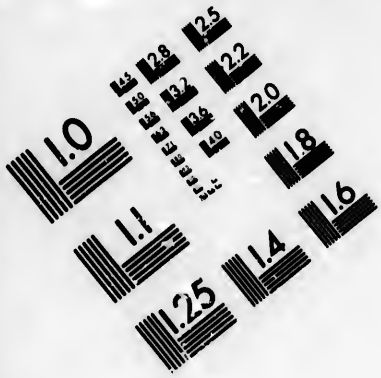

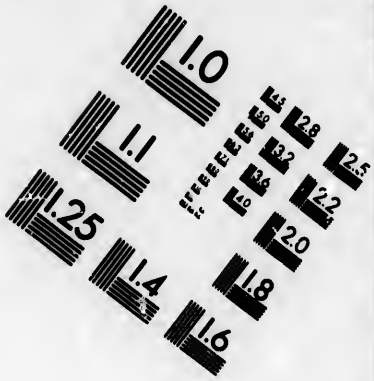

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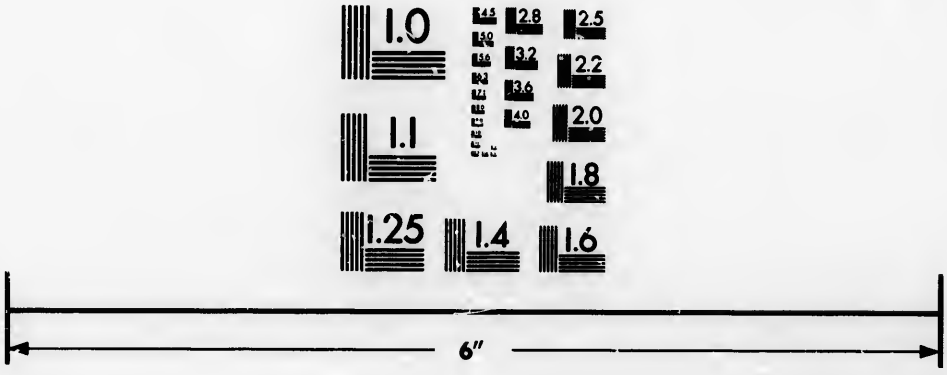

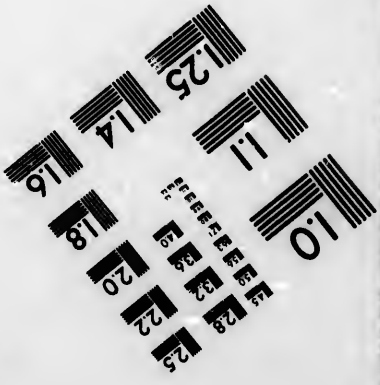

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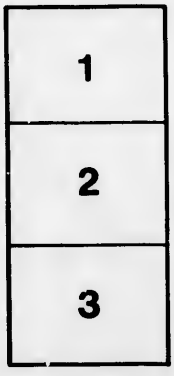

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A

MANUAL

OF THE

CRIMINAL LAW

OF

CANADA.

BY JOHN HENRY WILLAN,

COUNSELLOR AT LAW.

QUEBEC.

1861.

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TO THE READER.

The following is compiled entirely from standard authors, indeed from all the best Essayists of the legal profession to be found in an Advocate's Library. It originally consisted of rough notes taken from time to time and not intended for print. I had occasion once or twice to shew them to some of the profession, and was advised to publish them. My first idea was to publish these notes for the use of students only and therefore to omit particular references to the Statutes leaving the student to look them up for himself. I again, however, adopted a suggestion to make the work more general by inserting such references. In some respects I believe this brief work bears marks of its origin and of its author's change of purpose, and I commend such defects to the reader's indulgence.

The following general directions should be kept in mind when I speak of a Statute without stating its source if it appears to be subsequent to 1774, it will have been passed by Provincial Authority; if previous to that date by Imperial Authority. It has been said the law "sleeps but dies not," and no time can repeal an Act of Parliament, it must be repealed or superseded by Parliament.

Therefore where very old Statutes existing in 1774 have not been superseded by the exercise of the powers delegated to Provincial authority, I have thought fit to refer to them as part of the law of this land. The Consolidated Statutes of Canada have much facilitated the work of reference to our Canadian Legislation.

When I have been unable to refrain from drawing an inference of my own from cases and authorities before me, I have used such language as will easily enable an observant reader to distinguish my mere opinion from the *dicta* of the great writers, whose products I have attempted to condense.

I have laid down the principal crimes, whether Treason, Felony, or Misdemeanor generally in alphabetical order. From this arrangement I have sometimes departed for the sake of grouping together crimes committed from a similar motive and presenting what I may be permitted to call a family likeness. Thus I have followed Treason, by *Præmunire* and Sedition, and made Larceny lead the train of offences committed by the defendant for the purpose of unlawfully appropriating the private prosecutor's means. I make those explanations that the small amount of method the work contains may be intelligible, and that some defects in its structure may receive a reasonable allowance.

J. H. WILLAN,
Counsel in the Law.

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CANADA.

ABDUCTION.

Abduction is the taking or detaining of certain females under certain circumstances. The females who may be the objects of this offence are heiresses or women of property, who are taken away or detained forcibly for lucre in order that they may be married or defiled, or any girls under sixteen years.

For the first class of females it would seem that they must have some kind of property or the expectation thereof, and that the motive must be lucre. The offence is complete whether the abductor perpetrate the crime for himself or another. It seems that the main ingredient in the crime is the design against the woman's property by the restraint of her person, and it is probable that the words "or defiled" are to cover any question of the validity of the marriage, or possibly a defiling with intent to induce her to accede to marriage; in any case her possession of property or her expectation thereof is essential, and so it would seem is her being a spinster. This crime is Felony.

In reference to girls under sixteen, it would seem all that is necessary to complete the offence is the removing them whether with or without their consent from the care of their parents or whoever has the lawful charge of them; but obtaining possession of a girl under sixteen with the consent of her parents obtained by false representations, when done with intent to debauch the girl, has been held an abduction.

It would seem that the mere removing is sufficient presumption of guilt if there be no consent by the parents or guardians, but an intent to know the girl must be proved if the consent of the parents or guardians be obtained by artifice or false statement. See Consolidated Statutes, Cap. 91, ss. 25, 26, 27.

ABORTION.

To administer to a woman any poison or other noxious thing, or cause the like to be taken by her, or use any instrument or other means whatsoever to procure a miscarriage is felony. It is immaterial whether this be with the woman's consent or no, and whether she be in fact pregnant. But it is necessary to complete the crime that the poison or other noxious thing be actually taken into the stomach of the woman, if drugging be the mode of procuring abortion alleged against the defendant. It is also necessary (where drugging is the mode) that the drug shall be noxious, for if it be harmless the intent will not make the crime. Though it is necessary to complete the crime (if by drugging) that poison or noxious "thing" be taken into the stomach, yet the attempt to administer it would probably be a misdemeanor. Consolidated Statutes, Cap. 91, sec. 24.

ABUSING otherwise described as carnally knowing any girl under ten years of age, is a felony, whether the girl consent or no. It is enough to prove penetration; the attempt to do it will be an assault whether with consent or no, and one of a grave character. If the girl be above ten and under twelve years it is a misdemeanor to know her if she consent; if not, it is felony for it is rape. It will be misdemeanor to attempt carnal connection with the girl's consent, but not an assault, and again if she submitted it will be for the *jury* to say whether she did so from fear, and they are not to hold such submission a plain proof of consent as they might do in the case of a grown up woman, but determine whether the submission was of fear or free will from the circumstances of the case. See Consolidated Statutes, Cap. 91, ss. 20, 21.

ACCOMPLICE.

ACCOMPLICE is a word in common usage applied to all persons who participate in the commission of any criminal offence, but in law criminals are divided into principals and accessories. This division applies only to felons. In treason all are principals, in misdemeanors there are no accessories, and treason, felony and misdemeanor are the three heads under which all crimes are included. An accessary before the fact in felony, is one who counsels, excites, moves, procures, hires, or commands another, and is not himself at the doing of it. An accessary after the fact is he who knowingly receives, harbors or assists the principal felon. This will not reach the wife of the felon. In treason the receipt of the principal, or other assistance towards his flight, concealment or unlawful deliverance, or other unlawful protection from justice, will make the party a principal traitor; in misdemeanor, the receipt, &c., is no crime. Accessary during the fact is a principal in the second degree. The difference between principals in the first and second degree is so immaterial that a man indicted as principal in the first degree, may be convicted on proof that he was present at the fact aiding and abetting, and if indicted in the second degree he may be convicted on proof that he did the act. Consolidated Statutes, Cap. 97.

ACCUSING.

ACCUSING of or threatening to accuse of certain crimes, with intent to extort money, is felony. The accusation must be of infamous crimes or it is no felony. The threat may be made either by letter or by words spoken, and must be made either to the party threatened, or to a third party with intent that it shall be mentioned to him, and this the prosecutor must prove. The intent may be either expressed or implied. The intended extortion must be either of money or chattels or valuable securities. The threat must be used before the accusation is made if the offence consist of the threat; but if the accuser threaten after the accusation made, doubtless it would be evidence of the intent of the accusation, though it would be for the jury to say whether at the time of the accusing the intent existed, which is necessary to the offence. This crime is a felony. For particulars see the Consolidated Statutes, Cap. 92, ss. 6 & 7.

It is to be noted that the indictment lies where the threat was used except when it was by letter—in that case the venue may be laid where the letter was addressed.

APPRENTICES, for Laws relative to, See Provincial Statutes, 41 Geo. 3, Cap. 13; 57 Geo. 3, Cap. 16; 12 Vic., Cap. 55; 18 Vic., Cap. 100.

APOTHECARIES. See Provincial Statutes, 10 & 11 Vic., Cap. 13; 28 Geo. 3, Cap. 8; 4 & 5 Vic., Cap. 41; 10 & 11 Vic., Cap. 28; 12 Vic., Cap, 52; 14 & 15 Vic., Cap. 105; 18 Vic., Cap. 244.

ATTORNEY.

ATTORNEY.—As every attorney in Canada East is also a counsel and *vice versâ*, the rules as to attorneys in English books need not be sought, but it is proper to remark that all the privileges and many of the responsibilities of English attorneys attach to the Bar of Canada, and some of them will be treated of elsewhere under other heads such as in dealing with the offence of barratry, &c. See 7 Vic., Cap. 19; 10 & 11 Vic., Cap. 13; 12 Vic., Cap. 38; 12 Vic., Cap. 44; 13 & 14 Vic., Cap. 37; 14 & 15 Vic. Cap. 95; 18 Vic., Cap. 100.

APPROVER.

APPROVER.—By the ancient usage of criminal law if a man indicted for treason or felony, confessed the indictment (that is his guilt) the court might admit him to become an approver, that is a witness against his accomplices in the crime. The whole learning of approvements (*i. e.* trial by the evidence of an approver) is now obsolete being superseded by the modern practice of allowing an accused person to turn evidence for the Queen without confessing the indictment. In point of law such a witness may convict another of any crime in which one witness suffices, yet it is not usual to convict on the testimony of an accomplice or of the wife of an accomplice, unless the evidence be corroborated by other testimony, and it has been held that evidence corroborating the testimony of the approver *quoad* A was not corroboratory of his evidence *quoad* B, and the corroboratory testimony must be as to some fact or circumstance which tends to connect the prisoner with the crime or with the approver, and not merely as to the commission of the crime. It is not proper to admit the guiltiest as approver and in many cases it would still perhaps, as anciently, have the effect of acquitting them all. Great caution should be and generally is used in allowing men to turn approver or evidence for the Queen.

ASSAULT.

ASSAULT.—An assault is an attempt to do a personal injury to another. Assaults vary with the nature of the intent of the assaulter and of the crime which he intends to commit. They enter as elements into other crimes, but at the same time every assault is in itself a distinct substantive offence. As such we will first treat of this offence. An attempt or offer with force and violence to do a corporal hurt to another is a common assault. As by striking at him with or without a weapon or presenting a gun at him within a distance to which the gun will carry, or pointing a pitchfork at him whilst standing within the reach of it, or holding up one's fist at him, or by any other rash act done in an angry or threatening manner. So riding towards a man with intent to do him a corporal injury, so that he was obliged to run away to avoid it, was holden to be an assault. Where A advanced in a threatening attitude to strike B, so that his blow would have almost immediately reached B if A had not been stopped, it was held an assault though at the moment A was stopped, he was not near enough for his blow to have taken effect. It is to be observed though that the principle of an attempt combined with the power of giving effect to the intention to do injury is the main ingredient in assault, and the cases which go beyond this, though they are to be taken as good law, should not and cannot be used as the basis of a principle which would extend the offence beyond its natural limits which appear to be confined to such menacing acts, motions and gestures as of themselves or when combined with an evident hostility inspire the reasonable apprehension of an immediate personal danger. No words will amount to an assault. But words may be taken as part of the *res gestæ* in an assault case and may be given

in evidence as shewing the intent of the party. A common assault is a misdemeanor at common law, and the remedies for this wrong are both civil and criminal. Being by suit for damages, by indictment, by information, by a summary trial, which is a mixed process, the costs being recovered by the prosecutor on conviction, while the penalty goes to the Queen or by Cap. 91, s. 39, of the Consolidated Statutes to the Municipality in which the offence was committed, and by binding the assaulter to keep the peace for the future, for the security of the assaulted. As to the first, it is competent for the injured party to proceed both by indictment and suit, but the judges will usually, on motion at least, stay process in either court, until the other has concluded, lest the defendant be punished beyond his deserts by the effect of these cumulative remedies. The mode in which proceedings are stayed belongs to the practice of these courts and not to this work. Of the third, information is a process wholly disused in Canada East and discouraged in England in cases of assault. This is not therefore the place to treat of it further than to observe that there is such a power though dormant and that this offence may be legally brought within its reach. The fourth and most usual remedy is a summary trial, Magistrates having jurisdiction up to a fine of five pounds including the costs. He who takes a summary trial waives all other remedy (which indeed is removed by Statute,) the last is binding to the peace. In so doing the complainant must swear to a reasonable apprehension of future violence, and that he is not animated by malice or revenge, but simply desires to bind over his opponent for his own safety. It is to be noted that this remedy is for a prevention of a repetition of the wrong, not for its punishment. It does not bar the complainant of any of his other remedies except an "information" or summary trial, but it is not usual for a magistrate to grant a warrant both for the peace and for trial criminally, though bail taken for appearance on criminal prosecution sometimes includes (during the interval elapsing before the prosecution,) surety to the peace. The powers of the higher criminal courts in dealing with common assault as with most or nearly all misdemeanors at common law are very wide, no period is fixed for the duration of the imprisonment which may be inflicted, and the law places no limit on the fine, but the imprisonment on indictment for this offence must be in the common gaol, and may therefore be regarded as limited to the period for which ordinary imprisonment not in a penitentiary can be inflicted. And it seems also that this imprisonment for common assaults at common law may not be with labor. I shall presently put a case in which it would seem this rule may be departed from. Assault may be committed in connection with or in the completion of other offences both felonies and misdemeanors. Of the latter, is assault and battery to be dealt with in its place and so assault and false imprisonment. Some assaults are felony by Act of Parliament, and assaults may also be committed in attempts to commit felony, as rape or murder. All these must be looked for under their several heads. It may be asked are there any assaults except these? I answer, yes, any offence against the person of another and against his will, if not otherwise described or amounting to a more serious offence, will be an assault whether it amount to a battery or no. Of this nature, will be ill usage by the harsh conduct of a jailor, mad house keeper, master, guardian of another or any person in the charge of another's liberty, if the same be not justified by the circumstances. In an indictment for assault on an apprentice, neglect in supplying him with sufficient food was amongst the allegations, and doubtless such neglect of a person who was dependent on another and under their control might be described and punished as an assault. So gross and improper treatment by a surgeon even though not offered with the intent to do injury will be an assault. So with the giving of deliterious drugs not sufficiently virulent to be poison. In indecent assaults, the consent of a parent

under a mistatement, or a lunatic or a young child will not render the act less an assault. Any person may be the subject of an assault. Consolidated Statutes, Cap. 91, ss. 31 up to 47. *

