager *v.* R. [1907], A. C. 326. The rule does not apply to foreign sovereigns or other persons enjoying the privilege of exterritoriality. *Vide ante*, pp. 103, 299.

(*n*) See 52 & 53 Vict. c. 63, s. 33 *ante*, p. 4.

prisoner ought not by law to have been tried alone. The objection was overruled and sentence passed. Upon a case reserved, it was contended that the judgment was irregular: for if the others were acquitted, the prisoner could not be guilty of conspiracy: that there was a contradiction on the face of the record, for the others had not been found guilty, and until they were his guilt was not proved: and that the judgment ought to have been respited. But it was held that there were no grounds for respiting or arresting judgment (*o*).

Incitement to Murder.—Upon an indictment for soliciting A. to murder C., the evidence was that the prisoner gave poison to A. to administer to C., and which A. accordingly did; but C. having taken part of it, discovered the fact in time to save his life. The jury found him guilty, believing that the poison had been delivered to C. with intent to poison him, and that the solicitation was to that effect; the judges held both indictment and conviction proper, in treating the prisoner as a principal soliciting, and not as an accessory before the fact (*p*).

In R. *v.* Most (*q*), an indictment under the above section for encouraging and endeavouring to persuade others to commit murder, the alleged encouragement and endeavour to persuade to murder was the publication and circulation by him of an article written in German in a newspaper published in London exulting in the recent murder of the Emperor of Russia, and commending it as an example. The jury were directed that if they thought he intended to, and did, encourage any person to murder any other person, whether a subject of Her Majesty or not, and whether within her dominions or not, and that such encouragement was the natural effect of the article, they should find him guilty. It was held that such direction was correct, although the encouragement was not addressed to any person in particular.

It is not necessary to prove that the mind of the person solicited was affected by the solicitation (*r*).

In R. *v.* Antonelli (*s*), the indictment contained counts against A., for encouraging and endeavouring to persuade persons unknown to murder certain persons, to wit, sovereigns and rulers of Europe, 'not then being within the dominions of our Lord the King, and not being subjects of our said Lord the King,' and against B.; and also a count for encouraging and endeavouring to persuade persons unknown to murder Victor

(*o*) R. *v.* Ahearne, 6 Cox, 6, relying on R. *v.* Cooke, 5 B. & C. 538. 'It has always appeared to me perfectly clear that even if on a subsequent trial the others were acquitted, it would in no way affect the previous verdict or judgment. The jury who convict a prisoner who is tried alone for conspiracy, must have been satisfied both that he conspired with the other, and that the other conspired with him, and the subsequent acquittal is in no respect *necessarily* inconsistent with that verdict; for it may have proceeded on the want or failure of evidence. Suppose a defendant pleaded guilty, or was convicted on his own written confession, it might well be that the person with whom he had admitted he had conspired might be acquitted, and it would be absurd that he should thereby be exonerated. It is a fallacy to suppose that there is any inconsistency on the face of a record containing an indictment, verdict, and judgment, where any state of facts can be suggested which is consistent with the statements in that record.' C. S. G.

(*p*) R. *v.* Murphy, Jebb. Circ. & Pr. Cas. 315 (Ir.): Hayes, Dig. 631.

(*q*) 7 Q.B.D. 244.

(*r*) Ibid. R. *v.* Krause, 66 J. P. 121, Alverstone, C.J.

(*s*) [1905] 70 J. P. 4, Phillimore, J. Cf. R. *v.* Bourtzeff, 129 Cent. Cr. Ct. Sess. Pap. 284.

Emmanuel III., King of Italy. The counts were challenged as bad for indefiniteness. Phillimore, J., ruled that the sovereigns of Europe were a sufficiently definite class, but considered that the word 'rulers' was somewhat vague and would have been better left out. The incitement was contained in a pamphlet called 'L'Insurrezione,' published and put on sale by A., on the anniversary of the murder of King Humbert of Italy. Phillimore, J., ruled that so far as it merely contained invectives on foreign systems of government it was not criminal; but left the case to the jury as to whether the document incited persons to murder the sovereigns of Europe in general or the reigning King of Italy in particular. The jury were also directed that B., who was charged with abetting, was liable if he circulated the pamphlet knowing, or wilfully shutting his eyes to, what it contained.

In R. *v.* Fox (*t*), on an indictment for soliciting H. to murder K., it was proved that the defendant wrote and posted a letter addressed to H., in which he requested him to murder K.; but that letter by accident fell into the hands of a fourth person and never reached H. It was ruled that this evidence was insufficient to warrant a conviction on the grounds that the words solicit, encourage, persuade, or endeavour to persuade all involved actual communication with the person to be influenced.

In R. *v.* Krause (*u*) the defendant was indicted for soliciting, persuading and endeavouring to persuade B. to murder one Foster, and for attempting to solicit, &c., B. to murder F. The case for the prosecution rested on two letters alleged to have been sent by the defendant to B., in South Africa. There was no evidence that the letters reached B. It was ruled in accordance with R. *v.* Fox (*supra*) that to constitute the statutory offence there must be evidence that there must be some communication to the person said to have been solicited; but the case was left to the jury on the counts charging an attempt to commit the statutory offence (*v*).

SECT. II.—ATTEMPTS TO COMMIT MURDER.

Common law.—Attempts to murder are at common law misdemeanors only (*w*). Such attempts, with maiming, and doing or attempting great

(*t*) R. *v.* Fox [1871], 19 W. R. 109 (C. C. R. Ir.), Whiteside, C.J., Pigott, C.B., Fitzgerald, B., Fitzgerald, J., O'Brien, J., George, J.; diss. Deasy, B., Lawson and Morris, JJ.

(*u*) [1902] 66 J. P. 121. Alverstone, C.J. Cf. R. *v.* McCarthy [1903], 2 Ir. Rep. 146, 154, a charge of inciting persons unknown to intimidate certain other persons unknown, and to take part in a criminal conspiracy.

(*v*) See R. *v.* Ransford, 13 Cox, 9 (C. C. R.), and *ante*, p. 203, tit. 'Incitement.' In R. *v.* Fox there is some discussion as to whether the word 'endeavour' in the statute is equivalent to 'attempt' in the common-law sense. See R. *v.* Watt, 20 Cox, 852: 70 J.P. 29, as to evidence.

(*w*) Staundf. 17. 1 East, P.C. 411. 1 Hawk. c. 44. R. *v.* Bacon, 1 Lev. 146. 1 Sid. 230, where the defendant, having been convicted for lying in wait to kill Sir Harbottle Grimstone, the Master of the Rolls, was sentenced to fine and imprisonment, the finding surety for his good behaviour for life, and acknowledging his offence at the bar of the Court of Chancery. And see two precedents of indictments at common law, for misdemeanor in attempting to murder by poison, 3 Chit. Cr. L. 796. Where the first count of an indictment charged an assault with an intent to murder, Kenyon, C.J., being of opinion, upon the facts given in evidence, that if death had ensued it would only have been manslaughter, directed the jury to acquit the defendant upon that count. R. *v.* Mitton [1788], 1 East, P.C. 411. See Starkie, Ev. tit. 'Assaults.'

bodily harm, were severely punishable under a series of enactments now repealed.

Former Statutes.—5 Hen. IV. c. 5 (*x*) related to cutting tongues and putting out eyes. Sir John Coventry's Act (22 & 23 Car. II. c. 1) (*y*) made malicious maiming a capital felony. 9 Anne, c. 21 (c. 16, Ruffhead) made it a capital felony to attempt to kill, assault, wound, &c., a privy councillor. The Black Act (9 Geo. I. c. 22) made maliciously shooting at any person a capital offence. 26 Geo. II. c. 19, s. 1 punished the beating or wounding persons shipwrecked with intent to kill them, &c., or putting out false lights to bring a ship into danger. Lord Ellenborough's Act (43 Geo. III. c. 58) dealt (*inter alia*), with malicious shooting. These statutes were repealed in 1827 (7 & 8 Geo. IV. c. 27), 1828 (9 Geo. IV. c. 31), and 1854 (17 & 18 Vict. c. 120). The substituted provisions contained in those Acts were repealed in 1861 (24 & 25 Vict. c. 95).

Present Law.—The existing statute law punishing attempts to murder is contained in sects. 11–15 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100) (*z*).

Poisoning, Wounding, &c., with Intent to Murder.—By sect. 11 (*a*), 'Whosoever shall administer to or cause *to be administered to or* (*b*) to be taken by any person any poison or other destructive thing, or shall by *any means whatsoever* (*c*) wound (*d*) or cause any grievous bodily harm (*e*) to any person, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*f*).

Use of Explosives with Like Intent.—By sect. 12 (*g*), 'Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building, *with intent to commit murder*, shall be guilty of

(*x*) Repealed in 1827 (7 & 8 Geo. IV. c. 27).

(*y*) Some old statutes, such as 5 Hen. IV. c. 5, and 22 & 23 Car. II. c. 1, though repealed in England, seem still to be in force as common law in America; but generally speaking some State statute is substituted for the old English statutes. See Bishop, ii. ss. 1002, 1003, 1004.

(*z*) These sections do not apply to attempts to commit suicide. R. *v.* Burgess, 32 L. J. M. C. 55; L. & C. 258.

(*a*) Framed from 7 Will. IV. & 1 Vict. c. 85, s. 2, with the modifications indicated in italics. The words 'by any means whatsoever' were intentionally inserted to over-ride rulings under the former Act, that wounding must be with some instrument. R. *v.* Bullock, L. R. 1 C. C. R. 115, 117.

(*b*) As to the introduction of these words, *vide* notes to s. 14, *post*, p. 841.

(*c*) Under 7 Will. IV. & 1 Vict. c. 85, s. 2, it was necessary to prove that the wound was with an instrument. See R. *v.* Jennings, 2 Lew. 130, Alderson, B. R. *v.* Payne, 4 C. & P. 558. R. *v.* Withers, 1 Mood. R. 294. R. *v.* Smith, 8 C. & P. 173. R. *v.* McLoughlin, 8 C. & P. 635. R. *v.* Briggs, 1 Mood. 318. R. *v.* Sheard, 7 C. & P. 846. R. *v.* Lancaster, 2 Stark. Ev. (3rd ed.), 692. R. *v.* Shadbolt, 5 C. & P. 504. R. *v.* Duffill, 1 Cox, 49. R. *v.* Elmsley, 2 Lew. 126, where the question arose whether the bite of a dog was within 9 Geo. IV. c. 31.

(*d*) 'Wound' was inserted as a general term including every 'stab' or 'cut.' All that 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. The words 'any grievous bodily harm' are inserted instead of 'any bodily injury dangerous to life,' in order to render the clause more comprehensive. If in any case it be doubtful whether the facts bring it within this clause, but there is evidence that the acts were done with intent to murder, a count on s. 15, *post*, p. 841, alleging an attempt to murder, should be added.

(*e*) *Vide post*, p. 854.

(*f*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892.

(*g*) Taken from 9 & 10 Vict. c. 25, s. 2. In this and the next section, the words 'unlawfully and maliciously' are omitted as unnecessary, and 'intent to commit murder' substituted for 'intent to murder any person.'

felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . ' (*gg*).

By sect. 13 (*h*), ' Whosoever shall set fire to any ship or vessel, *or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein*, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . ' (*gg*).

By sect. 14 (*i*), ' Whosoever shall attempt to administer to *or shall attempt to cause to be administered to or to be taken by* any person any poison or other destructive thing, or shall shoot (*j*) at any person, or shall, by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms (*k*) at any person, or shall attempt to drown (*l*), suffocate, or strangle (*m*) any person, with intent, in any of the cases aforesaid, to commit murder (*n*), shall, *whether* any *bodily injury* (*o*) be effected *or not*, be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*gg*).

By sect. 15 (*p*), ' Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder (*q*), shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*gg*).

It is to be observed that the punishment under each of these

(*gg*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892.

(*h*) Taken from 7 Will. IV. & 1 Vict. c. 89, s. 4. The words in *italics* were introduced for the same reason as it was made felony to set fire to goods, &c., in buildings. As to setting fire, see *post*, Vol. ii. p. 1775.

(*i*) Taken from 7 Will. 4 1 Vict. c. 85, s. 3. 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 7 Will. IV. & 1 Vict. c. 85, s. 3; 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. Cf. R. *v.* Carr, R. & R. 377, and R. *v.* Harris, 5 C. & P. 159. ' The words ' whether any bodily injury be effected or not,' are substituted for, ' although no bodily injury be effected,' in order to prevent an objection which might possibly have been raised on an indictment under the former clause, if it had appeared that any bodily injury had been effected.' C. S. G.

(*j*) *Vide post*, p. 842.

(*k*) See s. 19, *post*, p. 842.

(*l*) See R. *v.* Sinclair, 2 Lew. 49, where the defendant in order to prevent boys landing at a place where there was a disputed right of ferry knocked holes in their boat with a boathook, which caused the boat to fill, and then pushed the boat away from the shore.

(*m*) As to choking, &c., see *post*, p. 863.

(*n*) 43 Geo. III. c. 58, and 9 Geo. IV. c. 31, s. 12, contained provisoes now omitted directing that if the offence were committed under such circumstances that if death had ensued the same would not have been murder, the prisoner should be acquitted, as otherwise if the person injured did not die the punishment would be death, but not so if he died.

(*o*) *Vide post*, p. 854.

(*p*) ' This' section, which was new law in 1861, is meant to include every attempt to murder not specified in any preceding section. It therefore embraces 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 within it. So also cases of sending or placing infernal machines with intent to murder. See R. *v.* Mountford, 1 Mood. 441, 7 C. & P. 242. Indeed every attempt to murder, which perverted ingenuity may devise, or 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.' C. S. G.

(*q*) See note (*d*), *ante*, p. 840.

sections is the same, and the effect of all could have been obtained by omitting the words "other than . . . to Act," in sect. 15. Sect. 15 cannot be used to punish attempts specified in sects. 11–14.

Letters Threatening to Murder.—Sect. 16, which punishes written threats to murder, is dealt with under the title 'Threats' *post*, Vol. II. p. 1161.

Impeding Escape from Wrecks.—By sect. 17 (*r*), 'Whosoever shall *unlawfully and maliciously* prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, *or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life' . . . (*rr*).

Shooting or Attempting to Discharge Loaded Arms.—By sect. 19, 'Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause' (*s*). In sects. 14, 18 (*post*, p. 853), and 19, the word 'arms' clearly means 'fire arms' (*t*).

The words 'any other cause' in this section appear to cover not only defects in the loading, &c., but also prevention by the acts of a bystander, or of the person attacked. R. *v.* St. George (*u*), in which it was held that a man was not guilty of an attempt to discharge a loaded pistol which he had drawn, because it was snatched from his hand, was overruled in R. *v.* Duckworth (*v*), where it was held that where a man pulled out a loaded revolver and tried to fire it, but was forcibly prevented by the bystanders, he had committed an offence within sect. 14.

In R. *v.* Lewis (*w*), an acquittal was directed where the weapon was not in a condition to be discharged.

In R. *v.* Jackson (*x*), an attempt to fire a revolver loaded in six chambers was held to be an offence within sect. 14, though it failed because the hammer fell over a chamber containing an empty cartridge case. In

(*r*) Taken from 7 Will. IV. & 1 Vict. c. 89, s. 7. The words 'unlawfully and maliciously' are substituted for 'by force' in the former Act. Under 7 Will. IV. & 1 Vict. c. 89, s. 7, if A. were pulling B. out of the water, and C. prevented A. from doing so, C. would have been guilty of no offence except an assault. The words in *italics* were introduced to meet this and similar cases. C. S. G.

(*rr*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892.

(*s*) This section was new law in 1861, and was intended to meet every case where a prisoner attempts to discharge a gun, &c., loaded in the barrel, but which misses fire for want of priming, or of a copper cap, or from any like cause. In R. *v.* Gamble, 10 Cox, 545, the attention of the Court does not seem to have been called to this section.

(*t*) Under 9 Geo. IV. c. 31, s. 11, a tin box filled with gunpowder and peas was held not to be a loaded arm. R. *v.* Mountford, 1 Mood. 441; 7 C. & P. 242. But to discharge the barrel of a gun when separated from the stock by striking the percussion cap with a knife was held to be shooting. R. *v.* Coates, R. & R. 394 and MSS. C. S. G. Patteson, J., consulted several other judges who agreed with him in opinion, otherwise the point would have been reserved.

(*u*) 9 C. & P. 483.

(*v*) [1892] 2 Q.B. 83.

(*w*) 9 C. & P. 523. The need for reconsideration of this case was strongly suggested in R. *v.* Brown, 10 Q.B.D. 383, 385.

(*x*) 17 Cox, 104, Charles, J.

R. *v.* Jones (*y*), it was held to be such attempt to pull the trigger of a central fire revolver loaded with rim-fire cartridges.

In R. *v.* Kitchen (*z*), where the prisoner was indicted under 43 Geo. III. c. 58 (rep.) for shooting at the prosecutor with a loaded pistol, Le Blanc, J., told the jury, that if it was loaded with powder and paper only, but fired so near, and in such a direction, that it would probably kill or do other grievous bodily harm, and with intent that it should do so, the case was within the Act. The jury convicted, saying, they were satisfied that the pistol was loaded with some other destructive material besides powder and paper. There was a petition to the Crown, on the ground that the pistol was loaded with powder and paper only. On a case reserved the judges held this direction to be right.

In R. *v.* Whiteley (*a*), where a similar indictment, under 9 Geo. IV. c. 31, s. 11 (rep.), in different counts, alleged a gun to have been loaded with shot and various destructive materials, and it appeared that a watcher of game being out in the night, saw the prisoner crouching under a wall, and said he knew him, when he instantly raised a gun to his shoulder, and levelled it at him; he stooped to avoid it, the gun went off, and the charge, whatever it was, struck a hairy cap he had on his head, and singed the hair. There was evidence of previous ill-will, and the prisoner after his apprehension, had said, 'I did it, and I rued it the instant I pulled the trigger.' A small bag of shot was found in the prisoner's pocket after he was apprehended. It was objected that there was no evidence to shew that the gun was loaded with shot, or any of the destructive materials charged in the indictment, and Patteson, J., was strongly of opinion that the objection ought to prevail; and, after consulting Alderson, B., he directed an acquittal.

The law seems to be that if a man does any act (such as pulling out a loaded pistol and pointing it at a person, or fumbling with the trigger or struggling to get free when seized and using words clearly indicating his intention to use the weapon if he could (*b*)) from which a jury might infer that he intended to discharge it, he may be convicted under 24 & 25 Vict. c. 100, s. 14, if his intent was to murder, or under sect. 18 (*post*, p. 853), if his intent was to do grievous bodily harm (*c*).

The prisoner was tried on an indictment under sects. 14 and 18, charging him with feloniously attempting to discharge a certain revolver loaded with gunpowder and leaden bullets, at one Houston, with the intent, as alleged in one count, to murder him, as alleged in another, to commit murder, and as alleged in a third, to do Houston grievous bodily harm. The indictment did not contain the words 'by drawing a trigger' nor did it specify any other manner in which the attempt was made. The prisoner was convicted on the third count. In the course of an interview the prisoner put his hand in his pocket and commenced to pull out something, which turned out to be a revolver loaded in five barrels. Before he could get it completely out, Houston sprang on him. The prisoner had

(*y*) 36 L. J. (Newsp.) 650. Kennedy. J., seems to have thought that if the prisoner knew the cartridge could not be discharged he would not be guilty.

(*z*) R. & R. 95, and MS. Bayley, J.

(*a*) 1 Lew. 123. See Blake *v.* Barnard, 9 C. & P. 626, *post*, p. 880.

(*b*) R. *v.* Linnaker [1906], 2 K.B. 99.

(*c*) R. *v.* Brown, 10 Q.B.D. 381. R. *v.* Duckworth [1892], 2 Q.B. 83.

by this time got the revolver out of his pocket. Houston and the prisoner struggled for a few minutes. During the struggle the prisoner said several times 'You 've got to die.' Eventually Houston wrested the revolver from the prisoner. A case was reserved as to whether there was evidence of an attempt within sections 14 & 18. The Court (Lord Alverstone, C.J., Kennedy, Ridley, Darling and Walton, JJ.) upheld the conviction. Kennedy, J., added: 'It is, however, important to bear in mind that in cases under this section, there must be evidence both of an attempt to discharge the weapon and of an intent to do grievous bodily harm, and, although an attempt implies the intent, an intent does not necessarily imply an attempt. There may be cases which are very near the line as regards the attempt, although there is no doubt as to the intent. It is always necessary that the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence (*d*).

Shooting at large.—On an indictment for shooting at a person unknown with intent to murder him, it appeared that the prisoner, being irritated at a crowd of boys, who were following him, discharged a loaded pistol among them, and thereby wounded a person who was passing along the street; there was nothing to shew any intent to shoot at any particular person, nor was the person injured one of those who were teasing him. Jervis, C.J., (Alderson, B., being present), said: 'I do not think that the charge contained in this indictment is proved; doubtless at common law, if the person wounded had been killed, it would have been murder: but this is an offence under the statute, and must be proved strictly in its very terms.' It was then proposed to amend the indictment, by charging the prisoner with an intent to murder in the words of 7 Will. IV. & 1 Vict. c. 85, s. 2. Jervis, C.J., said: 'That would no doubt be a good indictment after verdict under 7 Geo. IV. c. 64, s. 20, being in the words of the statute; but it may be a question whether it would not be demurrable for generality. We think that if we amend, we ought to do it in such a manner as that the indictment shall not be in any way defective. The prisoner has pleaded, and he ought to have an opportunity of demurring, which now of course he cannot do. We must therefore refuse the application' (*e*).

The prisoner was indicted for shooting at L. with intent to do him grievous bodily harm. The prisoner had been assaulted and annoyed by several persons, among whom was L. These persons were standing together in a group of about fifteen, and the prisoner fired a pistol into the group, and L. received some severe shot wounds in the neck. The jury found that the prisoner did not aim at L., or at any one in particular,

(*d*) R. *v.* Linnaker, *ante*, p. 843.

(*e*) R. *v.* Lallement, 6 Cox, 204. Mr. Greaves on this case says: 'It is clear that after the amendment the jury might have been discharged under 14 & 15 Vict. c. 100, s. 1, and the Court might then have given the prisoner leave to withdraw his plea and demur to the amended indictment. This case as to the general allegation being insufficient on demurrer, accords with my former note (Russell, Cr. and M. (6th ed.) iii. 691). I still venture to submit that it is extremely questionable whether the indictment would not be equally bad after verdict, and I doubt whether any case can occur where an indictment may not be so framed as to meet the facts, and avoid the necessity for such a count; for wherever it is possible to prove an intent to murder any person, it is plain a count may be framed to meet that case.'

but that he fired into the group, intending generally to do grievous bodily harm, and so unlawfully wounded. Upon a case reserved, it was held that he was rightly convicted of the felony (*f*).

Upon an indictment under 9 Geo. IV. c. 31, s. 12, for maliciously shooting at C., it appeared that the prisoner fired into a room of C.'s house where he supposed C. was; C. was in another part of the house, where he could not by possibility be reached by the shot. Gurney, B., suggested that a man could scarcely be said to be shot at who was not near the place where the gun was fired. R. *v.* Bailey (R. & R. 1) was then cited for the prosecution, where, on an indictment for shooting at H. T., who was wounded with grape-shot out of a gun fired at a ship in which he was, Lord Eldon told the jury that he was of opinion, that if they thought the guns were fired at the vessel, and those on board her generally, that the guns might be considered as shot at each individual on board her, and therefore at H. T., the person named in the indictment: Gurney, B., 'That case is perfectly distinguishable from the present; cannon-shot fired into a ship more or less endangers every individual in it; every part of the ship may be penetrated by cannon-shot; but that cannot be said of shot fired from a gun into a room where it is proved no individual then was' (*g*).

Where on an indictment for shooting at the prosecutor with intent to maim, &c., it appeared that the prisoner had at various times been annoyed by night by idle persons attempting to frighten him, and the prosecutor returning home by night, passed near the prisoner's house with a lantern; the prisoner, seeing the light, thought that his nightly visitors had again appeared, reached his gun, and fired in the direction of the light, and wounded the prosecutor in the face: Patteson, J., thought that the facts would hardly bear out the charge in the indictment (*h*).

Wound.—The word 'wound' was introduced in 1837 to obviate difficulties which arose in the construction of the words 'cut' and 'stab' in the Act of 1828; and in the Act of 1861 the latter words were advisedly omitted as being included in the word 'wound' (*i*). It is now immaterial by what means the wound is given, and the means need not be stated in the indictment (*ii*).

In Moriarty *v.* Brookes (*j*), Lord Lyndhurst said that the 'definition of a wound, in criminal cases, is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, it is a wound.' In R. *v.* Withers (*k*), upon an indictment for cutting and wounding, with intent to murder, it appeared that the prisoner threw a

(*f*) R. *v.* Fretwell, L. & C. 443. R. *v.* Lallement, *ante*, p. 844, does not appear to have been cited. See R. *v.* Stopford, 11 Cox, 643. R. *v.* Jarvis, 2 M. & Rob. 40. R. *v.* Lewis, 6 C. & P. 161.

(*g*) R. *v.* Lovell, 2 M. & Rob. 39.

(*h*) R. *v.* Porter, 5 Cox, 148. The prisoner was convicted of an assault. A question was raised in R. *v.* Turner, 2 M. & Rob. 213, whether the facts shewed an intent to maim the prosecutor; but Patteson, J., expressed no opinion on it.

(*i*) Whether with a weapon or instrument, a blow or a kick. See R. *v.* Briggs, 1 Mood. 318, decided on 9 Geo. IV. c. 31, s. 12 (rep.). Cf. Holloway *v.* R. 17 Q.B. 317, and R. *v.* Erle, 2 Lew. 133, Coleridge, J. R. *v.* Platt, 69 J. P. 424.

(*ii*) See Greaves, Crim. Cons. Acts (2nd ed.) 25.

(*j*) 6 C. & P. 684. In R. *v.* Wood (1 Mood. 278.) 4 C. & P. 381; it was held by all the judges except Bayley and Park that striking a man with an iron bar and hammer whereby his collar-bone had been broken was not a wound within 9 Geo. IV. c. 31, s. 12.

(*k*) 1 Mood. 294; 4 C. & P. 446.

hammer at the prosecutor, and hit him over his right eye and nose, and made a wound on the eye, and by the side of the nose; his head was very bloody; the hammer was a blacksmith's finishing hammer; one end of it round, and the surface flat, the other end sharp, to draw out with. Upon a case reserved, the judges were unanimously of opinion that the injury stated in the case amounted to a wound within the statute.

In R. *v.* Beckett (*l*), it appeared that the prisoner attacked the prosecutor with a butcher's knife, and, drawing him backwards, attempted to cut his throat. The prosecutor succeeded in warding off all hurt except what he described as a slight scratch on his throat, by lifting his two hands up to his throat, but in doing this his hands struck against the knife and were cut. Parke, B., said: 'A scratch is not a wound within the statute: there must at least be a division of the external surface of the body; the cuts on the hands are indeed wounds; but it appears that they were inflicted by the prosecutor himself in the attempt to defend himself from the prisoner's attack; those cuts, therefore, cannot be considered wounds inflicted by the prisoner with intent to murder or maim the prosecutor.'

In R. *v.* McLoughlin (*m*), a medical man stated that there was a slight abrasion of the skin, not exactly a wound, but an abrasion of the cuticle; it did not penetrate farther than that; the cuticle is the upper skin; blood would issue, but in a different manner, if the whole skin was cut. Coleridge, J. (Bosanquet and Coltman, JJ., being present), told the jury: 'It is essential for you to be quite clear that a wound was inflicted. I am inclined to understand, and my learned brothers are of the same opinion, that if it is necessary to constitute a wound that the skin should be broken, it must be the whole skin; and it is not sufficient to shew a separation of the cuticle only. You will, therefore, have to say on the first three counts whether there was a wounding in the sense in which I have stated, viz., was there a wound—a separation of the whole skin?'

In R. *v.* Smith (*n*), a surgeon stated 'that the lower jaw on the left side was broken in two places; the skin was broken internally, but not externally; there was not a great deal of blood; one fracture was near the chin, and the other near the ear.' The prisoner had struck the prosecutor with a hammer on the left side of the face, but there was no wound on the outside of the face. It was objected that this was not a wounding within 7 Will. IV. & 1 Vict. c. 85. Park, J. said: 'When I first read the deposition I thought there might be some doubt. In consequence of this, I consulted with my Lord Chief Justice, and considered the question very much in my own mind, and we are of opinion that it is a wounding within the meaning of the Act.' Denman, C.J.: 'If it is the immediate effect of the injury, we think we cannot distinguish this from the cases which have been already decided.' Park, J., in summing up: 'A question was very properly put to us, as to whether we thought there was a wound within the meaning of the statute. We were of opinion that there was a wound; and upon consideration, I am more strongly of that opinion than I was at the outset. There must be a wounding; but if

(*l*) 1 M. & Rob. 526. (*m*) 8 C. & P. 635. (*n*) 8 C. & P. 173.

there was a wound (that is, if the skin is broken, whether there be an effusion of blood or not), it is within the statute, whether the wound is internal or external.'

In R. *v.* Jones (*o*), on an indictment for wounding with intent to do grievous bodily harm, it appeared that the prisoner had given the prosecutrix a violent kick in the private parts, and that it had been followed by an occasional discharge of blood mingled with urine, but the surgeon could not say from what precise vessels the blood originally flowed. Patteson, J., held that the charge was not sustained; there might have been no lesion of any vessels at all; but the blood might have been discharged simply from natural causes.

In R. *v.* Waltham (*p*), on a similar indictment, it appeared that a policeman had received a violent kick on his private parts, and the external skin was unbroken, but the lining membrane of the urethra was ruptured, which caused a small flow of blood, mingled with urine, for two days. Cresswell, J., held that this case was very different from the preceding, and that there was a wounding within the statute.

In R. *v.* Warman (*q*), there was no external breach of the skin, but a collection of blood between the scalp and the cranium just above the spot where within the cranium there was an extravasation of blood pressing on the brain, and the surgeon called it a contused wound with effusion of blood. The internal part of the skin was broken. Medically the breaking of the skin, whether internally or externally, is a wound. It was held that this internal wound was a sufficient wound to support the allegation of a wound in an indictment for murder, whether it would have been so or not on an indictment on the statute for wounding with intent, &c.

In R. *v.* Sheard (*r*) it appeared that the prisoner struck the prosecutor with an air-gun twice on the left side of a thick hat that he had on his head. The prosecutor had a contused wound on the left side of his head, which was made by the hard rim of the prosecutor's hat, by the violence with which the hat was struck by the prisoner, and was not occasioned by the gun alone, as the prosecutor said the gun had never come directly in contact with his head. Upon a case reserved upon a doubt whether, as the wound must have in fact have been caused by the hat, and not by the gun barrel, the prisoner ought to have been convicted, the conviction was held right.

In R. *v.* Day (*s*), an indictment for wounding with intent to maim, &c., the prosecutor proved that he endeavoured to persuade the prisoner to leave a public-house, and that the prisoner knocked him over a form with his fists, in one of which he appeared to have some instrument; when the prosecutor recovered his legs, he put forth his hand to ward off the attack of the prisoner, and in so doing he pushed it against the right hand of the prisoner, in which was a penknife, which ran into the prosecutor's finger just deep enough to bring blood. The prisoner seemed to hold the knife in his hand, and to use it as if he was attempting to cut the frock of the prosecutor, and the frock bore three long marks as if it had been slit

(*o*) 3 Cox, 441.
(*p*) 3 Cox, 442.
(*q*) 1 Den. 183.
(*r*) 7 C. & P. 846.
(*s*) 1 Cox, 207. *Cf.* R. *v.* Beckett, 1 M. & Rob. 526, *ante*, p. 846.

downwards by cuts from the knife, and there were several scars through which the knife had not penetrated. Parke, B., held that there was an end to the charge of felony, as the prosecutor's hand came in contact with the knife at a moment when no intention existed in the mind of the prisoner to inflict any wound on his person.

In R. *v.* Spooner (*t*), on an indictment for wounding with intent to do grievous bodily harm, it appeared that the prisoner knocked the prosecutor down with a stick on a tram-road ; and it was contended that the wound was caused by the fall on the iron trams. Talfourd, J., told the jury, that in order to convict the prisoner the wound must be direct, and if they should be of opinion that the injury was the result of a fall, although occasioned by a blow from the prisoner, that would not be sufficient.

Proof of Intent.—Upon an indictment for shooting, or wounding, or administering poison, &c., to another, with intent to murder him, or to do him some grievous bodily harm, ' whether the act was done by the prisoner, with the particular intention wherewith it is charged to have been done, is, as in other cases of specific malice and intention, a question for the jury. The inference upon this important point, as in other cases of malicious intention, must be founded upon a consideration of the situation of the parties, the conduct and declarations of the prisoner, and, above all, on the nature and extent of the violence and injurious means he has employed to effect his object. In estimating the prisoner's real intention, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule, that a man's motives and intentions are to be inferred from the means which he uses and the acts which he does. If, with a deadly weapon, he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results that his mind and intention were to destroy. It is not, however, essential to the drawing of such an inference, that the wound should have been inflicted on a part where it was likely to prove mortal ; such a circumstance is merely a simple and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound was inflicted on a part where it could not have proved mortal, provided the criminal intention can be clearly inferred from other circumstances ' (*u*).

Intent to Commit Murder.—The common element in sects. 11–15, is the ' intent to commit murder,' generally. Under the Act of 1828 (9 Geo. IV. c. 31), s. 11, it seems to have been necessary to allege an intent to murder a particular person, which caused difficulties in cases where poison meant for A. was taken by B., or a shot aimed at A. hit B. (*v*).

(*t*) 6 Cox, 392.

(*u*) R. *v.* Case, York. Sum. Ass. 1820, cited 2 Stark. Ev. (3rd ed.) 692, note (*h*), where Park, J., said that it had been so held by the judges. ' It is obvious that a case may fall both within the letter and the spirit of the statute, although from accident or from ignorance the prisoner has not succeeded in reaching a vital part.'—Note by Mr. Starkie.

(*v*) In R. *v.* Ryan, 2 M. & Rob. 213, Parke and Alderson, BB., declined to allow a conviction on an indictment for causing poison to be taken by G. on evidence that the poison was intended for G. but was taken by C., but directed a fresh indictment

It is generally considered that under the existing enactments a count alleging a general 'intent to commit murder' is good (*w*).

It is a very important question, whether on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder had death ensued (*x*); and this question does not seem to be completely settled. In R. *v.* Cruse (*y*), where a man was indicted for inflicting an injury dangerous to life on a child, with intent to murder it, and his wife as principal in the second degree, for aiding and abetting him, where it appeared that the prisoners had inflicted great violence on the child, Patteson, J., told the jury, 'Before you can find the prisoner, T. C., guilty of this felony, you must be satisfied that when he inflicted this violence on the child, he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient, unless he actually intended to commit murder. With respect to the wife,

to be prepared alleging the intent to be to commit murder generally, upon which the defendant was convicted and sentenced. They doubted R. *v.* Lewis, 6 C. & P. 161, decided on 9 Geo. IV. c. 31, s. 11, where Gurney, B., on a similar indictment and similar evidence had said: 'The question is, whether the prisoner laid this poison on the shop counter, intending to kill some one. If it was intended for Mrs. Daws, and finds its way to Mrs. Davis, and she takes it, the crime is as much within this Act of Parliament as if it had been intended for Mrs. Davis. If a person sends poison with intent to kill one person, and another person takes that poison, it is just the same as if it had been intended for such other person.'

(*w*) See Archb. Cr. Pl. (23rd ed.), 815. Mr. Greaves' note on the subject is as follows: 'Where a mistake of one person for another occurs, the cases of shooting, &c., 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, Salop Spr. Ass. 1841, *cor.* Gurney, B., 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 of the prisoner; for in such case he can have no actual intent to injure that person. These difficulties, however, seem to be obviated by 1 Vict. c. 85 (see now 24 & 25 Vict. c. 100, s. 11), which instead of using the words 'with intent to murder such person,' have the words 'with intent to commit murder.' It may perhaps be doubted whether this alteration was not intended to enable the prosecutor to charge a shooting at one person with intent to murder another person; and doubts may perhaps be entertained, notwithstanding the very great weight due to any opinion of the judges in R. *v.* Ryan (*supra*), whether a count, stating a shooting with intent to commit murder, would not be bad on demurrer, and in arrest of judgment, for not stating the person intended to be murdered. It is true that it would follow the words of the Act; but in many cases that is not sufficient. Thus in R. *v.* Martin, 8 A. & E. 481, it was held that an indictment for obtaining goods by false pretences was bad on error, on the ground that it did not state that the goods obtained were the property of any person. 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.

(*x*) R. *v.* Jones, 9 C. & P. 258, Patteson, J.

(*y*) 8 C. & P. 541.

it is essential not only that she should have assisted her husband in the commission of the offence, but also that she should have known that it was her husband's intention to commit murder.' In R. *v.* Jones (*z*), where the first count charged the prisoner with shooting at Vaughan with intent to murder him, and the facts were such as only to amount to manslaughter, the same judge said, in summing up, 'It is a very important question, whether on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued. However, if it be necessary that the jury should be satisfied of the intent, I have no doubt that the circumstance, that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts. In the present case, I think you may dismiss the first count from your consideration, as it would be very difficult to say, that if Mr. Vaughan had died, this would have been a case of murder.

Upon an indictment for feloniously wounding with intent to murder, disable, &c., it appeared that the prisoner, being confined in gaol, knocked the turnkey down by a blow on the head with a towel-roller, and thereby wounded him. He did this in order to effect his escape. In summing up, Maule, J., said: 'If the prisoner had killed this man it would have been murder, whether he intended to kill him or not; but I think that there is hardly evidence here to support the charge of an intent to murder. A person cannot have an intent to murder, or an intent to do any other thing, without intending to commit murder, or to do that other thing. It would be a contradiction in terms if it were otherwise. You will, therefore, consider whether the prisoner had an intent to kill this man, or only an intent to disable him, or to do him some grievous bodily harm' (*a*).

So where upon an indictment for attempting to suffocate and strangle with intent to murder, it appeared that the prisoner had put a bed over his wife, and pressed it down upon her, and put a rope round her neck with a running noose on it, by which she was nearly prevented from breathing; Maule, J., told the jury, that in many cases a party might be guilty of murder if he caused the death by an illegal act, although at the time he did not actually intend to kill, and that in this case the prisoner would have been guilty of murder if his wife had died; but upon this indictment the jury must be satisfied that at the time the prisoner did the acts in question, he did intend to murder his wife (*b*). And in a later case, Coleridge, J., told the jury that the words 'with intent to commit murder' meant 'with intent to kill under such circumstances as would amount to the crime of murder, if death ensued' (*c*).

Upon an indictment for wounding with intent to murder, &c., it appeared that the prosecutor had given evidence against some wood-stealers, with whom the prisoner was intimate; the prisoner struck him

(*z*) 9 C. & P. 258.
(*a*) R. *v.* Bourdon, 2 C. & K. 366.
(*b*) R. *v.* Caldecott, Hereford Sum. Ass. 1843. MSS. C. S. G.
(*c*) R. *v.* Davies, Gloucester Spr. Ass. 1844. MSS. C. S. G.

with a tin can four times on the head, knocked him about, and said he would break his neck; and there were two cuts on the prosecutor's scalp, which laid his skull bare. Alderson, B., in summing up, said: 'You will have to consider in this case whether, if death had ensued, the prisoner would have been guilty of murder; and in giving your judgment on that question, you will have to consider whether the instrument employed was, in its ordinary use, likely to cause death; or though an instrument unlikely under ordinary circumstances to cause death, whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise. A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but, if the prisoner struck the prosecutor repeated blows on the head with it, you will say whether he did this merely to hurt the prosecutor and give him pain, as by giving him a black eye or a bloody nose, or whether he did it to do him some substantial grievous bodily harm. The former enactments on this subject were confined to cutting instruments, and perhaps wisely; but now the matter is much more vague, and cases ought therefore to be watched carefully. When a deadly weapon, such as a knife, a sword, or gun, is used, the intent of the party is manifest; but with an instrument like the present, you must consider whether the mode in which it was used satisfactorily shews that the prisoner intended to inflict some serious or grievous bodily harm with it' (*d*).

Upon an indictment for administering opium with intent to commit murder, it appeared that the prosecutrix had been left in charge of her master's house, and going out into the yard at night the prisoners threw her down, and said they would kill her if she did not swallow some stuff out of a phial which they held to her mouth, and which stuff the evidence tended to prove was a preparation of opium. She struggled, but was compelled to swallow it; they then tied her apron tight over her face, and left her lying on her back in the yard. She was afterwards found almost insensible and very ill: by proper treatment she recovered in a few days; but there was reason to conclude, that had she remained much longer undiscovered, her life would have been in very great peril. When her master returned he found the house robbed. For the prosecution it was contended, that if the main object of the prisoners was to steal from the house, and in order to effect that they committed an act in itself unlawful, they must be taken to have intended all the consequences likely to result from such act, and death was one of those consequences: it was immaterial which was the principal and which the subordinate intent. Coltman, J., told the jury that 'it would undoubtedly appear probable that one intention of the prisoners was to rob the house; but they might have had that intention and also another, namely, to destroy life; and if a noxious drug is administered, which is likely to occasion death, and the party administering it is indifferent whether it occasion death or not, that party must be looked upon as contemplating the probable results of his own action' (*e*).

(*d*) R. *v.* Howlett, 7 C. & P. 274.
(*e*) R. *v.* Dilworth, 2 M. & Rob. 531. This case would fall within 24 & 25 Vict. c. 100, s. 22, *post*, p. 863.

Sect. III.—Of Unlawful Acts causing or intended or calculated to cause Bodily Harm.

A. *Common Law.*

Mayhem.—*Mayhem*, or the maiming of persons, was probably at one time a felony at common law, as the judgment was *membrum pro membro* (*f*). But this judgment afterwards went out of use; partly because the law of retaliation is at best an inadequate rule of punishment (*g*). The offence, therefore, appears to have been considered in later times, as a misdemeanor; and the only judgment which now remains for it at common law is fine and imprisonment (*h*). It is, however, spoken of by Coke as the greatest offence under felony (*i*).

A bodily hurt whereby a man is rendered less able in fighting, to defend himself or to annoy his adversary, is properly a maim at common law (*j*). Therefore cutting off, or disabling, or weakening a man's hand or finger, or striking out his eyes or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims; but the cutting off his ear, or nose, or the like, are not held to be maims at common law; because they do not weaken a man, but only disfigure him (*k*). In order to support an indictment for mayhem the act must be done maliciously, though it matters not how sudden the occasion (*l*).

If a person maims himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted; and, on conviction, fined and imprisoned (*m*). For as the life and members of every subject are under the safeguard and protection of the King; so they are said to be *in manu regis*, to the end that they may serve the King and country when occasion shall require (*n*).

It would seem that there can be no accessories before the fact in mayhem, at common law; though there appears to have been some difference of opinion, or rather misapprehension, upon the subject (*o*). For, supposing the offence to be a misdemeanor only, the rule will apply, that in crimes under the degree of felony there can be no accessories, but

(*f*) 3 Co. Inst. 118. 1 Hawk. c. 55, s. 3. 4 Bl. Com. 206.

(*g*) 4 Bl. Com. 206.

(*h*) Id. ibid. 1 Hawk. c. 55, s. 3. 1 East, P.C. 393. But it is observed, that perhaps mayhem by castration might have continued an offence of higher degree, as all our old writers held it to be felony. 4 Bl. Com. 206.

(*i*) Co. Lit. 127 *a*.

(*j*) Staundf. 3. Co. Lit. 126. 3 Co. Inst. 62, 118. 1 Hawk. c. 55, s. 1. 4 Bl. Com. 205. 1 East, P.C. 393.

(*k*) 1 Hawk. c. 55, s. 2. 4 Bl. Com. 205, 206. 1 East, P.C. 393. Bac. Abr. 'Maihem' (A.).

(*l*) 1 East P.C. 393.

(*m*) 1 Hawk. c. 55, s. 4, and Co. Litt. 127 *a*, where Coke says, 'In my circuit, *anno* 1 *Jacobi regis*, in the county of Leicester, one Wright, a young, strong, and lustie rogue, to make himself impotent, thereby to have the more colour to begge, or to be relieved without putting himself to any labour, caused his companion to strike off his left hand; and both of them were indicted, fined, and ransomed.'

(*n*) Co. Litt. 127 *a*. Bract. lib. 1, fol. 6. Pasch. 19 Edw. I *cor.* Reg. Rot. 36, Northt.

(*o*) Hale (1 P.C. 613) states that there are no accessories before in mayhem, but that they are in the same degree as principals. Hawkins, on the contrary, says, that it seems there may be accessories before the fact in mayhem. 2 Hawk. c. 29, s. 5. In 1 East, P.C. 401, there is a learned argument to shew that the latter opinion proceeded on a mistake.

that all persons concerned therein, if guilty at all, are principals (*p*). It does not appear to have been anywhere supposed that there can be accessories after the fact in mayhem (*q*).

Maiming is not now indicted at common law, but under the enactments next to be noticed.

B. *Statutes.*

Felonious Wounding—By 24 & 25 Vict. c. 100, s. 18 (*r*), 'Whosoever shall unlawfully and maliciously *by any means whatsoever* (*s*) wound (*t*) *or cause* (*u*) *any grievous bodily harm* to any person, or shoot at any person (*v*), or, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms (*w*) at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable *any* person, or to do some other grievous bodily harm to *any* person (*x*), or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for life' . . . (*y*). Under this section the intent to maim, &c., is an essential element in the offence and must be charged and found (*z*), and the malicious intent must be found (*zz*).

Where D. at night heard a person in her house, and reasonably believing that he was there for a felonious purpose, shot at him with intent to frighten him, and hit him; it was held that D. had not committed an offence within sect. 18 (*a*).

Shoot and Wound.—The decisions as to these words are collected, *ante*, pp. 842–848.

Intent to Maim, Disfigure, or Disable, or to do some other Grievous Bodily Harm.—The meaning of the word 'maim' is stated, *ante*, p. 852. 'Disfigure' appears to mean an external injury which may detract from

(*p*) *Ante*, p. 138.

(*q*) 1 Hawk. c. 55, s. 13. 2 Hawk. c. 29, s. 5. 1 East, P.C. 401.

(*r*) Taken from 7 Will. IV. & 1 Vict. c. 85, s. 4. The words in *italics* at the beginning of this section were introduced to make it correspond with s. 11, *ante*, p. 840. As to the word 'wound,' see the note to that section. The word 'any' is substituted in two places for 'such' in order to provide for cases where the prisoner wounds, &c., A., when he intends to wound B., and the like. In R. *v.* Hewlett, 1 F. & F. 91, where on an indictment under 7 Will. IV. & 1 Vict. c. 85, s. 4, for wounding with intent to do grievous bodily harm to the prosecutor, it appeared that the prisoner with a knife struck at Withy, and the prosecutor interfered and caught the blow on his arm; Crowder, J., held that this would not sustain the charge; but the prisoner might be convicted of unlawfully wounding. There was no intent to injure the person wounded; it is therefore quite different from the cases where, though there is a mistake as to the person, the injury is intended for the person on whom it falls. This case is doubted in R. *v.* Stopford, 11 Cox, 643, and said to be inconsistent with R. *v.* Hunt, 1 Mood. 93, and R. *v.* Smith, 1 Cox, 51.

(*s*) *Vide ante*, p. 840, note (*a*).

(*t*) *Vide ante*, p. 845.

(*u*) An indictment under this section charging the prisoner that he did 'inflict' grievous bodily harm has been held good. R. *v.* Bray, 15 Cox, 197 (C. C. R.). The word 'inflict' is used in s. 20, *post*, p. 859.

(*v*) It was suggested that where an effectual exchange of shots took place in a deliberate duel both parties might be convicted under 43 Geo. III. c. 58 of maliciously shooting. 3 Chit. Cr. L. 848, note (*w*). Shooting or attempting to shoot in duels seems to fall within s. 18. See R. *v.* Douglas, C. & M. 193.

(*w*) Defined in sect. 19, *q. v. ante*, p. 842.

(*x*) *Vide ante*, note (*r*).

(*y*) For other punishments, see 54 & 55 Vict. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

(*z*) *Vide* Archb. Cr. Pl. (23rd ed.) 841.

(*zz*) See Slaughenwhite *v.* R. [1905], 9 Canada Cr. Cas. 173.

(*a*) R. *v.* Dennis, 69 J. P. 352, Fulton, Recorder.

personal appearance, such as slitting nose or ears (*b*). The word 'disable' in 43 Geo. III. c. 58, s. 1 (rep.) was held to mean permanently and not temporarily disable (*c*). But for the words in the statute, 'to do some *other* grievous bodily harm,' it would be unnecessary in any indictment to charge an intent to maim, disfigure, or disable.

'Bodily harm' is not defined. It may mean internal as well as external injuries (*d*) and need not be permanent, nor dangerous, nor amount to maiming, disfigurement, or disablement. It is not grievous unless it seriously interferes with health or comfort (*e*). The following decisions on enactments superseded by 24 & 25 Vict. c. 100, ss. 11-15, 18, are of some value as a guide on the question of the various intents.

On an indictment for wounding with intent to murder, maim, disable, or do some grievous bodily harm, it appeared that the prisoner's goods had been distrained for rent, and one of the broker's men turned out of the room, and the broker said, 'Break the door open and go in and take possession again;' and the prisoner said, 'he would split open the head of any person who opened the door'; the door was then forced open, and as the prosecutor was entering the room, the prisoner, who had an axe in his hand, struck him on the head with it and inflicted a cut of about a quarter of an inch, and a graze of about half an inch on the forehead; the axe had cut through the skin and flesh, but very little below the surface of the skin. Parke, B., told the jury 'there was no proof of an intent to maim and disable, as the blow was aimed at the head of the prosecutor; it would have been otherwise if it had been aimed at his arm to prevent him being able to use it. The question, therefore, was, whether there was a wounding with intent either to murder the prosecutor or to do him some grievous bodily harm (*f*).

On an indictment for shooting at M., with a gun loaded with powder and blood, with intent to do grievous bodily harm, it appeared that M. was preaching in church when the gun was fired through a hole previously cut in the window: he was struck on the temple, knocked back and stunned; his face being sprinkled with blood; there was no wound, but grains of powder were embedded in the forehead; the eye was weak, and the effect of the blow felt for two months after. The surgeon said that had the charge struck the eye, or a place nearer to the eye, the result would have been much more serious; Willes, J., told the jury, 'You must be satisfied that the prisoner had an intent to do grievous bodily

(*b*) The words 'intent to maim or disfigure' are derived from Sir John Coventry's Act, 22 & 23 Car. II. c. 1, s. 7. See R. *v.* Woodburn and Coke, 16 St. Tr. 53.

(*c*) R. *v.* Boyce, 1 Mood. 29. *Sed quære.*

(*d*) As to bodily harm by infection with disease, see R. *v.* Clarence, 22 Q.B.D. 23, doubting R. *v.* Sinclair, 13 Cox, 28.

(*e*) In R. *v.* Cox, R. & R. 362, the prisoner cut a female child, ten years old, in her private parts, probably to enlarge them to admit his entrance, but he was interrupted and fled; the wound was small, but bled a good deal; and when a surgeon saw it, four days afterwards, he found it near an inch in length, not deep nor dangerous, because below the hymen; but if it had entered the hymen it would have been dangerous. Graham, B., left it to the jury to say, whether this was not a grievous bodily injury; and if so, then, though there might have been an ulterior intention to commit a rape, yet, if there was an intent to do grievous bodily harm, the case was within the Act; and that the intention might be inferred from the cutting. The jury found the prisoner guilty, and the judges held the conviction right.

(*f*) R. *v.* Sullivan, C. & M. 209.

harm : it is not necessary that such harm should have been actually done, or that it should be either permanent or dangerous ; if it be such as seriously to interfere with comfort or health, it is sufficient' (*g*).

On an indictment for shooting at a person with intent to maim, &c., it appeared that the prosecutor was hunting small birds, when the prisoner, a gamekeeper, came up with his gun, and ordered him off ; the prosecutor ran away, but had not got more than forty or fifty yards off when he heard the report of a gun, and at the same moment felt several shots rattling against his back and arms, one of which lodged in his finger : the prisoner afterwards said, 'He had warmed their tails a goodish bit for them' ; Parke, B. : 'There can be no doubt that this is an assault, but I think the felonious part of the charge cannot be supported on these facts. In order to do so, it must appear clearly that the prisoner discharged the gun at the prosecutor with the intent laid in the indictment ; but he seems to have waited till the prosecutor had attained such a distance from him as not to be injured by the shot. He would rather appear to have fired after the prosecutor with a view of frightening him than with any serious intention of inflicting any injury on his person. This conduct, though very reprehensible, is not sufficient to bring the case within the Act, and he ought, therefore, to be acquitted of the felony' (*h*).

On an indictment for feloniously wounding, it appeared that the prosecutor and his companion came up to the prisoner, who was fighting with his brother, and the prosecutor's companion said they were very quarrelsome people ; whereupon the prisoner knocked him down, and said he would do the same to the prosecutor, if he would fight ; the prosecutor refused, and threatened to take the law, and then the prisoner struck the prosecutor a blow with his fist, which broke the prosecutor's jaw on both sides of his face ; Alderson, B., told the jury that striking a blow, even though grievous bodily harm is done, is not in itself sufficient to shew an intent to do such grievous bodily harm ; that must be proved by other circumstances (*i*).

On an indictment for wounding with intent, &c., and for unlawful wounding, it appeared that the police ordered some gipsies to remove from a common by the direction of the owner of a neighbouring plantation, but not the lord of the manor ; they refused to do so, and one of them assaulted one of the police, who thereupon proceeded to take him into custody. The prosecutor took hold of two of the women, and while holding them the prisoner struck him on the back with a scythe, the edge of which was fenced, except two inches at the end, inflicting a wound half an inch deep, and an inch long ; it was contended that the prisoner could not be convicted even of wounding ; it was like the case where a person inflicted a wound with a nail on a stick, unknown to the person using it. Bramwell, B., said, 'The police had no right to interfere with the gipsies, except by the order of the owner of the land, and their resistance, without the use of weapons, would have been justifiable. As to the felony charged, a man is generally supposed, by the law, to intend the natural

(*g*) R. *v.* Ashman, 1 F. & F. 88.
(*h*) R. *v.* Abraham, 1 Cox, 208.
(*i*) R. *v.* Wheeler, 1 Cox, 106.

consequence of his act; but in this case it is not so, and to find the prisoner guilty of the felony you must be satisfied of the existence of the actual intent (to wound) charged in the indictment. As to the unlawful wounding, if this case were like that put by the counsel for the prisoner, she would not be guilty, as it would be a mere accident. But it is for you to say whether, though the prisoner did not intend to wound, she did not know that the end of the scythe was uncovered, and therefore likely to wound. Suppose you fired a gun loaded with shot, at a person, but at such a distance, that you did not think it would reach him, and some of the shots did, that would be an unlawful wounding. You will say whether the prisoner is guilty of wounding with intent, or of unlawful wounding, or not guilty' (*j*).

Upon an indictment for maliciously wounding with intent to do grievous bodily harm, it appeared that the prisoner got into an altercation with the prosecutor, and challenged him to fight; that he put down the blade of a scythe, and advanced towards the prosecutor to fight, but was prevented; afterwards the prosecutor challenged the prisoner to fight, but they were again prevented, and the prosecutor and his party left, and some time after the prisoner and two other men followed the prosecutor and passed him. The prosecutor and his party followed, and challenged the prisoner to fight, and used provoking language. The prisoner then took his own road, and the prosecutor followed him, and again challenged him to fight, which the prisoner refused, and said he would go back and take the peace of him, and actually went back a few steps for that purpose: but the prosecutor got before him, and was making towards him, when the prisoner flourished his scythe, and told him to stand back, or he would cut him down, and himself retreated a few steps; the prosecutor sprang on him, and seized him by the collar; a scuffle ensued, in which the prisoner struck the prosecutor across the shoulder with the scythe, and produced a severe wound. Cresswell, J., said: 'The recent Act (7 Will. IV. & 1 Vict. c. 85), having omitted the proviso contained in the 9 Geo. IV. c. 31, the judges have determined that the facts will bring a case within this statute, if the offence would have amounted to manslaughter, in case death had ensued. If the act was done unlawfully and maliciously, that is, without lawful excuse, and intentionally, it is enough. Maliciously does not mean with premeditated malice, as in murder; an intention to do the mischief unlawfully will satisfy the statute. Now, in order to render a case of homicide, committed with a deadly weapon, lawful on the ground of self-defence, it must appear that the party retreated as far as he possibly could, and then only used the weapon to avoid his own destruction. It is impossible to contend that the prisoner was so driven to use the scythe in this case; the offence would have amounted to manslaughter if death had ensued, though certainly not an aggravated one; and therefore you will be bound to say that the prisoner is guilty, if you believe he really intended to do grievous bodily harm' (*k*).

Upon an indictment for wounding with intent to do grievous bodily

(*j*) R. *v.* Cox, 1 F. & F. 664. See 14 & 15 Vict. c. 19, s. 5. This case is evidently not reported with accuracy.

(*k*) R. *v.* Odgers, 2 M. & Rob. 479.

harm, it appeared that the prosecutor and the prisoner were fellow-servants, and the prosecutor had told the prisoner to cut some grass, which he ought to have done, but did not do, whereupon the prosecutor took a strap, and beat the prisoner with it, when the prisoner, who had lost his right arm, took out a clasp knife, and wounded the prosecutor with it. Platt, B. : ' One servant has clearly no right to strike another ; and if an under-servant conducts himself in a way in which the upper-servant thinks he ought not, the latter should inform his master, and let him act as he thinks proper, either by dismissing the under-servant or otherwise. In an ordinary case, a wrongful beating with a strap would not justify the other party in resorting to a knife, but there is certainly in this case the distinction that the prisoner has lost his right arm. The assault of the prisoner by the prosecutor was clearly illegal and unjustifiable, and if, under all the circumstances, you think that the prisoner acted in self-defence only, you ought to acquit him ; but if you think that in defending himself the prisoner used more violence than was necessary, you ought to find him guilty of wounding without the intent mentioned in the indictment ' (*l*).

It was held that if a wound was inflicted for the purpose of accomplishing a robbery, the defendant might be convicted under 9 Geo. IV. c. 31, s. 12 (rep.), if the jury found that he intended to disable or do grievous bodily harm (*m*).

Although the intent laid is that of doing grievous bodily harm, and upon the evidence it appears that the prisoner's main and principal intent was to prevent his lawful apprehension, yet he may be convicted, if, in order to effect the latter intent, he also intended to do grievous bodily harm (*n*).

A sexton and others surprised two body-stealers, and attempted to take them ; one of them cut the sexton's assistant with a sabre : and was indicted on 43 Geo. III. c. 58, s. 1 (rep.), for cutting, with the intent to murder, disable or do some other grievous bodily harm. The jury found that he cut with the intent to resist and prevent their apprehension, and for no other purpose. Upon a case reserved, the judges held, that the case would not have been within the Act unless the apprehension would have been lawful ; and that if the cutting was to resist or prevent a lawful apprehension, it should have been so stated, this being one of the intents mentioned in the Act ; and that, as the jury had negatived the intent stated, the conviction could not be supported (*o*).

Upon an indictment for shooting with intent to do grievous bodily harm, it appeared that the prisoner, being a constable, was employed to guard a copse from which wood had been stolen, and for this purpose he carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner, having no other means of bringing him to justice, fired and wounded him in the leg. It was alleged that the prosecutor was actually committing a felony, he having been before

(*l*) R. *v.* Huntley, 3 C. & K. 142.

(*m*) R. *v.* Bowen, C. & M. 149. Cf. R. *v.* Cox, R. & R. 362, *ante*, p. 854, note (*e*). R. *v.* Shadbolt, 5 C. & P. 504.

(*n*) R. *v.* Gillow, 1 Mood. 85. Cf. R. *v.* Davis, 1 C. & P. 306, Garrow, B.

(*o*) R. *v.* Duffin, R. & R. 365, Bayley J., and MS.

repeatedly convicted of stealing wood; but these convictions were unknown to the prisoner, and there was no reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences. Erle, J., told the jury, that 'shooting with intent to do grievous bodily harm amounted to the felony charged, unless from other facts there was a justification; and that neither the belief of the prisoner that it was his duty to fire, if he could not otherwise apprehend the prosecutor; nor the alleged felony, it being unknown to him, constituted such justification.' The jury convicted; and, upon a case reserved, the judges were unanimously of opinion that the prisoner was not justified in firing at the prosecutor, because the fact that the prosecutor was committing a felony was not known to the prisoner at the time, and therefore the conviction was right (*p*).

P., the prosecutor, who was a gamekeeper, proved that he met the prisoner sporting upon his manor, and remonstrated with him for so doing; and proposed that the prisoner should go with him to the steward, saying, that if the steward would pardon him he should have no objection. The prisoner assented to go with him, and they walked together until they came near to the gamekeeper's horse, which was about sixty yards off, when P. went on before him towards the horse; and when he was at a short distance from the prisoner, the prisoner fired at his back, and ran away. On his way home P. saw the prisoner again, and the moment he looked round at him the prisoner again fired his gun, the discharge from which beat out one of P.'s eyes and several of his teeth. Between the first and second firing was about a quarter of an hour. In the course of the trial it was suggested that the prosecutor ought not to give evidence of two distinct felonies; but the learned judge thought it unavoidable in this case, as it seemed to him to be one continued transaction, in the prosecution of the general malicious intent of the prisoner. Upon another ground also the learned judge thought such evidence proper. The counsel for the prisoner, by his cross-examination of P., had endeavoured to shew that the gun might have gone off the first time by accident; and, although the learned judge was satisfied that this was not the case, he thought that the second firing was evidence to shew, that the first, which had preceded it only a quarter of an hour, was wilful; and to remove the doubt, if any existed, in the minds of the jury. The prisoner having been convicted, the matter was submitted to the consideration of the judges, who were of opinion that the evidence was properly received, and the prisoner rightly convicted (*q*).

On an indictment charging the defendant with wounding A. with intent to do him grievous bodily harm the defendant may be properly convicted on evidence that he wounded A. in belief that he was some one else (*r*).

(*p*) R. *v.* Dadson, 2 Den. 35.

(*q*) R. *v.* Voke, R. & R. 531.

(*r*) R. *v.* Stopford, 11 Cox, 643. Brett, J., after consulting Mellor, J., told the jury that the question was whether the defendant meant to do grievous bodily harm to the man when he struck. He held R. *v.* Hewlett, 1 F. & F. 91 to be inconsistent with R. *v.* Smith, 1 Cox, 51, and R. *v* Hunt, 1 Mood. 93.

Sect. IV.—Of Unlawful Wounding.

By 24 & 25 Vict. c. 100, s. 20 (*s*), 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude . . .' (*t*).

In R. *v.* Martin (*u*), the defendant, with the intention of causing terror in the minds of persons leaving a theatre, put out the gaslights on the staircase, and also, with the intention of obstructing the exit, placed an iron bar across the doorway. Several of them were injured. It was held that he had been rightly convicted on an indictment under this section of unlawfully and maliciously inflicting grievous bodily harm upon two of the audience named in the indictment.

If in consequence of a reasonable and well-grounded fear of violence, a person jumps from a window, or into a river, to escape the threatened violence, and sustains grievous bodily harm; or if the person sustains grievous bodily harm in escaping from the threatened violence, this will amount to inflicting grievous bodily harm under the section.

A prisoner was charged under the section. He was drunk, and threatened his wife. He asked if she was in bed, she said she was not. He then said, 'I'll make you so that you can't go to bed.' The prisoner's wife was frightened and opened the window and got one leg out, to get out. Her daughter caught hold of her and held her. The prisoner had got within reach of his wife, and was calling out to let her go; whereupon the daughter left hold, and the prisoner's wife fell into the street and broke her leg. It was held (following R. *v.* Martin (*v*)) a correct direction to the jury, that if the prosecutrix's apprehension was well grounded, taking into account the circumstances in which she was placed, and if getting out of the window was an act such as under the circumstances a woman might reasonably be led to take, they should find the prisoner guilty (*w*).

Sect. V.—Of Setting Engines calculated to destroy Human Life or inflict Grievous Bodily Harm.

By 24 & 25 Vict. c. 100, s. 31, 'Whosoever shall set or place, or cause 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 a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and being convicted thereof shall be

(*s*) Taken from 14 & 15 Vict. c. 19, s. 4; and see 10 Geo. IV. c. 34, s. 29 (I). The word 'wound' has been so placed in this clause that the words 'either with or without any weapon or instrument,' may apply to it.

(*t*) The words omitted were repealed in 1892 as superseded by 54 & 55 Vict. c. 69, s. 1, under which the term of penal servitude is from three to five years, and the term of imprisonment not more than two years with or without hard labour. *Vide* R. *v.* Peters, 1 Cr. App. R. 141, and *ante*, pp. 211, 212.

(*u*) 8 Q.B.D. 54.

(*v*) *Ubi supra.*

(*w*) R. *v.* Halliday, 38 W. R. 256. See also R. *v.* Hickman, 5 C. & P. 151. R. *v.* Pills, 5 C. & P. 284. R. *v.* Curley, 2 Cr. App. R. 109. R. *v.* Grimes, 15 N. S. Wales Rep. (Law), 209; *ante*, p. 666, note (*a*). These cases appear to over-rule R. *v.* Donovan, 4 Cox, 399, *ante*, p. 666, note (*a*).

liable . . . to be kept in penal servitude . . . (*x*); and whosoever shall knowingly and wilfully permit any such spring gun, man trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person, to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid: Provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: 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 (*y*).

It has been ruled that an alarm gun loaded with a shotted cartridge may be an engine calculated to destroy life within the section (*z*).

Causing death by engines set in contravention of this enactment is manslaughter (*a*).

Setting dog-spears in a wood is not an illegal act at common law, and it was not rendered so by 7 & 8 Geo. IV. c. 18 (*b*).

Sect VI.—Of Causing Bodily Harm by Furious Driving or other Wilful Misconduct or Wilful Neglect.

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100) (*c*), sect. 35, 'Whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm (*c*) to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour' (*d*).

The section extends to bicycles (*e*), and to all carriages whether drawn by animals or propelled by steam, petrol, electricity, or other mechanical means. Where death is caused by contravention of the enactment the slayer is liable to conviction of manslaughter (*f*).

(*x*) The punishment is now penal servitude from three to five years or imprisonment with or without hard labour for not over two years. 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

(*y*) Framed from 7 & 8 Geo. IV. c. 18, with some slight verbal alterations.

(*z*) R. *v.* Smith [1902], noted 37 L. J. (Newsp.) 89, Bruce, J. See Archb. Cr. Pl. (23rd ed.), 853.

(*a*) R. *v.* Heaton, 60 J. P. 508, Kennedy, J.

(*b*) Jordin *v.* Crump, 8 M. & W. 782. See Wootton *v.* Dawkins, C. B. (N. S.) 412.

(*c*) *Vide ante*, p. 854.

(*d*) Taken from 1 Geo. IV. c. 4, which was confined to stage-coaches and public carriages, and to the wanton and furious driving or racing, or wilful misconduct of coachmen and others having the charge of such coaches or carriages. The present section includes all carriages and vehicles, and extends also to wilful neglect. As to the meaning of the term 'wilful,' see *post*, p. 876. As to furious riding or driving in the metropolis, see the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54 (5) and by licensed drivers, the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 28; and in towns generally, the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28. As to furious driving of motor cars, see 3 Edw. VII. c. 36, s. 1.

(*e*) R. *v.* Parker, 59 J. P. 793, Hawkins, J. See Archb. Cr. Pl. (23rd ed.), 855.

(*f*) *Vide ante*, p. 794.

SECT. VII.—PROCEDURE, &c.

Where it is uncertain whether the defendant intended by his act to murder or to cause grievous bodily harm, &c., it is usual to insert counts varying the intent (*g*). A person who is present aiding and abetting when the criminal act is done is indictable as a principal, though his was not the hand by which the mischief was attempted or effected (*h*). But, if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maims a pursuer to avoid being taken, the others are not to be considered principals in such act (*i*).

Power to Convict of Unlawful Wounding on Indictment for Felonious Wounding.—By 14 & 15 Vict. c. 19, s. 5, 'If upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case, the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding (*j*), and thereupon the defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding.'

This section appears to apply when the indictment alleges a felonious wounding, and does not apply to a felonious shooting with intent, &c. (*k*).

In R. *v.* Ward (*l*) the prisoner was indicted under 24 & 25 Vict. c. 100, s. 18, for unlawfully, maliciously and feloniously wounding with intent to do grievous bodily harm. The prosecutor was using a punt in a creek of a river for the purpose of shooting wild fowl, lying with his face downwards in the punt, and paddling with his arms over the sides. When slewing the punt round to return home he suddenly heard the report of a gun and found himself shot and wounded seriously. The prisoner had fired the shot in the direction of the punt with the intention of frightening the prosecutor from again coming into the creek for the purpose of fowling, and not with the intention of doing him grevious bodily harm. The prisoner at the time and afterwards asserted that if the prosecutor had not slewed the punt round at the moment of his shooting, the shot would not have struck him. The jury found the prisoner guilty of unlawful wounding. It was held that 14 & 15 Vict. c. 19, s. 5, must be construed as if the word 'malicious' were applied to wounding; and there was evidence of a malicious wounding by the prisoner and that the conviction was right.

As to conviction of the attempt on an indictment for the complete offence, see 14 & 15 Vict. c. 100, s. 9, *post*, Vol. ii. p. 1966.

(*g*) *Vide ante*, p. 853.
(*h*) R. *v.* Towle, R. & R. 314; and *vide ante*, p. 114.
(*i*) R. *v.* White, R. & R. 99, and MSS. Bayley, J. *Vide ante*, pp. 123, 124.
(*j*) Under 24 & 25 Vict. c. 100, s. 20, *ante*, p. 859.
(*k*) R. *v.* Miller, 14 Cox, 356, Bowen, J., but see R. *v.* Waudby, *post*, p. 862.
(*l*) L. R. 1 C. C. R. 356.

On an indictment under sect. 20 (*ante*, p. 859), the defendant may be convicted of a common assault (*m*).

In R. *v.* Sparrow (*n*), where some counts charged the defendant with an assault on S. G., and with having thereby unlawfully and maliciously inflicted grievous bodily harm upon him, and another count was for a common assault, it appeared that the defendant struck the prosecutor with his fists two violent blows on the mouth, another on the temple, and a fourth on the back of the ear; three of his front teeth, and other teeth farther up were loosened; his gums were lacerated, and the mouth was swollen. The pain which was suffered immediately afterwards was insufferable; one of the front teeth and the back teeth had since partially fastened, but the two front teeth had not, and the prosecutor must lose them. The prosecutor had suffered much otherwise for a long time. The jury were told that the injuries inflicted fell within the definition of 'grievous bodily harm,' and that if they believed the witnesses, there was evidence to support the first counts; and that the question of whether the defendant intended to inflict grievous bodily harm did not arise, but that the simple point for their consideration was, 'did the defendant unlawfully assault the prosecutor, and thereby inflict upon him grievous bodily harm?' The verdict was, 'We find the defendant guilty of an aggravated assault, but without premeditation; it was done under the influence of passion.' It was then contended that this was a verdict of guilty upon the count for the common assault only; but a verdict of guilty was directed to be entered on the other counts, and, upon a case reserved, it was urged that the jury might have intended not to find the prisoner guilty of intending bodily harm, and that intention was a necessary ingredient in the offence, and the word 'maliciously' meant something more than 'intentionally'; but it was held that the direction was correct; that the language used by the jury must be construed by looking at the subject matter of the charge, and what was left to the jury; and that the assault was intentional in the eye of the law, though committed without premeditation and under the influence of passion.

Upon an indictment against three for maliciously wounding with intent to do grievous bodily harm, the jury may convict two of the felony charged, and the third of unlawfully wounding (*o*).

In R. *v.* Waudby (*p*), one prisoner was charged on the first count with feloniously shooting at F. with intent to do him grievous bodily harm and another prisoner was charged with feloniously aiding and abetting him to commit the felony, and on a second count with feloniously wounding F. with like intent. The jury found the one guilty of unlawful wounding, and the other guilty of aiding and abetting. On a case reserved, the question was raised whether the second prisoner could, on such an indictment, be convicted of aiding and abetting in the misdemeanor. The conviction of both was upheld (*q*).

(*m*) R. *v.* Yeadon, L. & C. 81. R. *v.* Oliver, Bell, 728. Cf. R. *v.* Roxburgh, 12 Cox, 8, as to plea of guilty to common assault.

(*n*) [1860] Bell, 298.

(*o*) R. *v.* Cunningham, Bell, 72.

(*p*) [1895] 2 Q.B. 482.

(*q*) The decision appears to be perfectly correct if the conviction on the second count be kept in view. If it rested on the first count it would be inconsistent with R. *v.* Miller (*ante*, p. 861), and with the words of 14 & 15 Vict. c. 19, s. 5, *ante*, p. 861.

CANADIAN NOTES.

Sec. 1.—Of Conspiring and Incitement to Murder.

Conspiring and Counselling to Murder.—Code sec. 266.

Sec. 2.—Attempts to Commit Murder.—Code sec. 264.

An indictment that "A. B. attempted to kill and murder C. D." sufficiently discloses an indictable offence, and the Court has the power to allow it to be amended so as to read that "A. B. with intent to commit murder, shot at C. D." The King v. Mooney, 11 Can. Cr. Cas. 333.

An indictment multifarious in that it combines a charge of a failure to provide necessaries for a child under sixteen under secs. 242 and 244 with a charge of an attempt to murder the child, to which indictment the prisoners pleaded, is sufficient upon which to base a conviction thereon for the latter offence without a formal amendment of the indictment, where the presiding Judge has withdrawn from the jury that portion of the charge based upon secs. 242 and 244. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

The prosecution must prove the intent as well as the assault. Re Kelly (1902), 5 Can. Cr. Cas. 541.

Upon a charge of causing grievous bodily harm to a child under defendant's care with intent to bring about the child's death, evidence of acts of cruelty by defendants to another child also in defendant's care are irrelevant to the case and inadmissible. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

On the trial of a person accused of attempt to murder by shooting, evidence that he had burglar's tools in his possession at the time is admissible, as tending to prove criminal intent. It is proper for the Judge, in charging the jury in a trial for an attempt to murder, to instruct them that they may draw an inference as to the prisoner's intent to kill from the circumstances of his being a stranger loitering in a street or park, between four and five o'clock in the morning, with a loaded revolver and burglar's tools in his possession. The King v. Mooney, 11 Can. Cr. Cas. 333.

Sec. 3.—Of Unlawful Acts Causing or Calculated to Cause Bodily Harm.

Felonous Wounding.—Code sec. 273.

The intent may be inferred from the act committed. R. v. LeDante, 2 Geldert & Oxley (N.S.) 401.

Upon an indictment charging a shooting at a person with intent, a verdict for common assault may be rendered. Re Cronan (1874), 24 U.C.C.P. 106.

Upon the trial of an indictment for wounding with intent to disable, a verdict of "guilty without malicious intent" is equivalent to a verdict of acquittal, although the jury were instructed that if intent to disable were negatived they might still convict of the simple offence of wounding. Such verdict is to be construed as a finding that the act of the accused which resulted in wounding the complainant was done without malice. (The King v. Slaughenwhite (No. 1), 9 Can. Cr. Cas. 53, 37 N.S.R. 382, reversed.) Slaughenwhite v. The King; The King v. Slaughenwhite (No. 2), 9 Can. Cr. Cas. 173, 35 Can. S.C.R. 607.

Upon a charge of shooting with intent to do grievous bodily harm in which the plea is self-defence, it is a question for the jury, whether the assault upon the accused, which had provoked the shooting, had ended or was still being pursued. It is mis-direction to charge the jury that, to support the plea of self-defence to the infliction of grievous bodily harm, they must find that the accused could not otherwise have preserved himself from death or grievous bodily harm, it being a sufficient justification if the accused had a reasonable apprehension of grievous bodily harm to himself from the violence of the assault upon him, and if he believed on reasonable grounds that he could not preserve himself from grievous bodily harm otherwise than by inflicting grievous bodily harm upon his assailant. The King v. Ritter, 8 Can. Cr. Cas. 31, Cr. Code secs. 53 and 54.

Bodily Injury by Unlawful Act or Omission.—Code sec. 284.

This sec. (284) is not in any English Act. The Imperial Commissioners on the Draft Code of 1879 recommended it, but there was a minority report against it, and it was not enacted.

Although a corporation cannot be guilty of manslaughter, it may be indicted under sec. 222 and possibly also under this section for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. A fine is the punishment which must be substituted under Cr. Code sec. 920 in the case of a corporation, in lieu of the imprisonment mentioned in Cr. Code sec. 284, and the amount is in the discretion of the Court (Cr. Code sec. 1029). The expression "grievous bodily injury" includes injuries immediately resulting in death, and as a corporation is not amenable to a charge of manslaughter, the death is as to it a circumstance in aggravation of the crime, and does not enlarge the nature of the offence. R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.);

affirmed by the Supreme Court of Canada *sub nom.*, Union Colliery v. The Queen (1900), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

Sec. 4.—Unlawful Wounding.—Code sec. 274.

A conviction for inflicting grievous bodily harm under sec. 274 which provides a punishment for the person "who unlawfully wounds or inflicts any grievous bodily harm upon any other person" need not state that the act was done "unlawfully," that term in the section being referable only to the offence of wounding. R. v. Treadwell (1902), 5 Can. Cr. Cas. 461.

Sec. 5.—Of Setting Engines Calculated to Destroy Human Life or Inflict Grievous Bodily Harm.—Code sec. 281.

The words "actual bodily harm" in sec. 295 would be fully covered by the least bodily harm, whilst the offence provided in sec. 274 has added to it an aggravating element which makes the bodily harm grievous. R. v. Hostetter (1902), 7 Can. Cr. Cas. 221.

Justices of the peace have no power on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction. R. v. Lee (1897), 2 Can. Cr. Cas. 233; Miller v. Lea (1898), 2 Can. Cr. Cas. 282. A conviction recorded by justices in such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts and does not support a plea of *autrefois convict. Ibid.*

Sec. 6.—Causing Bodily Harm by Furious Driving or Other Wilful Misconduct or Wilful Neglect.

Punishment for.—Code sec. 285.

As to the meaning of the term "wilful neglect," *e.g.*, wilfully refusing or neglecting to maintain a wife, see Anonymous Case (1902), 6 Can. Cr. Cas. 163 (Que.). A "wilful" refusal to allow a person to vote means a refusal which is perverse or malicious. Johnson v. Allen, 26 O.R. 550.

CHAPTER THE FOURTH.

OF ATTEMPTING TO CHOKE OR TO INJURE BY POISON OR EXPLOSIVES.

SECT. I.—OF ATTEMPTING TO CHOKE, &C., AND USING DRUGS IN ORDER TO COMMIT OFFENCES.

ATTEMPTS to suffocate or strangle *with intent to commit murder* are punishable under 24 & 25 Vict. c. 100, s. 14, *ante*, p. 841.

By 24 & 25 Vict. c. 100, s. 21 (*a*), 'Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*b*).

A male person convicted under the above section may, in addition to the punishment awarded by the section (as amended in 1891) or any part thereof be sentenced to be whipped under the Garrotters Act, 1863 (26 & 27 Vict. c. 44), which is set out *ante*, p. 216.

By 24 & 25 Vict. c. 100, s. 22 (*c*), 'Whosoever shall unlawfully apply or administer to *or cause to be taken by*, or attempt to apply or administer to *or attempt to cause to be administered to or taken by* any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit or with intent in any of such cases thereby to assist any other person in committing, any *indictable* offence, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*b*).

By 48 & 49 Vict. c. 69, s. 3, sub-s. 3 (*post*, p. 956) it is an indictable misdemeanor to apply, administer to, or cause to be taken by any woman or girl, any drug, matter, or thing, with intent to stupefy or overpower so as to enable any person to have a lawful carnal connection with such woman or girl (*d*).

(*a*) This section was new law in 1861.

(*b*) Or not less than three years or to imprisonment with or without hard labour for not more than two years; 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted in s. 21, 22 were repealed in 1892, S. L. R.; s. 21 was new law in 1861.

(*c*) Taken from 14 & 15 Vict. c. 19, s. 3. The words in *italics* in the beginning of this section were introduced for the same reason as those in s. 14. See the note to that section, *ante*, p. 841.

(*d*) Corroboration is necessary, s. 3, proviso.

Sect. II.—Of the Use of Poison to commit Crime.

Persons who administer or attempt to administer or cause or attempt to cause to be administered to or taken by any person, any poison or other destructive things with *intent to commit murder* are punishable under 24 & 25 Vict. c. 100, sects. 11, 14, *ante*, pp. 840, 841.

By sect. 23 (*e*), 'Whosoever shall unlawfully and maliciously administer to or cause 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, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding ten years . . .' (*f*).

By sect. 24 (*g*), 'Whosoever shall unlawfully and maliciously administer to or cause 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, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .' (*h*).

By sect. 25, 'If upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor' (*i*).

Poison or Other Destructive Thing.—Upon an indictment for administering poison with intent to murder, it appeared that the prisoner had administered to a child nine weeks old two *cocculus indicus* berries. The child vomited one of them up, and the other passed through her body in the course of nature. Two medical men proved that the *cocculus indicus* berry is classed with narcotic poisons: the poison consists in the presence

(*e*) Taken from 23 & 24 Vict. c. 8, s. 1.

(*f*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*g*) Taken from 23 & 24 Vict. c. 8, s. 2. Upon an indictment on that section for administering cantharides to a female, with intent to injure, aggrieve, and annoy her, it appeared that the prisoner, unknown to the prosecutrix, put cantharides into a cup of tea which she drank, and was very ill in consequence. This drug taken in large quantities is poisonous, but it is administered by medical men as a stimulant to the kidneys and bladder. The jury found that the prisoner administered the cantharides with intent to excite the sexual passion and desire of the prosecutrix, in order that he might obtain connection with her, and on a case reserved, after a verdict of guilty, on the question whether the intent above stated was an intent to injure, aggrieve or annoy within the statute, the conviction was affirmed. R. *v.* Wilkins, L. & C. 89. But where cantharides was administered in such a small quantity as to be incapable of doing any mischief, although administered with the intent to cause inconvenience and annoyance, Cockburn, C.J., after consulting Hawkins, J., held that this was no 'administering of a noxious thing' within the section. R. *v.* Hennah, 13 Cox, 547. For decisions on the earlier law see R. *v.* Walkden, 1 Cox, 282. R. *v.* Hanson, 2 C. & K. 912. R. *v.* Vaughan, 8 Cox, 256.

(*h*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*i*) This section re-enacts 23 & 24 Vict. c. 8, s. 3.

of an alkaloid, which is extracted from the kernel; all the noxious properties are in the kernel; it has a very hard exterior or pod, to break which much force is required. One of these witnesses added that the berry, if the pod is broken, is calculated to produce death in an adult human subject, though he did not know how many would be required for the purpose: he thought the poison contained in the kernels of two berries, if the pods were burst, and if retained on the stomach, might produce death in a child of nine weeks old, but that the berry could not be digested by the child, and that it would pass through its body without the pod being burst, and so would be innocuous. It was objected that the berries were not poison within the meaning of the statute; for that though the kernel of the berries contained poison, yet the pod rendered the poison innocuous. The objection was overruled, and upon a case reserved, the judges were unanimously of opinion that the conviction was right. Wilde, C.J., said: 'It is admitted that the kernel is poison though not the pod; part of the berry is therefore admitted to be poison, though not the whole. The whole berry was administered, and with intent to kill. The act, therefore, of administering poison with intent to kill is proved. The effect of that act is beside the question: the act was an administering poison, which failed to produce the intended effect. We all think the conviction right' (*j*).

If a person mix poison with coffee, and tells another that the coffee is for her, and she take it in consequence, it seems that this is an administering, and at all events, it is a causing the poison to be taken (*k*).

On an indictment for attempting to administer poison it appeared that the prisoner had bought some salts of sorrel, and put it in a sugar-basin in order that the prosecutor might take it with his tea, and the prosecutor and his wife took some of it with their tea, and discovered that something was wrong, and this led to a discovery of the poison; Wightman, J., held, that if the prisoner put the poison in the sugar intending that it should be taken, that was an attempt to administer it (*l*).

If A. delivered poison to B. for the purpose of his administering it to C. in A.'s absence, A. was not liable to be convicted under 1 Vict. c. 85, s. 3, of an attempt to administer poison to C., if B. were a guilty agent (*m*).

Sect. III.—Of the use of Explosives, Corrosives, &c., for Criminal Purposes.

The statutory provisions for preventing and punishing the use of explosives (other than fire arms) to commit crimes against person and

(*j*) R. *v.* Cluderay, 1 Den. 514. In the course of the argument, Alderson, B., said: 'Suppose arsenic given in a globule of glass, would that be an administering of a destructive poison?' Williams, J.: 'Suppose a child to have a feeble digestion by reason of tender age, and the medical man to say that it could not digest the pod for that reason, could the amount of the digestive power in the particular case affect the question?' Alderson, B.: 'Suppose a grown man could digest it, would it be poison? if so, would it cease to be poison because a child is supposed to be incapable of doing so?'

(*k*) R. *v.* Harley, 4 C. & P. 369. In this case the prisoner was indicted under 9 Geo. IV. c. 31, s. 11. See the cases, *ante*, p. 830, as to administering drugs to procure abortion.

(*l*) R. *v.* Dale, 6 Cox, 14, *vide ante*, p. 834.

(*m*) R. *v.* Williams, 1 Den. 39; 1 C. & K. 589. The prisoners were afterwards convicted on an indictment for the misdemeanor of doing the acts with a criminal intent. See Dears. 547.

property are, for reasons of practical convenience, dealt with together in this chapter.

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 9 (*n*), 'Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building, whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life, . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping' (*o*).

On an indictment under this section it was held by Lopes, J., after consulting Lord Coleridge, C.J., that the endangering of life must result from the damage done to the building mentioned in the indictment, but that it was not necessary that the persons whose lives were endangered should have been inside the building. For the purpose of proving such endangering of life evidence of damage to other buildings that might be inhabited was inadmissible, though such evidence was admissible to shew the nature and extent of the explosion and its tendency to destroy the particular building. To endanger within this section includes not only actual injury received but also exposure to, or chance of, injury (*p*).

By sect. 10 (*q*), 'Whosoever shall unlawfully and maliciously place or throw 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, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen . . . years, or to be

(*n*) This section embodies 9 & 10 Vict. c. 25, ss. 1, 2. Under s. 2 of that Act, where life was endangered, the offence was capital. See 24 & 25 Vict. c. 100, s. 12 (*ante*, p. 840).

(*o*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

(*p*) R. *v.* McGrath, 14 Cox, 598.

(*q*) Taken from 9 & 10 Vict. c. 25, s. 6. In R. *v.* Brown, 3 F. & F. 821, the prisoners were indicted under this section for damaging the house of J. Gate by the explosion of gunpowder, J. Gate and his wife being therein. In Cumberland there is a custom in country places, when a wedding has taken place, for the neighbours to assemble with guns, and fire a kind of *feu de joie* in honour of the event, the bridegroom or his friends treating them. In pursuance of this custom the prisoners and others went with a gun thus to celebrate the marriage of Gate's daughter with one Noble. On arriving at Gate's house they asked for drink, and said they had come to shoot. Noble treated them to beer, and gave the one who had the gun 2*s.* 6*d.* not to fire. Having got the beer, they wanted something to eat, but were put out of Gate's house. They then began to fire the gun; at first in front of the house; then they fired under the door, filling the house with smoke. They fired off the gun next through the keyhole of the door, and, being out of percussion-caps, applied a candle to the nipple for the purpose. The effect of this shot was to drive the key with great violence into the house, cutting the arm of Mrs. Gate, and knocking Gate insensible off his chair, by striking him on the head. It also blew the lock of the door to pieces, and split the door. The prisoners were afterwards very abusive and violent on the inmates rushing out to capture them and their gun. Martin, B., was of opinion that the statute was not meant to apply to such a case as this, but rather to malicious injuries to houses, by placing or throwing explosive substances against or into them, with intent to destroy the house or injure the inmates. This was more in the nature of wanton mischief or assault, and he directed an acquittal. 'If this case is correctly reported, it deserves reconsideration.' C. S. G.

imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping (*r*).

By sect. 45 (*rr*), 'Whosoever shall unlawfully and maliciously place or throw 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, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years, . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping (*r*).

Shooting into a house has been held not to be within sect. 9 (*s*).

The prisoners were indicted under sect. 10 for throwing gunpowder against a house with intent to damage. It appeared that they had thrown a bottle containing gunpowder against a window of a house, and that in the neck of the bottle there was a fuse, and Kelly, C.B., held that unless the fuse in the bottle was lighted at the time the bottle was thrown against the house the offence was not made out, but said: 'I do not say that it is necessary that the light should pass from the fuse to the powder in the bottle and that an explosion should take place. It is enough to constitute the offence if once the light was applied to the fuse before the bottle was thrown, although it might go out before the bottle struck the house and no explosion actually resulted from it. . . . If anybody merely threw a bottle containing gunpowder that would not comply with the conditions of the statute. If the fuse was not lighted, it could not cause an explosion, and it would be merely throwing a bottle against a house' (*t*).

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 28 (*u*),' Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping (*r*).

By sect. 29 (*v*), 'Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, *or put or lay at any place*, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive (*vv*) or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, *whether* any bodily harm

(*r*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

(*rr*) Taken from 9 & 10 Vict. c. 25, s. 6.

(*s*) R. *v.* Brown, 3 F. & F. 821.

(*t*) R. *v.* Sheppard, 11 Cox, 302.