A person indicted for a higher crime may in many cases be subjected to conviction for assault or for a simple assault, this is by recent well known Statutes, (Con. Stat. cap. 99, s. 65, 66,) but it is said that under the late Act concerning injuries to the person, with or without a weapon, known as Cameron's Act and which is nearly a copy of one of Lord Campbell's, no conviction will be had for simple assault, but a count may be added for it to an indictment for a wounding within the Act. So that the jury may convict for either offence. In other offences this is to be noted, that joining a count for a common assault to an indictment for feloniously wounding or shooting, or for highway robbery is to be avoided, as the judges have held it misjoinder and fatal, on the principle that a misdemeanor and a felony ought not to be and cannot be joined in the same bill, but it is competent to the jury in such felonies to say not guilty of the felony whereof the prisoner stands indicted but guilty of an assault or if they please simple assault. The imprisonment allowed on such a conviction is not to exceed three years, and in practice I believe it has never exceeded one, and it seems the prisoner may be sent to Kingston for two or three years, but it is a question if the insertion of the word simple might not prevent a sentence to the penitentiary. Every thing which will justify a battery will justify a simple assault, though not it seems by deadly weapons. It may be a question whether an assault without battery may not be culpable when committed with a deadly weapon, under circumstances which would completely justify a slight or moderate battery, and it is easy to imagine cases in which the assault might be a more serious offence than actual battery. The reverse of this is the general rule, and the battery usually a greater offence than mere assault.

AFFRAY. See Riot.

AGENT.—The cases in which dishonesty by an agent will be criminal will be treated of under the heads of larceny and embezzlement.

ARREST.—Malicious arrest may be the ground of an action, to support which several ingredients are wanted besides the malice.

In some cases it may make the ground of an indictment of which we will treat under its proper head "False imprisonment."

ARSON.

ARSON.—The wilful destruction of property by fire is in almost all cases arson. The offence of arson is completed by the "setting on fire." The setting on fire of a dwelling house a person being therein is capital, and so of a ship in like case. Every arson is a felony. For particulars of the offence look to the Consolidated Statutes of Canada, Cap. 93.

A man may burn his own house if it be not insured, mortgaged, or otherwise the subject of another person's interest, or jeopardise other men's houses, and so with his other properties. In case he thereby fires other houses wilfully or by such gross disregard of consequences as to constitute legal malice, he may be convicted for arson.

ARMS. See Riot, and 2 Ed. 3, c. 3.

ASSEMBLY. See Riot.

ATTEMPTS TO COMMIT CRIMES.—Every attempt to commit felony is a misdemeanor at common law, and there are some attempts dealt with under

* Imperial Statutes, 43 Eliz. c. 6,—22 & 23 c. 2, c. 9 s. 136,—9 Ann, c. 16,—9 Ann, c. 14, s. 8,—6 G. 2, c. 21.

Statutes which are noticed in the class of offences in which they occur. As a general rule an attempt to commit a misdemeanor is a misdemeanor at common law.

In High Treason a bare attempt will amount to the same crime as its completion.

BAIL.—In treason justices cannot take bail. In misdemeanors, except for breach of prison, one justice may admit the party to bail. In felony it takes two justices to do this—but for this and a good many other purposes, the Inspector and Superintendent of Police has the power of two justices. The law has provided against the abuse of this power which, together with all other instances of misconduct by magistrates and other ministerial officers, I will treat of hereafter. Formerly it was not usual to take bail during remands in felony, but now, one justice may do so. Consolidated Statutes cap. 102,—24 Geo. 3, cap. 1,—4, 5 Vic. cap. 24.

BARRISTER. See Attorney.

BARRATRY. See Maintenance.

BATTERY.

Battery is an injury, however small, actually done to the person of another in an angry, revengeful, rude or insolent manner, spitting on a man, jostling him out of the road or in any way touching him in anger, are all given as instances of the strict definition of a battery, and the following are given as instances of a touching or contact which is *not* a battery. To lay one's hand on a man *if it be necessary* to serve him with a process, to lay one's hand *gently* on another against whom an officer has a warrant and to tell the officer this is the man he seeks, or a horse bolting *without any fault* in his rider and riding over a man will not be a battery, nor will suit lie for it. A violence done to the person of another being in the full possession of adult reason with his consent and knowledge of its purpose and effect will not be a battery if done with no hostile intention. Thus athletic games such as wrestling, boxing, &c., when not immoral or dangerous or so pursued as to attract crowds in inconvenient situations may be pursued with legal impunity. It is not battery to pursue them under these restrictions and the restriction given in the preceding sentence. It is a good defence, that a battery was committed in sport where the subject of it may be reasonably and still more if truly deemed a consenting party. Such as intimate acquaintances "larking" together as it is called, or the like.

Under the head of assault I have already treated of almost all that need be noted in battery, but will add these instances of justification to a battery. If an officer having a warrant against a man who will not suffer himself to be arrested, beat or wound him in an attempt to take him, he will be justified. This presumes the warrant was for a misdemeanor, in which under such circumstances he could justify beating or even wounding, but that is the most; were the pursuit is that of a *felon* the same circumstances may justify killing him. Many persons possess the right of inflicting chastisement, as parents over their children being under their control by reason of their tender years, master tradesmen and ship captains their apprentices, gaolers their prisoners, keepers of lunatics their patients and some say a master may beat his servant, (though in many cases I doubt if that will be allowed in any court at this day,) provided the chastisement in all these cases be of a reasonable nature and proper to the case in which it is applied. In all these cases persons pretending to an authority they do not possess, will make themselves answerable for its exercise, and excessive chastisement will, in any case, be a battery. The instances in which the law will allow an unauthorized private person unpermitted to lay his hand upon another are few, and that such be done with

great caution appears from the observation, that if a man fight with and beat one who attempts to kill a stranger, or if he gently lay his hand upon another to stay him from inciting a dog against a third party, or if a man force a sword from one who threaten to kill another therewith, it is no battery. All matters of justification or even of extenuation in most (but not all cases) may be given under the plea of not guilty. It will be a justification of a battery to show that it was done in self-defence. The instances given of this in the books show very plainly that the law while it admits defence does not encourage it, and always forbids revenge, as thus, "if I beat one (without wounding him or throwing a dangerous weapon at him,) who wrongfully endeavors with violence to dispossess me of my land or goods, or the goods of another delivered to me for safe custody, and will not desist upon my laying my hand gently upon him and disturbing him," it is no battery. This is to be understood of a wrongful act being a bare trespass, were it felony it would be a good excuse for more than battery. Or if a man beat or as some say main (and this seems the better opinion) one who makes an assault upon him or upon his wife, parent, child or master, especially if he did all he could to avoid fighting before he gave the wound, hurt or blow, it is no breach of the peace. It is disputed how far a master may defend his servant by force, none doubt the right of the servant to defend the master by force as above. Moderate force may be used to expel a trespasser, but it must be necessary force, and the trespass though it will justify a gentle push, or ejectment from the premises by pushing in an ordinary manner will not justify the chastisement of the trespasser by blows or the like. This example has been given. If a man conduct himself in a disorderly manner in a public house and refuse to depart when ordered to do so, the landlord is justified in putting his hands upon him to put him out, the same has been held in reference to a man persevering in disturbing a public meeting though in these cases the man was not a trespasser *ab initio.* In all cases however, unnecessary violence will make the defendant criminal. Where the law specially orders corporal chastisement the executioner is protected unless he exceed his office and if he do he may be made to answer as for a battery. Where killing a man will be justified so would beating him, where imprisoning the man would be justified, a battery in order to effect the imprisonment necessary thereto will be justified. Persons coming to the aid of justice, as in suppressing riots and affrays and in some other cases, may justify acts which otherwise would be batteries. These cases will be dealt with in their proper place. Any person may be the subject of a battery whether a good witness or no.

By the few instances given of justifiable interference in the quarrels of third parties, it is evident that batteries justifiable by an assaulted party are not so by any stranger who may come to his assistance ; on the other hand the maxim *qui facit per alium, facit per se* applies fully to a battery. He who orders it, is a principal in the crime were he a hundred miles off at the doing of it. If a constable see a battery or any other breach of the peace committed within his jurisdiction, he should arrest the offender. A magistrate should both arrest and hold him to bail. But I doubt whether he could convict him for battery on view, and I think he could not. In an action for assault and battery it will be a good defence that the plaintiff chastised the defendant in revenge for it. On a criminal prosecution this is no defence. Words will not justify but may extenuate a battery. In a summary trial it is sometimes though not often proper (where other evidence is not available) to plead guilty, and let the defendant make oath to the provocation offered to him by the complainant, and this course may also be proper where the provocation is not immediate or within twenty-four hours, and might be ruled out, but where it is gross enough to have effect upon the court in giving sentence. As a rule the provocation which extenuates a battery should be immediate—the blood

should not have time to cool, before the blow is struck. It is usually but not invariably (in summary cases) the practice on trial to confine the evidence of the provocation to the day of the offence.

Batteries may be thus divided common assault and battery, of which in all its incidents we have treated already, and aggravated assaults, which most usually though perhaps not necessarily include a battery, and an aggravated battery is known as an aggravated assault.

There are some aggravated assaults by statute law, for instance, an assault at an election, and so for assaults on particular persons specially protected by their office or by the circumstances of the case, amounting to an assault upon them in the discharge of a public duty. There is also such a thing as an aggravated assault at common law. This is supposed to be a case in which the facts do not amount to a wounding or a permanent injury or a wilful attempt to take life, but in which nevertheless the corporal wrongs and hurts done are serious and the violence too great for the matter to be properly treated or described as a mere common assault or battery. In such cases a summary trial is not an adequate remedy, and though under the *alia enormia* (other wrongs done to the prosecutor) which generally *but not necessarily* concludes an indictment for common assault and battery, all the particulars constituting the aggravation of the assault might be proven, and the discretion of the judge is a wide one in respect of punishment on conviction, yet it is proper to set out the particulars. The reason is doubtless that the conviction may upon the face of it justify a sentence commensurate with the offence. Of woundings, maiming and similar offences we will treat in their proper place. Consolidated Statutes, Cap. 91, ss. 37 to 47.

Bailiffs—Assaults on, in the execution of their duty are provided for by Statute. See Consolidated Statutes, cap. 105.

For the rest the common law of Canada will teach much about them which is out of the scope of this work.

Bawdy-house. See Nuisance.

BIGAMY.

Bigamy is the contracting of a second marriage during the life of the parties and duration of the first marriage. The offender may be tried in the district in which he is apprehended or is in custody. (Consolidated Statutes, cap. 99, s. 9.) In order to prove the charge the prosecutor must prove the two mariages. This may be proved by any person who was present and can identify the parties, or by producing and proving an examined copy of the registry of the marriage, and giving satisfactory proof of identity, and this will be sufficient without proof of license or publication of banns. The marriages must be valid and the parties must not have been divorced by law. If either marriage were in a foreign country, proof that it was solemnized in the manner usual in that country will suffice, and it appears to be immaterial whether such foreign country be pagan, christian or what not. Bigamy in Canada is prosecuted under a provincial statute, (Consolidated Statutes, cap. 91, ss. 29, 30.) But it has been questioned and not yet decided whether the Parliament of Canada has power to Legislate for bigamy, when one marriage has been contracted out of the country, and it has been doubted whether the Parliament of Canada can lawfully divorce man and wife or no—though the exercise of such a power is now fully established. The first wife or husband cannot be a witness, the second may. The prosecutor must show that the parties to the first marriage were both of them alive when the second was contracted. The criminality consists in marrying again pending a lawful marriage, therefore where there are several subsequent marriages, one of them only ought to be alleged, and the legal criminality only attaches to the violation of the first and lawful mar-

riage. It is a good defence that the wife or husband of the prisoner has been continually absent from the other for the space of seven years last past, and was not known to the other to be living within that time. A divorce from the first previous to the second marriage is a good defence. Also that the former marriage was declared void by a court of competent jurisdiction; but it is open to the Crown to object to such decision on the ground of fraud or collusion. Bigamy is a common law felony, but the jurisdiction of the common law is confined to cases in which both marriages are contracted within the realm, and in which the first if not both marriages are valid at common law, and it would appear the *venue* at common law must be laid in the place in which the second marriage was contracted. It is not usual to prosecute bigamy at common law. To particularise the circumstances which will make a marriage void, the irregularities which will fail of that effect, and the deceits which may be practised with intent to defeat the law, and the cases in which the law will pronounce them futile and of no effect, would exceed the limits and objects of this work. These general instructions should be borne in mind. To examine the provincial statute and compare it with modern English Statutes, and where the exact words or their substance is the same to examine such precedents as may be found. The judges will probably admit them. To examine such English Statutes as were in force previous to the accession of Canada to Britain, and see whether by their wording their effect is limited to England or no, if not then to examine English decisions upon them. To see what was anciently settled as the common law of England, for reference on any common law indictment and to examine how far the same will apply to an indictment under the statute.

It is to be observed that the authorities appear to incline to the opinion that the prisoner's admission of a prior marriage is evidence that it was lawfully solemnized. A conviction where one marriage was in Ireland and the other in Canada was lately maintained by the Court of Appeals in Quebec.

BLASPHEMY AND PROFANENESS.—The law in reference to these offences is never enforced in these days except in the case of blasphemous libel which shall be considered in its place. Denying a God, ridiculing the scriptures, talking against christianity, and even (in England) against the established religion, are indictable crimes in contemplation of law. As to the last of these it might be a question whether it would apply to Canada or not, but however ingenious may be the speculations to which this question might give rise it is not likely ever to prove a matter of practical importance and therefore should not be here discussed. Magistrates may fine persons summarily for profane swearing, but it is never done in these days.*

BREACH OF TRUST. See Larceny.

BREACH OF PRISON. See Escape.

BRIBERY AT ELECTIONS. See Consolidated Statutes, cap. 6, ss. 82, 83, 84.

BRIBERY OF PUBLIC OFFICERS. See Misprision.

BURGLARY. See Larceny.

CHALLENGE TO FIGHT.

It is indictable as a misdemeanor to challenge a man to fight a duel, or to provoke him to challenge with intent to fight, or to provoke or incite him to commit any other breach of the peace. To be the bearer or messenger of any challenge or message of provocation to a duel or other breach of the peace is likewise indictable. But it would be a good defence that the bearer of a closed

* Imperial Statutes, 5 G. c. 21,—1 W. 3, Sess. 1, c. 18,—9, 10 W. 3, c. 32,—22 G. 2, c. 33.

letter or ambiguous message did not know the purport thereof, and the guilty knowledge of the bearer of such letter should appear by his actions or words, &c. In this offence it is to be observed that the intention being the crime must be proved expressly, no grossness of language will support the charge if the intent be wanting: on the other hand the prosecutor is not confined to the words actually used, he may prove the intent by other words or conversations at other times and places, and the manner of uttering a spoken defiance, challenge, or provocation, may be and usually is material, and therefore the manner and gestures of the defendant, and the like may be given in evidence. It is a good defence that the intent to fight was wanting as that a challenge was sent in sport; for instance, to frighten or surprise the recipient and without hostile motive, or that the provocation was offered to draw a challenge, in order afterwards to bind the party to the peace.

Whether words used be spoken or written is not essential to the completion of this offence, but posting a man as a coward is a high aggravation of the offence of challenging and may be included in the same indictment. The intents of the challenger or even provoker (if the special circumstances allow it) may be variously stated, the intention to kill being the most aggravated. Formerly the fact of the challenge having arisen about money won at play, was an aggravation and such cases were provided for by a statute. 9 Ann, Cap. 14.

To challenge some persons, as clergymen, justices of the peace for acting officially, lawyers for acting professionally, &c., is more henious than to challenge others. The offence is punishable by fine and imprisonment, and binding to the peace, and is very much at the discretion of the court who are competent to take the circumstances into consideration as to the sentence.

Coin.—The various offences in reference to coin, are dealt with under various Statutes to which look for the law as it now is. Consolidated Statutes, cap. 90.

Compromise.—It is a misdemeanor to compromise penal actions or informations for money, or to compound any penal action brought at the suit of a common informer. To constitute this offence it is not necessary that any information should have been laid, and a party may be indicted for taking money for refraining to prefer an information as a common informer, though in truth the offence which ought to have been the subject of the information had not been committed. Compromises of criminal charges without leave of the court are illegal, and leave of the court is only given on misdemeanors of such a nature as chiefly affect the private prosecutor and of little consequence to the public. All other compromises are void.

COMPOUNDING FELONY.

Compounding felony is where a person whose goods have been stolen, takes them back again, or takes other amends not to prosecute. But it is no offence to take back one's stolen goods unless some favour is shewn to the thief. This crime is a misdemeanor, and punished with fine and imprisonment, except when attended with such maintenance as may make the party an accessory to the theft. It would seem by the authorities on this head that a man may be rightly indicted as an accessory after the fact to a robbery, burglary or larceny committed against himself, where for a valuable consideration he has aided the principal felon to fly or escape from justice.

All expressions however ambiguous may be given in evidence and their purport judged, the sole question being whether the expressions made plain the intention to condone the felony (be its degree what it may) to the mind of the felon and whether the intention of so condoning existed in fact.

Taking a reward for helping to goods stolen, that is agreeing for reward to procure stolen goods without prosecuting the thief or discovering him to justice is also indictable. It is said that advertising for stolen goods with offers of impunity, is an offence at common law, and for statute law on the same subject, see Consolidated Statutes, Cap. 92, s. 79.

CONCEALING THE BIRTH OF A CHILD.—It it is a misdemeanor at statute law for a woman to conceal the birth of a child, and it is also a misdemeanor to counsel her to do so. The concealment intended is a permanent disposal of the body and concealment of the birth. The child must cease to live, or never have lived, it matters not whether it was born dead or alive. A conviction for this offence may be had either on an indictment for the concealing, &c., or an indictment for the murder of the child on the acquittal of the mother thereof. Consolidated Statutes, cap. 91, s. 4.

CONSPIRACY.—If two or more persons conspire to do an unlawful act, or a lawful act by unlawful means, it is a misdemeanor at common law punished by fine and imprisonment, whether any act be done in pursuance of the conspiracy or no. If a felony be committed by one conspirator in *pursuance of the conspiracy*, it will make felons of them all. A man and his wife cannot conspire, for in contemplation of law (criminal) they are one, but they or either of them may be convicted if another person conspire with them. If any two be indicted and the proof fail to come home to one of them, both must be acquitted for a man cannot conspire by himself. If two be indicted and one die, or one appear for trial and the other fly his country, or if two be tried for the conspiracy with others still at large, *so* only one be convicted, the conviction is good. It is said that a conspiracy to commit a mere civil trespass is not indictable. But this must be understood in a very restricted sense, as conspiracies to do malicious injuries will be indictable, where the injury itself would not be the subject of indictment, as conspiracies to defame or to maliciously indict, and so in a conspiracy to defraud it does not appear necessary that the fraudulent act or device should be of itself indictable. Besides the criminal prosecution of this offence, the law allows the party principally injured to recover damages by an action on the case. To support this action there must have been an overt act not so to support the indictment. *

Conspiracies by workmen to enhance the rate of wages are unlawful and seem to have been so at the Common Law of England from remote times. They are usually called COMBINATIONS, and this seem to have been their ancient name. Conspiracies of a political character fall either under the head of Treason or Sedition in the latter case the word "Seditiously" is used in the indictment for conspiracy.

CRUELTY TO ANIMALS. See Consolidated Statutes cap. 90.

CUTTING AND STABBING, MAIMING and all injuries to life, short of Homicide, will be found under the head of WOUNDING.

DAMAGING OR DESTROYING PROPERTY, or deeds or other documents, or stealing the same, *vide* Consolidated Statutes, cap. 92.

DEAD BODIES.—It is a misdemeanor to violate graves and remove corpses, punishable with fine and imprisonment. This applies of course only to removal of the body contrary to the will of those who have it in charge whether they be the public authority or not, but on this head it is sufficient to allege that the removal was unlawful, let the defendant justify if he can. Prove that the defendant dug up the body, the slightest removal of it will be sufficient to complete the offence. If the body be found in the defendant's possession it

* Imperial Statute, 33 Ed. 1, St. 2.

will be sufficient to prove that it was dug up from the place of interment, and from these circumstances the guilt of the defendant may be inferred. If the body cannot be identified it may be laid as that of a person to the jurors unknown.

DECOYING CHILDREN. See Consolidated Statutes, Cap. 91, ss. 27, 28.

DEMANDING MONEY with menaces or force. See Larceny.

DOG STEALING. See Consolidated Statutes, ap. C92, s. 33.

DISOBEYING THE ORDERS of a Magistrate. See Misprision.

DISSENTING CHAPEL. See Riot.

DISTURBING PUBLIC WORSHIP. See Consolidated Statutes, Cap. 91, s. 35; Cap. 92, s. 18.

DISORDERLY HOUSE. See Nuisance.

DROWNING. See Murder.

DRUNKENNESS is no excuse in crime, and when punishable. See Police Ordinance, 2 Vic. c. 2.

DUEL. See Murder, and Consolidated Statutes, Cap. 78, s. 3.

DYING DECLARATION. See Murder.

DWELLING HOUSE. See Arson—Larceny—Burglary—Riot.

EMBEZZLEMENT. See Larceny.

EMBRACERY.—Is where one tries to unlawfully influence a jury, (to solicit, to procure, to advise, even to inform or instruct in a matter of private right,) or in any way to labor much more to bribe or intimidate a juror is embracing. Bribing and threatening jurymen may be and should be treated as distinct substantive offences inasmuch as they are misdemeanors of themselves, but they are also acts of embracery and highly criminal. To labour a juryman to appear and give a just verdict is no embracery and one interested may justify it. Acts of embracery may be treated as contempts when committed in the face of a court of record and it is said so may perjury when very gross and apparent. Any of the above offences may be commited by a lawyer as much as by a layman, and all offences of this nature are aggravated by the fact of the culprit being a lawyer, but lawful open pleadings can be justified by a lawyer.

ENEMY. See Treason.

ENGROSSING, FORESTALLING and REGRATING are misdemeanors at common law, punishable by fine or imprisonment or both.

ENGROSSING is the getting into one's possession or buying up of corn or other dead victual with intent to sell it again. Prosecutions for engrossing are contrary to the general tenour of men's opinions in these days, and it would not probably have been held a misdemeanor at any time to engross for sale beyond sea in any free or lawful trade, as the word to sell it again seems to import that the increasing the price to the people of the realm by selling again to them was the offence, and that it was not intended even in ancient times when the state interfered largely with commerce to prevent foreign trade in dead victual, or even to punish a substraction of the amount of food by hoarding. In engrossing the intent to sell again must be established. This may be done by the defendant's admission or by proof of his having actually sold the dead victual, or by proof of some other circumstance by which the jury may infer it.

REGRATING is the purchasing of corn, or other victual in any market and selling it again in the same market or in any other market within four miles thereof.

FORESTALLING* is the buying or contracting for any merchandize or victual on the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there. As to the evidence on prosecutions for these offences, it is to be observed that a variance between the indictment and the evidence in the quantity of victual, as the number of geese, weight of cheese or the like, or as to the price seems immaterial. (Prosecutions for all the above offences by Indictment are disused).

ENTRY, *see* Forcible Entry and Detainer.

ESCAPE.

If a man being charged with any crime escape out of the keeping of him who has him in lawful custody, he may be indicted for a misdemeanor, and on conviction punished by fine and imprisonment, and so may the constable or other person lawfully charged with the prisoner be indicted, and on conviction fined or imprisoned, or both. A voluntary escape is one wilfully allowed. This makes the custodian guilty of treason, felony or misdemeanor, according to the offence for which the prisoner is convicted, and if the prisoner be not first convicted it is still a misdemeanor as against a constable or other. An indictment will lie for negligent escape, though the imprisonment must be for some criminal matter or £100 debt to make the officer or person liable criminally, yet the guilt or innocence of the prisoner is immaterial provided he was lawfully in custody, as under a sufficient warrant or other circumstance justifying the imprisonment, such as a charge of felony afterwards supported by a conviction. The older books seem to make a distinction in all cases between negligent and voluntary escapes, which seems supported both by reason and precedent, and by these it appears that the description of the escape should be sustained by some kind of proof, and that its being voluntary is not a matter of bare inference like negligence, a modern authority being the other way. A rescue is a good defence to an indictment for escape against a constable or other person in charge of a prisoner, if the defendant has done his duty to the best of his ability, usually shown by his having made fresh-suit (or pursuit) after the prisoner. But if the prisoner rescue himself it will not of itself excuse the constable for he might have raised power to aid him being in authority under the Queen so to do, otherwise if it be a private person, for a private person has no authority to raise power. If the officer or person so closely follow the fresh-suit as never to lose sight of the prisoner, it is no escape. If an officer voluntarily suffer an escape, he cannot take the man again on the same warrant, but he may be taken on a new warrant, or without warrant, where he might have been originally lawfully arrested without warrant, otherwise if the prisoner escape against his will. Unreasonable indulgence is an escape in certain cases as suffering a man on bail who is not bailable, allowing a prisoner to go out of bounds or the like. But a man shall not be held guilty of treason or felony for such an escape as this, for unless he designed the party to fly from prison or avoid execution, it is but a misdemeanor. If a prisoner be on record and his name called over and the gaoler says he cannot produce him, and knows not where he is, it shall be deemed an escape and he shall be fined for it, but it is not sufficient proof alone of a voluntary escape. It seems the fine is to be imposed upon the confession by the gaoler in such case and without a jury trial, in fact that the gaoler is sufficiently convicted of negligence by the circumstance just stated. (This does not seem to accord with the modern opinion referred to on voluntary escape by a gaoler.) The guilt of voluntary escape cannot be avoided by a subsequent pursuit nor the guilt of a negligent one by the killing of

* Imperial Statute, 5 & 6 Ed. 6, c. 14.

the prisoner in the pursuit. If an officer allow his prisonor to commit suicide knowingly it is felony in both of them. If through negligence it is a misdemeanor in the officer, in either case the suicide is an escape. To constitute an escape there must be an actual arrest or imprisonment, for instance the mere sight of the prisoner and exhibition of a warrant or mere words as a promise to go quietly will not make such custody as will constitute an escape, and the custodian must be a person whom the law recognizes. But a person wrongfully taking on himself a lawful office will not be protected by his wrong in acting as a gaoler. Only the person who voluntarily allows an escape ought to be convicted for a voluntary escape, but the sheriff may be convicted as for negligence in appointing an improper person as gaoler, where the gaoler is guilty of a voluntary escape. Nearly allied to escape are the crimes of RESCUE AND BREACH OF PRISON, therefore we will consider them under this head.

To aid a prisoner on charge for treason or felony to escape or to attempt to escape is felony, and to do the same by any prisoner for misdemeanor or debt to the amount of £100, is misdemeanor, whether any escape or attempt be made or no. So conveying or causing to be conveyed a vizor or other disguises, or files or other instruments, or arms into a gaol is felony. The conveying to a prisoner or any other person in the gaol, for the use of the prisoner of any of the articles above named without the privity or consent of the keeper is deemed sufficient proof of the offence. The prosecution must be commenced within one year.

BREACH OF PRISON is where a man being lawfully confined in a lawful place of confinement (which must be proved as described in the indictment) breaks out (the manner of the breaking should be stated in the indictment that the court may judge its sufficiency.) If the prisoner be under charge of felony or treason, the breach of prison is felony; a misdemeanor, if the cause of imprisonment be less than felony. The escape of the prisoner must be proved if the indictment for breaking be for felony otherwise it seems if for a misdemeanor. There must be an actual breaking, but if the breaking be accidental it will be sufficient if done in the attempt to escape. A very slight break will suffice. Throwing down some loose bricks by accident in getting over a wall, was held to be a prison breach. It is said that it is not material whether the prisoner be guilty of the crime for which he was in prison or not, yet if he can prove no such crime was committed or he was confined without reasonable cause or he was subsequently acquitted, it will be a good defence to the indictment for the breach.