(*u*) Taken from 9 & 10 Vict. c. 25, s. 3.

(*v*) Taken from 9 & 10 Vict. c. 25, s. 4, and 7 Will. IV. and 1 Vict. c. 85, s. 5. Under those sections, if any person had placed an infernal machine in any place where he believed another would tread on it and thereby cause it to explode, he would not have been guilty of an offence. The words 'put or lay at any place' were introduced to meet all such cases. As to the words 'whether any bodily injury,' &c., see the note to s. 14, *ante*, p. 841.

(*vv*) Including, it would seem, boiling water. R. *v.* Crawford, 1 Den. 100.

be effected *or not*, be guilty of felony, and being convicted thereof shall be liable,' at the discretion of the Court to be kept in penal servitude for life . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping' (*w*).

This section is by the Gunbarrel Proof Act, 1868 (31 & 32 Vict. c. cxiii.), s. 123, extended to persons knowingly sending for proof a gun barrel containing any explosive substance.

Where the prisoner threw an electric fuse detonator out of a railway carriage window, and it was picked up by the prosecutor, and exploded and injured him, it was held that it was a question for the jury as to the intent with which the prisoner had acted (*x*).

By sect. 30 (*y*), 'Whosoever shall unlawfully and maliciously place or throw 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, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping' (*w*).

By sect. 64 (*z*), 'Whosoever shall knowingly have in his possession, or make or manufacture any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, . . . and, if a male under the age of sixteen years, with or without whipping . . .' (*a*).

By sect. 65, 'Any justice of the peace of any county or place in which any such gunpowder, or other explosive, dangerous, or noxious substance or thing, or any such machine, engine, instrument, or thing, is suspected to be made, kept, or carried for the purpose of being used in committing any of the felonies of this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal for searching in the day-time any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place, or any carriage, waggon, cart, ship, boat, or vessel, in which the same is suspected to be made, kept, or carried for such purpose as hereinbefore mentioned; and every person acting in the execution of any such warrant shall have, for seizing, removing to proper places, and detaining all such gunpowder, explosive, dangerous, or noxious substances, machines, engines, instruments, or things, found upon such search, which he shall have good cause to suspect to be intended to be used in committing any such offence, and the barrels, packages, cases, and other receptacles in which the same shall be, the

(*w*) As to other punishments see 54 & 55 Vict. c. 69, s. 1, pp. 211, 212. The words omitted are repealed.

(*x*) R. *v.* Saunders, 14 Cox, 180, Denman, J.

(*y*) Taken from 9 & 10 Vict. c. 25, s. 6.

(*z*) Taken from 9 & 10 Vict. c. 25, s. 8. There is a like provision in 24 & 25 Vict. c. 97, s. 54.

(*a*) The words omitted were repealed in 1893 (S. L. R.).

same powers and protections which are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice by the Act passed in the session holden in the 23 & 24 Vict. c. 139 . . . ' (*b*).

By the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), s. 2, ' Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life, or to cause serious injury to property, shall, whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for life, or for any less term (not less than the minimum term allowed by law) (*c*) or to imprisonment with or without hard labour for a term not exceeding two years.'

By sect. 3, ' Any person who within or (being a subject of His Majesty) without His Majesty's dominions unlawfully and maliciously—

(a) does any act with intent to cause, by an explosive substance, or conspires to cause by an explosive substance, an explosion in the United Kingdom of a nature likely to endanger life or to cause serious injury to property, or,

(b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom,

shall, whether any explosion does or does not take place, and whether any injury to person or property has been actually caused or not be guilty of felony, and on conviction shall be liable to penal servitude for a term not exceeding twenty years (*d*), or to imprisonment with or without hard labour for a term not exceeding two years, and the explosive substance shall be forfeited.'

By sect. 4 (1), ' Any person who makes or knowingly has in his possession or under his control any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or does not have it in his possession or under his control for a lawful object, shall, unless he can shew that he made it, or had it in his possession, or under his control for a lawful object, be guilty of felony, and on conviction shall be liable to penal servitude for a term not exceeding fourteen years (*e*), or to imprisonment for a term not exceeding two years with or without hard labour, and the explosive substance shall be forfeited (*f*).

' (2) In any proceeding against any person for a crime under this section, such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case ' (*g*).

(*b*) There is a like provision in 24 & 25 Vict. c. 97, s. 55. 23 & 24 Vict. c. 139 was repealed by the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 122. By s. 86 of the Act of 1875 the power of search for gunpowder under the repealed enactment is now exercised under the Act of 1875.

(*c*) Now three years: 54 & 55 Vict. c. 69, s. 1, *ante*, p. 211.

(*d*) The minimum term is three years; *vide ante*, p. 211.

(*e*) Nor less than three years, *ante*, p. 211.

(*f*) If several persons are connected in a common design to have an explosive substance made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others for the carrying out of their common design. R. *v.* Charles, 17 Cox, 499.

(*g*) As to present position of this subsection see 61 & 62 Vict. c. 36, *post*, Bk. xiii. c. v.

By sect. 5, 'Any person who within or (being a subject of His Majesty) without His Majesty's dominions by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever procures, counsels, aids, abets, or is accessory to the commission of any crime under this Act, shall be guilty of felony, and shall be liable to be tried and punished for that crime as if he had been guilty as a principal.' (*Vide ante*, Book I. Chapter V.)

Sect. 6 gives power to the Attorney-General, where he has reason to believe that a crime has been committed under the Act, to authorise any justice of the peace to hold an inquiry. The evidence taken at such inquiry is, however, not to be used against the witness giving such evidence except in case of perjury. Absconding witnesses may be arrested.

By sect. 7 (1), 'If any person is charged before a justice with any crime under this Act, no further proceeding shall be taken against such person without the consent of the Attorney-General, except such as the justice may think necessary by remand or otherwise to secure the safe custody of such person.

'(2) In framing an indictment the same criminal act may be charged in different counts as constituting different crimes under this Act, and upon the trial of any such indictment the prosecutor shall not be put to his election as to the count on which he must proceed.

'(3) For all purposes of and incidental to arrest, trial, and punishment, a crime for which a person is liable to be punished under this Act, when committed out of the United Kingdom, shall be deemed to have been committed in the place in which such person is apprehended or is in custody.

'(4) This Act shall not exempt any person from any indictment or proceeding for a crime or offence which is punishable at common law or by any Act of Parliament other than this Act; but no person shall be punished twice for the same criminal act' (*h*).

Sect. 8 deals with the search for the seizure of explosive substances (*i*), and by sect. 9 (1), 'The expression "explosive substance" shall be deemed to include any materials for making any explosive substance, also any apparatus, machine, implement, or materials used or intended to be used or adapted for causing or aiding in causing any explosion in or with any explosive substance, also any part of any such apparatus, machine, or implement' (*j*).

Any part of a vessel which, when filled with an explosive substance, is adapted for causing an explosion, is an explosive substance (*k*).

(*h*) *Vide ante*, pp. 27, 31.

(*i*) It applies ss. 73–75, 89 and 96 of the Explosives Act, 1875 (38 & 39 Vict c. 17).

(*j*) The Act applies to the whole of the United Kingdom, *vide* s. 9 (1) (2).

(*k*) R. *v.* Charles, *ante*, p. 869.

CANADIAN NOTES.

Sec. 1.—*Of Attempting to Choke or to Injure by Poison or Explosives.*

Of Attempting to Choke, etc., and Using Drugs in Order to Commit Offences.—Code sec. 276.

Sec. 2.—*Of the Use of Poison to Commit Crime.*

Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully 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. Code sec. 277.

Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully 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. Code sec. 278.

Sec. 3.—*Of the Use of Explosives, Corrosives, etc., for Criminal Purposes.*

Causing Bodily Injury.—Code sec. 279.

Using with Intent to Harm.—Code sec. 280.

CHAPTER THE FIFTH.

OF OFFENCES RELATING TO RAILWAYS AND PASSENGERS THEREON.

ALTHOUGH, perhaps, it may be departing from a strictly accurate distribution of offences to collect the clauses creating offences relating to railways and railway trains in one chapter, yet, as such a course appears to be likely to be of more practical utility, it has been adopted.

By the Railway Regulation Act, 1840 (3 & 4 Vict. c. 97, s. 13), 'It shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine driver, guard, porter, or other servant in the employ of such company who shall be found drunk while employed upon the railway, or commit any offence against any of the byelaws, rules or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains shall be or might be obstructed or impeded, and to convey such engine driver, guard, porter, or other servant so offending, or any person counselling, aiding, or assisting in such offence, with all convenient despatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this Act; and every such person so offending, and every person counselling, aiding, or assisting therein as aforesaid, shall, when convicted before such justice as aforesaid (who is hereby authorised and required, upon complaint to him made, upon oath, without information in writing (*a*), to take cognisance thereof, and to act summarily in the premises), in the discretion of such justice, be imprisoned, with or without hard labour, for any term not exceeding two calendar months, or, in the like discretion of such justice, shall for every such offence forfeit to His Majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labour as aforesaid . . .' (*b*).

By sect. 14, 'Provided always, and be it enacted, that (if upon the hearing of any such complaint he shall think fit) it shall be lawful for such justice, instead of deciding upon the matter of complaint summarily, to commit the person or persons charged with such offence for trial for the

(*a*) *Qu.* whether this exception to the general rules under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42) or the Summary Jurisdiction Acts is still in force.

(*b*) The provisions of the section as to imprisonment in default of paying the fine were repealed in 1884 (47 & 48 Vict. c. 43, s. 4), as having been superseded by s. 5 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

same at the Quarter Sessions for the county or place wherein such offence shall have been committed, and to order that any such person so committed shall be imprisoned and detained in any of His Majesty's gaols or houses of correction in the said county or place in the meantime, or to take bail for his appearance, with or without sureties, in his discretion; and every such person so offending, and convicted before such Court of Quarter Sessions as aforesaid (which said Court is hereby required to take cognisance of and hear and determine such complaint), shall be liable, in the discretion of such Court, to be imprisoned, with or without hard labour, for any term not exceeding two years.'

By sect. 21, 'Wherever the word "railway" is used in this Act it shall be construed to extend to all railways constructed under the powers of any Act of Parliament, and intended for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam or by any other mechanical power; and wherever the word "company" is used in this Act it shall be construed to extend to and include the proprietors for the time being of any such railway, whether a body corporate or individuals, and their lessees, executors, administrators, and assigns, unless the subject or context be repugnant to such construction.'

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100) s. 32, (*c*) 'Whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously, turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or shew, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*d*).

By sect. 33 (*e*), 'Whosoever shall *unlawfully* and maliciously throw, or cause 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

(*c*) Taken from 14 & 15 Vict. c. 19, s. 6, and the word 'unlawfully' is substituted for 'wilfully' throughout.

(*d*) For present punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

(*e*) Taken from 14 & 15 Vict. c. 19, s. 7. The word 'unlawfully' is substituted for 'wilfully.' The introduction of the word 'at' extends this section to cases where the missile fails to strike any engine or carriage. The other words in *italics* were introduced to meet cases where a person throws into or upon one carriage of a train, when he intended to injure a person in another carriage in 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 this case would clearly come within the clause. As to punishing youthful offenders in a summary manner, see 42 & 43 Vict. c. 49 (E), 47 & 48 Vict. c. 19 (I), which supersede 34 & 35 Vict. c. 78, s. 13.

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 shall form part,* shall be guilty of felony and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*f*).

An acquittal of the felony created by sect. 32 has been held to be no bar to a prosecution on the same facts for an offence against s. 33 (*g*).

By sect. 34, 'Whosoever *by any unlawful act* (*h*), *or by any wilful omission or neglect,* shall endanger, or cause to be endangered, the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour' (*i*).

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97) s. 33, it is a felony unlawfully and maliciously to pull down or destroy a bridge or viaduct or aqueduct over or under which a railway passes, with intent to render the bridge, &c., dangerous or impassable (*j*).

By sect. 35 (*k*), 'Whosoever shall *unlawfully* and maliciously put (*l*) place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or shew, hide or remove, any signal or light upon or near to any railway, or shall *unlawfully* and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court

(*f*) For present punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

(*g*) R. *v.* Gilmore, 15 Cox, 85, Huddleston, B.

(*h*) Two boys went upon premises of a railway company and began playing with a heavy cart which was near the line. Being started by the boys, the cart 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 until it passed through a hedge and a fence of posts and rails and over a ditch to the railway, and it rested so close to the railway lines as to obstruct any carriage passing upon them. The boys did not attempt to remove it. It was held, that as the first act of removing 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 under the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 34. R. *v.* Monaghan, 11 Cox, 608 (Ir.), Piggott, B. The defendant with a cart arrived at the gates of a level crossing, and having twice shouted for the gate-man, who was in a hut close by, without receiving any answer, opened the gates himself and crossed the line. A passing train collided with the cart and sustained injury. He was indicted under s. 36 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), and s. 34 of the Offences against the Person Act, 1861, but the jury acquitted him, holding the gate-man to blame. R. *v.* Strange, 16 Cox, 552. See R. *v.* Pittwood, 19 T. L. R. 37.

(*i*) Framed from 3 & 4 Vict. c. 97, s. 15, the words of which were, any person who 'shall wilfully do, or cause to be done, anything in such a manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same.' The present section extends to any unlawful act and any wilful omission or neglect.

(*j*) *Vide post*, Vol. ii. p. 1819.

(*k*) Framed from 14 & 15 Vict. c. 19, s. 6, with the substitution of 'unlawfully' for 'wilfully.'

(*l*) Erroneously printed 'cut' in Rev. Statt. (2nd ed.), Vol. x. p. 710.

to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen, with or without whipping' (*m*).

By sect. 36, 'Whosoever *by any unlawful act, or by any wilful omission or neglect, shall* obstruct or cause to be obstructed (*n*) any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour' (*o*).

An acquittal on an indictment for felony under sect. 35 has been held no bar to a subsequent indictment on the same facts for a misdemeanor under sect. 36 (*p*).

Malice.—In the case of an indictment for offences under the Malicious Damage Act, 1861, it is not necessary to prove malice against the owner of the property against which the offence is committed (*q*). There is no similar provision in the Offences against the Person Act, 1861. Maliciously, in the enactments above set forth appears to mean

(*m*) For present punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 211. The words omitted are repealed.

(*n*) Where a drunken man got upon a railway and altered the signals, in consequence of which a luggage train shut off steam, and was brought 'very near to a stand,' it was held there was an 'obstruction' within 24 & 25 Vict. c. 97, s. 36. R. *v.* Hadfield, L. R. 1 C. C. R. 253; 39 L. J. M. C. 131; 11 Cox, 574, Martin, B., *diss.* The defendant placed himself on the space between two lines of railways, at a spot between two stations, and held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations, and the driver of a goods train, acting upon the supposition that he was signalled by an inspector to slacken speed, shut off steam, and reduced his speed from twenty miles an hour to four miles an hour, and the defendant by this means was enabled to jump into the guard's van, and thereupon the train resumed its natural speed, and without stopping proceeded onward: Held, that the defendant had unlawfully obstructed the train within the meaning of the above section of the said statute. R. *v.* Hardy, L. R. 1 C. C. R. 278; 40 L. J. M. C. 62: Bovill, C.J., said: 'Upon the facts stated in this case there can be no doubt but that the defendant made a signal by holding up his arms in the mode used by inspectors of the line. He thereby made a signal to the driver of the train with the intention of inducing him to reduce the speed of his train, and the driver did so in consequence; so there can be no doubt but that he in one sense obstructed the train; but the question is raised whether s. 36 of 24 & 25 Vict. c. 97 did not contemplate a physical obstruction. If the words used had been "whosoever shall obstruct the line of railway," there might have been ground for that contention, but those are not the words used. S. 36 enacts that, "whoever by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway," &c. That section refers to acts of wilful omission or neglect, which shews that acts of physical obstruction of the line were not alone contemplated. That section seems rather to point to acts of servants which might effect the stoppage of the carriages of a train. But all doubt is removed by reference to s. 35, which provides against the maliciously doing certain acts which are enumerated to be placing objects upon the railway, removing part of a line, turning the points, and "making or shewing, hiding or removing, any signal, &c.," and "any other matter or thing" with intent to obstruct. The acts there enumerated are clearly not matters necessarily of physical obstruction. The acts contemplated by s. 36 must be taken to be *ejusdem generis* with those in s. 35; and the same construction must be put on both sections. "Any unlawful act" in s. 36 includes the acts mentioned in s. 35, therefore on that point this case is clear, and R. *v.* Hadfield was decided on the same principle. In that case, however, there was an alteration made of an actual fixed signal belonging to the line; but the words of this indictment following the statute are "by making a signal," which the defendant undoubtedly did, and therefore is within the statute. The two cases are not distinguishable.'

(*o*) Taken from 3 & 4 Vict. c. 97, s. 15. In place of the words in italics that section had 'shall wilfully do or cause to be done anything in such manner as to.'

(*p*) R. *v.* Gilmore, 15 Cox, 85, Huddleston, B.; *vide post*, Vol. ii. p. 1982, '*Autrefois acquit*.'

(*q*) 24 & 25 Vict. c. 97, s. 58, *post*, p. 1771.

deliberately and intentionally or recklessly, as distinct from inadvertently or accidentally (*qq*).

Upon an indictment on 3 & 4 Vict. c. 97, s. 15 (*r*), it appeared that the railway was constructed under an Act of Parliament, and was intended for the conveyance of passengers in carriages drawn by steam, but that at the time of the offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of materials and workmen. A railway truck was placed by the prisoners across the railway so as to obstruct the passage of any carriage and endanger the safety of persons conveyed therein, but its position was discovered, and it was removed before any collision occurred; it was objected that the case was not within the statute—1st, because the railway was not used for the conveyance of passengers for hire; 2ndly, because no actual obstruction took place. On a case reserved, it was held that the case was within the statute. It must be assumed that the railway was completed, and that all that required to be done was to open it for the public traffic. The case came within both branches of the section; there was an obstruction put on the line by the prisoners, and it was put in such a position so as to endanger the safety of the persons conveyed. It was contended that there could be no obstruction until some train were absolutely obstructed; but such a construction could not be maintained. The object of the legislature was obviously to prevent any disaster to those using the railway, and to punish those who put obstructions in such a manner as was likely to cause such disaster. The case was, therefore, within the intention of the statute; and though, in the ordinary course of things, it would generally be after the railway was fully opened that the public required to be protected, yet an obstruction before that time was within the mischief as well as the words of the statute (*s*).

On an indictment on 3 & 4 Vict. c. 97, s. 15 (*r*), for throwing a stone upon a railway in such a manner as thereby to endanger the safety of one G. C. and of divers other persons being conveyed on the engines and carriages then using the railway, it appeared that the defendant was on a bridge over the railway, and let drop a stone on a train that was passing; the stone was a thin flat stone, and the train was travelling at the rate of about fifteen miles an hour. The railway was opened in January, 1845, but no Act of Parliament was obtained until the July following. It was objected that this railway was not constructed under an Act of Parliament, but Alderson, B., held that the effect of the definition of railway in the interpretation clause (*t*), was to extend and not to weaken the effect of sect. 15 (*u*). And he told the jury, 'there are two propositions for you to consider:—First, did the defendant wilfully cast or drop this stone on the railway? and secondly, did the casting that stone on the railway in the manner in which it was cast endanger the safety of any of the persons travelling on the railway at that time? If you are satisfied on both these points, he is guilty. If the defendant had this stone in his hand

(*qq*) *Vide* R. *v.* Latimer, 17 Q.B.D. 359; R. *v.* Senior [1899], 1 Q.B. 283.

(*r*) Repealed and replaced by 24 & 25 Vict. c. 97, s. 36; c. 100, s. 34.

(*s*) R. *v.* Bradford, Bell, 268 (C. C. R.).

(*t*) S. 21, *ante*, p. 872.

(*u*) *Ante*, note (*r*). Alderson, B., said it would have been wiser if a count had been inserted at common law for throwing a stone at a railway carriage, which is an offence at common law.

at the time when the train was passing, and it dropped accidentally from his hand on the railway, you should acquit him; for that which occurs by accident cannot be said to be wilful. Should you think that the defendant did cast the stone on the railway wilfully, the next question is, was it cast there by him under such circumstances as to endanger the safety of G. C., the guard, the engineer, or any of the passengers or persons in the carriages? Now that would depend very much on the rate at which the train was proceeding at the time, and the weight and the size of the stone dropped. The former is material, because it is the same thing whether I throw a stone at your head or you run your head against the stone. If, therefore, the train were coming along at the rate of fifteen miles an hour, it would strike with that velocity a stone that meets it. You might drop a stone on a broad-wheeled waggon without doing any harm; but it may be very different when you drop it on a machine going at an enormous rate. Suppose a passenger in this train, going at the rate of fifteen miles an hour, had put his head out of the window, or the guard were to do so, which his duty might render necessary, a blow from a stone of this size and weight certainly might endanger his safety.' The jury found that the defendant foolishly dropped the stone on the railway, but not with the intention of doing any injury; Alderson, B.: 'The intention of the prisoner in dropping the stone is not the question. It is, "did he purposely drop the stone on the railway, and would the effect of the stone's being so dropped be to endanger the safety of the persons on the railway?"' (*v*).

Where on an indictment under 3 & 4 Vict. c. 97, s. 15, 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 the jury asking 'what was the meaning of the term "*wilfully*" used in the statute?' the learned judge added, 'he should consider 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' (*w*).

In another case upon 3 & 4 Vict. c. 97, s. 15, it was strongly intimated that the neglect of a driver and stoker of an engine to keep a good look-out for signals, according to the rules of the railway company, whereby a collision occurred, and the safety of the passengers endangered, was not

(*v*) R. *v.* Bowray, 10 Jurist, 211.

(*w*) R. *v.* Holroyd, 2 M. & Rob. 339. See Roberts *v.* Preston, 9 C. B. (N. S.) 208; and R. *v.* Senior [1899], 1 Q.B. 283, as to the meaning of 'wilfully.'

an offence within the section (*x*). But such neglect may come within the words of 24 & 25 Vict. c. 97, s. 36, or 24 & 25 Vict. c. 100, s. 34, *ante*, p. 873, or both, *ante*, p. 874.

On an indictment under 14 & 15 Vict. c. 19, s. 6 (*y*), for maliciously placing a stone upon a railway with intent to obstruct the carriages travelling thereon, it appeared that the prisoners, two boys, were seen to go upon the railway, and whilst one held the lever by which the points were turned, so as to separate two portions of the rails, the other dropped a stone between them, so as to keep them separated; the result would have been, had the act not been detected, that the carriages would have been thrown off the rail. No motive was suggested except that of wanton mischief. The jury were told 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 mischievously and with a view to cause an obstruction of a train (*z*).

The prisoner was indicted under 14 & 15 Vict. c. 19, ss. 6, 7 (*a*), for maliciously throwing a torch at a railway truck with intent in one count to injure it, in another to endanger the safety of persons travelling in the truck; there was, however, no one on the truck upon which the prisoner let the torch fall; and Channell, B., held that there was no evidence to support the second count (*b*).

On an indictment under 14 & 15 Vict. c. 19, s. 7 (*a*), for maliciously throwing a stone into a railway carriage with intent to endanger the safety of any person in it, it appeared that there had been considerable popular excitement against a person who was about to travel by the train, and there was a crowd assembled at the time of its departure, and the prisoner had thrown a stone intending to hit him, but without any previous ill-will. It was urged that the statute did not apply; its objects was to protect passengers by railways, and not to afford any additional protection against common assaults. Erle, J., after consulting Williams, J., said: 'Looking at the preamble of the sections relating to this class of offences, which recites that it is "expedient to make further provision for the punishment of *aggravated* assaults," and looking also to the provision of these clauses as indicated by the terms of sect. 6, immediately preceding the section upon which this indictment is framed, I consider that the "intent to endanger the safety of any person" travelling on the railway, spoken of in both sections, must appear to have been an intent to inflict some grievous bodily harm, and such as would sustain an indictment for

(*x*) R. *v.* Pardenton, 6 Cox, 247, Cresswell and Williams, JJ.

(*y*) S. 6 was repealed in 1861, and replaced by 24 & 25 Vict. c. 100, s. 32, *ante*, p. 872.

(*z*) R. *v.* Upton, Greaves' Campb. Acts, 92; 5 Cox, 298, Wightman, J.

(*a*) S. 7 was repealed in 1861 and replaced by 24 & 25 Vict. c. 100, s. 33, *ante*, p. 872.

(*b*) R. *v.* Sanderson, 1 F. & F. 37. See R. *v.* Court, *ante*, p. 872, note (*e*). It is reported to have been objected that the words 'matter or thing' were *ejusdem generis* with the other words employed, and did not include the case of a combustible which could only injure a truck by means of fire; for otherwise the eighth section would be nugatory, and that section requires proof of an intent to destroy the carriage by fire. Now, this is an error, for s. 8 has nothing to do with railway carriages, but only with railway buildings, and it is quite clear that s. 6, 7, include everything whatsoever that is used with any of the intents therein mentioned.

assaulting or wounding a person with intent to do some grievous bodily harm; but as that is a question of degree, which it is impossible to define further than in those terms, it must be a question for the jury, upon the facts, whether there has been such an intent'; and his lordship directed the jury, that 'in order to convict the prisoner they must be satisfied that he intended to inflict on the person at whom he aimed some grievous bodily harm' (*c*).

(*c*) R. *v.* Rooke, 1 F. & F. 107. 'This case does not appear to have been argued on the part of the Crown, and, with all deference to the very learned judges, it clearly proceeded on a mistake. 14 & 15 Vict. c. 19, contained a number of enactments which had no bearing whatever on each other; the Act was framed to provide for totally different matters, which at that time called for a remedy for each. Ss. 1 and 2 related to persons found by night with intent to commit felonies. S. 3 related to administering chloroform. S. 4 and 5 related to aggravated assaults. Then ss. 6, 7 and 8 were railway clauses, and it is perfectly clear that, although a person who committed an offence within either s. 6 or s. 7, may commit an assault, it was not essential to prove an assault in any offence contained in them, and no indictment upon them ever does allege an assault. They were most carefully framed for the very purpose of including every case where there was an "intent to injure or endanger the safety of any person"; and those words were selected as much more general than "with intent to do grievous bodily harm." It is also a fallacy to suppose that, even if the sections were to be construed together, s. 4 warrants this decision; for though one branch of it is "inflict any grievous bodily harm," the other is "cut, stab, or wound" without any aggravation; so that a wound, however slight, and given without any intention to inflict grievous bodily harm, is within the section. Every indictment must allege the intent to be to injure or endanger the safety of some person, and it is very confidently submitted that the only proper question to be left to the jury in every case is, did the defendant do the act with intent to injure or endanger the safety of that person?' C. S. G.

CANADIAN NOTES.

OF OFFENCES RELATING TO RAILWAYS AND PASSENGERS THEREON.

Acts Done with Intent to Injure Passengers.—Code sec. 282.

Wantonly Endangering Safety of Persons on Railways.—Code sec. 283.

Omission or Neglect of Duty.—There must be a duty to do the thing omitted to be done; a promise, not constituting a contract, made by a railway manager to do something which the company was under no legal obligation to do does not constitute a "duty" under this section. Ex parte Brydges, 18 L.C. Jur. 141.

Wilfully Breaking Contract with Railway Under Agreement to Carry Mails.—Code sec. 499.

Railway Company Wilfully Breaking Contract to Carry Mails.—Code sec. 499.

Damage to Railway with Intent to Render Impassable.—Code sec. 510.

Injuries Affecting Railway.—Code sec. 517.

Obstructing Railways.—Code sec. 518.

Damaging Goods on a Railway.—Code sec. 519.

Offences Relating to Operation of Railway.—R.S.C. (1906), c. 37.

Conviction, etc.—A conviction under Code sec. 517(*f*) for doing an unlawful act on a railway in a manner likely to cause danger is bad if it does not disclose the nature of the unlawful act. The King v. Porte, 14 Can. Cr. Cas. 238.

CHAPTER THE SIXTH.

OF ASSAULT AND BATTERY.

SECT. I.—DEFINITION AND PUNISHMENT.

MANY of the crimes classed as offences against the person involve assault and battery.

An assault is an attempt or offer to apply force of any kind to another person, by striking, touching, or moving him or otherwise applying any direct or indirect force to him : as by striking at another with a stick or other weapon, or without a weapon, though the party striking misses his aim. So, drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with an actual or apparent present ability, of using actual force against the person of another, will amount to an assault (*a*).

The Queensland Criminal Code, 1899 (*b*), appears correctly to embody the common law in saying that force in the definition of assault and battery includes light, heat, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.

No words, however provoking, can amount to an assault (*c*). Words used at the time of the transaction may so explain the intention of the party as to qualify his act, and prevent it from being deemed an assault. Thus where A. laid his hand upon his sword, and said, 'If it were not assize-time, I would not take such language from you,' it was held not to be an assault, on the ground that he did not design to do the other party any corporal hurt at that time, and that a man's intention must operate with his act in constituting an assault (*d*).

The threat or attempt must be of immediate and not of future or contingent injury.

If a person presents a pistol, purporting to be a loaded pistol, so near as to produce danger to life if the pistol had gone off, it is an assault in

(*a*) 1 Hawk. c. 62, s. 1. Bac. Abr. tit. 'Assault and Battery' (A.). 3 Bl. Com. 120. Burn Just. (30th ed.) tit. 'Assault and Battery.' 1 East, P. C. 406. Bull (N. P.) 15. Selw. (N.P.) tit. 'Assault and Battery,' 1. Addison, Torts (8th ed.) 158. Dft. Criminal Code, 1880, cl. 196.

(*b*) 63 Vict. No. 9, s. 245. This code was prepared by the Right Hon. Sir S. Griffith now Chief Justice of the High Court of the Australian Commonwealth.

(*c*) 1 Hawk. c. 62, s. 1. Bac. Abr. tit. 'Assault and Battery' (A.). There were many ancient opinions to the contrary.

(*d*) Tuberville *v.* Savage, 1 Mod. 3; 86 E. R. 684; 2 Keb. 545.

point of law, although in fact the pistol is unloaded. Parke, B., said: 'My idea is, that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and said to the party this is an empty pistol, then that would be no assault, for there the party must see that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent (*e*).

However, where in an action for assault and presenting a loaded pistol at the plaintiff, it appeared that the defendant cocked a pistol, and presented it at the plaintiff's head, and said that if he was not quiet he would blow his brains out; but there was no evidence that the pistol was loaded, Abinger, C.B., held, that if the pistol was not loaded it would be no assault (*f*). And in another case Tindal, C.J., ruled in the same way (*g*).

Pointing a loaded gun at half-cock at a person is an assault; for there is a present ability of doing the act threatened, as the gun can be cocked in an instant (*h*).

It is not every threat, where there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means or present capacity of carrying the threat into effect. If, therefore, a man is advancing in a threatening attitude, *e.g.* with his fist clenched, to strike another, so that his blow would almost immediately have reached such person, and is then stopped, it is an assault in law, if his intent were to strike the other man, though he was not near enough at the time to have struck him (*i*).

Where the plaintiff was in the defendant's workshop and refused to leave it, and the defendant and his workmen surrounded him, and tucking up their sleeves and aprons, threatened to break his neck, if he did not go out, and fearing that the men would strike him if he did not do so, the plaintiff went out; it was held that this was an assault; for there was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution (*j*).

(*e*) R. *v.* St. George, 9 C. & P. 483, 490. R. *v.* St. George is over-ruled on another point by R. *v.* Duckworth [1892], 2 Q.B. 83, *ante*, p. 842.

(*f*) Blake *v.* Barnard, 9 C. & P. 626. See also an anonymous case, *cor.* Erskine, J., cited by Ludlow, Serjt., 9 C. & P. 492. It seems that a very reasonable distinction might be made in cases of this kind. If a person presents a gun at another, knowing it not to be loaded, there can be no intent to injure in any event, and therefore he ought not to be criminally responsible; but if the person, at whom such an unloaded gun was presented did anything in self-defence, his justification, whether in a civil or criminal proceeding, ought to be just the same as if the gun were loaded; for the act of the party presenting the gun led to the natural consequence that the party at whom it was presented should defend himself, and the party presenting the gun ought not to be permitted to shew the facts to be otherwise than he had himself held them out to be. C. S. G.

(*g*) R. *v.* James, 1 C. & K. 530. In R. *v.* Baker, 1 C. & K. 254, Rolfe, B., seems to have held the same opinion.

(*h*) Osborn *v.* Veitch, 1 F. & F. 317, Willes, J.

(*i*) Stephens *v.* Myers, 4 C. & P. 349, Tindal, C.J.

(*j*) Read *v.* Coker, 13 C. B. 850.

AMERICAN NOTE.

Bishop (Amer. Crim. Law, ii. 32) agrees with the doctrine in R. *v.* St. George, rather than with that of Blake *v.* Barnard and R. *v.* James.

The plaintiff was walking on a footpath by a roadside, and the defendant, who was on horseback, rode after him at a quick pace; the plaintiff then ran away into his own garden, and the defendant rode up to the gate, and shook his whip at the plaintiff, who was about three yards off; it was held, that if the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter to avoid being beaten, it was an assault (*k*).

Battery.—A *battery* involves something more than an *attempt* to apply force to another person; but any force whatsoever, be it ever so small, being actually applied to the person of a man adversely (i.e. without his consent), in an angry or revengeful, or rude or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, or throwing water over him, is a battery in law (*l*). For the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner (*m*). Every battery includes an assault (*n*).

To cut a man's clothes whilst on his person is an assault, although there is no intention to inflict any bodily injury, and in the ordinary case of a blow on the back there is clearly an assault, though the blow is received by the coat on the person (*o*).

Where a policeman was stationed at a door to prevent a person from entering, it was held that, if he was entirely passive, like a door or a wall put to prevent that person from entering that room, and simply obstructing the entrance of that person, no assault was committed (*p*).

The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c., against the carriage of another person, and thereby causing bodily injury to the persons travelling in it (*q*). It is not necessary that the assault should be immediate; thus where a defendant threw a lighted squib into a market place, which being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery (*r*). And the same has been held where a person pushed a drunken man against another, who was thereby hurt (*s*), but if such person intended doing a right act, as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued, he would not be answerable (*t*).

For an assault or battery to be criminal it must be (1) *intentional* and not merely accidental, (2) *without legal* justification or excuse, and (3) committed *without the consent* of the person assaulted or struck,

(*k*) Mortin *v.* Shoppee, 3 C. & P. 373, Tenterden, C.J.

(*l*) Bac. Abr. tit. 'Assault and Battery' (B.). 1 Hawk. c. 62, s. 2. Pursell *v.* Horn, 8 A. & E. 602.

(*m*) 4 Bl. Com. 120.

(*n*) Termes de la Ley, 'Battery.' 1 Hawk. c. 62, s. 1. Bac. Abr. tit. 'Assault and Battery' (A.).

(*o*) R. *v.* Day, 1 Cox, 207, Parke, B.

(*p*) Innes *v.* Wylie, 1 C. & K. 257, Denman, C.J.

(*q*) See Hopper *v.* Reeve, 7 Taunt. 698, and the precedents for assaults of this kind, Cro. Circ. Comp. 82. 3 Chit. Cr. L. 823, 824, 825. 2 Starkie, Cr. Pl. (2d ed.), 388, 389.

(*r*) Scott *v.* Shepherd, 2 W. Bl. 892; 3 Wils. K.B. 403: 1 Smith, L.C. (11th ed.), 457.

(*s*) Short *v.* Lovejoy [1752], Bull. (N. P.) 16, Lee, C.J.

(*t*) Id. Ibid.

or under circumstances which make consent no defence by reason of the youth or mental incapacity of the person assaulted or because the consent is extorted by fraud or force or is otherwise not really given, or is not by law allowed to be given.

Intention. Accident.—It is not an assault or battery to lay a hand gently on another without hostile intention, but merely to attract his attention (*u*), nor, it is said, to lay hands gently on a man against whom a warrant is out and to tell the officer holding the warrant that that is the man wanted (*v*).

It has been held not to be an actionable trespass to the person when a beater was wounded by a shot which glanced off a tree (*w*). This rule excluding civil liability in such a case applies *à fortiori* to criminal liability.

If one soldier accidentally hurts another by discharging a gun in exercise, it is not a battery (*x*). And it is no battery if, by a sudden fright, a horse runs away with his rider, and runs against a man (*y*). So where upon an indictment for throwing down skins into a man's yard, being a public way, by which a person's eye was beaten out, it appeared by the evidence that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendants were acquitted (*z*).

Accident is not a defence when the defendant *meaning* to strike one person and unintentionally strikes another person. Thus if one of two persons, who are fighting, strikes at the other, and hits a third person unintentionally, this is a battery, and cannot be justified on the ground that it was accidental (*a*).

(*u*) Coward *v.* Baddeley, 4 H. & N. 478; 28 L. J. Ex. 260.

(*v*) 1 Hawk. c. 62, s. 2. Bac. Abr. tit. 'Assault and Battery' (B.). Griffin *v.* Parsons, Gloucester Lent Ass. 1754. Selwyn, N. P. (7th ed.), tit. 'Assault and Battery,' 26 n. (1).

(*w*) Stanley *v.* Powell [1891], 1 Q.B. 86. This decision is discussed and questioned, 1 Beven, Negligence (3rd ed.), 569.

(*x*) Weaver *v.* Ward, Hob. 134. 2 Rolle Abr. 548. Bac. Abr. tit. 'Assault and Battery' (B.). But if the act were done without sufficient caution, the soldier would be liable to an action at the suit of the party injured; for no man will be excused from a trespass, unless it be shewn to have been caused by inevitable necessity, and entirely without his fault. Dickenson *v.* Watson, Sir T. Jones, 205. Underwood *v.* Hewson, 1 Str. 595. 2 W. Bl. 896. Selw. (N. P.) tit. 'Assault and Battery,' 27. 1 Beven, Negligence (3rd ed.) 555.

(*y*) Gibbons *v.* Pepper, 4 Mod. 405; 2 Salk. 637; 1 Ld. Raym. 38. But if the horse's running against the man were occasioned by a third person whipping him, such third person would be the trespasser. Bac. Ab. tit. 'Assault and Battery' (B.). And upon the principles which have been before mentioned, such an act in a third person, causing death to any one, may, under certain circumstances, amount to felony. *Ante*, p. 781. The plaintiff was walking along a public street when the defendant seated on the box of his carriage, which was drawn by two horses and driven by a man then under his control, came down a cross street. The horses, frightened by the barking of a dog, ran away. The driver was unable to hold them in, but told the defendant to leave them to him. The defendant accordingly sat passive, while the driver, trying to turn the horses so as to prevent them from running into a shop window opposite, pulled them aside towards the spot where the plaintiff then happened to be; but, on nearing her, endeavoured vainly to draw them away from her. They ran against her, and she being hurt, sued the defendant for negligence, and trespass. The jury found the defendant free from negligence, and that the occurrence was mere accident. Held, that he was not liable in trespass. Holmes *v.* Mather, L. R. 10 Ex. 261; 44 L. J. Ex. 176.

(*z*) R. *v.* Gill and another, 1 Str. 190.

(*a*) James *v.* Campbell, 5 C. & P. 372, Bosanquet, J. Cf. Foster, Cr. L. 261. 'As the blow, if it had struck the party at whom it was aimed, would have been a battery, so it was though it struck another person; just in the same way as if a blow intended for A. hits and kills B., it will be murder or manslaughter, according as it would have been murder or manslaughter if the blow had hit A. and killed him.' C. S. G. See R. *v.* Hunt, 1 Mood. 93. In Hall *v.* Fearnley, 3 Q.B. 919, it was held that inevitable accident arising from superior agency is a

The prisoner, in striking at a man with whom he had been fighting, struck and wounded a woman beside him. He was indicted for unlawfully and maliciously wounding the woman. The jury found that the blow was unlawful and malicious, but the striking of the woman was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected. The prisoner was convicted, and it was held that the conviction was right (*b*).

Justification of the Use of Force.—The use of force against the person of another without his assent is in certain cases lawful, *e.g.* where the force is used (a) in the due execution of the law, (b) in lawful correction, (c) in defence of person or property.

Lawful Arrest.—The right to use force is correlative to the right to arrest, whether with or without written warrant from a judicial officer (*c*).

If an officer of justice has a warrant for the arrest of a man who will not suffer himself to be arrested, the officer may lay hands on the person to be arrested and use such force as is necessary to effect the arrest. And it may be lawful to lay hands on a man in order to serve civil process upon him (*d*).

The force used is limited to that necessary for the purpose of effecting the object in view, and if there is an excess of violence the officer is guilty of assault (*e*). Where one of the marshals of the City of London, whose duty it was on the day of a public meeting in Guildhall, to see that a passage was kept for the transit of the carriages of the members of the corporation and others, directed a person in the front of the crowd to stand back, and on being told by him that he could not for those behind him, struck him immediately on the face, saying, that he would make him, it was held that a more moderate degree of pressure ought to have been exercised, and some little time given to remove the party in a more peaceable way, and that consequently the marshal had been guilty of a too violent exertion of his authority (*f*).

An officer having a warrant to search for an illegal still in the defendant's house, the defendant asked to see the warrant, and it was given him, and he then refused to return it, upon which the officer endeavoured by force to retake it, and a scuffle ensued, it was held that the officer was justified in using so much violence as was necessary to retake the warrant, and no more (*g*).

defence under the general issue; but that a defence which admits that the accident resulted from an act of the defendant must be pleaded. In an action for assault, where the defendant had thrown a stick, and hit the plaintiff, but it did not appear that he threw the stick with the intention of hitting the plaintiff; Rolfe, B., is reported to have held that this was not sufficient to constitute an assault, as it did not appear for what purpose the stick was thrown; and it was therefore fair to conclude that it was thrown for a proper purpose, and that the striking of the plaintiff was merely accidental. Alderson *v.* Waistell, 1 C. & K. 358. But this ruling may well be doubted, at all events as far as relates to a civil suit. See *ante*, p. 882, note (*x*). C. S. G.

(*b*) R. *v.* Latimer, 17 Q.B.D. 359. In discussing R. *v.* Pembliton, L. R. 2 C. C. R. 119, where in throwing a stone at a man the prisoner broke a window, Bowen, J., suggested that, if in R. *v.* Latimer the facts were that the prisoner meant to strike a pane of glass and hit a person by accident, it might have been that the malice shewn would be insufficient.

(*c*) *Vide ante*, pp. 721 *et seq.*

(*d*) Harrison *v.* Hodgson, 10 B. & C. 445. See 2 Rolle Abr. 546.

(*e*) Levy *v.* Edwards, 1 C. & P. 40, Burrough, J.

(*f*) Imason *v.* Cope, 5 C. & P. 193, Tindal, C.J.

(*g*) R. *v.* Milton, M. & M. 107; 3 C. & P. 31, Tenterden, C.J.

The justification extends to persons lawfully acting in aid of the peace officer and to private persons lawfully engaged in effecting an arrest, and extends to preventing the escape before or after arrest of the person to be arrested and to preventing his rescue from others. The causing of death or grievous bodily harm is justifiable in cases where the arrest is for felony (*h*).

Arrest by Railway Officer.—On an indictment for assaulting J. S., it appeared that the prisoner got into an empty third-class carriage proceeding from Manchester to Stoke-upon-Trent, and got out on the wrong side at North Road Station, and being asked by the guard for his ticket, he said he had none, and had intended to get out at the station for Crewe. No other demand was made on the prisoner; but the guard ordered him to get into a second-class carriage, and locked the doors. The train then proceeded to Stoke, a distance of several miles. The prisoner, on getting out, was asked for his ticket; and on his not producing it, the second-class fare from Manchester to Stoke was demanded. It not being paid, the policeman at the station collared the prisoner, who gave him a blow and got away. He was pursued and retaken, when he cut the policeman's hand. The reason alleged for bringing the prisoner to Stoke was, that it was the headquarters of the railway authorities, and there was no mode of dealing with the prisoner at the North Road Station. Wightman, J., told the jury (after stating the facts that occurred at the North Road Station), 'the guard, instead of then taking him on the specific charge of going so far without his ticket, which perhaps he might have done, takes him in a second-class carriage to Stoke, several miles out of the way. A ticket from Manchester to Stoke is there demanded and afterwards the full fare. It seems to me that this is clearly beyond the law, and that the railway authorities had no right to demand the fare from North Road to Stoke. I do not give any opinion as to the right to convey a person refusing to produce his ticket at one station on to another, on the charge of not paying his fare for that part of the journey which the prisoner had voluntarily and fraudulently performed; but whatever might have been the situation of the parties, if, on demand and refusal of the ticket or fare at North Road, the charge was there made, and he had been conveyed to Stoke for the purpose of dealing with it; here, the arrest being for non-payment of the fare to Stoke, the apprehension was illegal, and the prisoner had a right to resist it' (*i*).

Lawful Correction.—A parent may chastise his child (*j*), a schoolmaster his pupil (*k*), and a master his apprentice (*l*), if the chastisement is moderate in the manner, the instrument, and the quality, and the child is old enough to appreciate correction (*m*). But an upper-servant cannot justify beating an under-servant for disobedience to orders (*n*).

(*h*) *Vide ante*, pp. 721, 727.

(*i*) R. *v.* Mann, 6 Cox, 461. See Chilton *v.* London and Croydon Rail. Co., 16 M. & W. 212. King *v.* Met. Dist. Rail. Co., 72 J. P. 294.

(*j*) 1 Hawk. c. 60, s. 23; c. 62, s. 2. Halliwell *v.* Counsell, 38 L. T. (N. S.) 176. This parental power is expressly preserved by 8 Edw. VII. c. 67, s. 37, *post*, p. 921.

(*k*) See Cleary *v.* Booth [1893], 1 Q.B. 654, and *ante*, p. 767.

(*l*) The right to chastise servants is recognised at common law. R. *v.* Mawgridge, 17 St. Tr. 57; Kel. (J.), 133; and see 33 Hen. VIII. c. 12, ss. 16, 19. But except as to servants to whom the master is *in loco parentis*, it cannot now be safely exercised. See Macdonell, Master and Servant (2nd ed.), 29, 30.

(*m*) R. *v.* Griffin, 11 Cox, 402, Martin, B.

(*n*) R. *v.* Huntley, 3 C. & K. 142, Platt, B.

The infliction of corporal punishment under the lawful sentence of a competent Court (*o*) is of course justifiable, if the punishment does not exceed the number of stripes prescribed by the sentence and is inflicted with the prescribed or a lawful instrument (*p*).

Use of Force by Commanders of Ships.—Officers of a ship, whether of the Royal Navy (*q*) or the merchant service (*r*), appear not now to be entitled to inflict corporal punishment, in port or at sea, on any of the crew, for disobedience to orders, or for any cause (*s*), except in the case of ship's boys in the Royal Navy (*t*), or apprentices to the sea service (*tt*). But the captain can justify the use for the purpose of maintaining good order and discipline on the ship, such force as he believes on reasonable grounds to be necessary and as is under the circumstances reasonable.

It was held in an old case that a defendant may justify even a *mayhem*, if done by him as an officer in the army, for disobeying orders; and that he may give in evidence the sentence of a council of war, upon a petition against him by the plaintiff; and that if, by the sentence, the petition is dismissed, it will be conclusive evidence in favour of the defendant (*u*).

Where parish officers, by force and against her consent, cut off the hair of a young woman who was an inmate of a workhouse, it was held an assault (*v*).

Consent.—The person assaulted may be too young to appreciate the nature of the act done or to do more than submit without actually consenting to it; and submission by a child in the hands of an older and stronger person and possibly acting under fear or a sense of constraining authority is not equivalent to consent. Where two boys of eight years of age submitted to indecent acts on the part of a grown-up man in ignorance of the nature of the acts to be done and done, the man was held to be rightly convicted of an indecent assault (*w*).

By the Criminal Law Amendment Act, 1880 (43 & 44 Vict. c. 45), in the case of an indecent assault on a child of either sex under thirteen, it is no defence that he or she consented (*x*).

Fraud.—A consent obtained by fraud, or threats, or violence, is no answer to proceedings for assault. Where the defendants told the mother of a child of which she had been delivered that it was to be taken to a nursery or institution to be brought up, and they put the child in a bag and hung it upon some park-pales at the side of a footpath, and it was likely that the putting a child of so tender an age into a bag and hanging the bag on the pales would cause its death; Tindal, C.J., held that the

(*o*) *Vide ante*, p. 215.

(*p*) Flogging is not now inflicted as a sentence of a court-martial, nor has any officer now any right to strike a soldier except in necessary defence, or in order to effect a lawful arrest. As to former law see R. *v.* Wall, 28 St. Tr. 51, 145.

(*q*) See p. 767.

(*r*) See 57 & 58 Vict. c. 60, ss. 220–238. Macdonell, Master and Servant (2nd ed.), 31.

(*s*) A contrary opinion seems at one time to have been held. *The Agincourt*, 1 Hagg. Adm. 271. Lamb *v.* Burnett, 1 Cr. & J. 291.

(*t*) 29 & 30 Vict. c. 108, s. 56, as modified by the King's Regulations (ed. 1908), Arts. 744, 789.

(*tt*) *Vide ante*, p. 884.

(*u*) Lane *v.* Hegberg, 1698, per Treby, C.J.; cited in Bull. (N. P.) 19.

(*v*) Forde *v.* Skinner, 4 C. & P. 239, Bayley, J.

(*w*) R. *v.* Lock, L. R. 2 C. C. R. 10; 42 L. J. M. C. 5. See R. *v.* Woodaston, 12 Cox, 180.

(*x*) As to consent in the case of sexual offences, *vide post*, p. 934 *et seq.* Though a girl of 12 is old enough to contract a lawful marriage, she cannot consent to unlawful carnal intercourse so as to relieve the male party to the intercourse from criminal responsibility.

defendants were guilty of an assault; for the mother gave consent in reliance on the pretence that the child was to be taken to some institution, and as that pretence was false, it was no consent at all (*g*).

Criminal responsibility for the use of any means intended to cause death nor to the doing of any act which is in itself an offence against the law, is not removed by the consent of the person on whom they are used, to the use of the means (*z*). The same rule applies as to the use of force likely to cause death or serious hurt, if used with knowledge of the consequences likely to ensue and with indifference and recklessness as to whether death or serious injury would ensue (*a*).

Consent may be given to acts done in the regular course of a lawful game (*b*), such as cricket or football, which, apart from consent, would be assault. Thus if two, by consent, play at cudgels, or singlestick, or wrestling, and one happens to hurt the other, it would not amount to a battery, as their intent was lawful and commendable, in promoting courage and activity (*c*). In playing such games disregard of the rules might afford evidence of hostile intent or recklessness, or that the act done was not of the class of act consented to by the person struck (*d*).

But this rule does not extend to protect persons who give blows in a duel with dangerous weapons (*e*), or in fencing with naked swords (*f*), nor in a fight by consent, whether for a prize or not (*g*), nor where the force used is such as to involve a breach of the public peace, and to affect the public as well as the person struck (*h*). And where a prize or other fight takes place, and a number of persons are assembled to witness it, if they have gone thither for the purpose of seeing the combatants strike each other, and were present when they did so, they are all in point of law guilty of an assault; and there is no distinction between those who concur in the act and those who fight (*i*); and it is not at all material which party struck the first blow, for if several are in concert, encouraging one another and co-operating, they are all equally guilty, though one only committed the actual assault (*j*). And if persons are voluntarily

(*g*) R. *v.* March, 1 C. & K. 496. Tindal, C.J., avoided saying whether the act would have been an assault if the mother had consented to all that was done. The acts of the prisoners would fall within 24 & 25 Vict. c. 100, s. 56, *post*, p. 904.

(*z*) *e.g.* illegal operations on women, *ante*, p. 756.

(*a*) *Ante*, p. 756.

(*b*) As to the unlawfulness of certain games or sports, *vide ante*, pp. 785, 786.

(*c*) Bac. Abr. tit. 'Assault and Battery,' referring to Dalton, c. 22. Bro. Coron. 229.

(*d*) See R. *v.* Bradshaw, 14 Cox, 83: charging at football.

(*e*) *Ex parte* Barronet, 1 E. & B. 1; Dears. 51. In 1 East, P.C. 269, it is said: In cases of friendly contests with weapons, which though not of a deadly nature may breed danger, there should be due warning given that each party may start upon equal terms. For if two were engaged to play at cudgels and the one made a blow at the other likely to hurt before he was on his guard and without warning and death ensued, the want of due and friendly warning would make such act amount to manslaughter.'

(*f*) 1 Hale, 473.

(*g*) In the notes to Bac. Abr. *ubi supra*, the case of Boulter *v.* Clarke, Abingdon Ass. *cor.* Parker, C.B., Bull. (N. P.) 16, is referred to, in which it was ruled that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful; and the case of Matthew *v.* Ollerton, Comb. 218, is also referred to as an authority, that if one license another to beat him, such licence is no defence, because it is against the peace.

(*h*) *Vide ante*, p. 785.

(*i*) R. *v.* Perkins, 4 C. & P. 537, Patteson, J. R. *v.* Hunt, 1 Cox, 177.

(*j*) Anon. 1 Lew. 17, Bayley, J. R. *v.* Lewis, 1 C. & K. 419. R. *v.* Coney, 8 Q.B. D. 534. *Ante*, p. 786.

present, the mere presence unexplained may, it seems, afford some evidence for the consideration of the jury, although voluntarily presence would not of itself be necessarily conclusive evidence of an assault (*k*).

In the case of dangerous exhibitions and performances, the question may arise as to how far consent can be given to acts involving danger to the life or limb of the person consenting. This is settled as to males under sixteen and females under eighteen, by the Dangerous Performances Acts, 1879 and 1897, *post*, p. 910.

Consent to a surgical operation frees the operator from criminal responsibility for assault, when freely given with knowledge of the purpose of the operation and when the purpose is lawful and the operation is performed with professional skill. And the trend of legal opinion is in favour of the proposition that no criminal responsibility is incurred by a surgeon who, with proper care and skill, and for the physical benefit of a sick person, performs on him a surgical operation even without his consent (*l*).

Defence of Person or Property.—The use of force is lawful for the necessary defence of self or others or of property; but the justification is limited by the necessity of the occasion and the use of unnecessary force is an assault (*m*).

Thus if one confines a friend who is mad, and binds him, &c., in such a manner as is proper in such circumstances; or if a man forces a sword from one who offers to kill another therewith; or if a man gently lays his hands upon another, and thereby stays him from inciting a dog against a third person; he cannot be indicted for assault or battery (*n*). So if A. beats B. (without wounding him, or throwing at him a dangerous weapon), who is wrongfully endeavouring, with violence, to dispossess him of his lands, or of the goods, either of himself or of any other person, which have been delivered to him to be kept, and will not desist upon A.'s laying his hands gently upon him, and disturbing him. And if a man beats, wounds, or maims one who is making an assault upon his own person, or that of his wife, parent, child, or master; or if a man fights with, or beats, one who attempts to kill any stranger; in these cases also it seems that the party may justify the assault and battery (*o*), and a wife may justify an assault in defence of her husband (*p*).

With respect to assaults by a master in defence of his servant, Lord Mansfield said: 'I cannot say that a master interposing, when his servant is assaulted, is not justifiable under the circumstances of the case; as well

(*k*) R. *v.* Coney, 8 Q.B.D. 534.

(*l*) By the Draft Code of 1880, cl. 68, 'Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit: provided that performing the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case.' The proposition contains no direct reference to the consent or dissent of the patient. It is accepted as the law by Sir J. F. Stephen (Dig. Cr. L. (6th ed.), Art. 226). It corresponds to part of s. 92 of the Indian Penal Code, and has been embodied in the Criminal Codes of Canada (Rev. Statt. Can. 1906, c. 146, s. 65); New Zealand (1893, No. 56, s. 69); Queensland (1899, No. 9, s. 282); Western Australia (1901, No. 14, s. 257); and Northern Nigeria.

(*m*) See R. *v.* Driscoll, C. & M. 214.

(*n*) 1 Hawk. c. 60, s. 23; Bac. Abr. tit. 'Assault and Battery' (C.).

(*o*) 1 Hawk. c. 60, s. 23, and the numerous authorities there cited. Bac. Abr. tit. 'Assault and Battery' (C.).

(*p*) Leward *v.* Baseley, 1 Ld. Raym. 62.

as a servant interposing for his master; it rests on the relation between master and servant' (*q*).

Son assault demesne is a good defence to an indictment for assault and battery (*r*). If one man strikes another a blow, or does that which amounts to an assault on him, that other has a right to defend himself, and to strike a blow in his defence without waiting till he is struck (*rr*), but he has no right to revenge himself; and if when all danger is past he strikes a blow not necessary for his defence, he commits an assault and battery (*s*). It is not, however, every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger; unless it happen accidentally, without any cruel or malignant intention, or after the blood was heated in the scuffle, but it must appear that the assault was in some degree proportionable to the mayhem (*t*). If a party raise up a hand against another, within a distance capable of the latter being struck, the other may strike in his own defence, to prevent him, but he must not use a greater degree of force than is necessary (*u*). For if the violence used be more than was necessary to repel the assault, the party may be convicted of an assault (*v*).

It should be observed, with respect to an assault by a man on a party endeavouring 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 case to oppose force to 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 (*w*). 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 a

(*q*) Tickel *v.* Read, Lofft. 215; and see 1 Hawk. c. 60, s. 24. In one old case it was said that a master cannot justify an assault in defence of his servant because he may have an action for loss of his services. Leward *v.* Baseley, 1 Ld. Raym. 62. 1 Salk. 407. Bull. (N. P.) 18. It is said that a servant cannot justify beating another in defence of his master's son, though he were commanded to do so by the master, because he is not a servant to the son, and that for a like reason a tenant may not beat another in defence of his landlord. 1 Hawk. c. 60, s. 24.

(*r*) 1 Hawk. c. 62, s. 3.

(*rr*) R. *v.* Carmen Deana, 73 J. P. 225; 25 T. L. R. 399, adopting the statement in Archbold, Cr. Pl. (23rd ed.), 837.

(*s*) R. *v.* Driscoll, C. & M. 412, Coleridge, J. Coke (Co. Litt. 162 *a*) cites from Bracton, *vim vi repellere licet, modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.* Bull. (N. P.) 18. As to when mere words will reduce a murder to manslaughter, see *ante*, p. 693.

(*t*) 1 East, P.C. 402.

(*u*) Anon. 2 Lew. 48, Parke, B.

(*v*) R. *v.* Mabel, 9 C. & P. 474, Parke, B. R. *v.* Whalley, 7 C. & P. 245, Williams, J.

(*w*) Green *v.* Goddard, 2 Salk. 641. In a case of this kind, however, it should seem that the violence must be considerable, and continuing, in order to justify the application of force by the owner, without some previous request to depart: at least, if the force applied be more than would be justified under a *molliter manus imposuit*: for in a case of assault and battery, where the defendant pleaded *son assault demesne*, and the plaintiff replied that he was possessed of a certain close, and that the defendant broke the gate and chased his horses in the close, and that he, for the defending his possession, *molliter insultum fecit* upon the defendant, the replication was adjudged to be bad; and that it should have been *molliter manus imposuit*, as the plaintiff could not justify an assault in defence of his possession. Leward *v.* Baseley, 1 Ld. Raym. 62. Bull. (N. P.) 19.

previous request (*x*). For 'there is a manifest distinction between endeavouring to turn a man out of a house or close into which he has previously entered quietly, and resisting a forcible attempt to enter: in the first case a request is necessary; in the latter not' (*y*). So, if one come forcibly and take away another's goods, the owner may oppose him at once, for there is no time to make a request (*z*). And the owner of goods (or his servant, acting by his command) which are wrongfully in the possession of another, may, after requesting him to deliver them up, justify an assault in order to repossess himself of them (*a*). It seems also that a person who has a right of way or other easement may justify using so much force as may be necessary to enable him to exercise that right, or to prevent another from interrupting it (*b*). But, in general, unless there be violence in the trespass, a party should not, either in defence of his person, or his real or personal property, begin by striking the trespasser, but should request him to depart or desist; and, if that is refused, should gently lay his hands upon him in the first instance, and not proceed with greater force than is made necessary by resistance (*c*). Thus, where a churchwarden justified taking off the hat of a person who wore it in church, at the time of divine service, the plea stated that he first requested the plaintiff to be uncovered, and that the plaintiff refused (*d*). And in all cases where the force used is justified, under the particular circumstances of the case, it must appear that it was not greater than was reasonably necessary to accomplish the lawful purpose intended to be effected (*e*). Therefore, though an offer to strike the defendant, first made by the prosecutor, is a sufficient assault by him to justify the defendant in striking, without waiting till the prosecutor had actually struck him first; yet, even a prior assault will not justify a battery, if such battery be extreme; and it will be matter of evidence, whether the retaliation of the defendant were excessive, and out of all proportion to the necessity or provocation received (*f*).

Procedure.—Except in the cases falling within 24 & 25 Vict. c. 100, ss. 44, 45 (*post*, pp. 897, 898), the person assaulted may take both civil and criminal proceedings against his assailant; for the penalty imposed in the criminal prosecution, and the damages to the party in the civil action, are perfectly distinct in their nature (*g*), but the Court of Queen's Bench refused to sentence a party convicted of an assault while an action was pending for the same assault (*h*).

There is no objection to including assaults on two persons in the same indictment (if they were committed as part of the same transaction) (*i*), nor to inserting several counts in the same indictment

(*x*) Tullay *v.* Reed, 1 C. & P. 6, Park, J. And see R. *v.* Meade, 1 Lew. 184. R. *v.* Wild, 2 Lew. 214.

(*y*) Polkinghorn *v.* Wright, 8 Q.B. 197.

(*z*) Green v. Goddard, 2 Salk. 641.

(*a*) Blades *v.* Higgs, 10 C. B. (N. S.) 713.

(*b*) Bird *v.* Jones, 7 Q.B. 742, Patteson, J., 2 Rolle Abr. 'Trespass,' p. 547 (E.), pl. 1 & 2, which rest on Y.B. 3 Hen. IV. f. 9, and 11 Hen. VI. f. 23.

(*c*) Weaver *v.* Bush, 8 T. R. 78. 1 Selw. N. P.), tit. 'Assault and Battery,' 39, 40.

(*d*) Hawe *v.* Planner, 1 Wms. Saund. 13.

(*e*) 1 East, P.C. 406.

(*f*) Bull. (N. P.) 18. 1 East, P.C. 406. See *ante*, pp. 692 *et seq.*

(*g*) Jones *v.* Clay, 1 B. & P. 191. 1 Selw. (N. P.) tit. 'Assault and Battery,' 27, note (2). 1 Hawk. c. 62, s. 4. Bac. Ab. tit. 'Assault and Battery' (D.).

(*h*) R. *v.* Mahon, 4 A. & E. 575, and see *Ex parte* ——, Gent., ibid., note, and R. *v.* Gwilt, 11 A. & E. 587.

(*i*) The reason for the rule is that assault

for distinct assaults, and it has long been the constant practice to receive evidence of several assaults upon the same indictment (*j*); nor is there any objection to an indictment charging an assault by two persons jointly. On such indictment either or both may be convicted according to the evidence (*k*). 'Cannot the King call a man to account for a breach of the peace, because he broke two heads instead of one?' (*l*).

Pleas.—Whatever is a legal justification or excuse for an assault or imprisonment, such as *son assault demesne*, the arrest of a felon, &c., may, upon an indictment, be given in evidence under the general issue (*m*).

As every battery includes an assault (*n*), it follows, that on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery it is sufficient (*o*).

Wherever a count for a misdemeanor contains a charge of assault accompanied with circumstances of greater or less aggravation, the jury may find the defendant guilty of a common assault, and acquit him of the circumstances of aggravation (*p*).

Punishment.—By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 47 (*q*), 'Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm (*r*) shall be liable, at the discretion of the Court, to be kept in penal servitude . . . (*s*), *and whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding*

is a misdemeanor only; and that the prosecutor is not, as in felony, required to elect on which count he will proceed. But if the joinder embarrass the defence the Court can quash the indictment or sever the trial of the counts.

(*j*) 1 Chit. Cr. L. 254. R. *v.* Davies, 5 Cox, 328.

(*k*) In two cases included in the sixth edition of this work, Vol. iii. pp. 317, 318, rulings are reported which seem to be incorrect and misleading. In the first, R. *v.* Troughton, 1 Cox, 197, on an indictment against two defendants for committing an assault, the prosecution proved an assault committed by one, with which the other had nothing to do, and it was urged that the latter was entitled to be acquitted, as an assault answering the description of that in the indictment had been proved, and, as there was only one count, more than one assault could not be proved; and it was held that the latter must be acquitted, on the ground that the assault proved was not the assault charged. It was then objected, for the other defendant, that as the count was for a *joint* assault, this defendant could not be convicted of an assault by him alone, and that he only came prepared to answer that joint assault; and it was held by Bullock, Commr., after consulting the Recorder of London, that this defendant must be acquitted. 'The second ruling is clearly wrong, and the two rulings are inconsistent.' C. S. G. In R. *v.* Gordon, 1 Cox, 259, on an indictment containing one count for an assault against two persons, an assault by one was proved, in which the other was not at all implicated, it was held by the same judge that one assault to which the indictment was applicable having been proved, evidence of other assaults could not be gone into. Mr. Greaves on this case says: 'This ruling is directly contrary to the second ruling in the last case. The point is not a question of law: it is merely a question for the discretion of the Court, and as any number of assaults may be tried under one indictment containing a count for each, there seems no good reason for confining the evidence on one count to the first assault that may happen to be proved. Stante *v.* Pricket, 1 Camp. 437, was cited in support of the objection.'

(*l*) Per Curiam in R. *v.* Benfield, 2 Burr. 984, over-ruling the contrary decision in R. *v.* Clendon, 2 Ld. Raym. 1572; 2 Str. 870.

(*m*) 1 Hawk. c. 62, s. 3. 1 East, P.C. 406, 428. Bac. Abr. tit. 'Assault and Battery.'

(*n*) *Ante*, p. 881.

(*o*) 1 Hawk. c. 62, s. 1.

(*p*) R. *v.* Oliver, Bell, 287. R. *v.* Yeadon, L. & C. 81. R. *v.* Taylor, L. R. 1 C. C. R. 194.

(*q*) Taken from 14 & 15 Vict. c. 100, s. 29.

(*r*) *Vide ante*, p. 853.

(*s*) For not less than three nor more than five years, or to imprisonment with or without hard labour for not over two years, 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212.

one year, with or without hard labour' (*t*). The Court may in addition to or as an alternative to the above punishments impose a fine and (or) put the offender under recognisances, with or without sureties, to keep the peace, and be of good behaviour (*u*), or release him on probation (*v*). As to the liability of the offenders to pay costs, see Book XII. Chapter V. tit. 'Costs,' *post*, Vol. ii. p. 2039.

Sect. II.—Of Certain Aggravated Assaults.

Most crimes classed as offences against the person involving assault or battery have been dealt with under their more special titles. But there remain certain forms of assault which are punishable more severely than common assault by reason of some circumstance of aggravation, either from the place in which, or the person upon whom, the assault is committed, or else from the great criminality of the purpose or object intended to be effected, or the amount of personal injury inflicted.

In Churches and Churchyards.—As to assaults in churches and churchyards or on ministers of religion, *vide ante*, pp. 401–408.

In Royal Palaces.—By the ancient law before the Conquest, fighting in the *King's palaces*, or before the King's judges, was punished with death (*w*). 33 Hen. VIII. c. 12, provided severe punishment for all malicious strikings by which blood was shed within any of the King's palaces or houses, or any other house, at such time as the royal person happened to be there abiding; but these provisions were repealed in 1828 (9 Geo. IV. c. 31, s. 1).

In Courts of Justice.—Striking in the King's superior *courts of justice* in Westminster Hall, or in any other place, while the Courts were sitting, whether the Court of Chancery, Exchequer, King's Bench, or Common Pleas, or before justices of assize, or Oyer and Terminer, was considered to be punishable even more severely than striking in the King's palace; perhaps for the reason that, those Courts being anciently held in the King's palace, and before the King himself, striking there included not merely contempt against the King's palace but something more, namely, the disturbance of public justice (*x*). So that, though striking in the King's palace was not punished with the loss of the offender's hand unless some blood were drawn, nor even then with the loss of lands and goods, the drawing of a weapon only upon a judge or justice in such Courts, though the party struck not, was regarded as a great 'misprision,' punishable by the loss of the right hand, perpetual imprisonment, and forfeiture of the party's lands during life, and of his goods and chattels (*y*). And a similar punishment might be inflicted on a man who, in the same Courts, and within their view, struck a juror or any other person, either with a weapon, or with hand, shoulder, elbow, or foot; but he was not deemed to be liable to such punishment if he made an assault

(*t*) The words in italics were new in 1861. The usual common-law punishment for assault was fine, imprisonment without hard labour and (or) the finding of sureties to keep the peace. See 4 Bl. Com. 217. 1 East, P.C. 406, 428.

(*u*) 24 & 25 Vict. c. 100, s. 71, *ante*, p. 218.

(*v*) *Ante*, p. 227.

(*w*) 4 Bl. Com. 124.

(*x*) 3 Co. Inst. 140. 4 Bl. Com. 125.

(*y*) Staundf. 38. 3 Co. Inst. 140, 141. 1 Hawk. c. 21, s. 3. 4 Bl. Com. 125. 1 East, P.C. 408. See R. *v.* Stobbs, 3 T. R. 737, 738.

only, and did not strike (*z*). And a man guilty of this offence could not excuse himself by shewing that the person so struck by him gave the first offence (*a*).

The three first counts of an information set forth a special commission for the trial of O. and others for high treason; and that, pending the sessions, after the acquittal of O., and before any order or direction had been made by the Court for his discharge, the defendants, in open Court, &c., made a great riot, and riotously attempted to rescue him out of the custody of the sheriff, to whose custody he had been assigned by the justices and commissioners; and, the better to effect such rescue and escape, did, at the said sessions, in open Court, and in the presence of the said justices and commissioners, riotously, &c., make an assault on one J. R., *beat, bruise, wound*, and ill-treat the said J. R., and thereby impede and obstruct the said justices, &c. There were two other counts in the information; the one for riotously interrupting and obstructing the justices in the holding of the session, and the other for a common riot (*b*). Two of the defendants having been found guilty generally, considerable doubt was intimated by Lord Kenyon whether the Court were not bound to pass the judgment of amputation, &c., for the offence, as laid in the three first counts; and the matter stood over for consideration. But before the defendants were again brought up to receive judgment, the Attorney-General said that he had received the royal command and warrant under the sign manual, whereby he was authorised to enter a *nolle prosequi* as to those parts of the information on which any doubt had arisen, or might arise, whether the judgment thereon were discretionary in the Court, and pray judgment only on such charges as left the judgment in their discretion; and, accordingly, a *nolle prosequi* was entered on the three first counts; and on the others the Court gave judgment against the defendants, of fine, imprisonment, and sureties (*c*).

A person who rescues a prisoner from any of the Courts which have been mentioned, without striking a blow, is said to be punishable by perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life; for this offence is, in its nature, similar to the other; but as it differs in this, that no blow is actually given, the amputation of the hand is excused (*d*). And for the like reason, an affray or riot near the said Courts, but out of their actual view, is said to be punishable by fine and imprisonment during pleasure, but not with the loss of the hand (*e*).

There has not since 1799 been any prosecution on indictment based on

(*z*) Staundf. 38. 3 Co. Inst. 140, 141. 1 Hawk. c. 21, s. 3. 4 Bl. Com. 125. 1 East, P.C. 410.

(*a*) 1 Hawk. c. 12, s. 4.

(*b*) See the precedent of this information 2 Chit. Cr. L. 208, *et seq.*

(*c*) R. *v.* Lord Thanet [1799], K. B. 1 East, P. C. 408, 409, 410. In R. *v.* Davis, 2 Dy. 188 *a*, 188 *b*; 73 E. R. 416, and the notes thereto, are various instances of the judgment having been executed to the fullest extent. One of them is remarkable for the speedy justice which appears to have been administered. 'Richardson, Chief Justice of C. B., at the assizes at Salisbury, in the summer of 1631, was assaulted by a prisoner condemned there for felony, who, after his condemnation, threw a brickbat at the said judge, and which narrowly missed; and for this an indictment was immediately drawn by Noy against the prisoner, and his right arm cut off and fixed to the gibbet upon which he was himself immediately hanged in the presence of the Court.'

(*d*) 1 Hawk. c. 21, s. 5. 4 Bl. Com. 125.

(*e*) 1 Hawk. c. 21, s. 6. 4 Bl. Com. 125. *Vide ante*, p. 427.

this antiquated view of the law (*f*). Assaults in Court are dealt with as contempts of the Court (*ante*, pp. 537 *et seq.*), or by indictment, and in the latter case the punishment meted out is that warranted by the Act of 1861.

It is said that, in order to warrant the higher judgment, the offence must be charged to have been committed in the presence of the King, or of the justices (*g*). And it seems also that in order to warrant such judgment, the indictment ought expressly to charge a stroke; though it does not appear whether any technical word would be necessary to be used for that purpose (*h*).

Superior Courts.—Though an assault in any of the King's inferior Courts of record did not subject the offender to lose his hand (*i*); yet, upon an indictment for such an assault, the circumstances under which it was committed would, doubtless, be considered as a matter of aggravation. And any affray or contemptuous behaviour in inferior Courts of record is summarily punishable as contempt of Court, by the judges there sitting (*j*), or where such offences are committed in a Court of summary jurisdiction by proceedings in the High Court (*k*).

As to assaults punishable as piracy see 11 Will. III. c. 7, s. 8, *ante*, p. 259; 7 Will. IV. & 1 Vict. c. 88, s. 2, *ante*, p. 266.

Assault with intent to Commit Felony.—It is a misdemeanor punishable by imprisonment, with or without hard labour, for not more than two years, to assault any person with intent to commit any felony (*l*). Assault with intent to commit murder (*m*), or robbery (*n*), are specially punishable, as are demands of property by menaces or force, with intent to steal (*o*). As to assaults with intent to ravish or to commit an unnatural offence, see *post*, pp. 942, 975.

Assaults on Officers of the Law.—By 24 & 25 Vict. c. 100, s. 37 (*p*), 'Whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorised, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years' . . . (*q*).

By sect. 38, 'Whosoever shall assault any person with intent to commit felony (*r*), or shall assault, *resist, or wilfully obstruct* any peace officer in the due execution of his duty (*s*), or any person acting in aid of such officer,

(*f*) The punishment of mutilation appears to have rested on the repealed portion of 33 Hen. VIII. c. 12.

(*g*) 1 East, P.C. 410. 1 Hawk. c. 21, s. 3.

(*h*) 1 East, P.C. 408, citing 1 Sid. 211.

(*i*) 3 Co. Inst. 141. 1 Hawk. c. 21, s. 10.

(*j*) 4 Bl. Com. 126. 1 Hawk. c. 21, s. 10.

(*k*) It is more usual to deal with the offence under the appropriate penal enactment.

(*l*) 24 & 25 Vict. c. 100, s. 38, *infra*, *i.e.* any felony, whether at common law or by statute, whenever passed.

(*m*) 24 & 25 Vict. c. 100, ss. 11–15, *ante*, pp. 840, 841.

(*n*) 24 & 25 Vict. c. 96, s. 42, *post*, p. 1127.

(*o*) *Vide post*, Vol. ii. pp. 1127, 1156.

(*p*) Taken from 9 Geo. IV. c. 31, s. 24 (E), and 10 Geo. IV. c. 34, s. 30 (I.).

(*q*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*r*) *Vide supra.*

(*s*) Upon an indictment, under this section, for assaulting police officers in the execution of their duty, it was objected that there was no offence, as the police were in plain clothes, and the defendants did not know they were constables; but it was held that the the offence was not assaulting them, knowing them to be in the execution

or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour' (*t*).

As to assaults occurring in the obstruction of officers executing civil process or in effecting a rescue, *vide ante*, pp. 551, 567.

By the Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 9, 'Where any person shall be charged with and convicted of any assault upon any officer of a workhouse or relieving officer in the due execution of his duty, or upon any person acting in aid of such officer, the Court may sentence the offender to the same punishment as is provided by law for an assault upon a peace officer (*u*), or revenue officer in the due execution of his duty' (*v*).

By the Poor Law Amendment Act, 1851 (14 & 15 Vict. c. 105), s. 18, the preceding clause was extended to 'an assault upon any person included under the word "officer" in the Poor Law Amendment Act, 1834 (5 & 6 Will. IV. c. 76), or upon any other person acting in his aid'; and by sect. 109 of the Act of 1834, the term 'officer' includes 'any clergyman, schoolmaster, person duly licensed to practise as a medical man, vestry clerk, treasurer, collector, assistant overseer, governor, master or mistress of a workhouse, or any other person who shall be employed in any parish or union in carrying this Act or the laws for the relief of the poor into execution, and whether performing one or more of the above-mentioned functions.'

By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 12, where any person is convicted of any assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the Court, be liable to either pay a penalty not exceeding twenty pounds, and in default of payment to be imprisoned with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months with or without hard labour.

By the Prevention of Crimes Amendment Act, 1885 (48 & 49 Vict. c. 75) s. 2, 'The provisions of 34 & 35 Vict. c. 112, s. 12, shall apply to all cases of resisting or wilfully obstructing (*vv*) any constable or peace officer when in the execution of his duty. Provided that in cases to which the said Act is extended by this Act, the person convicted shall not be liable to a greater penalty than five pounds, or in default of payment to be imprisoned, with or without hard labour, for a greater term than two months.'

of their duty, but assaulting them being in the execution of their duty. R. *v.* Forbes, 10 Cox, 362 (Russell Gurney, Recorder), approved in R. *v.* Maxwell, 73 J. P. 174.

(*t*) Taken from 9 Geo. IV. c. 31, s. 25 (E) and 10 Geo. IV. c. 34, s. 31 (I.). The section extends the former enactment to resisting and wilfully obstructing peace officers. Revenue officers were included in the former enactment, but are omitted in this, because assaults on them are provided for by 44 & 45 Vict. c. 12, s. 12, *ante*, p. 374; 53 & 54 Vict. c. 21, s. 11.

(*u*) Under 24 & 25 Vict. c. 96, s. 38, *supra*.

(*v*) As to the costs of prosecution, see *post*, Vol. ii. p. 2039.

(*vv*) See Bastable *v.* Little [1907], 1 K.B. 59.

By 14 & 15 Vict. c. 19, s. 11 (*w*), any person whatsoever may apprehend any person who shall be found committing any indictable offence in the night, and may convey or deliver him to any constable or police officer in order to his being conveyed, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law; and by sect. 12, 'If any person liable to be apprehended under the provisions of this Act, shall assault or offer any violence to any person by law authorised to apprehend or detain him, or to any person acting in his aid or assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years.'

24 & 25 Vict. c. 100, sect. 38 is not limited to assaults on a peace officer, but extends—

(i) To persons acting in aid of such officer (in the due execution of his duty); and

(ii) To any person who is assaulted with intent to resist the *lawful* apprehension or detainer of the assailant or another for *any offence* (whether indictable or not).

Head (i) applies whether the duty being executed relates to civil or criminal matters; but head (ii) is limited to the case of lawful arrests for a *criminal* matter.

The expression 'in the execution of his duty,' includes all cases in which the constable at common law or by statute is lawfully seeking to make an arrest without warrant or with a warrant regular on the face of it, or to prevent the commission of crimes or breaches of the public peace (*x*), or to execute a search warrant, lawfully issued (*y*), or is lawfully detaining his prisoner or conveying him before a judicial officer (*z*), or is using reasonable precautions to prevent escape (*a*). He appears also to be in the execution of his duty in searching a person who is conducting himself with violence, to see if he has weapons about him (*b*), or in searching a person arrested on suspicion of larceny or unlawful possession.

Head (ii) applies to resistance to arrest by a private person authorised by common law or statute to effect the arrest.

The words 'peace officer in the due execution of his duty' are wide enough to include the sheriff or his officers, when concerned in executing civil process (*c*), and the bailiffs of County Courts (*d*). The words are not restricted to arrests for crime and are wide enough to cover acts relating to civil proceedings, *e.g.* the service of summonses relating to civil matters

(*w*) *Ante*, p. 729.

(*x*) *Vide ante*, pp. 721 *et seq.*

(*y*) See Jones *v.* German [1896], 2 Q.B. 418. Crozier *v.* Cundey, 6 B. & C. 232. Parton *v.* Williams, 3 B. & Ald. 330. Smith *v.* Wiltshire, 2 B. & B. 619, and Theobald *v.* Crichmore, 1 B. & Ald. 227. 24 Geo. II. c. 44.

(*z*) He is bound to take his prisoner before a magistrate as soon as he reasonably can, and in the event of unreasonable delay (*i.e.* for three days) becomes a trespasser. Wright *v.* Court, 4 B. & C. 596.

(*a*) Handcuffing is legal where the prisoner has tried to escape, or where it is necessary to prevent him doing so. Wright *v.* Court, 4 B. & C. 596. R. *v.* Taylor, 59 J. P. 393. R. *v.* Lockley, 4 F. & F. 155.

(*b*) See Leigh *v.* Cole, 6 Cox, 329. Williams, J. Dillon *v.* O'Brien, 16 Cox, 245 (Ir.). It is established practice to search prisoners at police stations for weapons, poison, or for anything which may be evidence with respect to a criminal charge. See Met. Pol. Guide (ed. 1906), p. 556. Criminal Appeal Rules, 1908, r. 31 (*b*).

(*c*) Resistance to execution of writs by the sheriff is a misdemeanor, 50 & 51 Vict. c. 55, s. 8 (2), *ante*, p. 550.

(*d*) For summary remedy see 51 & 52 Vict. c. 43, s. 48; Lewis *v.* Owen [1894], 1 Q.B. 102.

within the jurisdiction of justices, and to revenue proceedings, *e.g.* attending to prevent the use of violence to a tax collector (*e*).

Sect. III.—Summary Proceedings for Assault.

In the case of common or minor assaults, instead of proceeding by indictment, it is usual to resort to the alternative summary remedy provided by the following enactments.

By 24 & 25 Vict. c. 100, s. 42, 'Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint *by or on behalf* of the party aggrieved (*f*), may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned *with or* without hard labour, for any term not exceeding two months (*g*) or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of five pounds; and if such fine as shall be so awarded, together with the costs (if ordered), shall not be paid, either immediately after the conviction or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine and costs be sooner paid' (*h*).

By sect. 43, 'When any person shall be charged before two justices of the peace with an assault or battery upon any male child whose age shall not in the opinion of such justices exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions

(*e*) R. *v.* Clark, 3 A. & E. 287. Much of this case turns on the authority of the collector under sections now repealed of the Land Tax Act, 1797 (37 Geo. III. c. 5).

(*f*) A prosecution under the section cannot be initiated by a police officer. Nicholson *v.* Booth, 57 L. J. M. C. 43. Cf. R. *v.* Wicklow JJ., 30 L. R. Ir. 633. But where the person assaulted, through age and infirmity, is in such a feeble state of health and so under the control of the assailant as to be incapable of instituting proceedings under this section, a third person may lay an information even though not in fact authorised by the party aggrieved. Pickering *v.* Willoughby [1907], 2 K.B. 296.

(*g*) Cumulative imprisonment for a period not exceeding in all six months may be imposed for several assaults committed on the same occasion. 42 & 43 Vict. c. 49, s. 18.

(*h*) Framed from 9 Geo. IV. c. 31, s. 27. Under that section the complaint could only be made by the party aggrieved. R. *v.* Deny, 2 L. M. & P. 230. This section, in order to enable parents and others to complain on the part of an injured child, permits the complaint to be made by any one on its behalf, and so it might under 14 & 15 Vict. c. 92, s. 2 (1). Where a complaint has been made the justices may proceed, though the parties have made a compromise. R. *v.* Wiltshire, 8 L. T. 242. But see 25 & 26 Vict. c. 50, s. 9, which was passed for the very purpose of enabling justices in Ireland to proceed, even where the party assaulted declined to complain. By 9 Geo. IV. c. 31, s. 27, the justices had only power to fine in the first instance; by 14 & 15 Vict. c. 92, s. 2, they may either fine or commit for two months; and under this clause they may either fine or commit. This clause also gives the justices power to commit to hard labour either in the first instance, or on default of payment of a fine. All summary proceedings under this section are taken under the Summary Jurisdiction Act, 1879, in England, and in Ireland under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93). The offences punishable under this and the next section are not offences as to which the accused can elect to be tried on indictment. See 42 & 43 Vict. c. 49, s. 17, *ante*, p. 17.

hereinbefore contained as to common assaults and batteries, may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused ; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of twenty pounds, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid, and, if the justices shall so think fit, in any of the said cases, shall be bound to keep the peace and be of good behaviour for any period not exceeding six months from the expiration of such sentence ' (*i*).

It would seem that the words ' aggravated nature ' mean aggravated by circumstances of violence or the like, and do not apply to indecent assaults which are indictable and not punishable on summary conviction. A person charged under sect. 43 may be convicted under sect. 42 (*j*).

By sect. 44, ' If the justices upon the hearing of any such case of assault or battery upon the merits where the complaint was preferred by or on the behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, and shall forthwith (*k*) make out a certificate (*l*) under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred ' (*m*).

(*i*) Taken from 16 & 17 Vict. c. 30, s. 1. The provisions of 8 Edw. VII. c. 67, *post*, pp. 918 *et seq.*, as to presumption of age, evidence, &c., apply to proceedings under ss. 42 & 43.

(*j*) See Stone, Justices' Manual (41st ed.), pp. 141–145.

(*k*) In R. *v.* Robinson, 12 A. & E. 672 (decided on the similar enactment, 9 Geo. IV. c. 31, s. 27), it was held that the certificate must be given before the justices separated ; but this was doubted in Thompson *v.* Gibson, 8 M. & W. 281. The act of granting the certificate is not judicial or discretionary, but ministerial only, and therefore ' forthwith ' does not mean forthwith upon the dismissal of the complaint, but forthwith upon the demand of it by the person entitled to it. Costar *v.* Hetherington, 1 E. & E. 802. Hancock *v.* Somes, 1 E. & E. 795.

(*l*) The certificate must state on which of the three grounds the complaint was dismissed, Skuse *v.* Davis, 10 A. & E. 635 ; and must be specially pleaded in an action. Harding *v.* King, 6 C. & P. 427. The production of the certificate is sufficient evidence of the dismissal by the justices without proof of their signature or official character, 8 & 9 Vict. c. 113, s. 1 ; and if the defendant appeared before the justices, 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, without producing the complaint or summons. R. *v.* Westley, 11 Cox, 139.

(*m*) This section is limited to the case where a complaint is made by or on behalf of the party aggrieved. 9 Geo. IV. c. 31, s. 27, only applied to a case where the complaint was made by the party aggrieved, and unless this clause had been limited as it is, any person who had committed an aggravated assault might have got some friend to make a complaint and get the case heard by the justices, on insufficient evidence, and might, by virtue of ss. 44 and 45, have deprived the party aggrieved of any remedy by action or indictment. Under 9 Geo. IV. c. 31, s. 27, where a party aggrieved made a complaint, and obtained a summons and served it on the defendant, but before the day for hearing, gave notice, both to the defendant not to attend, and to the magistrates' clerk that he should not attend, but the defendant attended, and claimed to have the information dismissed, and a certificate of dismissal granted, notwithstanding the prosecutor's absence, it was held that the justices were warranted in granting such certificate, and that it was a bar to an action of the assault. Tunnicliffe *v.* Tedd, 5 C. B. 553. Vaughton *v.* Bradshaw, 9 C. B. (N. S.) 103. As to s. 44 these cases are no authority ; for in order to

By sect. 45, 'If any person, against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted (*n*), shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause' (*o*).

By sect. 46, 'Provided, that in case the justices shall find (*p*) the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same: Provided also, that nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title (*q*) to any lands,

obtain a certificate under it the case must be heard 'upon the merits'; that is, the decision of the justices must be after having heard the evidence. 14 & 15 Vict. c. 93, s. 21 (1), required the justices to state in the certificate that the dismissal was on the merits, or that the assault was of a trifling or justifiable nature.

(*n*) Hartley *v.* Hindmarsh, L. R. 1 C. P. 353; 35 L. J. M. C. 255.

(*o*) Taken from 9 Geo. IV. c. 31, s. 28 (E); and see 14 & 15 Vict. c. 93, s. 21 (1). See the note to the last section. Several decisions occurred under the former enactment, whilst 1 Vict. c. 85, s. 11 (which authorised a conviction of an assault on an indictment for felony), was in force, as to the cases in which a plea of *autrefois* acquit and convict might be sustained, and these will be found, together with remarks upon them, in Greaves' Crim. Acts, p. 71 (2nd ed.); but as that enactment was repealed by 14 & 15 Vict. c. 100, s. 10, there cannot now be a conviction of a common assault upon an indictment for felony (as to indecent assault, see *post*, p. 955); and it seems clear that *autrefois acquit* or *convict* by the common law cannot be pleaded in any case, unless the prisoner might be convicted on the former indictment, either of the whole or at least of a part of the criminal charge contained in it. See R. *v.* Walker, 2 M. & Rob. 446. See *post*, Vol. ii. p. 1982. In R. *v.* Elrington, 1 B. & S. 688; 31 L. J. M. C. 14; 9 Cox, 86, the first count was for assaulting and doing grievous bodily harm to the prosecutor; the second for assaulting, and doing actual bodily harm to him; and the last for a common assault; and it was held that pleas of a dismissal of a complaint for the same assault under 9 Geo. IV. c. 31, s. 27, were a bar to the indictment, on the ground that the two first counts only charged the same assault with certain aggravations, and the last only charged the same assault. See R. *v.* Clare JJ. [1905], 2 Ir. Rep. 510.