RESCUE.—The rescue of a traitor is treason, and of a felon, felony. A prosecution for either of these crimes must be sustained by the previous conviction of the traitor or felon and in case of the rescue of one confined for misdemeanor it is misdemeanor, punishment, fine and imprisonment. Rescuing a murderer out of prison or on the road to execution is by law more criminal than the rescue of other felons. It is also a misdemeanor and indictable to rescue cattle (taken dommage faisant) out of a pound and so in a case of distress for rent. In rescue that is a good defence which would answer to a breach of prison and in rescuing a prisoner from a private person, the rescuer must be notified that he was in lawful custody, no warning is necessary where the party rescued was in charge of a constable, otherwise the notice is necessary to complete the guilt of the rescuer. It is to be observed a prisoner who rescues himself is indictable and punishable in the same way as any other rescuer.

FALSE IMPRISONMENT.—False imprisonment that is any imprisonment not justifiable by law is a misdemeanor at common law punishable with fine and imprisonment. Every false imprisonment includes an assault and indictments for

it are therefore called indictments for assault and false imprisonment. Nevertheless an actual assault is not invariably required to support the indictment. If for instance a man submits to either a real or pretended warrant and suffers himself to be actually locked up or otherwise positively deprived of his liberty it is false imprisonment unless there be good cause in law for it. So if he yield to verbal threats and from reasonable apprehension suffer himself to lose his liberty though his oppressor used no gesture which would have constituted an assault. Still the imprisonment requires both a certain amount of force and also requires a positive detention though a very slight detention will suffice, even forcibly detaining a man in the public street is sufficient. All the prosecutor has to do is to prove the imprisonment, it is for the defendant to justify it. If the prosecutor fail to prove the imprisonment he may still prove an assault under the same bill if the evidence is sufficient to establish it. A false imprisonment may be sued for civilly in an action for damages. In some cases it is proper to add a count for false imprisonment to an indictment against a magistrate or other officer of the law for oppression. In some cases a civil action for malicious arrest or prosecution is preferred to the indictment.

FALSE PRETENCES. See Larceny.

FALSE SCALES, Weights and Measures this together with every indictable fraud which may be committed we will consider under the head of Larceny.

FENCES. See Consolidated Statutes, Cap. 92, s. 37.

FISH, FISHERY, FISHPOND. See Consolidated Statutes, Cap. 62 and Cap. 93, s. 23.

FLOODGATES. See Consolidated Statutes, Cap. 93, s. 23.

FORCIBLE ENTRY AND DETAINER

Are misdemeanors which may be committed and prosecuted for either conjunctively or separately and an indictment for both may result in a conviction at common law, as well as by several statutes, of the detainer only or the entry only. These offences are punished by imprisonment in the common gaol, and fine, or either, and if the offence be by three or more it is frequently also a riot, and may be treated as such unless the parties have been punished for the entry or detainer. It is to be observed that where parties are fined for forcible entry or detainer, the fine must be set on either of them severally and not on the whole jointly. On a conviction under statute, the prosecutor may have restitution as an effect of the verdict, unless the defendant hath had three years possession previous to the indictment; otherwise restitution may be awarded not only after conviction but after the finding of a true bill, and in order to this object, it is proper for the party to allege he is still kept out of possession though that is not necessary to complete the offence. Where restitution may be awarded, the prosecuting party is no witness neither is his wife a witness. The degree of force to constitute entry must exceed a mere trespass, and if the offence be laid at common law, the prosecution must establish more force than will be needed to support an indictment under the statutes as at common law, the degree of force must amount *per se* to a public breach of the peace. Whatever force is sufficient to make a forcible entry will also suffice to constitute a forcible detainer. The particulars of the prosecutor's estate in the property entered or detained must be set out where restitution is sought, but not at common law.

Forcible entry and detainer may be committed by joint tenants and by tenants in common against each other, but cannot be made of any public uninclosed place on a highway, or it is said of a common. A wife may be guilty of forcible entry into her husband's house, and so will all aiding and abetting her in her violence. The violence sufficient to constitute a forcible

entry is with such a force as is calculated to prevent resistance; it may be confined to threats only, but in that case they must be such threats as are likely to intimidate those in possession and deter them from resistance; threatening to destroy goods or cattle is not sufficient for this purpose, in point of fact the threatening must be a putting in bodily fear and reasonable apprehension. Verbal threats, however, are no more necessary than actual personal violence as to the main ingredient in this offence, the actions of the defendant if calculated to effect the object or to terrify may be taken in place of words, and so may the fact of his being unusually armed or attended. But an entry by mere trick or artifice is not deemed forcible, but, note, a peaceable entry may be followed by a forcible detainer. A forcible entry may be made by breaking the doors and windows whether any one was in the house or no. Where the party entering has no right of entry all in his company are equally guilty, where he has a right none are guilty, save those who use or threaten violence or abet those who do. With this exception the right of the party indicted to the property is not material. Force being the element and the entering with strong hand or multitude of people being the crime irrespective of the title, and all persons are forbidden to right themselves with force and arms instead of by writ of ejectment. *

Foreign Coin. See Coin, also Consolidated Statutes, Cap. 90.

Forgery. See Cheating.

Fraud. See Cheating.

Fruit. ditto as also see Larceny.

Gaming. See 41 Geo. 3, c. 13, s. 2; 57 Geo. 3, c. 16, s. 10; 2 Vic. c. 2, s. 9; 18 Vic. c. 100, s. 25.

Gaming House. See Nuisance.

Highways. See Nuisance.

HOMICIDE.

Homicide may be classed as justifiable, excusable, or felonious. Excusable homicide is either *per infortunium* (by misadventure,) or *se defendendo* (in self defence). Felonious homicide is divided into murder, manslaughter, and suicide or self murder. This last is when a person of sound mind and discretion kills himself. It is not necessary we should treat of this last at large, further than to remark that the verdict in such case is *felo de se* and is found by twelve men at the least on oath, being lawfully empanneled as a coroner's inquest, or jury, and all agreeing or a majority of the Jury of twelve at the least. Justifiable homicide is killing commanded or at least approved by the law. Killing by an officer of justice, or a private person to prevent a forcible and atrocious crime, is justifiable homicide. So killing felons in the fact of escaping or resisting lawful custody by those who are bound to enforce the custody, affrayers or rioters in suppressing the riot or affray, foreign enemies, traitors or pirates in arms, are justifiable homicides done in obedience to and maintainance of law. Excusable homicide, where the death was purely accidental without fault in the involuntary slayer, is called misadventure. Homicide *se defendendo* is excusable where the slayer was not the aggressor, was in immediate danger of life or limb or enormous bodily harm, and unable to escape by flight from his assailant, and no other option or choice was left him but to defend himself by force or to suffer in such case to the above extent, a good

* Imperial Statutes, 5 R. 2, c. 8,—15 R. 2, c. 2,—8 H. 6, c. 9, s. 2,—15 R. 2, c. 2, 8,—31 Eliz. c. 11,—21 J. 1, c. 15.

reasonable apprehension of such enormous wrong being his defence. So a false imprisonment may excuse homicide where it is necessary to the escape of the prisoner and his only mode of escaping, and be of an aggravated nature such as to amount to reasonable apprehension of death or enormous bodily harm, or otherwise to be of an unbearably aggravated character. Homicide to escape an unlawful or false imprisonment is either excusable or manslaughter according to circumstances, and the general rule to determine the distinction is as above. Another kind of excusable homicide is where one slays another who innocently endangers his own life, as where in a shipwreck two seize the same plank and one shove the other off and drown him, or the like. In such cases the law excuses the act, because the killing is not of malice, but of natural self-love or preference for one's own life over another's, the wish of safety and fear of death for which the law makes allowance.

MANSLAUGHTER is an offence which nearly approaches either to excusable homicide or wilful murder according to the circumstances under which it is committed, and in its extremes of extenuation and of aggravation it is sometimes difficult to distinguish it from the descriptions of homicide we have mentioned. As its shades of guilt are various and uncertain, a narrow line (to ordinary sight often almost invisible) separates this crime in its worst features from the highest of felonies, and in its mildest form from total innocence, including an infinity of degrees of guilt between its extremes. The discretion of the judge wisely preserved by the law is proportionate to these various degrees of guilt, which depend on an infinity of circumstances defy classification (attempted in the United States) and in Canada are included in the one word manslaughter. On conviction for this crime, the prisoner may be imprisoned in the penitentiary for life, he may also be discharged on payment of a shilling or other nominal fine. We may therefore define manslaughter to be a killing which is not wholly blameless but which has not the malice aforethought, and therefore is not murder even when of a most aggravated character. Accidentally killing while doing an unlawful act (which act should be *malum in se*) not amounting to felony is manslaughter, so is the accidental killing of another while doing a lawful act without proper regard to such immediate danger to life as may attend such act, but not amounting to such contempt for human life as will constitute an implied malice aforethought. If two men fight on a sudden quarrel and one is killed by the other, it is deemed manslaughter, unless some extraordinary circumstance, amounting to proof of malice prepense, (or aforethought,) should show it to be murder, and so is it where a man greatly provokes another who immediately kills him. An unwarrantable imprisonment will make killing, though with a sword or other deadly weapon, manslaughter only, and this applies to all illegal arrests or attempts to arrest whatsoever so long as the killing is by resisting the arrest or in the attempt to escape, and not in cold bloody revenge. Accidentally killing a man without hatred or malice while following an unlawful or dangerous sport is manslaughter.

MURDER, is the unlawful killing of a human being in the Queen's peace of malice aforethought, express or implied. This offence is felony, its punishment death. In manslaughter there are no accessories before the fact, in murder there are. Previous hatred (even previous attempts to kill) are good evidence on a prosecution for murder, bad and indeed inadmissible on a prosecution for manslaughter. In either case the death should be proved before any other circumstance of the crime is gone into. A murderer may be found not guilty on an indictment for murder but guilty of manslaughter only. The distinction between these crimes depends on the presence or absence of the preconceived malice called prepense or aforethought. In cases of killing upon provocation, the nature of the provocation and of the force used in resenting it are material,

and therefore the nature of the instrument used is important. That provocation must be grievous indeed which will so palliate the use of a deadly weapon as to make the homicide manslaughter only. If a husband find one in the act of adultery with his wife and kill him, this is manslaughter. If a man pull another's nose or offer him other great personal indignity and be killed by him on the instant, it is manslaughter. It is a good general rule that no words however insulting will reduce the crime of murder to manslaughter if the slaying were done with a deadly weapon; but if with a fist or ordinary stick or other thing not likely to kill, such provocation as would extenuate a battery will constitute a homicide manslaughter. If nevertheless there be express malice, the killing will be murder however great the provocation, and in all cases to reduce homicide on provocation to manslaughter, it is essential that the act causing the death should be done in the heat of provocation without giving the blood time to cool, and the mode of resentment must bear a reasonable proportion to the provocation. Thus where a mob threw a pickpocket into a horse-pond only meaning to duck him and he was accidentally drowned, it was holden manslaughter. But where a park-keeper having found a boy stealing wood, tied him to a horse's tail and dragged him along the park, and he died of it, it was holden murder. Where a parent in moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal (this includes all lawful prison discipline,) an accidental death is misadventure, but if he exceed the bounds of moderation, in the manner, the quantity or the instrument of punishment, and death ensue, according to the excess of the severity the killing is either murder or manslaughter. Where the master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, the killing in each case was held murder. But where a master struck a servant with a dog, because he had not cleaned it, the instrument and correction made use of though improper, not being likely to cause death, it was deemed manslaughter. So in all other cases of the same kind where the instrument is not likely to kill though improper for the purpose of correction and is not used to great excess, it will be deemed manslaughter, but if the killing be done with a deadly weapon, it will be murder. It is here proper to observe that death must ensue within a year and a day from the injury causing it to support any charge of a criminal homicide under any circumstances. In homicide by correction it is observed that if he undertakes to correct, who has no legal right so to do, and death ensue, it will be manslaughter at the least even if the circumstances are such as would not make it a punishable homicide in one who had the right to correct.

Killing by fighting.—If two men fight a duel and one be killed, it is murder in the survivor, and all concerned are either principal or accessory therein. But if two fight in the heat of blood or go at once from the scene of quarrel to the ground of combat (say a field to fight in conveniently,) or each goes to arm himself and forthwith returns to fight his man and one be killed, it is manslaughter. If the fight be without deadly weapons or likelihood of death from it, such as a stand up fight with fists, it will be manslaughter if fairly conducted; foul play however may be deemed proof of malice aforethought and so will any advantage such as the drawing of a knife, the stamping on a man when down, or the like, if it appear to be taken through anger or revenge and not in self defence. If a set appointment be made for mortal combat the killing therein will be murder, though done in manifest self defence, and so if one set on another with malice prepense and be beaten and retreat and on his defence kill his man, it is murder.

If a man take on himself an office requiring skill or care, and by negligence or gross ignorance or carelessness, cause death, it will be manslaughter. As killing by furious or careless driving, drowning by negligently swamping

a boat, causing death by want of care or skill in medical practice, these are all manslaughters. A doctor or other person attending the sick is bound to use competent skill and sufficient attention, a want of either will make such person answerable to the law for all the consequences.