It has been held that the words 'same cause' mean the same assault or same offence, and that the protection given by 24 & 25 Vict. c. 100, s. 45, is not limited to proceedings for the same cause of action. Therefore a person who has been convicted of a common assault on a married woman, and who has paid the whole amount adjudged to be paid, may rely on the protection given by this section as a bar to an action against him by the husband, for the loss he, as such husband, has sustained by the assault on his wife. Masper *v.* Brown, 1 C. P. D. 97; 45 L. J. C. P. 203. Where a servant in the course of his employment commits an assault his release under the section does not exonerate his master. Dyer *v.* Munday [1895], 1 Q.B. 742.

(*p*) Where the defendant had been convicted of a common assault, though it was alleged that the evidence shewed a felonious assault, and a *certiorari* was moved for on the ground that the justices had no jurisdiction, the Court of Queen's Bench held that the justices had *found* that the assault was not 'accompanied by any attempt to commit felony,' which they had jurisdiction to determine, Lord Tenterden relying especially on the words 'in case the justices shall *find* the assault or battery to have been accompanied by any attempt to commit felony' in 9 Geo. IV. c. 31, s. 29. Anon. 1 B. & Ad. 382. S. C. as R. *v.* Virgil, 1 Lew. 16. See *In re* Thompson, 6 H. & N. 193, where the information was for unlawfully assaulting and abusing a woman. *Ex-parte* Thompson, 3 L. T. (N. S.) 294; Wilkinson *v.* Dutton, 3 B. & S. 821; and R. *v.* French, 20 Cox, 200.

(*q*) See Latham *v.* Spalding, 2 L. M. & P. 378. R. *v.* Pearson, 39 L. J. M. C. 76: 11 Cox, 493.

tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any Court of justice.'

The justices have jurisdiction under this section to commit for trial even where the prosecution is not by nor on behalf of the person assaulted (*r*).

Assaults by Husbands or Wives.—By the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39) s. 4, 'Any married woman whose husband who shall have been convicted summarily of an aggravated assault within the meaning of sect. 43 of the Offences against the Person Act, 1861 (*ante*, p. 896), or whose husband shall have been convicted on indictment of an assault on her and sentenced to pay a fine of more than five pounds, or to a term of imprisonment exceeding two months . . . (*s*), may apply to any Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which any such conviction has taken place . . . for an order or orders under this Act: (*i.e.* for release from obligation to cohabit with her husband, custody of the children of the marriage, and maintenance, sect. 5). Provided that where a married woman is entitled to apply for an order or orders under this section on the ground of the conviction of her husband upon indictment, she may apply to the Court before whom her husband has been convicted, and that Court shall, for the purpose of this section, become a Court of summary jurisdiction and shall have the power without a jury to hear an application and make the order or orders applied for' (*s*).

An order cannot be made under the Act if the wife is proved to have been guilty of adultery, unless the husband has condoned, or connived at, or by his wilful neglect or misconduct induced to, the adultery (sect. 6).

(*r*) R. *v.* Gaunt, 18 Cox, 210.

(*s*) This Act takes the place of 41 & 42 Vict. c. 19. In R. *v.* Knowles, 65 J. P. 27, an order was made under the proviso in the case of a husband convicted and sentenced to eighteen months' imprisonment for throwing corrosive fluid on his wife with intent to burn (24 & 25 Vict. c. 100, s. 29, *ante*, p. 867).

CANADIAN NOTES.

OF ASSAULT AND BATTERY.

Sec. 1.—*Definition of Assault.*—Code sec. 290.

To discharge a pistol loaded with powder and wadding at a person within such a short distance that the party might have been hit, is an assault. R. v. Cronan (1874), 24 U.C.C.P. 106. And see, as to pointing fire-arms. Code sec. 122.

A blow struck in anger or which is intended or is likely to do corporal hurt is a criminal assault, notwithstanding the consent to fight of the person struck. R. v. Buchanan (1898), 1 Can. Cr. Cas. 442 (Man.).

A conviction for unlawfully assaulting V. by standing in front of the horses and carriage driven by the said V. in a hostile manner, and thereby forcibly detaining him, the said V. in the public highway against his will, was held bad, in stating the detention as a conclusion and not as part of the charge. It will not be inferred as a matter of law that standing in front of the horses was a forcible detention, there being no statement that the detention was by any other means than mere passive resistance. R. v. McElligott (1883), 3 O.R. 535.

Justification of the Use of Force in.

(*a*) *Lawful Arrest.*

Force in Executing Process.—Code sec. 39.

Re Arrest.—Where the officer executing a warrant releases the prisoner, at his request, for a temporary period on his promise to surrender himself, such does not constitute a voluntary abandonment of the arrest, and a re-arrest is justified upon the same warrant. R. v. O'Hearon (No. 2), 5 Can. Cr. Cas. 531.

(*b*) *Peace Officer Preventing Escape.*—Code sec. 41.

Shooting.—Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to prevent the escape of an accused person who is attempting to escape by flight. R. v. Smith (1907), 7 Western L.R. 92, 95, per Perdue, J.A.

(*c*) *Private Person Preventing Escape.*—Code sec. 42.

"It is the duty of every citizen to assist in the pursuit and capture of a criminal who is fleeing from arrest, when such citizen is called upon to do so by a peace officer." R. v. Smith (1907), 7 Western L.R. 92, 95, per Perdue, J.A.; and see Code sec. 167.

(*d*) *Preventing Escape in Other Cases.*—Code sec. 43.

(*e*) *Preventing Escape or Rescue of Arrested Prisoner.*—Code secs. 44, 45.

(*f*) *Preventing Breach of the Peace.*—Code sec. 46.

(*g*) *Arrest by Railway Officer.*—R.S.C. (1906) ch. 37, sec. 302.

(*h*) *By Commander of Ship to Maintain Discipline.*—Code sec. 64.

(*i*) *Lawful Correction of Child or Pupil.*—Code sec. 63.

School Teacher and Pupil.—A school teacher who inflicts unreasonably severe chastisement upon a pupil is criminally responsible, under Code secs. 63 and 66, for the excess of force, used, although the punishment occasional no permanent injury and was inflicted without malice. R. v. Gaul (1904), 8 Can. Cr. Cas. 178.

The following principles are laid down by Judge Chipman in the Nova Scotia case of R. v. Robinson (1899), 7 Can. Cr. Cas. 52:—

(1) The authority of a school teacher to chastise a pupil is to be regarded as a delegation of parental authority.

(2) Corporal punishment inflicted by a school teacher upon a pupil is presumed to be reasonable and for sufficient cause, until the contrary is shewn.

(3) Where there is a sufficient cause for punishing the pupil, and the chastisement produces only temporary pain and no serious injury, it will be presumed to be reasonable.

(4) Any punishment with an instrument calculated to produce danger to life or limb is unreasonable and unlawful.

(5) Any punishment protracted beyond the child's powers of endurance is excessive and unlawful.

(6) Any punishment which ordinarily may seriously endanger life, limbs, or health, or which disfigures the child, or causes any other permanent injury, is in itself unreasonable and unlawful.

(7) If there is any reasonable doubt whether the punishment was excessive, the school teacher should have the benefit of the doubt.

(*j*) *Consent.*

(1) *To the Infliction of Death.*—Code sec. 67.

(2) *By Child Under Fourteen.*—Code sec. 294.

(*k*) *Defence of Person or Property.*—Code sec. 53.

Defendant being justified by this section if the force used by him to repel an unprovoked assault was not meant to cause death or grievous bodily harm, or was no more than was necessary for the purpose of self-defence, and there being evidence which, if believed, would have enabled the jury to find for defendant, the trial Judge erred in charging the jury that there must be evidence that defendant could not otherwise preserve himself from death or grievous bodily harm. R. v. Ritter (1904), 8 Can. Cr. Cas. 31, 36 N.S.R. 417.

The trial Judge having instructed the jury that, to justify or excuse the homicide, the prisoner must be found to have had reason-

able grounds for apprehending imminent peril to his life or the lives of his wife and children, and having made no mention of a reasonable apprehension of grievous bodily harm as a ground of justification although the evidence pointed to both, a new trial was ordered. R. v. Theriault (1894), 2 Can. Cr. Cas. 444.

(*l*) *Self-defence in Case of Aggression.*—Code sec. 54.

(*m*) *Defence from Assault with Insult.*—Code sec. 55.

An assault is not justified by the circumstance that the person assaulted had then and there sworn at the defendant and used insulting language towards him but without any attempt to assault the defendant, whereupon the defendant assaulted the complainant. Wentzell v. Winacht (1907), 41 N.S.R. 406.

Defence of Person or Property.

(*a*) *Defence of Movable Property.*—Code sec. 56.

(*b*) *Defence with Claim of Right.*—Code sec. 57.

(*c*) *Defence without Claim of Right.*—Code sec. 58.

(*d*) *Defence of Dwelling House.*—Code sec. 59.

(*e*) *Defence at Night.*—Code sec. 60.

The mere threat of parties standing outside of a dwelling house that they will break in does not justify the householder in shooting at and wounding them, unless the householder has first warned them to desist and depart or that he would fire. Spires v. Barrick, 14 U.C.Q.B. 420.

(*f*) *Defence of Real Property.*—Code sec. 61.

The words are "if such trespasser resists such attempt." The word "such" applies to an attempt by force referred to in the former part of the section, and will not apply to mere words of warning or of request to leave. Packett v. Pool (1896), 11 Man. R. 275, 32 C.L.J. 523. The latter part of the section does not apply until there is an overt act on the part of the person in possession towards prevention or removal, and an overt act of resistance on the part of the trespasser. *Ibid.*

Trespass for assaulting the plaintiff, and shooting at and wounding him with a pistol. Plea, that the plaintiff and thirty others threatened to break into defendant's dwelling house where he was peacefully residing with his family, and to assault, tar and feather, and ride him on a rail; that they were armed and riotously assembled in front of the house, and apparently in the act of breaking into it to accomplish such threats; whereupon defendant, having good reason to believe and verily believing that they were then breaking into his house against his will, for the said purpose, in defence of himself and his house, and in order to prevent them from entering and tarring and feathering, etc., opposed such entrance, and in so doing unavoidably committed the trespasses in the declaration mentioned, as he law-

fully might, using no unnecessary force or violence, and doing no more injury to the plaintiff than was necessary to effect such purpose.

Held, on demurrer, plea bad, as shewing no defence, for before firing defendant should have warned the plaintiff to desist and depart, which was not averred. Spires v. Barrick, 14 U.C.Q.B. 420.

(*g*) *Entry of House or Land in Day-time to Take Possession.*—Code sec. 62.

Punishment.

Common Assault.—Code sec. 291.

Assault on Female.—Code sec. 292, as amended by 8 & 9 Edw. VII. ch. 9.

Assault Causing Actual Bodily Harm.—Code sec. 295.

Assault with Intent to Rob.—Code sec. 448.

A conviction for common assault would be a bar to a subsequent prosecution for assault occasioning bodily harm. Larin v. Boyd, 11 Can. Cr. Cas. 74.

The term "actual bodily harm" does not imply a wounding or breaking of the skin. R. v. Hostetter (1902), 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363.

In a prosecution for an assault occasioning actual bodily harm, it is improper to exclude evidence of statements sworn to by a witness for the prosecution at a preliminary enquiry, the record of the depositions upon which had been lost, as to what was said by the accused at the time of the assault, as such statements of the witness had reference to statements of the accused forming a part of the *res gestæ*. R. v. Troop (1898), 2 Can. Cr. Cas. 22.

The fact that a prisoner committed for trial for assault occasioning bodily harm was told by the constable removing him to gaol under the commitment that the assaulted party would die, is not evidence of an inducement or threat to the prisoner so as to make his subsequent question, "What do you think I will get—about 15 years?" inadmissible against him. The prisoner's question under the circumstances raised a strong inference that he was present when the injuries were inflicted. R. v. Bruce (1907), 12 Can. Cr. Cas. 275.

Sec. 2.—Of Certain Aggravated Assaults.

Punishment for.

Assault (*a*) with intent to commit indictable offences. Code 296(*a*).

(*b*) on officer in execution of his duty. Code sec. 296(*b*).

(*c*) with intent to resist lawful apprehension. Code sec. 296(*c*).

(*d*) with intent to rescue goods lawfully seized. Code sec. 296(*d*).

(*e*) within two miles of polling booth on election day. Code sec. 296(*e*).

Assault on Wife or Other Female Doing Bodily Harm.—8 & 9 Edw. VII. ch. 9, sec. 242.

Where a constable was assaulted while attempting to execute a warrant issued by two justices for non-payment of a fine and costs imposed on a person convicted of an offence, and the justice had jurisdiction over the offence, and the warrant was valid on its face, it was held that a conviction for the assault would lie notwithstanding the fact that part of the original conviction by the two justices was erroneous in awarding a punishment which was not authorized. R. v. King (1889), 18 Ont. R. 566. The offence of obstructing a peace officer in the execution of his duty is dealt with by Code secs. 168 and 169.

A fine as well as imprisonment may be imposed on the conviction of the accused, if tried either by a Court of criminal jurisdiction or by a "magistrate" under the Summary Trials Procedure. Sec. 1058, Ex parte McClements (1895), 32 C.L.J. 39.

A magistrate summarily trying, with the consent of the accused, a charge of aggravated assault has jurisdiction to award costs against the accused as well as to impose both fine and imprisonment. R. v. Burtress (1900), 3 Can. Cr. Cas. 536 (N.S.).

An assault on a constable attempting to serve a summons issued by a magistrate on information charging violation of the Canada Temperance Act is an assault on a peace officer in the due execution of his duty. R. v. MacFarlane, 16 S.C.R. 393.

Opening a railway switch with intent to cause a collision whereby two trains did come into collision, causing a severe injury to a person on one of them, is not an assault. In re Lewis, 6 O.P.R. 236.

Sec. 3.—Summary Proceedings for Assault.

Justice May Try Common Assault.—Code sec. 732.

Justice May not Try Assault.

When question arises as to—

(*a*) title to land.

(*b*) bankruptcy or insolvency, or

(*c*) execution under process of any Court of Justice. Code sec. 709.

Dismissal of Complaint.—Code sec. 733.

Release from Further Proceedings.—Code sec. 734.

Summary Trial of Indecent Assault (with Consent of Prisoner).—Code sec. 773.

Summary Trial of Assault on Officer Engaged in Execution of His Duty (with Consent of Prisoner).—Code sec. 773.

Where the accused found committing an offence is arrested without warrant by a peace officer, and on being brought before a police

magistrate a written charge not under oath is read over to him, and he thereupon consents to be tried summarily, the police magistrate has jurisdiction to try the case although no information has been laid under oath. R. v. McLean (1901), 5 Can. Cr. Cas. 67 (N.S.).

Proceedings on Arraignment.—Code sec. 783.

Code sec. 169 deals with resistance or obstruction to, and Code sec. 296(*b*) with assault on, an officer in the execution of his duty. Code secs. 773 and 783, treats of the trial of both offences.

The provisions of Cr. Code sec. 169 fixing the punishment for which anyone guilty of obstructing a peace officer shall be liable "on summary conviction," are controlled by Code secs. 773 and 778, and the charge cannot be summarily charged by a magistrate except the consent of the accused is given in conformity with sec. 778. R. v. Crossen, 3 Can. Cr. Cas. 153.

By sec. 709 it is provided that no justice shall hear and determine any case of assault or battery in which any question arises as to the title to any tenements, hereditaments or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any Court of justice. Rent payable under a lease of land is an incorporeal hereditament. Kennedy v. MacDonnell (1901), 1 O.L.R. 250.

A summary conviction for assault upon a female, causing bruises, will be presumed one of common assault under Code secs. 291 and 732, and not of an assault occasioning bodily harm under sec. 295 where there has been no election of summary trial. Larin v. Boyd, 11 Can. Cr. Cas. 74.

A summary conviction imposing a sentence of sixty days is not invalid where the statutory maximum is two months, unless there is a reasonable probability of the sixty days' term being in the particular case more than two months. R. v. Brindley (1906), 12 Can. Cr. Cas. 170, per Graham, E.J.; but see *contra* the decision of Russell, J., in the same case. And see note 12 Can. Cr. Cas. 173.

A magistrate holding a preliminary enquiry for an indictable offence may not proceed to summarily convict on the evidence given therein for both the accused and the prosecutor for a lesser offence included in the offence charged, although such lesser offence, if originally charged, would have been within his jurisdiction for trial. Ex p. Duffy (1901), 8 Can. Cr. Cas. 277.

Upon a summary trial for inflicting grievous bodily harm, the magistrate may convict instead for the lesser offence of common assault in like manner as a jury might do. The punishment which may be imposed by a city stipendiary magistrate convicting of common assault upon a summary trial for a greater offence under sec. 777 is that which is provided in case of conviction upon indictment.

i.e., one year's imprisonment or a fine of $100. R. v. Coolen (1903), 7 Can. Cr. Cas. 522.

Where the sentence imposed upon a summary trial by consent before a city stipendiary magistrate for common assault was, in the first instance, three months' imprisonment without mention of hard labour, and the minute of adjudication did not include hard labour, a formal conviction, including hard labour, and a commitment thereon in similar terms are invalid and the accused will be discharged on *habeas corpus*. Ex parte Carmichael, 8 Can. Cr. Cas. 19.

A city stipendiary magistrate holding a summary trial under Code sec. 777, may impose imprisonment not exceeding one year for common assault although Code sec. 291 specifies such punishment with the addition of the words "if convicted upon an indictment." Sec. 777 gives to police and stipendiary magistrates of towns and cities the power to award on summary trials held with the consent of the accused, the same punishment as an Ontario Court of General Sessions might impose on a trial on indictment. R. v. Hawes (1902), 6 Can. Cr. Cas. 238, per Graham, E.J. In the same case Townshend, J., held, that upon a summary trial for common assault, the imprisonment authorized by Code sec. 291 can only be imposed in the first instance, and that where a fine is imposed the imprisonment in default of payment thereof is controlled by Code sec. 739(*b*) and is therefore limited to three months.

CHAPTER THE SEVENTH.

OF FALSE IMPRISONMENT, KIDNAPPING, AND CHILD-STEALING.

SECT. I.—FALSE IMPRISONMENT.

FALSE imprisonment is unlawful and total restraint of the personal liberty of another, whether by constraining him or compelling him to go to a particular place (*a*) or by confining him in a prison or police-station or private place, or by detaining him against his will in a public place (*b*). It usually, but not necessarily involves an assault (*c*) or battery (*d*) or some degree of threatened or actual violence to the person (*e*); but the essential element in the offence is the unlawful detention of the person or the unlawful restraint on his liberty. Such interference with the liberty of another's movements is unlawful unless it can be justified at common law or by statute as having been made under the lawful process or order of a Court of Justice or a competent official, or in exercise of a lawful authority to arrest without such warrant or order in respect of an offence committed, or to restrain the person imprisoned from committing some crime or act dangerous to others. Thus it is false imprisonment to detain a

(*a*) Pocock *v.* Moore, Ry. & M. 321, where the defendant had given a man in charge of a police officer to be taken to a police station.

(*b*) 2 Co. Inst. 589. Com. Dig. tit. 'Imprisonment' (G.). 3 Bl. Com. 127. In the Queensland Criminal Code, 1899, the common-law offence is thus described: 'any person who unlawfully confines or detains another in any place against his will, or otherwise unlawfully deprives another of his personal liberty is guilty of a misdemeanor.' In Bird *v.* Jones, 7 Q.B. 742, the majority of the Court held that where the plaintiff in attempting to go in a particular direction was prevented from going in any direction but one, not being that in which he endeavoured to pass, it was not an imprisonment, and this, whether the plaintiff had or had not a right to pass in the first-mentioned direction. 'A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing: he must be prevented from leaving that place, within the ambit of which the party imprisoning him would confine him, except by prison breach.' Coleridge, J., said: 'In general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and it is not necessary in order to constitute an imprisonment that a man's person should be touched. The compelling a man to go in a given direction against his will may amount to imprisonment.' Patteson, J., said: 'Imprisonment is a total restraint of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it bring on him.' See also Warner *v.* Riddiford, 4 C. B. (N. S.) 180. Where the schoolmaster of a Board School kept in a child for not preparing his home lessons, it was held that he was liable to be convicted of an assault, since the Education Acts do not authorise the setting of Home lessons. Hunter *v.* Johnson, 13 Q.B.D. 225.

(*c*) R. *v.* Linsberg [1905], 69 J. P. 107, Bosanquet, Common Serjeant.

(*d*) Emmett *v.* Lyne, 1 B. & P. (N. R.) 255. A contrary view is expressed in Buller, (N. P.) 22, and is said to have been adopted by Kenyon, C.J. in Oxley *v.* Flower 2 Selwyn (N. P.) tit. 'Imprisonment' (I.).

(*e*) See 3 Bl. Com. 127. Com. Digest, tit. 'Imprisonment (H.). Bac. Abr. tit. 'Trespass,' (D. 3). 2 Selw. (N. P.) tit. 'Imprisonment.' Clerk and Lindsell on Torts (3rd ed.), 177. Addison on Torts (8th ed.), 167.

prisoner after his acquittal (*f*) or after his term of imprisonment has expired (*g*); and detention upon warrant or process which is regular in form is unlawful if the warrant is executed at an unlawful time, *e.g.* in case of civil process, on a Sunday (*h*), or on civil process in a privileged place, such as a Royal palace (*i*) or a Court of justice (*j*) or of a person privileged from arrest (*k*).

False imprisonment is indictable (*l*) at common law as well as actionable, and is punishable by fine and (or) imprisonment without hard labour (*m*). But it is unusual to proceed by indictment for false imprisonment alone, though the fact of illegal detention may be stated as matter of aggravation in an indictment for assault and battery.

In R. *v.* Lesley (*n*), the master of a British merchant ship was indicted for false imprisonment of certain Chilians whom he had received on board his ship in Chilian waters under contract with the Chilian government to convey them to Liverpool. On a case reserved it was held that he had been properly convicted on the indictment, inasmuch as the detention of the Chilians in the ship after it left Chilian waters was wrongful by the law of the flag, and being intentionally planned and executed in the pursuance of the contract, was in law indictable as false imprisonment.

In R. *v.* Linsberg (*o*), on an indictment for false imprisonment it was ruled that mere false imprisonment without belief in the existence of any authority, was indictable, although no actual assault or battery took place.

Sect. II.—Of Kidnapping.[1]

The stealing and carrying away, or secreting of any person of any age or either sex against the will of such person, or if he be a minor against

(*f*) Ince *v.* Cruikshank, 20 Cox, 210.

(*g*) Migotti *v.* Colvill, 4 C. P. D. 323.

(*h*) 29 Car. II. c. 7. Arrest for crime on Sunday is lawful. 11 & 12 Vict. c. 42, s. 4. Hawkins *v.* Ellis, 16 M. & W. 172. *Ex parte* Eggerton, 23 L. J. M. C. 41. Johnson *v.* Coultson, Sir T. Raym. 250, and see Anon., Willes, 459. Atkinson *v.* Jameson, 5 T. R. 25. R. *v.* Myers, 1 T. R. 25.

(*i*) Mather, Sheriff Law, 181. Att.-Gen. *v.* Dakin, L. R. 4 H. L. 338. Special provision is made in the Metropolitan Police Acts for the police of Royal Palaces.

(*j*) Ibid. This does not apply if the arrest is by order of the Court itself, *e.g.* for contempt of court.

(*k*) *e.g.* in the case of purely civil process a member of Parliament during the Session (*In re* Gent, 40 Ch. D. 190; *Re* Onslow's and Whalley's cases, L. R. 9 Q.B. 208), a barrister or solicitor *eundo, morando, et redeundo* from a Court on professional business, and parties and witnesses in a cause *eundo, morando et redeundo*, and clergymen in performing religious rites and duties (24 & 25 Vict. c. 100, s. 36). See Mather, Sheriff Law, 182. Short and Mellor, Cr. Pr. (2nd ed.) 347. As to assaults on foreign diplomatic officers, *vide ante*, p. 299.

(*l*) 1 Hawk. c. 60, s. 7. 4 Bl. Com. 218. For precedents of indictments for assaults and false imprisonment, see Cro. Circ. Comp. (10th ed.), 79. 2 Stark. Cr. Pl. (2nd ed.) 385, 386. 3 Chit. Cr. L. 835 *et seq.* Archb. Cr. Pl. (23rd ed.) 891.

(*m*) *Ante*, p. 246.

(*n*) Bell, 220. This case was cited with approval in Phillips *v.* Eyre, L. R. 4 Q.B. 225, 240, on the question of the justification under Chilian law of what was done in Chilian waters. Cf. Canadian Prisoners' case, 9 A. & E. 7, 31.

(*o*) [1905] 69 J. P. 107, Bosanquet Common Serjeant. Cf. Hunter *v.* Johnson, 13 Q.B.D. 225.

American and Colonial Notes.

[1] It is said in America that a man would be justified in resisting to the death an attempt to forcibly carry him out of his country. See Bishop, Amer.Cr.L. i. s. 868(3). Kidnapping need only be the sending of the person to any other place. See S. *v.* Rollins, 8 N. H. 550, and it is suggested that a mere intent to carry away is sufficient.

the will of his friends or lawful guardians, sometimes called *kidnapping*, is an offence at common law, punishable by fine and imprisonment without hard labour (*p*). The most aggravated form of kidnapping is the forcible abduction or stealing and carrying away of any person from his own country into some other (*q*), or to parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from captivity (*r*). The carrying away of females is usually termed abduction, and the statutes punishing various forms of such abduction are dealt with *post*, p. 959. By the Habeas Corpus Act, 1679 (31 Car. II. c. 2) s. 11, 'for preventing illegal imprisonment in prisons beyond the seas,' it is enacted 'that no subject of this realm, that now is or hereafter shall be an inhabitant or resiant of this Kingdom of England, dominion of Wales or Town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier or into any parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of His Majesty, his heirs and successors.' Such imprisonment is then declared to be illegal; and an action for false imprisonment is given to the party, with treble costs, and damages not less than five hundred pounds (*s*). The section then proceeds thus:—'And the person or persons who shall knowingly frame, contrive, write, seal or countersign, any warrant for such commitment, detainer, or transportation, or shall so detain, imprison, or transport, any person or persons, contrary to this Act, or be any ways advising, aiding, or assisting therein,' being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within England, &c., or the dominions thereunto belonging, and shall incur the pains, &c., of the Statute of *Præmunire* (16 Rich. II. c. 5), and shall be incapable of any pardon from the King of such forfeitures or disabilities (*t*). Sect. 15 provides that offenders may be sent to be tried where their offences were committed, and where they ought to be tried. Sect. 16 enacts, that prosecutions for offences against the Act must be within two years after the offence committed, if the party grieved be not then in prison; and if he be in prison, then within two years after his decease, or delivery out of prison, which shall first happen.

Though in terms applied to subjects the Act appears to extend to persons owing temporary allegiance, and the removal of alien friends

(*p*) 1 East, P.C. 429, 430. R. *v.* Baily. Comb. 10; 90 E. R. 312. See U. S. Statt. Rev. (ed. 1873), ss. 5525–7). By the Queensland Criminal Code, 1899, s. 354, 'any person who forcibly takes or detains another with intent to compel *that other person to work for him against his will*' is said to commit an offence at common law described in the Code as kidnapping.' As to Indian law, see Mayne, Criminal Law of India (ed. 1896), 168, 637.

(*q*) 43 Eliz. c. 13, which provided for the punishment of kidnapping in the Border counties was repealed in 1826 (7 & 8 Geo. IV. c. 27).

(*r*) 1 East, P.C. 430.

(*s*) See Designy's case, T. Raym. 474; 83 E. R. 247.

(*t*) S. 12 excepts persons who have contracted in writing to be transported in beyond seas, and have received earnest on the contract, and s. 13 excepts convicted felons who have prayed to be transported and have been remanded to prison for that purpose.

Bishop, ii. s. 750. It is not clear how far fraud or threats are sufficient, without any force being used, to constitute the offence of kidnapping under American statutes. See Bishop ii. s. 752. By the law of the United States Rev. Statt, s. 5377, it is an offence to bring into America any person of colour kidnapped in any other country.

from the realm would seem to be unlawful unless effected in accordance with the Extradition Acts and Treaties or the Aliens Act, 1905 (5 Edw. VII.c. 13) (*u*).

As to the slave trade and the kidnapping of Pacific Islanders, see *ante*, Book II. Chapter II. pp. 271 *et seq.*

Sect. III.—Of Child-Stealing.

By 24 & 25 Vict. c. 100, s. 56, 'Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, 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 may belong, and whosoever shall, with any such intent, receive or harbour 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, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . (*v*), and, if a male under the age of sixteen years, with or without whipping: Provided that no person who shall have claimed any right to the possession of such child, *or shall be the mother* or shall have 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' (*w*).

The provisions as to evidence, &c., of the Children Act, 1908 (*x*), apply to this offence.

In R. *v.* Duguid (*y*), it was held that a conspiracy with the mother of a child under fourteen to carry the child away from its lawful guardian was indictable even if the mother could not herself be convicted of an offence against sect. 56 or of a conspiracy to commit it (*z*).

A person may be convicted under this section even though the child is no longer in his custody and there is no evidence to shew where it is (*a*). The force or fraud may be committed on the parent or guardian of the child, or on the child itself, or upon any other person (*b*).

(*u*) *Ante*, p. 208. As to the right to exclude or expel aliens, see Musgrove *v.* Chung Teeong Toy [1891], A. C. 272. Att.-Gen. for Canada *v.* Cain and Gilhula [1906], A. C. 542. Robtelmes *v.* Brenan [1906], 4 Australian C. L. R. 395. *Law Quarterly Review*, 1890, p. 27.

(*v*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892.

(*w*) Taken from 9 Geo. IV. c. 31, s. 21 (E), and 10 Geo. IV. c. 34, s. 25 (I). The word 'unlawfully' is substituted for 'maliciously,' which was inaccurately used in the former enactments. The age of the child is extended from ten to fourteen years, and 'guardian' is introduced; and in the proviso words are added to include the mother of an illegitimate child.

(*x*) *Post*, p. 918.

(*y*) 75 L. J. K. B. 470; 21 Cox, 200; 70 J. P. 294 (C. C. R.).

(*z*) An application to quash a warrant issued against the mother was refused. The Court declined to decide the question of criminal liability of the mother on such an application. See *ex parte* Chetwynd, 43 L. J. (Newsp.), 125, 223.

(*a*) R. *v.* Johnson, 15 Cox, 481 (C. C. R.).

(*b*) R. *v.* Bellis, 62 L. J. M. C. 155; 17 Cox, 660 (C. C. R.), over-ruling R. *v.* Barrett, 15 Cox, 658, where A. L. Smith, J., held that the force must be on the child.

SECT. IV.—ILLEGALLY LEAVING MERCHANT SEAMEN BEHIND (*c*).

By the Merchant Shipping Act, 1906 (6 Edw. VII. c. 48) s. 43 (*d*), 'A person belonging to a British ship shall not wrongfully force a seaman (*e*) on shore and leave him behind, or otherwise cause a seaman to be wrongfully left behind at any place either on shore or at sea, in or out of His Majesty's dominions, and if he does so he shall in respect of each offence be guilty of a misdemeanor (*h*).

By sect. 36 (1), 'The master of a British ship shall not leave a seaman (*d*) behind at any place out of the United Kingdom, ashore or at sea, except where the seaman is discharged in accordance with the Merchant Shipping Acts, unless he previously obtains endorsed on the agreement with the crew, the certificate of the proper authority (*f*) as defined for that purpose in this Act stating the cause of the seaman being left behind, whether the cause be unfitness or inability to proceed to sea, desertion, or disappearance or otherwise (*g*).

. . . . . .

(3) If the master of a ship fails to comply with this section he shall (without prejudice to his liability under any other provision of the Merchant Shipping Acts, be guilty in respect of each offence of a misdemeanor (*h*), and in any legal proceeding for the offence it shall be on the master to prove that the certificate was obtained or could not be obtained without unreasonable delay to the ship or was unreasonably withheld.'

As to the jurisdiction and venue on trials for these offences, see 57 58 Vict. c. 60 ss. 684, 685, 686, 687 (*ante*, p. 43).

On an indictment on 5 & 6 Will. IV. c. 19 (rep.), against a master of a vessel for leaving one of his crew at Quebec, in Lower Canada, for the defence a certificate was put in evidence which stated that the defendant appeared before E. B. a commissioner for carrying the Act into effect, and being duly sworn, said that the seaman in question did desert from the vessel while at Quebec, and was then absent without leave. It was held that this certificate was insufficient, inasmuch it did not certify the facts as ascertained by the proper officer, that the captain deposed to certain things before him (*i*).

The defendant was master of a merchant ship, belonging to a subject of the United Kingdom (*j*), namely, J. H. and E. W. and H. G. were

(*c*) 'Marooning.'

(*d*) This section re-enacts with variations 57 & 58 Vict. c. 60, s. 187, which took the place of 17 & 18 Vict. c. 120, s. 205, which section superseded and replaced the earlier enactments, 5 & 6 Will. IV. c. 19, ss. 40, 42 and 7 & 8 Vict. c. 112, s. 1.

(*e*) Including apprentices to the sea service. 6 Edw. VII. c. 48, s. 49 (2).

(*f*) The proper authority in a foreign country is a British Consular official, or, if there be none, two, or if there are not two, one British merchant; in a British possession, the Chief Officer of Customs at or near the place. 6 Edw. VII. c. 48, s. 49 (1). The authority is to examine into the grounds of application, and may take evidence on oath, and may grant or refuse the certificate, but may not unreasonably refuse it. 6 Edw. VII. c. 48, s. 36 (2).

(*g*) This section supersedes 57 & 58 Vict. c. 60, s. 188.

(*h*) Punishable under 57 & 58 Vict. c. 60, s. 680, by fine or imprisonment with or without hard labour for not over two years on a conviction on indictment. It may be prosecuted summarily, in which event the maximum fine is £100, and the maximum term of imprisonment is six months with or without hard labour.

(*i*) R. *v.* Smison, 1 Cox, 188, Bullock, Commr., after consulting the Recorder.

(*j*) It would seem to be enough to name or describe the ship sufficiently to identify her, or to aver that she is British.

persons belonging to the crew, duly engaged to serve in a voyage, which was not then completed; the indictment alleged that the defendant at B. unlawfully, wilfully, and wrongfully did leave the said E. W. and H. G. behind on shore, before the completion of their voyage, on the plea that they were not in a condition to proceed on the voyage, he not having obtained a previous certificate in writing of the said consul or of any such functionary of their not being in such condition, there being time to obtain such certificate (*k*). It appeared that E. W. and H. G. were both ill when the vessel put into B. on her voyage, and went ashore, and saw the doctor, who said they were not sick enough to be left on shore, and go to the hospital, as they wished; they then went to the English consul, who said he could do nothing without the doctor's certificate, that they came again and asked for their clothes, and the mate, believing that they had got their discharge, though they did not say so, let them have them; that they were very ill, and if they had not gone on shore at B. and got medical advice, one of them would have died. The collector of customs of the port of Harwich produced a certificate of the registry of the ship with the name J. H. in it, which he knew to be his signature, but did not see him write it: the declaration was signed by him. He knew H. personally. He did not know where he was born: he was a British subject: he knew he was so by the declaration which he had made. He believed him to be an Englishman. Cresswell and Coleridge, JJ., were of opinion, first, that the allegation of ownership was a material allegation, and must be proved as laid; secondly, that the 41st (*l*) and 42nd sections of 5 & 6 Will. IV. c. 19, did not create separate offences, but that they should be taken together, and were intended to shew that certain conduct on the part of the seaman will not excuse the captain, unless he produce the required certificate; and therefore, thirdly, that on this indictment, which charged the defendant with wrongfully and wilfully leaving behind him two persons belonging to his crew, the only answer he could give would be either to prove the certificate, or shew the impossibility of obtaining it; and not having done either of these things, if the jury believed the evidence, he must be found guilty (*m*).

(*k*) The count concluded with an averment that the defendant was found within the jurisdiction of the Central Criminal Court, which appears to be now unnecessary. See *post*, p. 981.

(*l*) *Quære*, 40th.

(*m*) R. *v.* Dunnett, 1 C. & K. 425.

CANADIAN NOTES.

OF FALSE IMPRISONMENT, KIDNAPPING, AND CHILD-STEALING.

Sec. 1.—*False Imprisonment.*

This is not the subject of any provision of the Code. It is, however, still an offence at common law.

To compel a man to go in a given direction against his will may amount to an imprisonment; but if a man merely obstructs the passage of another in a particular direction whether by threats of personal violence or otherwise, leaving him at liberty to stay where he is or go in any other direction if he pleases, he cannot be said to thereby imprison him. Bird v. Jones (1845), 7 Q.B. 742, per Patteson, J.

Detention of a prisoner after expiry of his sentence is false imprisonment. Moone v. Rose (1869), L.R. 4 Q.B. 486.

Sec. 2.—*Kidnapping.*—Code sec. 297 (as amended by 8 & 9 Edw. VII. ch. 9).

Sec. 3.—*Child Stealing.*—Code sec. 316.

The child's own father may be guilty of child-stealing within the Code, if after a divorce by a Court of competent jurisdiction and the award thereon of the custody of the child to the mother, the father wilfully removes the child from her custody. R. v. Watts, 5 Can. Cr. Cas. 538.

Where a divorce decree of a Court of competent jurisdiction in the United States has awarded the custody of a child to the father as against the mother, and the mother thereafter removes and conceals the child for the purpose of evading the decree, a *primâ facie* case for extradition is thereby made out against the mother upon a charge of child-stealing. And, semble, the offence of child-stealing under the Code, may be complete against the child's mother although the father, to whom the child's custody has been awarded, has never had any actual separate possession of the child. Re Lorenz (1905), 9 Can. Cr. Cas. 158.

Sec. 4.—*Illegally Leaving Merchant Seaman Behind.*

R.S.C. (1906), ch. 113, secs. 265, 266.

CHAPTER THE EIGHTH.

OF NEGLECT AND ILL-TREATMENT OF THE YOUNG, THE HELPLESS AND THE INSANE.

SECT. I.—COMMON LAW.

IT is an indictable misdemeanor at common law to refuse or neglect to provide sufficient food or other necessaries for any person such as a child, apprentice, or servant, unable to provide for and take care of himself, whom the party is obliged by duty or contract to provide for; so as thereby seriously to injure health (*a*). The obligation is, it would seem, limited to cases where the person neglected is of tender years or helpless or so dominated by the parent or employer as to be unable to do for itself (*b*). It has been extended to cases where an aged or sick person, neither servant nor apprentice, but under the care or control of another, is neglected so as to cause death or injury to health (*c*). Where an indictment stated that W., 'an infant of tender years,' was placed 'under the care and control of' the prisoners as a servant, and that it was their duty to supply her with sufficient food, &c., and also to permit her to have sufficient food, &c., and that they neglected to supply her with sufficient food, &c.; and refused to let her have sufficient food, &c.; whereby her health was injured. W. was between fourteen and seventeen years of age during the time of the ill-treatment alleged, and it did not appear that she was prevented from going out and complaining of the treatment she received. It was held, first, that W. was not an infant of tender years. A person of tender years is a person incapable of acting or judging for himself. And children of much earlier age may contract marriage and other relations, and are competent in law to act for themselves. Secondly, that the terms 'under the care and control' of the prisoners meant under such control as to be prevented from acting for herself, and that this girl was a free agent; and, therefore, the indictment was not proved (*d*).

(*a*) R. *v.* Friend, R. & R. 20, and MS. Bayley, J. Chambre, J., differed, thinking it not an indictable offence, but a matter founded wholly on contract, in this which was the case of an apprentice. See R. *v.* Senior [1899], 1 Q.B. 283, 289. As to the neglect of paupers by overseers of the poor, see *ante*, p. 606.

(*b*) The obligation has been held to apply to a servant (R. *v.* Ridley, 2 Camp. 650), except where the servant was of full age and able to take care of herself and to leave the service. R. *v.* Smith, L. & C. 607, 620, 625.

(*c*) R. *v.* Instan [1893], 1 Q.B. 450, *ante*, p. 678. As to lunatics, *vide post*, p. 924. In Urmston *v.* Newcomen, 4 A. & E. 899, in answer to a remark by counsel, that, 'by the common law if a child perish for want of proper care, it is murder in the party neglecting it,' Denman, C.J., said: 'If the person has the actual custody,' and Patteson, J., added: 'Or the child be part of his family, would it be murder in the parent to abscond?' As regards ill-treatment, this opinion seems to be over-ridden by R. *v.* Connor [1908], 2 K.B. 26, *post*, p. 914.

(*d*) Anon. 5 Cox, 279, Coleridge and Cresswell, JJ. The latter said, 'If being of ordinary or even superior intellect and capacity, she was so under the control of the defendants, so impressed with fear either from being watched or being threatened, as to be unable to resort to the assistance of her natural defenders or of other persons, then a duty would devolve on the defendants greater than that arising from the civil contract.'

In these cases it must be both alleged and proved that the health was seriously injured. In R. *v.* Phillpot (*e*), the indictment alleged that the prisoner was the mother, and had the care of an infant female child unable to support itself, and that it was the duty of the prisoner to support the child, but that the prisoner unlawfully neglected to support it, and unlawfully abandoned it without necessary food for a long space of time, whereby the child was greatly injured and weakened. The prisoner was the wife of a seaman, and received a portion of his pay, and was able to work and get her living if she chose; she left the child without food from Monday evening till Thursday morning, and but for the attention of a poor neighbour, the child must have suffered most severely, and might probably have died for want of food, and though it did suffer in some degree from want of food, it was not to any serious extent; and it was held that the conduct of the prisoner in absenting herself, irrespective of any actual injury to the child, was not a misdemeanor at common law, and therefore it was necessary to prove the averment that the child was greatly injured and weakened; and that the evidence that the child had suffered to some but not to any serious extent was not sufficient, as it did not shew any injury to health (*f*).

It is the duty of all persons having children of tender age, whom they cannot support, to endeavour to obtain the means of getting them support, and if they wilfully abstain for several days from resorting to the poor-law authorities of the place where they have by law a right to support, they are criminally responsible for the consequences (*g*).

In R. *v.* Chandler (*h*), the indictment alleged that the prisoner was a single woman and the mother of a child of very tender age and unable to provide for itself, and that it was the duty of the prisoner to provide food for the child, she 'being able and having the means to perform her said duty,' and that she unlawfully neglected to provide sufficient food for the child, whereby its life was endangered. There was no evidence that the prisoner actually had the means of supporting the child; but it was proved that she could have applied to the relieving officer of the union, and, had she done so, she would have been entitled to and would have received relief for herself and the child adequate to their due support and maintenance, and that she had not made any such application. It was held that the allegation in the indictment that the prisoner had the means of maintaining the child was not proved.

In R. *v.* Rugg (*i*), the first count of the indictment charged the prisoner with neglecting to provide sufficient food for her infant child, 'she being able and having the means to perform her duty' in that respect. The jury found her guilty on the ground that 'if she had applied to the guardians for relief she would have had it,' and the Court held, on the authority of R. *v.* Chandler (*supra*) that the finding of the jury was not sufficient to maintain the count. A second count charged the neglect to provide food, but omitted the allegation that she had means to do so, and it was doubted if the count was good in law (*j*); Bovill, C. J., said:

(*e*) Dears. 179.

(*f*) See R. *v.* Cooper, 1 Den. 459; 20 L. J. M. C. 219. R. *v.* Hogan, 2 Den. 277. 24 & 25 Vict. c. 100, s. 27, *post*, p. 911.

(*g*) R. *v.* Mabbet, 5 Cox, 339. 8 Edw. VII. c. 67, s. 12, *post*, p. 913.

(*h*) Dears. 453.

(*i*) 12 Cox, 16.

(*j*) See R. *v.* Ryland, *infra*. R. *v.* Shepherd, L. & C. 147, *ante*, p. 675.

'We have to consider the effect of the verdict of the petit jury on the first two counts. They found a verdict of guilty, but added, "we do so on the ground that if she had applied" (to the guardians) "for relief, she would have had it." The case of R. *v.* Chandler shews that that finding was not sufficient to maintain the first count of the indictment, which contains the allegation of ability and means on the part of the prisoner. On the second count of the indictment, assuming that count to be good, which we doubt, the allegation is, that the prisoner unlawfully and wilfully did neglect and refuse to find and provide her child with necessary food, &c.; but there is no allegation that the prisoner had the means of procuring, or could have procured it, and wilfully abstained from doing so. The allegation in that count is not found by the jury. On these grounds we are of opinion that the conviction should be quashed.' This ruling conflicts with R. *v.* Mabbet (*supra*) and appears to be no longer law: see the provisions in sect. 12 of the Children Act, 1908 (*post*, p. 913).

An indictment for neglecting to provide sufficient food and sustenance for a child of tender years, whereby the child became ill and enfeebled, averred that it was the duty of the prisoner to provide for, give, and administer to the said shild wholesome and sufficient meat, drink, and clothing for the sustenance, &c., of the said child, and that he unlawfully, and contrary to his said duty in that behalf, did omit, neglect, and refuse to provide for, &c., the child:—It was held that the indictment sufficiently alleged the breach of duty, and that the prisoner had the ability to provide but omitted to exercise it (*k*).

A parent who wilfully withholds necessary food from his child, with the wilful determination by such withholding to cause the death of the child, is guilty of murder, if the child dies, and if he does so negligently but not wilfully, and the child dies in consequence of the neglect, he is guilty of manslaughter (*l*).

Medical Aid.—At common law a parent appears to be bound to provide medical attendance for his child (*m*), and a master bound to provide medical attendance for his apprentice (*n*). But the obligation is said not to extend to servants (*o*). When the child is under sixteen want of means is no excuse if the poor-law doctor is available.

As to liability for death caused by failure to provide medical advice, see *ante*, p. 674.

Sect. II.—Of Ill-treatment of Apprentices and Servants.

In the case of apprentices and servants the common law is supplemented by 24 & 25 Vict. c. 100, s. 26 (*p*), 'Whosoever, being legally liable (*q*).

(*k*) R. *v.* Ryland, L. R. 1 C. C. R. 99. The indictment should aver that the child was of tender years and unable to provide for itself.

(*l*) R. *v.* Conde, 10 Cox, 547. R. *v.* Senior [1899], 1 Q.B. 283, *ante*, pp. 672, 674.

(*m*) R. *v.* Senior [1899], 1 Q.B. 283. For statutory obligations *vide* 8 Edw. VII. c. 67, s. 12, *post*, p. 913.

(*n*) R. *v.* Smith, 8 C. & P. 153. Sellen *v.* Norman, 4 C. & P. 80. Wennall *v.* Adney, 3 B. & P. 217. *Vide ante*, p. 669.

(*o*) R. *v.* Smith, *ubi supra*.

(*p*) Taken from 14 & 15 Vict. c. 11, s. 1, with the substitution of the words in italics for the word 'assault.'

(*q*) *i.e.* it would seem under contract. See ruling of Barton, J., Belfast Assizes, 1901, cited by Clarke Hall, Law relating to Children (ed. 1906), p. 40.

either as a master or mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously *do or cause to be done any bodily harm to* any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . (*r*). This enactment contains no words making it necessary to prove that the apprentice was of tender years or under the dominion or control of the master or mistress. The words 'so that . . . injure' appear to apply both to refusal or neglect to supply food and to causing bodily harm. The enactment is silent as to medical attendance. By sect. 73 guardians of the poor may be required (*s*) to prosecute offenders under this sect. Where the apprentice or servant is under sixteen the provisions as to evidence, &c., of the Children Act, 1908 (*post*, p. 918) are applicable.

By the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 6, a master is punishable on summary conviction by imprisonment not exceeding six months, with or without hard labour for wilfully and without lawful excuse neglecting to supply necessary food, &c., or medical aid, whereby the health of the servant or apprentice is likely to be seriously or permanently injured (*ss*).

Sect. III.—Dangerous Performances by Young Persons.

By the Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34), s. 3 . . . 'Where in the course of a public exhibition or performance, which in its nature is dangerous to the life or limb of a child under such age as aforesaid' (under fourteen years) 'taking part therein, any accident causing actual bodily harm occurs to any such child, the employer of such child shall be liable to be indicted as having committed an assault, and the Court before whom such employer is convicted on indictment shall have the power of awarding compensation not exceeding £20, to be paid by such employer to the child, or to some person named by the Court on behalf of the child, for the bodily injury so occasioned, provided that no person shall be punished twice for the same offence (*t*).

By sect. 4 of the Act, if the child is apparently of the age alleged, it lies on the accused to prove that the child is not of that age (*u*).

By the Dangerous Performances Act, 1897 (60 & 61 Vict. c. 52) s. 1,

(*r*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892.

(*s*) This does not exclude prosecutions by other persons. Caswell *v.* Morgan, 28 L. J. M. C. 209. *Cf.* 8 Edw. VII. c. 67, s. 34, *post*, p. 921.

(*ss*) The accused may elect to be tried on indictment, *vide ante*, p. 17.

(*t*) It is difficult to see how this offence should be described in an indictment, and it is not clear whether the compensation is cumulative on or alternative to the punishment. The earlier part of the section imposes a penalty on summary conviction for causing a child under fourteen to take part in a public performance, whereby in the opinion of the Court the life or limbs of the child shall be endangered.

(*u*) *Cf.* 8 Edw. VII. c. 67, s. 123, *post*, p. 922. As to training children under sixteen for exhibitions of a dangerous nature, see 3 Edw. VII. c. 45, s. 3 (5).

'The Children's Dangerous Performances Act, 1879 (*supra*) shall apply in the case of any male young person under the age of sixteen years and any female young person under the age of eighteen years in like manner as it applies in the case of a child under the age of fourteen years' (*v*).

By sect. 2 (1) 'Except where an accident causing actual bodily harm occurs to any child or young person no prosecution or other proceeding shall be instituted for an offence against the Children's Dangerous Performances Act, 1879, as amended by this Act without the consent in writing (*w*) of the chief officer of police (*x*) of the area in which the offence is committed. In the case of persons under 16 the provisions as to evidence of the Children Act, 1908 (*post*, p. 918) are applicable.

Sect. IV.—Exposing or Abandoning Children under Two.

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 27 (*y*), 'Whosoever shall unlawfully abandon or expose (*z*) any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . (*a*).

The provisions of 8 Edw. VII. c. 67, *post*, p. 918, as to presumption of age, evidence, &c., apply to proceedings under this section.

The prisoners were convicted on an indictment under sect. 27, which charged that they did abandon and expose a child, under the age of two years, whereby the life of the child was endangered. One of the prisoners was the mother of the child, which was illegitimate, and both prisoners put the child in a hamper at S., wrapped up in a shawl, and packed with shavings and cotton wool, and the mother took the hamper to the booking office of the railway station at M., and left it, having paid the carriage of it to G. The hamper was addressed to the lodgings of the father of the child at G. She told the clerk at the office to be very careful of it, and to send it by the next train, which was due in ten minutes from that time. Upon the address were the words written 'With care; to be delivered immediately.' The hamper was carried by the passenger train, and was delivered at its address in a little less than an hour from leaving M. On its being opened the child was found alive. The child was taken by the relieving officer the same evening to the union workhouse, where it lived for three weeks afterwards, when it died from causes not attributable to the conduct of the prisoners, or either of them. It was proved to have

(*v*) *Vide supra*, 910.

(*w*) It is submitted that this means consent previous to the institution of the proceeding. See Thorpe *v.* Priestnall [1897], 1 Q.B. 159, decided on a similar provision in the Sunday Observance Prosecution Act, 1871 (34 & 35 Vict. c. 87).

(*x*) In the City of London the Commissioner of City Police, and elsewhere in England defined in the Police Act, 1890 (53 & 54 Vict. c. 45).

(*y*) This section was new law in 1861, and 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.* Phillpot, 1 Dears. 179; R. *v.* Gray, D. & B. 303, which shew the necessity for this enactment. In R. *v.* Hogan, an indictment at common law for abandoning was held bad because it did not aver injury to the child nor means in the parent.

(*z*) As to exposure amounting to assault, *vide post*, p. 912.

(*a*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

been a delicate child :—On a case reserved a conviction on these facts was upheld (*b*).

The prisoner was the father of a child under two years of age. The child was in the custody of the mother, who was living apart from the prisoner. The mother brought the child to him and left it outside the door of his house at about seven o'clock p.m. He was inside, and she called out 'Bill, here 's your child, I can't keep it ; I am gone.' She left, and the prisoner afterwards came out of the house, stepped over the child, and went away. An hour and a half afterwards the child was still lying in the road outside the wicket of the garden ; it was dressed in short clothes, and had nothing on its head. The prisoner's attention was called to the child when he came home, after a further interval of an hour and a half. He said that he should not touch it, and that those that brought it there must come and take it. The child was found at one a.m. lying cold and stiff :—On a case reserved it was held, that the prisoner was rightly convicted of having abandoned and exposed the child, within the meaning of sect. 27 (*c*).

In R. *v.* Renshaw (*d*), a mother left her child, ten days old, at the bottom of a dry ditch, by which there was a path, and a lane separated from the ditch by a hedge ; Parke, B., is reported to have said that 'there were no marks of violence on the child, and it does not appear in the result that the child actually experienced any inconvenience, as it was providentially found soon after it was exposed, and therefore, although it is said in some of the books that an exposure to the inclemency of the weather may amount to an assault, yet, if that be so at all, it can only be when the person suffers a hurt or injury of some kind or other from the exposure (*e*), The acts made the subject of indictment in that case now fall within 24 & 25 Vict. c. 100, s. 27, and Part II. of the Children Act. 1908, *post*, p. 913, and the provisions of that Act as to evidence, &c. (*post*, p. 918) apply.

Sect. V.—Cruelty to Children.

The common law liability for neglect of children has been stated, *ante*, p. 907.

The history of legislation on the subject is as follows. By sect. 37 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), it was made an offence for a parent wilfully to neglect to provide adequate food, clothing, medical aid, or lodging for his child being in his custody under the age of fourteen, whereby the health of such child shall have been or shall be likely to be seriously injured (*f*). This section was repealed in 1889 by 52 & 53 Vict. c. 44, which by sect. 1 made it a misdemeanor for

(*b*) R. *v.* Falkingham, L. R. 1 C. C. R. 222.

(*c*) R. *v.* White, L. R. 1 C. C. R. 311.

(*d*) 2 Cox, 285. 'This case is open to doubt on the ground that it seems to make the question, whether the act of the prisoner was a battery or not, depend on the result of that act ; whereas, it is conceived that that act was either a battery or not a battery at the moment it was committed. It is confidently submitted that the instant a mother deposits a child with intent to abandon it, as that is an unlawful act, which she can neither justify nor excuse, she is guilty of battery. C. S. G.

(*e*) Cf. R. *v.* Ridley, 2 Camp. 650.

(*f*) See R. *v.* Downes, 1 Q.B.D. 25; R. *v.* Morby 8 Q.B.D. 571, *ante*, p. 674, as to liability to indictment for manslaughter for neglect to provide medical aid to a child. And as to servants and apprentices, *vide ante*, p. 909.

a person over sixteen, having the custody, control, or charge of a child under sixteen wilfully to ill-treat, neglect, abandon, or expose such child in a manner likely to cause such child unnecessary suffering or injury to its health.

The Act of 1889 was repealed in 1894 and re-enacted without alteration as sect. 1 (1) of 57 & 58 Vict. c. 41.

Sect. 1 (1) of the Act of 1894 was repealed in 1904 and re-enacted without alteration as sect. 1 (1) of 4 Edw. VII. c. 15.

The Acts of 1889, 1894, and 1904 contain no reference to medical aid; but in R. *v.* Senior (*g*) deliberate omission to obtain necessary medical or surgical aid was held to fall within the words 'likely to cause unnecessary suffering, &c.'

Sect. 1 of the Act of 1904 was in 1908 repealed and re-enacted as sect. 12 of the Children Act, 1908 (8 Edw. VII. c. 67), in which section reference to medical aid is again introduced (sub-sect. 1).

Part II. of the Children Act, 1908 (8 Edw. VII. c. 67), deals with the prevention of cruelty to children and young persons.

By sect. 12, '(1) If any person over the age of sixteen years, who has the custody, charge, or care (*h*) of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated (*i*), neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor, *and shall be liable*—

(*a*) on conviction on indictment, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and

(*b*) on summary conviction, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months (*j*);

and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor (*k*).

'(2) A person may be convicted of an offence under this section, either

(*g*) [1899] 1 Q.B. 283, *ante*, p. 674.

(*h*) This is a matter of fact for the jury subject to the definition in s. 38 (2), *post*, p. 921. R. *v.* Cox [1898], 1 Q.B. 79, decided on the Act of 1894.

(*i*) *Quære* whether direct evidence is essential to prove this. R. *v.* Brinton 111 Cent. Cr. Ct. Sess. Pap. 309, Day, J. *Contra* R. *v.* Ryland L. R. 1 C. C. R. 99.

(*j*) The section thus far re-enacts 4 Edw. VII. c. 15, s. 1 (1) merely altering the position of the words italicised. The defendant may elect to be tried by a jury. 24 & 43 Vict. c. 49, s. 17, *ante*, p. 17.

(*k*) A re-enactment of 4 Edw. VII, c. 15, s. 23 (2). As to common law, *vide ante* p. 907.

on indictment or by a Court of summary jurisdiction, notwithstanding that actual suffering or injury to health, or the likelihood of such suffering or injury to health, was obviated by the action of another person.

'(3) A person may be convicted of an offence under this section, either on indictment or by a Court of summary jurisdiction, notwithstanding the death of the child or young person in respect of whom the offence is committed (*l*).

'(4) Upon the trial of any person over the age of sixteen indicted for the manslaughter of a child or young person of whom he had the custody charge or care, it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under this section in respect of such child or young person, to find the accused guilty of such offence' (*m*).

In R. *v.* Connor [1908] 2 K.B. 26, it was held that the mere omisssion by a father to pay any part of his earnings towards the support of his child might constitute wilful neglect within 4 Edw. VII. c. 15, s. 1, although the child was living with its mother and the father was living apart from her. In Cole *v.* Pendleton (60 J.P. 359), where the father was living with his wife, a similar ruling was given.

By sub-sect. (5), 'If it is proved that a person *convicted* under this section was directly or indirectly interested in any sum of money accruable or payable in the event of the death of the child or young person, and had knowledge that such sum of money was accruing or becoming payable, then

(*a*) *in the case of a conviction on indictment*, the Court may in its discretion *either* increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; *or, in lieu of awarding any other penalty under this section, sentence the person* to penal servitude for any term not exceeding five years (*n*); and

(*b*) in the case of a summary conviction, the Court in determining the sentence to be awarded shall take into consideration the fact that the person was so interested and had such knowledge (*o*).

'(6) A person shall be deemed to be directly or indirectly interested in a sum of money under this section, if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable (*p*).

'(7) A copy of a policy of insurance, certified by an officer or agent of the insurance company granting the policy, to be a true copy, shall in any proceedings under this *section* be *prima facie* evidence that the child or young person therein stated to be insured has been in fact so insured, and that the person in whose favour the policy has been granted is the person to whom the money thereby insured is legally payable (*q*).

'(8) An offence under this section is in this part of this Act referred to as an offence of cruelty.'

(*l*) Taken from 4 Edw. VII., c. 15, s. 1 (2).

(*m*) Taken from 4 Edw. VII., c. 15, s. 1 (3).

(*n*) Nor less than three years. 54 & 55 Vict. c. 69, s. 1, *ante*, p. 211.

(*o*) As to convictions on indictment this section is in substance taken from 4 Edw. VII., c. 15, s. 1 (4); as to summary convictions it is new.

(*p*) Taken from 4 Edw. VII., c. 15, s. 1 (5).

(*q*) Taken from 4 Edw. VII., c. 15, s. 1 (6) substituting 'Section' for 'Act.'

By sect. 13 (*r*), 'Where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant), whilst the infant was in bed with some other person over sixteen years of age, and that that other person was at the time of going to bed under the influence of drink, that other person shall be deemed to have neglected the infant in a manner likely to cause injury to its health within the meaning of this part of this Act.'

Sect. 19 (based on 4 Edw. VII. c. 15, s. 4) provides for the arrest by a constable for offences under this part of the Act or within Sched. 1, *post*, committed in his view or persons who have committed or are reasonably suspected of having committed such offences if the constable cannot get their names and addresses or has reasonable ground for believing that they will abscond.

Sect. 20 provides for the detention in a place of safety of children or young persons against whom such offences have been committed or there is reason to believe have been committed.

By sect. 21, '(1) Where a person having the custody charge or care of a child or young person has been—

(*a*) convicted of committing in respect of such child or young person an offence under this part of this Act or any of the offences mentioned in the First Schedule to this Act; or

(*b*) committed for trial for any such offence; or

(*c*) bound over to keep the peace towards such child or young person,

by any Court, that Court, either at the time when the person is so convicted, committed for trial, or bound over, and without requiring any new proceedings to be instituted for the purpose, or at any other time, and also any petty sessional Court before which any person may bring the case, may, if satisfied on inquiry that it is expedient so to deal with the child or young person, order that the child or young person be taken out of the custody, charge, or care of the person so convicted, committed for trial, or bound over, and be committed to the care of a relative of the child or young person, or some other fit person, named by the Court (such relative or other person being willing to undertake such care), until he attains the age of sixteen years, or for any shorter period, and that Court or any Court of like jurisdiction may of its own motion, or on the application of any person, from time to time by order renew, vary, and revoke any such order (*s*).

'(2) If the child or young person has a parent or legal guardian no order shall be made under this section unless the parent or legal guardian has been convicted of or committed for trial for the offence, or is under committal for trial for having been, or has been proved to the satisfaction of the Court making the order to have been, party or privy to the offence,

(*r*) S. 14 relates to begging. S. 15 relates to exposing children to risk of burning or scalding, and specially preserves liability for any indictable offence constituted by the acts referred to in the section. Ss. 16, 17, and 18, which relate to the corruption of the morals of children, are dealt with *post*, pp. 952, 953.

(*s*) A re-enactment of 4 Edw. VII., c. 15, s. 6 (1). Apparently no costs can be given on varying an order. *Re* O'Halloran, 70 J. P. 8.

or has been bound over to keep the peace towards the child or young person, *or cannot be found* (*t*).

'(3) Every order under this section shall be in writing, and any such order may be made by the Court in the absence of the child or young person; and the consent of any person to undertake the care of a child or young person in pursuance of any such order shall be proved in such manner as the Court may think sufficient to bind him.

'(4) Where an order is made under this section in respect of a person who has been committed for trial, then, if that person is acquitted of the charge, or if the charge is dismissed for want of prosecution, the order shall forthwith be void, except with regard to anything that may have been lawfully done under it (*u*).

. . . . . .

'(7) Nothing in this section shall be construed as preventing the Court, instead of making an order as respects a child under this section, from ordering the child to be sent to an industrial school in any case in which the Court is authorised to do so under Part IV. of this Act (*v*).

By sect. 22 '(1) Any person to whose care a child or young person is committed under this part of this Act shall, whilst the order is in force, have the like control over the child or young person as if he were his parent, and shall be responsible for his maintenance, and the child or young person shall continue in the care of such person, notwithstanding that he is claimed by his parent or any other person, and if any person

(*a*) Knowingly assists or induces, directly or indirectly, a child or young person to escape from the person to whose care he is so committed; or

(*b*) Knowingly harbours, conceals, or prevents from returning to such person, a child or young person who has so escaped, or knowingly assists in so doing;

he shall on summary conviction be liable to a fine not exceeding £20 or to be imprisoned, with or without hard labour, for any term not exceeding two months.

'(2) Any Court having power so to commit a child or young person shall have power to make the like orders on the parent of or other person liable to maintain the child or young person to contribute to his maintenance during such period as aforesaid, and such orders shall be enforceable in like manner as if the child or young person were ordered to be sent to a certified school (*w*) under Part IV. of this Act, but the limit on the amount of the weekly sum which the parent or such other person may be required under this section to contribute shall be one pound a week instead of the limit fixed under Part IV.

'(3) Any such order may be made on the complaint or application of the person to whose care the child or young person is for the time being committed, and either at the time when the order for the committal of the child or young person to his care is made, or subsequently, and the sums

(*t*) A re-enactment of 4 Edw. VII., c. 15, s. 6 (2) with amendments.

(*u*) Sub-ss. 5, 6, empower the Secretary of State to discharge absolutely or on conditions, or to authorise emigration of the child or young person.

(*v*) *Vide ante*, pp. 230 *et seq.*

(*w*) *i.e.* to an industrial school or reformatory, see ss. 44 *et seq.*

contributed by the parent or such other person shall be paid to such person as the Court may name, and be applied for the maintenance of the child or young person.

'(4) Where an order under this part of this Act to commit a child or young person to the care of some relative or other person is made in respect of a person who has been committed for trial for an offence, the Court shall not have power to make an order under this section on the parent or other person liable to maintain the child or young person prior to the trial of the person so committed.

'(5) Any Court making an order under this section for contribution by a parent or such other person may in any case where there is any pension or income payable to such parent or other person and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard, further order that such part as the Court may see fit of the pension or income be attached and be paid to the person named by the Court. Such further order shall be an authority to the person by whom such pension or other income is payable to make the payment so ordered, and the receipt of the person to whom the payment is ordered to be made shall be a good discharge to such first-mentioned person.

'(6) An order under this section may be made by any Court before which a person is charged with an offence under this part of this Act, and without regard to the place in which the person to whom the payment is ordered to be made may reside' (*x*).

By sect. 23 (*y*), '(1) In determining on the person to whose care the child or young person shall be committed under this part of this Act, the Court shall endeavour to ascertain the religious persuasion to which the child or young person belongs, and shall, if possible, select a person of the same religious persuasion, or a person who gives such undertaking as seems to the Court sufficient that the child or young person shall be brought up in accordance with its own religious persuasion, and such religious persuasion shall be specified in the order.

'(2) In any case where the child or young person has been placed pursuant to any such order with a person who is not of the same religious persuasion as that to which the child or young person belongs, or who has not given such undertaking as aforesaid, the Court which made the order, or any Court of like jurisdiction, shall, on the application of any person in that behalf, and on its appearing that a fit person, who is of the same religious persuasion, or who will give such undertaking as aforesaid, is willing to undertake the care of the child or young person, make an order to secure his being placed with a person who either is of the same religious persuasion or gives such undertaking as aforesaid.

'(3) Where a child or young person has been placed with a person who gives such undertaking as aforesaid, and the undertaking is not observed, the child or young person shall be deemed to have been placed with a person not of the same religious persuasion as that to which the child belongs, as if no such undertaking had been given (*z*).

(*x*) Except as to the parts in italics a re-enactment of 4 Edw. VII., c. 15, s. 7.

(*y*) This section re-enacts 4 Edw. VII., c. 15, s. 8.

(*z*) S. 24 gives power to justices on sworn information to issue warrants to search for

By sect. 26, 'Where it appears to the Court by or before which any person is convicted of an offence of cruelty, or of any of the offences mentioned in the First Schedule to this Act, that that person is a parent of the child or young person in respect of whom the offence was committed, or is living with the parent of the child or young person, and is a habitual drunkard within the meaning of the Inebriates Acts, 1879 to 1900 (*a*), the Court, in lieu of sentencing that person to imprisonment, may, if it thinks fit, make an order for his detention in a retreat under the said Acts, the licensee of which is willing to receive him, for any period named in the order, not exceeding two years, and the order shall have the like effect, and copies thereof shall be sent to the local authority and Secretary of State in like manner, as if it were an application duly made by that person and duly attested by a justice under the said Acts; and the Court may order an officer of the Court or constable to remove that person to the retreat, and on his reception the said Acts shall have effect as if he had been admitted in pursuance of an application so made and attested as aforesaid: Provided that—

(*a*) an order for the detention of a person in a retreat shall not be made under this section unless that person, having had such notice as the Court deems sufficient of the intention to allege habitual drunkenness, consents to the order being made; and

(*b*) if the wife or husband of such person, being present at the hearing of the charge, objects to the order being made, the Court shall, before making the order, take into consideration any representation made to it by the wife or husband; and

(*c*) before making the order the Court shall, to such extent as it may deem reasonably sufficient, be satisfied that provision will be made for defraying the expenses of such person during detention in a retreat; and

(*d*) nothing in this section shall affect any power of the Court to order the person convicted to be detained in a certified inebriate reformatory (*b*).

Evidence and Procedure.—By sect. 27, 'As respects proceedings against any person for an offence under this part of this Act, or for any of the offences mentioned in the First Schedule to this Act, the Criminal Evidence Act, 1898 (*c*), shall apply as if in the schedule to that Act a reference to this part of this Act and to the First Schedule of this Act were substituted for the reference to the Prevention of Cruelty to Children Act, 1894 (*d*).

By sect. 28 '(1) Where a justice is satisfied by the evidence of a duly qualified medical practitioner that the attendance before a Court of

children or young persons alleged to have suffered, or to be suffering, ill-treatment, or to have been, or to be, subject to the offences mentioned in the first schedule to the Act. S. 25 relates to visitation of homes for children.

(*a*) 42 & 43 Vict. c. 19; 51 & 52 Vict. c. 19. *Vide ante*, p. 244.

(*b*) A re-enactment of 4 Edw. VII., c. 15, s. 11.

(*c*) 61 & 61 Vict. c. 36, *post* Bk. xiii. c. v.

(*d*) A re-enactment of 4 Edw. VII., c. 15, s. 12. On the trial of an indictment against a husband and wife under the corresponding section of 57 & 58 Vict. c. 41, it was held that if either of them elected to give evidence, the case as against the other was not over until such evidence had been heard. R. *v.* Martin, 17 Cox, 36, Wills, J. See R. *v.* George, 73 J. P. 11.

any child or young person, in respect of whom an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, is alleged to have been committed, would involve serious danger to the life or health of the child or young person, the justice may take in writing the deposition of the child or young person on oath, and shall thereupon subscribe the deposition and add thereto a statement of his reason for taking the deposition, and of the day when and place where the deposition was taken, and of the names of the persons (if any) present at the taking thereof.

'(2) The justice taking any such deposition shall transmit it with his statement—

(*a*) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the Court for trial at which the accused person has been committed; and

(*b*) in any other case, to the clerk of the peace of the county or borough in which the deposition has been taken;

and the clerk of the peace to whom any such deposition is transmitted shall preserve, file, and record the deposition' (*e*).

By sect. 29, 'Where, on the trial of any person on indictment for an offence of cruelty, or any of the offences mentioned in the First Schedule to this Act, the Court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the Court of any child or young person in respect of whom the offence is alleged to have been committed would involve serious danger to the life or health of the child or young person, any deposition of the child or young person taken under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42) or this part of this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use it as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition (*f*).

By sect. 30, 'Where, in any proceeding against any person for an offence under this part of this Act, or for any of the offences mentioned in the First Schedule to this Act (*g*), the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the Court understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the

(*e*) A re-enactment of 4 Edw. VII. c. 15, s. 13.

(*f*) A re-enactment of 4 Edw. VII. c. 15, s. 14. See R. *v.* Katz, 64 J. P. 807, Darling, J.

(*g*) Including indecent assault (24 & 25 Vict. c. 100, s. 52), *post*, pp. 924, 955. R. *v.* Paul, 25 Q.B.D. 202, is no longer law.

evidence of the child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), or of this part of this Act, shall be deemed to be a deposition within the meaning of that section and that part respectively (*h*) :—

Provided that—

(*a*) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused (*hh*) ; and

(*b*) Any child, whose evidence is received as aforesaid and who wilfully gives false evidence under such circumstances that, if the evidence had been given on oath, he would have been guilty of perjury, shall, subject to the provisions of this Act, be liable on summary conviction to be adjudged such punishment as might have been awarded had he been charged with perjury and the case dealt with summarily under section ten of the Summary Jurisdiction Act, 1879 (*i*).

By sect. 31, 'Where in any proceedings with relation to an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, the Court is satisfied that the attendance before the Court of any child or young person in respect of whom the offence is alleged to have been committed is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child or young person' (*j*).

By sect. 32, '(1) Where a person is charged with committing an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, in respect of two or more children or young persons, the same information or summons may charge the offence in respect of all or any of them, but the person charged shall not be liable to a separate penalty for each child or young person except upon separate informations.

'(2) The same information or summons may also charge any person as having the custody, charge, or care, alternatively or together, and may charge him with the offences of assault, ill-treatment, neglect, abandonment, or exposure, together or separately, and may charge him with committing all or any of these offences in a manner likely to cause unnecessary suffering or injury to health, alternatively or together, but when those offences are charged together the person charged shall not be liable to a separate penalty for each (*k*).

'(3) A person shall not be summarily convicted of an offence under this part of this Act, or of an offence mentioned in the First Schedule to this Act, unless the offence was wholly or partly committed within six months before the information was laid ; but, subject as aforesaid,

(*h*) This part gets rid of the difficulties raised by R. *v.* Pruntey, 16 Cox, 344.

(*hh*) See R. *v.* Everett, 2 Cr. App. R. 130.

(*i*) A re-enactment of 4 Edw. VII. c. 15, s. 15.

(*j*) A re-enactment of 4 Edw. VII. c. 15, s. 16.

(*k*) As to charging neglect and assault of an imbecile son, see R. *v.* Watson, 30 Ir. L. T. Rep. 135.

evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time.

'(4) When an offence under this part of this Act, or any offence mentioned in the First Schedule to this Act, charged against any person is a continuous offence, it shall not be necessary to specify in the information, summons, or indictment, the date of the acts constituting the offence' (*l*).

By sect. 33, 'When, in pursuance of this part of this Act, any person is convicted by a Court of summary jurisdiction of an offence, or when in the case of any application to a Court of summary jurisdiction under this part of this Act for an order committing a child or young person to the care of any person, or for an order for contribution to the maintenance of a child or young person, any party thereto thinks himself aggrieved by any order or decision of the Court, he may appeal against such a conviction, or order, or decision to quarter sessions (*m*).

By sect. 34 '(1) A board of guardians may institute any proceedings under this part of this Act for any offence in relation to a child or young person and may, out of their common fund, pay the reasonable costs and expenses of any proceedings so instituted by them (*n*).

'(2) The like powers of instituting proceedings may, in London, be also exercised by a local authority for the purposes of Part I of this Act, and the expenses of such proceedings shall be defrayed as expenses of the authority under Part I' (*o*).

By sect. 35, 'Every misdemeanor under this part of this Act shall be deemed to be an offence within, and subject to, the provisions of the Vexatious Indictments Act, 1859 (*p*), and any Act amending that Act' (*q*).

By sect. 36, 'Section ten of the Poor Law Act, 1879, shall be amended so as to include in it as one of the associations or societies to which a board of guardians may, with the consent of the Local Government Board, subscribe, any society or body corporate for the prevention of cruelty to children.'

By sect. 37, 'Nothing in this part of this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to such child or young person' (*r*).

Interpretation.—By sect. 38, '(1) In this Part of this Act, unless the context otherwise requires, the expression "fit person," in relation to the care of any child or young person, includes any society or body corporate established for the reception or protection of poor children or the prevention of cruelty to children.

(2) 'For the purposes of this part of this Act—

'Any person who is the parent or legal guardian of a child or young

(*l*) A re-enactment of 4 Edw. VII. c. 15, s. 18.

(*m*) A re-enactment of 4 Edw. VII. c. 15, s. 19. As to costs see 8 Edw. VII. c. 15, *post*, Vol. ii. p. 2039.

(*n*) As to costs of prosecution and defence, *vide post*, Vol. ii. pp. 2039, 2048.

(*o*) A re-enactment with modifications of 4 Edw. VII., c. 15, s. 21. S. 36 extends s. 10 of the Poor Law Act, 1879.

(*p*) 22 & 23 Vict. c. 17, *post*, Vol. ii. p. 1927.

(*q*) A re-enactment of 4 Edw. VII. c. 15, s. 25.

(*r*) A re-enactment of 4 Edw. VII. c. 15, s. 28. *Vide ante*, p. 767.

person, or who is legally liable to maintain a child or young person, shall be presumed to have the custody of the child or young person, and as between father and mother the father shall not be deemed to have ceased to have the custody of the child or young person by reason only that he has deserted, or otherwise does not reside with, the mother and child or young person; and

'Any person to whose charge a child or young person is committed by any person who has the custody of the child or young person shall be presumed to have charge of the child or young person; and

'Any other person having actual possession or control of a child or young person shall be presumed to have the care of the child or young person.

(3) 'This part of this Act shall apply in the place of a child or young person who has before the commencement of this Act been committed to the care of a relative or other fit person, by an order made under the Prevention of Cruelty to Children Act, 1904' (4 Edw. VII. c. 15), 'as if the order had been made under this part of this Act.'

By sect. 123, 'Where a person, whether charged with an offence or not, is brought before any Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child or young person, the Court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the Court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person, and, where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, that person shall for the purposes of this Act be deemed not to be a child or young person.

'(2) Where in a charge or indictment for an offence under this Act, or any of the offences mentioned in the First Schedule to this Act, except an offence under the Criminal Law Amendment Act, 1885 (*s*), it is alleged that the person by or in respect of whom the offence was committed was a child or young person or was under or above any specified age, and he appears to the Court to have been at the date of the commission of the alleged offence a child or young person, or to have been under or above the specified age, as the case may be, he shall for the purposes of this Act be presumed at that date to have been a child or young person or to have been under or above that age, as the case may be, unless the contrary is proved (*t*).

'(3) Where in any charge or indictment for an offence under this Act or any of the offences mentioned in the First Schedule to this Act it is alleged that the person in respect of whom the offence was committed was a child or was a young person, it shall not be a defence to prove that the person alleged to have been a child was a young person or the person

(*s*) 48 & 49 Vict. c. 69, *post*, pp. 946 *et seq.*

(*t*) See 4 Edw. VII. c. 15, s. 17. R. *v.* Hale [1905], 1 K.B. 126.

alleged to have been a young person was a child in any case where the acts constituting the alleged offence would equally have been an offence if committed in respect of a young person or child respectively.

'(4) Where a person is charged with an offence under this Act in respect of a person apparently under a specified age it shall be a defence to prove that the person was actually of or over that age.'

By sect. 131, 'For the purposes of this Act unless the context otherwise requires—

'The expression "child" means a person under the age of fourteen years (*u*);

'The expression "young person" means a person who is fourteen years of age or upwards and under the age of sixteen years;

'The expression "guardian" in relation to a child, young person, or youthful offender, includes any person who, in the opinion of the Court having cognisance of any case in relation to the child, young person, or youthful offender, or in which the child, young person, or youthful offender is concerned, has for the time being the charge of or control over the child, young person, or youthful offender;

'The expression "legal guardian" in relation to an infant, child, young person, or youthful offender, means a person appointed, according to law, to be his guardian by deed or will, or by order of a Court of competent jurisdiction;

'The expression "place of safety" means any workhouse or police station, or any hospital, surgery, or any other suitable place, the occupier of which is willing temporarily to receive an infant, child, or young person;

'The expression "common council" means the mayor, aldermen, and commons of the City of London in common council assembled;

'The expression "local education authority" means a local education authority for the purpose of Part III. of the Education Act, 1902' (2 Edw. VII. c. 42);

'The expressions "police authority" and "police fund" as respects the City of London mean the Common Council and the fund out of which the expenses of the City police are defrayed, and elsewhere have the same meanings as in the Police Act, 1890' (53 & 54 Vict. c. 45);

'The expression "common fund" means, as respects a poor law union consisting of a single parish, the poor rate of that parish;

'The expression "street" includes any highway and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not;

'The expression "public place" includes any public park, garden, sea beach, or railway station, and any ground to which the public for the time being have or are permitted to have access, whether on payment or otherwise;

(*u*) By s. 128 (1) 'fourteen' is substituted for 'twelve' in the definition of child and young person in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and the first schedule of that Act is amended.

'The expression "intoxicating liquor" means any fermented, distilled, or spirituous liquor which cannot according to any law for the time being in force be legally sold without a licence from the Commissioners of Inland Revenue.'

FIRST SCHEDULE.

Any offence under sections twenty-seven (*v*), fifty-five (*w*), or fifty-six (*x*) of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), and any offence against a child or young person under sections five (*y*) forty-two, forty-three (*z*), fifty-two (*a*), or sixty-two (*b*) of that Act, or under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69) (*c*).

Any offence under the Dangerous Performances Acts, 1879 and 1897(*d*).

Any other offence involving bodily injury to a child or young person (*e*).

SECT. VI.—OF OFFENCES WITH REFERENCE TO LUNATICS.

Besides the general provisions of the criminal law with regard to crimes irrespective of the mental condition of the person affected by the crime, there are a number of special enactments punishing offences with reference to lunatics.

A. *Common Law.*

The ill-treatment of a lunatic by a person having duties towards him by status or contract seems at common law to fall within the rule as to sick or helpless persons (*ante*, pp. 667, 678) (*f*). It would seem that to justify conviction for neglect of a person of unsound mind as for a common law misdemeanor it is necessary directly to aver and to prove that the lunatic was under the control and care of the defendant or that the defendant was under some duty to take care of the lunatic, that the neglect occurred while the care and control continued, and that the neglect was of a character to produce serious injury to the health of the lunatic, and in fact caused such injury (*g*).

(*v*) Exposing children, *ante*, p. 911.
(*w*) Abduction, *post*, p. 959.
(*x*) Child-stealing, *ante*, p. 904.
(*y*) Manslaughter, *ante*, p. 779.
(*z*) Assaults, *ante*, p. 896.
(*a*) Indecent assault, *post*, p. 955.
(*b*) Infamous crime, *post*, p. 975.
(*c*) *Post*, pp. 948 *et seq.* (*d*) *Ante*, p. 910.
(*e*) See Lord Advocate *v.* Fraser, 3 Fraser, Justiciary (Sc.) 67. R. *v.* Roberts, 18 Cox, 530.
(*f*) 'As a person incapable of taking care of himself through imbecility of mind, is in contemplation of law in the same situation as an infant (R. *v.* Much Cowarne, 2 B. & Ad. 861), it would seem that if a person, who is the parent, or has the actual custody of a lunatic, neglects to provide for such lunatic, though more than twenty-one years of age, whereby his health is injured, such person would be indictable in the same manner as if the lunatic were a child of such tender years as to be unable to provide for and take care of itself. See R. *v.* Friend, R. & R. 20,' *vide ante*, p. 907. C. S. G. And see Buchanan *v.* Hardy, 18 Q.B.D. 486.
(*g*) R. *v.* Pelham, 8 Q.B. 959, where an indictment of a mother for neglect of her illegitimate lunatic son was held to be defective. It charged unlawful confinement in an unwholesome room, neglect to clothe the lunatic and suffering him to be covered with filth, and possession of sufficient means for properly caring for him. Such an offence is now covered by 53 & 54 Vict. c. 5, s. 322, *post*, p. 929. In R. *v.* Smith, 2 C. & P. 449, Burrough, J., held that it was not an indictable offence in a brother to neglect to maintain another brother, even though he was an idiot, helpless and an inmate of the defendant's house. The idiot was bed-ridden and was kept in a dark room without sufficient warmth or clothing, and so to keep him was held to be neither an assault nor false imprisonment. See R. *v.* Marriott, 8 C. & P. 425 Patteson, J., *ante*, p. 678.

B. *Statutes.*

(i.) CRIMINAL LUNATICS.—By the Criminal Lunatic Asylums Act, 1860 (23 & 24 Vict. c. 75) s. 13, 'Any superintendent, officer, nurse, attendant, servant, or other person employed in any asylum for criminal lunatics, who strikes, wounds, ill-treats, or wilfully neglects any person confined therein, shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, and, on conviction under the indictment, to fine or imprisonment, with or without hard labour, or to both fine and imprisonment at the discretion of the Court, or to forfeit for every such offence, on summary conviction thereof before two justices, any sum not exceeding twenty pounds nor less than two pounds.'

The treatment of criminal lunatics (*h*) is further regulated by the Criminal Lunatics Acts of 1838 (1 & 2 Vict. c. 14) & 1884 (47 & 48 Vict. c. 64) which extends to lunatic prisoners removed from the Colonies or India (14 & 15 Vict. c. 81; 47 & 48 Vict. c. 3).

(ii.) OTHER LUNATICS.—The other statutory offences against lunatics are for the most part contained in the Lunacy Act, 1890 (53 & 54 Vict. c. 5). That Act and the Lunacy Act, 1891 (54 & 55 Vict. c. 65) contain regulations for the care and treatment of lunatics other than criminal lunatics, and for the licensing of houses for the reception of lunatics.

By sect. 341 of the Act of 1890, 'In this Act if not inconsistent with the context—

'"Asylum" means an asylum for lunatics provided by a county or borough, or by a union of counties or boroughs.' . . .

'"Hospital" means any hospital or part of a hospital or other house or institution not being an asylum where lunatics are received and supported wholly or partly by voluntary contributions or by any charitable bequest or gift only applying the excess of payments by some patients for or towards the support, provision, or benefit of other patients.' . . .

'"Institution for lunatics" means an asylum, hospital, or licensed house' (*i*). . . .

'"Lunatic" means an idiot or person of unsound mind' (*j*). . . .

'"Manager" in relation to an institution for lunatics, means the superintendent of an asylum, the resident medical officer or superintendent of a hospital, and the resident licensee of a licensed house.'

By sect. 7 (4), 'If after a petition' (for a reception order) 'has been dismissed, another petition is presented as to the same alleged lunatic, the person presenting such other petition, so far as he has any knowledge or information with reference to the previous petition and its dismissal, shall state the facts relating thereto in his petition, and shall obtain from the

(*h*) Defined in s. 16 of the Act of 1884 for the purposes of that Act.

(*i*) Licensed houses are governed by ss. 207–229 of the Act: 'workhouses' are governed by ss. 24–27 of the Act of 1890 and by ss. 4, 6, 19 of the Act of 1891 (54 & 55 Vict. c. 65).

(*j*) *Vide ante*, pp. 64 *et seq.* The definition is for purposes of management and control of persons and their property by the judge in lunacy extended (s. 116). In R. *v.* Shaw, L. R. 1 C. C. R. 145, it was held that imbecility and loss of mental power, whether arising from natural decay or from paralysis, softening of the brain, or other natural cause, and although unaccompanied by frenzy or delusion, constituted unsoundness of mind within 8 & 9 Vict. c. 100, of which the Act of 1890 is to a large extent a re-enactment.

commissioners at his own expense, and present with the petition a copy of the statement sent to them of the reasons for dismissing the previous petition, and if he wilfully omits to comply with this subsection he shall be guilty of a misdemeanor.'

By sect. 8, provision is made for the right of a lunatic received as a private patient to be examined by a judicial authority, and for notice being given of his reception, and for notice to the patient of his right to have an interview with the judicial authority and give him an opportunity of making a request for interview and transmitting it when made, and producing the certificate on which the patient was received. By sub-sect. 5, 'If any manager of an institution for lunatics, or any person having charge of a single patient, omits to perform any duty imposed upon him by this section he shall be guilty of a misdemeanor.'

By sect. 38 (7), 'The manager of any institution for lunatics and any person having charge of a single patient, who detains a patient (*k*) after he has knowledge that the order for his reception (*l*) has expired shall be guilty of a misdemeanor.'

By sect. 40 (1), 'Mechanical means (*m*) of bodily restraint shall not be applied to any lunatic unless the restraint is necessary for the purposes of surgical or medical treatment, or to prevent the lunatic from injuring himself or others' in which case a certificate of the grounds for using such restraint shall be given (sub-sects. 2, 3), and a record of it shall be kept and transmitted to the commissioners quarterly (sub-sects. 4, 5). By sub-sect. 7, 'Any person who wilfully acts in contravention of this section shall be guilty of a misdemeanor.'

By sect. 44 (4), 'If any person having charge of a single patient fails to give effect to any direction of the commissioners under this sect.' (as to visits by a medical practitioner) 'he shall be guilty of a misdemeanor.'

By sect. 76 (2), 'Any person who has been duly served with any such order of discharge (*n*), and detains a patient after the date of discharge appointed thereby, shall be guilty of a misdemeanor' (*o*).

By sect. 158 (3), 'Any disqualified person (*p*) continuing to act (as commissioner or secretary or clerk to the commissioners) shall be guilty of a misdemeanor.'

By sect. 177 (5), 'Any disqualified person (*q*) continuing to act' (as visitor or clerk or assistant clerk to any visitor) 'shall be guilty of a misdemeanor.'

Concealment of Buildings, Persons, or Facts from Official Visitors.—By sect. 195 (2), 'Every manager of a hospital or licensed house (*r*) who

(*k*) This enactment does not apply to lunatics so found by inquisition. S. 38 (10).

(*l*) As to the requirements and duration of reception orders see ss. 28–37.

(*m*) By 'such instruments and appliances as the commissioners by regulations to be made from time to time shall determine.' S. 40 (6). The regulations in force are dated April 17, 1895 (Stat R. & O. 1895 No. 212.)

(*n*) By the commissioners who, on making such order must forthwith serve it on the manager of the institution or the person having charge of a single patient. S. 76 (1).

(*o*) The detention may perhaps be justified at common law, if necessary for his safety or the safety of others. See Brookshaw *v.* Hopkins, Lofft, 243. Symm *v.* Fraser, 3 F. & F. 328.

(*p*) The disqualification is, to be, or to have been, within one year prior to appointment, interested in a house licensed for lunatics. S. 158 (1).

(*q*) The disqualification is to be, or become, or to have been within one year prior to appointment interested in such licensed house. S. 171 (3) (4).

(*r*) These words are defined in s. 341.

conceals or attempts to conceal or refuses or wilfully neglects to show any part of the building, or any building communicating therewith or detached therefrom but not separated as aforesaid (*s*) or any part of the ground or appurtenances held, used, or occupied therewith, or any person detained or being therein, from any one or more of the visiting commissioners or visitors, or from any person authorised under this Act to visit and inspect the hospital or house, or the patients therein or any of them, or who does not give full and true answers to the best of his knowledge to all questions which any visiting commissioner or visitor asks in the execution of his office, shall be guilty of a misdemeanor.'