HOMICIDE UNINTENTIONALLY COMMITTED IN DOING ANOTHER AN EVIL.—If the act be felony is murder, and any unlawful dangerous act will make him who does it guilty of murder. For instance a trick played on a person out of mischief but not likely to cause death or any grievous bodily harm, makes the party committing it guilty of manslaughter, and where the act manifestly endangers life, it will be murder if death result from it. Even an act perfectly innocent must be done with reasonable care. For instance poison to kill rats, &c., must be laid with a proper degree of care, and not so that it will be probably mistaken for sugar; so rubbish must be thrown in a manner not likely to cause death or injury, so fire arms are to be used with due care; and acts of omission may make persons answerable for deaths as well as acts of commission at least to the extent of manslaughter. In making this remark it is to be noted, that murder is not confined to the particular means by which death is effected, starvation, or strangulation, or drowning, or stifling by noxious vapours, are as much murder (if they be unlawfully done with malice aforethought) as killing by poison or the sword; in fact if the evil *animus* and other ingredients of the crime be present it is immaterial by what means nature may be overcome. The following instances may shew the degrees of responsibility attaching to involuntary, accidental or unforeseen homicides. If a man breaking an unruly horse, ride him amongst a crowd and he kill a man, this is murder, if the rider intended to do mischief or even frighten the crowd for sport; it is manslaughter, if he did it heedlessly and incautiously only, not intending to do mischief or excite fear. If a man driving a cart or carriage, drive over another and kill him, if he saw or had timely notice of the probable mischief and yet drove on, it will be murder, and the same if he purposely drove it furiously amongst a crowd. Death by improper or furious driving especially in a much frequented street, will be manslaughter. Where one drove in a cart with two horses without reins and at a furious pace ran over and killed a drunken man, being unable to turn away from him, it was held manslaughter. So a near sighted man driving a cart at the rate of eight or nine miles an hour, and sitting at the bottom of it, killed a foot passenger who was walking along the road by lamplight, he was held guilty of manslaughter. If a man discharge a loaded gun amongst a multitude of people and death ensue, it is murder for the law will imply malice; if he discharges it for the purpose of unloading it, or the like, in a place where persons are likely to pass and so unwittingly kills one, it is manslaughter, but in a proper place for such an action and where there is no want of common prudence or foresight an accidental death from such an act, is misadventure only. If a workman throw stones or rubbish (without giving warning) from the roof of a house, in a place and at a time that persons are apt to be passing, it is murder; if at the time that persons were not likely to be passing then manslaughter, and so would it be if he gave warning in a populous town at a time that people were likely to pass; but in a country village where few people pass, a good and sufficient and timely warning to those underneath would excuse him, or if he gave no warning and the place was very retired and it could not be reasonably expected that any one would be near then he would be excused. Death by the shooting at a butt or target is misadventure if proper precautions be taken, but if the target be placed near a path or highway the killing will be manslaughter. If a stone be thrown or arrow shot into a street with intent to do any injury however slight and a man be killed by it, it is murder (though the hurt was designed to no particular person,) if no hurt was designed then manslaughter. If it were thrown where no person was apt

to pass by, and no harm could be reasonably foreseen, it is misadventure. A lad out of frolic took the trap-stick out of the front of a cart, this caused an accident and killed the driver, it was held manslaughter; so was it where an iron-founder being called on to repair a cannon which had burst and was returned to him for the purpose, sent it back in so imperfect a state that it burst again and killed a man, and so where one for sport gave an improper quantity of spirits to a child of tender years and thereby killed it, it was deemed manslaughter. If where proper medical assistance can be had one totally ignorant of the science of medicine take upon himself to administer a violent and dangerous remedy and death ensue, it is manslaughter. If any noxious thing be privily given by one to another out of sport and cause death it will be manslaughter if it were unlikely to cause death, and if otherwise it will be murder. For instance to give poison intending to but sicken and thereby kill a person, or to administer a large quantity of a powerful and dangerous physic in wanton mischief will amount to murder, such acts being of immediate danger to life; so also where the intent of him who gives the potion or drug is criminal, such as to hocus a watchman or servant with intent to commit a theft or burglary, to drug one with intent to steal from him when sleeping, to drug an officer with intent to escape or rescue another out of lawful custody at least for treason or felony, or to procure a miscarriage with or without the consent of the woman and unintentionally kill her or her child if it die of it after birth, in all these cases the homicide will amount to murder. Killing officers and killing by officers of justice, I will treat of under another head, as the subject belongs to or rather is connected with those misdemeanors including considerations of the powers of officers and of office, and is to be found under their respective heads, and will conclude this notice by some general remarks on the crime of murder. This, like other crimes, must be committed by a person of sound memory and discretion: an idiot, or lunatic, or a child who shews no capacity and discernment are not capable of it. But he who procures one of these to commit murder is guilty thereof and may be hanged for it even if not present when the deed was done. So in this and all other cases, it is no excuse that a murder was done by a foreigner and would not have been considered such by the law of his land. If a man accidentally kill himself in escaping from murder, as leaping out of a window or the like, it is as much murder as if there had been an actual killing by the hand of the assailant. If one, under a well grounded apprehension of personal violence, do an act which causes his death, he who threatened him is answerable for the consequences. An unnatural son exposed his sick father to the air against his will by which he died, it was held murder. And the same was held in these cases. A harlot exposed her child in an orchard and a kite struck it and killed it, a mother hid her child in a pig-stye and it was devoured, parish officers moved a child from parish to parish till it died from want of care and sustenance (this is a case arising out of the eleemosynary laws of England not existing or now needed in Canada, but the principle involved, the guilt of maliciously withholding sustenance when bound to give it extends beyond the instance and makes it proper to cite as example,) a master caused his apprentice to die by harsh treatment and want of care while labouring under disease. So to incite a dog or bear to worry a person and thereby kill him, to turn out a beast that is used to do mischief or that is dangerous by nature if purposely done, (though only to cause fear), is murder; if by negligence, manslaughter should death ensue from it. So to maliciously inoculate or infect one with a dangerous malady is murder if it cause death. If a man be feloniously wounded and the wound turn to a gangrene or fever for want of proper attention it is a killing sufficient to support an indictment for murder. So to maliciously and unlawfully hasten the death of a dying man is a killing sufficient to be murder. But if improper applications cause a

wound to become fatal which otherwise might not have proved so this will be no murder and the question in such case is did the deceased die of the wound or the treatment thereof. And it would appear the same might be put under an indictment for manslaughter. To kill a child in its mother's womb is no murder, but if the child be born alive and afterwards die by reason of the potion or bruises given it in the womb it is murder, and if it at first lives and then die of a wound given it while in the act of being born it is murder. The child having breathed is not considered a conclusive proof that the entire child has been actually born into the world in a living state, neither is the fact of the child being attached to the mother by the umbilical cord only sufficient to shew that it is a reasonable (that is human) creature, in being. In the "King's peace," is merely an averment that the deceased was not an alien enemy in actual war. Killing an alien enemy within the realm not in actual war, (for instance killing a disarmed prisoner after action is over and without authority, a peaceable person such as a merchant coming into the realm in ignorance that war had begun, a merchant sailor in distress or the like) is murder, if it have the ingredient of motive requisite to complete the crime. Malice is either express or implied. Express malice is when one with a sedate and deliberate mind and formed design, doth kill another, which formed design is evidenced by external circumstances as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. Implied malice is the malice the law presumes in every instance in which homicide is intentionally committed until its absence is proved. For if one knowingly kill another, it is for him to justify or excuse it else it is murder. But malice need not be against a particular person. Going deliberately amongst a multitude of people with a horse used to strike or discharging a gun amongst them, or letting loose a wild beast among them, these are acts showing malice against all mankind, and so resolving to kill the next person he meets, and killing him makes a man guilty of murder. If A. intend to kill B. and by pure accident kill C. this is murder, manslaughter or excusable homicide, according as the killing of B. would have been in either of these degrees in homicide. If two persons agree to commit suicide together, one perishes and the other survives, it is murder in the survivor. No provocation will excuse murder where there is express malice. A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him, B. struck and A. killed him, it was held murder. And it is a safe rule that it is murder to kill one whom you have provoked to assail you with the intent of killing him, though you do it in self defence. If A. being absolutely in the unlawful power of B. (as one fallen among pirates or the like,) and at his command kill C. an innocent person towards his slayer and in the Queen's peace, it is murder, for he should rather suffer death than kill one who in no way provokes or justifies him in it. Killing by poison being more detestable than other sorts of murder, as it can the least be prevented by either manhood or forethought, is that killing in which the implied malice is the greatest. It is not material whether the poison be laid in a man's way or administered by unconcious agents or how given or taken, so long as the poison was knowingly designed to be used by a human being. But that which is perhaps in other respects the most henious of all murder is in law not so regarded. I mean the swearing away of an innocent life by wilful and corrupt perjury, here the perjury itself is the only crime in law, and the fact of death being caused by it is not brought into issue. So tender is the law in dealing with witnesses in all cases of felony or treason. An executioner is only justified in killing his prisoner in the way the law has prescribed for him. If he behead where the sentence is to hang and beheading is no part of the sentence, or if he hang one who is finally adjudged to be beheaded, (as where in treason the Queen remits the hanging but leaves the prisoner for execution) it is

murder. And so is it murder for any but the proper officer to inflict the punishment. This punishment of death must be inflicted strictly according to the sentence and by those who have it in charge to the very letter of law. (Despite this some indulgence was left in treason and some other cases to the humanity of the executioner, but none amounting to a change of the sentence.) That the deceased was attainted or outlawed is no excuse for killing him. Parent and child, master and servant, husband and wife, may justify killing in defence of each other. A man may kill a tresspasser who endeavours to forcibly dispossess him of his house, or a felon who so endeavours to dispossess his of his goods, but not a trespasser in the latter case as that would be manslaughter, although he might justify beating him. To justify killing a presumed felon in the fact or one committing a forcible and enormous crime as feloniously breaking into a house, or burning, or ravishing a woman, or murdering a person, the criminal intent of the deceased must have been made manifest; but in cases within this rule, the slayer is not bound to retreat as in other cases of self defence, but may even pursue the assailant till he find himself or his property out of danger, (to which rule adjust the right of arresting persons in certain cases, and of killing the resisting or flying in certain cases, as you may easily do,) and he who defends his house or his person within his house is never bound to retreat, for his house is his castle and he may keep the advantage of it. If while two are deliberately and unlawfully fighting, a third go between them and be killed, though accidentally it is murder. If a man shoot at another's poultry and accidently kill a man the design being unlawful it is manslaughter, unless he designed to steal the poultry, in which case it is murder for the slayer designed to commit a felony. Where several are concerned, if murder in one it is usually murder in all, but not always so. For there are cases in which the unlawful killing is shared by several, but all are not parties to the premeditated malice. Thus if an officer of justice be killed in attempting an arrest under circumstances which would extenuate the killing of a private person, but not of a constable, those only who knew his office will be guilty of murder, the others of manslaughter only, and so of a private person endeavouring to suppress an affray, those who knew his intention are guilty of murder the rest of manslaughter. So in a sudden fight, or an unlawful and dangerous sport, the killing may be manslaughter in all the others, but murder in one who acted of express malice unknown to his associates. Indictments for murder are now very simple owing to a late statute.* It is however to be observed that the name of the deceased should be correctly given, and if unknown it should be so stated, no other offence should be joined in the same indictment, and any indictment charging the death as the result of two different injuries, inflicted by each of two defendants on different days is bad. The death should be proved beyond a doubt and a missing man is never to be accounted murdered till his body is found, if none saw him slain or received his body, or saw it destroyed or removed beyond recovery as at sea. Sentence on the convict to be hanged by the neck till dead. See Consolidated Statutes, Cap. 91, s. 2 & 3—Cap. 99, ss. 51,* 95.

IDLE AND DISORDERLY PERSONS. See Police Ordinance, 2 Vic., Cap. 2.

IMPOUNDING CATTLE. See 20 Vic., Cap. 40.

IMPRISONMENT. See False Imprisonment.

INDECENCY. See Nuisance.

INFANTICIDE. See Murder.

INFANTS.

INFANTS in law also called minors, are persons under 21 years of age. It is a general rule that infants under the age of discretion are not punishable by any criminal prosecution whatever, but the age of discretion varies according to the nature of the crime. Within the age of seven, no one can be guilty of felony. For all persons within it are *doli incapax* or incapable of crime by presumption of law and no evidence will be received to the contrary. Under fourteen a boy is presumed by law too impotent to ravish, and no evidence will be heard to the contrary, but if he aid and assist another in rape, and show a mischievous discretion and knowledge he will be as responsible (in law) as a grown person. So with all other felonies. Infants between 7 and 14 years old are presumed *doli incapax*, but this may be rebutted by strong and pregnant evidence (the doubt going for the prisoner), *malitia supplet ætatem*, and a mischievous discretion may be inferred from strong circumstances establishing its existence beyond doubt or contradiction. Concealing the body and blood in murder, is among the circumstances which prove a guilty knowledge. In some misdemeanors for instance, a mere non feasance of some duty of a public and general nature, or omission to do something commanded by Statute, a minor though over 14, may be excused by his age, for *laches* shall not be imputed to him while under the control of others. This exception is manifestly very contracted. It does not reach notorious lewdness, battery or riot, perjury or cheating, and it is good law that persons fourteen years of age or more are *doli capaces* and shall be answerable for crime the same as others.

INHABITANTS of a parish not repairing a highway. See Nuisance.

INNKEEPER. See Provincial Statutes, 14 & 15 Vic., Cap. 100, and 20 Vic., Cap. 40.

IRON. See Larceny.

JURORS. See Embracery.

JUSTICES. See Misprision.

JUVENILE OFFENDERS. See Larceny.

KEEPER OF A GAOL or House of Correction. See Statutes, 6 Will. 4, Cap. 15 ; 4 Vic. Cap. 20.

KILLING OF FISH OR GAME, &c. See Consolidated Statutes, Cap. 62 ; 22 Vic. Cap. 103 ; 23 Vic., Cap. 64.

LANDING UNCUSTOMED GOODS, and all other offences against the Excise. See Consolidated Statutes, Cap. 17, ss. 55 to 72, and Cap. 92, s. 19 *et seq.*

LARCENY, (SIMPLE.)