By sect. 200 (2), 'If the person having charge of a single patient refuses to shew to any commissioner, at his request, any part of the house wherein the single patient resides, or any part of the grounds belonging thereto, he shall be guilty of a misdemeanor.'

By sect. 214, 'If any person, for the purpose of obtaining a licence or the renewal of a licence for a house for the reception of lunatics, wilfully supplies to the commissioners or justices any untrue or incorrect information, plan, description, statement, or notice, he shall be guilty of a misdemeanor.'

By sect. 222, 'If after the lapse of two months from the expiration or revocation of the licence of any house, there are in the house two or more lunatics, every person keeping the house or having the care or charge of lunatics therein, shall be guilty of a misdemeanor.'

By sect. 231 (10), 'The superintendent of any hospital' (*ante*, p. 925), 'who receives or detains any lunatic in the hospital contrary to the provisions of this Act or to the terms of the complete certificate of registration, shall be guilty of a misdemeanor.'

By sect. 233 (2), 'If the superintendent of a registered hospital knowingly permits any lunatic to be detained or lodged in any building not shewn on the plans of the hospital sent to the commissioners, he shall be deemed guilty of a misdemeanor.'

By sect. 237 (4), 'If any lunatics are detained or kept in the hospital (*t*) after the date appointed by the order for closing the hospital, the superintendent of the hospital shall be guilty of a misdemeanor.'

By sect. 315 (1), 'Every person who, except under the provisions of this Act, receives or detains a lunatic (*u*), or alleged lunatic (*v*), in an institution for lunatics, or for payment (*w*) takes charge of, receives to board or lodge, or detains a lunatic or alleged lunatic in an unlicensed house, shall be guilty of a misdemeanor, and in the latter case shall also be liable to a penalty not exceeding fifty pounds.

(*s*) By ground belonging to any other person. S. 194 (1).

(*t*) *i.e.* a registered hospital which the commissioners have ordered to be closed under s. 237 sub-s. 1–3.

(*u*) *i.e.* as a lunatic and to be subjected to treatment *ejusdem generis* with that given to lunatics in public asylums. R. *v.* Bishop, 5 Q.B.D. 259. R. *v.* Sharrard [1894], noted in Wood-Renton on Lunacy, 674, 675.

(*v*) As to the meaning of lunatic see R. *v.* Shaw, L. R. 1 C. C. R. 145, *ante*, p. 925, note (*i*).

(*w*) The former Act (8 & 9 Vict. c. 100), s. 90 had the words 'for profit.' Under those words if the payment made was not high enough to give a profit the defendant might have been entitled to acquittal. See R *v.* Vollan [1872], 28th Rep. of Lunacy Commissioners, 73.

'(2) Except under the provisions of this Act, it shall not be lawful for any person to receive or detain two or more lunatics in any house unless the house is an institution for lunatics or workhouse.

'(3) Any person who receives or detains two or more lunatics in any house, except as aforesaid, shall be guilty of a misdemeanor' (*x*).

By sect. 316, 'The manager of any hospital or licensed house, and any person having charge of a single patient who omits to send to the commissioners the prescribed documents and information upon the admission of a patient, or to make the prescribed entries, and give the prescribed notices upon the removal, discharge, or death of a patient, shall be guilty of a misdemeanor, and in the case of a single patient shall also be liable to a penalty not exceeding fifty pounds' (*y*).

By sect. 317 (1), 'Any person who makes a wilful misstatement of any material fact in any petition, statement of particulars, or reception order under this Act, shall be guilty of a misdemeanor.

'(2) Any person who makes a wilful misstatement of any material fact in any medical or other certificate, or in any statement or report of bodily or mental condition under this Act, shall be guilty of a misdemeanor.

'(3) A prosecution for a misdemeanor under this section shall not take place except by order of the commissioners, or by the direction of the Attorney-General or the Director of Public Prosecutions' (*z*).

By sect. 318, 'Any person who in any book, statement, or return knowingly makes any false entry as to any matter as to which he is by this Act or any rules made under this Act required to make any entry shall be guilty of a misdemeanor' (*a*).

By sect. 319, 'If the manager of an institution for lunatics, or the person having charge of a single patient, omits to send to the coroner notice of the death of a lunatic within the prescribed time (*b*), he shall be guilty of a misdemeanor.'

By sect. 321 (1), 'Any person who obstructs any Commissioner, or Chancery or other visitor, in the exercise of the powers conferred by this or any other Act, shall for each offence be liable to a penalty not exceeding fifty pounds, and shall also be guilty of a misdemeanor.

'(2), Any person who wilfully obstructs any other person authorised under this Act by an order in writing under the hand of the Lord Chancellor, or a Secretary of State, to visit and examine any lunatic or supposed lunatic, or to inspect or inquire into the state of any institution for lunatics, gaol, or place wherein any lunatic or person represented to be a lunatic is confined or alleged to be confined, in the execution of such order, and any person who wilfully obstructs any person authorised under this Act by any order of the commissioners to make any visit and examination or inquiry, in the execution of such order, shall (without prejudice to any

(*x*) It was decided on the corresponding section (44) of 8 & 9 Vict. c. 100 to be no defence that the person so receiving the lunatics honestly and reasonably believed that they were not lunatics. R. *v.* Bishop, 5 Q.B.D. 259. The ground of decision was that having regard to the scope and object of the enactment the word 'knowingly' should not be imported into it.

(*y*) As to the liability of the clerk of a poor-law union under this section, see Wood-Renton, Lunacy, 676.

(*z*) As to this office, *vide post*, Vol. ii. p. 1924.

(*a*) For form of indictment see 5 Cox, Appendix.

(*b*) Within forty-eight hours of the death. Rules of 1895, r. 27 (St. R. & O. 1895, No. 281).

proceedings, and in addition to any punishment to which such person obstructing the execution of such order would otherwise be subject) be liable for every such offence to a penalty not exceeding twenty pounds.'

By sect. 322, 'If any manager, officer, nurse, attendant, servant, or other person employed in an institution for lunatics, or any person having charge of a lunatic, *whether by reason of any contract, or of any tie of relationship, or marriage, or otherwise* (*c*) ill-treats or wilfully neglects a patient, he shall be guilty of a misdemeanor, and, on conviction on indictment, shall be liable to fine or imprisonment, or to both fine and imprisonment at the discretion of the Court, or be liable on summary conviction for every offence to a penalty not exceeding twenty pounds, nor less than two pounds.'

Sect. 324. Carnal knowledge of female lunatics by officials, &c. *Vide post*, p. 947.

Prosecution and Procedure.—By sect. 325 (1), 'Except as by this Act otherwise provided, proceedings against any persons for offences against this Act may be taken—

'(*a*) By the secretary of the commissioners upon their order for any offence;

'(*b*) By the clerk of the visitors of any licensed house for an offence committed within their jurisdiction;

'(*c*) By the clerk of the visiting committee of an asylum for any offence by any person employed therein.

'And such proceedings shall not abate by the death or removal of the prosecuting secretary or clerk, but the same may be continued by his successor, and in any such proceedings the prosecuting secretary or clerk shall be competent to be a witness.

'(2) Except as by this Act otherwise provided, it shall not be lawful to take such proceedings except by order of the commissioners, or of visitors having jurisdiction in the place where the offence was committed (*d*), or with the consent of the Attorney-General or Solicitor-General.'

By sect. 328, 'A Secretary of State on the report of the commissioners or visitors of any institution for lunatics may direct the Attorney-General to prosecute on the part of the Crown any person alleged to have committed a misdemeanor under this Act.'

Evidence.—By sect. 329 (1), 'Where any person is proceeded against under this Act, on any charge of omitting to transmit or send any copy, list, notice, statement, report, or other document required to be transmitted or sent by such person, the burden of proof that the same was

(*c*) In R. *v.* Rundle, Dears. 482, it was held that 16 & 17 Vict. c. 96, s. 9 did not cover the case of a husband ill-treating his lunatic wife. In R. *v.* Porter, 33 L. J. M. C. 126; 9 Cox, 449, it was held that persons who voluntarily undertook the charge of a lunatic were within that Act. In R. *v.* Smith [1880], 15 Cox, 399 (C. C. R.), the two brothers of a lunatic were held liable under that enactment for ill-treatment of a lunatic sister who lived with them, though they received no payment for or on account of any special charge of her. In Buchanan *v.* Hardy [1890], 18 Q.B.D. 486, R. *v.* Rundle seems to have been virtually overruled. In the latter case it was held that parents had been properly convicted of ill-treating a lunatic daughter. The words italicised in the present enactment seem to make it clear that it applies to all cases of persons ill-treating lunatics in their charge. As to what is ill-treatment see Wood-Renton, Lunacy, 681, 682.

(*d*) In certain cases the time for prosecution may be limited by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

transmitted or sent within the time required shall lie upon such person: but if he proves by the testimony of one witness upon oath that the copy, list, notice, statement, report, or document in respect of which the proceeding is taken, was properly addressed and put into the post in due time or (in case of documents required to be sent to the commissioners, or a clerk of the peace, or a clerk to guardians) left at the office of the commissioners, or of the clerk of the peace, or clerk to the guardians, such proof shall be a bar to all further proceedings in respect of such charge (*e*).

'(2) In proceedings under this Act where a question arises whether a house is or is not a licensed house or registered as a hospital, it shall be presumed not to be so licensed or registered unless the licence or certificate of registration is produced, or sufficient evidence is given that a licence or certificate is in force' (*e*).

A lunatic may be received as a witness on any criminal charge if the Court considers him rational enough to be a competent witness (*f*).

Punishment.—The punishment for the above statutory misdemeanors is by fine or imprisonment without hard labour unless another punishment is prescribed by the enactment creating the offence (*g*).

(*e*) Under 8 & 9 Vict. c. 100 there was some doubt as to the burden of proof in such cases. R *v.* Harris, 10 Cox, 541. There notice to produce the documents had been given to the defendant, and he had not produced them.

(*f*) See R. *v.* Hill, 2 Den. 254; 20 L. J. M. C. 222.

(*g*) *Vide ante*, p. 249.

CANADIAN NOTES.

Sec. 2.—Ill-treatment of Apprentices and Servants.—Code sec. 243.

Punishment.—Code sec. 244.

This section was adopted from the Imperial Statute 24-44 Vict. ch. 100, sec. 26. The gist of the offence was the wilfully and without lawful excuse refusing or neglecting to provide. R. v. Nasmith, 42 U.C.Q.B. 242. The words of the Code constitute a mere omission an offence, if without lawful excuse.

This section does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine. R. v. Coventry, 3 Can. Cr. Cas. 541.

The reason for the restriction (to those under sixteen) is, that adults may, if not provided with proper nourishment, remonstrate, and, if necessary, leave the service. R. v. Nasmith, 42 U.C.Q.B. 242.

In a case before the Code where a young farm-hand fifteen years of age died from gangrene resulting from frost-bites through exposure and neglect which the master could have obviated, it was held that, in view of the age of the deceased, the circumstances of the country, the fact of there being no provision for maintaining poor people, it was the duty of the prisoner, as a master towards the deceased as his servant, to have taken care of him, and that by his omission to do so he was guilty of gross negligence, to which the lad's death was attributable, and that, therefore, the prisoner was guilty of manslaughter. R. v. Brown (1893), 1 Terr. L.R. 475.

Causing Bodily Harm to Apprentices or Servants.—Code sec. 249.

A verdict for common assault is maintainable upon an indictment under this section. R. v. Bissonnette (1879), Ramsay's Cases (Que.) 190.

It is purely a question of fact whether the acts proved shew that the health is likely to be permanently injured; and the words "permanently injured" have no technical meaning as here used. R. v. Bowman (1898), 3 Can. Cr. Cas. 410.

Sec. 5.—Of Cruelty to Children.

Duty of Head of Family to Provide Necessaries.—Code sec. 242.

Punishment.—Code sec. 244.

Abandoning.—Code sec. 245.

Head of Family.—A person who engages the services of a child under sixteen years, placed out with him by his legal guardian under

a contract for the child's services for a fixed period, whereby the party with whom he is placed engages to furnish the child with board, lodging, clothing, and necessaries, is not as to such child a "guardian or head of a family" so as to become criminally responsible as such, under section 242, for omitting to provide "necessaries" to such child while a member of his household. The relationship in such case is that of master and servant, and comes within the provisions of sec. 243, under which the master is criminally responsible only in respect of a failure to provide "necessary food, clothing, or lodging." R. v. Coventry, 3 Can. Cr. Cas. 541.

Without Lawful Excuse.—It must be shewn that the parent or guardian was in the actual possession of means to provide for the child. R. v. Robinson (1897), 1 Can. Cr. Cas. 28.

Permanently Injured.—It is purely a question of fact whether the acts proved are such that the health of the person is likely to be permanently injured by reason thereof; and the words "permanently injured," as here used, have no technical meaning. R. v. Bowman (1898), 3 Can. Cr. Cas. 410 (N.S.).

Where a child's toes were so badly frozen, through the neglect of the person in whose charge the child was, that they had to be amputated, it was held in the Territories that the Court should not without expert evidence upon the effect of the loss of the toes infer that the child's health had thereby been or was likely to be permanently injured, or that his life had thereby been endangered. R. v. Coventry, 3 Can. Cr. Cas. 541.

Sec. 6.—Of Offences with Reference to Lunatics.

Duty of Person in Charge of Lunatics to Provide Necessaries of Life.—Code sec. 241.

Punishment.—Code sec. 244.

Preservation of Life.—Sections 241 and 242 appear in the Code under the heading of "Duties Tending to the Preservation of Life." As such headings have the same effect as preambles to statutes, the terms "necessaries of life," and "necessaries" which occur in the respective sections, mean, when read in connection with the heading mentioned, such necessaries as tend to preserve life, and not necessaries in their ordinary legal sense. R. v. Brooks (1902), 5 Can. Cr. Cas. 372, 9 B.C.R. 13.

CHAPTER THE NINTH.

Of Rape, and of the Defilement or Corruption of Females.

Sect. I.—Of Rape.

The definition of the crime of rape depends wholly on the common law as explained by judicial decisions. The crime consists in having unlawful carnal knowledge of a woman without her consent (*a*), *i.e.* her free and conscious permission (*b*). It is therefore an aggravated form of assault (*bb*). The older definitions described the offence as committed with violence, but as will be presently stated it is not necessary in all cases to prove actual violence.

This offence does not appear to have been regarded as equally heinous at all periods of our history. Anciently, indeed, it appears to have been punishable with death; but this was afterwards thought too hard; and in its stead, another severe but not capital punishment was inflicted by William the Conqueror, namely, castration and loss of eyes, which continued till after Bracton wrote, in the reign of Henry III. (*c*). The punishment for rape was still further mitigated, in the reign of Edward I., by the Statute of Westm. I, 3 Edw. I. c. 13 (*d*), which reduced the offence to a trespass, and subjected the party to two years' imprisonment, and a fine at the King's will. This lenity, however, is said to have been productive of terrible consequences; and it was, therefore, found necessary, by 13 Edw. I. (stat. Westm. sec.) c. 34 (*e*), to make punishable by judgment of life and member the ravishing of a woman, whether married, maid or other, where she did not consent, neither before or after. The punishment was still further enhanced by 18 Eliz. c. 7, s. 1 (*f*). These statutes were repealed and superseded by 9 Geo. IV. c. 31 (E.) & 10 Geo. IV. c. 34 (I.). And by 24 & 25 Vict. c. 100, s. 48 (*g*), 'Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*h*)

(*a*) 1 Hawk. c. 41, s. 2. 1 Hale, 627, 628. Co. Litt. 123 *b*. 2 Co. Inst. 180. 3 Co. Inst. 60, 4 Bl. Com. 210. 1 East, P.C. 434. Steph. Dig. Cr. L. (6th ed.) art. 270. The line between rape and abduction was not distinct in the early stages of the English criminal law. 2 Pollock and Maitland, Hist. Eng. Law, 488, 489. See R. *v.* Camplin, 1 Den. 89, *post*, p. 934.

(*b*) *Post*, p. 934.

(*bb*) See R. *v.* Page, 3 Dyer, 404 *a*. 73 E.R. 683, for a conviction of assault after acquittal of rape.

(*c*) 4 Bl. Com. 211. 1 Hawk. c. 41, s. 11. 1 Hale, 627. Bract. lib. 3, c. 28. Leg. Gul. i. l. 19. Wilk. Leg. Anglo-Sax. 222, 290. 2 Pollock and Maitland. 489.

(*d*) Repealed as to England in 1828 (9 Geo. IV. c. 31), as to Ireland in 1829 (10 Geo. IV. c. 34).

(*e*) Repealed as to England in 1828, as to Ireland in 1829 by the statutes specified in note (*d*). In R. *v.* Fletcher, Bell, 63, this Act was referred to as being in force.

(*f*) Repealed in 1828 (9 Geo. IV. c. 31).

(*g*) A re-enactment of 9 Geo. IV. c. 31, s. 16 (E) and 10 Geo. IV c. 19 (I) as modified by 4 & 5 Vict. c. 56, s. 3.

(*h*) The words omitted were repealed in 1892 (S. L. R.). By 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212, the minimum term of penal servitude is three years and imprisonment (with or without hard labour) for not over two years may be substituted. As to recognisances, *vide ante*, p. 218.

As to the punishment of principals in the second degree and accessories before and after the fact see 24 & 25 Vict. c. 94, & 24 & 25 Vict. c. 100, s. 67, *ante*, pp. 130, 133.

An indictment for rape may be prosecuted at any time, and notwithstanding any subsequent assent of the woman alleged to have been ravished (*i*).

All who are present, aiding and assisting a man to commit a rape, are principal offenders in the second degree, whether they be men or women (*j*).

Capacity.—The law presumes absolutely that a boy under the age of fourteen years is unable to commit the crime of rape; and, therefore, he cannot be guilty of it (*k*); or of an assault with intent to commit a rape (*l*); and if he be under fourteen no evidence is admissible to shew that he was in fact physically capable of sexual intercourse (*m*). This presumption, however, proceeds upon the grounds of impotency, rather than the want of discretion; and such infant may, therefore, be a principal in the second degree, as aiding and assisting in this offence, as well as in other felonies, if it appear, by sufficient circumstances, that he had a mischievous discretion (*n*).

There are conflicting dicta as to whether a male under fourteen can be convicted of an attempt to commit rape (*o*).

But it seems to be clear that a boy under fourteen may, on evidence which would warrant a conviction of an older male of rape be convicted of indecent assault (*p*) or simple assault (*q*).

It is said (*r*) that a husband cannot be guilty as a principal in the first degree of a rape on his wife, on account of the matrimonial consent which she has given and which she cannot retract. As to the correctness of this opinion there is some difference of judicial opinion.

In R. *v.* Clarence (*s*), Wills, J., said, 'If intercourse under the circumstances now in question constitutes an assault on the part of the man, it must constitute rape, unless indeed between married persons rape is impossible, a proposition as to which I certainly am not prepared to assent, and for which there seems to be no sufficient authority' (*t*). But Hale's view was accepted by A. L. Smith, J. (p. 37), Stephen, J. (p. 46),

(*i*) 1 Hale, 631 & 632. 1 East, P. C. 446. But delay in prosecution or failure to make complaint on the earliest opportunity affords strong presumptive evidence of consent. See R. *v.* Osborne [1905], 1 K.B. 551, *post*, p. 944.

(*j*) R. *v.* Vide, Fitz. Corone, pl. 86. 1 Hawk. c. 41, s. 10. Lord Baltimore's case, 4 Burr. 2179. 1 Hale, 628, 633. 1 East, P. C. 435. R. *v.* Burgess, Trin. T. 1813, *post*, p. 939.

(*k*) 1 Hale, 630. R. *v.* Brimilow, 2 Mood. 122. R. *v.* Groombridge, 7 C. & P. 582, Gaselee, J., and Abinger, C.B. See R. *v.* Waite [1892], 2 Q.B. 600, *post*, p. 932.

(*l*) R. *v.* Eldershaw, 3 C. & P. 396, Vaughan, B. R. *v.* Philips, 8 C. & P. 736, Patteson, J. See *ante*, p. 60.

(*m*) R. *v.* Philips, 8 C. & P. 736, Patteson, J. R. *v.* Jordan, 9 C. & P. 118, Williams, J.

(*n*) 1 Hale, 620.

(*o*) R. *v.* Waite, *ubi supra*.

(*p*) See R. *v.* Williams [1893], 1 Q.B. 320.

(*q*) R. *v.* Brimilow, *ubi supra*. R. *v.* Waite, *ubi supra*. In R. *v.* Angus [1907], 24 N. Z. L. R. 948, where the above cases are fully discussed, it was held as stated in the text above, the Court observing that an act of indecency may be independent of sex.

(*r*) 1 Hale, 630.

(*s*) [1888] 22 Q.B.D. 23. In that case a husband was indicted for an assault on his wife causing grievous bodily harm, and the evidence was that he knowing that he was infected with a venereal disease (of which she was ignorant) he carnally knew her with her consent and infected her with the disease.

(*t*) Opinions to the same effect were expressed by Field, J. (p. 57).

and Hawkins, J. (p. 51). The last-named judge said that, 'the intercourse which takes place between husband and wife is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law. Consent is immaterial.' Upon this opinion he came to the conclusion that the act of the husband was not the less an assault because of the submission of the wife (*u*).

A husband may be guilty as a principal in the second degree to a rape on his wife by assisting another person to commit a rape upon her, for though in marriage the wife has given up her body to her husband, she is not by him to be prostituted to another (*v*): and a woman may be convicted as a principal in the second degree or as an accessory before the fact to a rape on another woman (*w*).

Carnal Knowledge.—There must be *penetratio*, or *res in re* in order to constitute the 'carnal knowledge,' which is a necessary part of the offences dealt with in this chapter (*x*). But a very slight penetration is sufficient (*y*). Thus in R. *v.* Russen (*z*), it was proved on behalf of a prisoner, who was charged with having ravished a young girl, that the passage of her parts was so narrow that a finger could not be introduced; and that the membrane called the hymen, which crosses the vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken; but it was admitted that the hymen is in some cases an inch, and in others an inch and a half, beyond the orifice of the vagina (*a*). Ashhurst, J., left it to the jury to say whether any penetration were proved: and the judges afterwards held, upon a conference (De Grey, C.J., and Eyre, B., being absent), that this direction was perfectly right; and that the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity.

It is not essential to prove rupture of the hymen (*b*), but absence of evidence of rupture of the hymen makes it necessary to caution the jury to be careful about convicting of the complete offence (*c*).

By 24 & 25 Vict. c. 100, s. 63, 'Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to

(*u*) Bishop, Amer. Cr. L. vol. ii. s. 72 (*b*) 2 expresses his concurrence with the minority of the judges.

(*v*) Lord Castlehaven's case [1631], 3 St. Tr. 402. 1 Hale, 629. Hutt. 116. 1 Str. 633.

(*w*) R. *v.* Ram, 17 Cox, 609, 610n.; cf. Lord Baltimore's case [1768], 4 Burr. 2179.

(*x*) 1 Hale, 628. 3 Co. Inst. 59, 60. 1 Hawk. c. 41, s. 3. Sum. 117. 1 East, P. C. 437. R. *v.* Page, 3 Dy. 304, *a. in marg.*: 73 E.R. 683: Cro. Car. 332.

(*y*) See R. *v.* Lines, 1 C. & K. 393, Parke, B.

(*z*) O. B. Oct. 1777. Serjt. Forster's MS. 1 East, P. C. 439. MS. Bayley, J.

(*a*) Upon this statement the reporters, in a note to R. *v.* Hughes, 9 C. & P. 752, observe, 'The first proposition appears to be much too strongly put, as several cases are mentioned by Dr. Davis (Elem. of Midw. 102), and Dr. Paris (1 Par. & Fonb. Med. Jur. 203), in which the hymen was entire during the pregnancy of the party, and in one case was obliged to be divided by a surgical operation at the time of the accouchement. With respect to the second proposition there may be some doubt, as in all the preparations in the museum of the Royal College of Surgeons, in which the hymen is shewn, it is not more than a quarter of an inch from the orifice of the vagina.' See Taylor, Med. Jurisp. (5th ed.), vol. ii. pp. 31 *et seq.*, 112.

(*b*) R. *v.* Hughes, 9 C. & P. 752 (all the judges) accepting R. *v.* Russen as good law. R. *v.* Jordan, ibid. 118, Williams, J. The ruling in R. *v.* Gammon, 5 C. & P. 321, to the contrary is not good law.

(*c*) R. *v.* McRue, 8 C. & P. 641, Bosanquet, J.

constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only (*d*). A person may be convicted of rape, even if the fact of emission is negatived by the evidence (*e*).

Consent.—If a man has connection with a woman who is in a state of insensibility, knowing her to be in such state, he is guilty of rape, as the offence of rape is ravishing a woman where she did not consent (*f*), and not ravishing her against her will (*g*). Thus a man is guilty of a rape if he has connection with a woman when she is asleep, he knowing her to be so (*h*).

Where upon an indictment for rape the prosecutrix, a girl of thirteen, stated that she usually slept with the prisoner (her father) and having gone to sleep by his side, on awaking she found him having connection with her; the prisoner had had connection with her before, but she had never complained to anyone, nor would she of her own accord now, and a woman, who saw them together on the bed on the occasion in question, stated that the girl appeared to lie quiet for a moment while the prisoner was upon her, but on seeing the witness she immediately attempted to push him off. Coleridge, J., told the jury, 'The question is, was she a consenting party? and you cannot doubt, after the evidence you have heard, that, although not in a state to give consent when the connection began, she betrayed no disposition to resistance when she might have done so, and that, too, before the connection was at an end. She had been so treated before without complaining, nor would she, from her own statement, have complained now. I think, therefore, there is not such an absence of consent throughout as to justify a conviction of rape' (*i*).

A consent or submission obtained by fraud is, it would seem, not a defence to a charge of rape or cognate offences.

By the concluding clause of sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), 'Whereas doubts (*j*) have been entertained

(*d*) Taken from 9 Geo. IV. c. 31, s. 18 (E) and 10 Geo. IV. c. 34, s. 21 (I). As to the reason for passing these enactments see R. *v.* Allen, 9 C. & P. 31, Tindal, C.J. Before these enactments there were great authorities to shew that there need not have been *emissio seminis* in order to constitute a rape. 1 Hale, 628. 1 East, P. C. 438. R. *v.* Blomfield, 1 East, P. C. ibid. R. *v.* Sheridan, ibid. Fost. 274. See also R. *v.* Reekspear, 1 Mood. 342. R. *v.* Cozens, 6 C. & P. 351. R. *v.* Brooks, 2 Lew. 267. R. *v.* Jennings, 4 C. & P. 249, 1 Lew. 290. But this was doubtful, and there were many authorities to the contrary, 12 Co. Rep. 37: Sum. 117. Staundf. 44. 1 Hawk. c. 4, s. 2; c. 41, s. 3. 1 East, P. C. 437, 438, 439, 440. R. *v.* Flemming, 2 Leach, 854. R. *v.* Burrows, R. & R. 519: 1 Lew. 288.

(*e*) R. *v.* Cox [1832], 1 Lew. 292, 5 C. & P. 297, where the jury negatived emission and the majority of the judges held a conviction good. R. *v.* Marsden [1891], 2 Q.B. 149.

(*f*) See R. *v.* Camplin, 1 Den. 90. The prisoner had caused the insensibility by giving the woman liquor for the purpose of exciting her. As to strangling or drugging with intent to make such offence possible, see 24 & 25 Vict. c. 100, ss. 21 & 22, *ante*, p. 863.

(*g*) R. *v.* Fletcher, Bell, 63, 71: 28 L. J. M. C. 85, after full discussion of all the authorities. As to rape on imbecile females see *post*, p. 946.

(*h*) R. *v.* Mayers, 12 Cox, 311, Lush, J. In R. *v.* Young [1878], 14 Cox, 114, it was held rape carnally to know a married woman when she was asleep. She woke up and when she found that the man was not her husband flung him off and cried out.

(*i*) R. *v.* Page, 2 Cox, 133.

(*j*) The doubts referred to arose out of the conflicting decisions in R. *v.* Barrow, L. R. 1 C. C. R. 156, and R. *v.* Dee, 14 L. R. (Ir.) 468; and of the disapproval of R. *v.* Barrow by some of the English judges in R. *v.* Flattery, 2 Q.B.D. 410. The enactment only applies where the woman is awake. The offence was in R. *v.* Williams, 8 C. & P. 286, held to be an assault. Cf. R. *v.* Saunders, ibid. p. 265. It is said to have been ruled in R. *v.* O'Shay, 19 Cox,

whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape.'

The question whether fraud as to the defendant's physical condition is sufficient to deprive him of the defence of consent has been fully discussed in R. *v.* Clarence (*k*) and elicited differences of opinion. But the rule accepted by the majority of the judges was that where the act is consented to with knowledge of its nature the fact that the defendant has concealed, or lied about, his physical condition, or the fact that bodily harm to the woman results from the act does not warrant the inference in law or fact that she did not consent to the act.

Force, Consent, Submission.—It is an essential element in the crime of rape that the woman should not be a consenting party at the time when the incriminating act is done. When the female is under sixteen, or is an imbecile, idiot, or lunatic, and in fact consents, the man is not guilty of rape, but is punishable under the enactments set out *post*, pp. 946 *et seq.*

Where a party took a woman by force, compelled her to marry him, and then had carnal knowledge of her by force, it appears to have been held that she could not maintain an appeal of rape against her husband, unless the marriage were first legally dissolved: but that when the marriage was made void *ab initio* by a declaratory sentence in the Ecclesiastical Court, the offence became punishable, as if there had been no marriage (*l*). As to carrying away a woman by force or fraud with intent to marry her, &c., see *post*, p. 968.

The offence of rape may be committed, though the woman at last yielded to the violence, if her consent was forced by fear of death or by duress (*m*). If non-resistance on the part of a prosecutrix proceeds merely from her being overpowered by actual force, or from her not being able, from want of strength, to resist any longer, or from the number of persons attacking her, she considered resistance dangerous, and absolutely useless, the crime is complete (*n*). And it is no excuse that she was first taken with her own consent, if she were afterwards forced against her will; nor is it an excuse that she consented *after the fact*, or that she was a common strumpet, or the concubine of the ravisher: for she is still under the protection of the law, and may not be forced (*o*). Circumstances of this kind, though they do not necessarily prevent the offence from amounting to a rape, are material to be left to the jury, in favour of the accused, especially in doubtful cases (*p*). The notion that, if the woman conceived, it could not be a rape, because she must in such case have consented, is exploded (*q*).

76, Ridley, J., that the effect of 48 & 49 Vict. c. 69 is to override R. *v.* Flattery and to establish that it is a good defence to a charge of rape to prove that consent was obtained by fraud; *sed quære*.

(*k*) 22 Q. B. D. 23, *ante*, p. 932. In this case doubts were thrown on the correctness of the decisions in R. *v.* Bennett, 4 F. & F. 1105, and R. *v.* Sinclair, 13 Cox, 28.

(*l*) 1 Hale, 629.

(*m*) 1 Hawk. c. 41, s. 6. 1 East, P. C. 444; see *post*, p. 937.

(*n*) R. *v.* Hallett, 9 C. & P. 748, Coleridge, J.

(*o*) 1 Hawk. c. 41, s. 7. 1 East, P. C. 444, 445. 4 Bl. Com. 213.

(*p*) 1 East, P. C. 445. See R. *v.* Harrison, 2 Cr. App. R. 94.

(*q*) 1 Hale, 631. 1 Hawk. c. 41, s. 8. 1 East, P. C. 445. Taylor, Medical Jurisp. (5th. ed.), Vol. ii. p. 146.

Submission without resistance is not necessarily tantamount to consent. The person assaulted may be too young to appreciate the nature of the act done or to do more than submit without actually consenting; and submission by a child in the hands of an older and stronger person, and possibly under the influence of fear or of a sense of constraining authority, is not equivalent to consent (*r*).

In R. *v.* Nichol (*s*), a master took very indecent liberties with a female scholar of the age of thirteen, by putting her hand into his breeches, pulling up her petticoats, and putting his private parts to hers: she did not resist, but it was against her will. The jury found him guilty of an assault with intent to commit a rape, and also of a common assault; and the judges thought the finding as to the latter clearly right (*t*).

In R. *v.* Jones (*u*), on the trial of a father for a rape on his daughter, aged fourteen years, it appeared that her father laid hold of her and had connection with her; he had previously told her not to tell anyone what he had done to her; he had said he would throttle her and kill her, if she told anything he had done; he had throttled her, and had had connection with her many times before; and on these occasions he had told her not to tell, and that was the reason she did not tell; she had consented to the prisoner's having connection with her because she was afraid of him; she was afraid of his choking her. Channell, B., told the jury that, 'if it is made out to your satisfaction that a kind of reign of terror was set up in this family, and in consequence of that terror and dread the girl allowed the connection to take place without resistance, then I am of opinion you may convict. It is possible she may have been a consenting party, and not influenced by dread: that is a question for you. She says the same thing had been done upon previous occasions, and her father had told her he would throttle her if she told her mother, and that is why she did not tell. She says she begged him not to do it, and to be quiet and leave her alone. This, in ordinary case would be quite insufficient; but in this case, if you think she remained passive under the influence of that dread and reign of terror which I have mentioned, and that is clearly made out, you may find the prisoner guilty' (*v*).

Submission to an act of carnal intercourse by a quack doctor on the faith of his statement that he was performing a surgical operation was held not to amount to consent, and he was convicted of rape (*w*).

A girl of sixteen was taken by her parents to the defendant, a German quack, on account of fits, by which she was afflicted; he said he would cure her, and bid her come again the next morning; she went accordingly the next morning by herself, and he told her she must strip naked; she said she would not. He said she must, or he could not do her any good. She began to untie her dress, and he stripped off all her clothes; she did nothing; he pulled off everything; she told him she did not like to be

(*r*) R. *v.* Day, 9 C. & P. 722, Coleridge, J.

(*s*) MS. Bayley, J., and R. & R. 130.

(*t*) *e.g.*, R. *v.* M'Gavavan, 3 C. & K. 320, Williams, J.

(*u*) [1861], 4 L. T. (N. S.) 154.

(*v*) Cf. R. *v.* Day, *ubi supra*, R. *v.* Woodhouse, 12 Cox, 443.

(*w*) R. *v.* Flattery, 2 Q. B. D. 414. In that case it was said that a conviction for indecent assault could be had if the consent was obtained by fraud. It seems to have been ruled that this decision is overridden by 48 & 49 Vict. c. 69, s. 4. R. *v.* O'Shay, 19 Cox, 76, Ridley, J.; *sed quære.*

stripped in that manner. When she was naked he rubbed her with a liquid. The case was left to the jury to consider whether the defendant believed that stripping the girl would assist his judgment, or whether he did not strip her wantonly, without thinking it necessary; and they were told that the making her strip and pulling her clothes off might, under the latter circumstances, justify a verdict for an assault. The jury found the defendant guilty; and, upon a case reserved, it was held that the conviction was right (*x*). And it has been held that where a girl of fourteen submitted without resistance to carnal intercourse with a medical man who made her believe that he was treating her medically, he was guilty of assault (*y*).

Upon an indictment containing a count for an assault with intent to commit a rape, and a count for a common assault, it appeared that the defendant, a surgeon, attended the prosecutrix for bleeding piles, and had been with her to consult another surgeon, and afterwards went with her into her bedroom, and told her he was ordered to give her an injection, and directed her to put her head on the bed and her feet on the floor, which she did, and her clothes were up over her back. He then began to use the injection, and the water ran down her legs. She was going to raise herself up, and he said, 'Put your head on the bed and do not stir for a moment.' She had had injections before, and they keep persons still for a little while after they are applied. As she lay she perceived something very warm against her person; she resisted, and rose up from the bed, and said, 'Doctor, what do you mean?' His small clothes were quite open. She felt the parts of the prisoner enter hers just a little. Coleridge, J.: 'An assault with intent to commit a rape is very different from an assault with intent to have improper connection. The former is with intent to have connection by force; but here, according to the statement of the prosecutrix, the prisoner desists the moment she resists, and at most it could only be an attempt by surprise to get possession of the person of the prosecutrix, and that is not an assault with intent to commit a rape, but is an assault. If in this case the prisoner had intended to have effected his purpose by force, the complete offence of the rape would have been proved, as the prosecutrix states that the prisoner penetrated her person, and the smallest penetration is sufficient to complete the offence of rape' (*z*).

Upon an indictment for assault it appeared that the prisoner was a medical man, and that the girl alleged to have been assaulted was fourteen years old, and had been placed under his professional care in consequence of illness arising from suppressed menstruation. The defendant gave her medicines, and on her going to his house, and informing him that she was no better, he observed, 'Then I must try further means with you.' He then laid her down in the surgery, lifted up her clothes, and had connection with her, she making no resistance, believing, as she stated, that she was

(*x*) R. *v.* Rosinski, MS. Bayley, J., and 1 Mood. 19; 1 Lew. 11.

(*y*) R. *v.* Case, 1 Den. 580; 19 L. J. M. C. 174.

(*z*) R. *v.* Stanton, 1 C. & K. 415. In R. *v.* Wright, 4 F. & F. 967 the woman, admitted that she had allowed extreme liberties, but alleged that the connection was against her will. The accused admitted the attempt but said that the woman then resisted and that he desisted. The summing up of Channell, B., accorded with that in R. *v.* Stanton.

submitting to medical treatment for the ailment under which she laboured. The jury were directed that the girl was of an age to consent to a man having connection with her, and that if they thought she consented to such connection with the defendant, he ought to be acquitted; but if they were satisfied she was ignorant of the nature of the defendant's act, and made no resistance solely from a *bona-fide* belief that the defendant was (as he represented) treating her medically with a view to her cure, his conduct amounted in point of law to an assault. The jury convicted, and, upon a case reserved upon the question whether this direction to the jury was correct in point of law, after argument, Wilde, C.J., thus delivered judgment: 'This case is free from doubt. The finding of the jury is clear. They are told that if they think she consented to the connection, they must acquit; that the girl was competent to consent; and that it is a question for them whether she did so or no. This is said to be qualified by what follows, viz., that if they thought she made no resistance, solely from the belief that the prisoner was treating her medically, they should convict of an assault. I do not see that this is any qualification; it is a strictly correct direction. The girl is fourteen years old. She might at that age be ignorant of the nature of the act, morally as well as physically, and of its possible consequences. It is said that, as she made no resistance, she must be viewed as a consenting party. That is a fallacy. Children who go to a dentist make no resistance; but they are not consenting parties. The prisoner disarmed her by fraud. She acquiesced under a misrepresentation that what he was doing was with a view to a cure, and that only; whereas it was done solely to gratify the passion of the prisoner. How does this differ from a case of total deception? She consented to one thing; he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will. The cases (*a*) which have been referred to shew that where consent is caused by fraud, the act is at least an assault, and perhaps amounts to rape. It has been suggested that were the act to be regarded in the light of medical treatment, it would be no offence, and that it was not left to the jury whether the prisoner did not intend it as such. That certainly was not left to them, nor need have been. The notion that a medical man might lawfully adopt such a mode of treatment is not to be tolerated in a court of justice. He would have committed a high ecclesiastical offence at all events' (*b*).

Indictment.—As the absence of previous consent is a material ingredient in the offence of rape, it should be averred in the indictment by the words 'violently and against her will' or 'without her consent' (*c*). It is essential to aver, that the offender 'feloniously did ravish' the party; and the omission of the word '*ravished*' will not be supplied by an averment that the offender 'did carnally know,' &c. (*d*). It has been considered that the words 'did carnally know' are not essential, on the ground that *rapere* signifies legally as much as *carnaliter cognoscere* (*e*); but they are

(*a*) R. *v.* Saunders, 8 C. & P. 265. R. *v.* Williams, ibid. 286.

(*b*) R. *v.* Case, 1 Den. 580. See R. *v.* Rosinski, 1 Mood. 19, *ante*, p. 937.

(*c*) Cro. Circ. Comp. ed. 427. 2 Stark. Cr. Pl. ed. 409. 3 Chit. Cr. L. 815.

(*d*) 1 Hale, 628–632. Br. Indict. pl. 7, citing 9 Ed. IV. c. 6.

(*e*) 2 Co. Inst. 180, and see 2 Hawk. c. 25, s. 56. Staundf. 81. Co. Litt. 137.

appropriate to describe the nature of the crime, and appear to be generally used (*f*), and this omission would not be prudent (*g*). Six judges out of twelve thought that omission in an indictment of the words '*carnaliter cognovit*' was cured by verdict, because those words were not in 9 Geo. IV. c. 31; but they thought it bad before verdict (*h*). Where an indictment alleged that the prisoner in and upon E. F., 'violently and feloniously did make (omitting "an assault"), and her the said E. F., then and there and against her will, violently and feloniously did ravish and carnally know'; upon a case reserved, ten of the judges were of opinion that the judgment ought not to be arrested, because of the omission of the words 'an assault' (*i*).

The indictment against aiders and abettors may lay the fact to have been done by all, or may charge it as having been done by one and abetted by the rest. Thus where, upon an appeal against several persons for ravishing the appellant's wife, an objection was taken that only one should have been charged as ravishing, and the others as accessories; or that there should have been several appeals, as the ravishing of one would not be the ravishing of the others: it was answered that if two come to ravish, and one by comport of the other does the act, both are principals, and the case proceeded (*l*). And where the indictment was against three persons for a rape, charging them all as principals in the first degree, that they ravished and carnally knew the woman; and the prisoners were all found guilty; the judge who tried them doubted whether the charge could be supported; and, at his desire, the case was mentioned by Heath, J., to the other judges, and all who were present agreed that the charge was valid, though the form was not to be recommended; but they gave no regular opinion, because the case was not regularly before them (*m*).

On an indictment of one for rape and another for aiding and abetting the rape, if the principal is (under 14 & 15 Vict. c. 100, s. 9) convicted of an attempt to commit rape the other defendant may be convicted of aiding and abetting the attempt (*n*).

An indictment in the first count charged F. with committing a rape, and L. with being present, aiding and assisting; the second count charged L. as principal in the first degree, and F. as aiding and assisting; the third count charged an evil-disposed person, to the jurors unknown, as principal in the first degree, and F. and L. as aiding and assisting; and the fourth count charged a certain other evil-disposed person as principal,

(*f*) See the precedents referred to *ante*, note (*e*).

(*g*) 1 East, P. C. 448. 2 Stark. Cr. Pl. 409, note (*p*). 3 Chit. Cr. L. 812. It is laid down, generally, in some of the books that the indictment must be *rapuit et carnaliter cognovit*, 1 Hale, 628–632.

(*h*) R. *v.* Warren, M. T. 1832, MSS. Bayley, B. 3 Burn's Justice (ed. D. & W.) 725. See 7 Geo. IV. c. 64, s. 21, *post*, Vol. ii. p. 1936. 24 & 52 Vict. c. 100, s. 48 (*ante*, p. 931) speaks of 'rape' without defining it.

(*i*) R. *v.* Allen, 9 C. & P. 521; 2 Mood. 179. It used to be considered necessary to conclude the indictment against the form of the statute and against the peace. 1 East, P. C. 448; but see 2 Stark. Cr. Pl. 409, note. R. *v.* Scott, R. & R. 415. Neither conclusion is now necessary.

(*l*) R. *v.* Vide, Fitz. Corone, pl. 86.

(*m*) R. *v.* Burgess, Tr. T. 1813, Ellenborough, C.J., Sir James Mansfield, C.J., and Grose, J., were absent. In 5 Evans' Col. Stat. Cl. 6, p. 399, note (12), the case is mentioned as having occurred at the Chester Spr. Ass. 1813.

(*n*) R. *v.* Hapgood and Wyatt, L. R. 1 C. C. R. 221; S. C. *sub. nom.* R. *v.* Wyatt, 39 L. J. M. C. 83.

and F. and L. as aiders. For the defence, before pleading it was moved to quash the indictment on the ground that it was bad for misjoinder of two offences of a different nature, and not liable to the same punishment, and that for aiding and abetting no provision was made by 9 Geo. IV. c. 31. It was also contended that the indictment contained different transactions and that the prosecutrix was bound to make an election. The Court overruled both objections. L. was acquitted, and a general verdict of guilty was found against F. It appeared that the prisoner, together with three other men, committed at the same time and place, the one after the other, successive rapes upon the body of the prosecutrix, the others aiding and abetting in turn; and the evidence, if believed, was sufficient to sustain the first count, as far as it charged F. as principal, as the other counts which charged him as aiding and assisting; and, upon a case reserved, the judges held that the conviction was good on the first count (*o*). Where the first count charged G. as principal in the first degree, and W. as present, aiding and assisting: and the second count charged W. as principal in the first degree, and G. as present, aiding and assisting; it was moved to quash the indictment, on the ground of misjoinder, as the judgment might be different, and it was said that this objection did not ultimately become material in the preceding case, as one prisoner alone was convicted; but Coleridge, J., said: 'The 9 Geo. IV. c. 31, s. 16, awards the punishment of death to "every person convicted of the crime of rape." Now, I take it that a principal in the second degree falls clearly within that provision: and that, therefore, the objection that the judgment might be different entirely fails' (*p*). A woman who has aided a man in the commission of a rape may be indicted as a principal (*q*).

Evidence.—The unsworn evidence of young children is not admissible on an indictment for rape (*r*), but is admissible on an indictment for unlawfully and carnally knowing, or attempting to have unlawful carnal knowledge of, a girl under thirteen (*s*).

The woman ravished is a competent witness: and indeed is so much considered as a witness of necessity, that where a husband was charged

(*o*) R. *v.* Folkes, 1 Mood. 354. 'There is an inaccuracy in the statement of this case; it treats the charge against the principal in the first degree as one count, and the charge against the principal in the second degree as another count; but that is not so, as both charges only constitute one count, as is plain from the indictments in murder, in which the conclusion, "and so the jurors, &c., say, that A., B., and C. murdered," always follows the allegation that B. and C. were present, aiding and assisting.' C. S. G.

(*p*) R. *v.* Gray, 7 C. & P. 164. R. *v.* Crisham, C. & M. 187. See also R. *v.* Parry, 7 C. & P. 836, where an indictment against five charged each as principal in one count, and the others as aiders and abettors.

(*q*) R. *v.* Ram, 17 Cox, 609.

(*r*) In R. *v.* Nicholas, 2 C. & K. 246, where on an indictment for abusing a child under ten years of age, the child was wholly ignorant of the nature of an oath, and therefore not examined, and it was proposed to give evidence of a statement made by her relative to the offence, and the name of the person who committed it; Pollock, C.B., refused to admit it, observing, 'If a man says to his surgeon, "I have a pain in my head," or a pain in such a part of the body, that is evidence; but if he says to his surgeon, "I have a wound," and adds, "I met John Thomas, who had a sword, and ran me through the body with it," that would be no evidence against John Thomas: and it is certainly a very odd reason for receiving the evidence of what a child has said, that that child is not capable of taking an oath.' Cf. R. *v.* Brasier, 1 East, P. C. 443.

(*s*) 48 & 49 Vict. c. 69, s. 4, *post*, p. 948.

with having assisted another man in ravishing his own wife, the wife was admitted as a witness against her husband (*t*).

But though the party ravished is a competent witness, the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony. Thus, if she is of good fame; if she presently discovered the offence, and made search for the offender; if she shewed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the fact 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 (*u*). But if, on the other hand, the witness is of evil fame, and stands unsupported by others; if, without being under 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 (*v*).

The offence of rape is not triable at quarter sessions (*w*).

On an indictment for rape, the jury, if not satisfied that the complete offence has been committed, may convict of an attempt to commit rape (*x*). And by sect. 9 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), 'If upon the trial of an indictment for rape or any offence made a felony by sect. 4 of this Act the jury shall be satisfied that the defendant is guilty of an offence under sects. 3, 4, or 5 (*vide post*, pp. 951–956) of this Act (*y*) or of an indecent assault but are not satisfied that the defendant is guilty of the felony charged in such indictment or of an attempt to commit the same, then, and in every such case the jury may acquit the defendant of such felony and find him guilty of such offence as aforesaid or of an indecent assault: and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid or for the misdemeanor of an indecent assault' (*z*).

Attempted Rape.—Attempts to choke, suffocate, or strangle a woman with intent to commit rape fall within 24 & 25 Vict. c. 100, s. 21 (*a*), and are punishable by flogging (*b*) in addition to and in substitution for the

(*t*) R. *v.* Lord Castlehaven, 3 St. Tr. 402. 1 Hale, 629. Hutt. 116. 1 Str. 633.

(*u*) 1 Hale, 633. 1 East, P. C. 445. 4 Bl. Com. 213. R. *v.* Osborne [1905], 1 K. B. 551, 559.

(*v*) 4 Bl. Com. 213, 214. 1 East, P. C. 445, 446.

(*w*) 5 & 6 Vict. c. 38, s. 1, being punishable by penal servitude for life on a first conviction.

(*x*) 14 & 15 Vict. c. 100, s. 9, *post*, Vol. ii. p. 1966.

(*y*) It is to be noted that a conviction for common assault cannot be made on an indictment for rape. But on an indictment for assault with intent to commit rape or for an attempt carnally to know a girl under thirteen, which are misdemeanors, a conviction could be had for common assault. See R. *v.* Guthrie, L. R. 1 C. C. R. 241. As to the principle see R. *v.* Taylor, L. R. 1 C. C. R. 194, an indictment for unlawful wounding. As to the double defence, see R. *v.* Chadderton, 1 Cr. App. R. 229.

(*z*) Punishment of Incest Act, 1908, *post*, p. 973.

(*a*) *Ante*, p. 863.

(*b*) 26 & 27 Vict. c. 44, *ante*, p. 216. In R. *v.* Smallbones, Hants Winter Assizes, 1898, a sentence of flogging was awarded for an offence under s. 21 with intent to commit rape. See Archb. Cr. Pl. (23rd ed.) 239.

other punishments lawful under that section. Use of stupefying or overpowering drugs with intent to commit an indictable offence is punishable under 24 & 25 Vict. c. 100, s. 22 (*c*).

Where there is no reason to expect that the facts and circumstances will suffice in evidence to prove commission of the complete offence, the proper course is to indict for the common-law misdemeanor of an attempt to commit rape (*d*), or for the misdemeanor of assault with intent to ravish, which is, under 24 & 25 Vict. c. 100, s. 38 (*ante*, p. 893), punishable as an assault with intent to commit felony, by imprisonment with or without hard labour for not more than two years (*e*). Courts of Quarter Sessions have jurisdiction to try this offence. Aiding and abetting an attempt to ravish is punishable under 24 & 25 Vict. c. 94, s. 8, and 24 & 25 Vict. c. 100, s. 67 (*ante*, pp. 138, 139).

As to indecent assaults on females, *vide post*, p. 955.

Upon an indictment for an assault with intent to commit a rape, Patteson, J., in summing up, said: 'In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part (*f*). He also ruled that evidence that the prisoner, on a prior occasion, had taken liberties with the prosecutrix was not admissible to shew the prisoner's intent (*g*).

Under a count for an assault with intent to commit rape, a prisoner may be convicted of common assault (*h*). But on an indictment containing a count for an assault with intent to commit a rape, and a count for a common assault, if the prisoner be acquitted on the count for an assault with intent to commit a rape, on the ground that the prosecutrix consented, he cannot be convicted on the count for a common assault; for to support that count such an assault must be proved as could not be justified if an action were brought for it, and leave and licence pleaded (*i*).

An indictment may contain two counts for two different attempts to commit a rape on the same female, and evidence of both may be given on the trial (*j*). And where one count charged the prisoner with an attempt to commit a rape, and another count charged him with an assault and the record stated that the jury found him 'guilty of the misdemeanor and offence in the said indictment specified,' and it was adjudged that 'for the said misdemeanor,' he shall be imprisoned for two years and kept to hard labour; it was held, upon error, that the word 'misdemeanor' was *nomen collectivum*, and therefore the finding of the jury was in effect that the prisoner was guilty of the whole matter charged by the indictment, and consequently the judgment was warranted by the verdict (*k*).

Evidence of Fresh Complaint.—On a trial for rape the fact that a

(*c*) *Ante*, p. 863.

(*d*) And see R. *v.* Hapgood, L. R. 1 C. C. R. 221, *ante*, p. 939.

(*e*) As to fines and sureties see 24 & 25 Vict. c. 100, s. 71, *ante*, pp. 217, 218, and as to probation *vide ante*, p. 227. As to common law punishment see 1 East, P. C. 441.

(*f*) R. *v.* Lloyd, 7 C. & P. 318.

(*g*) Ibid.

(*h*) 1 Lew. 16, Hullock, B.

(*i*) R. *v.* Meredith, 8 C. & P. 589, Abinger, C.B.

(*j*) R. *v.* Davies, 5 Cox, 328.

(*k*) R. *v.* Powell, 2 B. & Ad. 75, Taunton, J., though the two counts only charged one assault.

complaint was made by the prosecutrix shortly after the time when the offence is alleged to have been committed and the particulars of the complaint may, so far as they relate to the charge against the prisoner, be given in evidence for the prosecutrix, not as evidence of the facts complained of nor as part of the *res gestæ*, but to shew the consistency of the conduct of the prosecutrix with the evidence given by her at the trial and as negativing consent on her part (*l*).

R. *v.* Clarke (*m*), cited in former editions of this work (*n*) as authority for the proposition that the particulars of the complaint cannot be given in evidence is said by Hawkins, J., in R. *v.* Lillyman (*l*) not to contain any such ruling, but to decide only (1) that the fact of the woman having made the complaint is admissible, (2) that the fact and the particulars of the complaint are not evidence of the truth of the complaint or of the statements of fact on which it was based; and these rulings he adopted as settled law (*o*).

The cases of R. *v.* Walker (*p*), R. *v.* Osborne (*q*) so far as they are inconsistent with R. *v.* Lillyman are overruled. R. *v.* Wood (*r*) is in accord with R. *v.* Lillyman (*s*), and so is R. *v.* Eyre (*t*) except as to the ruling by Byles, J., that what was said to the woman in answer to what she said immediately after the occasion was equally evidence with her complaint (*u*), which is open to question.

The ruling in R. *v.* Lillyman makes it unnecessary to resort to the modes of getting in the particulars of the complaint by indirect methods countenanced in R. *v.* Wink (*v*), but disapproved in R. *v.* Osborne (*ubi sup.*) and R. *v.* Taylor (*w*) and in R. *v.* Lillyman (*x*).

The rule as to the admissibility of fresh complaint applies not only to rape but also to attempts to have carnal knowledge of a girl of thirteen and under sixteen (*y*), assaults with intent to ravish, and indecent assaults,

(*l*) R. *v.* Lillyman [1896], 2 Q.B. 167. See R. *v.* Brasier, 1 Leach, 199, 1 East, P. C. 443, and for a discussion of the law by the Rt. Hon. Sir J. H. de Villiers, R. *v.* Jenkinson [1904], 21 Cape S. C. Rep. 233.

(*m*) 2 Stark. (N. P.) 241, Holroyd, J.

(*n*) 6th ed. vol. iii. pp. 232, 233.

(*o*) [1896] 2 Q.B. 173, citing 1 Phillips and Arnold on Evidence (10th ed.), 204.

(*p*) [1839] 2 M. & Rob. 212, where Parke, B., after referring to the usage then prevailing of excluding particulars of the complaint, said he could not understand the reasons for limiting the examination-in-chief to the general inquiry whether a complaint had been made and leaving the particulars to be elicited, if at all, by cross-examination. See hereon R. *v.* Lillyman [1896], 2 Q.B. 173, 174.

(*q*) [1842] C. & M. 622. In that case, Cresswell, J., ruled that what the prosecutrix said at the time when the offence was committed was admissible (as part of the *res gestæ*), because the prisoner was present and the violence going on; (2) that if the prisoner had gone away, and the prosecutrix had in running away shouted out the name of the prisoner, they would not be admissible. He allowed the prosecutrix to be asked whether she had named a particular person, but declined to allow her to say whom.

(*r*) [1877] 14 Cox, 46, Bramwell, L.J. In R. *v.* Lillyman [1896], 2 Q.B. 175, the Court agreed with the ruling that the complaint was not admissible as part of the *res gestæ*, and doubted whether the evidence would have been rejected if it had been pressed on the judge that the complaint in all its detail was nevertheless a fact admissible to prove consistency of conduct on the part of the prosecutrix.

(*s*) [1896] 2 Q.B. 167.

(*t*) [1860] 2 F. & F. 579.

(*u*) See R. *v.* Lillyman [1896], 2 Q.B. 167, 176.

(*v*) [1834] 6 C. & P. 397, where Patteson, J., held that a party, who had been robbed, might be asked if he named any person as the person who had robbed him to a constable, but that he ought not to be asked what name he mentioned. This case was criticised by Mr. Greaves. Russell on Crimes (6th ed.) vol. iii., 233 note, as at variance with R. *v.* Walker, *ubi sup.*

(*w*) [1874] 13 Cox, 77, Brett, J.

(*x*) [1896], 2 Q.B.D. at p. 179.

(*y*) 48 & 49 Vict. c. 69, s. 5, *post*, pp. 947, 951.

whether the female assaulted is (*z*) or is not (*a*) of an age to consent to an indecent assault.

The question arose whether the rule in R. *v.* Lillyman was limited to cases of offences against females, where the absence of consent was an essential element in law of the offence. Upon this fact there were inconsistent rulings (*b*), but in R. *v.* Osborne (*c*) it was decided that the complaint in the case of offences against female chastity (*d*) is admissible, not merely as negativing consent but establishing the consistency of the story told by the prosecutrix at the trial, which, from the nature of the case, is aided by proof of immediate complaint and discredited by failure to make it, and that whether consent in the particular case is legally a necessary part of the issue or is a collateral issue of fact or merely part of the story of the prosecutrix, in either case it is equally admissible (*e*).

The rules now established are clearly exceptional, but are traced historically to the old common-law rule applicable in appeals of rape, that it was for the prosecution to shew whether, while the offence was recent, the woman raised the hue and cry and shewed her injuries and clothing to others (*f*).

The rule is obviously one to be kept carefully within due limits. 'It applies only where there is a complaint, not elicited by questions of a leading and inducing or intimidating character (*g*), and only when it is made at the first opportunity after the offence which reasonably offers itself within such bounds . . . the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and when consent is an issue of the absence of consent' (*h*).

The following rulings have been given as to the time within which the complaint must be made for it to be admissible. Three weeks after the alleged offence, indecent assault, has been held too late (*i*) and a complaint was held too late when made on the Monday following the day of the alleged offence, Saturday (*j*). It need not be made on the earliest possible opportunity, but on the first opportunity which reasonably offers (*k*).

(*z*) R. *v.* Lillyman [1896], 2 Q.B. 167.

(*a*) R. *v.* Osborne [1905], 1 K.B. 551.

(*b*) In R. *v.* Rowland [1898], 62 J. P. 459, Hawkins, J., limited the rule to cases where the question of consent was legally material. In R. *v.* Kiddle [1898], 19 Cox, 77; and R. *v.* Kingham [1902], 66 J. P. 393, Lawrance, J., the rule was applied to indecent assault of a girl under thirteen.

(*c*) [1905] 1 K.B. 551. The indictment was for an indecent assault and a common assault on a girl aged twelve, whose consent to indecent assault was not in law a defence (43 & 44 Vict. c. 45, s. 2, *post*, p. 955).

(*d*) The ruling of Hall, Recorder, on R. *v.* Folley [1896], 60 J. P. 569, applying the rule to felonious wounding with intent to do bodily harm, is not warranted by the authorities, except so far as the complaint was part of the *res gestæ*.

(*e*) [1905] 1 K.B. 558.

(*f*) R. *v.* Osborne [1905], 1 K.B. 551, 559.

(*g*) Ibid. at p. 561.

(*h*) R. v. Osborne [1905], 1 K.B. 561, Alverstone, L.C.J., Kennedy, Ridley, Channell, and Phillimore, JJ. This decision must be taken to overrule R. *v.* Rowland [1898], 62 J. P. 459, Hawkins, J., and R. *v.* Merry, 19 Cox, 442. See R. *v.* Jenkinson [1904], 21 Cape Sup. Ct. 233. In R. *v.* Spuzzum, 12 Canada Cr. Cas. 287, evidence was admitted of a statement made by a girl of sixteen to her aunt (the first adult female she had seen since the assault) in answer to a general question, 'What is the trouble?'

(*i*) R. *v.* Pantaney, 71 J. P. 101 (C. C. R.).

(*j*) R. *v.* Ingrey, 64 J. P. 107, Russell, L.C.J.

(*k*) R. *v.* Osborne [1905], 1 K.B. 551, 561; R. *v.* Kiddle, 19 Cox, 77; and R. *v.* Spuzzum, *ante*, note (*h*).

The question whether the complaint was made reasonably soon appears to be for the judge and not for the jury (*l*).

In R. *v.* Megson (*m*) a woman who had undoubtedly been ravished by some man had died before the trial without having made any admissible deposition which could be placed before the jury. An attempt was made to put in evidence a detailed account of the transaction in the shape of a complaint by the woman with a view by that complaint alone to shew the prisoner to be the guilty person. Rolfe, B., rejected the evidence, saying: 'There is a wide difference between receiving such statements as confirmation of a prosecutrix's credibility in a charge of rape in which she is examined as a witness and a case like the present, where the complaint made is to be received as independent evidence.'

In R. *v.* Guttridge (*n*), where the prosecutrix, though living, was not examined as a witness, Parke, B., held that it was not competent to prove that she made a complaint soon after the occurrence; for such evidence would be merely confirmatory of the story of the prosecutrix, and no part of the *res gestæ* (*nn*).

The character of the prosecutrix, as to general chastity, may be impeached by *general* evidence (*o*), as by shewing her general light character, and giving general evidence of her being a street walker (*p*). And the prosecutrix may be cross-examined as to particular discreditable transactions (*q*) and as to her having had connection with the prisoner previously to the alleged rape (*r*), and if she deny such connection, the prisoner may shew that she has been previously connected with him (*s*). On an indictment for an indecent assault, as in cases of rape, or attempt to commit rape, the answer of the prosecutrix, to questions put to her on cross-examination as to particular acts of connection with persons named to her, *other than the prisoner*, is final, and the party questioning is bound thereby, and if her answer be a denial, the persons named cannot be called to contradict her (*t*).

Where, on a trial for rape, the prosecutrix was cross-examined as to a charge of stealing money from a former mistress, and as to the account she had given of the money found in her possession to a constable, and she said that she told the constable a gentleman had given it her for not telling of his insulting her, and denied that she had told him that it

(*l*) R. *v.* Ingrey, *ubi sup.*

(*m*) [1840] 9 C. & P. 420. Rolfe, B., in summing up, referred to the rule as to admission of the complaint, in terms which were in R. *v.* Lillyman [1896], 2 Q.B. 174, held consistent with the opinion that the particulars as well as the fact of complaint are admissible.

(*n*) [1840] 9 C. & P. 471. Cf. 1 East, P. C. 443. This case ruled nothing as to the admissibility of the particulars where the ravished woman was called. R. *v.* Lillyman [1896], 2 Q.B. 175.

(*nn*) In R. *v.* Harrison, 2 Cr. App. R. 94, a conviction of indecent assault on an indictment for rape was upheld though the prosecutrix had absconded.

(*o*) R. *v.* Clarke, 2 Stark. (N. P.) 241. Taylor, Ev. (10th ed.), ss. 363, 1470.

(*p*) R. *v.* Clay, 5 Cox, 146, where Patteson, J., admitted evidence that the prosecutrix had been seen on the streets of Shrewsbury as a reputed prostitute. In R. *v.* Tissington, 1 Cox, 48, Abinger, C.B., allowed witnesses to be called to prove general want of decency in the prosecutrix, and then permitted the prosecutrix to call witnesses to rebut their evidence.

(*q*) R. *v.* Barker, 3 C. & P. 589. See R. *v.* Holmes, *infra*.

(*r*) R. *v.* Martin, 6 C. & P. 562, approved in R. *v.* Holmes, *infra*.

(*s*) R. *v.* Riley, 18 Q.B.D. 481.

(*t*) R. *v.* Holmes, L. R. 1 C. C. R. 334. *Semble*, that the question may be put to her in cross-examination, but that she is not bound to answer it: ibid. R. *v.* Hodgson, R. & R. 211. R. *v.* Robins, 2 M. & Rob. 512, is overruled; and R. *v.* Cockeroft 11 Cox, 410, is approved in R. *v.* Holmes.

was given her by the gentleman for having connection with her; it was held that the constable could not be called to contradict her, and to prove that she told him the gentleman had given her the money for having connection with her (*u*).

The application of these and other rules should always be made with due regard to the caution given by Hale, who says: 'It is true, that 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' (*v*). He then mentions two remarkable cases of malicious prosecution for this crime, that had come within his own knowledge: and concludes, 'I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the Court and jury may, with so much ease, be imposed upon without great care and vigilance: the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes, of malicious and false witnesses' (*w*).

Where, on a trial for rape, the prosecutrix stated that she complained almost immediately to her mistress, and the next day her clothes were washed by a washerwoman, and they had blood on them; Pollock, C.B., directed these persons to be called as witnesses for the prosecution, although they were attending as witnesses for the prisoner, but allowed the counsel for the prosecution all latitude in examining them (*x*).

On a trial for rape it was proposed on the part of the prisoner to ask a witness for the defence as to something that had been said by a relative of the prosecutrix to a relative of the prisoner, in the presence of the prosecutrix, about making it up; it was objected that evidence of a conversation between third persons, not made in the presence of the prisoner, was inadmissible. Martin, B.: 'In a civil case, what is said in the presence of either of the parties is admissible, because it is open to the party so present to express assent or dissent to what is said, and that would be admissible against him. In criminal cases, the prosecutor, although not in strict law a party to the case, is so in fact; and I think that the rule applicable to conversation in the presence of a party in a civil case may be fairly extended to a conversation in the presence of the prosecutor in a criminal case' (*y*).

Sect. II.—Unlawful Carnal Knowledge of Idiot, Imbecile, and Lunatic Females.

Common Law.—On a trial for a rape upon 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 either consent or dissent,

(*u*) R. *v.* Dean, 6 Cox, 23, Platt, B., after consulting Wightman, J.

(*v*) 1 Hale, 635.

(*w*) 1 Hale, 636.

(*x*) R. *v.* Stroner, 1 C. & K. 650.

(*y*) R. *v.* Arnall, 8 Cox, 439. This case was referred to *arguendo* in R. *v.* Holmes, but is not noticed in the judgments. In any event the suggested conversation appears to have been meant to suggest evidence of subsequent consent, which is no defence in *rape*, *vide ante*, p. 935.

and that the prisoner had connection with her without her consent, it was their duty to find him guilty; but that a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape (*z*).

In a subsequent case it was held that there must be some evidence of want of consent, even when the woman is an idiot, to warrant a conviction for rape (*a*). This decision must be taken as a ruling on the particular evidence: and in R. *v.* Barratt (*b*), the Court adopted the rule of law as laid down in the earlier case of R. *v.* Fletcher (*c*).

In R. *v.* Barratt, the prisoner was convicted of attempting to rape a girl of fourteen years of age who had been blind from six weeks old and wrong in her mind, hardly capable of understanding anything that was said to her, but capable of going up and down stairs by herself. If placed in a chair by anyone she would remain there till night, passing her evacuations in the chair. If told to lie down she would do so. She could not communicate to her friends what she wanted. She could feed herself a little, but was obliged to be dressed and undressed, and was unable to do any work. The prisoner had known her and her family for two years, and knew she was not right in her mind. There were no marks of violence, but there had been recent connection, and the surgeon thought she had been in the habit of having connection. The girl upon being brought into Court was evidently idiotic, and it was found impossible to communicate with her. She grinned, and made no reply to questions except a vacant laugh. The prisoner was seen by the girl's father lying on the girl, who was lying on a couch where she had been placed by her sister. When the father entered the room the prisoner was standing up buttoning his trousers, while the girl was lying quietly on the couch. Blackburn, J., said there was ample evidence of the want of capacity to give consent, and it was held that the act being done without consent the prisoner was rightly convicted.

Statutes.—By sect. 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), 'Any person who—

. . . . . .

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

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years with or without hard labour.'

By sect. 324 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5) (*e*), 'If any manager, officer, nurse, attendant, or other person employed in any

(*z*) Anon. stated by Willes, J., in R. *v.* Fletcher, Bell, 63, 70; and approved by the C. C. R. in that case. See R. *v.* Ryan, 2 Cox, 115. In R. *v.* Pressy [1867], 10 Cox, 635 (C. C. R.), conviction of *rape* on a female evidently idiotic was upheld, though there was no evidence of resistance.

(*a*) R. *v.* Fletcher, L. R. 1 C. C. R. 39.

(*b*) L. R. 2 C. C. R. 81.

(*c*) Bell, 63; 28 L. J. M. C. 172.

(*d*) *Vide ante*, pp. 931 *et seq.*

(*e*) Re-enacting s. 82 of the Lunacy Act, 1889. See Wood-Renton on Lunacy, p. 214.

institution for lunatics (*f*) (including an asylum for criminal lunatics (*g*)) or workhouse, or any person having the care or charge of any single patient, or any attendant of any single patient, carnally knows or attempts to have carnal knowledge of any female under care or treatment in the institution or workhouse, or as a single patient (*h*), he shall be guilty of a misdemeanor and on conviction on indictment, shall be liable to be imprisoned with or without hard labour for any term not exceeding two years; and no consent or alleged consent of any such female thereto shall be any defence to an indictment or prosecution for such offence' (*i*).

SECT. III.—UNLAWFUL CARNAL KNOWLEDGE OF GIRLS UNDER SIXTEEN.

It is an essential element in the crime of rape that the carnal knowledge should be without the previous consent of the female. There has been much legislation to deal with corruption of young girls (*j*), which is cumulative on the law as to rape and indecent assault (*k*). That now in force is contained in the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).

Girls under Thirteen.—By sect. 4 (*l*), 'Any person who unlawfully and carnally knows (*m*) any girl under the age of thirteen years shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*n*).

(*f*) *i.e.*, an asylum, hospital, or licensed house (s. 341, *ante*, p. 925).

(*g*) See 47 & 48 Vict. c. 64.

(*h*) It is to be noted that the female is not described as a lunatic, but as under care or treatment; *i.e.*, it is not the fact of lunacy, but the fact of being under treatment that takes away the power to consent and creates the liability of the person in charge.

(*i*) Prosecutions for the offence can be taken only as prescribed by s. 325, *ante*, p. 929.

(*j*) By 18 Eliz. c. 7, carnal knowledge of any woman-child under the age of ten years was made felony without benefit of clergy, without reference to the consent or non-consent of the child, which was therefore considered as immaterial. It appears at one time to have been thought that the carnal knowledge of a child above the age of ten and under twelve years was rape, though she consented: twelve years being the age of consent in a female, and the Statute Westm. 1, 13 Edw. I. c. 13, which enacted, 'That none do ravish any maiden *within age*, neither by her own consent nor without,' being admitted to refer, by the words, 'within age,' to the age of twelve years. (1 Hale, 631, 2 Co. Inst. 180, 3 Co. Inst. 60.) It was, however, afterwards well established that if the child was above ten years old it was not a rape, unless it was without her consent. Sum. 112, 4 Bl. Com. 212, 1 East, P. C. 436. But children above that age, and under twelve, were within the protection of the Statute of Westm. 1, c. 13, the law with respect to the carnal knowledge of such children not having been altered by either of the subsequent Statutes of Westm. 2, Edw. I. c. 34, or 18 Eliz. c. 7. The Statute Westm. 1, c. 13, made the deflowering a child above ten years old, and under twelve, though with her own consent, a misdemeanor punishable by two years' imprisonment, and fine at the King's pleasure (4 Bl. Com. 212, 1 East, P. C. 436). These statutes were repealed by 9 Geo. IV. c. 31 (E), and 10 Geo. IV. c. 34 (I). Those Acts in turn were repealed in 1861, and such offences against girls under ten were made punishable by 24 & 25 Vict. c. 100, ss. 50, 51, which were repealed in 1875 (38 & 39 Vict. c. 94) making the age twelve. The Act of 1875 was repealed in 1885 (44 & 45 Vict. c. 69).

(*k*) See 48 & 49 Vict. c. 69, s. 16, and *ante*, p. 6.

(*l*) This clause replaced 38 & 39 Vict. c. 94, s. 3, raising the age from twelve to thirteen.

(*m*) Proof of penetration is sufficient, and it is not necessary to prove emission. R. v. Marsden [1891], 2 Q.B. 149. *Vide ante*, p. 933.

(*n*) Now three years, 54 & 55 Vict. c. 69, s. 1, *ante*, p. 211, or imprisonment with or without hard labour for not more than two years, *ante*, p. 212. The words omitted are repealed.

'Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour (*o*).

'Provided that in the case of an offender whose age does not exceed sixteen years, the Court may, instead of sentencing him to any term of imprisonment, order him to be whipped, as prescribed by the Whipping Act, 1862 (*p*), and the said Act shall apply so far as circumstances admit as if the offender had been convicted in manner in that Act mentioned; . . .' (*pp*).

Unsworn Evidence.—['Where upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the Court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth (*q*).

Corroboration.—'Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused (*r*): Provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn'] (*rr*).

On an indictment for felony under this section the defendant may be convicted of an indecent assault (*s*), to which the consent of a girl under thirteen is no defence (*t*), but not of a common assault (*u*). On an indictment for the attempt, a verdict of indecent assault or, unless there were consent, of common assault, would seem to be possible.

The consent of a child under thirteen is immaterial both as to the

(*o*) This clause replaced part of 24 & 25 Vict. c. 100, s. 52, raising the age from twelve to thirteen. The former enactments contained the word 'abuse,' not here re-enacted. See R. *v.* Dawson [1821], 3 Stark. (N. P.) 62.

(*p*) *Ante*, p. 215. Imprisonment of offenders of fourteen and under sixteen is restricted by the Children Act, 1908 (8 Edw. VII. c. 67, s. 106, *ante*, p. 231). The punishment by whipping being alternative to the other punishments for the offence, in the event of an appeal, there has been a difficulty as to detaining the lad in custody during the time within which he may appeal from his sentence under the Criminal Appeal Act, 1907.

(*pp*) Words here omitted were repealed by 8 Edw. VII. c. 67, s. 134.

(*q*) Unsworn evidence taken under this section would support a conviction for indecent assault on an indictment for an offence against sect. 4. R. *v.* Wealand, 20 Q.B.D. 827. As to receiving unsworn evidence on an indictment for indecent assault, see 8 Edw. VII. c. 67, sched. 1, *ante*, p. 924.

(*r*) Refusal by the defendant to submit to medical examination is not corroboration within this section, R. *v.* Gray, 68 J. P. 327. Cf. R. *v.* Everest, 2 Cr. App. R. 130.

(*rr*) The words in brackets were repealed by 8 Edw. VII. c. 67, s. 134. (as from April 1, 1909), as being superseded by the provisions of that Act, as to procedure and evidence (*ante*, p. 918) and punishment (*ante*, p. 230).

(*s*) 48 & 49 Vict. c. 69, s. 9, *ante*, p. 941.

(*t*) 43 & 44 Vict. c. 45, *post*, p. 955.

(*u*) See R. *v.* Catherall, 13 Cox, 109 *sed quære*.

complete offence (*v*) and the attempt (*w*). But this enactment does not exclude liability to prosecution for rape if the child did not in fact consent (*x*) nor is proof of want of consent a ground for acquittal (*y*).

A boy under fourteen cannot be convicted of the complete offence under 48 & 49 Vict. c. 69, s. 4 (*yy*), but on an indictment under that section he may be convicted of an indecent assault (*z*). The consent of a girl under thirteen is no defence to proceedings under sect. 4.

Under the repealed enactments as to abusing children of tender years it was considered, 'that although a child between ten and twelve cannot by law consent to have connection, so as to make that connection no offence, yet, where the essence of the offence charged is an assault (and there can be in law no assault, unless it be against consent) (*a*), this attempt, though a criminal offence, is not an assault; and the indictment must be for an attempt to commit a felony, if the child is under ten years old, and for an attempt to commit a misdemeanor, if the child is between the ages of ten and twelve; for it is perfectly clear that every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor' (*b*).

On this view on failure to prove commission of the full offence against a girl above ten and under twelve it was held that the defendant could not be convicted on other counts of the indictment charging (1) assault with intent carnally to know; (2) common assault. The judges considered that as consent in fact had been proved there could not be a conviction of assault and that the proper charge was attempt to commit the statutory offence (*c*). In a later case, R. *v.* Guthrie (*d*), on an indictment under 24 & 25 Vict. c. 60, s. 51, containing a single count for the misdemeanor of carnally knowing a girl between ten and twelve years of age, the principal offence was not proved, but there was evidence of indecent assault. The jury returned a verdict of common assault, which was held good, the Court considering that the indictment charged an assault as a distinct, separable offence. In R. *v.* Catherall (*e*) it was held that the

(*v*) See R. *v.* Neale, 1 Den. 36.

(*w*) R. *v.* Beale, L. R. 1 C. C. R. 10.

(*x*) See R. *v.* Dicken, 14 Cox, 8, Mellor, J.

(*y*) R. *v.* Neale, 1 Den. 36. R. *v.* Ryland, 11 Cox, 101. R. *v.* Woodhouse, 12 Cox, 443.

(*yy*) R. *v.* Waite [1892], 2 Q.B. 600.

(*z*) R. *v.* Williams [1893], 1 Q.B. 320.

(*a*) In R. *v.* Cockburn, 3 Cox, 543, Patteson, J., said: 'My experience has shewn me that children of very tender age may have vicious propensities. A child under ten years of age cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality; but she can give such consent as to render the attempt no assault. We know that a child can consent to that which, without such consent, would constitute an assault.' And he refused to allow a conviction of assault on an indictment for criminally knowing a child under ten, too young to be sworn as a witness. There was no evidence of consent or non-consent except medical proof of marks of violence, which might have been inflicted by any foreign substance.

(*b*) R. *v.* Martin, 9 C. & P. 215, Patteson, J. R. *v.* Meredith, 8 C. & P. 589, Abinger, C.B. R. *v.* Reed, 1 Den. 377. Nor upon an indictment for an indecent assault. R. *v.* Johnson, 10 Cox, 114; L. & C. 632: 'The statutory offence may be committed though there is consent; but if there is consent there cannot be an assault, R. *v.* Guthrie, L. R. 1 C. C. R. 24, 243, Bovill, C.J.

(*c*) R. *v.* Martin, *ubi sup.* Consent would be no defence on such indictment. R. *v.* Beale, L. R. 1 C. C. R. 10, 12, Pollock, C.B.

(*d*) L. R. 1 C. C. R. 241. The indictment charged that G. 'did . . . *make an assault* and did carnally know and abuse.'

(*e*) 13 Cox, 109.

jury could not convict of *common* assault on an indictment charging the felony, under 38 & 39 Vict. c. 93, s. 4 (rep.), of carnally knowing a girl under twelve.

Upon an indictment for attempting to abuse (*f*) a child under the age of ten, containing a count for a common assault, no proof was given of the child being under ten years of age but it appeared that the prisoner made an attempt on her, without any violence on his part, or actual resistance on hers, and it was contended that as she offered no resistance it must be taken that she consented, and therefore the prisoner must be acquitted. Coleridge, J.: 'There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves 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. You will therefore 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. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment' (*g*).

Carnal Knowledge of Girls of Thirteen and under Sixteen.—By sect. 5, 'Any person who (1) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years; . . . (*h*) shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

'Provided that it shall be a sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years (*i*).

'Provided also, that no prosecution shall be commenced for an offence under sub-section one of this section more than *six* (*k*) months after the commission of the offence' (*l*).

Permitting Defilement of Girls under Sixteen.—By sect. 6, 'Any person who, being the owner or 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 is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and

(*f*) This word is not in the existing enactment, *vide ante*, p. 948.

(*g*) R. *v.* Day, 9 C. & P. 722, Coleridge, J. Cf. R. *v.* Guthrie, L. R. 1 C. C. R. 241. R. *v.* Lock, L. R. 2 C. C. R. 10. R. *v.* Woodhouse, 12 Cox, 443, Lush, J.

(*h*) The portion omitted here is printed *ante*, p. 947.

(*i*) This clause excludes the operation of the rule laid down in R. *v.* Prince, L. R. 2 C. C. R. 154, *ante*, p. 102, and *post*, p. 959.

(*k*) Six months was substituted for three months by 4 Edw. VII. c. 15, s. 27. See R. *v.* Chandra Dharma [1905], 2 K.B. 335.

(*l*) As to commencement of prosecution, see R. *v.* West [1898], 1 Q.B. 74. R. *v.* Beighton, 18 Cox, 535, and *vide post*, Vol. ii. p. 1930.

carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally (*m*),

'(1) shall, if such girl is under the age of thirteen years, be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life, . . . (*n*); and

'(2) if such girl is of or above the age of thirteen and under the age of sixteen years, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

'Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.'

On an indictment containing (1) a count for an offence under sect. 5, (2) a count for an indecent assault, the defendant may be convicted of common assault (*o*). But it would seem that on an indictment under sect. 5, there cannot be a conviction of indecent assault and common assault *if the girl consented* to what was done, as 43 & 44 Vict. c. 45 does not apply to a girl of thirteen or over.

A girl of thirteen or under sixteen cannot be convicted of aiding and abetting the commission with herself of an offence against sect. 5 (*p*).

Liability to punishment under sect. 5 does not exempt from liability to prosecution and punishment for rape if the girl did not consent: but a person may not be twice punished in respect of the same transaction (*q*), or on an indictment under sect. 5, even if the facts proved constituted a rape. It would seem that the accused might be convicted of the misdemeanor under sect. 5, by virtue of 14 & 15 Vict. c. 100, s. 12 (*r*).

Allowing Child or Young Person to be in Brothels.—By the Children Act, 1908 (8 Edw. VII. c. 67), s. 16, '(1) If any person having the custody, charge, or care of a child or young person between the ages of four and sixteen, allows that child or young person (*s*) to reside in or to frequent a brothel (*t*), he shall be guilty of a misdemeanor and shall be liable on conviction on indictment or on summary conviction to a fine not exceeding *twenty-five pounds*, or alternatively or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months (*tt*).

'(2) Nothing in this section shall affect the liability of a person to be indicted under section six of the Criminal Law Amendment Act, 1885

(*m*) Where an illegitimate girl lived with her mother, and the premises, in respect of which the charge was made, were her home where she resided with her mother, it was held that the mother could be convicted under the section. R. *v.* Webster, 16 Q.B.D. 134.

(*n*) Nor less than three years, or to imprisonment with or without hard labour for not more than two years, *ante*, pp. 211, 212. The words omitted are repealed.

(*o*) R. *v.* Bostock, 17 Cox, 700.

(*p*) R. *v.* Tyrrell [1894], 1 Q.B. 712; R. *v.* Ratcliffe, 10 Q.B.D. 74, decided on 38 & 39 Vict. c. 94, s. 4 (rep.).

(*q*) S. 16, *vide ante*, p. 6.

(*r*) *Post*, Vol. ii. p. 1965.

(*s*) As introduced the bill applied only to girls between 7 and 16.

(*t*) As to definition of brothel, *vide* Singleton *v.* Ellison [1895], 1 Q.B. 607; Durose *v.* Wilson, 70 J. P. 6, *post*, Vol. ii. p. 1893.

(*tt*) The accused may elect to be tried on indictment, *vide ante*, p. 17.

(*ante*, p. 951), but upon the trial of a person under that section it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under this section, to find the accused guilty of such offence.'

By sect. 17, '(1) If any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he shall be guilty of a misdemeanor and shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years.

'(2) For the purposes of this section a person shall be deemed to have caused or encouraged the seduction or prostitution (as the case may be) of the girl who has been seduced or become a prostitute if he has knowingly allowed the girl to consort with or to enter or to continue in the employment of, any prostitute or person of known immoral character.'

The procedure and evidence on trials for offences under ss. 16, 17 (*supra*) is regulated by Part II. of the Children Act, 1908, ss. 27–38 (*vide* p. 918 *et seq.*).

By sect. 18, '(1) Where it is shewn to the satisfaction of a Court of Summary Jurisdiction that a girl under the age of sixteen years is, with the knowledge of her parent or guardian exposed to the risk of seduction or prostitution, or living a life of prostitution, the Court may adjudge her parent or guardian to enter into a recognisance to exercise due care and supervision with respect of the girl.

'(2) The provisions of the Summary Jurisdiction Act, 1879, with respect to recognisances to be of good behaviour, (including the provisions as to the enforcement thereof,) shall apply to recognisances under this section.'

Girls under Eighteen.—As to abduction of girls under eighteen with intent that they shall be carnally known, see 48 & 49 Vict. c. 69, s. 7, *post*, p. 967.

By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), sect. 12, 'Where on the trial of any offence under this Act it is proved to the satisfaction of the Court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, it shall be in the power of the Court to divest such father, mother, guardian, master, or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the Court may direct, and the High Court shall have the power from time to time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect.'

This provision is supplemented by the provisions of the Children Act, 1908 (8 Edw. VII. c. 67, s. 26, *ante*, p. 918).

Indictment.—In indictments for offences against girls under sixteen care should be taken to specify the age of the girl, in accordance with the terms of the section on which the charge is founded, *i.e.* 'under the age of thirteen years' or 'of the age of thirteen years and under the age of sixteen years,' for the description appears to be matter of substance,

and to amend the age might be to insert in the indictment an offence distinct from that originally charged (*u*).

Proof of Age.—The provisions of the Children Act, 1908, as to presumption of the age of children (*v*) do not apply to offences under the Criminal Law Amendment Act, 1885. It is therefore necessary in prosecutions under sects. 4, 5 with respect to girls, to prove that the girl against whom the offence is alleged to have been committed should be proved by the prosecution to be under thirteen or under sixteen as the case requires. The evidence of age should be clear and distinct. It is usually given by producing a certified copy of the entry in the register of births kept under the Births and Deaths Registration Act (*w*), coupled with evidence of the identity of the girl with the child referred to in the entry. The certificate is evidence of the date as well as the fact and registration of the birth (*x*). It is immaterial whether the certified copy emanates from the registry at Somerset House or from the district registry or the office of the superintendent registrar of the district (*w*). But production of the certificate is not essential, and the age may be proved by any person who has sufficient knowledge of the facts (*y*).

Where the offence of carnally knowing a child under ten years of age was charged to have been committed on February 5, 1832, and the only evidence of the age of the child was given by the father, who stated that in February, 1822, he went from home for a few days, and that his wife had not then been confined, and that on his return on February 9, he found the child had been born, and he was told by his wife's mother that it had been born the day before; the grandmother was alive at the time of the trial, but the mother was dead. It was held that the evidence was not sufficient, and that the grandmother ought to have been called, for in a matter of so much importance the best evidence ought to be adduced (*z*). On a similar indictment, evidence by the child herself that she was ten years old on a particular day, her mother being ill at home, and her father being unable to state the precise time of her birth, was held insufficient (*a*). But on an indictment for carnally knowing a child under ten years of age the mother stated that she had never kept any account of the child's age, but that her knowledge of it was derived from hearing her husband speak of it, and from conversation with him and the child, and that it had been usual to keep the birthday of the child on February 7, and there was no other evidence of the age: it was objected that more certain evidence of the age ought to have been produced, and R. *v.* Wedge (*supra*) was relied upon; Coltman, J., however, observed, that 'the evidence in that case was mere hearsay; but this evidence went much farther, and must be submitted to the jury as some evidence, though open to observation, as to the child's age (*b*).

(*u*) See R. *v.* Shott, 3 C. & K. 206, Maule, J. R. *v.* Martin, 9 C. & P. 215, Patteson, J. Cf. R. *v.* Benson [1908], 1 K.B. 270, as to limits of amendment under 14 & 15 Vict. c. 100, s. 1.

(*v*) 8 Edw. VII. c. 67, s. 123, *ante*, p. 922.

(*w*) R. *v.* Weaver, L. R. 2 C. C. R. 85.

(*x*) *Re* Goodrich [1904], Prob. 138, in which *Re* Wintle, L. R. 9 Eq. 373, was disapproved.

(*y*) R. *v.* Cox [1898], 1 Q.B. 179: where the age was proved by a mistress of an elementary school at which the child attended.

(*z*) R. *v.* Wedge, 5 C. & P. 298 and MS. C. S. G., Taunton and Littledale, JJ.

(*a*) R. *v.* Day, 9 C. & P. 722, Coleridge, J.

(*b*) R. *v.* Hayes, 2 Cox, 226.

Where the mother of a child swore that she was ten years old last March, but did not know the year and month of the child's birth, and in cross-examination gave confused and inconsistent answers as to the age of her children, it was held that there was some evidence for the jury as to the age of the child (*c*).

As to taking the evidence of the person charged and of the husband and wife of the person charged, see 48 & 49 Vict. c. 69, s. 20 (*d*), 61 & 62 Vict. c. 36, ss. 1, 4, and 8 Edw. VII. c. 67, s. 27, and *post*, Book XIII. Chapter V. 'Evidence.'

Sect. IV.—Indecent Assault on Females.

Indecent Assault.—By 24 & 25 Vict. c. 100, s. 52, 'Whosoever shall be convicted of an indecent assault upon any female . . . (*e*) shall be liable at the discretion of the Court to be imprisoned for any time not exceeding two years with or without hard labour.'

As to conviction of indecent assault on an indictment for rape or felonious carnal knowledge of a girl under thirteen, see *ante*, p. 941 (*f*).

By the Children Act, 1908 (8 Edw. VII. c. 67), s. 127 (2), Courts of Summary Jurisdiction are empowered to try adults for indecent assault on a female who in the opinion of the Court is under sixteen, if the defendant consents, *vide* 42 & 43 Vict. c. 49, s. 12. The maximum punishment on summary conviction for the offence is six months' imprisonment.