Larceny at common law is the felonious taking and carrying away of the mere personal chattels of another, with intent wholly to deprive him of them, and to convert them to the taker's own use or benefit against the owner's consent, or without his knowledge. Such a taking is said to be *cum animo furandi* or *lucri causâ*, and this element of the *animus furandi* is most particularly to be observed, in larceny and all its kindred offences of which we shall treat by and bye. For there is no larceny without a trespass, (in the legal acceptation of the word,) yet there is many a trespass which is not a larceny, and it is to be observed though the statute law comes to the aid of the common law, and adds to it many cases of larceny, yet it changes its principles very little, and rarely in respect of this offence, rather multiplying the objects of larceny than changing its conditions, and rather defining some

civil relations than altering or displacing them. Thus in the application of the law to any illegal acquisition of goods, the general principle above laid down has to be regarded. It is to be remarked that some thefts created by statute are misdemeanors only, but in general the statute law rather makes the punishment of the crime more severe than that of the common law felony, by limiting a discretion likely to be exercised in favour of mercy or inflicting some additional pain not inflicted by common law. Simple larceny we have already described, there are complicated and more heinous forms of the offence, such as larceny from the person and larceny from a dwelling house, from a church, chapel or post office, or a vessel. Larceny by a servant is also judged more heinous on account of the especial fidelity he owes his master, and the confidence reposed in him. Of the ingredients of larceny, the first in order is the thing of which larceny may be committed. Larceny may be committed of things living, dead and inanimate. There is no larceny of animals while in a state of nature, nor at common law of beasts or other creatures *ferœ naturæ*, but if animals be dead, or inclosed, or tame or domesticated they may become subjects of larceny. Beasts of burden or the ordinary birds and animals generally used for food, as sheep or swine if they have an owner, are subjects of larceny at common law as well as statute law, whether they be inclosed or at large. Deer are subjects of larceny if *inclosed in a park* or *fish in a pond*, and so are *dead* game, skins, feathers, stuffed specimens, probably skeletons in a museum and the like, be they of what animal they might or any carcass or skin if of any value is subject of larceny. Some creatures however which the common law would not protect, (at least criminally,) by reason of their supposed uselessness or unfitness for domestication or food, have been protected by statutes, (to which and all others concerning larceny,) refer.* If the larceny consists in taking live animals, it is enough to describe them by their name, if dead when stolen they must be so set forth, error in this will be fatal. No larceny can be committed of a corpse, but stealing or disturbing a dead body is a misdemeanor and if the grave clothes or other effects be stolen from (or with the body if there be an *animus furandi*,) it is larceny. There can be no larceny at common law of real property or immoveable goods, or any thing which savors of the realty, that is that immediately attaches or appertains to the estate. Thus title deeds are not subjects of larceny at common law, but are protected by statute. And there could be no larceny at common law of any thing growing in or attached to the ground, or fixed to any tenement, and to cut up, break off, pull out or tear away, cut or otherwise sever such things, as trees or fruit growing, or lead on the roofs of houses, or covered work forming parts of houses or outhouses were not larcenies, (the word house or outhouse is here used as denoting a fixture and all attached to them in a permanent state, as by a nail or by any insertion in the wall are fixtures,) but if any such be severed at one time and taken at another, such taking will be larceny as the severence converts the article from a portion of the real estate to a mere chattel, thus changing its nature without changing its ownership. So a tree when felled, a door when unhinged, fruit when gathered, beams or roofs when thrown down are all subjects of larceny at common law, and the various arts by which thieves may steal, as cutting lead from a roof, &c., and shelter themselves under the plea that the thing savoured of the realty are now repressed by statutes which provide for such cases. As a general rule there is no larceny of the elements, which are either the common property of mankind or savor of the realty, for instance taking water out of a man's well and the like are bare trespasses, yet doubtless under some circumstances the elements may so change their character as to be made subjects of larceny, for example ether in a bottle might (I imagine) be subject of larceny. It seems also theft may be committed of gas and probably medicinal waters when collected in artificial reservoirs for sale will be subjects of larceny. It is worthy of

notice that the common law decisions in reference to stealing of wild animals domesticated, seem somewhat conflicting, thus tamed foxes, monkeys, &c., are said not to be subjects of larceny at common law, because they are not proper for the food of man, yet swans marked or pinioned or confined in a pond or river, are said to be objects of larceny at common law, and so is a hawk reclaimed, but not a cat, a dog or a ferret, as to all these, see the statutes.* It is possible hawks and swans may have once been regarded as food for man and the others not. Stealing wool by pulling or shearing it from a sheep's back is larceny. Bills of exchange or written securities for money are not subjects of larceny at common law, as they are mere *choses in action* and not chattels, but they are provided for by statute.* Where chattels, money or securities have not been in the owner's possession, but delivered to his clerk or servant for his use, and the clerk or servant steals them, this at common law is no larceny, but *vide* statutes.* There must be a taking or there is no larceny, but the taking may be either actual or constructive and where the Legislature defines an offence to be larceny, which otherwise would not be such, it may be unnecessary to enter into the question of the taking, if the case fall within the Act. An actual taking is the getting the goods out of possession of whoever is lawfully in charge of them without their knowledge or consent or against their will, (and the latter is always presumed where consent is absent,) and needs no further description. A constructive taking is where possession is obtained by some trick or artifice not having the effect of transferring the right of property but merely the possession. If a right of property pass it is not larceny, but obtaining goods under false pretences of which we will treat in its proper place. The following cases will shew a constructive taking. A man asks another to let him ride his horse just to shew his paces and rides off with it, one asks for goods to be given for cash down, but immediately runs away with the goods without paying for them, or offers change to get hold of money and immediately runs off with it without giving the change, or offers to hold or carry an article intending to get it and runs off with it, all these are larcenies, and it is not difficult in the foregoing cases to infer the intention to steal existed at the time of the taking. So where the prisoner offered a half crown asking for change, and the prosecutor or his clerk gave him 2 shillings and 6 pence, and got hold of the rim of the half crown and the prisoner ran off with the half crown and the 2 shillings and 6 pence, being indicted for stealing the 2 shillings and sixpence, it was held larceny. So suing out a writ fraudulently and with intent to get possession of another's personal property is larceny. Thus seizing goods under a lawful writ if done without any just cause, and with the felonious intent of unlawfully appropriating them, and only as a color for the same will be a felony; for instance to take a horse under a writ of revendication, (sued out for that purpose,) and having possession of him, to ride off with him and sell him, would be as much larceny as to steal him out of a stable, and such cases have been so ruled in England. So a man may commit larceny by taking his own goods, if it be done so as to charge another with them, and with that fraudulent intent. As stealing goods from a carrier, retaking by stealth cloth given to a tailor to make up, or things pawned from the pawnbroker, or the like, in these cases the offence is the same, though the thief is the owner of the thing stolen. Where goods are stolen from a bailee, to wit: one having the lawful possession of them, they may be laid either in the owner or bailee. Where A. steals from B. goods which B. stole from C. it seems the prosecution of A. should be for a crime against C, the real owner. A wife cannot be guilty of larceny of the goods of her husband, for they are one person in law, (this is, at least, as to criminal law,) except in those cases in which he himself would be guilty of larceny. But if one join with the wife in taking the goods knowing they are the husbands, and that it is against his consent, it is larceny in the person so acting. As to the case of an avow-

terer or adulterer receiving goods from the wife, and taking them into his own separate possession even though such goods be her wearing apparel, it is by some authorities larceny, other and older authorities seem to say as there is no theft in the wife, neither can there be theft in the avowterer's receiving from her. Where there is a joint possession of the goods in the wife and the avowterer, there is no larceny in either. But the authorities though divided as to the responsibility of one who cohabits with the wife, or an adulterer, called in the older works the avowterer, yet concur that if the wife give the husband's goods to another stranger (not her avowterer,) it is no larceny in such stranger to take or receive them. Tenants in common or joint tenants of the same chattel cannot be guilty of larceny towards one another, partnership or part ownership of any thing, as an entire stock of goods debars the commission of larceny by the one against the other, but the taking from a bailee if it have the effect of charging the bailee will be larceny, though the thief be a tenant in common or occupy any of the foregoing relations in respect of the chattel and its owner. And in larcenies from a bailee it would seem that if there were an unlawful taking and dishonest intent and the effect was to charge the bailee, it would not be material whether the intent was to charge the bailee or to effect some other dishonest purpose, and a majority of the judges appear to have sanctioned this view by their decision on a certain bank case in which it was intended to defraud either the agents or the Crown. Where the goods are in *transitu* the ownership may be laid so as to meet the case, sometimes even where there is a bare custody, (as in a coachman in some cases,) such as would not make the person in charge a bailee if he himself took the goods, yet the ownership may be laid in him who was thus in charge, for it seems that the law will rather feign an ownership where in strictness there is none then suffer a thief to escape. Thus where a master robbed his servant of his own goods with intent to charge the hundred (according to the law of that day which made the place or district called the hundred, liable to pay compensation in certain cases,) it was held a robbery of the servant and it seems there was no objection to laying the goods in the servant. Nevertheless the ownership should be laid with care, for though temporary or constructive ownership be admitted for convenience of commerce and trade, and in order to prevent defeats of justice, yet a causeless departure from the true ownership, or needless uncertainty will not be permitted, and the rule in general is that the ownership is to be proved as laid. Where the owner of the goods is unknown it is so stated, but it will be a fatal error should he turn out to be known. It is to be observed that no one should be considered guilty of stealing the goods of a person unknown merely because he will not account for them. It is proper in such a case that the theft should be first proved, and the fact of the possession of the stolen goods then proved, and the *onus* of accounting for them, if the theft be recent then and not till then left upon the prisoner, the same in fact as in other cases of presumed larceny and felonious possession of the thing stolen. If a man take goods that do not belong to him under a mistake or under an honest claim of right however erroneous, it is no larceny, for he did it not from *an animus furandi*. In many cases the *animus* or felonious intent will be presumed from the very act of taking, in others from the circumstances of the taking. Stealth in the taking and the denial of the fact, or concealment of the goods, are strong circumstances against the taker, and so is his flight or concealment from pursuit, but there may be a larceny without any of these circumstances, and it would indeed be ill judged to make mere audacity an excuse for crime, as that he who should openly take away goods in noon-day could be no thief, for if that were so thieves would only have to affect boldness and they might go free of crime, but in all such case the jury are to consider all the facts and infer the intent from them. An asportation or carrying away of the goods must be

proved in Larceny. Where a thief lifted goods off a counter which were tied to the counter with a string, it was held not sufficient, for in this case there was no severance. Where the prisoner merely turned a bale of goods on end where it lay for the purpose of cutting it open and taking the goods out, and was detected before he succeeded in so doing, it was held not sufficient. If a man be leading another's horse out of a close and be taken in the fact, if a guest stealing goods from an inn, have removed them from his chamber down stairs, if a servant, *animo furandi*, take his master's hay from his stable and put it in his master's waggon, or a thief with intent to steal plate take it out of a chest, and lay it on the floor, and is surprised before he can take it off, or if intending to steal a cask of wine, he removes it from the head to the tail of the waggon in which it is placed, all these are larcenies, the asportation being sufficient. The time is of no consequence in larceny generally, but under particular statutes it must be shewn that the prosecution was commenced within the time specified in the statute. Larceny ought to be laid where it is committed, but if the goods be carried by the thief into another county, the law supposes a taking in that county, and he may be indicted in either, or it would appear in any intermediate county through which he may have carried the goods, and the same would be the case of districts in Lower Canada, and if larceny be committed within 500 yards of the boundary line between two counties, the indictment will lie in either, and the same of two districts, and if there be a larceny of goods on a journey or a voyage, the *venue* may be laid in any place having jurisdiction over the offence, through which, or to which, or by the boundary of which, in the course of the voyage or journey the vehicle or vessel may have passed.* A person lawfully in possession of the goods of another is called the bailee, he who owns them and puts them into the possession of the bailee is called the bailor, he who has not a complete possession but merely a charge or bare custody is not bailee. It is a good general rule that he who can maintain an action of trespass for the removal of goods not his own is bailee of them, and he who cannot is none. A bailee is not guilty of larceny at common law by the conversion of his bailment, unless he break the bulk, or obtain the possession fandulently in the first instance, or take or remove the goods after the bailment has determined (that is, is ended) for such retaking or removing is an original taking or asportation in contemplation of law, and must be justified as though he never had been bailee. The reason of this is that the bailee has a special property in the goods, and the law has not hitherto come to the aid of the bailor at the expense of the public by indictment for a mere breach of trust but leaves him to his suit, as he is supposed not to leave his goods without knowing in whose hands they are and a certain amount of caution and judgment is exacted from every man, for the law neither supplies prudence nor encourages the subject to dispense with it. This principle however may applies either to bailees generally or at least as to carriers only, will probably be modified by Act of Parliament before long and much of the old or rather of the present learning as to bailments will then be obsolete (see Consolidated Statutes, cap. 92, s. 55.) But however the principles which now regulate the relations between bailor and bailee are so wide and general that they include almost all the distinctions between theft or larceny, and breach of trust or other mere violation of civil obligations such as negligence in the discharge of a trust and liability for damage arising therefrom. † The immediate divergence by a carrier from the route he was to have followed has been held a sufficient proof of the existence

* 4 & 5 V. c. 24, ss. 40, 41, 68.

† The above was written previous to the passing of the Act. As there may be cases in which a knowledge of the common law principles of bailments will yet be useful I do not omit it.

of the *animus furandi* at the time of the bailment to make the carrier guilty of larceny. Severing or dividing or breaking the bulk of the goods entrusted to a carrier or other bailee, has all the effect of an original taking or asportation, it will sustain a charge of larceny. Some simple instances will suffice to shew the difference between a bailment and a mere charge. If a guest at a tavern steals the tankard (or other vessel) he drinks from it is larceny, so if a butler steal his master's plate, a groom steals his master's horse or a shepherd his sheep, or a public driver about the city a parcel forgotten in his vehicle by one he knows, or a mere stage driver on a longer journey a parcel or other article which he ought to have delivered, in all those cases there is no tenable pretence of possession. So a bailiff may be indicted for larceny in stealing goods which he holds under an execution, and it appears goods so stolen should be laid as the property of the defendant who has an interest in them inasmuch as the sale of them goes to pay his debt and satisfy the judgment against him. All the persons in the relations above named are capable of larceny by a conversion to their own use for they are not bailees but have a bare charge only. The breaking of the bulk of the bailment will make the bailee guilty of larceny if he cannot justify or excuse it. Thus the drawing of the spigot of a wine cask and gathering a portion of the wine into a vessel, the breaking, the seal of a letter, untying the strings, or tearing the corner of a parcel and taking out the contents and the like appear to be asportations or according to some proofs of an original fraudulent intent or *animus furandi* and will constitute larceny in the bailee. No man can be held guilty of larceny for an act done under a *bonâ fide* claim of right however erroneous, for if the *animus furandi* be wanting, the grossest mistake will not constitute the guilt of larceny. A man can justify taking his own goods where he does it not to charge a third party, and the same rule and the same exception applies to husband and wife taking each other's goods, and if a man in taking his own goods carry off his neighbor's by the same act, it is not larceny. As where the goods of different persons are in one parcel or otherwise fastened together or welded so that there is but one taking. Thus if a man take his own grain and his neighbour's both being mingled together it is no larceny nor even a bare trespass. Or if a man in retaking his own cloth take also his neighbors lace secured on to it, this is under the same rule. But if the original commingling, or interweaving or welding (as in the case of metals) were the man's own act or done at his desire with intent to dishonestly take all under pretext of retaking his own without doubt this would change the case and be such an intent as to make the taking larceny. The cases given and the principle applied to them intend an absence of any dishonest intent in the commingling of the goods on the part of the owner. The *lucri causa* in larceny is not always the pecuniary value of the thing stolen. Where a workman took an axle and threw it into a furnace to diminish the amount of his work though his direct gain was about a penny and his master's loss 7 shillings it was held a sufficient *lucri causa*, and so where an accomplice took away a horse and killed it to destroy evidence against his confederate who had stolen it, it was held larceny. It has been even deemed larceny where in a taking by a servant of his master's property the whole benefit to the servant was a diminution of his labour. It would seem to be the better opinion that where a man is starving and steals food to keep himself from perishing it is not larceny; but this goes only to excuse acts done in obedience to the cravings of nature in extremity of hunger, and for the more immediate satisfaction of the necessities of the sufferer, and probably considers also the influence produced by the sight of food, on a famishing person, but will not reach to theft to supply the means of procuring food, and it seems by some works it will not excuse the defendant if his wants arise from his own fault. One very eminent authority controverts this and says taking food when starving makes a man guilty of theft but seems more indulgent on homicide for the