By 43 & 44 Vict. c. 45, 'It shall be no defence to a charge or indictment for an indecent assault on a young person (*g*) under the age of thirteen to prove that he or she consented to the act of indecency (*h*). In cases of indecent assault on females of thirteen or over the defence of consent is still available. The section applies to England and Ireland. (See sect. 3.)

Sect. V.—Procuring the Defilement or Prostitution of Women and Girls.

Procuration.—By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), sect. 2, 'Any person who, (1) Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without the King's dominions, with any other person or persons; or (2) Procures or attempts to procure any woman or girl to become, either within or without the King's dominions, a common prostitute; or (3) Procures or attempts to procure any woman

(*c*) R. *v.* Nicholls, 10 Cox, 476.

(*d*) This section was in R. *v.* Owen, 20 Q.B.D. 829, held to render a person charged with indecent assault competent as a witness in his own behalf.

(*e*) The words omitted relating to attempts to have carnal knowledge of girls under twelve were repealed in 1885, 48 & 49 Vict. c. 69, s. 19. On proceedings under s. 52, for indecent assault on a female under sixteen, the unsworn evidence of a child is admissible, 8 Edw. VII. c. 67, s. 30 (*ante*, p. 919), which overrides R. *v.* Paul, 25 Q.B.D. 202.

(*f*) A boy under fourteen who is indicted under 48 & 49 Vict. c. 69, s. 4 (*ante*, p. 950) for carnally knowing a girl under thirteen may on that indictment be convicted of indecent assault. R. *v.* Williams [1893], 1 Q.B. 320.

(*g*) Of either sex, *vide post*, p. 975.

(*h*) This enactment overrides the rulings in R. *v.* Read, 1 Den. 377. R. *v.* Johnson, L. & C. 632. R. *v.* Lock, L. R. 1 C. C. R. 10. R. *v.* Roadley, 14 Cox, 463 (C. C. R.).

or girl to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere ; or (4) Procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the King's dominions, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour ' (*i*).

Corroboration.—' Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused.' (*Vide post*, Book XIII. Chapter V.)

Defilement by Threats, Fraud, or Drugs.—By sect. 3, ' Any person who, (1) By threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without the King's dominions ; or (2) By false pretences or false representations procures any woman or girl, not being a common prostitute (*j*) or of known immoral character, to have any unlawful carnal connection, either within or without the King's dominions ; or (3) Applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour ' (*k*).

Corroboration.—' Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.' (See *post*, Book XIII. Chapter V.)

Detention in Brothels.—By sect. 8, ' Any person who detains any woman or girl against her will, (1) In or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man or generally (*l*) ; or (2) In any brothel, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

' Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connection, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or, where wearing apparel has been lent or otherwise supplied to such

(*i*) As to acts of procuration outside the King's dominions, see R. *v.* Blythe [1895], 1 Canada Cr. Cas. 263. *Re* Gertie Johnson, [1904], 8 Canada Cr. Cas. 243.

(*j*) There can be no conviction of the attempt if the woman was already a prostitute when the attempt is commenced to procure her to become one without the King's dominions. R. *v.* Gold and Cohen [1907], 71 J. P. 360, Bosanquet, C.S.

(*k*) Sub-s. 3 supplements the provisions of 24 & 25 Vict. c. 100, s. 22, *ante*, p. 863. See 48 & 49 Vict. c. 69, s. 16, and *ante*, pp. 4, 6.

(*l*) As to girls under sixteen, see 48 & 49 Vict. c. 69, s. 6, *ante*, p. 952. 8 Edw. VII. c. 67, ss. 16, 17, *ante*, pp. 952, 953.

woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.

'No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel.'

Search Warrant.—By sect. 10, 'If it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice is *bona fide* acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant (*m*) authorising any person named therein to search for, and when found, to take to and detain in a place of safety such woman or girl until she can be brought before a justice of the peace; and the justice of the peace before whom such woman or girl is brought may cause her to be delivered up to her parents or guardians, or otherwise dealt with as circumstances may permit and require.

'The justice of the peace issuing such warrant may, by the same or any other warrant (*n*), cause any person accused of so unlawfully detaining such woman or girl to be apprehended and brought before a justice, and proceedings to be taken for punishing such person according to law.

'A woman or girl shall be deemed to be unlawfully detained for immoral purposes if she is so detained for the purpose of being unlawfully and carnally known by any man, whether any particular man or generally, and (a.) Either is under the age of sixteen years; or (b.) If of or over the age of sixteen years, and under the age of eighteen years, is so detained against her will, or against the will of her father or mother or of any other person having the lawful care or charge of her; or (c.) If of or above the age of eighteen years is so detained against her will. Any person authorised by warrant under this section to search for any woman or girl so detained as aforesaid may enter (if need be by force) any house, building or other place specified in such warrant, and may remove such woman or girl therefrom.

'Provided always, that every warrant issued under this section shall be addressed to and executed by some superintendent, inspector, or other officer of police, who shall be accompanied by the parent, relative, or guardian or other person making the information, if such person so desire, unless the justice shall otherwise direct.'

A conspiracy by false pretences to procure a female under the age of twenty-one years to have illicit carnal connection with a man has been held to be an indictable misdemeanor at common law (*o*).

(*m*) The act of the justice in issuing such warrants is a judicial act. Hope *v.* Evered, 17 Q.B.D. 336. Lea *v.* Charrington, 23 Q.B.D. 45.

(*n*) See *ante*, note (*m*).

(*o*) R. *v.* Mears, 2 Den. 79. The first counts were framed on 12 & 13 Vict. c. 76, which was repealed in 1891 (S. L. R.), but no opinion was expressed as to them. R. *v.* Delaval, 3 Burr. 1434, was referred to by the Court. *Vide ante*, p. 158, tit. 'Conspiracy.'

CANADIAN NOTES.

OF RAPE, AND OF THE DEFILEMENT OR CORRUPTION OF FEMALES.

Sec. 1.—*Of Rape, Definition of.*—Code sec. 298.

Carnal Knowledge.—Code sec. 7.

Female Under Fourteen.—An indictment for rape lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding the provisions of sec. 301, which enacts that everyone is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife. R. v. Riopel (1898), 2 Can. Cr. Cas. 225.

Consent.—By Child Under Fourteen, not a Defence.—Code sec. 294.

Consent.—It has been held that, in the case of alleged rape on an idiot or lunatic the mere proof of connection will not warrant the case being left to the jury; that there must be some evidence that it was without her consent, *e.g.*, that she was incapable, from imbecility, of expressing assent or dissent; and that if she consent from mere animal passion it is not rape. R. v. Connolly (1867), 26 U.C.Q.B. 317.

The question whether the act of connection was consummated through fear, or merely through solicitation is a question of fact for the jury. R. v. Day (1841), 9 C. & P. 722; R. v. Jones (1861), 4 L.T.N.S. 154; R. v. Cardo (1889), 17 Ont. R. 11.

Evidence of complaint made by the woman on a charge of rape as corroborative of non-consent will be rejected if made only in answer to questions suggesting the guilt of the accused. The King v. Dunning, 14 Can. Cr. Cas. 461.

Proof on behalf of the defence that the injured party or her parents had instituted civil proceedings to recover damages arising from the commission of the alleged rape is properly excluded upon the criminal trial as irrelevant, unless other facts have been disclosed in evidence which tend to shew an intent to thereby wrongfully extort money from the accused. R. v. Riendeau (1900), 3 Can. Cr. Cas. 293.

On a charge of rape evidence is admissible on behalf of the defence to contradict a statement of the complainant, made on her cross-examination, denying that, on an occasion when she met the accused subsequent to the alleged rape, she had refused to put an end to the interview, as requested by her mother, and had struck her mother for

the latter's interference. Such evidence is relevant to the charge not only as affecting the credibility of the complainant's testimony generally, but as shewing conduct inconsistent with resistance to the alleged offence. R. v. Riendeau (No. 2), 4 Can. Cr. Cas. 421 (Que.).

The prisoner's statement made at a previous trial through his counsel may be given in evidence by the prosecution if it tends to anticipate a possible defence which might be offered by the prisoner. R. v. Bedere (1891), 21 O.R. 189.

Questions may be put to the complainant tending to elicit the fact that she had previously had connection with other men. So where the prosecutrix, after she had declared she had not previously had connection with a man other than the prisoner, was asked in cross-examination whether she remembered having been in the milk house of G. with two men, D.M. and B.M., one after the other. Held, that the witness may object, or the Judge, may, in his discretion, tell the witness she is not bound to answer the question. R. v. Laliberte (1877), 1 Can. S.C.R. 117.

The weight of authority and the course of practice by the Judges in England is to permit questions of the kind to be asked of a witness on cross-examination in cases of rape. The prosecuting officer is not permitted to raise the objection. The witness may object, or the Judge may tell the witness she is not obliged to answer, if he thinks proper, though not bound to do so, and the Judge will decide whether the witness is obliged to answer or not, when the point is raised. R. v. Laliberté (1877), 1 Can. S.C.R. 117, 131, per Richards, C.J.

In the same case prisoner's counsel afterwards proposed to ask one of the witnesses for the defence: "Did you see the prosecutrix with D.M. and B.M.? if you have, please state on which occasion, and what were they doing?" This question was also disallowed by the Judge, and the objection was sustained in the Supreme Court of Canada on the authority of R. v. Cockroft (1870), 11 Cox Cr. Cas. 410, and R. v. Holmes (1871), L.R. 1 C.C.R. 234, upon the principle that a witness cannot be contradicted in matters foreign to the issue, which, on the trial of this indictment was, not whether the prosecutrix was unchaste, but whether the prisoner had had connection with her by violence. R. v. Laliberte (1877), 1 Can. S.C.R. 117, 142.

Evidence is admissible for the defence of the general bad reputation of the prosecutrix for unchastity. R. v. Bishop (1906), 11 Can. Cr. Cas. 30.

Where two prisoners are jointly indicted but an order is made for their separate trial, the one is an admissible witness for the other and is bound to testify although he may prevent his evidence being used against himself at his subsequent trial. Only the person then on trial is a "person charged" within the meaning of the Canada Evidence Act, sec. 4, and comment is not prohibited as to the failure

of the accused to call as a witness the person jointly indicted with him but whose trial has been ordered to be separate. The King v. Blais, 10 Can. Cr. Cas. 354, 11 O.L.R. 345.

On a charge of aiding and abetting another to commit rape if it appears that a man called as a witness for the prosecution had immediately prior to the offence been in the company of the prosecutrix under circumstances making it probable that he had had illicit connection with her, and that the man accused of the rape had taken the prosecutrix away from the witness, the witness may be cross-examined as to his relations with the prosecutrix for the purpose of shewing prejudice against the accused, and for this purpose is bound to answer whether he had had connection with the prosecutrix on that occasion. And where the witness refused to answer as to his connection with the prosecutrix and the trial Judge upheld his refusal, and the prosecutrix also refused to answer as to same, but the guilt of the accused was corroborated by independent testimony, Code sec. 1019 may be applied to uphold the conviction on the ground that no substantial wrong has been occasioned by the ruling. The King v. Finnessey, 10 Can. Cr. Cas. 347.

Evidence of Fresh Complaint.—Upon the trial of a charge of rape the whole statement made by the woman by way of complaint shortly after the alleged offence; including the name of the party complained against and the other details of the complaint, is admissible in evidence as proof of the consistency of her conduct and as confirmatory of her testimony regarding the offence, but not as independent or substantive evidence to prove the truth of the charge. Whether or not the complaint was made within a time sufficiently short after the commission of the offence as to admit evidence of the particulars of the complaint, is a question to be decided by the Court under the circumstances of the particular case; but it is nevertheless the province of the jury to take into consideration the time which intervened in weighing the probability of its truth. R. v. Riendeau (1901), 4 Can. Cr. Cas. 421, 10 Que. K.B. 584.

Upon a charge of rape, statements made by the complainant to a police officer on the day after the offence was alleged to have been committed and in response to his inquiries, the complainant having on the day of the offence complained to others of an assault but not of rape, are not admissible in evidence either as part of the *res gestæ* or as in corroboration. But if the jury acquit the accused of that offence but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admissions in evidence of statements so made by the complainant after the alleged offence, if the other evidence in the case is ample to warrant the verdict of indecent assault. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.).

Where the complainant makes a statement to a third party, not in the presence of the accused, such statement may be given in evidence, provided it is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating nature. R. v. Spuzzum (1906), 12 Can. Cr. Cas. 287.

Where the depositions at the preliminary enquiry on which an indictment for rape is founded shew that the statements of the prosecutrix relied upon by the Crown to shew a complaint were not made spontaneously, but in answer to questions by the police officer, evidence of the answers so made is admissible against the accused at the trial. R. v. Bishop (1906), 11 Can. Cr. Cas. 30.

Indictment.—A prosecution for rape is in fact and in substance a prosecution for any offence of which, on an indictment for rape, the prisoner could have been found guilty; and the maxim *Omne majus continet in se minus* applies. R. v. West, [1898] 1 Q.B. 174; R. v. Edwards (1898), 2 Can. Cr. Cas. 96.

An indictment may now be laid under Cr. Code secs. 856 and 951 charging rape and also assault with intent to commit rape.

Attempted Rape.—Code sec. 300.

Capacity.—A boy under fourteen is incapable of committing rape, but Code sec. 72 would seem to render such a boy liable to punishment for an attempt to commit rape.

Jurisdiction to Try.—Although a County Court Judge in the Province of New Brunswick has no jurisdiction to try this offence, he may proceed to try the offence of attempting to have carnal knowledge of a girl under fourteen (Cr. Code 302), although the evidence discloses the offence of attempting to commit rape. Code sec. 583; R. v. Wright (1896), 2 Can. Cr. Cas. 83. The same rule applies to restrict the jurisdiction of Courts of general sessions. Sec. 583.

Section 296 of the Code includes as an indictable offence for which two years' imprisonment may be imposed, the case of any one assaulting any person "with intent to commit any indictable offence," but would probably be held to be exclusive of the offence of assault with intent to commit rape, which is in itself, under the decision in John v. The Queen, 15 Can. S.C.R. 384, an attempt to commit rape. But see R. v. Preston, 9 Can. Cr. Cas. 201.

After a commitment upon a charge of "unlawful assault with intent to carnally know," the accused cannot insist upon a trial, without a jury under the Speedy Trial Clauses if the Crown express an intention of indicting him for an attempt to commit rape, which latter offence is beyond the jurisdiction of a County Judge's Criminal

Court and is disclosed on the depositions returned. R. v. Preston (1905), 9 Can. Cr. Cas. 201 (B.C.).

On the trial for an attempt to commit rape if the only issue involved is as to the identity of the prisoner, it is unnecessary for the trial Judge to point out to the jury that the law permits the finding of a lesser offence than the one charged. R. v. Clarke (1907), 12 Can. Cr. Cas. 300 (N.B.).

Evidence of Complaint.—On the trial of an indictment for an attempt to commit rape statements of the person assaulted, and of her companion present at the beginning of the assault, made to police officers, some four hours after the assault; and that they had given a description of the assailant, but not stating what the description was; and evidence of the officers that in consequence of such description they had looked for the assailant, were properly received, although statements of a like character had previously been made to other persons. And where the prosecutrix on cross-examination had stated that she had given a description of her assailant in the presence of her father, and that in consequence of such description her father had suspected a person other than the prisoner, the Crown was properly allowed to prove by the father what the description was that his daughter had given in his presence. R. v. Clarke (1907), 12 Can. Cr. Cas. 300 (N.B.).

Punishment for Attempt.—Code sec. 300.

Sec. 2.—Of Unlawful Carnal Knowledge of Idiots, Imbecile and Lunatic Females.—Code sec. 219.

Corroborative Evidence Essential—Code sec. 1002.

Sec. 3.—Of Unlawful Carnal Knowledge of Girls Under Fourteen.—Code sec. 301.

Capacity.—The common law presumption of the physical incapacity of a boy under fourteen to have carnal knowledge would be a defence to a charge of this offence. R. v. Hartlen, 2 Can. Cr. Cas. 12.

Unsworn Evidence by Girl Under Fourteen.—Code sec. 1002.

Canada Evidence Act.—R.S.C. (1906) ch. 145.

Consent.—Carnal knowledge alone constitutes an offence under this section when the girl is under the age of fourteen and her consent to the act is not a defence. R. v. Brice, 7 Man. R. 627; R. v. Chisholm, 7 Man. R. 613.

When there has been no violence, and the girl is under fourteen and has consented or complied, the offence falls under art. 301; but when there has been violence, and when the girl has not consented, then, notwithstanding the fact that the girl is under fourteen years of age, the crime is rape, and falls under sec. 298. R. v. Riopel (1898), 2 Can. Cr. Cas. 225, 228. The word "man" and "woman" in this section are to be taken in a general or generic sense as indicating all

males and females of the human race, and not in a restricted sense as distinguished from boys and girls. R. v. Riopel (1898), 2 Can. Cr. Cas. 225.

Indictment.—The words "not being his wife" in sec. 301, providing for the offence of defiling children under fourteen, is an exception, the failure to negative which in the indictment will not invalidate a conviction thereon where no objection was taken before pleading. The King v. Wright, 11 Can. Cr. Cas. 221.

The offence of carnal knowledge of a girl under fourteen years includes the offence of indecent assault, and a trial for the greater offence is a trial also for the lesser offence included therein, and the accused may, although found not guilty of the greater offence, be convicted for such lesser offence, if proved, under the same charge or indictment. R. v. Cameron (1901), 4 Can. Cr. Cas. 385 (Ont.). A police magistrate trying an accused with his consent summarily, upon the charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of general sessions would have upon a trial under an indictment. *Ibid.* And an acquittal by the police magistrate on such summary trial is a bar to a charge upon a fresh information for indecent assault in respect of the same occurrence. *Ibid.* An indictment for rape under secs. 298 and 299 lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding this section. R. v. Riopel (1898), 2 Can. Cr. Cas. 225; R. v. Ratcliffe (1882), 15 Cox C.C. 127; R. v. Dicker (1877), 14 Cox C.C. 8.

Section 951 authorizes a verdict of indecent assault, the consent of a girl under fourteen not being material to that offence; sec. 294; R. v. Cameron (1901), 4 Can. Cr. Cas. 385 (Ont.); or if the complete commission of the offence under sec. 301 is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. Sec. 949.

Attempt to Have Carnal Knowledge.—Code sec. 302.

The presumption of physical incapacity by a boy under fourteen to have carnal knowledge would seem to be over-ridden in reference to this and similar offences by Code sec. 72.

Corroboration.—Upon the trial of a charge of attempted carnal knowledge of a girl under fourteen who is too young to understand the nature of an oath, a conviction for that offence is not warranted unless her evidence not under oath is corroborated by some other material evidence implicating the accused (Code sec. 1003), but the accused may be convicted of common assault upon the charge so laid if there be corroboration merely by some other material evidence (Can. Evidence Act, sec. 16). The King v. De Wolfe, 9 Can. Cr. Cas. 38.

Alibi.—It is misdirection entitling the accused to a new trial for the trial Judge to charge the jury that the onus is upon the accused to prove an alibi set up in defence by a preponderance of testimony. The King v. Myshrall, 8 Can. Cr. Cas. 474, 35 N.B.R. 507.

Jurisdiction.—See note to sec. 300.

Proof of Age.—See sec. 984.

Excluding Public from Court Room.—See sec. 645.

Sec. 4.—Indecent Assault on Females.—Code sec. 292.

Punishment.—Under this section everyone found guilty of an indecent assault on a female is liable to two years' imprisonment and to be whipped; but the Court in many cases, acting under the discretion conferred by the special proviso contained in sec. 1028 of the Code, does not inflict the whipping, and imposes only an imprisonment. R. v. Robidoux (1898), 2 Can. Cr. Cas. 19.

Complaint.—In an Ontario case it has been held that in a civil action for damages under circumstances constituting the criminal offence of indecent assault, evidence is admissible of complaint made by the woman shortly after the assault was committed, in like manner as upon a criminal trial; and that complaint made by the woman to her husband, on her first meeting him some hours after the assault, but on the same day, was admissible in evidence under the circumstances of the case. The proof of such complaint by the evidence of both the woman and her husband is corroborative of the woman's evidence that she did not consent to the acts complained of. Hopkinson v. Perdue, 8 Can. Cr. Cas. 286. Where evidence of complaint is admissible on a charge of indecent assault, not only the fact of complaint may be shewn, but the particulars of the complaint. *Ibid.*

It is essential in all cases of indecent assault that complaint should have been made at the earliest opportunity after the offence, and evidence of such complaint may, under special circumstances, be received after the lapse of several days' delay. The fact of the girl being only seven years of age, that the act was committed without violence and that the girl did not realize the serious nature of the act, are circumstances which make a complaint made ten days afterwards admissible in evidence. R. v. Barron (1905), 9 Can. Cr. Cas. 196 (N.S.).

Under exceptional circumstances evidence of a complaint made by an adult female of an indecent assault may be admitted although five days had intervened between the assault and the complaint. R. v. Smith (1905), 9 Can. Cr. Cas. 21 (N.S.).

Corroboration.—Code sec. 1002.

Sec. 5.—Of Procuring the Defilement of Women.

Conspiring by False Pretenses to Induce Woman to Commit Adultery.—Code sec. 218.

Householder Permitting Defilement.—Code sec. 217.

Corroboration.—Code sec. 1002.

On a charge of allowing a girl under 18 to be upon premises for immoral purposes, the evidence of the girl proving that she shared with the proprietor the money she obtained by prostitution there carried on, is sufficiently corroborated under Code sec. 1002, by the evidence of another witness tending to shew that the place was a bawdy house. The King v. Brindley (1903), 6 Can. Cr. Cas. 196.

Limitation of Prosecution.—Code sec. 1140(*c*).

Parent or Guardian Procuring or Party to Defilement of Girl or Woman.—Code sec. 215.

Punishment for—

(*a*) Procuring girl for defilement. Code sec. 216.

(*b*) Enticing girl to house of ill-fame. Code sec. 216.

(*c*) Procuring girl to become prostitute. Code sec. 216.

(*d*) Procuring girl to leave Canada to become prostitute. Code sec. 216.

(*e*) Procuring girl to enter Canada to become prostitute. Code sec. 216.

(*f*) Procuring girl to leave her abode to become prostitute. Code sec. 216.

(*g*) Procuring carnal connection by threats. Code sec. 216.
Procuring carnal conection by false pretenses. Code sec. 216.

(*h*) Administering drugs to enable unlawful carnal connection. Code sec. 216.

Void Conviction.—A conviction for "unlawfully procuring or attempting to procure" a girl to become a prostitute, is void for duplicity and for uncertainty. R. v. Gibson (1898), 2 Can. Cr. Cas. 302.

Limitation.—Code sec. 1140(*c*).

Corroboration.—Code sec. 1002.

In R. v. McNamara (1891), 20 O.R. 489, it was held that it is admissible to prove in corroboration of the woman's evidence, that the house to which the prisoner had taken her had the general reputation of being a bawdy house; (Galt, C.J., Rose and MacMahon, JJ.).

Inducing to Come from Abroad.—Upon a charge of procuring a girl to come to Canada from abroad with intent that she may become an inmate of a brothel in Canada, the acts of inducement must be shewn to have been committed in Canada to give jurisdiction to a Canadian Court, unless the accused is a British subject. Re Gertie Johnson, 8 Can. Cr. Cas. 243.

Search Warrant for Girl in House of Ill-fame.—Code sec. 640.

Conspiracy to Defile.—Code sec. 218.

CHAPTER THE TENTH.

OF ABDUCTION OF FEMALES.

Common Law.—It appears not to be an indictable offence at common law for a man to marry a woman under age, without the consent of her father or guardian (*a*). But children might be taken from their parents or guardians by violence, conspiracy, or other improper practices in such a way as would render the act an offence at common law, though the parties themselves might be consenting to the marriage (*b*).

Various forms of abduction of wards and women have been made the subject of legislation from the time of Henry III. (Statute of Merton) down to 1885 (*c*). The enactments still effectively in force are as follows:

Abduction of Girls under Sixteen.—By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 55, 'Whosoever shall unlawfully take or cause 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, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour' (*d*). The provisions of the Children Act, 1908, Part II. apply to offences under this section (*dd*).

It is no defence to an indictment under this section that the girl looked over sixteen, or told the defendant that she was over sixteen, or that he *bona fide* and reasonably believed her to be over sixteen (*e*), or

(*a*) 1 East, P. C. 458.

(*b*) Id. ibid. p. 459. And see in 3 Chit. Cr. L. 713, a precedent of an information for a misdemeanor, in procuring a marriage with a minor, by false allegations. See R. *v.* Lord Grey [1682], 9 St. Tr. 127. 1 East, P. C. 460. This case was in the nature of ravishment of ward, and Wright (on Conspiracy, p. 106) considers it not to be a case of conspiracy at all, *vide ante*, p. 158.

(*c*) See Pollock and Maitland, Hist. Eng. Law, ii. 363, 435.

(*d*) Taken from 9 Geo. III. c. 31, s. 20 (E), and 10 Geo. IV. c. 34, s. 24 (I). These enactments reproduced an earlier statute, 4 & 5 Ph. & M. c. 8.

(*dd*) *Vide ante*, pp. 918–924.

(*e*) R. *v.* Prince, L. R. 2 C. C. R. 154. This case was not argued for the prisoner. Brett, J., the only dissentient judge, said: 'Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or *mens rea*. Then comes the question, what is the true meaning of the phrase? I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime, if the result were as he anticipates, but in which the result may not improbably end by bringing the offence within a more serious class of crime. As if a man strike with a dangerous weapon with intent to do grievous bodily harm, and kills. The result makes the crime murder. The prisoner has run the risk. So if a prisoner do the prohibited acts without caring to consider what the truth is as to facts. As if a prisoner were to abduct a girl under sixteen, without caring to consider whether she was in truth under sixteen. He runs the risk. So if he, without abduction, defiles a girl who is in fact under ten years old, with a belief that she is between ten and twelve. If the facts were as he believed, he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable grounds to believe, and does believe, to be the facts, would, if true, make his acts no criminal

had no means of ascertaining her age (*f*). He is bound at his peril to find out her age (*g*).

The enactment seems to extend to the taking of a natural daughter from the *care and custody* of her putative father (*h*), or from the mother, though she has married again, and the second husband has assented to the taking away (*i*).

Unlawfully.—The enactment does not require the presence of a corrupt motive or particular intent, so that the absence of such motive or intent is no answer to the criminal charge (*j*). But an honest belief in the existence of a right in favour of the prisoner to the custody of the girl may suffice to justify acquittal (*k*).

The enactment does not include the word 'detain.'

Take or Cause to be Taken.—The taking need not be by force, actual or constructive, physical or moral, and it is immaterial whether or not the girl consents (*l*), or whether the proposal that she should go away emanates from the defendant or from the girl (*m*).

Questions have arisen whether decoying or enticing away as distinct from actual taking falls within the enactment (*n*). It seems now to be established that persuasion or blandishment by the defendant to the girl to leave her home, if effective, is within the statute; but that where the active part is by the girl and not by the man he is not liable to conviction (*o*).

offence at all. It may be true to say that the meaning of the word "unlawfully" is that the prohibited acts be done "without justification or excuse." I, of course, agree that if there be a legal justification there can be no crime. But I come to the conclusion that a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England.'

Bramwell, B.: 'What the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, can be said to be in another's possession and in that other's care or charge. No argument is necessary to prove this. It is enough to state the case. The Legislature has enacted that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in any one's possession, nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute, an act which if he knew she was in possession and in care or charge of any one, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention if done without lawful cause.' See the discussion of the case in R. *v.* Tolson, 23 Q.B.D. 168; and as to *mens rea*, *ante*, p. 101.

(*f*) R. *v.* Booth, 12 Cox, 231, Quain, J.

(*g*) R. *v.* Mycock, 12 Cox, 28, Willes, J. R. *v.* Olifier, 10 Cox, 402, Bramwell, B.

(*h*) R. *v.* Cornforth, 2 Str. 1162 (decided on 4 & 5 Ph. & M. c. 8). 1 Hawk. c. 41, s. 14. R. *v.* Sweeting, 1 East, P. C. 457.

(*i*) Ratcliffe's case, 3 Co. Rep. 39.

(*j*) 1 East, P. C. 459. See R. *v.* Booth, 12 Cox, 231, Quain, J., and R. *v.* Tinkler, 1 F. & F. 513, Cockburn, C.J., decided on 9 Geo. IV. c. 31, s. 20, of which 24 & 25 Vict. c. 100, s. 55, is a re-enactment.

(*k*) R. *v.* Tinkler, *ubi sup.*

(*l*) R. *v.* Mankletow, Dears. 159. R. *v.* Kipps [1859], 4 Cox, 167, Maule, J. R. *v.* Handley, 4 F. & F. 648, Wightman, J.: all decided on 9 Geo. IV. c. 31, s. 20. R. *v.* Jarvis, 20 Cox, 249, Jelf, J.

(*m*) R. *v.* Robins [1844], 1 C. & K. 456. Atcherley, Serjt., afterwards stated that he had mentioned the case to Tindal, C.J., and that he was of opinion that the direction of the jury was right, and that there was a taking of the girl within s. 20. See R. *v.* Prince, *ante*, p. 959, note (*c*). In R. *v.* Frazer [1861], 8 Cox, 446, Pollock, C.B., after consulting Williams, J., ruled that it was unnecessary under 9 Geo. IV. c. 31, s. 20, to prove such a taking as would amount to a trespass or anything in the nature of a trespass.

(*n*) R. *v.* Meadows, 1 C. & K. 399, Parke, B.

(*o*) R. *v.* Jarvis, 20 Cox, 249, Jelf, J.

The prisoner met in the street a girl under sixteen, and persuaded her to go with him to a neighbouring city. He there seduced her, and afterwards, on the same day, accompanied her back, and parted with her in the street where he had met her. The girl lived with her parents at home, and immediately returned there. The prisoner made no inquiries, and had no knowledge of whether the girl's parents were even living or not, but he did not believe she was a prostitute :—Held, that there was no evidence to support a conviction under sect. 55 (*p*).

If the girl, while living with her father, leaves his house for a mere temporary purpose, intending to return to it, she is still in his possession within the meaning of the statute ; and if when so out of the house the defendant induces her to run away with him, he is guilty of an offence within sect. 55 (*q*).

Although it seems that a man is not bound to return a girl under sixteen to her father's custody when she has left home without any inducement, and come to him (*r*), yet if he has at any time held out an inducement to her, and she, acting upon that, comes to him at a time unexpected by him, and he then induces her to continue away from her father's custody, he is guilty (*s*).

On an indictment for taking a girl under sixteen, out of the possession of her father, it appeared that the prisoner lived near the girl's home, and had known her a considerable time. Six months previously, the father, hearing that the girl went to the prisoner's house, remonstrated with him for encouraging her to go there ; the prisoner replied that he did not want girls for the purpose of intercourse, as he was old and under medical treatment. One Sunday she left her father's house to go, as she said, to the Sunday school, but did not return. In fact she went to the prisoner's house, and was found there a month afterwards. A youth proved that the prisoner had told him to bring that young girl if he could. He had told a policeman that he had the girl to do his work, as he had no servant. The girl stated that she had for two years been in the habit of going to his house occasionally, and that he had tried to persuade her to come and live with him, and had promised her a new dress if she came, and that when she came he promised to provide for her in his will, and persuaded her to sleep with him. Pollock, C.B., directed the jury that if they believed that the prisoner by promises or persuasion enticed the girl away from her father, and so got her out of his possession, and into his own, they should find him guilty, otherwise if she came without any previous inducement or enticement (*t*).

(*p*) R. *v.* Hibbert, L. R. 1 C. C. R. 184, Pigott, B., doubted. Bovill, C.J., said : 'In the case before us there is no statement or finding of the fact that the prisoner knew, or had reason to know, that the girl was under the charge of her father or mother or any other lawful guardian. Circumstances might exist to negative the presumption that she was in any such care, as if the girl were upon the town, though that does not appear to be the case here. So, on the other hand, there might be circumstances from which it might be inferred that the prisoner knew, or had reasonable cause to know, that the girl was under such care ; but no such facts are found by the case to have existed. In the absence of any such finding, we think that the conviction should be quashed.' See R. *v.* Green, 3 F. & F. 274, and see per Brett, in R. *v.* Prince, *ante*, p. 959, note (*c*).

(*q*) R. *v.* Mycock, 12 Cox, J. 28, Willes, J.

(*r*) R. *v.* Miller, 13 Cox, 179.

(*s*) R. *v.* Olifier, 10 Cox, 402, Bramwell, B.

(*t*) R. *v.* Robb, 4 F. & F. 59. See R. *v.* Meadows, 1 C. & K. 399.

Where the suggestion to go away came from the girl herself and the defendant merely yielded to her suggestion, it was held that he should be acquitted (*u*).

Out of the Possession.—A father is at common law entitled to the custody of his child until it attains the age of twenty-one or marries under that age (*v*), or unless there be some sufficient reason to the contrary (*w*), but sixteen is described as the age of emancipation for the purpose of poor law settlement and maintenance. The word in the statute is 'possession,' which involves more than the legal right to custody.

Against the Will.—Where the parent, &c., is induced to let the girl be taken out of his possession by fraudulent representations it would seem that the taking is against his will within the meaning of the enactment.

On an indictment under 9 Geo. IV. c. 31, s. 20 (*x*), for the abduction of a girl under sixteen years of age, it appeared that the prisoner pretended that he had heard of a place for the girl; the mother said that the child was too young, being only between ten and eleven years of age; but the prisoner said she was quite old enough, for he only wanted her to go to S. with a lady to nurse a baby, and to go on errands. The prisoner called the same day and took the child away, saying the lady was too ill to come herself. He did not, however, take her to any lady, but kept her with him from Monday till Friday, and slept with her every night, and then took her home. The father proved that he parted with the child on the representation that she was to go to live with a lady, which he believed to be true. For the Crown it was argued that the consent of the father having been obtained by the fraudulent representations of the prisoner, was no consent at all; for the prisoner it was contended that the abduction was not complete, for the child was brought back; if this were an abduction, any seducing away of a girl for an hour would be an abduction; there was no intention shewn to deprive the parents of the child. Gurney, B., left it to the jury to say whether the father was induced to part with the possession of the child by the fraudulent representations made by the prisoner (*y*).

In Hicks *v.* Gore (*z*), where a widow, fearing that her daughter, who was a rich heiress, might be seduced into an improvident marriage, placed her under the care of a female friend, who sent for her son from abroad, and married him openly in the church, and during canonical hours, to the heiress, before she attained the age of sixteen, and without the consent of her mother, who was her guardian; it was held that in order to bring the offence within the statute (4 & 5 Ph. & M. c. 8, rep.) it must appear some artifice was used, that the elopement was secret, and that the

(*u*) R. *v.* Jarvis, 20 Cox, 249, Jelf, J. This decision is contrary to R. *v.* Biswell [1847], 2 Cox, 279.

(*v*) *Re* Agar Ellis, 24 Ch. D. 317. Cf. *Ex parte* Barford, 8 Cox, 405.

(*w*) *Re* Newton [1896], 1 Ch. 740.

(*x*) Repealed in 1861, and re-enacted as 24 & 25 Vict. c. 100, s. 55, *ante*, p. 959.

(*y*) R. *v.* Hopkins [1842], C. & M. 254. The prisoner was convicted, and the point would have been reserved had not the prisoner been convicted and sentenced on another indictment. The mother proved that she would have let the child go with the prisoner if he had told her that she was to go and live with him as his servant; but Gurney, B., held that this could not affect the case.

(*z*) 3 Mod. 84. 1 Hawk, c. 41, s. 11.

marriage was to the disparagement of the family. But in this case no stress appears to have been laid upon the circumstance of the mother having placed the child under the care of the friend, by whose procurance the marriage was effected; and that it deserves good consideration before it is decided that an offender, acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or guardian did not consent, was not within the statute; for that then every schoolmistress might dispose, in the same manner, of the children committed to her care (*a*). It was said that there must be a continued refusal of the parent or guardian; and that if they once agreed it was an assent within 4 & 5 Ph. & M. c. 8, notwithstanding any subsequent dissent (*b*); but this was not the point in judgment; and it needs further confirmation (*c*).

It was no legal excuse for the offence under 4 & 5 Ph. & M. c. 8, that the defendant made use of no other means than the common blandishments of a lover, to induce the lady secretly to elope and marry him, if it appeared that the father intended to marry her to another person, and so that the taking was against his consent (*d*).

In R. *v.* Kipps (*e*), on an indictment under 9 Geo. IV. c. 31, s. 20, it appeared that the girl was between fifteen and sixteen years of age, and the prisoner had for several months corresponded with her, and paid her the attentions of a lover, though he was a married man, and had endeavoured to persuade her to leave her home, where she was living with her parents, and ultimately prevailed upon her to meet him at a place in the village where they were both living, which accordingly she did, when they left the village together. There was no suggestion of any force or fraud used by the prisoner in inducing the girl to consent to elope with him. It was urged that there was no taking within the meaning of the Act, as the girl went voluntarily with the prisoner, and R. *v.* Meadows (*f*) was relied upon; for the Crown, R. *v.* Robins (*g*) and R. *v.* Biswell (*h*) were cited. Maule, J., said: 'If the construction apparently put upon the statute in R. *v.* Meadows be the right construction, the Act can hardly ever be violated, except in the case of children in arms. It rarely or never happens that the abductor takes away a girl of fourteen or fifteen in his arms, or upon his back; so that such an interpretation would make the statute inoperative. The law throws a protection about young persons of the sex and within the age specified by the statute. It has been determined by the legislature, that at that age young females are not able to protect themselves, or give any binding consent to a matter

(*a*) 1 East, P. C. 457. By the fraud the temporary guardian loses all right to the possession of the child. See an Anonymous case decided in 1875 and referred to in Roscoe Crim. Ev. (13th ed.) 230.

(*b*) Calthrop *v.* Axtel, 3 Mod. 169.

(*c*) 1 East, P. C. 457.

(*d*) R. *v.* Twisleton, 1 Lev. 257; 1 Sid. 387; 2 Keb. 32. 1 Hawk. c. 41, s. 10.

(*e*) [1850] 4 Cox, 167.

(*f*) 1 C. & K. 399. Parke, B., said: 'It is quite evident that the Legislature made a distinction between an offence under sect. 20 of the 9 Geo. IV. c. 31, and under sect. 21; and I am inclined to think, that to bring a case within sect. 20 [which is similar to 24 & 25 Vict. c. 100, s. 55], there must be an actual taking or causing to be taken away; and a mere decoying or enticement away which would be an offence within sect. 21, would not constitute one under sect. 20.'

(*g*) [1844] 1 C. & K. 456.

(*h*) [1847] 2 Cox, 279.

of this description. It is therefore quite immaterial whether the girl abducted consent or not; if her family, that is to say, those who under the statute may lawfully have the possession and control over her, do not consent to her departure, the offence is completed.'

In R. *v.* Mankletow (*i*), upon a similar indictment, it appeared that the prisoner had stated to the father that he intended to emigrate to America, and a short time before his departure he had privately persuaded the girl, who was between twelve and thirteen, to go with him to America, and on the morning of his departure he had secretly told her to put her things in a bundle, and to walk to a place where he would meet her; she did so, and the prisoner, having parted with her father in a road, met her at the place appointed, and they travelled together to London, where he was apprehended, and then said he had paid the girl's passage to London, and was going to take her to America. For the prisoner it was urged that as the girl went voluntarily there was no taking within the meaning of the statute, and R. *v.* Meadows (*ii*) was cited. R. *v.* Robins (*j*) was cited on the other side, and it was stated that Maule, J., at a previous assize, had declined to act on R. *v.* Meadows. Coleridge, J., overruled the objection, and told the jury that the girl was in the father's possession while in his house, although he was not actually in it; that the taking need not be by force, nor against the girl's will; and that if the prisoner by persuasion induced her to leave her father's roof against his will, in order to her going with him to America, the case was within the statute; and, upon a case reserved, it was held that the conviction was right. In a case like the present the taking need not be by force, actual or constructive, and it is immaterial whether or not the girl consents. The Act was passed to protect parents and others having the lawful charge or custody, and it is therefore immaterial whether the taking be with or without the consent of the girl. And as to the taking of the girl out of the possession of the father, a manual possession is not necessary; if the girl be a member of the family, and under the father's control, there is a sufficient possession. If a girl leaves her father's house for a particular purpose, with his sanction, she cannot legally be said to be out of his possession. Here the father had possession until the very act of taking (*jj*).

In R. *v.* Handley (*k*), on a similar indictment against a man and a woman, it appeared that the girl had become acquainted with the female prisoner, and at her house met the male prisoner, and she and the prisoners met frequently, and at last she left her father's house, as she said, to go

(*i*) [1853] Dears. 152: 22 L. J. M. C. 151: 6 Cox, 143.

(*ii*) *Ante*, p. 963.

(*j*) [1844] 1 C. & K. 456.

(*jj*) Parke, B., said: 'Supposing the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But supposing she conditionally abandoned the possession of her father under the impression that the prisoner would be at a certain point to take her away, that would not be a determination of the father's possession.' On R. *v.* Meadows being cited, Jervis, C.J., observed that 'the girl, by voluntarily going from her father's house, may have severed the possession of the father, and so could not be said to be taken out of the possession of her father. I do not find that in R. *v.* Kipps that point was brought before my brother Maule's mind': and at the end of his judgment he added, 'I do not think the case of R. *v.* Kipps interferes at all with the decision of R. *v.* Meadows.'

(*k*) [1859] 1 F. & F. 648.

for a walk, at the same time saying that she should return in an hour, but she did not return; and the same evening her brother went to the house of the female prisoner, who denied having seen her; and it was afterwards discovered that she had left the same night, and she was afterwards found in a low lodging together with the male prisoner; the girl had taken some wearing apparel to the house of the female prisoner the day before she left home, and she had advised her to go away with the male prisoner; it was contended that there was nothing to shew that the girl's going away was not entirely voluntarily. Wightman, J., told the jury, that 'this offence is complete under the statute which creates it without any reference to the object for which the girl may be taken. You must be satisfied that the girl was under sixteen years of age, and that her father was unwilling that she should go away, and it must be assumed to be so, if it appears that, had he been asked, he would have refused his consent. You must also be satisfied that the prisoners, or one of them, took the girl out of the possession of her father. For this purpose a taking by force was not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's house. If, however, the going away was entirely voluntary on the part of the girl, the prisoners would not be guilty of an offence under this statute

In R. *v.* Baillie (*l*), on a similar indictment the prisoner was proved to have lodged in the house of the girl's father, and he and the girl became engaged, and he induced her to go with him to a Roman Catholic chapel, where they were married; but she immediately returned to her father's house, and continued to live there as before; and the marriage had never been consummated; the father did not know of the marriage till two or three weeks afterwards; it was urged that the girl had never been taken out of her father's possession within the meaning of the Act; it was answered that the marriage without the father's consent was an abduction within the meaning of the Act, and after the marriage the father had no legal control over the girl. It was held that this case was within the Act; the girl could not be considered to be in her father's possession, although she was in his house; because she was in the lawful possession of her husband, and the father could never have the custody of her in the same sense as before her marriage. The distance she was taken, and the time she was kept away, were immaterial, her husband having power to take her away whenever he liked, and her whole relationship to her father being altered by the marriage.

In R. *v.* Timmins (*m*), on a similar indictment it appeared that the prisoner was well known to the girl, and she had on a former occasion slept with him a whole night; and that on a Sunday she met the prisoner, and they went to London together, and spent three days in visiting places of public entertainment, sleeping together at night, and on Wednesday morning, on getting up, the prisoner said to her, 'I 'll go to work, and you go home': they separated, and the girl went home; the father swore that his daughter was absent without his knowledge and against his will.

(*l*) [1859] 8 Cox, 238, Recorder and Common Serjeant.

(*m*) [1860] Bell 276.

The jury found that the father did not consent, and that the prisoner knew he did not consent, and that the prisoner took the girl away with him in order to gratify his passions, and then allowed her to return home, and did not intend to keep her away permanently. Upon a case reserved upon the question, whether, on the facts so found, any offence had been committed under the statute, Erle, C.J., delivered judgment: 'We are of opinion that the conviction must be affirmed. The statute was passed for the protection of parents, and for preventing unmarried girls from being taken out of the possession of their parents against their will; and it is clear that no deception or forwardness on the part of the girl in such cases can prevent the person taking her away from being guilty of the offence created by this section. The difficulty which we have is to say what constitutes a taking out of the possession of the father. The taking away might be consistent with the possession of the father, if the girl went away with the party intending to return in a short time; but when a person takes a girl away from the possession of her father, and keeps her away against his will for a length of time, as in this case, keeping her away from her home for three nights, and cohabiting with her during that time, we think the evidence justified the jury in finding the taking to be a taking out of the possession of the father within the meaning of the statute. The prisoner took the girl away from under her father's roof, and placed her in a situation quite inconsistent with the father's possession. In our judgment, therefore, the jury were justified in their verdict by the evidence before them, which we consider to be the point submitted to us, although the prisoner did not intend the taking to be permanent, but when his lust was gratified intended to cast the girl from him. We limit our judgment to the facts of this particular case. It may be that a state of facts might arise upon which the offence would be complete in law when the girl passed her father's threshold, as where she is taken away with the intention of keeping her away permanently; but we mean it to be understood, that, although we affirm this conviction, we do not intend to say that a person would be liable to conviction under the section if it should appear that the taking was intended to be temporary only, or for a purpose not inconsistent with the relation of father and child. It is sufficient for us to say that in this case the conviction was justified by the evidence' (*n*).'

In R. *v.* Tinkler (*o*), on a similar indictment it appeared that the girl was the younger sister of the prisoner's deceased wife, and had lived in his house up to the time of his wife's death, but on that occasion another married sister had caused her to be placed under the care of another woman, and no improper motive was alleged against the prisoner, he having alleged as his reason for taking the child away that he had promised her father on his death-bed to take care of her. Cockburn, C.J., told the jury that it was clear that the prisoner had no right to take the child out of the woman's custody. But as no improper motive was suggested, it might be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise he had made to her father, and that he did not suppose he was breaking the

(*n*) Only argued for the Crown.

(*o*) [1859] 1 F. & F. 513,

law when he took the child away. If the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to be acquitted.

In R. *v.* Primelt (*p*), on a similar indictment it appeared that the girl was more than fifteen, but in appearance three years older and very prepossessing, and lived with her mother, a widow; on the evening of the alleged abduction she left her mother's house at nine o'clock to spend the night at a married sister's, but, joining company with another girl, they went to a public-house, where they met the two prisoners, and from thence went to another public-house, where they met the prisoners again by appointment, and thence to the farming premises of one of the prisoners, where they remained till four o'clock in the morning; it was then proposed that they all should go to London, which they did, and stayed the day there, and one of the prisoners slept with the girl, and the other with her companion, and returned the next day. The mother swore that it was not by her consent that the girl had gone away, and that she had inquired everywhere for her without success; but the girl stated that she occasionally went to dances at public-houses, and was occasionally out late at night without anyone to look after her, and that her mother on these occasions left the door on the latch, or came down and let her in; that the prisoner who slept with her was not the first man who had had connection with her. Cockburn, C.J., directed the jury that there was no case against the other prisoner; and as to this prisoner, if they thought that the mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out alone at night and to dance at public-houses, this was not a case that came within the intent of the statute; but was one where what had occurred, though unknown to her, could not be said to have happened against her will (*q*).

Abduction of Girls under Eighteen.—By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 7, 'Any person who, with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally—takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

'Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the Court or jury that the person so charged had reasonable cause (*r*) to believe that the girl was of or above the age of eighteen years' (*s*).

(*p*) [1858] 1 F. & F. 50.

(*q*) For a similar instance of failure to take reasonable care of a girl under sixteen, which led to a doubt whether the girl was taken against her will. See R. *v.* Frazer [1861], 8 Cox, 446, Pollock, C.B. See 8 Edw. VII. c. 67, s. 18, *ante*, p. 953.

(*r*) At the time of taking. R. *v.* Packer, 16 Cox, 57.

(*s*) This clause excludes the application of R. *v.* Prince, *ante*, p. 959.

It must be proved that the girl was taken out of the possession of the person mentioned in the indictment. Whether the girl was in her father's possession seems to be a question of fact for the jury (*t*). A girl employed as a barmaid at some distance from her home was held not to be in possession of her father (*u*). Under this enactment the *intent* is an essential element in the offence. As to proof of age *vide ante*, p. 954. The father or mother should be called to prove that he or she did not consent (*v*).

The word 'taking' in this enactment has the same meaning as in 24 & 25 Vict. c. 100, s. 55 (*w*). The enactment does not apply when the girl has left her home without any inducement from the defendant (*x*).

The willingness of the girl to go with the defendant is no answer to an indictment under the section, which protects parental and public rights.

Abduction of Heiresses (*y*).—By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 53, 'Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress *or coheiress*, or *presumptive* next of kin, *or one of the presumptive next of kin*, to any one having such interest,

whosoever shall, from motives of lucre, take away or detain such woman 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; and

whosoever shall fraudulently allure, take away, *or detain such* woman, and 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*,

shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . (*z*); and whosoever shall be convicted of any offence against 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 shall have any such interest, or which shall come to her as such heiress, coheiress, or next of kin as aforesaid;* and if any such marriage as aforesaid shall have taken place, such property shall upon such conviction *be settled in such manner* as the Court of Chancery in *England* or *Ireland* shall *upon any information at the suit of the Attorney-General* appoint' (*a*).

(*t*) R. *v.* Mace, 50 J. P. 776.

(*u*) R. *v.* Henkers, 16 Cox, 257.

(*v*) R. *v.* Nash, Wright, J., noted in the *Times* 2nd July, 1903.

(*w*) R. *v.* Henkers, 16 Cox, 257, following R. *v.* Olifier, 10 Cox, 402, *ante*, p. 961.

(*x*) R. *v.* Kaufmann, 68 J.P. 189, Bosanquet, Common Serjeant.

(*y*) By 13 Edw. I. c. 35, it is an offence punishable by two years' imprisonment to take or carry away any infant, male or female, whose marriage belongs to another. 2 Co. Inst. 437. As to carrying away nuns or carrying away a wife with the goods of her husband, see 13 Edw. I. c. 34, 2 Co. Inst. 433.

(*z*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*a*) This section combines the provisions of 9 Geo. IV. c. 31, s. 19 (E) and 10 Geo. IV. c. 34, s. 23 (I). The words in *italics* in the first branch of the clause were introduced to avoid a doubt which might have been raised, whether the cases they expressly include were within the former enactments. In the second branch, the age of twenty-one is substituted for eighteen in 10 Geo. IV. c. 34, s. 23 (I).

By sect. 54 (*b*), 'Whosoever shall, by force, take away *or detain* 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, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*bb*).

Decisions on Former Statutes.—It was made a question of considerable doubt, whether persons 'receiving wittingly the woman so taken against her will, and knowingly the same,' were ousted of clergy by 18 Eliz. c. 7 (*c*). But it was agreed that those who received *the offender*, knowingly, were only accessories after the fact, according to the rule of the common law (*d*). Those who were only privy to the marriage, but in no way parties or consenting to the forcible taking away were not within the statute (*e*).

It was no sort of excuse that the woman was at first taken away with her own consent, if she afterwards refused to continue with the offender and was forced against her will; for till the time when the force was put upon her, she was in her own power; and she might from that time as properly be said to be taken against her will, as if she had never given any consent (*f*). Getting a woman inveigled out by confederates, and then detaining and taking her away, was a taking within the statute (*g*). The taking alone did not constitute the offence under 3 Hen.VII. c. 2 (*h*), and it was necessary that the woman taken away should have been married or defiled by the misdoer, or by some other, with his consent (*i*). The present enactment makes the taking away or detaining a woman, *with intent* to marry or carnally know her, a complete offence. Under 3 Hen. VII. c. 2, it was decided, that if the woman were under force at the time of taking, it was not at all material whether she were ultimately married or defiled with her own consent or not; on the ground that an offender should not be considered as exempted from the provisions of the statute by having prevailed over the weakness of a woman, whom he got into his power by such base means (*j*). And it was also decided

Under 10 Geo. IV. c. 34, s. 23 (I), the girl must have been married or defiled, and by the person taking her away. The section is so altered as to make it correspond with 9 Geo. IV. c. 34, s. 19, in both respects. The last part of the clause is framed on 10 Geo. IV. c. 34, s. 23 (I). It is enlarged so as to embrace property that may come to the woman after the marriage; and the High Court is empowered to settle the property in such a manner as it deems fit, instead of its being invested in trustees for the separate use of the wife alone, which was all that 10 Geo. IV. c. 34, s. 23 (I), directed. The Court, therefore, may, in its discretion, settle the property on the issue of the marriage, and in default of such issue, on any relatives of the wife.

(*b*) Taken from 10 Geo. IV. c. 34, s. 22 (I), and 5 Vict. Sess. 2, c. 28, s. 15 (I). It provides protection for women who happen to have neither any present nor future interest in any property. See Baker and Hall's case, 12 Co. Rep. 100. Burton *v.* Morris, Hob. 182; Cro. Car. 485.

(*bb*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*c*) 1 Hale, 661. 1 East, P. C. 452, 453. The statute was repealed in 1828 (9 Geo. IV. c. 31).

(*d*) 1 Hale, 661. 1 Hawk. c. 41, s. 9. 3 Inst. 61. 1 East, P. C. 452, 453.

(*e*) Fulwood's case, Cro. Car. 488, 489. 1 Hawk. c. 41, s. 10.

(*f*) 1 Hawk. c. 41, s. 7. Fulwood's case, Cro. Car. 485.

(*g*) R. *v.* Brown, 1 Ventr. 243: 3 Keb. 193.

(*h*) Repealed in 1828 (9 Geo. IV. c. 31).

(*i*) R. *v.* Wakefield, 2 Lew. 1. The parties were convicted of conspiracy to contravene 3 Hen. VII. c. 2, and 4 & 5 Ph. & M. c. 8.

(*j*) 1 Hale, 660. 1 Hawk. c. 41, s. 8. Fulwood's case, Cro. Car. 485, 493.

that a marriage would be sufficient to constitute the offence, though the woman was in such fear at the time that she knew not what she did (*k*).

Venue.—Under 3 Hen. VII. c. 2, where a woman was taken away forcibly in one county, and afterwards went voluntarily into another county, and was there married or defiled, with her own consent, the fact was not indictable in either county; on the ground that the offence was not complete in either, but that if by her being carried into the second county, or in any other manner, there was a continuing force in that county, the offender might be indicted there, though the marriage or defilement ultimately took place with the woman's own consent (*l*). The place of trial in such a case is now regulated by 7 Geo. IV. c. 64, s. 12 (*ante*, p. 20).

The doctrine that there must have been a continuance of the force into the county where the defilement took place, was recognised and acted upon in the following case: The prisoners, a clergyman and his brother, were indicted in the county of Oxford, under 3 Hen. VII. c. 2, for forcible abduction. Certain evidence was given at the trial on the part of the prosecution. Lawrence, J., told the jury that, in order to constitute the offence with which the prisoners were charged, there must be a forcible taking, and a continuance of that force into the county where the defilement takes place, and where the indictment is preferred; that in the present case, though there appeared clearly to have been force used for the purpose of taking the prosecutrix from her house (which was in Middlesex), yet, it appeared also, that in the course of the journey she consented, as she did not ask for assistance at the inns, turnpike gates, &c., where she had opportunities; and that, as she was unable to fix times or places with any precision, this consent probably took place before the parties came into the county of Oxford; and that they must therefore acquit the prisoners (*m*).

Evidence.—Upon an indictment for abduction under 9 Geo. IV. c. 31, s. 19 (rep.), it was necessary to prove that the prisoner took away the woman from motives of lucre, but his expressions relative to her property were evidence that he was actuated by such motives (*n*).

An indictment under sect. 53 ought expressly to set forth that the woman taken away had lands or goods, or was presumptive heiress, &c., and that the taking was against her will, and from motives of lucre (*o*), and with intent to marry or defile, &c. (*p*).

In R. *v.* Burrell (*q*), the indictment charged that F. B. fraudulently allured, took away, and detained J. B. out of the possession of her mother

Swendsen's case, 5 Harg. St. Tr. 450, 464, 468: 14 Howell St. Tr. 559.

(*k*) Fulwood's case, Cro. Car. 482, 484, 488, 493.

(*l*) Fulwood's case, Cro. Car. 485, 488. 1 Hale, 660. 1 Hawk. c. 41, s. 11. 1 East, P. C. 453.

(*m*) R. *v.* Lockhart and Loudon Gordon, *cor.* Lawrence, J., Oxford Lent Ass. 1804. This case is set out at length in the fourth edition of this work.

(*n*) R. *v.* Barratt, 9 C. & P. 387.

(*o*) For rulings on the Act of Hen. VII. see 1 Hawk. c. 41, s. 4. 1 Hale, 660. 4 Bl. Com. 209. 12 Co. Rep. 21, 100.

(*p*) Under the former Acts it was not necessary to state such intention. Fulwood's case, Cro. Car. 488, *supra*. It is said, however, in 1 Hale, 660, that the words *eâ intentione ad ipsam maritandam* were usually added in indictments on this statute, and that it was safest so to do.

(*q*) L. & C. 354: 33 L. J. M. C. 54.

and W. S. H., he then having the lawful care and charge of her, she being under the age of twenty-one years, and having a present legal interest in real estates, with intent to marry, &c., and H. R. B. was charged with feloniously aiding, &c., to commit the felony. The prisoners were paternal uncles of J. B., who was sixteen years old, and entitled to real estates of the value of £50 a year. Her mother had first married the brother of the prisoners, and after his death she had married W. S. H. J. B. lived with her mother and stepfather till she went to school in January, 1862, where she remained till August, 1862, when she returned to her mother's, and in October she went to another school, whence she returned to her mother's on December 20, in the afternoon; she stayed half an hour, and then left the house alone. About nine o'clock that evening she returned, and stayed till ten, when she again left without her mother's knowledge or consent. She returned the next morning, and stayed with her mother about two hours, and then went away without her mother knowing whither. In fact, she went to the house of her uncle, H. R. B., and she continued there till January 19, 1863. She continued to pay visits to her mother for an hour or two nearly every day till January 19. In the interval between her coming home from the first and her going to the second school, it had been arranged, at her own desire, in consequence of her not living happily with her stepfather and mother, that she should live with her mother's mother and brother. When she came back for the Christmas holidays, she wished to remain with her mother, but the latter insisted on her abiding by her own choice to go to her grandmother's for the holidays, and would not consent to her staying with her at her stepfather's house. On this she went to the house of H. R. B. Her mother, as soon as she discovered that her daughter was there, desired her to come to her house, and refused to let her have her clothes unless she did so. On January 19, F. B. and J. B. left together by railway, and were married the next day at Plumstead. These occurrences took place under such circumstances as fully warranted the jury in finding that J. B. was allured and taken away by F. B., with intent to marry her, and that H. R. B. aided in the committing of this act. It was objected—1, that there was no evidence that F. B. had *fraudulently* allured away J. B.; 2, that there was no evidence that she was taken out of the possession of her mother; 3, that the indictment charged that she was taken out of the possession of her mother and W. S. H., he having then the lawful charge of her, and that it was necessary to prove that she was in his possession as thus alleged, as well as of her mother; but the only proof was that the guardianship of her person and copyhold estate had been granted to him when she was admitted as tenant of her copyhold estate. Upon a case reserved it was urged—1, that there was no fraudulent alluring away, and that the mere alluring away was not sufficient; 2, there was no evidence that she was taken out of the possession of her mother; 3, that the stepfather had not the lawful care of the girl; he had no general guardianship of her person. In Ratcliffe's case, 3 Co. Rep. 396, it was held that the consent of the stepfather was wholly immaterial; but here the indictment alleged the stepfather to have the lawful custody. (Pollock, C.B.: 'We are all of opinion that the indictment would be supported by shewing that the

girl was taken out of the possession and against the will of the mother. The rest might be struck out as surplusage.') For the crown it was urged—1, that in this case the statute did not require any evidence of fraud, but if it did there was sufficient evidence of fraud; 2, the girl was in the possession of the mother; she had never abandoned the possession, and the mere right of possession was sufficient. Pollock, C.B.: 'The Court is divided in opinion on the facts of the case. The opinion of the majority is that the facts do not bear out the prosecution, or, in other words, that the crime has not been established against the prisoners. There is no difference of opinion as to the law of the case.'

As to the woman taken away and married being a witness, see *post*, Book XIII. Chapter V. 'Evidence.'

CANADIAN NOTES.

ABDUCTION OF FEMALES.

Abduction of Woman, with Intent.—Code sec. 313 (as amended by 8 & 9 Edw. VII. ch. 9).

Abduction of Heiresses.—Code sec. 314(*a*) (amended by 8 & 9 Edw. VII. ch. 9).

Fraudulently Alluring Heiress Under Twenty-one Against Will of Father or Mother.—Code sec. 314(*b*) (amended by 8 & 9 Edw. VII. ch. 9).

Evidence must be given on a prosecution under Code sec. 314 as amended by the Code Amendment Act of 1909, to prove that a girl under twenty-one alleged to have been fraudulently detained against her parent's will with intent to marry her, is an heiress or is entitled to real or personal property within the terms of the statute; and such property interest must be alleged in an indictment or charge. R. v. Fielding, 14 Can. Cr. Cas. 486.

Effect of Conviction on Property—Code sec. 314(2).

It need not be shewn that the accused knew that the woman was an heiress or had such an interest in real or personal estate, etc., as is specified in sub-sec. (*b*). R. v. Kaylor, 1 Dor. Q.B. (Que.) 364.

It may be doubted whether the Dominion Parliament have the legislative authority to enact the sub-sec. 2, particularly as regards the power purported to be conferred upon a Court of competent jurisdiction to make a settlement of the property. The power to legislate as to the "criminal law" is conferred by the British North America Act upon the federal parliament, and the power to legislate as to "property and civil rights" is vested by the same statute in the Provincial Legislatures. Canada Criminal Law of Tremeear, p. 257.

Abduction of Girls Under Sixteen.—Code sec. 315.

Abduction of Girls Under Fourteen.—Code sec. 316.

In Ontario in the extradition case of R. v. Watts (1902), 5 Can. Cr. Cas. 246, 3 O.L.R. 368, it was held that the child's own father may be guilty of child-stealing within the Code, if after a divorce and the award of the custody of the child to the mother, the father wilfully removes the child from her custody. And that an objection by the husband to the validity of the divorce on the ground of collusion cannot, where the collusion is denied on oath, be adjudicated upon by the extradition commissioner, but extradition should be ordered

notwithstanding such objection, and the prisoner left to his right to contest the divorce decree at his trial by the foreign Court.

And in a Montreal extradition case, it was afterwards held that where a divorce decree of a Court of competent jurisdiction in the United States has awarded the custody of a child to the father as against the mother, and the mother thereafter removes and conceals the child for the purpose of evading the decree, a *primâ facie* case for extradition is thereby made out against the mother upon a charge of child-stealing. And, semble, the offence of child-stealing under the Code, may be complete against the child's mother although the father, to whom the child's custody has been awarded has never had any actual separate possession of the child. Re Lorenz (1905), 9 Can. Cr. Cas. 158, 7 Que. P.R. 101 (Hall, J.).

Out of the Possession.—To constitute the crime of abducting a girl out of the possession of and against the will of her father under this section, there must be an actual or constructive possession *de facto*, in the father at the time of the taking. When the girl who was resident with her father in a foreign country, left without his consent and with intent to renounce his protection, and came to Canada, the father's possession ceased, and semble, a possession *de jure* afterwards established by his following her to the place of flight is not the possession contemplated by the section. R. v. Blythe (1895), 1 Can. Cr. Cas. 263 (B.C.).

If the persuasion to leave and remain away operated wholly in the foreign country, there is no jurisdiction to convict in Canada, as persuasion is a necessary element in such cases of abduction. *Ibid.*

The girl is none the less in the "possession" of her guardian by reason of having left her guardian's house for a particular purpose with his sanction. R. v. Mondelet (1877), Ramsay's Cases (Que.) 179, 21 L.C. Jur. 154.

Attempt.—Code sec. 949.

Punishment for Attempt.—Code sec. 570.

Conviction for Assault.—Code sec. 951.

CHAPTER THE ELEVENTH.

OF OFFENCES AGAINST NATURE.

SECT. I.—OF INCEST.

THE punishment of certain forms of this offence is regulated by the Punishment of Incest Act, 1908 (8 Edw. VII. c. 45) (*a*).

Incest by Male Persons.—Sect. 1.—'(1) Any male person who has carnal knowledge (*b*) of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother (*c*), shall be guilty of a misdemeanor, and upon conviction thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour: Provided that if on an indictment for any such offence it is proved that the female person is under the age of thirteen years the same punishment may be imposed as may be imposed under section four of the Criminal Law Amendment Act, 1885 (which deals with the defilement of girls under thirteen years of age).' (*Ante*, p. 948.).

'(2) It is immaterial that the carnal knowledge was had with the consent of the female person.

'(3) If any male person attempts to commit any such offence as aforesaid, he shall be guilty of a misdemeanor, and upon conviction thereof shall be liable at the discretion of the Court to be imprisoned for any time not exceeding two years with or without hard labour.

'(3) On the conviction before any Court of any male person of an offence under this section, or of any attempt to commit the same, against any female under twenty-one years of age, it shall be in the power of the Court to divest the offender of all authority over such female, and if the offender is the guardian of such female to remove the offender from such guardianship, and in any such case to appoint any person or persons to be the guardian or guardians of such female during her minority or any less period: Provided that the High Court may at any time vary or

(*a*) Before this Act incest (*i.e.* carnal intercourse between persons within the forbidden degrees of consanguinity or affinity) was punishable in England and Ireland only by proceedings in the Ecclesiastical Courts. See Canons of 1603, Nos. 109, 113. 2 Steph. Hist. Cr. L. 396-429. Blackmore *v.* Briders, Phillim, 359. As to enforcing the order of the Ecclesiastical Court, see 53 Geo. III. c. 127. In Scotland (Act of 1567, c. 14) and in most British colonies the offence is punishable by statute.

(*b*) See *ante*, p. 933.

(*c*) See sect. 3, *post*, 973. It will be observed that step-parents, &c., and step-children are not included. See R. *v.* Geddeson [1906], 25 N. Z. L. R. 323, decided on the corresponding section of the Penal Code of New Zealand. In that colony 'adopting' parents and 'adopted' children are included, because of the special laws of the colony on adoption. R. *v.* Stanley [1903], 23 N. Z. L. R. 378, 1100.

rescind the order by the appointment of any other person as such guardian or in any other respect' (*d*).

Incest by Females of or over Sixteen.—By sect. 2, 'Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother, or son as the case may be) shall be guilty of a misdemeanor, and upon conviction thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years.'

Test of Relationship.—By sect. 3, 'In this Act the expressions "brother" and "sister" respectively includes half-brother and half-sister (*e*), and the provisions of this Act shall apply whether the relationship between the person charged with an offence under this Act and the person with whom the offence is alleged to have been committed, is or is not traced through lawful wedlock.'

The relationship of the parties may be proved by oral evidence supplemented by certified copies of certificates of birth or marriage when available (*f*). In prosecutions under this Act if the other party to the offence is called for the Crown, his or her evidence will need corroboration in a material particular implicating the accused (*ff*).

Prosecution of Offences.—By sect. 4, '(1) An offence under this Act shall be deemed to be an offence within, and subject to, the provisions of the Vexatious Indictments Act, 1859, and any Act amending the same (*g*).

'(2) A Court of Quarter Sessions shall not have jurisdiction to inquire of, hear, or determine any indictment for an offence against this Act, or for an attempt to commit any such offence.

'(3) If on the trial of any person for rape, the jury are satisfied that the defendant is guilty of an offence under this Act, but are not satisfied that the defendant is guilty of rape (*ante*, p. 941), the jury may acquit the defendant of rape and find him guilty of an offence under this Act, and he shall be liable to be punished accordingly' (*h*).

'If, on the trial of any indictment for an offence under this Act the jury are satisfied that the defendant is guilty of any offence under sections four or five of the Criminal Law Amendment Act, 1885 (*ante*, pp. 947-951), but are not satisfied that the defendant is guilty of an offence under this Act, the jury may acquit the defendant of an offence under

(*d*) Cf. Children Act, 1908 (8 Edw. VII. c. 67), s. 21, *ante*, p. 915.

(*e*) See Horner *v.* Horner, 1 Hagg. Consist. 352. Sherwood *v.* Ray, 1 Moore P. C. 353; 12 E. R. 848. R. *v.* Brighton, 1 B. & S. 147. The English and Scottish authorities on the meaning of incest and consanguinity are fully discussed in R. *v.* Minnis [1903], 22 N. Z. L. R. 856, where a conviction was upheld for incest between a man and his illegitimate half-sister. The definition of incest in the Act of 1908 is not that of the Table of Prohibited Degrees which applies in divorce cases. See R. *v.* Geddeson [1905], 25 N. Z. L. R. 323.

(*f*) See Morris *v.* Miller, 1 W. Bl. 632. R. *v.* Allison, R. & R. 109. R. *v.* Manwaring, D. & B. 132. Birt *v.* Barlow, 1 Doug. 171. In the province of Quebec local legislation requires proof of relationship by extracts from the registers *d'état civil*. R. *v.* Garneau [1899], 4 Canada Cr. Cas. 69. This rule is peculiar to that province.

(*ff*) See R. *v.* Everest, 2 Cr. App. R. 130.

(*g*) *Post*, Vol. ii. p. 1927.

(*h*) *Post*, Vol. ii. pp. 1962 *et seq.*

this Act and find him guilty of an offence under sections four or five of the Criminal Law Amendment Act, 1885, and he shall be liable to be punished accordingly.'

(4) 'Section 4 of the Criminal Evidence Act, 1898 (*post*, Book XIII. Chapter V.), shall have effect as if this Act were included in the schedule to that Act.'

By sect. 5, 'All proceedings under this Act are to be held in camera.'

By sect. 6. 'No prosecution for any offence under this Act shall be commenced without the sanction of His Majesty's Attorney-General, but this section shall not apply to any prosecution commenced by or on behalf of the Director of Public Prosecutions.'

Extent.—By sect. 7, 'This Act shall not extend to Scotland.'

Commencement.—By sect. 8, 'This Act may be cited as the Punishment of Incest Act, 1908, and shall come into operation on the first day of January one thousand nine hundred and nine.'

Sect. II.—Of Sodomy and Cognate Offences.

In ancient times the punishment of sodomy, *peccatum illud horribile, inter Christianos non nominandum*, was death (*i*): but it had ceased to be so highly penal, when 25 Hen. VIII. c. 6 (*j*) again made it capital.

By 24 & 25 Vict. c. 100, s. 61 (*k*), 'Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be kept in penal servitude for life . . .' (*l*).

On an indictment under this section the defendant may be convicted (and punished under section 62) for an attempt to commit the offence (*m*).

By sect. 62 (*n*), '*Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same*, or of any indecent assault upon any male person, *shall be guilty of a misdemeanor, and being convicted thereof shall be liable. . . . to be kept in penal servitude for any term not exceeding ten years . . .*' (*o*).

When the indecent assault is by an adult on a male under sixteen the defendant may consent to be tried summarily and on a summary conviction may be sentenced to imprisonment for not over six months (*oo*).

The crimes punishable under these sections and solicitation or incitement to commit them are 'infamous crimes' within 24 & 25 Vict. c. 100, ss. 46–48, *post*, p. 1156, tit. 'Threats.'

(*i*) 12 Co. Rep. 37. The books differ as to the mode of punishment. According to Britton, a sodomite was to be burnt, Britt. lib. 6, c. 9. In Fleta it is said, *pecorantes et sodomitæ in terrâ vivi confodiantur*. The Mirror, bk. 1, c. 5, joins it with heresy and apostasy as a form of treason against God (Seld. Society edition, pp. 15, 32, 53). See also Pollock & Maitland Hist. Eng. Law, ii. 554. Steph. Hist. Cr. Law, ii. 429. About the time of Richard I., the practice was to hang a man, and drown a woman, guilty of this offence. 3 Co. Inst. 58.

(*j*) Repealed as to E. in 1828 (9 Geo. IV. c. 31, s. 1).

(*k*) Taken from 9 Geo. IV. c. 31, s. 5, except the punishment, which under that Act was death.

(*l*) The minimum term of penal servitude was reduced from ten to three years and the alternative of imprisonment allowed by 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*m*) 14 & 15 Vict. c. 100, s. 9, *post*, Vol. ii. p. 1966 'Procedure.'

(*n*) This section was new law in 1861 except the part in common type, which was taken from 14 & 15 Vict. c. 100, s. 29.

(*o*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The omitted words are repealed.

(*oo*) 8 Edw. 7, c. 67, s. 128 (2) and sched. ii.

The offence dealt with by ss. 61, 62 consists in a carnal knowledge committed against the order of nature (*p*) by man with man; or in the same unnatural manner with woman (*q*); or by man or woman in any manner with beast (*r*). The carnal knowledge necessary to constitute this offence is the same that is required in the case of rape (*s*).

In this offence, as in rape, the crime is complete on proof of penetration, and even if emission be expressly negatived (*t*).

To constitute this offence the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute the offence (*u*). An unnatural connection with an animal of the fowl kind was considered not to be sodomy, when the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt (*v*).

Those who are present aiding and abetting in this offence are all liable as principals (*w*). If the party on whom the offence is committed is under fourteen (*x*), it is not felony in him but only in the agent (*y*). But where one count charged the prisoner with committing an unnatural crime on J. W., and another count charged the prisoner with permitting the said J. W. to commit an unnatural crime with him, and the facts were that the prisoner induced J. W., a boy of twelve years of age, to have carnal knowledge of his person, the prisoner having been the pathic in the crime, and the jury found the prisoner guilty, the judges, upon a case reserved, were unanimously of opinion that the conviction was right (*z*).

Indictment.—The indictment must charge that the offender *contra naturæ ordinem rem habuit veneream, et carnaliter cognovit* (*a*). But it is said, that this alone would not be sufficient; and that, as the statute describes the offence by the term 'buggery,' the indictment should also charge *peccatumque illud sodomiticum Anglice dictum* buggery *adtunc et ibidem nequitur, felonie diabolice ac contra naturam commisit ac perpetravit* (*b*).

Where an indictment alleged that the prisoner did attempt to commit an unnatural crime with 'a certain animal called a bitch,' it was objected that the description was too uncertain, as it might apply to a bitch fox, a bitch otter, or the bitch of some other animal; but Tindal, C. J., held that the description was sufficient (*c*).

On trials for this offence at least as much strictness should be observed

(*p*) *i.e. per anum.*

(*q*) See R. *v.* Wiseman Fortescue (K.B.), 91. R. *v.* Jellyman, 8 C. & P. 604. Swinburne on Wills, 97. 3 Co. Inst. 59.

(*r*) 1 Hale, 669. Sum. 117. 3 Co Inst. 58, 59. 1 Hawk. c. 4. 6 Bac. Abr. tit. 'Sodomy.' 3 Bl. Com. 215. 1 East, P. C. 480.

(*s*) *Ante*, p. 933.

(*t*) 24 & 25 Vict. c. 100, s. 63, *ante*, p. 933. R. *v.* Reekspear, 1 Mood. 342. R. *v.* Cozins, 6 C. & P. 351, Park, J. See R. *v.* Cox, 1 Mood. 337.

(*u*) R. *v.* Jacobs, R. & R. 331. See 48 & 49 Vict. c. 69, s. 11, *post*, p. 978.

(*v*) R. *v.* Mulreaty, Hil. T. 1812. MS. Bayley, J. But a person may be convicted of an attempt to commit an unnatural offence with a fowl. R. *v.* Brown, 24 Q.B.D. 357.

(*w*) 1 Hale, 670. 3 Co. Inst. 59. Fost. 422, 423.

(*x*) 1 Hale 670. Fost. 422, 423. *Vide ante*, p. 60.

(*y*) 1 Hale, 670. 3 Co. Inst. 59. 1 East, P. C. It would seem that a male under fourteen cannot be convicted as an agent: 3 Co. Inst. 59.

(*z*) R. *v.* Allen, 1 Den. 364. See 43 & 44 Vict. 45, *ante*, p. 955.

(*a*) 1 Hawk. c. 4, s. 2. 3 Co. Inst. 58, 59.

(*b*) Fost. 424, referring to Co. Ent. 351 *b*, as a precedent settled by great advice.

(*c*) R. *v.* Allen, 1 C. & K. 495. *Cf.* R. *v.* Stride [1908], 1 K.B. 617.

with regard to the evidence and manner of proof as in cases of rape. The evidence should be plain and satisfactory, in proportion as the crime is detestable (*d*).

Corroboration of the evidence of an accomplice is particularly to be required and a conviction has been quashed where such corroboration was not forthcoming and the judge did not sufficiently warn the jury against convicting on such evidence uncorroborated (*e*).

A party consenting to the commission of an offence of this kind, whether man or woman, is an accomplice, and requires corroboration. On the trial of an indictment for an unnatural offence by a man upon his own wife, she swore that she resisted as much as she could. Patteson, J., said: 'There was a case of this kind which I had the misfortune to try, and it there appeared that the wife consented. If that had been so here the prisoner must have been acquitted; for although consent or non-consent is not material to the offence, yet as the wife, if she consented, would be an accomplice she would require confirmation; and so it would be with a party consenting to an offence of this kind, whether man or woman' (*f*).

Where on an indictment for bestiality the offence was alleged to have been committed on December 17, 1842, but no complaint was made to the justices until October, 1844, and the first witness being asked why he did not mention the offence until so long a time had elapsed, said he did so, but it was not to a magistrate, and there was no confession, and nothing offered by the counsel for the prosecution to explain the delay; Alderson, B., told the jury, 'I ought not to allow this case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial' (*g*).

In the case of offences against ss. 61 & 62 against a child under thirteen it is no defence to prove that the child was a consenting party (*h*). Mere submission by children is not equivalent to consent (*i*).

In a prosecution for an unnatural offence, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that his natural inclination was towards such practices, ought not to be received in evidence (*j*).

In cases where it is not probable that all the circumstances necessary to constitute this offence will be proved it may be advisable only to prefer

(*d*) 4 Bl. Com. 215.

(*e*) R. *v.* Tate [1908], 2 K.B. 680: 77 L. J. K.B. 1043.

(*f*) R. *v.* Jellyman, 8 C. & P. 604. 'Perhaps it may be doubtful whether a wife, who consented, would at common law be a competent witness against her husband. The cases, in which she has been held competent as a witness against him in criminal proceedings, are cases of injuries inflicted upon her against her consent.' C. S. G. See *post*, Bk. xiii. c. v.

(*g*) R. *v.* Robins, 1 Cox, 114.

(*h*) 43 & 44 Vict. c. 45 (*ante*, p. 955). This overrides R. *v.* Wollaston, 12 Cox, 180 (C. C. R.).

(*i*) R. *v.* Lock, L. R. 2 C. C. R. 10.

(*j*) R. *v.* Cole, Buckingham Sum. Ass. 1810, and by all the judges, M. T. following. MS. C. C. R. I. 1 Phill. Evid. 499.

an indictment for an assault with intent to commit an unnatural crime. And it should be observed, that the mere soliciting another to the commission of this crime has been treated as an indictable offence (*k*).

By sect. 11 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), 'Any male person who, in public or private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour' (*l*).

The consent of the other male person is no defence. On a charge under s. 11, where the prisoner had procured the commission by another male person of an act of gross indecency with the prisoner himself, it was held that he had committed an offence against the section (*m*).

Where an offence under the above section or under sect. 62 of the Act of 1861 is committed with a person under sixteen, the rules of evidence of Part II. of the Children Act, 1898 (8 Edw. VII. c. 67) (*n*), apply.

The rule as to the admissibility of complaints applying to offences against women (*o*) appears not to apply to a criminal prosecution for the offences with male persons referred to in this chapter (*p*).

Offences against sect. 61 of the Act of 1861 and sect. 11 of the Act of 1885 are not triable at Quarter Sessions (*q*), but an offence against sect. 62 of the Act of 1861 is there triable.

(*k*) See R. *v.* Ransford, 13 Cox, 9, and a precedent of an indictment for such a solicitation, 2 Chit. Cr. L. 50. For the principles and cases upon which such an indictment may be supported, see *ante*, pp. 203 *et seq.* For an instance of an indictment for conspiracy to commit an offence against s. 61, see R. *v.* Boulton, 12 Cox, 87.

(*l*) This enactment punishes practices which in R. *v.* Jacobs, R. & R. 331, R. *v.* Wollaston, 12 Cox, 180 (C. C. R.), and R. *v.* Rowed, 3 Q.B. 180, were held not punishable at common law or the statutes then in force.

(*m*) R. *v.* Jones and Bowerbank [1896], 1 Q.B. 4.

(*n*) *Vide ante*, pp. 918–924.

(*o*) Stated, *ante*, p. 943.

(*p*) See R. *v.* Hoodless, 64 J. P. 282. In Chesney *v.* Newsholme [1908], Prob. 301, 307, the rule in R. *v.* Lillyman and R. *v.* Osborne was applied by Sir Lewis Dibdin, to proceedings under the Clergy Dicipline Act, 1892, in respect to misconduct by a clergyman with choir boys. Acting on the rule he admitted a statement made by a boy to his mother in answer to questions on the day of and very soon after the alleged offence and excluded a further statement made on the next day when pressed by his mother and after he had been mixing all day with his schoolfellows.

(*q*) 5 & 6 Vict. c. 38, s. 1. 48 & 49 Vict. c. 69, s. 17, *post*, Vol. ii. p. 1932.

CANADIAN NOTES.

OF OFFENCES AGAINST NATURE.

Sec. 1.—*Of Incest, Punishment for.*—Code sec. 204.

Prior to the statute, 53 Vict. (Can.) ch. 37, sec. 8, from which this section is taken, it seems that incest, unless committed under circumstances amounting to rape, was not punishable in Ontario, as the ecclesiastical law of England was not introduced into that province. Re Lord Bishop of Natal, 3 Moo. P.C. (N.S.) 115.

There were, however, statutes dealing with the offence in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island. R.S.N.S. (3rd series), ch. 160, sec. 2; R.S.N.B. ch. 145, sec. 2; 24 Vict. (P.E.I.) ch. 27, sec. 3. Quære, whether those statutes do not still apply in those provinces as to cases of incest, for which no provision is made by sec. 176.

Capacity.—On the principle of R. v. Hartlen, 2 Can. Cr. Cas. 12, a boy under fourteen could not be convicted of this offence.

Attempt to Commit.—An attempt to commit incest is an indictable offence punishable by seven years' imprisonment. Code sec. 570.

By Threats.—See Code sec. 216(*g*). See notes on "attempts," at end of chapter 6, Book 1.

Evidence.—Oral evidence is not admissible to prove relationship on a charge of incest in the Province of Quebec, and the relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by the Canada Evidence Act, sec. 35, unless the absence of such registers is proved. R. v. Garneau (1899), 4 Can. Cr. Cas. 69 (Que.). It is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed.

Sec. 1.—*Of Sodomy and Cognate Offences.*

Buggery, Definition of.—Code sec. 202.

Buggery, Penetration Sufficient.—Code sec. 7.

Buggery, Attempt to Commit.—Code sec. 203.

Indecent Assault on Males, Punishment for.—Code sec. 293.

Consent Procured by Fraud.—Code sec. 292(*b*).

Capacity.—Although a boy under fourteen cannot be convicted of sodomy, he may if the act be committed against the will of the other

party be punished for an assault under this section. R. v. Hartlen (1898), 2 Can. Cr. Cas. 12; R. v. Allen, 1 Dennison's Cr. Cas. 364.

It is suggested that a boy under fourteen could, however, be convicted of an attempt to commit sodomy. (See the comments at the end of Book 1, ch. 6.)

Evidence.—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 shew 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. Per Hagarty, C.J., and Armour, J.—The evidence was properly admissible as evidence in chief. Reg. v. James Chute, 46 U.C.Q.B. 555.

Indictment.—An indictment under sec. 293 (for indecent assault on males) is defective even after verdict if it does not aver that the parties to the offence are males. R. v. Montminy, W.B. (Que.), May, 1893.

CHAPTER THE TWELFTH.

OFFENCES WITH REFERENCE TO MARRIAGE.

SECT. I.—OF BIGAMY.

MARRIAGE as recognised by the law of England is a contract for the voluntary union of one man and one woman to the exclusion of all others, until that union is terminated by death (*a*), or is dissolved or annulled by statute or by the decree of a competent tribunal (*b*). It is an offence against English law to have a plurality of 'wives' at the same time. The offence is more correctly styled polygamy, but is usually described as bigamy (*c*). It was originally of ecclesiastical cognisance only, and though it is referred to as a capital crime in the Statute *de Bigamis* (4 Edw. I. (*d*)), the jurisdiction of the temporal courts was doubtful until 1603, when the offence was declared felony (1 Jac. I. c. 11). The Act of James I. was in several respects defective. A person whose consort though known to be living had been abroad seven years might have married again, with impunity and so might a person who had been divorced *a mensa et thoro*. That Act was repealed and re-enacted with amendments in 1828 (9 Geo. IV. c. 31, s. 22).

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57 (*e*), 'Whosoever, being married, shall marry any other person during the life of the former husband or wife (*ee*), whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . (*f*), and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place.

'Provided that nothing in this section contained shall extend' (1) 'to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of His Majesty,' or (2) 'to any person marrying

(*a*) See Hyde *v.* Hyde, L. R. 2 P. & D. 130. Cf. Brinkley *v.* Att.-Gen., 15 P. D. 76. This definition excludes unions which are subject to the power of the husband or wife to take other wives or husbands while the first is alive. *Re* Bethell, 38 Ch. D. 220.

(*b*) Until 1857 a marriage could be dissolved in England only by legislation.

(*c*) Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists, bigamy consisted in marrying two virgins successively one after the death of the other; or in once marrying a widow. 4 Bl. Com. 163, note (*b*). And see Bac. Abr. tit. 'Bigamy,' in the notes.

(*d*) Rep. in 1863 (26 & 27 Vict. c. 125) as to England; and in 1872 (35 & 36 Vict. c. 98) as to Ireland.

(*e*) This section re-enacts 9 Geo. IV. c. 31, s. 22 (E), and 10 Geo. IV. c. 34, s. 26 (I).

(*ee*) *Vide post*, p. 1006.

(*f*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such persons to be living within that time (*g*), or shall extend' (3) 'to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage' (*h*), or (4) 'to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction' (*i*).

As to the punishment of principals in the second degree and accessories before or after the fact, see 24 & 25 Vict. c. 94 and 24 & 25 Vict. c. 100, s. 67, *ante*, pp. 130 *et seq.*

Accessories.—Where an indictment charged a woman with bigamy and the man, with whom she contracted the second marriage, with inciting and counselling the woman to commit the offence of bigamy, it was held that if the man knew at the time of the marriage that she was a married woman, and her husband alive, he might be convicted of counselling her to commit the crime of bigamy (*j*). This indictment did not contain any count charging the man as principal in the second degree; but there is no doubt, where a man marries a woman, knowing such woman to have a husband alive at the time of such marriage, that he is a principal in the second degree, as he is present and aids and assists the woman in committing the felony (*k*).

Venue.—The effect of the first proviso is to make it an offence within sect. 57, triable in England (or Ireland) for a British subject to contract a bigamous marriage in Scotland (*l*) or in any other part of the world outside England or Ireland, whether within or without the King's dominions (*m*).

The effect of the enactment taken with the proviso is that bigamy by British subjects wherever committed is cognisable in England under the section: though in the absence of Imperial legislation the Courts of British possessions are as a general rule unable to try bigamy outside the possession by British subjects domiciled or ordinarily resident in the possession (*n*).

It is immaterial where the first marriage was celebrated if the second was solemnized in England or Ireland: and where the defendant is a British subject it is immaterial where either the first or the second marriage was celebrated, if after the bigamous marriage the offender is arrested in England (or Ireland).

Indictment.—An indictment for bigamy states the first marriage and goes on to charge that 'whilst so married to A. B.' the prisoner feloniously

(*g*) *Post*, p. 1008.

(*h*) *Post*, p. 1010.

(*i*) *Post*, p. 1011.

(*j*) R. *v.* Brawn, 1 C. & K. 144, Denman, C.J., *vide post*, p. 1009.

(*k*) 'I know such to have been the opinion of Denman, C.J., and Alderson, B., in R. *v.* Brawn.' C. S. G.

(*l*) R. *v.* Topping, Dears. 647, 25 L. J. M. C. 72, decided on the similar enactment 9 Geo. IV. c. 31, s. 22 (E). 1 Jac. I. c. 11, applied only to bigamous marriages contracted in England and Wales. Kel. (J.) 79, 80; 1 Hale, 692 693; 1 East, P. C. 465.

(*m*) Earl Russell's case [1901], A. C. 446. 70 L. J., K.B. 998; 2 Cox, 51: where the second marriage was contracted in the United States, after a divorce there granted from the prior marriage, but regarded as invalid by English law. See R. *v.* Griffin, 4 L. R. Ir. 497.

(*n*) Macleod *v.* Att.-Gen. of N. S. W. [1891], A. C. 453. R. *v.* Hilaire [1903], 3 N. S. W. State Rep. 228. But see *re* Bigamy Laws of Canada [1897], 27 Canada Supr. Ct. 461. R. *v.* Brinkley [1907], 12 Canada Cr. Cas. 454, on s. 306 of the Canadian Criminal Code, 1906.

did intermarry with C. D., 'the said A. B., his former wife, being then alive' (*o*).

It is not necessary to state more than the name of the second wife (*p*). In a case decided before 1851, where the second wife was described as a widow but proved to be a spinster, this was held a fatal variance (*q*). But such a variance is now amendable (*r*).

On an indictment for bigamy which described the first wife as 'Ann G.,' an examined copy of the certificate (*s*) of the marriage of the prisoner and 'Sarah Ann G.' was put in, and there was no evidence to explain the difference in the names: Maule, J., directed an acquittal (*t*).

It is not necessary to state that the prisoner was apprehended or is in custody (*u*) in the county or place in which he is to be tried (*v*), nor to negative the second exception (*w*) nor in a case where the second marriage was contracted elsewhere than in England and Ireland to aver that the prisoner is a British subject (*x*). Indeed according to the reasoning of R. *v.* Audley (*supra*), whatever be the burden of proof it is not necessary to make any express mention on the indictment of any of the four exceptions.

First Marriage.—To support an indictment for bigamy it is necessary to prove that there has been a marriage *in fact*, that it is *valid*, *i.e.* not void *ab initio*, and *subsisting*, *i.e.* not put an end to by the death of one of the spouses, or by divorce *a vinculo*, nor declared null.

In Fact.— It is not sufficient to prove a first marriage by acknowledgment (*y*), cohabitation, or habit and repute, or by production of marriage

(*o*) The words whilst so married to A. B. are superfluous and it is for the defence to set up that the marriage has been annulled or dissolved. See Murray *v.* R., 7 Q.B. 700. In that case error was brought in 1845 on a judgment given in 1815 on an indictment for bigamy under 35 Geo. III. c. 57, s. 1 (rep.), probably in consequence of a doubt thrown on the validity of the first marriage in R. *v.* Millis, 10 Cl. & F. 534; 8 E. R. 844. See also R. *v.* Apley, 1 Cox, 71.

(*p*) R. *v.* Deeley, 1 Mood. 303; 4 C. & P. 579.

(*q*) Id. ibid.

(*r*) 14 & 15 Vict. c. 100, s. 1, *post*, Vol. ii. p. 1972.

(*s*) *Quære*, Register.

(*t*) R. *v.* Gooding, C. & M. 297. Maule, J., thought that 'evidence might perhaps be offered to explain the circumstance of this difference in the name of the prisoner's first wife, as she is described in the indictment, and as described in the marriage certificate; and even in the absence of such evidence, proof might be supplied that the woman was known by both names.'

(*u*) The words 'in custody' were not in 1 Jac. I. c. 11.

(*v*) The offence is triable either where the second marriage was contracted (at common law, 1 Hale, 694; 3 Co. Inst. 87. Starkie, Cr. Pl. 11, and *ante*, p. 19), or where the accused was apprehended or is in custody (s. 57), and see R. *v.* Gordon, R. & R. 48. Lord Digby's case, Hutt, 131. The reason given to support the statement in the trial is that it will appear by the caption that the prisoner was in the custody of the sheriff (or gaoler) in the county in which the indictment is found. R. *v.* Whiley, rightly reported 1 C. & K. 150, erroneously reported 2 Mood. 186. See R. *v.* Smythies, 1 Den. 498; 2 C. & K. 878. In R. *v.* Fraser, 1 Mood. 407, the first marriage was laid in Kent, the second in Surrey, the venue was Middlesex, and it was alleged that the prisoner was apprehended without stating any place, and the conviction held bad, but no suggestion was made that the defect was cured by the caption; this case, therefore, may now be considered no authority. See R. *v.* O'Connor, 5 Q.B. 16, 34. R *v.* Treharne, 1 Mood. 298. Where an indictment for bigamy alleged that the prisoner was apprehended in Gloucestershire, and this was not proved; Channell, B., allowed the indictment to be amended by stating that he was in custody in that county. R. *v.* Smith, 1 F. & F. 36.

(*w*) *Ante*, p. 979.

(*x*) R. *v.* Audley [1907], 1 K.B. 383: 76 L. J. K.B. 270.

(*y*) The admission of the accused was rejected in R. *v.* Lindsay, 66 J. P. 505, *post*, p. 983.

articles : and it is essential to give evidence that the marriage was actually solemnised in a manner recognised by the law of the parties, or of the place of celebration (*z*). Though a lawful canonical marriage need not be proved, yet a marriage in fact, regular or not, must be proved (*a*), *i.e. prima facie* evidence must be given of a lawful marriage (*b*). But a marriage in fact may be sufficiently established by proving that the ceremony took place between the parties without proving the preliminary notices (*b*), licences (*c*), banns (*d*), or consents (*e*), or residence for the prescribed period (*ee*), or that the place of solemnisation was one where the ceremony might lawfully be performed or the celebrant a person competent to officiate (*f*).

It is not quite clear upon the authorities whether, if the first marriage is alleged to have been outside England and Ireland, evidence showing a marriage by habit and repute if valid by the foreign law will suffice on a prosecution in England for bigamy.

In R. *v.* Wilson (*g*), upon an indictment for bigamy it was proved on the part of the prisoner that her first husband, before he married her, had been in Canada, and that he was absent for about two years, and when he returned he said he had brought his wife with him, and a lady accompanied him, whom he treated as his wife, and everyone else regarded her in that capacity ; she had been heard of as being alive after the prisoner's first marriage ; and thereupon Crompton, J., interposed, and said that there was evidence of a prior marriage, and, although there might be some technical difficulty in proving the marriage in Canada, still if there was reasonable doubt of the fact, the prisoner ought to be acquitted, and the jury said that it was unnecessary to hear any more evidence (*h*).

In Truman's case (*i*) it was held that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of a proceeding in a Scotch Court against him and his wife for having contracted the marriage irregularly (but nevertheless validly) was sufficient evidence of the first marriage. The point being reserved, all the judges who were present held the conviction proper. Two of them observed that this did not rest upon cohabitation and bare acknowledgment, for the defendant had backed his assertion by the production of the copy of the proceeding ; but some of the judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only

(*z*) Catherwood *v.* Caslon, 13 M. & W. 261. See Morris *v.* Miller, 4 Burr. 2059. Smith *v.* Huson, 1 Phillimore 287, 314. 1 Hawk. c. 42, s. 9. Geary on Marriage, 25.

(*a*) By Denison, J., referred to by the Court in Morris *v.* Miller, 1 W. Bl. 1, 632.

(*b*) R. *v.* Brampton, 10 East, 287, note (*b*).

(*c*) *Post*, p. 989.

(*d*) R. *v.* Allison, R. & R. 109, *post*, p. 992.

(*e*) *Post*, pp. 994, 995.

(*ee*) *Vide post*, pp. 993, 994.

(*f*) R. *v.* Hind, R. & R. 253.

(*g*) 3 F. & F. 119.

(*h*) The defence set up a marriage by habit and repute prior to the first marriage stated in the indictment. See Hamblin *v.* Shelton, 3 F. & F. 133 ; and Doe d. Fleming *v.* Fleming, 4 Bing. 266, for evidence in civil cases.

(*i*) Nottingham Spr. Assizes, 1795, decided upon by the judges in East, T. 1795, MS. Jud. 1 East, P. C. 470, 471 ; where see some remarks as to the admission of a bare acknowledgment in evidence in a case of this nature. An admission or statement made by a prisoner is evidence against him, though it may under circumstances be entitled to little or no weight.

a confirmation of such acknowledgment. In Upton's case (*j*), where it was proved that the prisoner being charged with bigamy made a statement before a justice, in which he expressly declared that he had married his first wife, who was then present; Erskine, J., left the case to the jury, observing that this was not an incautious statement made without due attention, but that the prisoner's mind was directed to the very point by the charge made against him.

In R. *v.* Newton (*k*), upon an indictment for bigamy it appeared that the prisoner returned from America with a woman described in the indictment as M. C., with whom he lived as his wife for some years afterwards; and that soon after his return he told her sister that he had been married to M. C. at New York by a Presbyterian minister, and he subsequently caused the bellman at Oldham to give public notice, which he did, that no one was to give credit to 'M., the wife of J. N.'; and some time afterwards M. N., describing herself as his wife, complained to a magistrate of his having ill-treated her, and the prisoner attended before the magistrate, and did not deny the alleged marriage, but said he could no longer live with her on account of her jealousy, and consented to allow her eight shillings a week; Wightman, J., after consulting Cresswell, J., told the jury that the question was, whether they were satisfied by the statements made by the prisoner on the various occasions referred to that he had been married to M. C. in America, and that such marriage was a valid one according to the law in force at New York. That declarations lightly or hastily made were entitled to very little weight in such a case; but what the prisoner said deliberately, and when it was obviously his interest to deny marriage, if he did not know it to be a valid one, was undoubtedly evidence entitled to the very serious consideration of the jury.

In R. *v.* Flaherty (*l*), the prisoner went to a police-station and said that he wanted to give himself up for bigamy. He stated when and where the first marriage took place, and while in custody signed a statement to that effect. Pollock, C.B., ruled that the statement, though some evidence of a first marriage, was not enough to justify conviction for bigamy.

In R. *v.* Savage (*m*), Lush, J., declined to follow R. *v.* Newton, and held the prisoner's admission that he had married his first wife in Scotland, insufficient to prove the validity of that marriage (*n*).

In R. *v.* Lindsay (*o*), on an indictment for bigamy, the evidence tendered of the former marriage was a certificate of the priest-in-charge of a Roman Catholic church, by whom it was said that the marriage had been solemnised, coupled with identification of the prisoner as one of the parties to the marriage, and proof of a statement made by him when arrested, 'That 's all right, but I did not know my former wife was alive,' Walton, J., following R. *v.* Savage, held this evidence insufficient to prove the first marriage.

(*j*) Gloucester Spr. Ass. 1839. See Dickinson *v.* Coward, 1 B. & Ald. 679, Ellenborough, C.J.

(*k*) 2 M. & Rob. 503. S. C. as R. *v.* Simmonsto, 1 C. & K. 164.

(*l*) [1847] 2 C. & K. 782.

(*m*) 13 Cox, 178.

(*n*) He relied on the Sussex Peerage Claim, 11 Cl. & F. 85; 8 E. R. 1034.

(*o*) [1902] 66 J. P. 505.

Neither party to the former marriage stated in the indictment is a competent witness *for the prosecution* to prove the marriage or for any purpose (*p*).

The prisoner was indicted for having married A. W., his first wife, A. A., being alive; the prisoner's first marriage with A. A. was proved. The prisoner's defence was, that the first marriage was void, as A. A. had a husband living at the time, and he proposed to call A. A. to prove that fact; it was objected to her competency that the fact of her marriage with the prisoner having been proved, she must be taken to be his lawful wife. Alderson, B., was at first inclined to think that she might be examined simply to the fact of her being the wife or not of the prisoner; but after conferring with Williams, J., he determined not to receive her evidence, but to reserve the point (*q*). But where a woman called as a witness against a prisoner, proved on the *voire dire* (*r*) that she married the prisoner in 1849, Erle, J., held that she might also prove on the *voire dire* that she had a sister seven years older than herself, and that they had been brought up together with their parents, and that she always believed that they were sisters, and that her sister had married the prisoner in 1846, and died in 1848; for if a person is questioned on the *voire dire* with the view to raise an objection to her competency, she may also be examined to remove that *prima facie* ground of objection (*s*).

And in R. *v.* Ayley (*t*), the alleged first wife was called as a witness

(*p*) 1 Hale, 693. 1 East, P. C. 469. 1 Hawk. c. 42, s. 8, where a case at the Old Bailey (Feb. 1786) is cited to shew that an affidavit by the first wife to support an application to adjourn the trial was rejected. See R. *v.* Green, Nov. 18, 1899, Wills, J. Archb. Cr. Pl. (23rd ed.), 1169. Under the Criminal Evidence Act, 1898, *post*, Vol. ii. p. 2271, the defendant and the husband or wife of the defendant are competent witnesses for the defence.

(*q*) R. *v.* Peat, 2 Lew. 288. The prisoner was acquitted. The first impression of the learned baron seems to have been correct. The only ground on which the witness could be rejected was, that she was the lawful wife of the prisoner; for 'the general rule does not extend to a wife *de facto*, but not *de jure*.' 2 Stark. Evid. 132 (2nd ed.). In Wells *v.* Fletcher, 5 C. & P. 12, 1 M. & Rob. 99, a woman called for the defendant on examination on the *voire dire*, said she had been married to the plaintiff, and on re-examination that she was married to another person previously; but not seeing him for thirty years, she thought he was dead, and therefore married the plaintiff, but afterwards found that her first husband was living; and Patteson, J., held that the witness was competent, as the second marriage was a nullity. If R. *v.* Peat case had been an indictment for larceny, and the witness called for the prisoner had proved her marriage to him on the *voire dire*, Wells *v.* Fletcher shews that she might have been rendered competent by proving her previous marriage, and it is difficult to see how proof by other evidence that she had married the prisoner, whether such evidence was given before or after she was called, could render her incompetent; for her evidence would not be inconsistent with such evidence, as it would admit the marriage with the prisoner, but shew that it was void. R. *v.* Bathwick, 2 B. & Ad. 639, shews that the competency of the wife does not depend upon the marshalling of the evidence, or the particular stage of the case in which she may be called; if, therefore, in Peat's case the witness had been called before her marriage with the prisoner had been proved and she would have been competent to prove her previous marriage, it is difficult to see how her marriage with the prisoner having been proved before she was called could render her incompetent, and it certainly would operate hardly on a prisoner, if such were the case, for the prosecutor might in the course of his case prove the marriage of the witness with the prisoner, and the prisoner might have no one except the witness to prove the former marriage. It may be added that Lord Hale says that a second wife is not so much as a wife *de facto*. C. S. G.

(*r*) As to the meaning of *voire dire*, see *post*, Bk. xiii. c. v.

(*s*) R. *v.* Young, 5 Cox, 296.

(*t*) 15 Cox, 328.

after production of a certificate of her previous marriage to another man and his death before her marriage to the prisoner.

The woman with whom the prisoner is alleged to have feloniously intermarried is a competent witness so soon as the former marriage is established.

It has not been thought necessary to set forth in detail, as in former editions, the numerous statutes regulating the celebration of marriages (*u*) or validating marriages not celebrated according to law (*v*).

The only grounds on which a marriage solemnised in England can be treated as invalid are :—

(1) That it was solemnised in a place not licensed nor authorised nor registered.

(2) That it was solemnised by or before a person not having authority to officiate at the marriage in question, whether civil or religious.

(3) That some necessary condition was deliberately not observed.

(4) That the parties were incapable of marriage, *e.g.* by reason of nonage or lunacy.

(5) That the parties could not lawfully intermarry because of consanguinity or affinity or because one or both of them was already *in vinculo matrimonii*.

Where the marriage took place outside England the evidence must go to shew that the marriage was solemnised in a form recognised as constituting a valid marriage by the laws of the country under whose forms the marriage was celebrated : *i.e.* a marriage in the sense of English law (*w*).

The common law requisite in point of form for a valid marriage in England is celebration *in facie ecclesiæ*, *i.e.* by an episcopally ordained minister (*x*). Owing to the provisions of the Marriage Acts, 1823–1898, proof of a common-law marriage in England is not sufficient for the purposes of an indictment for bigamy. But when the marriage is at sea (*y*) or within the British lines by a chaplain or officer or other person officiating under

(*u*) See Geary on Marriage. Chit. Stat. tit. 'Marriage.' Hammick on Marriage.

(*v*) Such of the numerous confirmation and validation Acts as are printed as public general Acts are enumerated in Appendix VII. to the Official Index to the Statutes. Those which are local and personal are enumerated in the Index to Local and Personal Acts, 1801-1899. By the Provisional Order Marriages Act, 1905 (5 Edw. VII. c. 23), power is given to a Secretary of State by provisional order, to be confirmed by Parliament, to remove the invalidity of or doubts as to marriages in England which are invalid or doubtful by reason of some informality.

(*w*) *Ante*, p. 979.

(*x*) R. *v.* Millis, 10 Cl. & F. 534 : 8 E. R. 844. In this respect English law differs from that of Scotland and from the canon law as recognised in Europe before the council of Trent. See Geary on Marriage, 3. The jurisdiction of Ecclesiastical Courts to decree specific performance of contracts of marriage *per verba de præsenti* or *per verba de futuro* was abolished in 1754 (20 Geo. III. c. 33, s. 13, re-enacted in 1823 as 4 Geo. IV. c. 76, s. 27). In Lyon's case, Old Bailey (1738, 1 East, P. C. 469, citing Serjeant Foster's MS.), Willes, C.J., seems to have been of opinion that a marriage in England by a priest of the Church of Rome was good if the ceremony of that Church in the words of the contracting party could be proved. East seeks to limit this to persons of the Roman allegiance. See R. *v.* Millis, *ubi supra*. Sussex Peerage Claim, 6 St. Tr. (N. S.) 79. Under the present Marriage Acts such a marriage in England is not valid unless celebrated under the statutory conditions.

(*y*) Culling *v.* Culling [1898], Prob. 116. Du Moulin *v.* Druitt, 13 Ir. C. L. Rep. 212. See 55 & 56 Vict. c. 23, ss. 12, 23, Marriage Order in Council, 1892 (public vessels). 57 & 58 Vict. c. 60, ss. 240, 242 (merchant ships).

the orders of the commanding officer of a British army serving abroad (*z*) or where no local authority can celebrate a valid marriage a common-law marriage between British subjects seems to be regarded as valid (*a*).

Under the existing law a marriage may be solemnised in England without a religious ceremony, or with the rites and ceremonies of the Church of England or of any other religious body, and every marriage solemnized under the Marriage Acts, 1836, 1837, 1840, and 1856, is good and cognizable in like manner as a marriage before the passing of the Act of 1836 according to the rules of the Church of England (*b*).

Form.—All the statutes regulating the celebration of a marriage in England require that the ceremony shall take place in the presence of two or more credible witnesses besides the officiating clergyman (*c*) or authorised person in whose presence the marriage is celebrated (*d*) or the civil registrar (*e*) or marriage officer by or in whose presence it is celebrated (*f*). In the case of marriages before a civil registrar or in a registered building (not of the Church of England) whether in the presence of an authorised person or of the civil registrar, the marriage must be celebrated *with open doors* (*g*). They also require that the marriage shall be registered in duplicate in the register provided by the Registrar-General for the purpose and authorise the clergyman, &c., to ask the parties as to the particulars required to be registered (*h*).

Each entry shall be signed by the parties and the clergyman (*h*) or authorised person (*i*) or registering officer (*j*) and attested by two witnesses. The statutes do not say, but certainly mean, that the witnesses signing should be witnesses of the marriage and not merely of the filling-in of the register, and the scheduled form of registry makes this clear.

Presumption in Favour of Validity.—In Catterall *v.* Sweetman (*k*), Dr. Lushington said: 'Viewing the successive Marriage Acts it appears that prohibitive words without a declaration of nullity were not considered by the legislature as creating a nullity: and this is a legislative interpretation of Acts relating to marriage. And not only is all legal presumption in favour of the validity and against the nullity of a marriage, but it is so on this principle: a legislative enactment to annul a marriage *de facto*

(*z*) R. *v.* Brampton, 10 East, 282. Ruding *v.* Smith, 1 St. Tr. (N. S.) 1053. 2 Hagg. (Consist.) 371. Waldegrave Peerage Claim, 4 Cl. & F. 649; 7 E. R. 247. Foreign Marriage Act, 1892 (55 & 56 Vict. 23), s. 22.

(*a*) 19 & 20 Vict. c. 119, s. 23; 61 & 62 Vict. c. 58, s. 4; and as to marriages under British law in foreign parts, 55 & 56 Vict. c. 23, ss. 1, 22, 23.

(*b*) *Post*, pp. 987, 989.

(*c*) 4 Geo. IV. c. 76, s. 28 (Church of England).

(*d*) 61 & 62 Vict. c. 58, s. 6 (3).

(*e*) 6 & 7 Will. IV. c. 85, ss. 20, 21. 61 & 62 Vict. c. 58, s. 10.

(*f*) 55 & 56 Vict. c. 23, s. 8 (British marriages in foreign parts).

(*g*) 6 & 7 Will. IV. c. 85, s. 20, 21. 61 & 62 Vict. c. 58, s. 6. As to the hours between which marriage is to be celebrated, see *post*, p. 1016.

(*h*) 6 & 7 Will. IV. c. 86, ss. 31, 40 (Church of England). 6 & 7 Will. IV. c. 85, s. 23 (marriages in presence of registrar). 55 & 56 Vict. c. 23, s. 9 (British marriages abroad). 61 & 62 Vict. c. 58, s. 7 (marriages before authorised persons without attendance of registrar). As to Quakers and Jews, see *post*, p. 998.

(*i*) 61 & 62 Vict. c. 58, ss. 6 (3), 7.

(*j*) *i.e.* the civil registrar in cases where the marriage is civil or his attendance at a religious ceremony is essential or required; 6 & 7 Will. IV. c. 85, ss. 20, 21; 61 & 62 Vict. c. 58, s. 10. In the case of Jews it is the secretary of the synagogue to which the husband belongs (6 & 7 Will. IV. c. 86, ss. 30, 31; 19 & 20 Vict. c. 119, s. 22); and in the case of Quakers the registering officer certified for the district by the recording clerk of the Society of Friends (6 & 7 Will. IV. c. 86, ss. 30, 31).

(*k*) [1845] 1 Rob. (Eccl.) 304, 317.

is a penal enactment, and not only penal to the parties but highly penal to innocent offspring, and therefore to be construed according to the acknowledged rule most strictly' (*l*).

As a general rule production of the certificate of the marriage in the proper form is sufficient *prima facie* evidence of the validity in point of form of the marriage, without proof of the status of the officiating minister, of the licensing (*m*) or registration (*n*) or official character of the building, and of compliance with other statutory requirements (*o*), such as publication of banns (*p*), or celebration with open doors (*q*).

Place.—A marriage to be valid must be celebrated—

(i) in a church or chapel of the Church of England, licensed by the proper ecclesiastical authority for the solemnisation of marriages (*r*);

(ii) at the office and in the presence of the superintendent registrar of the district (*s*); or

(iii) in a building certified according to law as a place of religious worship (not of the Established Church) and registered for solemnising marriages and specified in the notice of the marriage in question (*t*).

These rules as to place do not apply to marriages by special licence of the Archbishop of Canterbury or by the usages of the Society of Friends or the practice of the Jewish religion.

In the following cases marriages are declared void for non-compliance with the directions of the Marriage Acts:—

(i.) Church of England.—By the Marriage Act, 1823 (4 Geo. IV. c. 76), sect. 22, 'If any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid (*i.e.* of the Archbishop of Canterbury) or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever' (*u*).

(ii. & iii.) General.—By sect. 42 of the Marriage Act, 1836 (6 & 7 Will. IV. c. 85), 'If any person shall knowingly and wilfully (*v*) intermarry' (after March 1, 1837) 'under the provisions of this Act in any place other

(*l*) *Vide ante*, p. 1.

(*m*) R. *v.* Cresswell, 1 Q.B.D. 446.

(*n*) R. *v.* Cradock [1863], 3 F. & F. 837 (Nonconformist chapel). Sichel *v.* Lambert [1864], 15 C. B. (N. S.) 761 (Roman Catholic chapel).

(*o*) Campbell *v.* Corley [1856], 28 L. T. (O. S.) 109.

(*p*) R. *v.* Bowen, 2 C. & K. 227.

(*q*) Campbell *v.* Corley, *ubi sup.*

(*r*) 4 Geo. IV. c. 76, s. 22 (*infra*); 6 & 7 Will. IV. c. 85, s. 42 (*infra*).

(*s*) 6 & 7 Will. IV. c. 85, s. 42.

(*t*) 6 & 7 Will. IV. c. 85, s. 42.

(*u*) Under this section to make a marriage invalid, both parties must know that no due publication of banns had taken place. R. *v.* Clarke, 10 Cox, 474. But see Mayhew *v.* Mayhew, 2 Phillim. 11. *Re* Rutter [1907], 2 Ch. 592, 595. In a case where the parties were misdescribed it was ruled on an indictment for bigamy that the prosecution to establish the validity of the marriage must shew that one of the parties was unaware of the misdescription. R. *v.* Kay, 16 Cox, 292, Huddleston, B.

(*v*) Apparently both parties must act with knowledge and deliberate intention. R. *v.* Rea, L. R. 1 C. C. R. 365. See Greaves *v.* Greaves, L. R. 2 Prob. 243. Lane *v.* Goodwin, 4 Q.B. 361 (licence). As to the Irish law, see *Re* Knox, 23 L. R. (Ir.) 542, Warren, J.

than the church, chapel, registered building, or office or other place specified in the notice and certificate aforesaid, *or* without due notice (*w*) to the superintendent registrar *or* without certificate of notice duly issued, *or* without licence in case a licence is necessary under this Act, *or* in the absence of a registrar or superintendent registrar where the presence of a registrar or superintendent registrar is necessary under this Act (*x*), the marriage of such persons except in any case hereinafter mentioned shall be null and void: Provided always that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of the Marriage Act, 1823' (4 Geo. IV. c. 76).

It has been held that where a marriage notice was given under the Marriage Act, 1856 (19 & 20 Vict. c. 119), which was false to the knowledge of both parties, as to the name of the woman and in other respects, the marriage was nevertheless valid (*y*).

Person Celebrating.—A person competent to officiate at a marriage cannot lawfully solemnise a marriage between himself and another person without the presence of another person authorised to celebrate marriages (*z*).

No one but a clergyman in holy orders of the Church of England can validly celebrate a marriage in a church or chapel of the Church of England or under the special licence of the Archbishop of Canterbury.

The presence of a superintendent registrar and of a registrar of the district is essential for a purely civil marriage (6 & 7 Will. IV. c. 85, s. 20).

The presence of an authorised person is essential at a marriage in a registered non-Anglican place of worship (*a*) unless the civil registrar is present (61 & 62 Vict. c. 58, ss. 7, 15).

In the case of marriages under the Foreign Marriage Act, 1892, a marriage officer must be present and may solemnise (55 & 56 Vict. c. 23, s. 8).

Banns—False Name.—It seems that the assuming a fictitious name upon the second marriage will not prevent the offence from being complete (*b*). And it was decided to be no ground of defence, that upon the second marriage (which was by banns) the parties passed by false Christian names when the banns were published, and when the marriage took place; and it was further held that the prisoner, having written down the names for the publication of the banns, was precluded thereby from saying that the woman was not known by the name he delivered in, and that she was not rightly described by that name in the indictment. The indictment was against the prisoner for marrying Anna T. whilst he had a wife living: the second marriage was by banns; and, it appeared

(*w*) Holmes *v.* Simmons [1868], L. R. 1 P. D. & A. 523. In Beavan *v.* McMahon [1861], 2 Sw. & Tr. 230 (licence), the man had deliberately suppressed one of the Christian names of the woman. It was held that the name given, Margaret Beavan, might represent the woman, and that as the licence was issued for competent authority the marriage was valid.

(*x*) Sect. 42 is repealed in respect of marriages authorised by and solemnised in accordance with the Marriage Act, 1898, by a person authorised under that Act, in the absence of the registrar (61 & 62 Vict. c. 58, s. 15).

(*y*) *Re* Rutter [1907], 2 Ch. 592, Eady, J.

(*z*) Beamish *v.* Beamish, 9 H. L. C. 274; 11 E. R. 735, the case of a person in holy orders performing his own wedding ceremony without the attendance of another clergyman.

(*a*) This does not apply to Jewish or Quaker marriages.

(*b*) R. *v.* Allison, *post*, p. 992. And see R. *v.* Allen, *post*, p. 1009, and the question as to the second marriage there discussed.

that the prisoner wrote the note for the publication of the banns, in which the woman was called Anna, and that she was married by that name, but that her real name was Susannah. Upon a case reserved two questions were made: one, whether this marriage was not void, because there was no publication of banns by the woman's right name, and that, if the second marriage were void, it created no offence: and the other question was, whether the charge of the prisoner's marrying Anna was proved. But the judges held, unanimously, that the second marriage was sufficient to constitute the offence; and that, after having called the woman 'Anna' in the note he gave in for the publication of banns, it did not lie in the prisoner's mouth to say that she was not known as well by the name of Anna as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment (*c*).

So where the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved by all the judges that the prisoner was rightly convicted (*d*).

So where the second wife had never gone or been known by the name of Thick, but had assumed it when the banns were published, that her neighbours might not know she was the person intended, it was held that the parties could not be allowed to evade the punishment for their offence, by contracting a concertedly invalid marriage (*e*).

In Mayhew *v.* Mayhew (*f*), where S. White, spinster, was married by banns as S. Kelso, widow, the marriage was held good though both parties were aware of the misdescription.

Misdescription of the parties in a notice for marriage before a registrar, though it renders the parties liable to penalties does not render the marriage void (*g*).

Notices.—The prisoner was married a second time before the registrar, describing himself as Benjamin Rea, his true name being Edward Rea. There was no evidence to shew the wife knew of this, and the man was held to be rightly convicted of bigamy, as the effect of the Marriage Act, 1836, ss. 4, 42, is to render invalid a marriage where both parties, and not one only, knowingly intermarry without due notice (*h*).

Licences.—A marriage celebrated under a licence, in which one of the parties is described by a name wholly different from his own, is not therefore void. G. R. was taken into custody as the reputed father of a child, of which a woman was pregnant, and married her by licence. He gave his name as G. N. at the times of the apprehension and marriage, and was named so in the licence, but had never gone by that name before; and the Court of Queen's Bench held this marriage valid (*i*).

(*c*) R. *v.* Edwards, R. & R. 283, and MS. Bayley, J.

(*d*) Palmer's case, 1 Deac. Dig. Cr. L. 147. Rosc. Crim. Ev. (13th ed.) 276.

(*e*) R. *v.* Penson, 5 C. & P. 412, Gurney, B. See R. *v.* Orgill, 9 C. & P. 80.

(*f*) 2 Phillimore, 11. But see Wormald *v.* Neale [1868], 19 L. T. (N. S.) 93. R. *v.* Drake, 1 Lew. 25, Parke, J.

(*g*) *Re* Rutter [1907], 2 Ch. 592, and cases there cited. Prowse *v.* Spurway [1877], 46 L. J. Mat. 49.

(*h*) R. *v.* Rea, L. R. 1 C. C. R. 365; 41 L. J. M. C. 92. The Court did not say that there would have been no offence if both parties had known of the false statement. See Holmes *v.* Simmons, L. R. 1 P. & M. 523.

(*i*) Lane *v.* Goodwin, 4 Q. B. 361. But if a licence were obtained for one person with the intention that it should be used for another, such a licence might not be valid. Patteson, J. Ibid.

Where a marriage was solemnised by licence, in which the woman's name was Margaret B.; her baptismal name and that by which she was commonly called being 'Margaret Lea B.'; the licence was obtained in the altered name by the man, who knowingly, and by direction of the woman, suppressed the name of 'Lea,' and gave false places of residence in order that the surrogate might not know who the woman was, and that the intended marriage might be kept secret from her friends; it was held that the question was whether the woman was married without a 'licence from a person or persons having authority to grant the same.' There was no doubt the person who granted the licence had authority to grant it, and it came therefore to the question whether this was a licence for the woman. It was clear that an altered name might represent a person; therefore the name 'Margaret B.' might represent her, and as the licence was obtained for her and by her direction from a person who had authority to grant it the marriage was not void (*ii*).

Publication of Banns.—The Marriage Acts do not specify what must be observed in the publication of banns, or that the banns shall be published in the *true names* of the parties; but it must be understood as the clear intention of the legislature that the banns shall be published in the true names, because it requires that notice in writing shall be delivered to the minister of the true Christian names and surnames of the parties seven days before the publication; and, unless such notice be given, he is not obliged to publish the banns. But a publication in the name which the party has assumed, and by which he is known in the parish, appears to be sufficient, and would, indeed, be the proper publication where the party is not known by his real name. Thus, where a person, whose baptismal and surname was A. L., was married by banns by the name of G. S., having been known in the parish where he resided and was married by that name only from his first coming into the parish till his marriage, which was about three years, the marriage was held valid (*j*). And a marriage by licence, not in the party's real name, but in the name which he had assumed, because he had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was also held valid. Ellenborough, C.J., said, 'If this name had been assumed for the purpose of fraud in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the Marriage Act and the rights of marriage, and the Court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to have become the name which the party has acquired by reputation, that is, within the meaning of the Marriage Act, the party's true name' (*k*).

In order to invalidate a marriage under sect. 22 of the Marriage Act, 1823 (4 Geo. IV. c, 76) (*l*), it must be contracted with a knowledge by

(*ii*) Beavan *v.* M'Mahon, 30 L. J. Mat. 61: 1 Sw. & Tr. 230.

(*j*) R. *v.* Billinghurst, 3 M. & S. 250.

(*k*) R. *v.* Burton-upon-Trent, 3 M. & S. 537.

(*l*) Under Lord Hardwicke's Act, 26 Geo. II. c. 33 (rep.), the marriage was void if the names were completely misdescribed, whether from accident or design: R. *v.* Tibshelf, 1 B. & Ad. 190, but if there were only a partial variation of name, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names had been such as the

both parties that no due publication of the banns has taken place. Where, therefore, J. C. told S. S. that he would see the banns properly published, and she took no steps in the matter, and he told her that they had been published, but procured the banns to be published in the name of A. W., which name she had never borne; and in performing the service the clergyman applied to her the name of A. till which time she believed she was about to be married by her own name, and she did not know, until after the marriage, that the banns had been published in a wrong name; it was held that the marriage was valid (*m*). But where both the man and the woman were aware that the banns had been published in a manner to conceal the identity of one of them, it was held that the marriage was void (*n*).

E. C. T., a minor, of the age of seventeen years, and M. A. A., a widow, of the age of thirty-five years, were married in 1833 by banns, which were published in the names of E. T., bachelor, and M. A. A., spinster; the entry in the register was in the same names and descriptions, and was signed E. T. The marriage was clandestine and without the knowledge or consent of the parents of T., who was baptised by the names of E. C. T., and though known to some persons by the name of C. T. or T. only, was never known by the name of E. T. It was admitted that the woman was cognizant of the fraud and intended it; and it was held that as the entry in the register was, E. T. and M. A. A. were married by banns, it was impossible for him not to have known of the publication of the banns; and the signature of only one of his Christian names showed that he must have known that the banns had been published in that name only; and, therefore, he, with the woman, knowingly and wilfully intermarried without due publication of banns (*o*).

One W. was baptised and had always been known by the name of Bower W., and never by the name of John W. His banns were published in the name of John W.; after the first publication the wife told W. that the name John W. was wrong. He said it was one of his names, though he had never been called by it; she asked him why he used the name John? He said it was for fear any of his relations should know of his marrying her. She wished him to use the name of Bower; he said he should be disinherited if he did; she asked him if the marriage would be legal under the name of John; he said it would. It was a long time before she would consent to being married to him in the name of John. She did so because he said if she loved him she would marry him

parties had used, and been known by, at one time, and not at another; in such cases the publication might or might not be void; the supposed misdescription might be explained, and it became a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. R. *v.* Tibshelf, 1 B. & Ad. Tenterden, C.J. See Sullivan *v.* Sullivan, 2 Hagg. Consist. Rep. 238, 254. Frankland *v.* Nicholson, 3 M. & S. 261. Pougett *v.* Tomkins, 3 M. & S. 263. Mather *v.* Ney, 3 M. & S. 265.

(*m*) R. *v.* Wroxton, 4 B. & Ad. 640. And see Gompertz *v.* Kensit, 41 L. J. Ch. 382. R. *v.* Kay, 16 Cox, 292.

(*n*) Wiltshire *v.* Wiltshire, 3 Hagg. (Eccl. Rep.) 332.

(*o*) Tongue *v.* Tongue, 1 Moore, P. C. 90. There was also evidence that it was the regular course to make the parties examine the entry in the banns book before a marriage, and see that their names and descriptions were right, and the witness added that she should not have been present at the marriage as a witness, unless the banns had been regularly published.

in that name, and would trust to him afterwards. Ultimately, they were married in the names of M. M. and John W. Cresswell, J., held that there was not a due publication of banns, as W. was described in them as John W., and both parties were aware of this misdescription when the marriage was solemnised, and therefore the marriage was invalid (*p*).

On the trial of an ejectment, a marriage was said to have taken place in 1784, at a private house under a special licence from the Archbishop of Canterbury. The plaintiff's counsel offered in evidence an affidavit made for the purpose of obtaining a special licence to be married at a private house, and a fiat signed by the Archbishop, directing a licence to be made out, as prayed, for a marriage between the parties; both which documents were produced from the Office of Faculties, the proper ecclesiastical office. No search had been made for the original licence, and there was proof that such licences were not kept in any regular custody, but were generally handed over to the officiating clergyman and not taken back from him. A copy of the register of the parish of St. Pancras, which stated the marriage to have been at a private house, by special licence, and professed to be signed by the parties, was also offered in evidence. Objection was taken to the fiat as being secondary evidence of the contents of the licence, for which no search had been made; but the evidence was admitted; but the Court held that it was properly received, as the fiat was an act done in the course of official duty, shewing that two persons bearing the names of the lessor of the plaintiff's parents were at that time engaged in taking measures for contracting a marriage; and that it might properly be taken into consideration by the jury as confirming the evidence of their union, which arose from cohabitation and reception. The affidavit and register were proofs of the same general fact (*q*).

Registration is not essential to the validity of a marriage in England (*r*). It is usual but not essential to prove the first marriage by a certified copy of the entry of the marriage in the register (*s*): or the original register may be produced from the proper custody (*t*). If the register or a certified copy of the entry is not available *viva voce* evidence of persons present at the ceremony will suffice if they can describe it sufficiently to shew that it was in a lawful form.

Identity.—The identity of the parties to the first marriage must also be proved (*u*). It is not necessary for this purpose to call any of the witnesses

(*p*) Midgley *v.* Wood, 30 L. J. Mat. 57. But see *Re* Rutter [1907], 2 Ch. 592.

(*q*) Doe d. Egremont *v.* Grazebrook, 4 Q.B. 406. In the argument it is said that 'the performance of a ceremony was proved'; 'but the ceremony was shewn to have been performed in a private house.' 'The same parties went through the ceremony, which, at any rate, was professedly a marriage.' See Doe d. France *v.* Andrews, 15 Q.B. 756, as to the entry in the register.

(*r*) R. *v.* Allison, MS. Bayley, J., and R. & R. 109. The prisoner was indicted for marrying Ann Epton, while Jane, his former wife was living. . . . Each marriage was proved by a witness present at the ceremony. It appeared that at the first marriage the prisoner went by the name of Allison, at the second by the name of Wilkinson. Chambré, J., doubted whether the evidence was sufficient without proof of the banns, but the other judges held that it was. Cf. R. *v.* Manwaring, 26 L. J. M. C. 10: D. *v.* B. 132.

(*s*) Doe *v.* Fowler, 14 Q.B. 700. The register itself is rarely produced. As to proof of entries in foreign registers, see Lyell *v.* Kennedy [1889], 14 App. Cas. 437, 449.

(*t*) See R. *v.* Millis, 10 Cl. & F. 534.

(*u*) See R. *v.* Simpson, 15 Cox, 423. R. *v.* Manwaring, 26 L. J. M. C. 10.

who are by law required to sign the register (*v*), but is sufficient to give any evidence as to the identity of the parties, *e.g.* by having their handwriting to the register or that bellringers were paid by them for the wedding or the like.

In R. *v.* Tolson (*w*), on an indictment for bigamy a photograph which had been taken from the prisoner, and which she had said was that of her husband, was allowed to be shewn to a witness present at the first marriage, and also to another witness who had known the man of whom the photograph was a likeness, in order to prove his identity with the person mentioned in the marriage certificate. But this form of identification is unreliable unless amply corroborated (*x*).

Evidence.—Where the entry of a marriage in England is in a non-parochial register or record it can be proved on an indictment for bigamy or other criminal case only by production from Somerset House of the original register or record (*y*).

The marriage registers are kept in duplicate and the entry of the marriage is made therein immediately after its solemnisation, and is signed by the parties and by two witnesses and by the officiating clergyman (*z*) or minister or authorised person (*a*) or registrar if he officiates or attends (*b*), or in the case of marriages abroad the marriage officer (*c*).

Where the entry is in a register kept under the provisions of the Registration Acts :—

(*a*) a certified copy of the entry purporting to be sealed or stamped with the seal of the general register office is to be received as evidence of the marriage to which the entry relates without any further or other proof of such entry (*d*) : or

(*b*) an examined copy or extract of the entry signed and certified as a true copy or extract by the officer to whose custody the original is entrusted is admissible in evidence (*e*) : but

(*c*) a certificate which is not a certified copy of the register is not so admissible (*f*).

Although marriages must be solemnised in the presence of two or more credible witnesses (*g*) it is not essential to call all or any of them (*gg*).

By the Marriage Act, 1823 (4 Geo. IV. c. 76), s. 26, 'After the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published ; or, where the marriage is by licence, it shall not be necessary to give any proof that

(*v*) 1 East P. C. 472. Bull (N. P.) 27. See Morris *v.* Miller, 4 Burr. 2057. Birt *v.* Barlow, 1 Doug. 162.

(*w*) 4 F. & F. 103.

(*x*) See Frith *v.* Frith [1896], Prob. 74.

(*y*) 3 & 4 Vict. c. 92, s. 17 ; 21 & 22 Vict. c. 25, s. 3. See *post*, Vol. ii. p. 2143.

(*z*) 6 & 7 Will. IV. c. 86, s. 31.

(*a*) 6 & 7 Will. IV. c. 85, s. 23 ; 61 & 62 Vict. c. 58, s. 7.

(*b*) 6 & 7 Will. IV. c. 85, s. 23.

(*c*) 55 & 56 Vict. c. 23, s. 9.

(*d*) 6 & 7 Will. IV. c. 86, s. 38. This section extends to registers of marriages solemnized under the Marriage Act, 1836 (5 & 6 Will. IV. c. 85), s. 44.

(*e*) 14 & 15 Vict. c. 99, s. 51. See R. *v.* Weaver, 1873, L. R. 2 C. C. R. 85. *Re* Goodrich [1904], Rob. 138.

(*f*) See Nokes *v.* Milward [1824], 2 Add. Eccl. 320.

(*g*) 4 Geo. IV. c. 76, s. 28 (Church of England). 6 & 7 Will. IV. c. 85, ss. 20, 21 (civil or non-anglican).

(*gg*) *Vide* note (*v*), *supra*.

the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of such marriage' (*h*).

By the Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), sect. 17, 'After any marriage shall have been solemnized, under the authority of any of the said recited Acts (*i*), or of this Act, it shall not be necessary in support of such marriage to give any proof of the actual dwelling or of the period of dwelling of either of the parties previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnized had been certified according to law as a place of religious worship (*j*) or that such building was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage; and all marriages which heretofore have been or which hereafter may be had or solemnized under the authority of any of the said recited Acts or of this Act, in any building or place of worship which has been registered pursuant to the provisions of the Marriage Act, 1836 (*k*), but which may not have been certified as required by law, shall be as valid in all respects as if such place of worship had been so certified' (*l*).

By sect. 23, 'Every marriage solemnized under any of the said recited Acts or of this Act shall be good and cognizable in like manner as marriages before the passing of the first-recited Act (*m*) according to the rites of the Church of England.'

Capacity.—The Marriage Acts, 1823 (4 Geo. IV. c. 76) and 1836 (6 & 7 Will. IV. c. 85), apply only to the mode of celebrating marriage and do not deal with capacity to marry (*n*).

The capacity of the parties to marry depends in the main on the law of their domicile at the date of the marriage (*o*). According to English law the consents of parents and guardians (*oo*) are part of the form of marriage, and are not regarded as limiting the capacity to marry (*p*). Consequently

(*h*) Upon an enactment nearly similar, it was determined, in a prosecution for bigamy, where the first marriage was proved to have been by banns, that it was no objection that the parties did not reside in the parish where the banns were published and the marriage was celebrated. The provision of the statute was considered as an express answer to the objection; and it appears not to have been adverted to when the point was received for the opinion of the judges. R. *v.* Hind, R. & R. 253.

(*i*) *i.e.* the Marriage Acts of 1836 (6 & 7 Will. IV. c. 85); 1837 (7 Will. IV. and 1 Vict. c. 22); and 1840 (3 & 4 Vict. c. 72).

(*j*) In R. *v.* Cradock [1863], 3 F. & F. 837. Proof of marriage in a chapel in the presence of the registrar of the district and two witnesses was held to raise a *prima facie* presumption that the chapel was registered for the celebration of marriages.

(*k*) 6 & 7 Will. IV. c. 85, s. 18. See also 7 Will. IV. and 1 Vict. c. 22, s. 35; 18 & 19 Vict. c. 81.

(*l*) By sect. 20, nothing in the Act is to alter the provisions of the existing Acts, except when they are at variance with this Act.

(*m*) The Marriage Act, 1836 (6 & 7 Will. IV. c. 85), passed Aug. 17, 1836.

(*n*) *Re* de Wilton [1900], 2 Ch. 481.

(*o*) *Re* Bozzelli [1902], 1 Ch. 751. Ogden *v.* Ogden [1908], P. 46, 65.

(*oo*) Required by 4 Geo. IV. c. 76, ss. 16, 17; 6 & 7 Will. IV. c. 85, s. 10; 55 & 56 Vict. c. 23, s. 4.

(*p*) False statements as to having obtained such consents are punishable (*post*,

a marriage of foreigners in England without the consents required by their national law or the law of their domicile is regarded as valid (*q*).

Prohibitions under foreign laws as to the marriage of persons under religious vows or of negroes appear not to affect the capacity of such persons to marry in England (*r*). But in the case of marriage under a foreign law it would seem to be necessary to prove any consents required by that law to establish the validity in point of form of the marriage.

Nonage.—By the law of England and Ireland males are capable of marrying at fourteen and females at twelve (*s*). Between these ages and twenty-one, persons of either sex may marry with the consent of parents or guardians if they have any (*t*).

Insanity.—Insanity in either party at the date of the marriage renders it absolutely void if the party was then a lunatic so found by commission (*u*), but voidable only, if the party had not then been found a lunatic, but was at the date of the marriage so unsound of mind as to be incapable of understanding and consenting (*v*). In the case of marriage the validity depends on the sanity of the party at the date of the ceremony and not whether the same party knows of the insanity of the other party (*w*).

Impotence.—Impotence of either party at the time of celebration makes the marriage voidable, but not void *ab initio* (*x*).

Impediments.—The impediment to marriage between persons who are capable of marrying which are recognised by English law are :—

(i.) the existence of a valid subsisting monogamous marriage of either party. (*Vide ante*, p. 979).

(ii.) consanguinity or affinity between the parties within certain degrees.

For persons domiciled in England at the date of the marriage, wherever it is celebrated (*y*) these degrees are determined by the Table of Consanguinity and Affinity (*z*) published in 1563 as an

p. 1012), but do not invalidate the marriage. R. *v.* Birmingham, 8 B. & C. 29. R. *v.* Clark, 2 Cox, 183. The decisions to the contrary under Lord Hardwicke's Act (26 Geo. II. c. 33) have ceased to be of force since 1823 (4 Geo. IV. c. 76, ss. 16, 22, 23; 19 & 20 Vict. c. 119, s. 17). As to the effect of belief that want of consent renders such marriage invalid, see R. *v.* Bayley, 1 Cr. App. R. 86.

(*q*) Ogden *v.* Ogden [1908], P. 46.

(*r*) Ibid. p. 66. *Cf.* Scott *v.* Att.-Gen., 11 P. D. 128.

(*s*) Co. Litt. 79. It is said that where the child is over seven the marriage is voidable only and not absolutely void. The canonists seem to have been prepared in certain cases to hold that evidence of sexual capacity might be given as to persons under fourteen and that in such cases '*malitia supplet aetatem.*' See Fraser, Husband and Wife (2nd ed.) 51. Geary on Marriage.

(*t*) *Vide post*, p. 1012, and *cf.* R. *v.* Bayley, *ubi supra*. In Scotland persons of an age to marry need no consent of parent or guardian. Fraser, 55.

(*u*) Under the great seal of Great Britain and Ireland, or whose person or estate has been committed to the care of trustees. 51 Geo. III. c. 37, which re-enacts and extends to Ireland 15 Geo. II. c. 20 (rep. 1873, 36 & 37 Vict. c. 91). The incapacity continues till the party is declared of sound mind by the judge in lunacy (53 & 54 Vict. c. 5), or the majority of the trustees.

(*v*) See Durham (Earl) *v.* Durham (Countess), 10 P. D. 80. This rule allows for lucid intervals.

(*w*) See Wood-Renton on Lunacy, 17-29.

(*x*) B. alias A. *v.* B [1891], 27 L. R. Ir. 587.

(*y*) Brook *v.* Brook [1861], 9 H. L. C. 193; 11 E. R. 703, a marriage under Danish law of an Englishman to his deceased wife's sister, both being domiciled in England.

(*z*) Affinity is constituted through marriage, not by sexual intercourse. Wing *v.* Taylor, 2 Sw. & Tr. 278. Consanguinity exists even between persons who are not akin through lawful wedlock, Horner *v.* Horner, 1 Hagg. (Consist.), at p. 352.

authoritative exposition of the Acts 28 Hen. VIII. c. 7, s. 7; 28 Hen. VIII. c. 16, s. 2; 32 Hen. VIII. c. 38 (*a*). For persons domiciled elsewhere the prohibited degrees depend on the law of the nationality or the domicile of the parties (*b*).

By the Marriage Act, 1835 (5 & 6 Will. IV. c. 54), sect. 2, 'all marriages celebrated after August 31, 1835, between persons within the prohibited degrees of *consanguinity or affinity* shall be absolutely null and void to all intents and purposes whatsoever' (*c*). Where, consequently, a marriage takes place within the prohibited degrees of consanguinity or affinity, as such marriage is wholly void, a second marriage will not amount to the crime of bigamy. Where, therefore, on an indictment for bigamy, it appeared that the prisoner had married two sisters, one after the death of the other, and the latter marriage was alleged in the indictment as the legal marriage, it was held that he was entitled to be acquitted, as that marriage was null and void to all intents and purposes (*d*). The Act of 1835 extends to the illegitimate as well as the legitimate child of a late wife's parents. Therefore a marriage with the illegitimate sister of a deceased wife was held void (*e*). So a marriage of a man with the daughter of the illegitimate half-sister of his deceased wife is void (*f*).

The table of prohibited degrees was varied by 7 Edw. VII. c. 47, for the purposes of marriage as a civil contract by legalising marriages between a man and the sister of his deceased, but not of his divorced, wife. The Act validates as civil contracts in the United Kingdom marriages already contracted with a deceased wife's sister solemnised in the United Kingdom, or in a foreign state or British possession where such marriage could lawfully be contracted (*g*).

On an indictment for bigamy, it appeared that the first marriage professed to be under the provisions of the Marriage Act, 1836, and the superintendent registrar produced the register returned to him by the registrar, who proved that he was present at the marriage, that it was registered, that the parties signed their names, and he witnessed it; and the superintendent registrar produced the register of the place where the marriage was celebrated, and the certificate he issued was produced and proved by him. A witness stated that he was present at the marriage, and that notice of it was duly given to the superintendent registrar, but the latter did not produce it, and said, if he had received it, he had left it at home; it was contended, on behalf of the prisoner, that it was

(*a*) The table extends to planted Colonies, subject to changes effected by local legislation. See Major *v.* Miller, 4 Australian C. L. R. 219, and *cf.* Watts *v.* Watts [1908], App. Cas. 573.

(*b*) As to Scots law see Scots Act, 1567, c. 14. Fraser (2nd ed.), 105, 134. As to Italy see *Re* Bozzelli [1902], 1 Ch. 751.

(*c*) Before this Act such marriages were voidable by sentence of an ecclesiastical Court during the lifetime of the parties. A marriage *de facto* voidable for consanguinity, but not avoided by decree, would support an indictment for bigamy under 1 Jac. I. c. 11 (rep.).

(*d*) R *v.* Chadwick, 11 Q.B. 173: 17 L. J. M. C. 33. The law has been altered as to this relationship by 7 Edw. VII. c. 47.

(*e*) R. *v.* St. Giles in the Fields, 11 Q.B. 173. Where a woman proved that she had a sister seven years older than herself, and that they were brought up together with their parents, and that she always believed that they were sisters, Erle, J., held this was sufficient evidence to prove that they were sisters. The witness having also proved that her sister married M. in 1846, and died in 1848, and the witness married M. in 1849, Erle, J., held that this shewed the latter marriage to be void. R. *v.* Young, 5 Cox, 296.

(*f*) R. *v.* Brighton, 1 B. & S. 447. This case is not affected by 7 Edw. VII. c. 47.

(*g*) See ss. 1, 3 of the Act.

incumbent on the prosecution to shew that the first marriage was celebrated in the registered building specified in the notice and certificate, to prove that due notice had been given to the superintendent registrar, and that the certificate of the notice had been duly issued. But, on a case reserved, all the judges present held the evidence sufficient (*h*).

Upon an indictment for bigamy, which alleged that the prisoner married E. G. in a Wesleyan chapel duly registered for solemnising marriages (*i*), and afterwards in her lifetime married E. O., a witness proved that he was present at the first marriage at the Wesleyan chapel in the presence of the registrar, and signed the register as a witness, and that the parties lived together as man and wife for two or three years. A witness proved that a certificate of this marriage was examined by him with the register book, kept at the office of the superintendent registrar of the district, and that it was correct, and that it was signed by the superintendent registrar. This certificate contained a copy of the register which the registrar certified to be correct. The witness also proved that he examined another certificate with the register book at the office of the superintendent registrar, and that it was correctly extracted, and was signed by the superintendent registrar in his presence (*j*). The witness also proved that another document was signed in his presence by the superintendent registrar, and that he examined it with the register at his office, and found it was correctly extracted (*k*). The reception of these documents was objected to, on the ground that certificates were not admissible to prove a marriage in a Wesleyan chapel, or that it was a place in which a marriage could be legally solemnised, or that, if admissible, they must be authenticated by the official seal of the registrar, and not under hand only. But the documents were admitted, and the prisoner convicted; and it was held that the conviction was right, upon the ground that, independently of the two last-mentioned documents, there was *prima facie* evidence that the chapel was duly registered, and was therefore a place in which marriages might be legally solemnised. The presence of the registrar at the marriage, the fact of the ceremony taking place, and the entry in the registrar's book, aided, as they were, by the presumption *omnia rite esse acta*, afforded *prima facie* evidence that the chapel was a duly registered place, in which marriages might be legally celebrated (*l*). So where on an indictment for bigamy the prisoner

(*h*) R. *v.* Hawes, 1 Den. 270. Where the production of the original register of marriages cannot be enforced, a witness, who has seen the register, may prove the handwriting of a party to a marriage therein registered, although such register be not produced. Sayer *v.* Glossop, 2 Ex. 409.

(*i*) Under 5 & 6 Will. IV. c. 85, s. 18.

(*j*) This certificate was, 'I, the undersigned, T. E. Austin, Superintendent Registrar of the district of Luton, &c., do hereby certify that the Wesleyan chapel, situate at Dunstable, in the county of Bedford, was duly registered for the solemnization of marriages, pursuant to the Act 6 & 7 Will. IV. c. 85, on the twenty-eighth day of November, 1845. Given under my hand, &c., Thos. Erskine Austin.'

(*k*) This document was, 'Henry Manwaring and Eliza Goodman were married after notice, read at the Board of Guardians of the Luton Union, without licence. Thos. Erskine Austin, Superintendent Registrar.'

(*l*) R. *v.* Manwaring, D. & B. 132; 26 L. J. M. C. 10. Pollock, C.B., and Willes, J., thought that the certificate that the chapel had been duly registered was admissible and evidence of the fact. 6 & 7 Will. IV. cc. 85, 86; 7 Will. IV. & 1 Vict. c. 22; 3 & 4 Vict. c. 92; 8 & 9 Vict. c. 113; 9 & 10 Vict. c. 119; and 14 & 15 Vict. c. 99, were referred to on the trial. Willes, J., said: 'It is a mistake to suppose that the provisions of

was shewn to have been secondly married at a Wesleyan chapel not registered under 15 & 16 Vict. c. 36, and this marriage was proved by the registrar, who produced the certificate; it was objected that there was no proof of the second marriage, or that it was invalid, having taken place in a chapel; but Wightman, J., overruled the objections (*m*).

In Sichel *v.* Lambert (*n*), in an action for goods sold there was a plea of coverture, and the defendant stated that she was married to J. L. at a Roman Catholic chapel; that she and L. were both Roman Catholics, and were married by a priest in the way in which Roman Catholic marriages are ordinarily celebrated, and that they lived together for some years, and she produced a certificate of the marriage from the priest who performed the ceremony, and a certificate shewing that the civil contract of marriage had been performed before the French Consul; but there was no proof that the person who performed the ceremony was a priest, or that the chapel was a place licensed for marriages, or that the registrar was present at the time. The Court of Common Pleas held that it might be presumed that the chapel was licensed and the registrar present as well because sect. 39 of the Marriage Act, 1836, declares any person who wilfully solemnises a marriage in any other place than a registered building or in the absence of the registrar, guilty of felony, as because the ordinary rule *omnia præsumuntur rite esse acta* ought to prevail in such a case. In R. *v.* Cresswell (*o*), where a marriage was solemnised in a building in a parish situate a few yards from the parish church, at a time when the parish church was disused in consequence of its undergoing repairs, and after divine service had been several times performed in such building, it was presumed in favour of the marriage to have been duly licensed, although no proof was given of a licence by the bishop. Coleridge, C.J., said: 'We are of opinion that the marriage service having been performed in the place where divine service was several times performed, the rule "*omnia præsumuntur rite acta*" applies, and that we must assume that the place was properly licensed, and that the clergyman performing the service was not guilty of the grave offence of marrying persons in an unlicensed place. The facts of the marriage and other church services being performed there by a clergyman are abundant evidence from which the Court and a jury might assume that the place was properly licensed for the celebration of marriages' (*p*).

In R. *v.* Cradock (*q*), proof of marriage in a chapel in the presence of the registrar of the district and two witnesses was held to raise a *prima facie* presumption that the chapel was registered for the celebration of marriages.

Quakers and Jews.—The marriages between Jews, and Quakers or ex-Quakers may be celebrated according to the practice and usages of

14 & 15 Vict. c. 99, s. 14, are anything more than cumulative, or that they give a rule and the only rule of evidence.' See R. *v.* Cradock, 3 F. & F. 837, *infra*.

(*m*) R. *v.* Tilson, 1 F. & F. 54.

(*n*) 15 C. B. (N. S.) 781.

(*o*) 1 Q.B.D. 446; 45 L. J. M. C. 77; 13 Cox, 126.

(*p*) As to the registration of Roman Catholic chapels, see 6 & 7 Will. IV. c. 85, s. 18; 7 Will. IV. & 1 Vict. c. 22, s. 35, and 18 & 19 Vict. c. 81.

(*q*) [1863] 3 F. & F. 837.

the Society of Friends (*r*) or the Jewish religion (*s*) on production of a certificate or licence of the civil registrar and without his attendance (*t*). The place where the marriage is celebrated need not be in a district in which the parties or either of them dwell (*u*). The statutes do not specify the number of witnesses necessary at these marriages but require registration of the marriage and signature of the register by two witnesses and the secretary of the synagogue or registering officer of the Quakers (*v*).

Such marriages are ordinarily proved by the production of a certificate, *i.e.* certified copy of the register, and by identification of the parties (*w*). But in the case of a marriage by Jewish rules it is said to be necessary also to prove (1) a contract of marriage (*x*); (2) that the witnesses to the marriage were not blood relations of the parties (*y*).

Marriages may be validly celebrated by Quakers or Jews before the civil registrar and in accordance with the statutory conditions required in such case (*z*), and it would seem that marriages by Jewish rules of Jews domiciled in England but within the English prohibited degrees are not valid in England (*a*).

Marriages by English Forms Outside the United Kingdom.—'All marriages solemnized within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad shall be as valid in law as if the same had been solemnized within the United Kingdom with a due observance of all forms required by law' (*b*).

Where a soldier on service with the British army in St. Domingo, in 1796, went with a woman to a chapel in the town, and the ceremony was there performed by a person appearing and officiating as a priest; the service being in French, but interpreted into English by a person who officiated as clerk, and understood at the time by the woman to be the marriage service of the Church of England. This was held sufficient evidence, after eleven years' cohabitation, that the marriage was properly celebrated, although the woman stated that she did not know that the

(*r*) 6 & 7 Will. IV. c. 85, ss. 2, 16; 19 & 20 Vict. c. 119, ss. 20, 21; 23 & 24 Vict. c. 18; 35 & 36 Vict. c. 10.

(*s*) See 4 Geo. IV. c. 76, s. 31; 6 & 7 Will. IV. c. 85, ss. 2, 16; 19 & 20 Vict. c. 119, ss. 20, 21. And see Ruding *v.* Smith, 1 St. Tr. (N. S.) 1053, 1064, 1065; 2 Hagg. (Consist.) 371.

(*t*) It is not required by the Marriage Acts, 1836, 1837, or 1840, and the Marriage Act, 1898, does not apply to Quaker or Jewish marriages (61 & 62 Vict. c. 58, s. 13).

(*u*) 3 & 4 Vict. c. 72, s. 5.

(*v*) 6 & 7 Will. IV. c. 86, ss. 31, 40; 19 & 20 Vict. c. 119, s. 22.

(*w*) In Deane *v.* Thomas, M. & M. 361, a marriage between Quakers was proved by producing the register of the meeting house, signed by the parties and several subscribing witnesses, and calling one of the witnesses who proved the form of marriage by declaration of the parties at a monthly meeting of the sect to be that usually considered as necessary to marriage in the Society of Friends.

(*x*) R. *v.* Althausen, 17 Cox, 630. R. *v.* Nasilski, 61 J. P. 520. These decisions are of doubtful authority. In Horn *v.* Noel, 1 Camp. 61, it was contended that the ceremony in the synagogue was merely a ratification of a previous written contract, and that as such contract was essential to the validity of the marriage, it must be put in and proved, and this was done.

(*y*) Nathan *v.* Woolf [1899], 15 Times L. R. 250.

(*z*) *Vide supra.*

(*a*) *Re* De Wilton [1900], 2 Ch. 481.

(*b*) 55 & 56 Vict. c. 23, s. 22. The section is declaratory of pre-existing law. As to registration of marriages outside the U. K. of officers and soldiers of the King's land forces and their families, see 42 & 43 Vict. c. 8. As to publishing on the King's ships at sea, the banns of an officer, seaman, or marine on the books of the ship, see 8 Edw. VII. c. 26.

person officiating was a priest. Ellenborough, C.J., in delivering his opinion, considered the case, first, as a marriage celebrated in a place where the law of England prevailed (supposing, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognised by subjects of England in a place occupied by the King's troops, who would impliedly carry that law with them) and held that it would be a good marriage by that law: for it would have been a good marriage in this country before the Marriage Act, and consequently would be so now in a foreign colony, to which that Act does not extend. In the second place, he considered it upon the supposition that the law of England had not been carried to St. Domingo by the King's forces, nor was obligatory upon them in this particular; and held that the facts stated would be evidence of a good marriage according to the laws of that country, whatever it might be; and that upon such facts every presumption was to be made in favour of the validity of the marriage (*c*).

On the authority of R. *v.* Millis (*d*) it was held that a marriage solemnised at the consulate office at Beyrout in Syria, according to the rites of the Church of England, between two British subjects who were members of that church, by an American missionary, who was not in holy orders, was void (*dd*).

R. *v.* Millis (*d*) does not decide that marriages of British subjects in the colonies, or on board ship or elsewhere, where a clergyman cannot be obtained, are invalid (*e*). This was expressly declared in Beamish *v.* Beamish (*f*), and in a case in India where no clergyman could be obtained, it was held that R. *v.* Millis did not apply (*g*).

The Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23) (*h*), which deals with the marriage of British subjects outside the United Kingdom by British marriage officers, provides by sect. 23 that 'nothing in this Act shall confirm or impair or in anywise affect the validity in law of any marriage solemnized beyond the seas otherwise than as herein provided, and the Act shall not extend to the marriage of any of the Royal family.'

Sect. 26 of this Act, after repealing former Acts as to marriages abroad (*i*), provides, subsect. 2, that, 'Every marriage in fact solemnized and registered by or before a British consul or other marriage officer in intended pursuance of any Act hereby repealed shall, notwithstanding

(*c*) R. *v.* Brampton, 10 East. 282. As to Ceylon law see Aronegary *v.* Vaigalie, 6 App. Cas. 364.

(*d*) [1843] 10 Cl. & F. 534, 8 E. R. 844.

(*dd*) Catherwood *v.* Caslon [1844], 13 M. & W. 261. See R. *v.* Manwaring, 26 L. J. M. C. 10; D. & B. 132.

(*e*) As to validation of certain marriages celebrated before July 21, 1879, on public ships on a foreign station, see 42 & 43 Vict. c. 29, s. 2.

(*f*) 9 H. L. C. 274; 11 E. R. 735.

(*g*) Maclean *v.* Cristall, Perry, Oriental Cas. 75. The marriage of Christians in India is regulated by Indian Acts No. XV. of 1872, and No. II. of 1891. The Acts extend to Christian subjects of His Majesty (*i.e.* professing the Christian religion), in the territories of native princes, and states in alliance with His Majesty. The Acts contain special provisions as to native Christians.

(*h*) This Act repealed, by sect. 26, the following enactments:—4 Geo. IV. c. 91; 12 & 13 Vict. c. 68; 31 & 32 Vict. c. 61; 33 & 34 Vict. c. 14, s. 11; 53 & 54 Vict. c. 47; 54 & 55 Vict. c. 74.

(*i*) The following enactments legalise certain marriages outside the U.K.:—58 Geo. III. c. 84 (India). 5 Geo. IV. c. 68 (Newfoundland). 17 & 18 Vict. c. 88 (Mexico). 21 & 22 Vict. c. 46 (Moscow, Tahiti, and Ningpo). 22 & 23 Vict. c. 64 (Lisbon). 23 & 24 Vict. c. 86, and 27 & 28 Vict. c. 77 (Ionian Islands). 30 & 31 Vict. c. 93 (Morro Velho, Brazil). 30 & 31 Vict. c. 2 (Odessa). 31 & 32 Vict. c. 61 (China). And see note (*r*), *ante*, p. 985.

such repeal or any defect in the authority of the consul or the solemnization of the marriage elsewhere than at the consulate, be as valid as if the said Act had not been repealed, and the marriage had been solemnized at the consulate by or before a duly authorised consul;

'Provided that this enactment shall not render valid any marriage declared invalid before the passing of this Act by any competent Court, or render valid any marriage either of the parties to which has before the passing of this Act, lawfully intermarried with any other person.'

Colonial Marriages.—By 28 & 29 Vict. c. 64, after reciting that laws 'have from time to time been made by the legislature of divers of her Majesty's possessions abroad for the purpose of establishing the validity of certain marriages previously contracted therein, but doubts are entertained whether such laws are in all respects effectual for the aforesaid purpose beyond the limits of such possessions,' it is enacted as follows:—

Sect. 1. 'Every law made or to be made by the legislature of any such possession as aforesaid, for the purpose of establishing the validity of any marriage or marriages contracted in such possession, shall have and be deemed to have had from the date of the making of such law, the same force and effect, for the purpose aforesaid, within all parts of her Majesty's dominions, as such law may have had, or may hereafter have, within the possession for which the same was made: Provided that nothing in this law contained shall give any effect or validity to any marriage, unless at the time of such marriage both of the parties thereto were, according to the law of England (*ii*), competent to contract the same.'

Sect. 2. 'In this Act the word "legislature" shall include any authority competent to make laws for any of her Majesty's possessions abroad, except the Parliament of the United Kingdom and her Majesty in Council' (see also 6 Edw. VII. c. 30: 7 Edw. VII. c. 47).

Marriages under other Laws than English.—Where the first marriage was contracted outside England and not under English law, evidence must be given to prove that the marriage was in form and substance valid by the law of the country where it was contracted, and where the second marriage was contracted outside England it is necessary to shew that it was in point of fact valid by the law under which it was celebrated. The laws of other countries being matters of fact must be proved by evidence of experts conversant with that law (*j*) *periti virtute officii* or *virtute professionis*, such as a lawyer practising in the courts of the country whose law is in question, or a person having from professional research or experience a sufficient qualification (*k*).

This rule as to proof of non-English law of marriage applies to Scots, Irish, and colonial law as well as to the law of foreign states, and these laws being matters of fact it is impossible here to deal with them in detail.

Scotland.—The law of Scotland recognises irregular marriages as valid where satisfied that the parties meant to contract marriage (*l*).

(*ii*) See 6 Edw. VII. c. 30.

(*j*) Sussex Peerage Claim, 11 Cl. & F. 85 (which overrules R. *v.* Dent, 1 C. & K. 97). R. *v.* Povey, Dears. 32. See also R. *v.* Griffin, 14 Cox, 308: 4 L. R. Ir. 497; and *post*, Vol. ii. p. 2136.

(*k*) Wilson *v.* Wilson [1903], P. 157.

(*l*) De Thoren *v.* Att.-Gen., 1 App. Cas. 686. Dysart Peerage Claim, 6 App. Cas. 489.

By 19 & 20 Vict. c. 96, s. 1, 'After the 31st of December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom, or usage to the contrary notwithstanding' (*m*).

Where it appeared that the second marriage took place at Gretna Green, and upon the whole evidence the assent of the second wife was not 'distinctly and clearly proved,' and, though the parties had lived together afterwards, the evidence tended rather to shew that they were living together in a state of concubinage, inasmuch as the prisoner still continued to address her by her maiden name, Alderson, B., directed the jury to find the prisoner not guilty (*n*). And where on an indictment for bigamy, to prove the second marriage in Scotland, a witness stated that she (being the sister of the second wife) was present at a ceremony performed by a minister of a congregation, but whether of the Kirk she did not know, in her private house in Edinburgh; that she herself was married in the same way, and that parties were always married in Scotland in private houses; that the prisoner and her sister lived together in her house as man and wife for a few days after the ceremony; and the jury found the prisoner guilty; upon the question being reserved whether the evidence was sufficient to justify the verdict, it was held that, even supposing that the witness had been a competent witness for such a matter, her evidence did not prove a marriage in fact (*o*).

Ireland.—The rules as to prohibited degrees of consanguinity and affinity are the same in Ireland as in England (*p*), and marriages within these degrees are absolutely void (*q*) except in cases within 7 Edw. VII. c. 47 (*r*).

It would seem that the celebration of marriages between two Protestants by a Roman Catholic priest is still illegal and punishable (*s*).

In Ireland at common law a marriage was not valid unless a clergyman in holy orders of the united churches of England and Ireland was present at the marriage ceremony. Where, therefore, A., a member of the Established Church in Ireland, went, in 1829, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a

(*m*) Lawford *v.* Davis, 4 P. D. 61. This Act put an end to Gretna Green marriages between persons, minors and others, domiciled in England. These marriages, after certain doubts, had been recognised as valid in England. Crompton *v.* Bearcroft, Bull. (N. P.) 113. Phillips *v.* Hunter, 2 H. Bl. 412, Eyre, C.J. Ilderton *v.* Ilderton, 2 H. Bl. 145. And see Ogden *v.* Ogden [1908], P. 46.

(*n*) R. *v.* Graham, 2 Lew. 97. In the same case the same learned judge refused to admit the certificate as evidence of the marriage.

(*o*) R. *v.* Povey, Dears. 32; 22 L. J. M. C. 19. In Lapsley *v.* Grierson, 1 H. L. C. 498, it was held that illicit cohabitation in Scotland begun in the lifetime of a husband, and continued after his death, continues to bear an illicit character, unless there be a clear change in its character after the death of the husband is known to the parties.

(*p*) By the Irish Statutes, 28 Hen. VIII. c. 2; 33 Hen. VIII. c. 6; 2 Eliz. c. 1, s. 2.

(*q*) By Lord Lyndhurst's Act, 5 & 6 Will. IV. c. 54, *ante*, p. 996.

(*r*) As to pre-contracts without consummation, see 12 Geo. I. c. 3, s. 3 (Ir.).

(*s*) See 12 Geo. I. c. 3, s. 1. R. *v.* Taggart, 2 Cox, 50. This Act is repealed to an extent difficult to understand by 3 & 4 Will. IV. c. 102, s. 1, and is modified as to mixed marriages by 33 & 34 Vict. c. 110, ss. 32, 33, 38-40.

present contract of marriage with the said B., the minister performing a religious ceremony between them, according to the rites of the Presbyterian church, and A. and B. lived together as man and wife for some time afterwards; but A., afterwards during B.'s life, married another person in a parish church in England; it was held, on an indictment for bigamy (under 10 Geo. IV. c. 34 (rep.)), that the first contract thus entered into was not sufficient to support the indictment (*t*).

A woman was married in 1799, at her father's house, in Ireland, in the presence of the friends of both families, by a clergyman of the Church of England, who had been curate of the parish for eighteen years. The parish church was standing, but persons of respectability were usually married at their own houses; the parties lived together for several years following as man and wife. Upon objection to the validity of this marriage, Best, C.J., said: 'I know of no law which says that celebration in a church is essential to the validity of a marriage in Ireland. The English Marriage Act does not apply, and I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that Act.' Dalrymple *v.* Dalrymple (*u*) has placed it beyond a doubt that a marriage so celebrated as this has been would have been held valid in this country before the existence of that statute (*v*). Where in support of a plea of coverture it was proved that Mrs. Q., in 1842, married Mr. Q. at the house of the Rev. F. M., and Mr. M.'s widow produced his letters of orders shewing that he had been ordained deacon and priest by bishops of the Established Church, and also proved that when persons were married at their house, her husband always made an entry in a register book, which she produced, and also gave a certificate of the marriage to the persons married; and the register contained an entry of the marriage of Mr. and Mrs. Q., and Mrs. Q. proved that she married Mr. Q. as before mentioned, and produced the certificate given to her by Mr. M.; Parke, B., held that the certificate was admissible as a part of the transaction; but not the register; and that the marriage was valid; for although it was not celebrated in a church, it was a valid marriage at common law (*w*).

Where a woman, being a Roman Catholic, and a man, being a Protestant, went in 1826 before W., a clergyman residing in Dublin, who, in his private house, read to them the marriage service, and in the course of it asked her whether she would be the wife of the man, and asked him whether he would be her husband, to which question both of them answered, 'I will'; W. was reputed to be a clergyman of the Established

(*t*) R. *v.* Millis [1843], 8 E. R. 844: 10 Cl. & F. 534. The case was tried at assizes and a special verdict found which was removed by *certiorari* into the Court of Queen's Bench. Perrin and Crampton, JJ., held the first marriage good; but Pennefather, C.J., and Burton, J., held it to be void. In order that 'error' might be brought in the House of Lords, Perrin, J., withdrew his opinion, and judgment was given for the prisoner. In the House of Lords, Lords Brougham, Denman, and Campbell held the first marriage good; but the Lord Chancellor (Lyndhurst), Lord Cottenham, and Lord Abinger held it void; whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, judgment was given for the defendant. In Beamish *v.* Beamish, 9 H. L. C. 274; 11 E. R. 735, it was held that this judgment was as much binding as if it had pronounced *nemine dissentiente*.

(*u*) 2 Hagg. (Consist.) 54.

(*v*) Smith *v.* Maxwell, Ry. & M. 80.

(*w*) Stockbridge *v.* Quicke, 3 C. & K. 305. See 7 & 8 Vict. c. 81, *post*, p. 1004.

Church, and a document purporting to be letters of orders signed and sealed by the late Archbishop of Tuam, dated in 1799, whereby the archbishop certified that he had ordained W. a priest, and which letters were found among W.'s papers at the time of his death in July, 1829, was admitted without proof of the handwriting or seal of the archbishop as being more than thirty years old. It was held that this document was properly received in evidence, being above thirty years old: if it had been only signed there could have been no question as to its admissibility, but it was, in fact, also sealed; but though an archbishop is a corporation sole for many purposes, yet such a certificate has no relation to his corporate character, and the seal must be considered as the seal of the natural person, and not of the corporation; and consequently that there was sufficient evidence of the marriage (*x*).

In a case in 1815 at the Old Bailey, a question was made, whether a marriage of a dissenter in Ireland performed in 1787 by a dissenting minister in a private room, was valid. It was contended on behalf of the prisoner, who was indicted for bigamy, that the marriage was illegal from the clandestine manner in which it was celebrated; and several Irish statutes were cited, from which it was argued that the marriage of dissenters in Ireland ought at least to be in the face of the congregation, and not in a private room. But the recorder is said to have been clearly of opinion that this marriage was valid, on the ground that as, before Lord Hardwicke's Act (26 Geo. II. c. 33), a marriage might have been celebrated in England in a house, and it was only made necessary by the enactment of positive law, to celebrate it in a church, some law should be shewn requiring dissenters to be married in a church, or in the face of the congregation, in Ireland, before this marriage could be pronounced to be illegal: whereas one of the Irish statutes, 21 & 22 Geo. III. c. 25 (*y*), enacted that all marriages between Protestant dissenters, celebrated by a Protestant dissenting teacher, should be good, without saying at what place they should be celebrated (*z*).

Under the Marriages (Ireland) Act, 1844 (7 & 8 Vict. c. 81), passed to remove the mischiefs created by the decision in R. *v.* Millis (*ante*, p. 1003), a marriage may be lawfully solemnised in certain registered places of public worship or before a registrar.

By sect. 4, 'Marriages between parties, both or either of whom are Presbyterians, may be solemnized between 8 a.m. and 2 p.m., with open doors, according to the forms used by Presbyterians, in certified meeting-houses, by licence of a Presbyterian minister or by publication of banns' (*a*).

Sect. 32. 'After any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the actual

(*x*) R. *v.* Bathwick, 2 B. & Ald. 639.

(*y*) Repealed in 1879 (S. L. R. Ir.). All the enactments of the Irish Parliament relating to persons forbidden to solemnise marriage are repealed except 12 Geo. I. c. 3, s. 1, which is against clandestine marriages. *Vide ante*, p. 1002, note (*s*).

(*z*) R. *v.* ——, Old Bailey, Jan. Sess. 1815, *cor.* Silvester, Recorder, MS. The prisoner was an officer in the army; and his first marriage, upon which this question was raised, took place in 1787, at Londonderry. The second marriage was celebrated in London according to the ceremonies of the Church of England.

(*a*) A marriage before this Act by a Presbyterian minister in Ireland was held void. R. *v.* Millis, *ante*, p. 1003. The marriage laws in Ireland are not altered by 49 & 50 Vict. c. 14.

dwelling of either of the parties previous to the marriage, within the district or presbytery (as the case may be), wherein such marriage was solemnized, for the time required by this Act, or of the consent of any person whose consent thereunto is required by law (*b*); and where a marriage shall have been solemnized in a certified Presbyterian meeting-house, it shall not be necessary to prove that either of the parties was a Presbyterian, or, if the marriage was by licence, that the certificate required to be delivered to the minister granting such licence had been so delivered, or, where the marriage was by banns, that a certificate of the publication of banns had been produced to the minister by whom the marriage was solemnized, in cases where such production is required by this Act; nor shall any evidence be given to prove the contrary of any of these several particulars in any suit touching the validity of such marriage, or in which such marriage shall be questioned.'

By sect. 49, 'Except in the case of marriages by Roman Catholic priests, which may now be lawfully celebrated, if any person shall knowingly and wilfully intermarry after the said thirty-first day of March [1845] in any place other than the church or chapel or certified Presbyterian meeting-house, in which banns of matrimony between the parties shall have been duly and lawfully published, or specified in the licence, where the marriage is by licence, or the church, chapel, registered building or office, specified in the notice and registrar's certificate or licence as aforesaid, or without due notice to the registrar, or without certificate of notice duly issued, or without licence from the registrar, in case such notice or licence is necessary under this Act, or in the absence of a registrar where the presence of a registrar is necessary under this Act, or if any person shall knowingly or wilfully, after the said thirty-first day of March, intermarry in any certified Presbyterian meeting-house without publication of banns, or any licence, the marriage of all such persons, except in any case hereinbefore excepted, shall be null and void.'

By the Marriage Law (Ireland) Amendment Act, 1863 (26 & 27 Vict. c. 90), s. 11, in the case of all marriages which may legally be solemnised in Ireland and do not come within the Marriages (Ireland) Act, 1844, or any Act amending it, the parties about to contract the marriage must produce to the clergyman celebrating the marriage a certificate in the form prescribed by the Act (sched. A.) from the registrar of the district in which the marriage is to be solemnised. The certificate is to be signed by the parties, and the witnesses not less than two, and the clergyman, and within three days of the marriage to be posted to the registrar, and by him entered upon the register (s. 13).

The Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870 (*c*), contains provisions as to the churches in which marriages may be celebrated (s. 32), the solemnisation of marriages (s. 33), and as to the grant of licences for marriages by certain specified officials (ss. 34–37), including the secretary of the conference of the Methodist or Wesleyan Church in Ireland (*d*).

(*b*) This to some extent alters the law of Ireland as laid down in R. *v.* Jacobs, 1 Mood. 140, that want of consent under 9 Geo. II. c. 11 (Ir. rep.) made the marriage voidable only if proceedings were taken within the year.

(*c*) Amended in 1871 (34 & 35 Vict. c. 49).

(*d*) 34 & 35 Vict. c. 49, s. 21.

By sect. 38, 'a marriage may, notwithstanding anything to the contrary hereinbefore in this Act contained, be lawfully solemnized by a Protestant Episcopalian clergyman between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, and by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, provided the following conditions are complied with :—

1st. That such notice is given to the registrar and such certificate is issued as at the time of the passing of this Act is required by the Marriages (Ireland) Act, 1844, as amended by the Marriage Law (Ireland) Amendment Act, 1863, in every case of marriage intended to be solemnized in Ireland according to the rites of the united Church of England and Ireland, with the exception of marriages by licence or special licence, or after the publication of banns.

2nd. That the certificate of the registrar is delivered to the clergyman solemnizing such marriage at the time of the solemnization of the marriage.

3rd. That such marriage is solemnized in a building set apart for the celebration of divine service, according to the rites and ceremonies of the religion of the clergyman solemnizing such marriage, and situate in the district of the registrar by whom the certificate is issued.

4th. With open doors.

5th. That such marriage is solemnized between the hours of eight in the forenoon and two in the afternoon, in the presence of two or more credible witnesses.'

Sect. 39, after repealing 19 Geo. II. c. 13 (Ir.), as to avoiding marriages between Papists and certain Protestants, enacts that 'any marriage solemnized by a Protestant Episcopalian clergyman between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, or by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, shall be void to all intents in cases where the parties to such marriage knowingly and wilfully intermarried without due notice to the registrar, or without certificate of notice duly issued, *or without the presence of two or more credible witnesses*, or in a building not set apart for the celebration of divine service, according to the rites and ceremonies of the religion of the clergyman solemnizing such marriage' (*e*).

By 34 & 35 Vict. c. 49, s. 27, 'Whenever a licence for the marriage of a Roman Catholic with a person not a Roman Catholic shall have been issued, pursuant to ss. 25 or 26 of this Act, such marriage may lawfully be solemnized by a Roman Catholic clergyman between such persons' (*f*).

Subsisting.—The prosecution must prove that the first husband or wife was alive at the date of the second marriage. This fact may be

(*e*) See s. 32.

(*f*) Before these Acts a marriage celebrated in Ireland between a Roman Catholic and a Protestant by a Roman Catholic priest was void. 19 Geo. II. c. 13, s. 1. R. *v.* Sunderland, 1 Lew. 109; R. *v.* Orgill, 9 C. & P. 80; Swift *v.* Swift, 3 Knapp, 303. Yelverton *v.* Yelverton, House of Lords, per Lord Wensleydale.

established by the appearance in Court and identification of the party, or by any person who knows the parties and can distinctly prove that the first husband or wife was alive at the crucial date.

In Reed *v.* Norman (*g*), where a daughter wrote to her father in America and the fact that she about two months afterwards received a letter in reply in his handwriting dated 31st May, 1836, was held to be evidence that he was then alive.

There is no presumption of death from the mere fact that it is long since the first husband or wife was last seen or heard of (*h*).

In R. *v.* Lumley (*i*), the prisoner was convicted of bigamy. The first marriage was with V., in the year 1836. The second marriage was with L., on July 9, 1847. The prisoner lived with V. till the middle of 1843, when they separated, and from that time no more had been heard of him. There was no evidence as to his age. The judge at the trial directed the jury that it was a presumption of law that V. was alive at the time of the second marriage. Upon a case reserved it was held, that there was no presumption of law that life continued for seven years, or for any other period after the time of the latest proof of the life of the party, and that it was a question of fact for the jury, under the circumstances of each case, whether a person be alive or dead at any time within the interval of seven years, at the termination of which the protection afforded by statute in cases of bigamy comes into operation, and the conviction was quashed.

In R. *v.* Willshire (*j*), the prisoner had married E. E. in 1864, and while she was still alive he, in April, 1868, married A. L. He was convicted of bigamy for this, and in 1879 he married C. L., and while C. L. was still

(*g*) 8 C. & P. 65. Denman, C.J., held in the same case, that the postmark was evidence that the letter was put into the post, but that the letter might have been written at any time, and therefore proof was given that it was in reply to the daughter's letter; but this seems to have been unnecessary, for the date is *prima facie* evidence of the time when an instrument is written. See R. *v.* Harborne, 2 A. & E. 540. Sinclair *v.* Baggaley, 4 M. & W. 313. Hunt *v.* Massey, 5 B. & Ad. 903. Potez *v.* Glossop, 2 Ex. 191. Anderson *v.* Weston, 6 Bing. (N. C.) 296. Morgan *v.* Whitmore, 6 Ex. 716.

(*h*) See R. *v.* Lumley, L. R. 1 C. C. R. 196. R. *v.* Willshire, 6 Q.B.D. 366, *infra*.

(*i*) L. R. 1 C. C. R. 196; 38 L. J. M. C. 86. In an indictment for bigamy it is incumbent on the prosecutor to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage, and that is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of R. *v.* Twyning, 2 M. & W. 894; R. *v.* Harborne, 2 A. & E. 540; and Doe d. Knight *v.* Nepean, 5 B. & Ad. 86, appear to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the Act then comes into operation, and exonerates the prisoner from criminal culpability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature by this proviso sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz., that when a party has been seen or heard of within seven years a presumption arises that he is still living. That is always a question of fact. See Murray *v.* R., 7 Q.B. 700. R. *v.* Apley, 1 Cox, 71.

(*j*) 6 Q.B.D. 366; 50 L. J. M. C. 57.

alive he, in September, 1880, married E. M. For this last marriage he was again indicted for bigamy, the indictment charging that 'his wife C.' was then alive. There was no evidence that E. E. was alive at the date of the prisoner's marriage to C. L.,—which would have made that marriage invalid,—and the judge held that under the circumstances the burden of proving that E. E. was alive at that date lay on the prisoner. He was convicted, but the Court quashed the conviction on the ground that it was a question for the jury whether upon the facts proved E. E. was alive at the date of the prisoner's marriage to C. L. If E. E. was alive at the date of the prisoner's marriage to C. L. that marriage was void (*jj*); and that marriage being void, the subsequent marriage with E. M. would not be bigamous, unless the prisoner could be shewn to have known of E. E.'s having been alive within the seven years, and even in that case he could not have been convicted on the indictment as it stood.

Continual Absence for Seven Years.—24 & 25 Vict. c. 100, s. 57, does not extend to 'any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, *and* shall not have been known by such person to be living within that time' (*k*).

This exception is available only as a defence to an indictment for bigamy, and even if proved does not validate the second marriage (*l*).

Where there has been such absence, the burden of proof is not upon the prisoner to shew that it was not known to him or her that the wife or husband was living within such time. On an indictment for bigamy, it was proved that the prisoner and his wife had lived apart for seven years, and that the prisoner then married again. There was no evidence of the prisoner's knowledge of the existence of his first wife at the time he married again. The prisoner was convicted. It was held, that the burden of proof that the prisoner did not know that his wife was alive at the time he contracted the second marriage was not on the prisoner, and that the conviction could not be sustained (*m*).

But where there was no evidence of any separation or of the date when the prisoner last saw his wife, it was held that the presumption was that the first wife was living at the time of the second marriage, although it took place seventeen years after the first marriage (*n*).

Even where the first husband or wife has not been continually absent for seven years it is a good defence to prove a *bona fide* belief upon reasonable grounds that at the time of the second marriage the first husband or wife was dead (*o*). Such *bona fide* belief is not sufficient unless proper and reasonable inquiries have in fact been made by the prisoner (*p*).

(*jj*) There being evidence that E. E. was alive in 1868, in the absence of evidence to the contrary she must be presumed to have been alive in 1879, though her disappearance for over seven years would be a bar to conviction for bigamy with E. M. *Vide infra.*

(*k*) See 1 Hale, 693; 3 Co. Inst. 88; 4 Bl. Com. 164; 1 East P. C. 466; R. *v.* Cullen, 9 C. & P. 681; R. *v.* Jones, C. & M. 614; R. *v.* Briggs, D. & B. 98.

(*l*) 4 Bl. Com. 164, note.

(*m*) R. *v.* Curgerwen, L. R. 1 C. C. R. 1. See R. *v.* Heaton, 3 F. & F. 819.

(*n*) R. *v.* Jones, 11 Q.B.D. 118.

(*o*) R. *v.* Tolson, 23 Q.B.D. 168, Coleridge, L.C.J., Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grantham, and Charles, JJ.: diss. Denman, Field, Manisty, JJ., and Pollock and Huddleston, BB., *vide ante*, p. 101.

(*p*) R. *v.* Thomson [1905], 70 J. P. 6, Bosanquet, Common Serjeant. *Cf.* R. *v.* Sellars [1905], 9 Canada Crim. Cas. 153.

But the fact that the prisoner deserted his first wife does not deprive him of the defence created by the exception or that of *bona fide* belief (*q*).