preservation of the homicide's own life. An apparent inconsistency which makes me think the better opinion is as above given. I have already said that live animals may be described by their name meaning that of their species or description of animal. It is to be observed that the description is important more especially under any Statute. If for instance several animals of the same genus be described in a statute, variance between the name given in the indictment and the proof will be fatal. At common law the generic name of the creature is usually and perhaps always sufficient. Thus if a statute speaks of sheep and lambs, the animal must be proved as described. It will be fatal to call it a sheep and prove it a lamb or *vice versâ*,—at common law the generic name sheep will include lambs, and so if an act say horse, mare and gelding, if the indictment allege a horse he must be a male and entire, on a common law indictment these particulars would not be material. See Consolidated Statutes, Cap. 99, ss. 19, 77, 78. It is provided by statute that an indictment may aver larceny in one count and receiving stolen goods in the other, and the prisoner be convicted of either. So also larceny and embezzlement may be joined in an indictment and a conviction had for either. Some new statutes provide for the summary trial of persons guilty of larceny in certain cases. Juvenile offenders may thus be disposed of. Vide Consolidated Statutes, caps. 95, 96. A count for a previous conviction may be added to a count for larceny. The object is to aggravate the punishment of the convict. The process is to prove the previous conviction by producing the record and calling a witness to establish the identity of the prisoner with the convict. This ought never to be done till the jury have found the prisoner guilty of the offence for which he is actually on trial. But this practice which should be strictly obse ed has some times been departed from. If a man voluntarily and freely consent to part with his goods, he who takes them is not guilty of theft. Nevertheless where persons have parted with their goods in order to apprehend thieves for the advantage of public justice, the taking has been deemed felony. As where a gentleman hearing of several robberies and desiring to apprehend the highwayman travelled the road he frequented and allowed him to rob him and then made him prisoner, the taking by the highwayman was deemed robbery and the felonious intent not affected by the device practised against him.

COMPOUND LARCENIES.

Larceny from the person is superior in guilt to simple larceny, inferior to robbery, yet if a man be indicted for larceny from the person, and robbery be proved, he should be convicted on the indictment and he may be acquitted of the indictment and convicted of simple larceny or of assault. The taking in this offence must be an actual and not a constructive taking and the goods must be actually severed from the person. Where the thief rose a pocket book about an inch above the top of the prosecutor's pocket and being alarmed let the book fall back into the pocket the asportation was not deemed sufficient to support a conviction under the indictment though it would have been a sufficient asportation to constitute simple larceny.

Stealing from a Vessel in a navigable river or canal. This offence requires an actual and not a merely constructive taking. The policy of the law in it is the protection of commerce and it seems the taking must be of the cargo or at least a passenger's baggage.

The *venue* may be laid in any district through which the river or canal passes. If the vessel be aground it seems the offence will not be complete. Consolidated Statutes Cap. 99, s. 12.

Stealing from a dock requires as in the last case an actual taking but the asportation must be from the dock, also it is not complete unless proof be given that the dock is adjacent to a navigable river. The goods stolen must

be such as are usually deposited in such places for shipment, safe custody, or the like. The statute describes goods and merchandise, money and valuable securities appear not to be within it. Failing proof of the indictment, the defendant may be convicted for simple larceny. Consolidated Statutes Cap. 92, s. 12.

STEALING FROM A WRECK is a compound and aggravated larceny, for which see Consolidated Statutes Cap. 92, s. 29.

STEALING IN A DWELLING HOUSE SOME PERSON THEREIN BEING PUT IN FEAR is another compound and aggravated larceny, *vide* Consolidated Statutes, cap. 92, s. 11. The dwelling house must be proved as laid. It must be a dwelling house in contemplation of the statute law to wit, a domicile or building connected therewith or communicating therewith by a covered and enclosed passage. If the theft was committed out of the presence of the party it seems there should be proof of actual terror; if in the presence of the party prove the fear as in robbery; that is it may be inferred from circumstances.

STEALING in a dwelling house to the value of five pounds (or more) is an aggravated felony. *Vide* Consolidated Statutes, cap. 92, s. 13. Prove the dwelling as in the last case. If A steal in his own house from another it is not within the statute. So theft from the person is not within the statute. The goods stolen must be under the protection of the house and not of the person. Whether they are in the protection of the dwelling house or in the care of the owner is a question for the court and not for the jury. The goods to be within the statute should be deposited in the house for safe keeping. But goods left at a house by mistake or clothes, &c., left by a person going to bed at the bed side or on the table are within the statute; and where a man went to bed with a prostitute who stole his watch while he slept, the watch being where he put it in his hat on the table it was held larceny from the dwelling and not from the person. If a man part with his money under such circumstances of trick as will constitute a simple larceny, yet it will not be a larceny within the Act.

BREAKING AND ENTERING A BUILDING WITHIN THE CURTILAGE AND STEALING THEREIN is also a serious compound larceny. (See Consolidated Statutes, cap. 92, s. 13.) The larceny must be proved in the same manner as on an indictment for house breaking; the breaking and entering as in burglary only it matters not whether it be by night or day. The building described by the statute is any building within the curtilage of a dwelling house and occupied therewith not being part of the dwelling house or communicating therewith by any covered and inclosed passage leading from one to the other (for in that case it would be part of the dwelling by Act of Parliament and to be dealt with according to the preceding directions.) This description of buildings within the curtilage limits the operation of the principle of the common law which deemed them part of the dwelling as see *ante*. A building separated from the dwelling by a public thoroughfare is not within this Act. So neither is a wall, gate, fence or part of the outward fence of the curtilage and opening into no building but into the yard only part of the dwelling house, nor is the gate of an area which opens into the area only, if there be a door or fastening to prevent persons from passing from the area into the house, although that door or fastening may not be shut or secured at the time. It seems a count should be laid for burglary or housebreaking if there be a doubt as to whether there was or was not an entering of part of the dwelling, and that the indictment should negative the communication with the dwelling and the prosecutor should prove it as laid. But the necessity of this is doubtful. The curtilage is a common fence surrounding the dwelling and appertaining to it. If proof of the statutable felony fail still there may be conviction for larceny in this and all the ordinary cases.

There are other compound larcenies than those I have described but they present nothing worthy of notice in so brief a work as this.

EMBEZZLEMENT is a breach of trust made criminal as felony by various Statutes. A breach of trust when not provided for by Act of Parliament is merely a civil injury for which an action will lie. And in some cases breach of trust has been made larceny in others embezzlement. In this crime of embezzlement it is first proper to shew that it is within a Statute more than a mere breach of trust, next that the act is not larceny. And to prevent the failure of the indictment on this ground it is usual to add a count for larceny. Embezzlement, larceny by a clerk and simple larceny may all be included in different counts of the same indictment and the conviction taken on any one of them. See Consolidated Statutes, Cap. 92, ss. 41 to 70—Cap. 99, s. 60.

OBTAINING MONEY UNDER FALSE PRETENCES is a misdemeanor at statute law, in which conspiracies or false tokens are not necessary, nor is the prudence or imprudence of the party defrauded of any great consequence, and which includes a number of cases, which at common law would not be indictable, and further where the fraud may be confounded with larceny, the statute enables the defendant to be convicted as indicted, and he is not to be afterwards tried for the larceny, whether acquitted or convicted. The false pretence or pretences must be set forth in the indictment with a reasonable certainty, and the indictment must negative the pretence or pretences by special averment. The false pretence need not be in words, the conduct and acts of the party will suffice. The pretence must be of some existing fact, and not a mere promise of future conduct, and it must be made for the purpose of inducing the prosecutor to part with his property. If made for another purpose it will not suffice to sustain the indictment, and the indictment must state the money or other thing was the property of the person intended to be defrauded, so that the defendant may plead his conviction or acquittal in bar to any subsequent indictment for larceny, and this want of such averment is not cured by verdict, but is bad in error. The false pretence must be proved as laid, variance is fatal, but see Con. Stat. Cap. 99, s. 35. If a general verdict of guilty be had on an indictment containing two false pretences, one of which is insufficient in law the conviction will be bad. If the false pretence be in writing, it may be proved by secondary evidence, should the paper be lost before the trial. If the money or other thing was not obtained by the pretence, the prisoner must be acquitted. It must be proved that the pretence (or pretences) was (or were) false, but if one pretence and it sufficient to amount to the crime be proved false, it will suffice to convict the prisoner. If the defendant believed the pretence himself to be true he ought to be acquitted, for he ought to know it to be false in order to constitute him guilty of the crime. His guilty knowledge will be generally inferred from his conduct, and is matter for presumption requiring no special proof. To present a check on a banker where the defendant had no money is a false pretence, (though not a cheat at common law,) even though no pretence in words accompanied the act. So getting goods in the cap and gown of a college to which the defendant did not belong, was deemed a sufficient false pretence (without express words.) But in the majority of cases under the statute, words constitute the false pretence. Where the false pretence has involved a forgery, it has been questioned whether an indictment under the modern statute could be maintained, and even under the ancient one it might be questionable whether the writing if forgery in law, should not have been treated as such rather than as a pretence, though writings were specially referred to in that statute, which mentioned false tokens and letters in other men's names. The distinction between a constructive larceny and obtaining by false pretences, which was frequently very subtile was formerly important. The difference between the two appears to be that in a constructive taking the custody of the article alone is acquired, in obtaining under false pretences the property in the thing obtained passes. Where the defendant

sent to a hatter in the name of one of his customers for a hat, and it was delivered on the credit of the customer, this was held no larceny, but would be a clear false pretence, for on the strength of it the prosecutor parted with the property in the hat. So where the defendant sent a letter to the prosecutor in the name of a third party requesting the loan of £30, it was held no larceny, this also would be a clear case both under the modern statute and also by the ancient for bringing letters in other men's names or false privy tokens. And in all doubtful cases it is better under the modern statute to indict for false pretence than to set up a constructive larceny.

If the prosecutor intend to maintain his title as in lending a book it is a larceny if the obtaining of the loan be *animo furandi*. If he intend a sale and delivery it is a misdemeanor if got by false pretence. See Consolidated Statutes Cap. 99, ss. 60, 61, 62.

CHEATING.

* Cheating in many instances is punishable by public prosecution as a misdemeanor. Cheats at common law consist in the fraudulent obtaining of the property of another by any deceitful and illegal practice or token, (short of felony) which affects or may affect the public. The common law in dealings between private persons exacted the use of a false token to constitute a cheat, and this token must be more than a mere private mark or money token, as a man's bare affirmation of a lie will not be enough to indict him on. But this doctrine seems to admit of exceptions. For if a minor goes about pretending he is of full age, and gets large quantities of goods thereby, and then pleads his non-age no action will lie, but he may be indicted as a common cheat, (this is in England, and it may be asked with advantage whether the civil law of Canada is not different, and if so, whether the English rule holds in all cases in Canada, and as to any sort of accommodation or commodity,) and where Government (otherwise called the Crown) is directly concerned, the common law gives a larger latitude to the remedy by indictment. Thus supplying prisoners of war with food unfit for the use of man, has been held an indictable fraud (or cheat.) It is said that all frauds directly affecting the Crown and public at large are indictable, though arising from a private transaction, or contract with a private party. An apprentice reclaimable by his master, obtaining the King's bounty by enlisting may be indicted as a cheat. If a man sell by false scales, weights or measures, it is indictable at common law, but not for merely selling a less quantity than he pretends, for the buyer should take care and measure what he gets, and if aggrieved by the advantage taken of his own imprudence he may bring his suit. But where a miller fraudulently exchanged good corn for bad it was held indictable at common law for it was said that being in the way of trade it concerned the public. So begging under false pretences was in some cases treated as a cheat at common law. The false token at common law must be more than the parties affirmation, therefore a privy token is not sufficient. But the tokens referred to by statute intend privy tokens, the mere writing a false affirmation will not change its nature or make it a token, but where there is a conspiracy to defraud, the indictment will lie at common law, and it will need no sort of token to complete the offence. Where there is a conspiracy it matters not whether the fraud was effected or not. Otherwise where there is no conspiracy, for there must be a prejudice or injury to some one, or the offence is not complete. Cheating with false dice is a cheat at common law. See Consolidated Statutes Cap. 92, ss. 71, 72, 73 and 74.

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* Imperial Statutes, 33 H. 8, c. 1,—3 G. 2, c. 24.

FORGERY.

Forgery at the common law is an offence in falsely and fraudulently making or altering any manner of record or any other authentic matter of a public nature. As for writings of an inferior nature as private letters, &c., counterfeiting them is not properly forgery at common law, but the counterfeiting may be treated as an indictable cheat, and as such a misdemeanor. Forgery at common law itself is a misdemeanor. Forgery however is made a crime by several statutes in different degrees of guilt. To treat of the statutes touching forgery is out of the scope of this work. The way to obtain information upon it is to look at the Provincial Statutes, and to ascertain what laws or amendments of laws have been made upon the subject by Canada, then examine what statutes (Imperial) were in force in Canada at the time of the Quebec Act, and then observe how far they have been repealed or altered by the Provincial Statutes. It is to be observed that wherever the forgery is in signing a private man's name or altering, &c., a writing to the prejudice of a man it must be done fraudulently, and the intent is material in forgery, though as in other crimes it is to be presumed from the act of the defendant, and in all cases of altering or publishing forged instruments the guilty knowledge of the prisoner is a question for the jury. See Consolidated Statutes, Cap. 94.

ROGUES AND VAGABONDS.