Second Marriage.—It is necessary to prove that the prisoner went through a form of marriage with the second consort which, but for the existence of the impediment of the former marriage, would have been recognised as a marriage valid in form by the law under whose forms it was celebrated. The words of the statute, 'whosoever being married shall marry any other person,' are to be read as though they were, 'whosoever being married shall go through the form and ceremony of marriage,' and the form and ceremony gone through must be such as is known to and recognised by the law as capable of producing a valid marriage, and such a circumstance as that the parties are within the forbidden degree of consanguinity will not prevent the marriage from being bigamous. Where a married woman went through the ceremony of marriage with her deceased sister's husband, it was held that although such second marriage was void under the Marriage Act, 1835 (5 & 6 Will. IV. c. 54, s. 2, *ante*, p. 996), yet she had committed the crime of bigamy (*r*).

Where the prisoner's first wife being dead, he married again, and subsequently went through the form of marriage with his first wife's niece, that marriage was held to be void, but it was also held that the prisoner was rightly convicted of bigamy (*s*).

Where in order to establish a charge of bigamy in a divorce suit it was proved that the husband married a woman in Australia according to the forms of the Church of Scotland, but there was no proof that such forms were recognised as legal by the laws of the colony, it was held that the bigamy was not established (*t*).

(*q*) R. *v.* Faulkes, 19 T. L. R. 250, Kennedy, J. *Cf.* R. *v.* Siffers [1904], N. S. W. State Rep. 320.

(*r*) R. *v.* Brawn, 1 C. & K. 144, Denman, C.J. Such marriages contracted in the U.K. are no longer void or voidable as civil contracts, and such marriages contracted before Aug. 28, 1907, are with certain savings declared valid (7 Edw. VII. c. 47, s. 1). Marriage with the sister of a divorced wife is during the lifetime of the latter still unlawful, s. 3 (2).

(*s*) R. *v.* Allen, L. R. 1 C. C. R. 367, 41 L. J. M. C. 97, which overrules the decision in R. *v.* Fanning, 10 Cox, 411 (Ir.), that bigamy was not committed in respect of a marriage by a Roman Catholic priest, of a Protestant to a Catholic, declared void by the Irish Act, 19 Geo. II. c. 13. *Cf.* R. *v.* Wright, 28 Ir. L. T. R. 131. In R. *v.* Allen the Court said: 'In thus holding, it is not at all necessary to say that forms of marriage unknown to the law, as was the case in Burt *v.* Burt, *infra*, would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorised person, or in an unauthorised place, would be a "marrying" within the meaning of the 57th section of the 24 & 25 Vict. It will be time enough to deal with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case.'

(*t*) Burt *v.* Burt, 29 L. J. P. & M. 133, approved in R. *v.* Allen, *supra*. It has been held by a majority of the Court in Ireland that where the first marriage is shewn to have been contracted in a foreign state according to the laws of the Roman Catholic church it will be presumed to be valid without proof of the law of that state relating to marriage. R. *v.* Griffin, 14 Cox, 308.

Dissolution or Nullification.—If the first husband or wife is proved to have been alive at the date of the second marriage, it is for the defence to prove the dissolution or nullification of the marriage and not for the prosecution to negative it.

The third exception to sect. 57 (*ante*, p. 980) provides that the section shall not extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage by a Court of competent jurisdiction (*u*). A judicial separation which has the effect of a divorce *a mensâ et thoro* is not within the exception (*v*). Under the Act of James, if a divorce *a vinculo* had been decreed, though an appeal by one of the parties suspended the sentence, a marriage pending the appeal was aided by the exception in that statute (*w*).

Under the present law a divorced person may marry again immediately after the decree of divorce has been made absolute, if the time limited for appealing has expired and no appeal has been presented, or if the appeal presented has been dismissed or on the appeal the marriage has been dissolved (*x*).

To avail as a defence the divorce must be by statute (*y*) or by the judgment of a Court having jurisdiction to dissolve the first marriage. It would seem that the words, 'by a Court of competent jurisdiction,' in sect. 57 apply to divorce *a vinculo* as well as to nullity.

It is immaterial where the divorce was granted if the Court granting it had jurisdiction to pronounce a decree of divorce between the parties. This jurisdiction, according to the English view of international law, depends on the domicil of the husband at the date of the proceedings.

In Lolley's case (*z*) the prisoner was indicted under 1 Jac. I. c. 11, for bigamy. Both his marriages were in England; but before his second marriage his wife had obtained a divorce *a vinculo* from him in the Commissary or Consistorial Court of Scotland (*a*). It appeared that he took his wife into Scotland, that she might be induced to institute a suit against him there; and that he cohabited with a prostitute there, for the very purpose of irritating his wife, and furnishing ground for the divorce. The question then arose whether the Scotch divorce came within the exception in the statute of James. The point was reserved. The judges were unanimous that no sentence or act of any foreign country or state

(*u*) The Act of James did not apply where the first marriage was between persons below the age of consent, 3 Co. Inst. 59, nor where a divorce *a mensâ et thoro* has been granted. 1 Hale, 694. 3 Co. Inst. 89. 1 Hawk. c. 42, s. 5. 4 Bl. Com. 164. Middleton's case, Old Bailey, 14 Car. II. Kel.(J.) 27. And see 1 East, P. C. 467.

(*v*) Matrimonial Causes Acts, 1857 (20 & 21 Vict. c. 85), ss. 16, 27, and 1884 (47 & 48 Vict. c. 68), s. 5.

(*w*) 3 Co. Inst. 89. 1 Hale, 694, citing Co. P. C. c. 27, p. 89, and stating further that if the sentence of divorce be reversed or recalled, a marriage afterwards is not aided by the exception, though there was once a divorce.

(*x*) The appeals are now usually from the decree *nisi*, 20 & 21 Vict. c. 85, s. 57; 44 & 45 Vict. c. 68, ss. 9, 10. See Chichester *v.* Mure, 32 L. J. Mat. 146.

(*y*) As in the case of marriages of persons domiciled in Ireland.

(*z*) R. & R. 297 & MS. Bayley, J.: 2 Cl. & F. 567n. The case is referred to by the Lord Chancellor in Tovey *v.* Lindsay, 1 Dow. (H.L.) 117, and see 5 Evans, Coll. St. 348, note (4).

(*a*) Upon the subject of the dissolution of marriages, celebrated under the English law, by the Consistorial Court of Scotland, see a publication of Reports of some Decisions of that Court, by James Fergusson, Esq., Advocate, one of the judges.

could dissolve an English marriage *a vinculo* for grounds on which it was not liable to be dissolved *a vinculo* in England; and that no divorce of an Ecclesiastical Court was within the exception in the third section of the statute, unless it was the divorce of a Court within the limits to which that statute extended (*b*). The judges gave no opinion upon the husband's conduct in drawing on his wife to sue for the divorce, because the jury had not found fraud.

It is clear that in Lolley's case the domicil of the husband was English and not Scotch (*c*), and the case has been much commented upon, and must be treated as either wrong in itself or as inapplicable to the words of the present statute, which contains the words 'any Court of competent jurisdiction,' and is not limited like the Act of James to Ecclesiastical Courts. According to the ruling decisions, both in the House of Lords (*d*) and in the Privy Council (*e*), the test of competency of a Court to grant a divorce *a vinculo* depends not on the place where the marriage was celebrated nor on the nationality of the parties, but on the *bona fide* existing domicil of the husband at the date when the Court is asked to exercise its jurisdiction (*f*). The English Courts will, however, recognise a decree of divorce by a Court not of the domicil if the Court of the domicil would recognise the decree (*g*).

The English Courts will recognise as valid the decision of a competent Christian tribunal, dissolving the marriage between a person domiciled in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion or fraud, and this although the marriage may have been solemnised in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England (*h*).

The fourth exception to sect. 57 (*ante*, p. 980) is that the Act shall not extend 'to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction.' It was resolved upon the Act of James, by all the judges, that a sentence of the spiritual Court against a marriage, in a suit of jactitation of marriage, was not conclusive evidence so as to stop the counsel for the Crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally, and not directly; and further, admitting such sentence to be conclusive, yet that counsel for the Crown might avoid the effect of such sentence, by proving it to have been obtained by fraud or collusion (*i*).

(*b*) The words of 1 Jac. I. c. 11, were 'divorced by any sentence in the *Ecclesiastical Court*.' The words of s. 57 are, 'divorced from the bond of the first marriage.' 'These words are so much more general, that it may be contended that they except every case where, according to the laws of the country where the divorce takes place, there is a legal divorce *a vinculo matrimonii*, and the words "*any* Court of competent jurisdiction" in the next clause, instead of the words "the Ecclesiastical Court," in 1 Jac. I. c. 11, seem to favour this view of the exception.' C. S. G.

(*c*) See Harvey *v.* Farnie, 5 P. D. 153; 6 P. D. 35, Le Mesurier *v.* Le Mesurier [1895], A. C. 517. Bater *v.* Bater [1906], P. 209, 229, 235.

(*d*) Harvey *v.* Farnie, 8 App. Cas. 43.

(*e*) Le Mesurier *v.* Le Mesurier, *ubi sup.*

(*f*) As to circumstances under which a wife may be entitled to seek dissolution in the country where she resides. See Ogden *v.* Ogden [1908], P. 46, 82.

(*g*) Armitage *v.* Att.-Gen. [1906], P. 135.

(*h*) Harvey *v.* Farnie, *ubi sup.* *Cf.* Bater *v.* Bater, *ubi sup.*

(*i*) Duchess of Kingston's case [1776], 20 St. Tr. 355; 2 Smith, L. C. (11th ed.) 731.

There is no exception in the Act where marriages are within the age of consent (*j*).

The dissolution or nullification of the marriage must be proved by producing the private Act (*k*) or the judgment, decree, or sentence of the Court which purported to dissolve or annul the marriage, and by establishing the competence of the tribunal to grant a decree which is valid according to English views of international private law.

It has been held that a Jewish divorce can only be proved by producing the document of divorce delivered by the husband to the wife (*l*). But this ruling, if good for any purpose (*m*), does not apply to dissolution or nullification in England of a Jewish marriage, and if still applicable to such divorces granted abroad must be supplemented by evidence that such divorce was valid in the country in which it took place, *e.g.* in Turkey, where marriage and divorce are regulated by the law of the religious community to which the parties belong (*n*).

Sect. II.—False Statements Made to Obtain or Prevent Marriage.

By the Marriage Act, 1823 (4 Geo. IV. c. 76), 'For avoiding all fraud and collusion in obtaining licences for marriage' (*o*), it is enacted (s.14), 'that before any such licence be granted, one of the parties shall personally swear before the surrogate (*p*), or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance or of any other lawful cause nor any suit commenced in any Ecclesiastical Court to bar or hinder the proceeding of the said matrimony according to the tenor of the said licence, and that one of the parties hath for the space of fifteen days immediately preceding such licence had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized: and where either of the parties, not being a widow or widower, shall be under the age of twenty-one years, that the consent of the person or persons whose consent is required under the provisions of this Act (*q*) have been obtained thereto: Provided always, that if there be no such person or persons having authority to give consent, then upon oath made to that effect by the party requiring such licence it shall be lawful to grant such licence notwithstanding the want of any such consent.'

(*j*) See R. *v.* Birmingham, 8 B. & C. 29. As to former law see *ante*, p. 995, note (*p*).

(*k*) In the case of Irish marriages.

(*l*) Lacon *v.* Higgins, 3 Stark. (N. P.) 178.

(*m*) See the learned note by the reporter, ibid.

(*n*) See Parapano *v.* Happaz [1894], A. C. 195.

(*o*) By the rites of the Church of England.

(*p*) By the canon law and the practice of the Ecclesiastical Courts the surrogate has power to administer the oath (see canon 103 of 1603 and R. *v.* Chapman, 1 Den. 432, Parke, B.). And see 7 Will. IV. & 1 Vict. c. 22, s. 30, *post*, p. 1013. By 3 Geo. IV. c. 75, s. 10 (rep.), a false oath before a surrogate was made perjury. No specific provision to that effect is contained in the Act of 1823. In R. *v.* Fairlie, 9 Cox, 209, the defendant was indicted for falsely swearing before a surrogate that the father had given his consent to the marriage of his daughter. The evidence was that the girl was the illegitimate daughter of G. E., who had not given his consent to her marriage. The Recorder held that, as the indictment had described G. E. as the natural and lawful father, and the evidence shewed that E. A. E. had no natural and lawful father, the prisoner must be acquitted, on the ground of variance between the indictment and the evidence. The question whether the putative father came within 4 Geo. IV. c. 26, s. 16, was not decided.

(*q*) ss. 16, 17.

An offence within the section may be committed by a person falsely swearing that he is one of the parties for whose marriage the licence is required (*r*). The offence is committed even when the marriage has not been and will not be solemnised (*s*). In R. *v.* Chapman (*s*) the prisoner had personated the man for whom the licence was required and had falsely stated the residence of the woman.

An oath taken under the section which is false to the knowledge of the taker in any one of the essential particulars required by the section, seems not to be punishable as perjury but is indictable as a misdemeanor at common law, because it is an attempt to deceive a public officer with reference to a matter of public concern (*t*).

By sect. 30 of the Registration Act, 1837 (7 Will. IV. & 1 Vict. c. 22), 'Every person before whom by the said Acts' (*i.e.* Marriage Act, 1836 (6 & 7 Will. IV. c. 85), or the Marriage Registration Act, 1836 (6 & 7 Will. IV. c. 86)) 'or either of them, an oath is directed to be taken, is hereby authorised to administer the same.'

By the Births and Deaths Registration Act, 1836 (6 & 7 Will. IV. c. 86), s. 41, 'Every person who shall wilfully make or cause to be made for the purpose of being inserted in any register (*u*) of . . . marriage any false statement touching any of the particulars herein required to be known and registered (*v*) shall be subject to the same penalties as if he were guilty of perjury' (*w*).

To support an indictment under this section it is essential that the false statement should have been made wilfully and intentionally and not by mistake only (*x*).

The Marriage Act, 1840 (3 & 4 Vict. c. 72), which provides for the solemnisation of marriages in buildings out of the district wherein one or both parties have dwelt for the time required by the Marriage Act, 1823 (ss. 1–3), enacts (s. 4) that 'every person who shall knowingly and wilfully make any false declaration under the provisions of this Act for the purpose of procuring any marriage out of the district in which the parties or one of them shall dwell shall suffer the penalties of perjury (*y*). Provided always that no such prosecution shall take place after the expiration of eighteen calendar months from the solemnization of such marriage.'

By the Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 2, 'Every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice (*z*) for the purpose

(*r*) R. *v.* Chapman, 1 Den. 432; decided on 4 Geo. IV. c. 17.

(*s*) Id. ibid.

(*t*) R. *v.* Chapman, 1 Den. 432, decided on a similar provision in 4 Geo. IV. c. 17 (rep.). *Vide ante*, p. 528, and *cf.* R. *v.* Foster, R. & R. 459. R. *v.* Verelst, 3 Camp. 422. Such an oath, if taken by a layman, seems not to be cognisable in an Ecclesiastical Court. Phillimore *v.* Machon, 1 P. D. 481.

(*u*) The Registrar-General is required to provide these registers (5 & 6 Will. IV. c. 86, s. 30), but on a prosecution for an offence under this section it is not necessary to prove that the register in question was provided by the Registrar-General. R. *v.* Brown [1848], 17 L. J. M. C. 145; 2 C. & K. 504.

(*v*) See s. 40 and sched. C. of the Act.

(*w*) The portions omitted (relating to births and deaths) were repealed in 1874 (37 & 38 Vict. c. 88, s. 54).

(*x*) R. *v.* Lord Dunboyne, 3 C. & K. 1, 3, Campbell, C.J.

(*y*) *Ante*, p. 455.

(*z*) *i.e.* a notice to the registrar of marriages.

of procuring any marriage under the provisions of any of the said recited Acts (*a*) or this Act shall suffer the penalties of perjury ' (*b*).

By sect. 18, ' Any person who shall knowingly or wilfully make any false declaration or sign any false notice required by this Act for the purpose of procuring any marriage, and every person who shall forbid the granting by any superintendent registrar of a certificate for marriage by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury ' (*c*).

This penal provision extends to banns published or certificates issued on King's ships at sea (*cc*).

By the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 15, ' If a person—

(*a*) knowingly and wilfully makes a false oath (*d*) or signs a false notice (*e*) under this Act, for the purpose of procuring a marriage; or

(*b*) forbids a marriage under this Act by falsely representing himself to be a person whose consent to the marriage is required by law, knowing such representation to be false,

such person shall suffer the penalties of perjury (*c*) and may be tried in any county in England and dealt with in the same manner in all respects as if the offence had been committed in that county.'

By sect. 17, ' All the provisions and penalties of the Marriage Registration Acts, relating to any registrar or register of marriages or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under this Act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted and in terms made applicable to this Act, and as if every marriage officer were a registrar under the said Acts.'

By the Marriage Act, 1898 (61 & 62 Vict. c. 58), which relates to marriages in buildings in England registered for solemnising marriage therein under the Marriage Act, 1836, solemnisation of marriages may take place without the presence of the registrar (unless the parties give him notice requiring his attendance) but in the presence of a person duly authorised under the Act and according to such form and ceremony as the parties may see fit to adopt (ss. 4–10). The Act came into operation on April 1, 1899 (s. 3), and it does not extend to Scotland or Ireland (s. 2).

By sect. 12, ' If any authorised person refuses or fails to comply with this Act or the enactments or regulations for the time being in force with respect to the solemnization and registration of marriages he shall be

(*a*) The Marriage Act, 1836 (6 & 7 Will. IV. c. 85): the Marriage Act, 1837 (7 Will. IV. & 1 Vict. c. 22): and the Marriage Act, 1840 (3 & 4 Vict. c. 72).

(*b*) *i.e.* solemn declaration in writing at the foot of a notice of marriage, signed or subscribed by a party intending marriage, that he or she believes there is no impediment of kindred or alliance or other lawful hindrance to the marriage, as to residence, and as to the consents, if any, required by law having been given.

(*c*) *Ante*, p. 455.

(*cc*) Naval Marriages Act, 1908 (8 Edw. VII. c. 26), s. 3.

(*d*) As to residence, necessary consents, and absence of impediments by kindred, alliance or otherwise (s. 7).

(*e*) See s. 4, forbidding marriage, without the consents required for a marriage in England.

guilty of an offence against this Act, and shall be liable on summary conviction to a penalty not exceeding £10, or on conviction on indictment to imprisonment with or without hard labour for a term not exceeding two years or to a fine not exceeding £50, and shall on conviction cease to be an authorised person.'

By sect. 15, 'So much of sects. 39 and 42 of the Marriage Act, 1836 (*f*), as punishes the solemnisation of or renders void any marriage by reason of the absence of the registrar is hereby repealed as regards any marriage authorised by and solemnized in accordance with this Act.'

By sect. 6 (3), "authorised person" is defined as "a person certified as having been duly authorised for the purpose by the trustees or other governing body of the building or of some registered building in the same registration district" including by sect. 1 in the case of Roman Catholic registered buildings "the bishop or vicar-general of the diocese."'

By the Naval Marriages Act, 1908 (8 Edw. VII. c. 26), s. 3, 'All enactments (including penal provisions) relating—

(1) to the publication of banns and certificates thereof, and

(2) to notices and declarations for obtaining certificates from superintendent registrars and to such certificates and to all rules required under such enactments to be observed shall apply in the case of marriages to which this Act applies, subject to such adaptations therein as may be made by his Majesty by Order in Council' (*g*).

Sect. III.—Offences With Respect to Solemnisation, Registration, &c.

Royal Marriages.—Marriages of members of the Royal family are specially excepted from the Marriage and Registration Acts (*h*), and are governed by the Royal Marriages Act, 1772 (12 Geo. III. c. 11), which confirms the prerogative of the Crown to superintend and approve of the marriages of the Royal family (*i*). The first section enacts, 'That no descendant of the body of his late Majesty King George the Second, male or female (other than the issue of princesses who may have married, or may hereafter marry, into foreign families) (*j*), shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs, or successors, signified under the great seal, and declared in council (which consent, to preserve the memory thereof, is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the privy council); and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.'

The only words in the section essential to make the marriage valid are those requiring the previous consent of His Majesty. The words requiring the recording of the consent on the licence and register of

(*f*) 6 & 7 Will. IV. c. 85, *ante*, p. 987.

(*g*) The Act relates to the publication on King's ships at sea of the banns of officers, seamen, or marines who are on the ship's books.

(*h*) 4 Geo. IV. c. 76, s. 30; 6 & 7 Will. IV. c. 85, s. 40; 55 & 56 Vict. c. 23, s. 23.

(*i*) 1 East P. C. 478.

(*j*) On the marriage of Princess Eugenie Victoria of Battenberg to the King of Spain in 1906, an Order in Council was made.

marriage are directory only, and apply only to cases where the marriage is celebrated in England by licence (*k*).

By sect. 2 provision is made for a marriage, without the Royal consent, of any such descendant, being above twenty-five years of age, after notice to the privy council and the expiration of twelve months after such notice; in case the two Houses of Parliament do not before that time expressly declare their disapprobation of the marriage.

By sect. 3, . . . 'Every person who shall knowingly or wilfully presume to solemnize, or to assist or to be present at the celebration of any marriage, with any such descendant, or at his or her making any matrimonial contract, without such consent as aforesaid first had and obtained, except in the case above mentioned, shall, being duly convicted thereof, incur and suffer the pains and penalties, ordained and provided by the Statute of Provision and *Præmunire* made in the sixteenth year of the reign of Richard the Second' (c. 5, Rev. Stat. (2nd ed.), vol. i. p. 173).

This Act applies to all Royal persons falling within its terms, irrespective of the place where the marriage takes place (*l*); but the penal clause is defective in not providing for the trial of British subjects who violate the Act outside the realm (*m*).

Church of England.—It has not been decided whether refusal by a clergyman of the Church of England to solemnise marriage between a couple who are his parishioners is indictable (*n*). A man and woman who had obtained a certificate of marriage from a registrar under 6 & 7 Will. IV. c. 85, requested a clergyman to appoint a day and hour for marrying them at his church. He refused to marry them unless the man consented to be confirmed. For this refusal the clergyman was indicted as for a statutory offence. The indictment failed for want of proof of a proper demand, but the Court did not decide that the refusal would be indictable even by reference to the statute, and Patteson, J., said that refusal to marry after banns would not be indictable (*n*).

The clergy of the Church of England and of the Protestant Episcopal Church of Ireland are not subject to any obligation to solemnise the marriage of a person whose former marriage has been dissolved on the ground of his or her adultery (*o*); and a clergyman of the Church of England is not bound to solemnise a marriage between a man and his deceased wife's sister (*p*).

The Marriage Act, 1823 (4 Geo. IV. c. 76), which relates only to marriages by licence or banns in churches or chapels of the Established Church of England, enacts (s. 21) that 'if any person shall, from and after the said first day of November [1823], solemnize matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight in the forenoon and three in the afternoon (*q*) unless by special licence from the Archbishop of Canterbury; or shall solemnize matrimony

(*k*) Per Tindal, C.J., in advising the H.L. on the Sussex Peerage Claim, 11 Cl. & F. 85, 148; 6 St. Tr. (N. S.) 79.

(*l*) Sussex Peerage Claim, *ubi sup.* The marriage took place in Rome by the rites of the Church of Rome.

(*m*) Id. ibid.

(*n*) R. *v.* James, 2 Den. 1; 3 C. & K. 167; 19 L. J. M. C 179.

(*o*) 20 & 21 Vict. c. 85, s. 57. See s. 58, as to right to use his church.

(*p*) 7 Edw. VII. c. 47, s. 1. The Act is silent as to ministers of non-established Churches.

(*q*) The hours were extended from 12 noon to 3 p.m. by 49 & 50 Vict. c. 14.

without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same (*r*): or if any person falsely pretending to be in holy orders, shall solemnize matrimony according to the rites of the Church of England, every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be *transported* for the space of fourteen (*s*) years, according to the laws in force for transportation of felons, provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed' (*t*).

The mere fact of institution to a living is no evidence that the person instituted is in orders, nor does it put him in the position of a person who has received holy orders, nor make him compellable to celebrate marriages. The question for the jury is, first, whether the prisoner has ever acquired the position and status which made him an ordained minister (*u*), and if not, whether he knew at the time he performed the ceremony that he had never been ordained (*v*).

The Marriage Act, 1836 (6 & 7 Will. IV. c. 85), provides for civil marriages, at the office of a registrar of marriages, and for marriages in his presence at a registered place of worship not belonging to the Church of England, or by the rules of the Church of England on a certificate from the registrar. By sect. 39, 'Every person who after the said first day of March [1837], shall knowingly and wilfully solemnize any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid, shall be guilty of felony (except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the said society, or between two persons professing the Jewish religion, according to the usage of the Jews), and every person who in any such registered building or office shall knowingly and wilfully solemnize any marriage in the absence of a registrar (*w*) of the district in which such registered building or office is situated, shall be guilty of felony (*x*): and every person who shall knowingly and wilfully solemnize any marriage in England after the said first day of March (except by licence) within twenty-one days after the entry of the notice to the superintendent registrar as aforesaid . . . (*y*) shall be guilty of felony' (*z*).

(*r*) As to marriages out of church see 6 & 7 Will. IV. c. 85, s. 39, *infra*.

(*s*) Now penal servitude from three to fourteen years or imprisonment with or without hard labour for not over two years (20 & 21 Vict. c. 3, s. 2; 54 & 55 Vict. c. 69, s. 1; *ante*, pp. 211, 212).

(*t*) See Lonsd. Cr. L. 140. The Act of 1823 contains no provisions for the punishment of principals in the second degree and accessories. But the principals in the second degree are punishable like the principals in the first degree. The Act does not extend to the marriages of any of the Royal family (s. 30), nor to any marriages amongst Quakers or Jews, where both the parties to any such marriage shall be Quakers or Jews (s. 32). C. S. G.

(*u*) The proper mode of proving this is by production of his letters of ordination. Forgery thereof is a misdemeanor at common law. R. *v.* Etheridge, 19 Cox, 676.

(*v*) R. *v.* Ellis, 16 Cox, 469, Pollock, B.

(*w*) Repealed by 61 & 62 Vict. c. 58, s. 15 (*ante*, p. 1015), as to marriages authorised by and solemnized in accordance with that Act.

(*x*) See 19 & 20 Vict. c. 119, s. 9, &c.

(*y*) The words here omitted were repealed in 1874 (37 & 38 Vict. c. 35). See 7 Will. IV. and 1 Vict. c. 22, s. 3, *post*, p. 1018.

(*z*) This being a felony for which no punishment is provided, is punishable under 7 & 8 Geo. IV. c. 28, s. 8, as amended by 54 & 55 Vict. c. 69, s. 1, *ante*, p. 246.

It is presumed that the building in which a marriage was solemnised was duly registered or licensed for marriage and that the registrar was present (*a*).

Sect. 40. 'Every superintendent registrar who shall knowingly and wilfully issue any certificate for marriage after the expiration of three calendar months after the notice shall have been entered by him as aforesaid, or any certificate for marriage by licence before the expiration of seven days after the entry of the notice, or any certificate for marriage without licence before the expiration of twenty-one days after the entry of the notice (*b*), or any certificate, the issue of which shall have been forbidden as aforesaid by any person authorised to forbid the issue of the registrar's certificate, or who shall knowingly and wilfully register any marriage herein declared to be null and void, and every registrar who shall knowingly and wilfully issue any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the registrar as aforesaid, or who shall knowingly and wilfully solemnize in his office any marriage herein declared to be null and void, shall be guilty of felony.'

Sect. 41. 'Every prosecution under this Act shall be commenced within the space of three years after the offence committed.'

By the Births and Deaths Registration Act, 1837 (7 Will. IV. & 1 Vict. c. 22), s. 3, 'Every superintendent registrar who shall knowingly and wilfully issue any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the superintendent registrar, as provided by the Marriage Act, 1836 (*c*), or who shall knowingly and wilfully solemnize, or permit to be solemnized in his office any marriage in the last recited Act declared to be null and void (*d*), shall be guilty of felony' (*e*).

By the Births and Deaths Registration Act, 1836 (5 & 6 Will. IV. c. 86), s. 42, 'Every person who shall refuse or without reasonable cause omit to register any marriage solemnized by him which he ought to register . . . and every person having the custody of the register book or certified copy thereof or of any part thereof who shall carelessly lose or injure the same or carelessly allow the same to be injured whilst in his keeping shall forfeit a sum not exceeding £50 for every such offence.'

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 36 (*f*), it is made felony punishable by penal servitude for life (*g*):—

(a) 'unlawfully' to 'destroy, deface, or injure or cause or permit to be destroyed, defaced, or injured any register of . . . marriages . . . which now is or hereafter shall be by law authorised or required to be kept in England or Ireland or any part of any such

(*a*) Sichel *v.* Lambert [1864], 33 L. J. C. P. 137, a marriage by the rites of the Church of Rome. R. *v.* Cresswell [1876], 1 Q.B.D. 446; 45 L. J. M. C. 77, a marriage by the rites of the Church of England.

(*b*) See 19 & 20 Vict. c. 119, s. 9, &c.

(*c*) *Cf.* 6 & 7 Will. IV. c. 85, s. 40, *supra*.

(*d*) 6 & 7 Will. IV. c. 85, s. 42, *ante*, p. 987. For instance of a prosecution see Cent. Crim. Ct. Sess. Pap., 29 Nov., 1854.

(*e*) Punishable under 7 & 8 Geo. IV. c. 28, s. 8, *ante*, p. 246.

(*f*) The section also deals with registers of births, baptisms, deaths, and burials.

(*g*) Or not less than three years, or imprisonment with or without hard labour for not more than two years (54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212).

register or any certified copy (*h*) of any such register or of any part thereof.'

(b) to 'forge or fraudulently alter in any such register any entry relating to any . . . marriage or any part of any such register or any certified copy of such register or of any part thereof' (*i*).

(c) 'knowingly and unlawfully' to 'insert or cause or permit to be inserted in any such register or in any certified copy thereof any false entry of any matter relating to any . . . marriage' (*j*).

(d) 'knowingly and unlawfully' to 'give any false certificate relating to any . . . marriage.'

(e) to 'certify 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 shall be so given to be false in any material particular.'

(f) to 'forge or counterfeit the seal of or belonging to any registry office.'

(g) to 'offer, utter, dispose of, or put off, any such register, entry, certified copy, certificate, or seal knowing the same to be false, forged or altered.'

(h) to 'offer, utter, dispose of, or put off, any copy of any entry in any such register knowing such entry to be false, forged or altered.'

Sect. 36 does not apply to the correction of accidental errors by the officiating minister (*k*) or registrar (*l*).

By sect. 37 it is also felony punishable by penal servitude for life (*m*):—

(a) 'knowingly and wilfully' to 'insert or cause or permit 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 . . . marriage.'

(b) to 'forge or alter' or to 'offer, utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid.'

(c) 'knowingly and wilfully' to 'sign or verify any copy of any register so directed or required to be transmitted as aforesaid which copy shall be false in any part thereof, knowing the same to be false.'

(d) 'unlawfully' to 'destroy, deface, or injure, or for any fraudulent purpose' to 'take from its place of deposit or conceal any such copy of any register.'

(*h*) Certified copies of registers of marriages are made up four times a year by the clergy, &c., who keep them, and sent to the superintendent registrar or registrar of the district (6 & 7 Will. IV. c. 86, s. 33; 7 Will. IV. and 1 Vict. c. 22, s. 30); and the latter has also quarterly to send to the Registrar-General the certified copies so received (6 & 7 Will. IV. c. 86, s. 34).

(*i*) See *post*, p. 1732, tit. 'Forgery.'

(*j*) Fraudulent intention is not an essential element in the offence. R. *v.* Asplin [1873], 12 Cox, 391, where the defendant was convicted of falsely signing his name in the register as brother of the bridegroom. To give false information for the purpose of insertion in the register or false information as to a death is within the section. Anon. Anglesey Assizes, July 24, 1875, Coleridge, L.C.J.

(*k*) See 11 Geo. IV. and 1 Will. IV. c. 66, s. 21.

(*l*) 6 & 7 Will. IV. c. 86, s. 44.

(*m*) Or not less than three years, or imprisonment with or without hard labour for not more than two years (54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212).

CANADIAN NOTES.

OFFENCES WITH REFERENCE TO MARRIAGE.

Bigamy, Definition of.—Code sec. 307.

Incompetency no Defence.—Code sec. 307(2).

Excuses.—Code sec. 307(3).

Bigamous Marriages Outside Canada.—Code sec. 307(4).

Form Valid Despite Default of Accused.—Code sec. 307(5).

Jurisdiction of Parliament.—A British subject, domiciled in Canada, and only temporarily absent, continues to owe to Her Majesty, in relation to her government of Canada, an obligation to refrain from the completion, whilst absent without any *animus manendi,* of a prohibited act, a material part of which is committed by him in Canada. Re Bigamy Sections; R. v. Brinkley, 12 Can. Cr. Cas. 454.

The onus is on the Crown to prove the facts that the defendant was, at the time of the second marriage, a British subject, resident in Canada, and had left Canada with intent to commit the offence. R. v. Pierce (1887), 13 Ont. R. 226.

Where the indictment is laid under sub-section 4 of sec. 307, for leaving Canada with intent, it should aver that the accused then was a British subject resident in Canada (stating the place in Canada), and that he then being married, left Canada with intent to go through the form of marriage with another person, and did go through such form of marriage in the foreign country (giving name, time and place). R. v. McQuiggan, 2 Lower Canada R. 340.

It is suggested in Canada Criminal Law (Tremeear) p. 251, that a British subject, resident in Canada, and punishable there for an offence under sec. 307(4), might be tried and punished in England or Ireland for a bigamous marriage in a foreign country, under Imp. Act. 24 & 25 Vict. ch. 100, sec. 57. Earl Russell's Case (1901), A.C. 446, *supra* 980.

Mens Rea.—The provisoes (*a*) and (*b*) of sub-sec. 3, are supplementary to the common law doctrine of *mens rea.* A guilty mind is an essential ingredient of the offence of bigamy, and if a woman, after obtaining information that the man, with whom she has gone through a form of marriage, is already married, leaves him and marries another man, her honest and reasonable belief, that the man she left had a wife living, is a good defence to a charge of bigamy. Semble, the fact of such honest and reasonable belief may be found from the circum-

stances of the case without strict proof of the man's former marriage. The King v. Sellars (1905), 9 Can. Cr. Cas. 153 (N.S.).

An absence of *mens rea* is not to be inferred from the knowledge of the husband that a divorce had been decreed by the foreign Court on his wife's application, and from his having first obtained legal advice that he could legally marry again. R. v. Brinkley (1907), 12 Can. Cr. Cas. 454, 13 O.L.R. 434. (Compare R. v. Thomson (1905), 70 J.P. 6.)

Lengthened Absence.—In R. v. Smith (1857), 14 U.C.Q.B. 565, the first was living at the time of the second ceremony, and it was held that the accused must shew enquiries made, and *bonâ fide* and reasonable belief in the wife's death, to excuse his conduct. This decision would not now be followed in the light of R. v. Curgerwen (1865), L.R. 1 C.C.R. 1, and of the particular form of words used in sec. 407(*b*).

Evidence of a confession by a prisoner of his first marriage is not evidence upon which he can be convicted (following R. v. Savage, 13 Cox 178; R. v. Ray, 20 Q.R. 212. But in R. v. Creamer, 10 L.C.R. 404, the Court of the Queen's Bench (Quebec), decided to the opposite effect. See also R. v. McQuiggan, 2 L.C.R. 346.

Validity.—On an indictment for bigamy, the witness called to prove the first marriage, swore that it was solemnized by a justice of the peace in the State of New York, who had power to marry; but this witness was not a lawyer or an inhabitant of the United States, and did not shew how the authority of the justice was derived. This evidence was held to be insufficient. R. v. Smith (1857), 14 U.C.Q.B. 565; R. v. Ray (1890), 20 O.R. 212.

Upon trials for bigamy proof is required of a first marriage in fact, such as the Court can judicially hold to be valid; mere evidence of cohabitation, and reputation of being married, will not do. R. v. Smith (1857), 14 U.C.Q.B. 656, per Robinson, C.J.

In another case to prove the second marriage, which took place in Michigan, the evidence of the officiating minister, a clergyman of the Methodist Church for twenty-five years, during which time he had solemnized many marriages, that this marriage was solemnized according to the law of the State of Michigan, was held admissible and sufficient. R. v. Brierly (1887), 14 O.R. 535.

In Fact.—On a trial for bigamy, in proof of the prior marriage, a deed was produced executed by the prisoner, containing a recital of the prisoner having a wife and child in England, and conveying real property to two trustees to receive and pay over the rents to his wife, but with a power of revocation to the prisoner. B., one of the trustees, proved the execution of the deed, and that at the time of its execution the prisoner informed him that he had a wife and child living in England, but that he had never paid over any of the rents to her, nor had he ever written to or heard from such alleged wife. It was

held that this was not sufficient evidence to prove the alleged prior marriage. R. v. Duff (1878), 29 U.C.C.P. 255.

Foreign Divorce.—Where both parties to a marriage in Canada are of Canadian domicil, but afterwards become *bonâ fide* domiciled in a foreign country, a decree of divorce, obtained in the foreign country, while they are domiciled there, will be valid in Canada as a defence to a prosecution of either for bigamy in having re-married. A decree of divorce, granted by a Court foreign to the domicil of both parties, pronounced by consent or collusion of the parties both temporarily resident within its jurisdiction, and which recites due proof of grounds sufficient under the foreign law for dissolving a marriage, is invalid in Canada if it be proved that such recital is incorrect, and that, in fact, no evidence was given. R. v. Woods (1903), 7 Can. Cr. Cas. 226, 6 O.L.R. 41.

A foreign divorce will be valid when granted by the Courts of a state in which the husband and wife had a *bonâ fide* domicil, although the wife was living in this province, provided that she was personally served with notice of the divorce proceedings, which were not collusive or contrary to natural justice. Guest v. Guest, 3 O.R. 344.

If the parties have their domicil in a foreign country, and are divorced there without collusion or fraud, by a Court of competent jurisdiction, such a divorce is valid in Canada, and that quite irrespective of the place of marriage, or of the residence or allegiance of the parties, or of their domicil at the time of the marriage, or of the place in which the offence, in respect of which the divorce was granted, was committed. Stevens v. Fiske, Cassels S.C. Dig. 235, 8 Montreal Legal News 42; and see an article by W. E. Raney, K.C., in 34 C.L.J., pp. 546-553. And see Swaizie v. Swaizie, 31 O.R. 330.

Residence abroad is not sufficient to effect a change of domicil, even where such domicil is not the domicil of origin, but one acquired by choice, unless it is accompanied by an intention to remain abroad, and not to return to the former domicil. Bonbright v. Bonbright (1901), 2 O.L.R. 249; McNamara v. Constantineau, 3 Rev. de Jur. (Que.) 482.

A foreign divorce, obtained by the wife of a British subject, domiciled in Canada without service of process on the husband, or submission on his part, to the jurisdiction of the foreign Court, is ineffective to dissolve a marriage performed in Canada, although the wife had, some years before applying for the divorce, left her husband, and taken up residence in the foreign country. A British subject, married and domiciled in Canada, who goes to the United States, accompanied by another woman, for the purpose of marrying her there, and who goes through the form of marriage with her there, and forthwith returns with her to Canada, is guilty of bigamy, and is properly convicted thereof in Canada under sec. 307, notwithstanding such foreign

divorce obtained by his first wife. R. v. Brinkley (1907), 12 Can. Cr. Cas. 454, 14 O.L.R. 434.

Punishment for Bigamy.—Bigamy is an indictable offence, punishable by seven years' imprisonment; and, after a previous conviction, by fourteen years' imprisonment. Code sec. 308.

Feigned Marriages.—Everyone is guilty of an indictable offence, and liable to seven years' imprisonment, who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids or assists in procuring such feigned or pretended marriage. Code sec. 309.

A person accused of an offence under this section shall not be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused. Sec. 1002.

Polygamy.

(*a*) Practising or Contracting—

(1) Polygamy. Code sec. 310.

(2) Conjugal union. Code sec. 310.

(3) Spiritual marriages. Code sec. 310.

(*b*) Cohabitation in conjugal union. Code sec. 310

(*c*) Celebrating rite or ceremony. Code sec. 310.

(*d*) Assisting in compliance with form. Code sec. 310.

(*e*) Procuring form of contract. Code sec. 310.

An Indian who, according to the customs of his tribe, takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under this section. R. v. "Bear's Shin Bone" (1899), 3 Can. Cr. Cas. 329 (N.W.T.).

The mere fact of cohabitation between a man and a woman, each of whom is married to another, will not sustain a conviction under this section (formerly 53 Vict. (Can.) ch. 37, sec. 11), to come within the terms of which there must be "some form of contract between the parties which they might suppose to be binding on them, but which the law was intended to prohibit," and the term "conjugal union" in the statute has reference to a form of ceremony joining the parties, a marriage of some sort before cohabiting with one another. The Queen v. Labrie (1891), Montreal Law Reports, 7 Q.B. 211.

In R. v. Liston, 34 C.L.J. 546, Armour, C.J., held that adultery is not indictable under sec. 310(*b*). But in R. v. Harris (1906), 11 Can. Cr. Cas. 254, it was held by Mulvena, D.M. (Que.), that a man is guilty of an offence under this sub-section who lives "in open, continuous adultery to the scandal of the public." It was not shewn in this case that the accused had gone through any form of marriage with the married woman he was cohabiting with, nor was it found as a fact that he lived with her "in anyq kind of conjugal union," though there was evidence from which this might perhaps have been found.

Unlawful Solemnization of Marriage.—Code sec. 311.

In Ontario.—The Mormon organization known as "the Recognized Church of Jesus Christ of Latter Day Saints," was held in Ontario to be a church and religious denomination within the meaning of the Ontario Marriage Act, although not incorporated in Ontario; and its ordained ministers resident in Ontario are therefore competent to solemnize marriages. R. v. Dickout, 24 O.R. 250.

Marriage Contrary to Law.—Code sec. 312.

Certain persons met and professed to form themselves into an independent church or congregation known as "The First Chinese Christian Church, Toronto," and appointed the defendant, one of their numbers, the minister of the church. At a subsequent meeting he was ordained by two congregationalist ministers, not as a Congregationalist minster, but as a minister of the new independent church. Held, that he was not a minister, ordained or appointed according to the rites and ceremonies of the church or denomination to which he belonged, within the meaning of R.S.O. (1897) ch. 162, sec. 2, sub-sec. 1; and the above facts appearing upon his indictment and trial for solemnizing or pretending to solemnize a marriage without lawful authority, contrary to sec. 311 of the Criminal Code, there was evidence upon which he could be convicted; and his conviction was affirmed. R. v. Brown (1909), 17 O.L.R. 698.

CHAPTER THE THIRTEENTH.

OF CRIMINAL LIBELS.

SECT. I.—PRELIMINARY.

APART from the subject of treason (not dealt with in this work) it is criminal to utter words or publish writings or exhibit matters which are (a) blasphemous, (b) seditious, (c) obscene, or (d) defamatory of individuals. The gist of the offence in the case of classes (a), (b) and (c) is the mischief to religion or government, including the administration of justice,or to public morals,which the publication or exhibition is calculated to cause, and in case (d) the risk of causing a breach of the public peace.

These offences were in the sixth edition of this work treated together under the head of libel and indictable slander. It has been found better to relegate them to more appropriate titles, as all the offences except defamatory libel may be by speech or act as well as by writing, print, &c.

As to blasphemous publications, see *ante*, p. 393.

As to sedition, see *ante*, p. 301.

As to indecent publications and exhibitions, see, *post*, Vol. ii. pp. 1875 *et seq.*

As to interference by invective, &c., with the administration of justice, see *ante*, Book VII. Chapter II. p. 537.

SECT. II.—DEFAMATORY LIBEL.

The publication of matter defamatory of any living private person (*a*) or definite class of living persons (*b*), is an indictable misdemeanor at common law, if effected by writing or print or by signs (*c*), effigies (*d*), or pictures (*e*). Such matter is usually referred to as 'libel'(*f*). Words *spoken*, however defamatory, are not the subject of indictment unless they directly tend to a breach of the peace: *e.g.* by conveying a challenge to fight (*g*), or are seditious (*h*), or blasphemous (*i*), or perhaps obscene (*j*), or constitute an incitement to the commission of an indictable offence (*k*).

(*a*) As to libels on the King or public persons, *vide ante*, pp. 311, 313. As to libels on the dead, *vide post*, p. 1025.

(*b*) R. *v.* Williams, 5 B. & Ald. 595, and see *post*, p. 1024.

(*c*) See 5 Co. Rep. 125; 1 Hawk. c. 28, s. 6, *e.g.* putting a gallows opposite a man's door, or burning him in effigy. Eyre *v.* Garlick, 42 J. P. 68.

(*d*) Monson *v.* Tussauds, Ltd. [1894], 1 Q.B. 71.

(*e*) Du Bost *v.* Beresford, 2 Camp. 511.

(*f*) A defamatory libel is termed *Libellus famosus seu infamatoria scriptura*, and has been usually treated of as scandal, *written* or expressed by symbols. Lamb. Sax. Law 64. Bract. lib. 3. c. 36. 3 Co. Inst. 174. 5 Co. Rep. 125. 1 Ld. Raym. 416. 2 Salk. 417, 418. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology. 'There is no other name but that of *libel* applicable to the offence of libelling; and we know the offence specifically by that name, as we know the offences of horse-stealing, forgery, &c., by the names which the law has annexed to them.' R. *v.* Wilkes, 2 Wils. (K.B.) 121, Camden, C.J.

(*g*) R. *v.* Langley, 6 Mod. 125, 2 Ld. Raym. 1029. R. *v.* Bear, 2 Salk. 417, *ante*, p. 439.

(*h*) *Ante*, p. 301. (*i*) *Ante*, p. 393.

(*j*) *Post*, Vol. ii. p. 1875. (*k*) *Ante*, p. 203.

One spouse cannot take criminal proceedings against the other for defamatory libel (*l*), and communication by one spouse to another of defamatory matter is not publication (*m*).

A defamatory libel which is actionable is also indictable, subject to the power and inclination of juries to acquit where the nature of the libel renders civil proceedings the appropriate remedy (*n*), and the disposition of the Courts to discourage criminal prosecutions launched merely to extract apologies or vindicate private character (*o*). But in certain cases, *e.g.* in the case of libels on the dead, defamation may be indictable, although it is not actionable (*p*).

Matter is defamatory if it tends to blacken the character of another and thereby to expose him to public hatred, contempt, and ridicule (*q*).

In Thorley *v.* Lord Kerry (*r*), Sir J. Mansfield, C.J., said: 'There is no doubt that this is a libel for which the plaintiff in error might have been indicted and punished, because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies.'

As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which to some men is more dear than life itself; it has been held that not only charges of a flagrant nature, reflecting a moral (*s*) turpitude on the party, are defamatory, but also such as set him in a discreditable (*t*), scurrilous, ignominious, or ludicrous (*u*) light, whether expressed in printing or writing, or by signs or pictures; for these equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace (*v*). In R. *v.* Cobbett (*w*), Ellenborough, C.J., said: 'No man has a right to render the person or abilities of another ridiculous, not only in publications but if the peace and welfare of individuals, or of society, be interrupted, or even exposed by types and figures, the act, by the law of England, is a libel.'

From the point of view of criminal law the gist of an indictment for libel is its tendency to lead to a breach of the public peace (*x*).

(*l*) R. *v.* Mayor of London, 1 Q.B.D. 772.

(*m*) Wennbak *v.* Morgan, 20 Q.B.D. 635.

(*n*) Starkie on Libel, 150, 165, 550 (1st ed.) Holt on Libel, 215, 216. Bradley *v.* Methuen, 2 Ford's MS. 78. This must be understood, however, of cases where the libel, from its nature and subject, inflicts a private injury, and not of those cases in which the public only can be said to be affected by the libel.

(*o*) R. *v. The World*, 13 Cox, 205, Cockburn, C.J.

(*p*) *Vide post*, p. 1025.

(*q*) 1 Hawk. c. 73, ss. 1, 2, 3, 7. Bac. Abr. tit. 'Libel' (A. 2).

(*r*) 4 Taunt. 364.

(*s*) *e.g.* a charge of ingratitude. Cox *v.* Lee, 38 L. J. Ex. 219.

(*t*) Bac. Abr. tit. 'Libel' (A. 2). Fray *v.* Fray, 34 L. J. C. P. 45. Villars *v.* Monsley, 2 Wils. (K.B.) 403.

(*u*) Cooke *v.* Ward, 6 Bing. 409.

(*v*) Thus the sending to a young woman of a letter containing a proposal that she should surrender her chastity to the writer was held to be publication of a defamatory libel, which might reasonably tend to provoke a breach of the peace. The letter was opened by the parents of the young woman and was not seen by the young woman herself. R. *v.* Adams, 22 Q.B.D. 66. See also R. *v.* Holbrook, 4 Q.B.D. 42, 46, Lush, J.

(*w*) Holt on Libel, 114, 115.

(*x*) 1 Hawk. c. 28, s. 3. R. *v.* Labouchere, 12 Q.B.D. 320.

Defamatory libel is ranked among criminal offences because of its supposed tendency to raise angry passion, provoke revenge, and thus endanger the public peace (*y*).

A libel against an individual may consist in the exposure of some personal deformity, the actual existence of which would only shew the greater malice in the defendant; and even if it contain charges of misconduct founded on fact, the publication will not be the less likely to produce a violation of the public tranquillity, and it has been observed that persons having a grievance ought to complain for the injury done to them in the ordinary course of law, and not to avenge themselves by the odious proceeding of a libel (*z*).

Upon these principles it has been held to be defamatory to write of a man that he had the itch, and stunk of brimstone (*a*). And an information was granted against the mayor of a town for sending to a nobleman a licence to keep a public-house (*b*). An information was also granted for a publication reflecting upon a person who had been unsuccessful in a lawsuit (*c*); and against the printer of a newspaper for publishing a ludicrous paragraph giving an account of the marriage of a nobleman with an actress, and of his appearing with her in the boxes with jewels, &c. (*d*). A defendant was convicted for publishing in a review, matter tending to traduce, vilify, and ridicule an officer of high rank in the Navy; and to insinuate that he wanted courage and veracity; and to cause it to be believed that he was of a conceited, obstinate, and incendiary disposition (*e*). And an information was granted against a printer of a newspaper, for publishing a paragraph representing the Bishop of Derry as a bankrupt (*f*). Where a count alleged that the defendant published of the Duke of Brunswick the following libel: 'Why should T. be surprised at anything Mrs. W. does? If she chooses to entertain the Duke of Brunswick, she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all the *expatriated* foreigners who crowd our streets to her table, if she thinks fit'; the Court of Exchequer Chamber held that the matter stated was defamatory, as it might be understood in such a sense as to be injurious to the prosecutor's character (*g*). But it was held not to be criminal to circulate a handbill: 'B. O., game and rabbit destroyer, and his wife, the seller of the same in country or in town,' in

(*y*) R. *v.* Holbrook, 4 Q.B.D. 42, 46, Lush, J.: and see Short and Mellor, Crown Practice (2nd ed.), 153.

(*z*) 1 Hawk. c. 73, s. 6. Bac. Abr. tit. 'Libel' (A. 5). 4 Bl. Com. 150, 151. 2 Starkie on Libel, 251, *et seq.* Holt on Libel, 275, *et seq.* The King's Bench Division will not give leave to file a criminal information for libel unless the prosecutor specifically denies the truth of the matters alleged against him. R. *v.* Aunger, 12 Cox, 407. It is said, however, that this rule may be dispensed with, if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in Parliament. R. *v.* Haswell, 1 Doug. 387: 4 Bl. Com. 151, note (6): or against a body of persons discharging public duties. R. *v.* Williams, 5 B. & Ald. 595.

(*a*) Villars *v.* Monsley, 2 Wils.(K.B.) 403.

(*b*) Mayor of Northampton's case, 1 Str. 422.

(*c*) 2 Barnard. (K.B.) 84.

(*d*) R. *v.* Kinnersley, 1 W. Bl. 294. It was sworn that the nobleman was a married man; and the Court said, that under such circumstances the publication would have been a high offence even against a commoner, and that it was high time to stop such intermeddling in private families.

(*e*) R. *v.* Smollet [1759], Holt on Libel, 224.

(*f*) Anonymous, Hil. T. 1812.

(*g*) Gregory *v.* R., 15 Q.B. 957.

the absence of any allegation or proof that the words implied illegal or improper destruction of game or rabbits (*h*).

Imputations on a man in respect of his trade or business, *e.g.* by denying his honesty or solvency, are actionable and might in a strong case be made the subject of indictment (*i*). But there does not seem to be any instance of an indictment for disparaging the goods of a trader (*j*).

Defamation may be effected as well by description, circumlocution, or insinuation as in express terms, and scandal conveyed by way of allegory or irony amounts to a libel. As where a writing, in a taunting manner, reckoning up several acts of public charity done by a person said, '*You will not play the Jew, nor the hypocrite,*' and then proceeded, in a strain of ridicule, to insinuate that what the person did was owing to his vainglory. Or where a publication, pretending to recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed famous for, selected such qualities as their enemies accuse them of not possessing (as by proposing such a one to be imitated for his courage who was known to be a great statesman, but no soldier; and another to be imitated for his learning who was known to be a great general, but no scholar); such a publication being as well understood to mean reproach to the parties with the want of these qualities as if it had done so directly and expressly (*k*). And upon the same ground, not only an allegory, but a publication in hieroglyphics, or a rebus or anagram, which are still more difficult to be understood, may be defamatory (*l*). So a man may be defamed by asking questions; for if a man insinuates a fact by asking a question, meaning thereby to assert it, it is the same thing as if he asserted it in terms (*m*).

A defamatory writing, expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as much a libel as if it had expressed the whole name at large (*n*).

Imputations on a Class.—An indictment lies for general imputations

(*h*) R. *v.* Yates, 12 Cox, 233.

(*i*) See Odgers on Libel (4th ed.), 32.

(*j*) Harman *v.* Delany, Barnard. (K.B.) 289: Fitzgib. 121: 2 Str. 898. Western Counties Manure Co. *v.* Lawes Chemical Manure Co., L. R. 9 Ex. 218. White *v.* Mellin [1895], A. C. 154.

(*k*) 1 Hawk. c. 73, s. 4. Bac. Abr. tit. 'Libel' (A. 3).

(*l*) Holt on Libel, 235, 236.

(*m*) R. *v.* Gathercole, 2 Lew. 237, 255, Alderson, B.

(*n*) Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. R. *v.* Lambert and Perry, 2 Camp. 403, Ellenborough, C.J. And in R. *v.* Watson, 2 T. R. 206, Buller, J., said: 'Upon occasions of this sort I have never adopted any other rule than that which has been frequently repeated by Lord Mansfield to juries, desiring them to read the papers stated to be a libel as men of common understanding, and say whether in their minds it conveys the idea imputed.' See Woolnoth *v.* Meadows, 5 East, 463. 1 Hawk. c. 73, s. 5. *Re* Raed *v.* Huggonson, 2 Atk. 470, Lord Hardwicke. In Bac. Abr. tit. 'Libel' (A. 3), it is said (in the marginal note) that if an application is made for an information in a case of this kind, some friend to the party complaining should, by affidavit, state the having read the libel, and understanding and believing it to mean the party. See Du Bost *v.* Beresford, 2 Camp. 512.

on a body of men, though no individuals be pointed out, because such writings have a tendency to inflame and disorder society, and are therefore within the cognisance of the law (*o*). And scandal published of three or four persons is punishable on the complaint of one or more, or all of them (*p*).

In R. *v.* Osborn (*q*), an information was prayed against the defendant for publishing a paper containing an account of a murder committed upon a Jewish woman and her child, by certain *Jews* lately arrived from Portugal, and living near Broad Street, because the child was begotten by a Christian (*r*). It was objected that no information should be granted in this case, because it did not appear who in particular the persons reflected on were (*s*). But the Court said, that admitting that an information for a libel might be improper, yet the publication of this paper was deservedly punishable on an information for a misdemeanor of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders amongst the people, and inflame them with a universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible. It is enough to specify some of the individuals affected by the libel; and where it was objected that the names of certain trustees, who were part of the body prosecuting, were not mentioned, Lord Hardwicke observed, that though there were authorities where, in cases of libel upon persons in their private capacities, it had been held necessary that some particular person should be named, this was never carried so far as to make it necessary that every person injured by such libel should be specified (*t*).

Where a publication stated that, upon the death of Queen Caroline, none of the bells of the several churches of Durham were tolled; and ascribed this omission to the clergy, and then proceeded to make some severe observations on that body, a criminal information was granted (*u*).

Imputations on the Dead.—There has been some controversy on the question whether and how far an indictment will lie on a libel defamatory of a dead person. Such a libel is not actionable (*v*). Coke, after speaking of libels against private men and magistrates or public persons, says, 'although the private man or magistrate be dead at the time of the making of the libel, yet it is punishable: for in the one case it stirs up others of the same family blood or society to revenge or to break the peace, and in the other the libeller traduces and slanders the state and

(*o*) R. *v.* Gathercole, 2 Lew. 237. See Le Fanu *v.* Malcolmson, 1 H. L. C. 637. Odgers on Libel (4th ed.), 427. Holt on Libel, 237.

(*p*) Holt on Libel, 237. In R. *v.* Benfield, 2 Burr. 980, it was held that an information lay against two for singing a libellous song on A. and B., which first abused A. and then B. And it was said that if the defendants had sung separate stanzas, the one reflecting on A. and the other on B., the offence would still have been entire. See R. *v.* Jenour, 7 Mod. 400.

(*q*) 2 Barnard. (K.B.) 138, 166. Kel. (J.) 230, Pl. 183.

(*r*) The affidavit set forth that several persons therein mentioned, who were recently arrived from Portugal, and lived in Broad Street, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more.

(*s*) R. *v.* Orme (3 Salk. 224; 1 Ld. Raym. 486) was cited.

(*t*) R. *v.* Griffin, 1 Sess. Cas. 257. Holt on Libel, 239.

(*u*) R. *v.* Williams, 5 B. & Ald. 595. No judgment was ever given in this case.

(*v*) R. *v.* Topham, 4 T. R. 126.

government, which dies not' (*w*). This dictum is extra-judicial and did not go to the point in judgment in the case in which it is made (*x*), and according to the latest decisions 'it must be some very unusual publication to justify an indictment or information for aspersing the memory of the dead' (*y*). The decided cases on this subject are not numerous. In R. *v.* Paine (*z*), the libel was on William III. who was living, and Queen Mary II. who was dead. In R. *v.* Critchley (*a*), the case arose on a statement made of Sir Charles Nicoll, deceased, who was father-in-law of a Secretary of State that 'he changed his principles for a red ribbon and voted for that pernicious project the Excise.' In R. *v.* Topham (*b*), the libel imputed to a deceased peer 'unmanly vices and debaucheries.' In that case it was held that an indictment for libel, reflecting on the memory of a deceased person, cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the King's subjects against his relations, and to induce them to break the peace in vindicating the honour of the family.

In R. *v.* Hunt (*c*), the indictment was for publishing Byron's 'Vision of Judgment,' which was alleged to contain imputations on King George III., then deceased.

In R. *v.* Labouchere (*d*), the Court refused to grant a criminal information for statements defamatory of a deceased foreign nobleman.

In R. *v.* Ensor (*e*), on an indictment for newspaper libel on a political opponent who had been dead for three years, which led to an assault on the defendant by the sons of the deceased, Stephen, J., directed an acquittal on the ground that the libel had no reference to any living person. This ruling in his view was inadequate and he later expressed an opinion that in such a case the libel must be intended and not merely calculated to provoke sorrowing relations (*f*).

Sect. III.—Trial.

By the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), sect. 1, Courts of Quarter Sessions for a county or borough have no jurisdiction to try any person for composing, printing, or publishing a defamatory libel.

By sect. 6 of the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), 'Every libel (*g*) or alleged libel and every offence under this Act shall be deemed to be an offence within the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17)' (*h*).

(*w*) *De libellis famosis*, 5 Co. Rep. 125 *a*, a case in the Star Chamber, 3 Jac. I.

(*x*) R. *v.* Topham, 4 T. R. 126, 128, Kenyon, C.J.

(*y*) R. *v.* Labouchere, 12 Q.B.D. 320, 324, Coleridge, C.J. In this case the earlier authorities are discussed.

(*z*) Carthew, 405.

(*a*) 4 T. R. 129, *cit.*

(*b*) 4 T. R. 126.

(*c*) 2 St. Tr. (N. S.) 69. *Vide ante*, p. 312.

(*d*) 12 Q.B.D. 320. The libel imputed was that the deceased was nearly hanged on a charge of supplying to the French army of Italy the flesh of soldiers who had died in hospital or been killed in battle. The application for the information was made by a foreign nobleman resident abroad who was a son of the deceased.

(*e*) 3 T. L. R. 366, Stephen, J.

(*f*) [1887], Steph. Dig. Cr. Law (6th ed.), 227 n.

(*g*) It is immaterial whether the libel is published in a newspaper or not; and the word 'libel' is wide enough to cover blasphemous and seditious, as well as defamatory and obscene libels.

(*h*) *Post*, Vol. ii. p. 1926.

The respective functions of judge and jury with respect to the trial of libel are as follows :—

In criminal cases the judge is to define the crime, and the jury are to find whether the party has committed that offence.

The Libel Act, 1792 (32 Geo. III. c. 60) (*i*), after reciting that 'doubts have arisen whether on the trial of an indictment or information for the making or publishing any libel where an issue or issues are joined between the King and the defendant or defendants on the plea of not guilty pleaded, it be competent to the jury empanelled to try the same to give their verdict on the whole matter in issue,' enacts (s. 1) that 'on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty, upon the whole matter put in issue on such indictment or information ; and shall not be required or directed, by the Court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.' Provided always (s. 2) that on every such trial 'the Court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury, on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases' (*j*).

In cases of libel, as in other cases of a criminal nature, it has been the course for a judge first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction. Whether the particular publication, the subject of inquiry, is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is a question of fact for the jury to determine. The judge as a matter of advice to them in deciding that question, may give his own opinion as to the nature of the publication, but is not bound to do so (*k*).

Sect. IV.—Punishment.

Common Law.—The judgment in cases of defamatory libel at common law was in the discretion of the Court ; and usually consisted of fine, imprisonment without hard labour, and finding sureties to keep the peace (*l*). Judgment was given on each of four counts of an information that the defendant be imprisoned on the first count 'for the space of two months now next ensuing' ; on the second count, 'for the further space of

(*i*) Generally known as Fox's Act. The Act in terms extends to all forms of libel and is not limited to defamation. The Act is said to declare the common law. But prior to its passing it had been in certain cases ruled that the only matters for the jury were publication and the truth of the innuendoes. Parmiter *v.* Coupland, 6 M. & W. 105. Parke, B. Jenner *v.* A'Beckett, L. R. 7 Q.B. 11 : 41 L. J. Q.B. 14. See Erskine's speeches in the case of the Dean of St. Asaph, Ridgway's Col. vol. i. pp. 234, 264.

(*j*) S. 3 provides that the jury may find a special verdict, in their discretion, as in other criminal cases. By s. 4, defendants found guilty may move in arrest of judgment as before the passing of the Act.

(*k*) Parmiter *v.* Coupland, *ubi sup.* Baylis *v.* Lawrence, 11 A. & E. 920. Paris *v.* Levy, 9 C. B. (N. S.) 342. R. *v.* Burdett, B. & Ald. 95 : 1 St. Tr. (N. S.) 1. Fray *v.* Fray, 17 C. B. (N.S.) 603 : 34 L. J. C. P. 45.

(*l*) 1 Hawk. c. 73, s. 21. Bac. Abr. tit. 'Libel,' C. R. *v.* Middleton, Fort. 201 : 1 Str. 177 : R. *v.* Dunn, 12 Q.B. 1026. As to the pillory, *vide ante*, p. 249.

two months, to be computed from and after the end and expiration of his imprisonment ' for the offence mentioned in the first count ; on the third count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the second count ; and on the fourth count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the third count. The third count was adjudged on error to be insufficient : but it was held, that the sentence on the fourth count was not thereby invalidated, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count (*m*).

Statutory Punishments.—The Libel Act, 1843 (6 & 7 Vict. c. 96), now regulates the punishment of persons publishing or threatening to publish defamatory libels.

Sect. 3 (Threats to Publish) is dealt with under ' Robbery and Threats,' *post*, Vol. ii. p. 1158.

Sect. 4. ' If any person shall maliciously publish any defamatory libel knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the Court shall award.'

Sect. 5. ' If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment or both, as the Court may award, such imprisonment not to exceed the term of one year.'

The Court may also or alternatively put the offender under recognisances to keep the peace and be of good behaviour, or deal with the case under the Probation of Offenders Act, 1907 (*n*).

Sects. 4 and 5 do not create any new offence nor alter the nature of the offence of defamatory libel as defined by the common law, but merely limit the punishment for the common law offence in the two cases with which they deal (*o*).

On an indictment for publishing a defamatory libel knowing it to be false (s. 4), the defendant may be convicted of publishing a defamatory libel without the scienter, sect. 5 (*p*).

Costs.—As to costs, see *post*, Vol. ii. pp. 2039, 2042.

Sect. V.—Indictment.

The only matter now essential to be stated in an indictment (*q*) for defamatory libel are that the defendant unlawfully published of and concerning (*r*) a named person (*s*) or a specified body of persons (*t*) certain defamatory matter which must be set out according to its tenor (*u*), with

(*m*) Gregory *v.* R., 15 Q.B. 974.

(*n*) *Ante*, p. 219.

(*o*) R. *v.* Munslow [1895], 1 Q.B. 768. Cf. R. *v.* Mabin [1901], 20 N. Z. L. R. 451.

(*p*) Boaler *v.* R., 21 Q.B.D. 284.

(*q*) For an example of a thoroughly defective indictment, see R. *v.* Barraclough [1906], 1 K.B. 201.

(*r*) R. *v.* Marsden, 4 M. & S. 164. R. *v.* Sully, 12 J. P. 536. Clement *v.* Fisher, 7 B. & C. 459.

(*s*) *Ante*, p. 1021. If it sufficiently appears from the terms of the libel to whom it refers the omission of the words of and 'concerning ' is not fatal. Gregory *v.* R., 15 Q.B. 957.

(*t*) *Ante*, p. 1024. An indictment seems not to lie for continued defaming a person to the jurors unknown. R. *v.* Orme, 1 Ld. Raym. 486, 3 Salk. 224.

(*u*) Bradlaugh *v.* R., 3 Q.B.D. 607, and see *post*, Vol. ii. p 1881.

such averments of extrinsic facts (*v*) and innuendoes as may be necessary to indicate its defamatory meaning and its reference to the person or class defamed (*w*). In some of the older cases the words 'composed' and 'printed' are added to 'published' (*x*); neither of these words is necessary, the gist of the offence being publication and not the composition (*y*) or printing.

It is usual to insert the words 'falsely and maliciously.' But 'falsely' is certainly superfluous (*z*) and omission of the word 'maliciously,' if a defect, is not covered by verdict (*a*). To justify punishment under sect. 4 of the Libel Act, 1843 (*b*), it must be averred and proved that the defendant knew the defamatory words to be false.

It is not essential even when the only publication intended to be proved is to the person defamed to state that the words were intended or calculated to cause a breach of the peace (*c*).

The proper conclusion is 'against the peace, &c.,' the provisions of sects. 4–5 of the Libel Act, 1843 (*d*) not having affected the common law definition of the offence and merely prescribing the punishment according as the scienter is or is not proved (*e*).

The words alleged to be defamatory should, as already stated, be set out according to their tenor (*f*), and with accuracy, and with care not to charge as continuous statements, statements which were in fact separated by intervening matter (*g*). This care is necessary to avoid variance between indictment and proof as to the words or sense and the risk that the Court might be unable or unwilling to amend under 14 & 15 Vict. c. 100, s. 1 (*h*).

Libel in Foreign Languages.—If the libel is in a *foreign language* it is necessary that it should be set forth in the indictment in the original language, and also in an English translation, to prove the translation to be correct (*i*).

Innuendoes.—Innuendoes are inserted to fix and point the defamatory meaning of the words and their reference to the person said to be defamed, and they may not add new matter (*j*).

It is the duty of a judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it (*k*).

(*v*) R. *v.* Yates, 12 Cox, 233.

(*w*) *Vide infra.*

(*x*) See R. *v.* Hunt, 2 Camp. 583. R. *v.* Williams, 2 Camp. 646, Lawrence, J. R. *v.* Knell, 1 Barnard. (K.B.) 305.

(*y*) *Post*, p. 1033.

(*z*) R. *v.* Burke, 7 T. R. 4. R. *v.* Brooke, 7 Cox, 251. And see Wyatt *v.* Gore, Holt (N. P.), 311 n.

(*a*) R. *v.* Harvey, 2 B. & C. 257. R. *v.* Munslow [1895], 1 Q.B. 758.

(*b*) *Vide ante*, p. 1028.

(*c*) R. *v.* Adams, 22 Q.B.D. 66. Older authorities to the contrary are cited there and in Odgers on Libel (4th ed.), 670.

(*e*) *Ante*, p. 1028.

(*d*) R. *v.* Munslow, *ubi sup.*

(*f*) See R. *v.* Barraclough [1906], 1 K.B. 201.

(*g*) See Tabart *v.* Tipper, 2 Camp. 352. The whole writing need not be set forth, but parts not set forth which qualify the matter set forth may be given as evidence. 2 Salk. 417.

(*h*) As to the former strictness see R. *v.* Beech, 1 Leach, 133. R. *v.* Hart, 1 Leach, 145.

(*i*) Zenobio *v.* Axtell, 6 T. R. 162. R. *v.* Peltier, 28 St. Tr. 617. R. *v.* Goldstein, 3 B. & B. 201.

(*j*) R. *v.* Horne, 20 St. Tr. 651. 2 Cowp. 652, De Grey, C.J. R. *v.* Burdett, 4 B. & Ald. 95: 1 St. Tr. (N. S.) 1, Abbott, C.J. And see Odgers on Libel (4th ed.), 110, 669.

(*k*) Blagg *v.* Sturt, 10 Q.B. 899: 16 L. J. Q.B. 39. Hunt *v.* Goodlake, 43 L. J. C. P. 54. Mulligan *v.* Cole, L. R. 10 Q.B. 549: 44 L. J. Q.B. 153.

Where written or printed matter is clearly defamatory of a particular person no statement of intrinsic circumstances, by way of inducement, is necessary (*l*). It is no objection, therefore, that words are not explained by an innuendo where they are commonly enough understood in a defamatory sense to warrant a jury in so applying them (*m*); and in such a case, innuendoes improperly enlarging the sense may be rejected as surplusage after verdict (*n*); for on motion in arrest of judgment, an innuendo which is not warranted by the words themselves nor properly connected with them by prefatory matter, may be rejected (*o*). But the case would be different if the words were capable of two senses, and the innuendo ascribed one meaning to them, and was good on the face of it (*p*). If there be contained in the alleged libel matter which is *capable* of receiving the interpretation put upon it by an innuendo, there is no fault in the count for not having explanatory averments to fix and point the libel. But generally if the words written or spoken *cannot* apply to the individual, no previous averments or subsequent innuendoes can help to give the words an application which they have not. 'Suppose the words to be, "a murder was committed in A.'s house last night," no introduction can warrant the innuendo "meaning that B. committed the said murder," nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly' (*q*). But if an innuendo ascribes to certain words a particular meaning which cannot be supported in evidence, the innuendo, if well pleaded in form, cannot be repudiated on the trial, so as to let in proof that the words have another meaning (*r*). If words are laid to be uttered with intent to convey a particular meaning to persons present, it must be proved that the party uttering them had that meaning, and that they were so understood by the hearers (*s*).

Where a count alleged that the defendant, intending to defame the Duke of Brunswick, published a libel containing divers false and malicious matters and things of and concerning the said duke, that is to say: We should think that no lady would admit to her society such a crack-brained scamp as the Duke of Brunswick (meaning the said duke), the Court of Exchequer Chamber held that these averments shewed sufficiently without more formal introduction, that the libel was of and concerning the duke (*t*).

An information stated, that defendant, intending to excite hatred

(*l*) R. *v.* Tutchin, 14 St. Tr. 1095: 2 Ld. Raym. 1061.

(*m*) Hoare *v.* Silverlock, 12 Q.B. 624. See Homer *v.* Taunton, 5 H. & N. 661, where there was no innuendo to explain 'truck-master,' and it was held that it was properly left to the jury to say whether it was used in a defamatory sense, though no evidence was given to explain its meaning.

(*n*) Harvey *v.* French, 2 Tyr. 585: 1 Cr. & M. 11.

(*o*) Williams *v.* Stott, 3 Tyr. 688; 1 Cr. & M. 675, Bayley, B.

(*p*) Barrett *v.* Long, 3 H. L. C. 395.

(*q*) Solomon *v.* Lawson, 8 Q.B. 823.

(*r*) Williams *v.* Stott, *supra*.

(*s*) Per Bayley, B., ibid., citing Woolnoth *v.* Meadows, 5 East, 470. See as to the office and nature of an innuendo, 1 Stark. on Libel, 418 *et seq.* Clegg *v.* Laffer, 10 Bing. 250; 3 M. & S. 727. Day *v.* Robinson, 1 A. & E. 554, 4 N. & M. 884: West *v.* Smith, 1 Tyr. & Gr. 825. Kelly *v.* Partington, 5 B. & Ad. 645.

(*t*) Gregory *v.* R., 15 Q.B. 957. In the same case 15 Q.B. 974, a count was held bad which suggested that certain words meant that the Duke was suspected of a crime which would bring him into danger of his life by the Court of England on the ground it did not shew in what manner the life of the duke would be endangered.

against the government of the realm, and to cause it to be believed that divers subjects had been inhumanly killed by certain troops of the King, published a libel of and concerning the government of this realm, and of and concerning the said troops, which libel stated, that the defendant saw with abhorrence, in the newspapers, the accounts of a transaction at Manchester, and alleged that unarmed and unresisting men had been inhumanly cut down by the dragoons (meaning the said troops), and then commented strongly upon this being the use of a standing army, and called upon the people to demand justice, &c.; but it did not, in terms, say, that the dragoons acted under the authority or orders of the government. After conviction, a motion was made in arrest of judgment, on the ground that it did not sufficiently appear that the libel was written of and concerning the government, nor of or concerning what troops it was written: but the Court held, that it was obvious, from its whole tenor and import, that it meant to cast imputations upon the government; that it was a libel to impute crime to any of the King's troops, though it did not define what troops in particular were referred to; and that the innuendo of 'the said troops' meant the undefined part of those troops (*u*).

Venue.—The libel must also be proved to have been published by the accused, in the county laid in the indictment (*v*). By 7 Geo. IV. c. 64, s. 12 (*w*), an offence begun in one county and completed in another is triable in either, and at common law, if a man writes a libel in one county and procures its publication in another, he is triable in the latter county (*x*). So if a man writes a libel in London, and sends it by post addressed to a person in Exeter, he is guilty of a publication in Exeter (*y*). And where the defendant wrote a libel in Leicestershire, with intent to publish it in Middlesex, and published it in Middlesex accordingly, and the information against him was in Leicestershire, Abbott, C.J., and Holroyd and Best, JJ., held the information right (*z*). From the same case it appears to have been considered that delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication in the county in which it is so delivered: and further, that if delivering it open were essential, proof that the defendant wrote it in county A., and that C. delivered it unsealed to D. in county B., would be *prima facie* evidence that the defendant delivered it open to C., in the county A., though there be no evidence of C.'s having been in county A. about the time; or that application had been made to D. to know of whom he received it. The information was for writing and publishing a libel in the county of Leicester, and it was proved by the date of the letter that the defendant wrote it in that county, and that A. delivered it to B., for publication in the county of Middlesex, it being then unsealed. A. was not called as a witness; and there was no evidence of his having been in the county of Leicester, or how the libel came to him. The jury were told that as A. had it open, they might presume that he received it open;

(*u*) R. *v.* Burdett, 1 St. Tr. (N. S.) 1; 4 B. & Ald. 314.
(*v*) Case of the Seven Bishops, 12 St. Tr. 354.
(*w*) *Ante*, p. 20.
(*x*) 12 St. Tr. 331.
(*y*) Id. ibid. 332.
(*z*) R. *v.* Burdett, 4 B. & Ald. 95. Bayley, J., doubted. The decision of the majority has been accepted as good law. R. *v.* Ellis [1899], 1 Q.B. 230, 236. *Vide ante*, p. 54.

and that, as the defendant wrote it in the county of Leicester it might be presumed that A. received it in that county; and three judges held against the opinion of Bayley, J., that this direction was proper; and they also held that if the delivering open could not be presumed, a delivery sealed with a view to and for the purpose of publication was a publication; and they thought there was sufficient ground for presuming some delivery, either open or sealed, in the county of Leicester (*a*). It appears from this case that the dating a libel at a particular place is evidence of its having been written at that place (*b*). The postmarks upon a letter are *prima facie* but not conclusive evidence that the letter was in the office to which the postmarks belong at the date thereby specified (*c*). If the envelopes have been destroyed fresh evidence of the postmark is admissible (*d*). If a libellous letter is sent by the post, addressed to a party at a place out of the county in which the venue is laid in an indictment for the libel, yet, if it were first received by him within that county, it is a sufficient publication to support the indictment (*e*). Owning the signature to a libel is no evidence in what county it was signed. This was held in the case of the Seven Bishops (*f*); but additional evidence being afterwards given that the bishops applied to the Lord President of the Council about delivering a petition to the King and that they were admitted to the King for that purpose in Middlesex, the case was left to the jury (*g*).

Sect. VI.—Evidence.

Evidence for the Prosecution.—Where no plea of justification has been filed it is usually sufficient for the prosecution to prove publication of the defamatory libel by or at the instance of the defendant and within the jurisdiction of the Court of trial and to produce and read the libel, and to prove if need be any innuendoes or averments of intrinsic facts necessary to shew the defamatory character of the publication and its reference to the persons charged to be defamed, and also, if the libel is framed on 6 & 7 Vict. c. 96, s. 4 (*h*), that the defendant knew the defamatory matter to be false. If the libel has merely been exhibited

(*a*) Ibid., and MS. Bayley, J.

(*b*) R. *v.* Burdett, 4 B. & Ald. 95.

(*c*) R. *v.* Canning, 19 St. Tr. 283, 370. R. *v.* Plumer [1814], R. & R. 264 & MS. Bayley, J. R. *v.* Johnson, 7 East, 65; 29 St. Tr. 103, 438. Fletcher *v.* Braddyl, 2 Stark. N. P. 64; 2 Stark. Ev. 456 (g). The contrary was held by Ellenborough, C.J., in R. *v.* Watson, 1 Camp. 215, where he said that the postmark might have been forged. But the decision is inconsistent with the cases above cited. Stocken *v.* Collin, 7 M. & W. 529. Odgers on Libel (4th ed.), 625.

(*d*) R. *v.* Johnson, *ubi sup.*

(*e*) R. *v.* Watson, 1 Camp. 215; and see R. *v.* Middleton, 1 Str. 77. In the case of R. *v.* Johnson, 7 East, 65 (*ante*, p. 52), the publisher of a public register received an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom letters should be directed, to which an answer was returned in the register. After this the publisher received two letters in the same handwriting directed as mentioned, and having the Irish postmarks on the envelopes, which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed. It was held that this was a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer, indicative of his having sent them to the publisher of the register in Middlesex for the purpose of publication, the whole was evidence sufficient for the jury to find a publication in Middlesex by the procurement of the defendant.

(*f*) 12 St. Tr. 183.

(*g*) Ibid.

(*h*) *Ante*, p. 1028.

by the defendant, and he refuses on the trial to produce it, after receiving 'notice to produce,' parol evidence may be given of its contents (*i*).

Publication.—To constitute the offence it is essential to prove *publication* (*j*). The mere writing or composing of a defamatory libel by anyone which is neither circulated or read to others, will not render him civilly, nor, it would seem, criminally responsible; nor will he be held to have published the paper, if it be delivered out of his study by his own or his servants' mistake (*k*), or pass out of his possession or control by accident, or some cause independent of his volition.

It is not publication of a libel to take a copy which is not published (*l*). But it is no defence to shew that the libel published was copied from another publication even if published as a copy and the name of the original author stated (*m*), but a person who has written a libel which is afterwards published will be considered as the maker of it, unless he can rebut the presumption of law by shewing another to be the author, or prove the act to be innocent in himself (*n*). For as said by Holt, C.J., if a libel appears under a man's handwriting, and no other author is known, he is taken in the mainour (*o*) and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not

(*i*) R. *v.* Watson, 2 T. R. 201, Buller, J. Att.-Gen. *v.* Lemarchant, ib. 201 n. R. *v.* Boucher, 1 F. & F. 486. R. *v.* Barker, 1 F. & F. 296. And see Odgers on Libel (4th ed.), 676, 677.

(*j*) It is insufficient to prove publication by a husband to his wife or by a wife to her husband (*ante*, p. 1022).

(*k*) R. *v.* Paine, 5 Mod. 167. 'As regards criminal libels there are weighty dicta to the effect that composing is an offence without publication.' In R. *v.* Burdett, 4 B. & Ald. 95, Lord Tenterden said: 'The composition of a *treasonable* paper *intended for publication*, has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing on the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published.' Holroyd, J., said: 'Where a misdemeanor has been committed by writing and publishing a libel, the writing of such a libel so published is in my opinion criminal, and liable to be punished by the law of England as a misdemeanor, as well as the publishing of it.' And again, 'The composing and writing, with intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion of itself a misdemeanor, in whatever county the publishing of it took place.' Upon the principle that an act done, and a criminal intention joined to that act, are sufficient to constitute a crime it should seem that writing a libel with intent to defame is a crime. C. S. G. It is submitted that the *dicta* should be limited to 'composing' treasonable, seditious or blasphemous writings, *ante*, pp. 301, 393.

(*l*) Com. Dig. tit. 'Libel' (B. 2). Lamb's case, 9 Co. Rep. 59. But see R. *v.* Bear, 2 Salk. 417; 1 Lord Raym. 414.

(*m*) De Crespigny *v.* Wellesley, 5 Bing. 392. See R. *v.* Newman, 1 E. & B. 268, 558, *post*, p. 1050. M'Pherson *v.* Daniels, 10 B. & C. 263. Watkin *v.* Hall, L. R. 3 Q.B. 396; 37 L. J. Q.B. 125. R. *v.* Sullivan, 11 Cox, 44 (Ir.) (copy from a foreign newspaper).

(*n*) Bac. Abr. tit. 'Libel' (B. 1). Lamb's case, 9 Co. Rep. 59. The writing a libel may be an innocent act, *e.g.*, in the clerk who draws an indictment, or in the student who takes notes of it. But in Maloney *v.* Bartley, 3 Camp. 210, Wood, B., held, on the trial of an action for libel, in the shape of an *extrajudicial* affidavit sworn before a magistrate, that a person who acted as a magistrate's clerk was not bound to answer whether by the defendant's orders he wrote the affidavit, and delivered it to the magistrate, as he might thereby criminate himself.

(*o*) A man was taken with the mainour, when he was taken with the thing stolen in his possession, or, as it was termed in the ancient indictments, *captus cum manu opere*, and when so taken he might be brought into Court, arraigned, and tried without a grand jury. 2 Hale, 148. Some lords of manors had jurisdiction to try such cases; for I have the record of such an indictment for horse stealing, tried in the Court of Leek, Staffordshire (35 Edw. I.) See Pollock & Maitland, Hist. Eng. Law, ii. 494, 577. C. S. G.

the very man (*p*). Where the manuscript of a seditious libel was in the handwriting of the defendant, and a printer had printed five hundred copies from it, three hundred of which had been posted about Birmingham, but there was no evidence to connect the defendant with the printing or the posting, except the handwriting, it was held, that there was evidence to go to the jury that it was published by the defendant (*q*).

Where, in an action for libel contained in a pamphlet, a witness proved that the defendant gave her a pamphlet, and that she read parts of it, and that she had lent it to several persons, and it was returned to her, but she could not swear the copy produced was the same pamphlet the defendant gave her, but it was an exact copy, if it was not the same, and she believed it to be the same, it was held that this was sufficient evidence to be left to the jury (*r*).

The reading of a libel in the presence of another, without previous knowledge of its being a libel, or the laughing at a libel read by another, or the saying that such a libel is made by J. S., whether spoken with or without malice, does not amount to a publication of the libel. And he who repeats part of a libel in merriment, without any malice or purpose of defamation, is not punishable (*s*). In an action for a libel contained in a caricature print, where the witness stated, that having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed, Lord Ellenborough, C.J., ruled that this was not sufficient evidence of publication to support the action (*t*).

In criminal cases it is not essential as in civil cases of defamatory libel to prove publication to a person other than the person defamed (*u*).

Proof that the libel was contained in a letter directed to the party, and delivered into the party's hands, is sufficient proof of publication (*v*). And delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication (*w*). The production of a letter containing a libel with the seal broken, and the postmark on it, is *prima facie* evidence of publication (*x*).

All persons concerned in any capacity in the publication or circulation of a defamatory libel or in causing or procuring its publication are liable

(*p*) R. *v.* Bear, 1 Ld. Raym. 414; 2 Salk. 417.

(*q*) R. *v.* Lovett, 9 C. & P. 462, Littledale, J.

(*r*) Fryer *v.* Gathercole, 4 Ex. 262.

(*s*) Bac. Abr. tit. 'Libel' (B. 2). This is doubted in 1 Hawkins, P. C. c. 73, s. 14, on the ground that jests of such a kind are not to be endured, and that the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it. As to reading a libel in the hearing of others, knowing it to be such, being a publication of it, see Bac. Abr. tit. 'Libel' (B. 2).

(*t*) Smith *v.* Wood, 3 Camp. 323. And see R. *v.* Paine, 5 Mod. 165, where a *qu.* is made in the margin, whether a person who has a libellous writing in his possession, and reads it to a private friend in his own house, is thereby guilty of *publishing* it.

(*u*) R. *v.* Adams, 22 Q.B.D. 66; 58 L. J. M. C. 1.

(*v*) 1 Hawk. c. 73, s. 11. Bac. Abr. tit. 'Libel' (B. 2), n. (a), Selw. (N. P.) 1050, n. (9). Odgers on Libel (4th ed.), 438, 670. R. *v.* Brooke, 7 Cox, 251. Addressing a letter to a wife containing reflections on her husband has been held publication and sufficient to support an action. Wenman *v.* Ash, 13 C.B. 836; 22 L. J. C. P. 190.

(*w*) R. *v.* Burdett, 4 B. & Ald. 95.

(*x*) Warren *v.* Warren, 1 Cr. M. & R. 360. Shipley *v.* Todhunter, 7 C. & P. 680.

as principals (*y*) unless the part taken by them was lawful (*z*), or innocent, or purely accidental (*a*).

It is usual in the indictment to charge the defendant with having 'published and caused or procured to be published' the libel in question (*b*).

According to the older books it is not material whether he who disperses a libel knew anything of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them (*c*).

This opinion must be read subject to qualification, for a messenger who cannot read, or the carrier of a sealed or closed parcel who has no knowledge of the defamatory nature of its contents, cannot be held criminally responsible for publication (*d*). The disseminator is not liable unless conscious of the contents (*e*) or unless he has notice of their nature putting him on inquiry (*f*). But printers can rarely rely on this defence (*g*). Evidence is of course admissible to prove innocence of the nature of the libel. Thus, where an action was brought against a porter for a libel contained in a handbill, which he had delivered tied up in a paper parcel, evidence was admitted that he delivered the parcel in the course of his business without any knowledge of its contents (*h*).

In such cases the criminal responsibility rests on the person who employs the innocent agent (*i*).

The defendant was indicted for causing to be published in a newspaper a libel which told a story of the prosecutor, and added comments on the story, giving it a ludicrous character. The editor of the newspaper stated that the defendant had expressed a wish to him that he would 'shew up' the prosecutor, and had told him the story. The witness communicated it to a reporter for the paper, and the libel was substantially what was so communicated. Before the publication the defendant remarked to the witness that the article had not yet appeared. After it had appeared, the defendant told the witness that he had seen it, and that he liked it very much. The witness had heard the story before the defendant told it him. It was held, that on this evidence the jury might find that the defendant authorised the publication of this particular

(*y*) 24 & 25 Vict. c. 94, s. 8, *ante*, p. 138.

(*z*) *e.g.*, by reason of absolute privilege, *post*, p. 1041.

(*a*) R. *v.* Munslow [1895], 1 Q.B. 758, 765: 64 L. J. M. C. 138. Wills, J., following Emmens *v.* Pottle, 16 Q.B.D. 354. Cf. R. *v.* Lord Abingdon, 1 Esp. 226.

(*b*) See Arch. Cr. Pl. (23rd ed.) 1122. For other precedents see 2 Cox, App. XXIX., and Odgers on Libel (4th ed.), 752.

(*c*) Bac. Abr. tit. 'Libel' (B. 2). 1 Hawk. c. 73, s. 10.

(*d*) Emmens *v.* Pottle, 16 Q.B.D. 354. R. *v.* Topham, 4 T. R. 127, 128, Kenyon, C.J. R. *v.* Nutt, Fitz. 47.

(*e*) Maloney *v.* Bartley, 3 Camp. 213. Mcleod *v.* St. Aubyn [1899], A. C. 549.

(*f*) Vizetelly *v.* Mudies, Ltd. [1900], 2 Q.B. 170, a case of a book called in as libellous by the publishers and negligently kept in circulation by a library after receipt of the publisher's notice.

(*g*) Lord Hardwicke said in *Re* Read and Huggonson, 2 Atk. 472: 'Though printing papers and pamphlets is a trade by which persons get their livelihood, yet they must take care to use it with prudence and caution; for if they print anything that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous.'

(*h*) Day *v.* Bream, 2 M. & Rob. 54. Patteson, J., said '*prima facie* he was answerable, he had in fact delivered and put into publication the libel complained of, and was therefore called upon to shew his ignorance of the contents.'

(*i*) *Vide ante*, p. 104.

libel, notwithstanding the comments added, as there were both a general authority to publish, and an approval of the particular publication (*j*).

Where a reporter to a newspaper proved that he had given a written statement to the editor of the paper, the contents of which had been communicated to him by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of some slight alterations, not affecting the sense; it was held, that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant; but that the newspaper could not be read without producing the written account delivered by the reporter to the editor (*k*).

In an action for libel the plaintiff complained of the publication in certain newspapers of reports of the proceedings of a board of guardians, containing defamatory statements concerning himself. At the meeting at which the proceedings in question took place, reporters were present in the discharge of their duty as representatives of newspapers. One of the defendants was chairman of the meeting, and the other was present and took part in the proceedings. The latter said that he hoped the local press would take notice of 'this scandalous case,' and requested the chairman to give an account of it. This he accordingly did, and in the course of his statement said, 'I am glad gentlemen of the press are in the room, and I hope they will take notice of it.' The other defendant thereupon said, 'And so do I.' The reports complained of were afterwards inserted in the newspapers, being somewhat condensed, but substantially correct, accounts of what had been said at the meeting. These reports were set out in the declaration, and constituted the libels complained of. The judge at the trial directed a verdict for the defendants, on the ground that there was no evidence of a publication by the defendants of these libels, to which direction the plaintiff excepted. Held (by Keating, Montague Smith, and Hannen, JJ., *diss.* Byles and Mellor, JJ.), that the direction was wrong, and that there was evidence for the jury (*l*).

Where an information for libel stated that the prosecutor had received certain anonymous letters, and that the defendant published a libellous placard of and concerning those letters, and the placard asked, 'Were you not warned that your character was at stake?' and the prosecutor stated that he should not have understood the meaning of the placard

(*j*) R. *v.* Cooper, 8 Q.B. 533. Denman, C.J., said: 'If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request: he contributes to a misdemeanor, and is therefore responsible as a principal.' 'I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state.'

(*k*) Adams *v.* Kelly, Ry. & M. 157.

(*l*) Parkes *v.* Prescott, L. R. 4 Ex. 169, 179: 38 L. J. Ex. 105. Montague Smith, J., in delivering the judgment of the majority of the Court, said: 'In the result, I come to the conclusion that, on principle it is correct to hold that, where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes the matter, adhering to the sense and substance of it, although the language be to some extent his own, the man making the request is liable to an action as the publisher. If the law were otherwise, it would, in many cases, throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents. I make this observation only with reference to the general consequences which would result from the arguments relied on to sustain the defendant's contention.'

if he had not also seen the letters, and that he understood the passage in the placard to allude to the letters, it was held that the letters were admissible without proving who wrote or sent them, as the placard referred to them, and would not be intelligible without them, and that a defendant, who refers to other papers in his publication, must submit to have them read as explanatory of such publication (*m*).

If the handwriting of the defamatory matter is in dispute it may be compared with genuine writing of the defendant. See 28 & 29 Vict. c. 18, ss. 1, 8 (*post*, Vol. ii. p. 2150).

As to the admissibility of depositions taken under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), and the use of gazettes, proclamations, &c., in evidence, see *post*, Bk. xiii. c. iv. and p. 2120.

Malice and Intent.—It is not necessary to prove malice unless the occasion is privileged or the defence of fair comment is raised (*n*). In such cases the evidence must go to shew express malice (*o*).

The criminal intention of the defendant will be matter of inference from the nature of the publication. Where a libellous publication appears unexplained by any evidence, the jury should judge from the overt act; and, where the publication contains a charge defamatory in its nature, should from thence infer that the intention was malicious (*p*). It is a general rule that an act unlawful in itself, and injurious to another, is considered in law to be done *malo animo* towards the person injured; and this is all that is meant by a charge of malice in an indictment or statement of claim for defamatory libel, which is introduced rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose (*q*), and is not essential in an indictment (*r*). The intention may be collected from the libel, unless the mode of publication, or other circumstances explain it; and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect (*s*). Publishing what is a libel without excuse is indictable, though the publisher be free from what in common parlance is called malice; for defaming wilfully without excuse is in law malicious. And even if it could be an excuse, that the publisher believed what he published to be true, it is not so if he professes to publish it from authority. A newspaper contained this paragraph: 'the malady under which his Majesty labours is of an alarming nature [meaning insanity]; it is from authority we speak.' At the trial of the indictment for this publication, the jury asked if a malicious intention were necessary to constitute a libel; to which Abbott, C.J., answered, that a man must have intended to do what his act was calculated to effect; and the jury found the defendant guilty. Upon a motion for a new trial it was admitted that the paragraph was libellous, but it was urged that malice was essential to make the defendant criminal; that he believed

(*m*) R. *v.* Slaney, 5 C. & P. 213, Tenterden, C.J.

(*n*) See Odgers on Libel (4th ed.), 677.

(*o*) *Vide post*, pp. 1039, 1047.

(*p*) R. *v.* Lord Abingdon, 1 Esp. 228. Kenyon, C.J. And see R. *v.* Topham, 4 T. R. 127. R. *v.* Woodfall, 5 Burr. 2667. Stuart *v.* Lovel, 2 Stark. (N. P.) 93.

(*q*) Duncan *v.* Thwaites, 3 B. & C. 584, 585, Tenterden, C.J.

(*r*) R. *v.* Munslow, *ante*, p. 1029.

(*s*) R. *v.* Burdett, 4 B. & Ald. 95. R. *v.* Lovett, 9 C. & P. 462, Littledale, J.

the King to have been so afflicted, and that the answer to the question by the jury was incorrect. But the Court thought otherwise, as the defendant must know whether he spoke from authority, and could have proved it; and if malice were a question of fact, a man must be presumed to have intended to produce the effect which his act will naturally produce; and libelling without excuse is legal malice (*t*). A person who publishes matter injurious to the character of another must be considered, in point of law, to have intended the consequences resulting from that act (*u*), for every man must be presumed to intend the natural and ordinary consequences of his own act (*v*). The judge, therefore, ought not to leave it as a question to the jury, whether the defendant intended to injure the person libelled, but whether the tendency of the publication was injurious to such person (*w*). In some cases, however, the paper or other matter may be libellous only with reference to circumstances which should be laid before the jury by evidence.

In order to shew the existence of actual malice in the mind of the writer of a libel, other libels by him, whether written previously or subsequently, are admissible in evidence (*x*). Where the House of Lords asked the judges 'in an action for defamatory libel, when the plea of the general issue is pleaded, and also a plea under 6 & 7 Vict. c. 96, s. 1, denying actual malice, and stating the publication of an apology set forth in the plea, is it admissible upon a trial for the plaintiff to give evidence of other publications by the defendant (some of them more than six years before the publication complained of) of and concerning the plaintiff, in order to prove malice against the defendant?' the judges answered, 'We are all of opinion that, under such a plea, the publication of the previous libels on the plaintiff by the defendant is admissible evidence to shew that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may shew in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight, not the admissibility of the evidence.' And the House of Lords held accordingly (*y*).

Where an information for libel alleged that a person unknown murdered E. G., and that one H. had been arrested on the charge of committing the murder and discharged, and the libel set out spoke of 'the acquittal of H. for the murder of E. G.;' it was held that the inducement was proved by evidence that a person had been murdered, and that H. had been charged with the murder and afterwards discharged, and that at the inquest held on the body witnesses called the deceased

(*t*) R. *v.* Harvey, 2 B. & C. 257, 2 St. Tr. (N. S.) 1.

(*u*) Fisher *v.* Clement, 10 B. & C. 472, Tenterden, C.J.

(*v*) Haire *v.* Wilson, 9 B. & C. 643, Tenterden, C.J.

(*w*) Haire *v.* Wilson, *supra*.

(*x*) Pearson *v.* Lemaitre, 5 M. & G. 700. Darby *v.* Ouseley, 1 H. & N. 1. Stuart *v.* Lovel, 2 Stark. (N. P.) 93.

(*y*) Barrett *v.* Long, 3 H. L. C. 395. See Hemmings *v.* Gasson, E. B. & E. 346

by the name of E. G., and that this last fact might be proved by the coroner, and that he might for this purpose use an inquisition drawn up on paper (*z*).

Where a declaration for libel set out the following passage: 'We would suggest to the ex-Duke of Brunswick the propriety of withdrawing into his own *natural* and sinister obscurity' (meaning thereby to insinuate that the plaintiff was guilty of unnatural practices), Lord Campbell, C.J., refused to permit a witness to be asked if he had read the libel, and what he understood by the word 'natural' printed in italics, as it was for the jury to form their own opinion as to what was meant by the word so printed (*a*).

In an action for libel it appeared that the plaintiff, an attorney, was employed by one N. to bring an action against an executor; and that the defendant who was employed to adjust the executor's accounts, finding that an action was about to be commenced against the executor, wrote a letter to N. blaming him for allowing the plaintiff to sue, and containing this passage, 'If you will be misled by an attorney, who only considers his own interest, you will have to repent it; you may think when you have once ordered your attorney to write to Mr. G., he would not do any more without your further orders; but if you once set him about it, he will go any length without further orders.' It was held that the question whether this letter applied to the plaintiff individually, or to the profession at large, was properly left to the jury (*b*).

Sect. VII.—Matters of Defence.

The defences to an indictment for defamatory libel are: (1) that the words were not published by the defendant; (2) that they do not refer to the person of whom they are alleged to be published; (3) that they are not defamatory; (4) that if published they are (a) absolutely privileged (*c*), or (b) conditionally privileged and published without express malice (*d*); (5) that if published they are in the nature of fair comment or criticism (*e*); (6) that they are true in substance and in fact and published for the public benefit (*f*). All these defences except the last may be set up under a plea of not guilty. The last must be set up by special plea. Under the plea of not guilty the defendant is entitled to prove that there was no publication or that he was not responsible for it, and to shew that the alleged libel does not relate to or does not defame the person to whom it is alleged to refer, and to prove privilege absolute or qualified, or fair comment.

Publication.—'The publication of a libel when prosecuted as a criminal offence was at common law treated upon an exceptional principle and with exceptional severity (*g*). The maxim "respondeat superior," which, with rare exceptions founded on reasons not applicable to libel, and which

(*z*) R. *v.* Gregory, 8 Q.B. 508.
(*a*) Duke of Brunswick *v.* Harmer, 3 C. & K. 10.
(*b*) Godson *v.* Home, 1 B. & B. 7.
(*c*) *Post*, p. 1041.
(*d*) *Post*, p. 1047.
(*e*) *Post*, p. 1055.
(*f*) *Post*, p. 1057.
(*g*) Libel was thus an exception from the 'distinction between the authority which will make a man liable criminally and that which will make him liable civilly for the acts of another.' Parkes *v.* Prescott, L. R. 4 Ex. 169: 38 L. J. Ex. 105, Byles, J.

I will presently notice (*h*), pertains to civil liability only, was applied to an indictment for libel, and the proprietor of a newspaper in which a libellous article had been inserted was held to be criminally as well as civilly responsible for it, though he had never authorised it nor had anything to do with its insertion and whether the editor had inserted it by negligence or wilfully' (*i*).

In accordance with this rule, proof of the purchase of a book or paper containing defamatory matter, in a bookseller's shop, was held *prima facie* evidence of publication by the master, although it did not appear that he knew of any such book being there, or what the contents thereof were, and though he was not upon the premises, and had been kept away for a long time by illness; the Court would not presume that it was obtained and sold there by a stranger, and held that the master must, if he suggested anything of this kind in his excuse, prove it (*j*). So the proprietor of a newspaper was held answerable, criminally as well as civilly, for the acts of his servants in the publication of a libel, although it could be shewn that such publication was without the privity of the proprietor (*k*); for a person who derives profit from, and who furnishes means for, carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, was presumed to cause to be published what actually appeared, and ought to be answerable, although it could not be shewn that he was individually concerned in the particular publication (*l*); and these were acts done in the course of the trade or business carried on by the proprietor.

But there were cases in which the presumption arising from the proprietorship of a paper might be rebutted by evidence in exculpation or contradictory (*m*). Thus in an action for a libel, where it appeared upon the evidence that the defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters; that a customer, to whom a bill written by the daughter had been sent by the daughter, sent it back on the ground of the charge being too high, and that the bill was afterwards returned to the customer, inclosed in a letter also written by the defendant's daughter, and being a libel upon the plaintiff, who had inspected and reduced the bill for the customer; it was held that this was not sufficient evidence to go to a jury, either of command, authority, adoption, or recognition by the defendant (*n*).

The rigour of the common law was mitigated by sect. 7 of the Libel Act, 1843 (6 & 7 Vict. c. 96), which enacts that 'Whensoever, upon the

(*h*) See R. *v.* Stephens, L. R. 1 Q. B. 702 (public nuisance).

(*i*) R. *v.* Holbrook, 4 Q.B.D. 42, 46, Lush, J. See R. *v.* Walter [1808], 3 Esp. 21. Colbourn *v.* Patmore [1834], 1 Cr. M. & R. 73, where Alderson, B., said, 'A master is presumed to authorise the insertion of a libel.'

(*j*) Bac. Abr. tit. 'Libel' (B. 2). R. *v.* Nutt, Fitzgib. 47; 1 Barnard. (K.B.) 306; 2 Sess. Cas. 33, pl. 38. And see R. *v.* Almon, 5 Burr. 2686, relating to Junius' letters which were published in a magazine bought at the defendant's shop and purporting to be 'printed for him.'

(*k*) R. *v.* Walter, 3 Esp. 21. R. *v.* Dod, 2 Sess. Cas. 33, pl. 38. 1 Hawk. c. 73, s. 10. Woodfall's case, Essay on Libels, p. 18. Salmon's case, K.B. Hil. 1777.

(*l*) R. *v.* Gutch, M. & M. 433, Tenterden, C.J.

(*m*) R. *v.* Gutch, M. & M. 433, Tenterden, C.J., and see R. *v.* Almon, 5 Burr. 2686.

(*n*) Harding *v.* Greening, 8 Taunt. 42. It was also held in this case that the daughter could not be compelled to prove by whose direction the letter was written. The answer would tend to fix herself with the crime of writing it.

trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part' (*o*).

This section is not limited to newspapers. 'It applies to any printed or written slander, whether contained in a newspaper, book, bill, or letter. What it deals with is the libel, nothing more' (*p*). Nor does it say what is the effect of proving the negative: 'but there can be as little doubt that it means it to be an entire defence entitling the defendant to a verdict and not merely to a mitigation of punishment' (*q*). The effect of the section as regards newspapers is to make the existence of an authority by the proprietor to the editor to publish libels no longer a presumption of law, but a question of fact. Under the former law the only question of fact was whether the proprietor authorised the publication of the newspaper; under the section it is whether he authorised the publication of the particular libel. Though production of the newspaper containing the libel with proof that he is owner raises a *prima facie* case of responsibility, he may under sect. 7 displace this case by appropriate evidence, and the jury are to be directed that criminal intention is not to be presumed, and that the general authority to an editor to conduct a newspaper is not *per se* evidence that the owner authorised or consented to the publication by the editor of a libel in the paper (*r*).

It is not open *to the defendant* to prove that a paper similar to that, for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it (*s*). Where the alleged libel was contained in a newspaper, it was held that the defendant had a right to have read in evidence any extract from the same paper, connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter, and printed in a different character (*t*). This rule is of general application so far as the context or other matter in the same publication qualifies or explains the matter charged as defamatory.

1. *Absolute Privilege.*

Petitions to the King.—A petition to the King to be relieved from doing what the King has directed the party to do, if made *bona fide* and in respectful terms, is not punishable, though it call in question the legality of the King's direction. James II. published a declaration of liberty of conscience and worship to all his subjects, dispensing with the oaths and tests prescribed by statutes of Charles II. (25 Car. II. c. 2, and 30 Car. II. st. 2) (*u*), and directed that it should be read two days in every church

(*o*) The section is not limited to defamatory libels. R. *v.* Bradlaugh, 15 Cox, 217. R. *v.* Ramsay, 15 Cox, 231. *Vide ante*, p. 310.

(*p*) R. *v.* Holbrook, 4 Q.B.D. 42, 48: 47 L. J. Q.B. 35, Lush, J.

(*q*) Id. ibid.

(*r*) Id. ibid.

(*s*) R. *v.* Holt, 5 T. R. 436.

(*t*) R. *v.* Lambert, 2 Camp. 398; 31 St. Tr. 335.

(*u*) The first of these Acts was repealed in 1863, the second in 1866 (29 & 30 Vict. c. 19, s. 6).

and chapel in the realm, and that the bishops should distribute it in their dioceses that it might be so read. The Archbishop of Canterbury and six bishops presented a petition to the King praying that he would not insist upon their distributing and reading it, principally because it was founded on such a dispensing power as had often been declared illegal in Parliament, and that they could not in prudence, honour, or conscience, so far make themselves parties to it as to distribute and publish it. This petition was treated as a libel: they were taken up and tried for it. The publication was proved; and Wright, C.J., and Allibone, J., thought it a libel: but Holloway and Powell, JJ., thought otherwise, there not being an ill intention of sedition in the bishops, and the object of their petition being to free themselves from blame in not complying with the King's command (*v*).

Statements made in a petition to Parliament or to a committee (*w*) of either House are absolutely privileged (*x*).

Proceedings in Parliament.—The members of the two Houses of Parliament, by reason of their privilege (*y*), are not answerable in law for any personal reflections on individuals contained in speeches in their respective Houses; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public, should, in the execution of their high functions, be wholly uninfluenced by private considerations (*z*).

The same privilege attaches to evidence given before committees (*a*). This form of privilege is limited to what is published in Parliament, and does not apply to republication outside (*z*), except perhaps to *bona fide* publication by a member for the information of his constituents (*b*).

Reports of Proceedings in Parliament.—The publication of a report of a debate in either House of Parliament is not absolutely privileged: but if it be accurate the publisher is not responsible for defamatory statements made in the course of the debate so reported and published (*c*), or for the publication of articles fairly commenting upon the debate so reported and published (*d*).

(*v*) Case of the Seven Bishops, 12 St. Tr. 183. Hare *v.* Mellers, 3 Leon. 138, 163.

(*w*) In Lake *v.* King [1668], 1 Wms. Saund. 131 *a*, it was held that the printing of a false and scandalous petition to a committee of the House of Commons and a delivery of copies *to the members of the committee* was justifiable (*qu.* absolutely privileged), because it was in the order and course of proceedings in Parliament. Cf. Kane *v.* Mulvany, Ir. Rep. 2 C. L. 402. In R. *v.* Salisbury, 1 Ld. Raym. 341, it was said to be indictable to publish a scandalous petition to the House of Lords.

(*x*) R. *v.* Creevey, 1 M. & S. 273, 278, Ellenborough, C.J. See Wason *v.* Walter, L. R. 4 Q.B. 73.

(*y*) By 4 Hen. VIII. c. 3 (*pro* Ricardo Strode), members of Parliament are protected from all charges against them for anything said in either House; and this is further declared in the Bill of Rights, 1 Will. & M. st. 2, c. 2. See Dillon *v.* Balfour, 20 L. R. Ir. 600. Fielding *v.* Thomas [1896], A. C. 600, 612.

(*z*) See Holt on Libel, 190. 1 Starkie on Libel, 239. Odgers on Libel (4th ed.), 219. R. *v.* Lord Abingdon, 1 Esp. 226. R. *v.* Creevy, 1 M. & S. 273.

(*a*) Goffin *v.* Donnelly, 6 Q.B.D. 307.

(*b*) Wason *v.* Walter, L. R. 4 Q.B. 95.

(*c*) Davison *v.* Duncan, 7 E. & B. 233.

(*d*) Wason *v.* Walter, L. R. 4 Q.B. 95; 38 L. J. Q.B. 34, *et per cur.*, 'Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of R. *v.* Lord Abingdon, 1 Esp. 225, and R. *v.* Creevey, 1 M. & S. 273. At the same time it may be as well to observe

This privilege is extended to the publication in newspapers in the case of fair and accurate reports of the proceedings of a select committee of either House unless published maliciously (*e*).

This privilege will be destroyed by proof of express malice (*f*).

Parliamentary Publications.—The Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9) (*g*), after reciting, 'whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned:' enacts (sect. 1) that 'it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of

that we are disposed to agree with what was said in Davison *v.* Duncan, 7 E. & B. 232, as to such a speech being privileged if *bona fide* published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a Court of justice of immunity will equally apply to a report of proceedings in Parliament. We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in the *Times*, commenting on the debate in the House of Lords; and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told that the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made; and that consequently the occasion was privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts; in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice; but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion, that a person taking upon himself publicly to criticise and to condemn the conduct or motives of another must bring to the task not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem under the circumstances of the case a fair and legitimate criticism on the conduct and motives of the party who is the object of censure. See Henwood *v.* Harrison, L. R. 7 C.P. 606; 41 L. J. C.P. 206.

(*e*) 51 & 52 Vict. c. 64, s. 4, *post*, p. 1049. See R. *v.* Wright, 2 T. R. 293. Kane *v.* Mulvany, Ir. Rep. 2 C. L. 402.

(*f*) Wason *v.* Walter, L. R. 4. Q.B. 73.

(*g*) This Act was passed in consequence of the decision in Stockdale *v.* Hansard, 9 A. & E. 1. See Wason *v.* Walter, *ubi sup.*, Cockburn, C.J.; Henwood *v.* Harrison, L. R. 7 C.P. 606, Willes, J. By s. 28 of the Unlawful Societies Act, 1799 (39 Geo. III. c. 79, *post*, p. 1062), nothing in that Act contained shall extend or be construed to extend to any papers printed by the authority and for the use of either House of Parliament. See Burr *v.* Smith [1909], 2 K. B. 306.

either House of Parliament, to bring before the Court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior Courts of Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue of this Act' (*h*).

By sect. 2, 'In case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to 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 (*hh*), of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.'

By sect. 3, 'It shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or an abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to shew that such extract or abstract was published *bona fide* and without malice; and if such shall be the opinion of the jury a verdict of not guilty shall be entered for the defendant or defendants' (*i*).

By sect. 4, 'Nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.'

Judicial Proceedings.—A defamatory statement made on oath or otherwise *in the course of* a judicial proceeding before a Court of competent jurisdiction cannot be made the subject of criminal proceedings for libel (*j*).

(*h*) This section makes it imperative upon the Court to stay proceedings. Stockdale *v.* Hansard, 11 A. & E. 297. Mangena *v.* Wright [1909], 25 T. L. R. 534.

(*hh*) As to incorrect extracts, see Reis *v.* Perry, 64 L. J. Q.B. 566.

(*i*) As to the extent to which this section protects *bona fide* publication of extracts from a Parliamentary paper published as a blue book, see Mangena *v.* Edward Lloyd, Ltd. [1908], 24 T. L. R. 610; [1909], 25 T. L. R. 10. Same *v.* Wright [1909], 25 T. L. R.

(*j*) McCabe *v.* Joynt [1901], 2 Ir. Rep. 115, 117.

It is immaterial whether the statement is made by a person sitting in a judicial capacity (*k*), or by jurors (*l*), advocate (*m*), party (*n*), or witness (*o*), and the privilege extends to proceedings to swear articles of the peace or *ex parte* applications to a court of justice (*p*).

The privilege extends to the pleadings and documents created or used for the purpose of the proceedings. Thus where the defendant, in an affidavit filed in Court, said that the plaintiff in a former affidavit against the defendant had sworn falsely, the Court held that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood (*q*).

And the calendars of prisoners for trial at assizes or quarter sessions, and the cause lists are within the privilege (*r*).

The privilege has been held to extend to reports by an official receiver, in execution of his duties under the Companies Winding-up Act, 1890 (*s*).

The privilege is not a privilege to be malicious but a privilege that statements in judicial inquiries should be exempt from any inquiry whether they were prompted by malice or not, it being for the public interest that such statements should be made without any apprehension of subsequent legal proceedings (*t*).

Reports and Acts of State Officials.—Absolute privilege also attaches to certain classes of communications made by a state official in advising the Crown, or by one official to another, whether superior or equal in rank, in pursuance of official duty (*u*), and to official notifications of matters of state concern (*v*). As regards publication of such notices in newspapers see 51 & 52 Vict. c. 64, s. 4, *post*, p. 1049.

Statements made in the courts of proceedings of military and naval tribunals, whether strictly judicial or not, seem to be in the same position, as statements in ordinary judicial proceedings, on grounds of public policy and convenience: the object being to secure the free and fearless discharge of high public duty, the administration of justice and the maintenance of military discipline on which the welfare and safety of the State depends (*w*). In the cases relating to this subject care must be

(*k*) Anderson *v.* Gorrie [1895], 1 Q.B. 668 (colonial judge). Hodgson *v.* Pare [1899], 1 Q.B. 455. Barrett *v.* Kearns [1905], 1 K.B. 544. Law *v.* Llewellyn [1906], 1 K.B. 487 (justice of the peace), and see Odgers on Libel (4th ed.), 220-231.

(*l*) R. *v.* Skinner, Loftt, 55. Little *v.* Pomeroy, Ir. Rep. 7 C. L. 50. 1 Hawk. c. 73, s. 8. Bac. Abr. tit. 'Libel' (A).

(*m*) Munster *v.* Lamb, 11 Q.B.D. 588 (solicitor). Hodgson *v.* Scarlett, 1 B. & Ald. 232 (barrister). And see Odgers on Libel (4th ed.), 221.

(*n*) Odgers on Libel (4th ed.), 226.

(*o*) Seaman *v.* Netherclift, 2 C. P.D. 53.

(*p*) 1 Hawk. c. 73, s. 8. Bac. Abr. tit. 'Libel' (A) 4. Hodgson *v.* Scarlett, 1 B. & Ald. 232, per Holroyd, J. It is held by some that no want of jurisdiction in the Court to which the complaint shall be exhibited will make it a libel; because the mistake of the Court is not imputable to the party, but to his counsel; see 1 Hawk. c. 73, s. 8; 1 Starkie on Libel, 254 (2nd ed.).

(*q*) Astley *v.* Younge, 2 Burr. 817. Revis *v.* Smith, 18 C. B. 126. Henderson *v.* Broomhead, 4 H. & N. 569, cases of malicious and false affidavits. See Fitzjohn *v.* Mackinder, 9 C. B. (N. S.) 505; Doyle *v.* O'Doherty, C. & M. 418.

(*r*) Andrews *v.* Nott Bower [1895], 1 Q.B. 588, 896, Rigby, L.J.

(*s*) Bottomley *v.* Brougham [1908], 1 K.B. 584, Channell, J. Burr *v.* Smith [1909], 2 K. B. 360. Cf. Hart *v.* Gumpach, L. R. 4 P.C. 439.

(*t*) Bottomley *v.* Brougham, *ubi supra*.

(*u*) Chatterton *v.* Secretary of State for India [1895], 2 Q.B. 189, and see Burr *v.* Smith, *ubi supra*, as to reports by officials to a Department of Government.

(*v*) Grant *v.* Secretary of State for India, 2 C. P.D. 445.

(*w*) Hart *v.* Gumpach, L. R. 4 P.C. 439, 465.

taken to distinguish between the privilege which protects such reports and communications from being put in evidence and the immunity from legal proceedings in respect of the statements contained in the reports. It is not satisfactorily settled how far the ordinary Courts can enter into inquiries as to the acts of officials in military and naval matters (*x*).

Where an action was brought against the president of a military court of inquiry for a libel contained in the minutes of the court, delivered by the defendant to the commander-in-chief and deposited in his office, it was held that these minutes were a privileged communication, and that neither the original nor a copy could be put in evidence in proof of the alleged libel (*y*). And where a court-martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused was highly injurious to the service, it was held that the president of the court-martial was not liable to an action for a libel for having delivered such sentence and declaration to the judge-advocate; and Sir James Mansfield, C.J., said: 'If it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor, or can it be any offence for him to state that the charge is groundless and malicious?' (*z*).

Where it was reported that the plaintiff, an officer in the army, had made charges against his brother officers, the commander-in-chief directed that a Court of inquiry should be assembled to inquire into the matter and report thereon to the commander-in-chief. A Court was held, at which the defendant, an officer in the army, was required to attend as a witness. He gave his evidence *viva voce*, and also handed in a paper containing in substance a repetition of his evidence, with some additions upon the subject, and this paper was received by the Court. A report was made by the Court to the commander-in-chief. The plaintiff unsuccessfully applied for a court-martial upon the defendant for this conduct, and then brought an action against the defendant, in respect of the written paper as a libel, and in respect of the *viva voce* evidence as slander. It was at the trial ruled that the action would not lie if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military inquiry in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of the inquiry, although the defendant had acted *mala fide*, and with actual malice, and without any reasonable and probable cause, and even if with knowledge that the statement made and handed in by him as aforesaid was false. On appeal it was held that this ruling was correct, and that the evidence of the defendant was mostly part of the minutes of the proceedings of the Court, which, when reported and delivered to the commander-in-chief, was received and held by him on behalf of the sovereign, and as such was inadmissible in evidence (*a*).

(*x*) See Dawkins *v.* Paulet, L. R. 8 Q.B. 255 (discussed in Odgers on Libel (4th ed.), 232), and Encycl. Laws of England (2nd ed.), tit. 'Act of State.'

(*y*) Horne *v.* Bentinck, 4 Moore (C. P.) 563.

(*z*) Jekyll *v.* Moore, 2 B. & P. (N. R.) 341.

(*a*) Dawkins *v.* Lord Rokeby, 42 L. J. Q.B. 63, Ex. Ch. *et per* Kelly, C.B., no action

The production of documents of this tenor at a trial could in most cases be resisted on the ground that their disclosure would be against the public interest.

2. *Qualified Privilege.*

A qualified privilege attaches to protect publication of certain kinds of defamatory statements. The matters thus protected *sub modo* fall into two classes: (a) reports of certain kinds of proceedings; (b) what are described as statements made on a privileged occasion.

The underlying principle on which the qualified privilege is recognised is the common convenience and welfare of society, not the convenience of individuals as a class (*b*).

Proceedings in Parliament.—The reports of the proceedings of either House of Parliament or of their committees, are privileged, *vide ante*, p. 1042 and *post*, p. 1049, if fair and accurate, and published without malice.

Reports of Judicial Proceedings.—By sect. 3 (*c*) of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), 'a fair and accurate report (*d*) in any newspaper (*e*) of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter' (*f*).

This enactment, being limited to newspapers, leaves the common law untouched as to the publication of reports of judicial proceedings otherwise than in the pages of a newspaper as defined in the Act of 1888.

In Wason *v.* Walter (*g*), Cockburn, C.J., in delivering the judgment of the Court said, that faithful and fair reports of the proceedings of courts of justice, though the characters of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. But a publication of the proceedings in a court of justice will not be protected unless it be a *true and honest* statement of those proceedings (*h*).

In Stiles *v.* Nokes (*i*), Ellenborough, C.J., said, 'It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect; and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous merely because the matter had been given in evidence in a court of justice' (*j*).

lies against parties or witnesses for anything said or done, although falsely and maliciously, and without any reasonable or probable cause, in the ordinary course of any proceedings in a Court of justice. Affirmed in H. L., R. 7 H. L. 744. See Williams *v.* Star Newspaper Co. [1907], 24 T. L. R. 297, Darling, J. Marks *v.* Beyfus, 25 Q.B.D. 494.

(*b*) Stuart *v.* Bell [1891], 2 Q.B. 341, 346; approved, in Macintosh *v.* Dun [1908], A. C. 380.

(*c*) As to the history of this section see Odgers on Libel (4th ed.), 306.

(*d*) *Post*, p. 1048.

(*e*) Defined *post*, p. 1049, note (*w*).

(*f*) As to blasphemous matter see *ante*, p. 393. As to indecent matter, see *post*, Vol. ii. p. 1875.

(*g*) L. R. 4 Q.B. 73, 38 L. J. Q.B. 34, and see Curry *v.* Walter, 1 B. & P. 523.

(*h*) Waterfield *v.* Bishop of Chichester, 2 Mod. 118. R. *v.* Wright, 8 T. R. 297, 298, Lawrence, J. Stiles *v.* Nokes, 7 East, 493; Wason *v.* Walter, *ubi sup.*

(*i*) 7 East, 503.

(*j*) And see R. *v.* Salisbury, 1 Ld. Raym. 341, that it is indictable to publish a scandalous affidavit made in a Court of justice.

Where it is allowable to publish what passes in a court of justice it is not essential that every word of the evidence, of the speeches, and of what was said by the judge, should be inserted; if the report is substantially a fair and correct report of what took place in a court of justice, it is privileged (*k*). It may sometimes not be justifiable to publish everything a counsel says in the course of his speech (*l*).

The party making the publication will not be justified, unless he confines himself to what actually passed in court (*m*). Before the case of Wason *v.* Walter was decided, it was an established principle, upon which the privilege of publishing a report of *any* judicial proceedings was admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what formed strictly and properly the legal proceedings. But fair comment upon any matter of public interest is privileged (*n*).

The privilege applies to the proceedings of every court of justice, from the lowest to the highest (*o*).

Proceedings before magistrates, under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), in which, after both parties are heard, a final judgment is given, are judicial, and the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct (*p*); and the like privilege extends to the publication of proceedings taking place publicly on a preliminary inquiry held under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42). The privilege now extends to reports of each separate stage of the proceeding, even to an *ex parte* application for process for an indictable offence (*q*).

It was at one time said that such publications had a tendency to cause great mischief by perverting the public mind, and disturbing the course of justice (*r*): and the Court of King's Bench granted a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and the party had no malicious motive in the publication (*s*). In Wason *v.* Walter (*t*), Cockburn, C.J., is reported to have said, 'Even in quite recent days, judges, in holding the publication

(*k*) Andrews *v.* Chapman, 3 C. & K. 286. Campbell, C.J. See Smith *v.* Scott, 2 C. & K. 580. Hoare *v.* Silverlock (No. 2), 9 C.B. 20. See Lewis *v.* Walter, 4 B. & Ald. 645. As to publishing a judgment alone see Macdougall *v.* Knight, 14 App. Cas. 194. Milissich *v.* Lloyds, 46 L. J. C.P. 404, 13 Cox, 75.

(*l*) Flint *v.* Pike, 4 B. & C. 473; 6 D. & R. 528, Bayley, J., Holroyd, J. Roberts *v.* Brown, 10 Bing. 519, Tindal, C.J. Saunders *v.* Mills, 6 Bing. 213; 3 M. & P. 520. R. *v.* Creevey, 1 M. & Sel. 281.

(*m*) Delegal *v.* Highley, 3 Bing. (N. C.) 950.

(*n*) Delegal *v.* Highley, 3 Bing. (N. C.) 950; Lewis *v.* Clement, 3 B. & Ald. 702.

(*o*) Lewis *v.* Levy, E. B. & E. 537.

(*p*) Id. ibid.

(*q*) Kimber *v.* Press Association [1893], 1 Q.B. 65. R. *v.* Gray, 10 Cox, 181 (Ir.). Lewis *v.* Levy, *ubi sup.*

(*r*) R. *v.* Lee, 5 Esp. 123. R. *v.* Fisher, 2 Camp. 563. Duncan *v.* Thwaites, 3 B. & C. 556; 5 D. & R. 447. Delegal *v.* Highley, 3 Bing. (N. C.) 950; but see the remarks in Lewis *v.* Levy, *supra*. The publication of a matter which was not brought before the magistrate in his judicial character, or in the regular discharge of his magisterial functions, cannot be justified. M'Gregor *v.* Thwaites and another, 3 B. & C. 24; 4 D. & R. 695.

(*s*) R. *v.* Fleet, 1 B. & Ald. 379. See East *v.* Chapman, M. & M. 46; 2 C. & P. 570; Charlton *v.* Watton, 6 C. & P. 835. R. *v.* Gray, 10 Cox, 184 (Ir.).

(*t*) 38 L. J. Q.B. 34, 44: L. R. 4 Q.B. 73

of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court, as, for instance, applications for criminal informations, are published every day; but such a thing as an action or indictment, founded on a report of such an *ex parte* proceeding, is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was, or was not, *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.' If the report of judicial proceedings is fair and impartial, the privilege is not taken away by the fact that the magistrate decided that he had no jurisdiction, or that the application was made *ex parte* (*u*).

Public Meetings.—By the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64) (*v*), sect. 4, 'A fair and accurate report published in any newspaper (*w*) of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) (*ww*), of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of State, commissioner of police or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided, that nothing in this section shall authorise the publication of any blasphemous or indecent matter. Provided also that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same; Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge

(*u*) Usill *v.* Hales, 3 C. P. D. 319. Kimber *v.* Press Association [1893], 1 Q.B. 65.

(*v*) At common law newspapers were liable for republishing slanders uttered at a public meeting. Purcell *v.* Sowter, 1 C. P.D. 781; 2 C. P.D. 215. The law was amended in 1881 (44 & 45 Vict. c. 60), and in 1888 further amended by the enactment above set forth.

(*w*) The word 'newspaper' shall mean 'any paper containing public news, intelligence, or occurrences, or any remarks or observations therein printed, for sale and published in England or Ireland periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers. Also any paper printed in order to be dispersed and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.' 44 & 45 Vict. c. 60, s. 1.

(*ww*) See 8 Edw. VII. c. 43.

any privilege now by law existing, or to protect the publication of any matter not of public concern, and the publication of which is not for the public benefit.

'For the purposes of this section "public meeting" shall mean any meeting *bona fide* and lawfully held for a lawful purpose (*x*) and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.'

Statements made on a Privileged Occasion.—The publication of defamatory matter which is false is excused if made in good faith on a privileged occasion and without malice in fact. 'The defence of privileged occasion is in a criminal case raised under a plea of not guilty. Whether the occasion was or was not privileged is a matter of law for the judge and not of fact for the jury (*y*). When the judge has ruled the occasion privileged the ordinary presumption of law that a defamatory publication is malicious is excluded (*z*), and in order to defeat the claim of privilege it becomes necessary for the prosecution to prove that the defendant in publishing the defamatory matter was actuated by express or actual malice in fact, *i.e.* by some wrong indirect or improper motive such as personal spite or ill-will against the person or class of persons defamed (*a*). The evidence necessary to defeat the claim of privilege may be *intrinsic*, *i.e.* may lie in the language used or in the circumstances (*b*), or *extrinsic*, *i.e.* by direct proof of other conduct or language of the defendant indicating personal ill-will (*c*). It is not enough for this purpose to prove that the words published are untrue or published by inadvertence or forgetfulness or negligently or with want of sound judgment or in honest indignation (*d*). But express malice can be proved by shewing that the defendant knew the words published to be untrue or did not believe them to be true (*e*), or that the words used are much too violent for the occasion and circumstances' (*f*).

If at the close of the case for the prosecution there is no intrinsic or extrinsic evidence of express malice, it is the duty of the judge to direct a verdict for the defendant (*ff*); but wherever there is evidence of express malice, either intrinsic or extrinsic, it is the duty of the judge to leave the question of express malice to the jury (*g*). Where defamatory matter was published on a privileged occasion it is not enough for the prosecution to prove that the facts proved are consistent with the presence of malice as well as with its absence; for the absence of such malice is presumed until proof of its presence is given (*h*).

(*x*) As to unlawful assemblies and meetings, see *ante*, p. 422.

(*y*) Hebditch *v.* McIlwaine [1894], 2 Q.B. 54. Stuart *v.* Bell [1891], 2 Q.B. 341.

(*z*) Allen *v.* Flood [1898], A. C. 1, 93, Lord Watson, 172, Lord Davey. Bromage *v.* Prosser, 4 B. & C. 247, 255.

(*a*) Clark *v.* Molyneux, 3 Q.B.D. 246. Royal Aquarium *v.* Parkinson [1892], 1 Q.B. 431.

(*b*) Rogers *v.* Clifton, 3 B. & P. 587. Patteson *v.* Jones, 8 B. & C. 578; 3 Man. and Ry. 101. Kelly *v.* Partington, 4 B. & Ad. 700; 2 Nev. & M. 460.

(*c*) Wright *v.* Woodgate, 2 Cr. M. & R. 573; 1 Tyr. & G. 12. See Blake *v* Pilfold, 1 M. & Rob. 190, Taunton, J.

(*d*) Odgers on Libel (4th ed.), 323.

(*e*) Clark *v.* Molyneux, 3 Q.B.D. 246. Hayward & Co. *v.* Hayward, 34 Ch. D. 198, 206.

(*f*) Gilpin *v.* Fowler, 9 Ex. 615.

(*ff*) As to whether he is bound to act if no submission is made on the part of the defence, see R. *v.* George 73 J. P. 11.

(*g*) Cooke *v.* Wildes, 5 E. & B. 328.

(*h*) Somerville *v.* Hawkins, 10 C. B. 588. Taylor *v.* Hawkins, 16 Q.B. 308. Harris *v.* Thompson, 13 C. B. 333. Wenman *v.* Ash, 13 C. B. 836. Wason *v.* Walter, L. R. 4 Q.B. 73. Hart *v.* Gumpach, L. R. 4 P.C. 439; 43 L. J. P.C. 25.

Where a letter containing defamatory words is written upon a privileged occasion, surrounding circumstances are to be considered in determining whether the words used are so much too violent for the occasion as to rebut the presumption of the absence of malice arising from the privilege of the occasion; and if from surrounding circumstances it appears that the words are capable of two constructions, one of which is compatible with the absence of malice, then the presumption of the absence of malice which existed in the first instance from the privilege of the occasion should be allowed to prevail throughout (*i*). But juries are directed not to scrutinise too closely the expressions used on a privileged occasion, but to satisfy themselves that there is clear evidence of malicious intent before finding that the privilege has been lost (*j*).

What constitutes a Privileged Occasion.—Belief in the truth of defamatory statements published creates no privilege, although disbelief in their truth will defeat a claim of privilege. The statements excused by proof that they were published on a privileged occasion include communications made in good faith in respect to a matter as to which the defendant has a legal, moral, social, or religious duty whether public or private (*k*), or in the general interests of society (*l*), or in respect whereof he has an interest, to another, who has a corresponding interest or duty with respect to the subject matter (*m*), and communications made in self-defence. An occasion is not privileged if a defamatory communication is made from motives of self-interest by persons who for the convenience of a class trade for profit in the character of other persons, *e.g.* trade-protection societies and inquiry agencies (*n*). The duty or interest must exist in law by reason of the facts of the case at the date of publication, and is not created by the belief of the defendant in its existence (*o*).

Where the occasion is privileged it is immaterial whether the statements were volunteered or made in answer to inquiries: but in cases near the line the fact that the information was volunteered is an element in determining whether the occasion is privileged (*p*).

If the communication is made in the regular and proper course of a proceeding, it is privileged. Thus where a writing, containing the defendant's case, and stating that some money, due to him from the Government for furnishing the guard at Whitehall with fire and candle, had been improperly obtained by a Captain C., was directed to a general officer and the four principal officers of the Guards, to be presented to His Majesty for redress a criminal information was refused, on the ground that the writing was merely a representation of an injury drawn up in a proper way for redress, without any intention to asperse the prosecutor

(*i*) Spill *v.* Maule, L. R. 4 Ex. 232.

(*j*) Woodward *v.* Lander, 6 C. & P. 548, Alderson, B. Cf. Odgers on Libel (4th ed.), 333.

(*k*) Henwood *v.* Harrison, L. R. 7 C.P. 606. Toogood *v.* Spyring, 1 Cr. M. & R. 181, 193. See Spencer *v.* Amerton, 1 M. & Rob. 470. Warren *v.* Warren, 4 Tyrw. 850. 1 Cr. M. & R. 150. Wright *v.* Woodgate, 2 Cr. M. & R. 573, 1 Tyr. & Gr. 12. Coxhead *v.* Richards, 2 C. B. 569.

(*l*) Whiteley *v.* Adams, 15 C. B. (N. S.) 392, 418. Macintosh *v.* Dun [1908], A. C. 390, 399.

(*m*) See Harrison *v.* Bush, 5 E. & B. 344, 348.

(*n*) Macintosh *v.* Dun, *ubi sup.* In this case the English and American authorities are collected and discussed.

(*o*) See Stuart *v.* Bell [1891], 2 Q.B. 341. Hebditch *v.* McIlwaine [1894], 2 Q.B. 54. And see Jenour *v.* Delmege [1891], A. C. 73.

(*p*) Macintosh *v.* Dun [1908], A. C. 390.

although there was a suggestion of fraud (*q*). So a petition addressed by a creditor of an officer in the army to the Secretary-at-War, *bona fide*, and with the view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not actionable (*r*). A letter written to the Postmaster-General, or to the Secretary to the General Post-Office, complaining of misconduct in a postmaster, or guard of a mail, is privileged, if written as a *bona fide* complaint to obtain redress for a grievance that the party really believes he has suffered (*s*). And where the defendant being deputy-governor of Greenwich Hospital, wrote a large volume, containing an account of the abuses of the hospital, and treating with much asperity the characters of many of the officers of the hospital (who were *public* officers), and of Lord Sandwich in particular, who was First Lord of the Admiralty, and printed several copies of it, which he distributed to the governors of the hospital only, and not to any other person, the Court refused to allow a criminal information to be filed. Lord Mansfield said, that distribution of copies to the persons who were from their situations called on to redress these grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make the publication criminal (*t*). A letter written to a Secretary of State, imputing to the town clerk and clerk to the justices of a borough, corruption in the latter office, was held not to be privileged, because the Secretary of State had no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application (*u*). But a memorial presented to the Secretary of State for the Home Department by the elector of a borough complaining of the conduct of a justice of the peace during a recent election of a Member of Parliament for the borough, and imputing that he had made speeches inciting to a breach of the peace, and praying that the secretary would cause an inquiry to be made into the conduct of the plaintiff, and that, on the allegations being substantiated, the secretary would recommend to the Queen that the justice should be removed from the commission of the peace, is a privileged communication; for though the Lord Chancellor generally is consulted as to the removal of justices of the peace, the memorial might be considered as addressed to the Crown, through the secretary of state who might have caused the inquiry to be made, have communicated with the Lord Chancellor, and have, in effect, recommended the removal of the justice (*v*). And where the publication

(*q*) R. *v.* Bayley, Andr. 229. Bac. Abr. tit. 'Libel' (A) 2. As to proceedings in Courts of justice, see *ante*, p. 1044.

(*r*) Fairman *v.* Ives, 5 B. & Ald. 642. See Wenman *v.* Ash, 13 C. B. 836, Maule, J.

(*s*) Woodward *v.* Lander, 6 C. & P. 548, Alderson, B. Blake *v.* Pilford, 1 M. & Rob. 198, Taunton, J.

(*t*) R. *v.* Bailie, 30 Geo. III. Holt on Libel, 173, Holt (N.P.) 312 *n.* 1 Ridgway's Collection of Erskine's Speeches, p. 1. Lord Mansfield seemed to think that whether the paper were in manuscript or printed, under these circumstances, made no difference.

(*u*) Blagg *v.* Sturt, 10 Q.B. 899. This case may, perhaps, be shaken by Harrison *v.* Bush, *infra*. The cases, however, are distinguishable, as the clerk to justices of the peace is appointed by them, and a Secretary of State has no authority as to him, either directly or indirectly.

(*v*) Harrison *v.* Bush, 5 E. & B. 344. In Dickeson *v.* Hilliard, L. R. 9 Ex. 79; 43 L. J. Ex. 37, it was ruled that the agents of candidates at an election had no common interest after the election was over.

is an admonition, or in the course of the discipline of a religious sect, as the sentence of expulsion from a society of Quakers, it is privileged (*w*). So a letter written by a son-in-law to his mother-in-law, containing imputations on the character of a person whom she was about to marry, and desiring a diligent and intelligent inquiry into his character, if written *bona fide* is privileged (*x*). Where an advertisement was published by the defendant at the instigation of A., the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A., it was held that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a view, it was not actionable (*y*). But it is very doubtful whether the wife would now be considered to have sufficient interest in such an inquiry to justify the offering of such a reward in a newspaper (*z*).

A communication made by a solicitor on behalf of his client to a third party, if reasonably necessary and usual in the discharge of his duty to his client and in the interest of his client it is privileged (*a*).

If a report made by a medical officer of health to a local authority in pursuance of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), contains defamatory matter, a newspaper proprietor is not privileged to publish it, although the local authority is bound to publish it (*b*).

When business communications are made on a privileged occasion, *i.e.* on matters relevant to business between the parties and necessary in due regard to the interests of the parties (*c*) the privilege is not lost by publishing the communication in the ordinary course of dictation or transmission to clerks of the defendant (*d*). In other words the privilege covers all incidents of the transmission and treatment of the communication which are in accordance with the reasonable and usual course of business (*e*).

A letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B., the writer of the letter, was likewise interested, was held to be privileged (*f*). And if a person, in a private letter to the party, should expostulate with him about some vices, of which he apprehends him to be guilty, and desire him to refrain from them; or if a person should send such a letter to a father, in relation to some faults of his children; these, it seems, would not be actionable but acts of friendship, not designed for defamation but reformation (*g*). But this doctrine must be applied with some caution; for to send an abusive letter filled with

(*w*) R. *v.* Hart, 2 Burn's Eccl. L. 779. The charge of a bishop to his clergy in convocation is a privileged communication. Laughton *v.* Bishop of Sodor and Man, L. R. 4 P.C. 495.

(*x*) Todd *v.* Hawkins, 8 C. & P. 88, Alderson, B.

(*y*) Delany *v.* Jones, 4 Esp. 19, Ellenborough, C.J.

(*z*) Lay *v.* Lawson, 4 A. & E. 795, 798, Denman, C.J.

(*a*) Boxsius *v.* Goblet Freres [1894], 1 Q.B. 842.

(*b*) Popham *v.* Pickburn, 7 H. & N. 891.

(*c*) See Tuson *v.* Evans, 12 A. & E. 733. Whiteley *v.* Adams, 15 C. B. (N. S.) 392.

(*d*) Edmondson *v.* Birch [1907], 1 K.B. 371. Sharp *v.* Skues [1909], 25 T. L. R. 336. As to what is not the ordinary course of business see Pullman *v.* Hill [1891], 1 Q.B. 524.

(*e*) Edmondson *v.* Birch at p. 382, per Moulton, L.J.

(*f*) M'Dougall *v.* Claridge, 1 Camp. 267. Wright *v.* Woodgate, 1 Tyr. & Gr. 12.

(*g*) Peacock *v.* Reynell, 2 Brownl. 151, 152. Bac. Abr. tit. 'Libel' (A) 2, in the notes.

provoking language to another, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and cause a disturbance of the public peace (*h*). A letter written by a master, in giving a character of a servant, is privileged, unless its contents be not only false but malicious (*i*).

Where a tradesman's wife being informed that one of the female assistants was dishonest wrote her a letter accusing her of theft and reproaching her, Huddleston, B., held the occasion privileged, and said that if the prisoner honestly believed what she wrote, the manner in which she expressed herself ought not to be too nicely criticised (*j*).

If a tenant is asked by his landlord to make communications to him in respect of any neglect of duty in his gamekeepers, any communication made by him in respect of any such neglect of duty is privileged, if written *bona fide*, and on the supposition that he was doing his duty to his landlord (*k*). The plaintiff was the agent of the defendants, a trading company, and it was part of his duty to furnish them with an account of his transactions, to enable them to prepare the balance sheet for the inspection of the shareholders. This balance sheet was prepared and duly referred to the auditors, who reported that there was a deficiency, for which the plaintiff was responsible, and that his accounts had been badly kept. There was evidence that an explanation had been offered to the auditors, which they had disregarded, but no evidence that the directors had any knowledge of this explanation. The directors, after laying the accounts before a general meeting of the shareholders, caused a letter containing the part of the report which affected the character of the plaintiff to be printed and forwarded to the absent shareholders. It was held, first, that this letter was published on a privileged occasion, as it was the duty of the defendants to communicate to all the shareholders any part of the report of the auditors which materially affected the accounts of the company; secondly, that there was no intrinsic or extrinsic evidence of malice to be left to the jury, as the report of the auditors was published without comment, and the explanations offered to the auditors did not come before the defendants; and that causing the letter to be printed was a reasonable and necessary mode of publishing it to the absent shareholders (*l*).

If a man *bona fide* writes a letter in his own defence, and for the defence of his rights and interests, and is not actuated by any malice, that letter is privileged, although it may impute dishonesty to another (*m*).

A letter published by an attorney honestly in vindication of the character of a client against charges published and circulated against the client by the prosecutor, is privileged (*n*).

(*h*) R. *v.* Cator, 2 East, 361. Thorley *v.* Lord Kerry, 4 Taunt. 355. In the last case the letter was unsealed, and opened and read by the bearer. See Bac. Abr. tit. 'Libel' (B). 2. Popham, 189, cited in Holt on Libel, 222, as to the sending of such a letter being calculated to make the recipient publish it among his friends.

(*i*) Weatherstone *v.* Hawkins, 1 T. R. 110. Edmondson *v.* Stephenson, Bull. N. P. 8. Child *v.* Affleck, 9 B. & C. 403. 4 M. & R. 338. Manby *v.* Witt, 18 C. B. 544. Taylor *v.* Hawkins, 16 Q.B. 308. Somerville *v.* Hawkins, 10 C. B. 583. Gardener *v.* Slade, 13 Q.B. 796. Croft *v.* Stevens, 6 H. & N. 570.

(*j*) R. *v.* Perry, 15 Cox, 169.

(*k*) Cockayne *v.* Hodgkinson, 5 C. & P. 543, Parke, B.

(*l*) Lawless *v.* Anglo-Egyptian Cotton and Oil Co., L. R. 4 Q.B. 262. See Edmondson *v.* Birch [1907], 1 K.B. 371. Nevill *v.* Fine Art and General Ins. Co. [1897], A. C. 68.

(*m*) Coward *v.* Wellington, 7 C. & P. 531, Littledale, J. See Whiteley *v.* Adams, 15 C. B. (N. S.) 392: 33 L. J. C. P. 89.

(*n*) R. *v.* Veley, 4 F. & F. 1117. Cf.

It has been held that the publication of defamatory matter by a trade inquiry or trade protection agency is not privileged when the society holds itself out as being ready for *reward* to communicate to subscribers and others confidential information as to the commercial standing of others for the exclusive use and benefit in business of the persons receiving the communication (*o*).

Defamatory telegrams or post cards are not privileged though sent *bona fide*, and under circumstances which otherwise would have made it privileged, because the mode of publication selected involves communication of the defamatory matter to persons who have no interest to receive it (*p*).

It has already been pointed out that the privilege must not exceed the occasion. Statements to be privileged must fall within the scope of the duty or interest which privileges the occasion ; and must be published to persons entitled to hear them and not to strangers. Where, therefore, remarks were made reflecting on a Roman Catholic priest at a public meeting called for the purpose of petitioning Parliament against the grant to the Roman Catholic College at Maynooth it was held that the speaker was not privileged by the circumstance that the libel was published in the course of a *bona fide* discussion respecting the propriety of supporting that college (*q*).

3. *Fair Comment.*

It is also an answer to an indictment for defamatory libel (under the plea of not guilty) to prove that the matter complained of is 'fair comment' 'honestly' made without actual malice upon facts truly stated and with reference to a matter of public interest and concern (*r*). This defence is not in strictness identical with qualified privilege, because it is equally open to all the public, and there is no special right of comment in the case of newspapers. The plea—unlike qualified privilege—does not protect any false statement of fact (*s*) even if made in good faith (*t*), and what is claimed to be the comment must not be so mixed up with the facts as to make it difficult for the reader to distinguish what is fact and what is comment (*u*). Nor may the facts on which the comment is based be mis-stated : and if the facts on which the comment is made do not exist the defence of comment fails (*v*).

Comment cannot be fair which is built upon facts which are not truly

Quartz Hill Gold Mining Co. *v.* Beall, 20 Ch. D. 501, a circular sent by a solicitor for some shareholders in a company on their behalf to all the shareholders.

(*o*) Macintosh *v.* Dun [1908], A. C. 390, reversing the decision of the High Court of Australia, 3 Australia C. L. R. 1134, and declining to follow American rulings on the subject.

(*p*) Williamson *v.* Freer, L. R. 9 C.P. 393; 43 L. J. C.P. 181. Whitfield *v.* S.E.R. [1858], E. B. & E. 115. Sadgrove *v.* Hole [1891], 2 K.B. 1 (post card).

(*q*) Hearne *v.* Stowell, 12 A. & E. 719. See Quartz Hill Gold Mining Co. *v.* Beall, 20 Ch. D. 511. Hoare *v.* Silverlock, 12 Q.B. 624.

(*r*) See Wason *v.* Walter, L. R. 4 Q.B. 73. Odgers on Libel (4th ed.), 184 *et seq.*

(*s*) See R. *v.* Flowers, 44 J. P. 377, Field, J. Campbell *v.* Spottiswoode, 3 B. & S. 769. Merivale *v.* Carson, 20 Q.B.D. 275.

(*t*) Thomas *v.* Bradbury Agnew & Co. [1906], 2 K.B. 627, 638, Collins, M.R. Hunt *v.* Star Newspaper Co. [1908], 2 K.B. 309.

(*u*) Andrews *v.* Chapman, 3 C. & K. 288, adopted by Moulton, L.J. in Hunt *v.* Star Newspaper Co. [1908], 2 K.B. at p. 319.

(*v*) Joynt *v.* Cycle Trade Publishing Co. [1904], 2 K.B. 294 ; [1905], 2 K.B. 292 ; approved in Hunt *v.* Star Newspaper Co., *ubi supra*.

stated, and further, it must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation (*w*).

'A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from these facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn' (*x*).

The imputation of corrupt motives cannot be relied on as fair comment unless warranted by the facts stated (*y*) or arising fairly and legitimately out of the conduct of the person criticised (*y*).

The term 'of public interest' covers public affairs, and the public acts of public men, the administration of justice, the doings of local authorities civil and ecclesiastical, and the working of public institutions such as hospitals and charities, literature and dramatic or pictorial art, and public entertainments or articles or letters in a newspaper (*z*), or any case where any person brings himself before the public (*a*), *e.g.* by offering himself as a Parliamentary candidate (*b*).

The Board of Admiralty having ordered the defendant, the Queen's printer, to print a board minute relating to their proceedings in naval ship-building, which contained a letter of the Comptroller of the Navy in reference to plans of the plaintiff submitted to the board, the defendant sold copies to the public; the plaintiff sued the defendant for defamation, averring that a statement in such letter that the plans derived no weight from his antecedents, meant that his plans were worthless, and were calculated to injure him in his profession; but no actual malice was imputed. It was held, by the majority of the Court (Willes, Byles, and Brett, JJ.: *dissentiente*, Grove, J.), that the plaintiff was rightly non-suited on the ground that every man has a right to discuss freely, if honestly and without malice, any subject in which the public are generally interested, and that what the defendant had done merely amounted to this (*c*).

Comments by a churchwarden upon the conduct of the clergyman, in taking meals in the vestry, and in causing books to be sold in the church during service, are matters of public interest, and may lawfully be published if they do not exceed the boundaries of fair criticism (*d*).

'In the case of literary or dramatic works (*e*) the occasion for fair comment is created by the publication and a right then arises to criticise honestly, however adversely' (*f*).

A publication commenting upon a literary work, exposing its follies

(*w*) Id. ibid.

(*x*) Dakhyl *v.* Labouchere [1908], 2 K.B. 325 *n.*, 329 *n.*, 77 L. J. K.B. 728; 23 T. L. R. 364, Lord Atkinson.

(*y*) Joynt *v.* Cycle Trade Publishing Co. [1904], 2 K.B. Hunt *v.* Star Newspaper Co. [1908], 2 Q.B. 309. Campbell *v.* Spottiswoode, 3 B. & S. 776: 32 L. J. Q.B. 185.

(*z*) Heriott *v.* Stuart, 1 Esp. 437. Stuart *v.* Lovell, 2 Stark. (N. P.) 93.

(*a*) See Odgers on Libel (4th ed.), 195.

(*b*) Davies *v.* Duncan, L. R. 9 C. P. 396: 43 L. J. C.P. 185.

(*c*) Henwood *v.* Harrison, L. R. 7 C.P. 606: 41 L. J. C.P. 206.

(*d*) Kelly *v.* Tinling, L. R. 4 Q.B. 699; 35 L. J. Q.B. 231.

(*e*) Merivale *v.* Carson, 20 Q.B.D. 275. McQuire *v. Western Morning News* [1903], 2 K.B. 100.

(*f*) Thomas *v.* Bradbury Agnew & Co. [1906], 2 K.B. 617, 627, Collins, M.R.

and errors, and holding up the author to ridicule, is not regarded as defamatory if the comment does not exceed the limits of fair and candid criticism, *e.g.* by attacking the character of the writer, unconnected with his publication (*g*). But if a person under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller (*h*). So if a reviewer imputes base, sordid, dishonest, and wicked motives, it is no answer that the reviewer published only what he believed was correct and true (*i*).

There is no distinction between a handbill, circular, or advertisement of a tradesman and a book; both are addressed to the public, and both are subject to such comments as do not exceed the bounds of fair and reasonable criticism (*j*).

It has been doubted whether the preaching a sermon, in the ordinary mode of a clergyman's duty, makes it public property, so as to allow observations upon it in the same way that a publication of a literary work does (*k*).

It is lawful to make a fair comment on a place of public entertainment (*l*).

Where the defence of fair comment is raised the state of mind of the defendant when he published becomes material, to ascertain whether he published in a spirit of unfairness or actuated by any malice, and extrinsic evidence is admissible to establish the defendant's motives in publication whether to shew his guilt or innocence (*m*).

4. *Truth.*

At common law the truth of a defamatory libel was no defence to criminal proceedings taken in respect of its publication (*n*).

If a libel imputes to a man that he has committed a crime, proof of the truth of such imputation is not admissible under a plea of not guilty. Where a libel imputed murder to certain soldiers, evidence was offered of the truth of such imputation, and rejected: and the Court of King's Bench were unanimous that such evidence was rightly rejected (*o*).

(*g*) Carr *v.* Hood, 1 Camp. 355. In an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant may adduce evidence to shew that the supposed libel is a fair stricture upon the general run of the plaintiff's publications. Tabart *v.* Tipper, 1 Camp. 350; Strauss *v.* Francis, 4 F. & F. 1107. If the plaintiff contends that the alleged libel exceeds the limits of fair criticism, he should, unless the contrary appears on the face thereof, put in his work as part of his case (S. C. and see 4 F. & F. 939).

(*h*) Nightingale *v.* Stockdale [1809], Ellenborough, C.J. Selw. (N. P.) 1044. Merivale *v.* Carson (*ubi sup.*). Thomas *v.* Bradbury Agnew & Co. (*ubi sup.*). It is lawful to animadvert upon the conduct of a bookseller in publishing books of an improper tendency. Tabart *v.* Tipper, 1 Camp. 354.

(*i*) Campbell *v.* Spottiswoode, 3 B. & S. 769; 31 L. J. Q.B. 185.

(*j*) Paris *v.* Levy, 9 C. B. (N. S.) 342.

(*k*) Gathercole *v.* Miall, 15 M. & W. 319.

(*l*) Dibden *v.* Swan [1793], 1 Esp. 28. See Odgers on Libel (4th ed.), 204.

(*m*) Thomas *v.* Bradbury Agnew & Co. [1906], 2 K.B. 617, 627, 642, Collins, M.R. Plymouth Mutual Co-operative Society *v.* Trades Publishing Association [1906], 1 K.B. 403, 413, Vaughan Williams, L.J.

(*n*) See Wyatt *v.* Gore. Holt, N. P. 299, 306. This rule was expressed by saying 'the greater the truth the greater the libel.'

(*o*) R. *v.* Burdett, 4 B. & Ald. 95. Bayley, J., said (p. 147), 'In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance, suppose a paper were to state that A. was on a given day tried at a given place, and

Where an information for a libel stated that certain transactions took place, and that the libel was published of and concerning them, and then set out the libel as referring to them, and general evidence was given in proof of such transactions on the part of the prosecution, the defendant was not allowed to give evidence of the particular nature of those transactions so as to bring into issue the truth or falsehood of the libel. But if such evidence were adduced, *bona fide*, to shew that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, it is admissible (*p*).

By sect. 6 (*q*) of the Libel Act, 1843 (6 & 7 Vict. c. 96), 'On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, *to allege the truth of the said matters charged* in the manner now (*r*) required in pleading a justification to an action for defamation, *and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published*, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and if after such plea the defendant shall be convicted on such indictment or information it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.'

It has been held in Ireland that to an indictment for publishing in a newspaper a certain false, defamatory, malicious, and seditious libel concerning her Majesty's Government and the Parliament of the United Kingdom, with intent to create disaffection and hatred to her Majesty's

convicted of perjury; if that be true it may be no libel, but if false, it is from beginning to end calumnious, and may no doubt be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel.' R. *v.* Brigstock, 6 C. & P. 184.

(*p*) R. *v.* Grant, 5 B. & Ad. 681.

(*q*) This section does not apply to proceedings at a preliminary inquiry before justices (R. *v.* Carden, 5 Q.B.D. 1. R. *v.* Townsend, 10 Cox, 356; 4 F. & F. 1089), unless the prosecution is of a person responsible for the publication of a newspaper for a libel published therein; 44 & 45 Vict. c. 60, s. 4, *post*, p. 1060.

(*r*) Aug. 24th, 1843, the date of the passing of the Act. The subsequent alterations in civil pleading are not in strictness applicable to a justification under sect. 6. For a precedent see Crown Office Rules, 1906, form No. 81.

Government and the Parliament, a special plea of justification cannot be pleaded under sect. 6 of the Libel Act, 1843 (*s*).

Where to a criminal information for a libel the defendant pleaded a justification, alleging that the imputations contained in the libel were true, it was held that it was not competent to the defendant to prove that imputations identical with those in the libel had been previously published in a book (*t*).

Where a justification is pleaded under 6 & 7 Vict. c. 96, s. 6, to an information for a defamatory libel, and the libel contains several distinct imputations, and the plea alleges the truth of all, and is traversed generally, if the evidence fail as to any one of them, the verdict will be entered generally against the defendant. Where, therefore, upon the trial of such an issue upon such a plea, evidence was offered in support of some only of the imputations, and the jury found that only one of the imputations upon which evidence was offered was proved, the verdict was entered for the Crown generally; as there can be no partial finding for a defendant on the ground that a justification is partially established (*u*). But where the libel was general, to the effect that the prosecutor was one of a gang of cardsharpers, and the plea of justification alleged specific instances of cardsharping, and also that the prosecutor confederated with others for the purpose of cheating, and did so cheat, at various places, it was held that it was sufficient to prove the plea in substance, and that it was so proved by the jury finding that in two instances the prosecutor did cheat at cards, and that he did confederate with other persons for that purpose (*v*).

Evidence in Aggravation or Mitigation.—By the express enactment that, wherever there is a conviction after such a plea of justification 'the Court, in pronouncing sentence,' shall 'consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove and disprove the same,' the Court is to consider the evidence on the one side and the other, and to form their own conclusion whether it aggravates or mitigates the guilt of the defendant, and they are to apportion the punishment accordingly. The evidence, as it appears on the notes of the judge who presided at the trial, comes in place of affidavits in aggravation and mitigation of punishment when sentence is to be pronounced, and by that the sentence is to be regulated, and not by any declaration of the jury as to the credit which they think ought to be given to the witnesses (*w*). In such a case the defendant may, in mitigation of punishment, shew by affidavit that after the publication, but before pleading, information was given to him which, if true, would have supported an allegation in the plea, evidence having been given at the trial to account for the non-production of proof, but no evidence in support of the allegation itself (*x*).

A libel purported to be founded on certain newspaper reports, and upon the foundation of those reports charged certain troops with acts of murder. After conviction the defendant tendered affidavits to prove that the

(*s*) R. *v.* Duffy, 6 St. Tr. (N. S.) 303. See R. *v.* McHugh [1901], 2 Ir. Rep. 569; *Ex parte* O'Brien, 15 Cox, 180; 2 Cox, 45.
(*t*) R. *v.* Newman, 1 E. & B. 268.
(*u*) R. *v.* Newman, 1 E. & B. 558.
(*v*) R. *v.* Labouchere, 14 Cox, 419.
(*w*) R. *v.* Newman, 1 E. & B. 558.
(*x*) Ibid.

newspapers did contain those reports, and also other affidavits that the facts were true. The former affidavits were received, because they explained the situation in which the defendant stood at the time he wrote the libel, and shewed the impression under which he wrote; but the latter were rejected, because the receiving them might deprive of a fair trial persons who might afterwards be tried for the murders; and if murders were committed, the proper course was to prosecute and bring to a fair trial, not to libel and create an unfair prejudice (*y*).

As to the admissibility of the defendant and the wife or husband of the defendant as witnesses for the defence, see 51 & 52 Vict. c. 64, s. 8, and *post*, Book XIII. tit. 'Evidence,' Chapter V.

As to costs see *post*, Vol. II. p. 2039 *et seq.*

Sect. VIII.—Special Provisions as to Libels in Newspapers.

Reports.—The special provisions as to reports in newspapers of the proceedings of courts of justice and public meetings have already been stated, *ante*, pp. 1047, 1049.

Prosecution.—By sect. 8 (*z*) of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), 'No criminal prosecution shall be commenced against any proprietor (*a*), publisher, editor, or any person responsible for the publication of a newspaper (*a*) for any libel (*b*) published therein without the order of a judge at chambers being first had and obtained (*c*). Such application shall be made on notice to the person accused who shall have an opportunity of being heard against such application' (*d*).

By sect. 4 of the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), 'A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the Court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case' (*e*).

Definitions.—By the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 1, '*newspaper*' is defined for the purposes of the

(*y*) R. *v.* Burdett, 4 B. & Ald. 314.

(*z*) This section superseded and repealed 44 & 45 Vict. c. 60, s. 3. Under that section the words 'criminal prosecution' were held not to apply to a criminal information whether *ex officio* or filed by leave of the Court. R. *v.* Yates, 11 Q.B.D. 750; 14 Q.B.D. 648. As to such informations see R. *v. The World*, 13 Cox, 305; R. *v.* Labouchere, 12 Q.B.D. 320; R. *v.* Allison, 16 Cox, 559. Short and Mellor, Crown Practice (2nd ed.), 153, 169.

(*a*) Defined in 44 & 45 Vict. c. 60, s. 1, *infra*.

(*b*) It is to be noted that the general term 'libel' is used and not the limited term 'defamatory libel.'

(*c*) There is no appeal against the refusal of a judge to order such prosecution. *Ex parte* Pulbrook [1892], 1 Q.B. 86.

(*d*) The procedure is by summons issued from the Crown Office. Crown Office Rules, 1906, r. 265.

(*e*) This section overrides, as to newspaper libels, the case of R. *v.* Carden, 5 Q.B.D. 1, *ante*, p. 1058.

Act as meaning 'any paper containing public news, intelligence, or occurrences, or any remarks or observations therein (*sic*) printed for sale, and published in England or Ireland periodically or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers': and 'also any paper printed in order to be dispersed and made public weekly or oftener or at intervals not exceeding twenty-six days, containing only or principally advertisements.'

By the same section 'The word "proprietor" shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.'

Ascertainment of the Names of Proprietors, &c.—By sect. 8 a register of newspapers as above defined is established under the superintendence of the registrar of joint stock companies, to which the printers and publishers of every such newspaper must make an annual return in a prescribed form, of the title of the newspaper and the names and addresses of all the proprietors (s. 9). These provisions do not apply where the newspaper is owned by a joint stock company incorporated under the Companies Acts, 1862 to 1901, in which case the company is registered in the ordinary course under those Acts (s. 18). Penalties are imposed for failing to make returns under the Act of 1881, or for wilful misrepresentation or omissions therein (ss. 10, 12). The returns when made are entered on the register (s. 13). And by sect. 15, 'Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appears in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil and criminal, be accepted as sufficient *prima facie* evidence of all the matters and things thereby appearing unless and until the contrary thereof be shewn.'

By a series of enactments of earlier date incorporated in the schedule to the Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (*f*) (32 & 33 Vict. c. 24), obligations are placed on the printers and publishers

(*f*) The first Act dealing with this subject, 38 Geo. III. c. 78, was repealed and replaced by 6 & 7 Will. IV. c. 76, s. 32, itself repealed by the Act of 1869, except sect. 19, re-enacted in the schedule, but relating only to civil proceedings, viz. bills for the discovery of the names of printers, publishers and newspapers, for the purposes of actions of damages for defamation. There were numerous decisions on 38 Geo. III. c. 78, as to proof of publication, included in the 6th edition of this work, i. 638-640, which are here omitted as of no present value. Where in an action for libel to prove that the defendant, H., was the proprietor of a newspaper, a certified copy of the declaration made at the stamp office under 6 & 7 Will. IV. c. 76, s. 6 (rep.), was put in, and it was a joint declaration, and stated that, 'We are the sole proprietors; that is to say, the said J. H., as legal owner as mortgagee, and M. Y., as owner of the equity of redemption,' it was objected that this declaration shewed that the defendant was a mortgagee only, and not a proprietor against whom an action for libel could be maintained; but Campbell, C.J., held that the defendant was liable. Duke of Brunswick *v.* Harmer, 3 C. & K. 10.

of papers and books as to printing therein the name of the printer and preserving copies of papers. The substance of the scheduled enactments is as follows:—

By the Unlawful Societies Act, 1799 (39 Geo. III. c. 79), s. 29 (*g*), 'Every person who shall print any paper for hire, reward, gain or profit, shall carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she shall write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she shall be employed to print the same; and every person printing any paper for hire, reward, gain, or profit, who shall omit or neglect to write, or cause to be written or printed as aforesaid, the name and place of his or her employer on one of such printed papers, or to keep or preserve the same for the space of six calendar months next after the printing thereof, or to produce and shew the same to any justice of the peace who within the said space of six calendar months shall require to see the same, shall for every such omission, neglect, or refusal, forfeit and lose the sum of twenty pounds.'

By sect. 31 (*g*), 'nothing herein contained shall extend to the impression of any engraving, or to the printing by letterpress of the name or the name and address, or business or profession, of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise.' Sects. 34, 35 & 36 relate to the recovery of the penalties. The Act of 1799 does not apply to 'papers printed by the authority and for the use of either House of Parliament' (*h*) nor to bank notes or bank post bills of the Bank of England or to valuable securities, or to prints of proceedings in courts of justice or to papers printed by the authority of any public board or public officer in the execution of the duties of their respective offices (*i*).

By an Act of 1839 (2 & 3 Vict. c. 12), s. 2 (*j*), 'Every person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business; and every person who shall publish or disperse, or assist in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than five pounds. Provided always, that nothing herein contained shall be construed to impose any penalty upon any person for printing any paper excepted out of the operation of the Unlawful Societies Act, 1799, either in the said Act or by any Act made for the amendment thereof.' (*Vide supra.*)

By sect. 3, in the case of books or papers printed at the University Press of Oxford, or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words: 'Printed at

(*g*) Ss. 29, 31, 34, 35, 36, are re-enacted by 32 & 33 Vict. c. 24, s. 1, sched. ii.

(*h*) S. 28 as re-enacted in 32 & 33 Vict. c. 24, sched. ii., *vide ante*, p. 1043.

(*i*) 51 Geo. III. c. 65, s. 3, as re-enacted in 32 & 33 Vict. c. 24, s. 1, sched. ii.

(*j*) Ss. 2, 3, as re-enacted in 32 & 33 Vict. c. 24, s. 1, sched. ii.

the University Press, Oxford,' or 'The Pitt Press, Cambridge,' as the case may be.

Proceedings under the Acts of 1799 and 1839 for penalties are not to be commenced except in the name of the Attorney or Solicitor-General in England or the Lord Advocate in Scotland (*k*).

The provisions of the Acts of 1869 and 1881 do not exclude the proof of publication by modes other than those permitted by the statutes.

Where the affidavit of a proprietor under 38 Geo. III. c. 78 (rep.), described the proprietor's residence to be in 'Red Lion Street, St. Ann's Square,' and on the paper it was described as in 'St. Ann's Square'; Tenterden, C.J., held that as the party was not excluded from other proof of publication, if he relied on the statutory proof he must bring himself within the statute, and that the discrepancy was fatal (*l*). In moving for a criminal information a prosecutor was not bound to adopt the statutory proof, but if he adopted any other, the publication must have been shewn by some direct proof (*m*).

(*k*) 2 & 3 Vict. c. 12, s. 4, and 9 & 10 Vict. c. 33, s. 1, re-enacted in 32 & 33 Vict. c. 24, s. 1, sched. ii.

(*l*) Murray *v.* Souter, 6 Bing. 414, cit.

(*m*) R. *v.* Baldwin, 8 A. & E. 168; and see Watts *v.* Fraser, 7 A. & E. 223; R. *v.* Stanger, L. R. 6 Q.B. 3521; R. *v.* Pearce, Peake, 75.

END OF VOL. I

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CANADIAN NOTES.

OF CRIMINAL LIBELS.

Sec. 1—Preliminary.

As to Blasphemous Publications.—See p. 400*a*.

As to Sedition.—See p. 316*a*.

As to Indecent Publications and Exhibitions.—See p. 1883*a*.

As to Interference with the Administration of Justice.—See p. 554*a*.

Sec. 2.—Defamatory Libel.

Defamatory Libel, Definition of.—Code sec. 317.

Publishing Defined.—Code sec. 318.

Newspaper Defined.—Code sec. 222.

Newspaper Proprietor's Responsibility Presumed.—Code sec. 329.

Evidence.—It must be proved that the defendant was proprietor or publisher of the journal at the time of the publication of the libel. R. v. Sellars, 6 Montreal Legal News 197.

When the accused in a case of defamatory libel in a newspaper resorts to the defence allowed by Code sec. 329 that the publication of the libel was made without his knowledge, the Crown may prove the publication of former libels of a similar character by the same editor, in order to establish the liability of the accused resulting by the terms of article 329 from his continuing to retain this editor in the conduct of the newspaper. R. v. Molleur (No. 1) (1905), 12 Can. Cr. Cas. 8.

Sec. 3.—Trial.

Place of Trial.—Code sec. 888.

In order to obtain a change of venue in a prosecution for defamatory libel such facts must be shewn as will satisfy the Court that a fair trial cannot be had at the present venue, and it is not sufficient that the applicant's solicitor swears to a belief that a fair trial is impossible there because of the prosecutor's interest in political affairs. The fact that two abortive trials of the cause have already taken place at both of which the jury disagreed, is not of itself a ground for ordering a change of venue. R. v. Nicol (1900), 4 Can. Cr. Cas. 1 (B.C.).

General Verdict of Not Guilty.—Code sec. 956.

This section originated in the English Act of 1792, 32 Geo. III. ch.

60, which became part of the law of the Province of Canada. Under it, it is for the jury to say whether, under the facts proved, there is libel and whether the defendant published it. R. v. Dougall (1874), 18 L.C. Jur. 85.

Sec. 4.—Punishment.

For Publishing or Threatening to Publish with Intent to Extort, etc.—Code sec. 332.

For Libel Known to be False.—Code sec. 333.

For Defamatory Libel.—Code sec. 334.

Sec. 5.—Indictment.

Innuendo.—An indictment charging the publication of a defamatory libel, which does not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, is bad by reason of the omission of an essential ingredient of the offence. R. v. Cameron (1898), 2 Can. Cr. Cas. 173.

On an indictment for a libel published in a newspaper, it appeared that the editor (who was not indicted) before inserting the libel shewed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted. The jury found it to be a malicious libel, and defendants were convicted. The Court held that what the prosecutor said to the editor, and did, did not hold out any assurance of impunity to the defendants, so as to render the conviction illegal, and a new trial was refused. R. v. McElderry (1860), 19 U.C.Q.B. 168.

When an indictment for defamatory libel consisting of words harmless in themselves, but importing by innuendo an imputation of dishonourable conduct contains in addition to the enunciation of the incriminating words an allegation of the sense in which they should be understood the Crown will be allowed to prove extrinsic circumstances which impute this meaning to them. It is not necessary to enumerate these circumstances in the indictment, and the accused is sufficiently guarded against surprise by the right that he has to demand particulars. See Code secs. 859-860. Failing to do so, he will not be allowed to object to the admission of the evidence above mentioned and the question of its legality is not one which can be reserved for the opinion of the Court of Appeal. R. v. Molleur (No. 1) (1905), 12 Can. Cr. Cas. 8.

A person alive to the vindication of his character when assaulted and entitled to the remedy of criminal information must apply with reasonable promptitude. The general rule is stated by Lord Mansfield in R. v. Robinson (1765), 1 W. Bl. 542, where he said: "There

is no precise number of weeks, months or years; but, if delayed, the delay must be reasonably accounted for. The party complaining must come to the Court either during the term next after the cause of complaint arose, or at so early a period in the second term thereafter as to enable the accused, unless prevented by the accumulation of business in the Court, or other cause within the second term; and this regardless of the fact whether an assize intervened or not. R. v. Kelly (1877), 28 U.C.C.P. 35, 41 U.C.Q.B. (1877), 1, 24.

It is of the highest importance that the applicant for a criminal information should in all cases lay before the Court all the circumstances fully and candidly in order that the Court may deal with the matter. R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 25 (citing R. v. Aunger, 28 L.T.N.S. 634 (S.C.), 12 Cox 407.

The granting of a criminal information is discretionary with the Court under all circumstances; the application is not to be entertained on light or trivial grounds. In dealing with such an application, the Court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the Court in granting the rule for a criminal information. R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 29.

There are two things principally to be considered in dealing with such an application; (1) To see whether the person who applies to conduct the prosecution, the relator or the informer, has been himself free from blame, even though it would not justify the defendant in making the accusation; (2) To see whether the offence is of such magnitude that it would be proper for the Court to interfere and grant the criminal information. Both these things have to be considered, and the Court would not make its process of any value unless the Judges considered them and exercised a deal of discretion, not merely in saying whether there is legal evidence of the offence having been committed, but also exercising their discretion as men of the world, in judging whether there is reason for a criminal information or not." R. v. Plimsoll (1873), noted in 12 C.L.J. 227; R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 29.

"The Court always considers an application for a criminal information as a summary extraordinary remedy depending entirely on their discretion, and therefore not only must the evidence itself be of a serious nature, but the prosecutor must apply promptly or must satisfactorily account for any apparent delay. He must also come into Court with clean hands, and be free from blame with reference to the transaction complained of; he must prove his entire innocence of everything imputed to him, and must produce to the Court such legal evidence of the offence having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendants."

Per Quain, J., in R. v. Plimsoll (1873), noted, 12 C.L.J., p. 228, cited by Hagarty, C.J., in R. v. Kelly (1877), 28 U.C.C.P. 35.

The Court confines the granting of criminal informations for libel to the case of persons occupying official or judicial positions, and filling some offices which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature; leave was therefore refused to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to. Per Armour, J.—"I think the practice of granting leave to file criminal informations in this country, having regard to the social conditions of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued and, if necessary, abolished by legislative enactment. The very rule adopted in England, that it will only be granted to what I may call 'a superior person' is the strongest reason, to my mind, why in this country it should never be granted at all. Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist a remedy for the superior person which is denied to the inferior." R. v. Wilson (1878), 43 U.C.Q.B. 583.

Per Cameron, J.—"There is no real necessity, so far as I am aware, for any one seeking this remedy. Any person libelled has a right to lay an information before a magistrate charging any one who may have libelled him with the offence, and may then by his oath deny the truth of the slanderous charge or imputations." *Ibid.* Hagarty, C.J., added that it was not to be understood that the Court laid down any absolute rule as to future applications for criminal informations, or that they meant to fetter their discretion in dealing therewith. *Ibid.* Reporter's note. R. v. Wilson (1878), 43 U.C.Q.B. 583.

Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter by his affidavit on which he moves for a criminal information is bound to answer such charge otherwise the affidavit will be held insufficient. R. v. Edward Whelan (1862), 1 P.E.I. Rep. 220, per Peters, J.

In Trinity Term, 1876, an application was made for a criminal information for libel in newspapers published on 23rd and 30th March and 25th May. The delay in not applying to the Court during Easter Term, or until 30th August, was not satisfactorily accounted for, and the Court refused the application, but, in view of the virulent language of the article, without costs. R. v. Kelly (1877), 28 U.C.C.P. 35.

In answer to an application for a criminal information for libel the defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received

the information from persons whom they trusted to be reliable and trustworthy; that the *Globe* newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true, and without malice. This was held to be no ground for the Court refusing to the applicant leave to file a criminal information for the reiterated publication in a newspaper of matter not pretended either to be not libellous, or to be true in fact. R. v. Thompson (1874), 24 U.C.C.P. 252.

Quære, whether a criminal information is the course to be adopted for wilful and corrupt misconduct of a Judge holding an inferior Court of record. R. v. Ford (1853), 3 U.C.C.P. 209, 218.

Where there is foundation for a libel, though it falls short, of justification, an information will not be granted. The Queen v. Biggs, 2 Man. R. 18.

Sec. 6.—Evidence.

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. R. v. Nicol (1898), 5 Can. Cr. Cas. 31 (B.C.).

Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called upon, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. In Ontario, a private prosecutor in a prosecution for defamatory libel has no *locus standi* to make the application. R. v. Young (1901), 4 Can. Cr. Cas. 580 (Ont.).

See Code sec. 947 as to evidence in respect of the publication of an extract from an authorized Parliamentary publication.

Sec. 7.—Matters of Defence.

(1) *Absolute Privilege.*

(*a*) Publication by petition to or under authority of Parliament. Code sec. 321.

Certificate of publication by order of Parliament. Code sec. 912.

Copy of report may be laid before Court. Code sec. 913.

Stay of proceedings had on dismissal. Code secs. 912, 913.

(*b*) Publication in judicial proceedings. Code sec. 320.

(2) *Qualified Privilege.*

(*a*) Fair reports of proceedings in Parliament. Code sec. 322. The Court has power summarily to commit for constructive con-

tempt notwithstanding secs. 322, 324 and 325 as to fair reports of Court proceedings and fair comment upon public affairs; but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice. Stoddard v. Prentice (1898), 5 Can. Cr. Cas. 103, 6 B.C.R. 308.

The privilege given to a report published in good faith of judicial proceedings does not extend to the publication of declarations made by one of the counsel out of Court and in private conversation. Desjardins v. Berthiaume, 16 Que. S.C. 506.

Code sec. 322 refers to libel and not to contempt of Court, and there is still power to commit summarily for constructive contempt, *ex. gr.*, a newspaper editorial to the effect that one of the parties to a pending suit will lose the case. Stoddart v. Prentice (1898), 5 Can. Cr. Cas. 103, 6 B.C.R. 308.

Extracts from Parliamentary Publications.—Code sec. 321.

Whole Publication may be Given in Evidence.—Code sec. 947.

Reports of Public Meetings.—Code sec. 323.

Publication of Matter Believed to be True, for Public Benefit.—Code sec. 324.

(3) *Fair Comment.*

(1) *Upon Public Conduct.*—Code sec. 325.

(2) *Upon Published Book.*—Code sec. 325(2).

(4) *Publication.*

(1) *In Good Faith, Seeking Redress.*—Code sec. 326.

(2) *By Answers to Inquiries.*—Code sec. 327.

(3) *By Giving Information to Interested Persons.*—Code sec. 328.

(4) *After Invitation or Challenge by Complainant.*—Code sec. 319.

(5) *Truth.*

When Truth a Defence.—Code sec. 331.

Not Guilty May be Pleaded in Addition.—Code sec. 331(2).

Effect of Plea on Punishment.—Code sec. 331(3).

Plea of Justification.—Code sec. 910.

(*a*) *In Two Senses or Either Sense.*—Code sec. 910(2).

(*b*) *Plea in Writing.*—Code sec. 910(3).

(*c*) *Reply Denying.*—Code sec. 910(4).

A plea of justification must set forth concisely the particular facts by reason of which its publication was for the public good, but must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument. R. v. Grenier, 1 Can. Cr. Cas. 55.

A plea of justification, which embodies a number of letters which it is proposed to use as evidence, and contains paragraphs of which the

matter consists merely of comments and argument, is irregular and illegal; and should be struck from the record, or the illegal averment should be struck out, and the defendant allowed to plead anew. *Ibid.*

To an indictment for libel, the language of which was couched in general terms, the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit, etc. It was held that the plea was insufficient because it did not set out the particular facts upon which the defendant intended to rely. R. v. Creighton (1890), 19 O.R. 339.

The existence of rumours cannot be proved in justification of the libel. R. v. Dougall (1874), 18 L.C. Jur. 85.

In a prosecution for an illegal defamatory libel contained in a newspaper article condemning an employer's dismissal of employees belonging to a trade union and charging that the distribution of certain gratuities by the employer to his employees was impelled by motives of selfishness on his part and was for the purpose of winning public approval and favourable public comment through press notices thereof, a plea of justification will not be struck out on the objection that the facts therein alleged do not shew that it was for the public benefit that the publication should be made, if such plea contains a charge that the press notices favourable to the complainant were published at his instance. If the complainant in a prosecution for defamatory libel has himself called public attention to the subject-matter of the alleged libel by obtaining the publication of newspaper articles commending his conduct therein, he thereby invites public criticism thereof and cannot object that the answer to his own articles is not a publication in the public interest. R. v. Brazeau (1899), 3 Can. Cr. Cas. 89 (Que.).

Where on the trial of a criminal information for libel the Judge in substance told the jury that the defendant, under the pleas of justification, was bound to shew the truth of the whole of the libel to which the plea is pleaded, and that in his opinion, the evidence fell far short of the whole matter charged; such a direction is not so much a direction on the law as a strong observation on the evidence, which may be made in a proper case without being open to the charge of misdirection. R. v. Port Perry, etc., Co., 38 U.C.Q.B. 431; R. v. Wilkinson (1878), 42 U.C.Q.B. 492, 505 (per Harrison, C.J., Wilson, J, dissenting).