I have endeavored in the foregoing pages to give a brief compendium of the offences to which property is liable by the force or direct fraud of the dishonest; to the category of these offences may be added, the crimes of those persons who add petty thefts (as stealing wood out of hedges, firewood, &c.,) and frauds to the crime of vagrancy, and who living an idle life commit trespasses and small larcenies against property, or take advantage of the credulous and unwary. It is a good rule that false personation is false pretence, if it is assumed *lucri causa*, (to borrow a phrase from the description of larceny,) but begging impostors are liable to be disposed of in a different way. We have already seen that in some cases they may be disposed of as cheats at common law, for instance, the impostors called Sham Abraham men in old times, and as a rule the impostor is liable to be treated as either a cheat or vagrant or disorderly person. Pretenders to magic or witch craft and dishonest and lazy imitators of bodily infirmities may generally thus be disposed of. Vagrancy itself is under the laws of England and indeed of most countries, regarded as an offence against society, and some jurists have laid down as a general rule that all vagrants should be locked up in prison. Suspicion attaches to vagrants and idle persons without known honest employment. Hence such persons were formerly indicted as rogues and vagabonds, and persons previously convicted as incorrigible rogues, but these matters are disposed of here altogether by the summary powers of justices, and it is useless for the student of law in Canada to consult English authorities on vagrancy, &c. The Police Ordinance and Provincial Statutes are the true guides on these subjects, and it is not likely that indictments for the description of cheats and impositions for which they were formerly used will ever be used here, as it is likely that a case not reached by the Police Ordinance would be dealt with in some special instance as false pretence under the statute, rather than as a cheat at common law, or as constituting some systematic and distinct act of fraud or theft. Indeed the Provincial Statutes contain more summary and adequate provisions against petty depredators than the old indictments for rogues, &c., and this is now obselete and merely referred to in this place to shew the policy of the law, and the antiquity of that protection which society employs against "loose, idle and disorderly persons and vagabonds of every description."

Receiving stolen goods knowing them to have been stolen is felony or misdemeanor. If the former the receiver may be prosecuted either as accessory after the fact or for a substantive felony. The latter is the more usual course. Thief and receiver may be indicted together so the same man may be indicted for stealing in one count and receiving in another and convicted on either. The thief is a good witness against the receiver. The receiver may shew that no theft was committed. Therefore it is competent for him to disprove the guilt of the principal. If two be indicted jointly for receiving a joint act of receiving must be proved in order to convict both. If the receiver assisted in the theft with some other person he may still be convicted for receiving even though he be not indicted for the theft. Where a larceny is laid in one count and receiving as a substantive felony in another, the receiver may be convicted through the principal is acquitted. It is indictable as misdemeanor to receive knowingly that which has been unlawfully obtained or converted. The evidence of a receiving is as follows. First prove the larceny (the same rule applies to misdemeanor) and then the receiving. Having the goods in possession is presumptive evidence on an indictment for receiving, then prove the defendant knew they were stolen. This may be done either directly or circumstantially. Buying very much under the value and denying possession are strong circumstances in proof of guilty knowledge. And to shew a guilty knowledge other instances of receiving may be proved even though they are the subject of other indictments and different and anterior in their date to the receiving in question. Where A stole notes of £100 each and changed them into notes of £20 each and B received them it was held that B could not be convicted because he did not receive the very notes that were stolen. In order to indict a receiver as accessory, the principal felon being convicted ; give in evidence an examined copy of the record of conviction of the principal felon for the commission of the larceny. The original is not needed error will not vitiate it for this purpose till reversed nor does it need to shew the thief convicted is sentenced. After this proving the larceny and conviction proceed as before directed to prove the receiving with guilty knowledge. If the goods stolen have been altered between the trial of the larceny and the receipt so as to change their designation the indictment should correspond with the fact. As for instance the principal may be charged with sheep stealing and the receiver with receiving so many "pounds of mutton, parcel of the goods, &c." See Consolidated Statutes, Cap. 92, ss. 75, 76, 77, 78.

Burglary at common law is the breaking and entering the dwelling house of another in the night time with intent to commit a felony therein. For statutable burglary see Consolidated Statutes, cap. 92, ss. 8 to 14. The hours at common law are thus ascertained: The day is divided into daylight, twilight and night. If the breaking and entering was in the night, it was burglary ; if in the daylight, not. If in twilight, if there were daylight or *crepusculum* enough began or left to discern a man's face withal, it was burglary, otherwise not. This did not extend to moonlight. But now as to time, see Consolidated Statutes, c. 92, s. 10. At common law the breaking and entering must both be committed in the night time, but the breaking may be on one night and the entering on another, provided the breaking were with intent to enter and the entry with intent to do a felony. If either be in the day time it is no burglary at common law, but *vide* Consolidated Statutes, cap. 92, s. 14. The intent of the entering must be felonious but it matters not what felony he intended, murder, rape, or felonious cutting and wounding or what not so it be felony. If a battery, a forcible entry and detainer, a false imprisonment, or the like be intended, it is no burglary, The intent must be proved as laid, variance will be fatal. If the intent be doubtful it may be laid different ways in different counts. The best evidence of the intent of the burglary is the actual commission of the felony intended, but failing this, other facts may be given in evidence, from which the jury may

presume it. It is a good defence on an indictment for burglary that no felony was intended or at least not the felony laid in the bill of indictment. The house broken in burglary must be a permanent dwelling house in which some one is in the habit of residing. Every permanent building so used is deemed a dwelling house. and burglary may also be committed in a building between which and the dwelling house there is a communication either immediate or by means of a covered and inclosed passage. If any part of the building be occupied as a house it is sufficient, and it will also be sufficient that any part of the family even one person lie in the house. Temporary absence will not deprive the house of the protection of the law, but the party absent must intend to return *himself* else it cannot be burglary to break into his empty house, and an intent to let or sell it will not suffice. Where the intent to return exists the absence of the party for sometime is not very material as appears by these instances, if a man leave town for the season (several months), if a barrister leave town for the long vacation also a period of several weeks (in England) intending to return to his residence the entry may be burglary, and so where a man locked up his house and went on a journey. Some one must usually sleep in the house. Tents and booths at fairs, have been held no subjects of burglary because the edifice must be a permanent and not a temporary residence. Possession by a servant would appear to be possession by his master and his dwelling therein, a dwelling by the master in contemplation of law. It appears use will make an out building subject of burglary, but if it be not connected with the dwelling house some one must both dwell and lie in it. Taking meals without sleeping or sleeping without residing generally will not suffice. A woman sleeping in a work-shop to take care of it but dining elsewhere in the daytime, a man sleeping in a warehouse, a servant watching by night in a barn for thieves will not make such tenements the subjects of burglary. A part of an out building used as a dwelling (not otherwise) will be a fit subject for burglary. It seems that a window within a building is not a sufficient communication between a part of a building occupied by A. and the part occupied by B. Where landlord and tenant dwell under one roof, if there be communication, the house should be laid (it appears) in the landlord. Where several buildings communicate and where one house is occupied by different parties as separate dwellings, or for different purposes the foregoing general principles will regulate the description of the breaking and entering. And according to the circumstances such entry and breaking will be burglary or no. The word dwelling house at common law includes all out-houses occupied with and immediately communicating with the dwelling.

Sacrilege.—Entering into and breaking into or breaking out of a church or chapel and stealing therein, is sacrilege and felony. The defendant may be acquitted of the breaking and convicted for simple larceny. The proof in such cases must be as in other larcenies. The proof of the breaking is the same as in burglary, except that it need not be done in the night time. See Consolidated Statutes, cap. 92, s. 17.

ROBBERY.

Robbery consists in the felonious and forcible taking from the person of another or in his presence against his will, of any property to any value, by violence, or putting in fear. The prosecutor must either prove that he was actually in bodily fear at the time of the robbery, or prove circumstances from which the jury may infer it. The force or fear must precede or accompany the taking, else there is no robbery. Violence subsequent to a taking and asportation will not make the taking robbery. Where during a riot at Birmingham the defendant told the prosecutor that unless he gave him money he would return with the mob and destroy his house, it was held robbery. In the riots

of 1780 a mob came to the defendant's house, headed by the prisoner, and demanded half a crown, and the prosecutor gave it out of terror of the mob, it was held robbery, though no threat was uttered. In another case the prisoner came to the prosecutor's house with a mob and advised him to give the mob something and prevent mischief, by which means they obtained money from the prosecutor, evidence was admitted of acts done by the mob on the same day, and both before and after the same transaction, to shew that the advice of the prisoners was not *bonâ fide*, but in reality only a mode of robbing the prosecutors, and the circumstances were held to amount to robbery. It is of no importance under what pretence the robber obtains the money or goods, if the prosecutor be forced to deliver it by actual fear or under circumstances from which it may be inferred. As for instance if a man ask alms with a drawn sword and gets them from the mistrust and apprehension thereby excited, it is robbery. Or if thieves finding little upon A force him by threats of violence to bring a greater sum, this is robbery. But where money is said to have been brought from fear the fear must be still operating to constitute robbery. And where one having been threatened with an accusation under circumstances which would have at the time the case happened amounted to robbery had the prosecutor given the money from fear it was held no robbery, because he gave the money not from fear but in order to prosecute the parties. But where J. N. went in a coach in order to apprehend a highway and the highwayman presented his pistol and J. N. gave his money and immediately afterwards jumped out and with assistance took the highwayman, this was robbery. In this case it is to be noted that violence was used, the robber presented his pistol. It is also to be observed that no confederate of J. N's induced the robber to commit the act ; whereas in another case R. vs. McDaniel, the prosecutor got a confederate to entice two strangers to commit the crime in order that he might procure a reward upon their conviction, and the judges held it was no robbery because the goods were not taken against his will. The following examples of robbery by manual force or violence will suffice for our purpose. If a man knock another down and steal from him whilst he is insensible on the ground, this is robbery. Where the defendant tore a lady's ear through in snatching away her ear-ring it was held robbery ; where the defendant tore some hair from a lady's head in snatching a diamond pin from it, the pin having a corkscrew stalk and being much twisted in the hair, it was held robbery ; where a watch being suspended from a man's neck by a steel chain, wound round his neck, and by pulling two or three jerks the thief broke the chain, it was held robbery. So it is robbery if there be a struggle for the property and the goods be taken from the prosecutor by superior force. But merely snatching property from a person unawares and running away with it is no robbery. And if a man privately steal from another and keep the stolen goods by afterwards putting him in fear, there is no robbery. So where the theft being no robbery, a scuffle takes place in the attempt to apprehend the thief, it seems to be no robbery, for the struggle must be for the goods not for the liberty or capture of the thief. Where a man took goods to the value of eight shillings and forced the prosecutor to take one shilling in payment, it was held robbery. The goods must be taken either from the person or in the presence of the prosecutor and it seems they must be in his personal possession at the time they are attempted to be taken. If a thief put a man in fear and then in his presence drive off his cattle, if a man flying from a robber drop his hat or throw away his purse and the robber take either, it shall maintain the indictment. Where the prosecutor being attacked with great violence, a person who was carrying a bundle belonging to the prosecutor dropped the bundle to go to his aid, and one of the prisoners took the bundle, it was said not to be robbery, because the bundle was not in the prosecutor's possession at the time. It may be proper to remark that A. may be robbed of B.'s goods

which he has in charge. And see larceny generally as all the ingredients of larceny must exist in robbery together with the force or fear or else there is no robbery. For the various statutable provisions as to this offence and where it is aggravated thereby, see the provincial statutes. A prisoner may be acquitted of robbery and convicted of assault as in some other felonies which may be worth considering. Where the defendant decoyed the prosecutor into a house and chained him down in a seat and there compelled him to write orders for the payment of money and for the delivery of deeds, and the paper on which he wrote remained in his hands half an hour, but he was chained all the time, this was not held an assault with intent to rob, but it was doubtless an assault and false imprisonment at common law. Where the prosecutrix was threatened by some persons at a mock auction to be sent to Bow Street (police office) and from thence to Newgate unless she paid for an article they pretended was knocked down to her though she never bid for it, and they called in a pretended constable who took a shilling from her not to take her to prison this was held no robbery, but a simple duress (that is false imprisonment.) But where the defendant with intent to extort from a prisoner in his charge for an assault, hand-cuffed her to another prisoner and beat her and kicked her and put her in a hackney coach, and took four shillings out of her pocket to pay for the coach, the jury finding that he had previously the intent to get all the money the prisoner had, and used all this violence with that intent, the judges held clearly that this was robbery. Where one is indicted for robbery aggravated by stabbing, the wound being given immediately before or after or at the time of the theft, the word "immediately" is to be interpreted by the court, and if the prisoner be convicted of an assault under an indictment for robbery if only one count was good and though the case was left to the jury on a bad count, it seems the conviction for assault will hold, and it also seems immaterial whether the jury find the assault to have been with or without intent to rob so far as this that it comes within the statute. Consolidated Statutes Cap. 92, ss. 1 to 5.

EXTORTING OR GAINING MONEY BY THREATENING TO ACCUSE OR ACCUSING A MAN OF AN INFAMOUS CRIME.—It is not material whether the party threatened be guilty or innocent of the offence imputed to him. The threat need not be that of judicial accusation a mere threat of exposure will suffice. It seems necessary to complete the offence that the money or other thing should be paid or given under the threat and the intimidation must be on the mind of the person threatened to be accused. The jury need not confine themselves to the consideration of the expressions used before the money or thing was given but may connect with them what was afterwards said by the prisoner when taken into custody. (And probably with any expressions subsequent to the act.) Demanding money with menaces with intent to rob, the menace being either expressed or implied, assaulting with intent to rob, and sending letters or uttering threats to accuse of crimes with intent to extort money are all crimes for which *vide* the Consolidated Statutes cap. 92, ss. 6, 7, and also bear in mind the common law principle that all attempts to commit felony not otherwise provided for are misdemeanors.

PIRACY.

Piracy is robbery upon the high sea. It must be committed beyond low water mark on the coast of the country trying the offence, and not in any water between headlands or any waters *infra corpus commitatus*, creeks, rivers, havens, &c. This does not hold as to foreign coasts for then to constitute piracy, it may be done wherever great ships go. Where there is ebb and flow upon the coast to be piracy the fact must be done when the tide is in, and not upon the strand, of the country trying the offence. The description

of the ship robbed must be proved as laid, if the ship or other vessel be unknown the indictment must so state it. The ingredients and proof in other respects are the same as in robbery on shore, but some evidence must be given that the persons robbed were in the Queen's peace, it will not be presumed as in other cases. The goods must be both alleged and proved to be those of a British subject or of an alien friend, for enemies cannot be pirates. The taking must be without authority from any prince or state for no nation are deemed pirates, and the barbarity of the state to which a man belongs does not affect his position in this respect. Thus the Algerine corsairs were never deemed pirates but enemies.

LETTERS. See Threats.

LEWDNESS. See Nuisance.

LIBEL.

LIBEL may be divided under the libels particularly affecting individuals and libels particularly affecting the public. The latter are the graver, both are misdemeanors at common law, punishable by fine and imprisonment. For the former an action lies, and not for the latter, except where a particular man is injured, in the course of a libel of special consequence to the public. The reason for which the crime of libel on a private man is indictable, is that it is calculated most directly to provoke a breach of the peace. Words written will be indictable which if spoken will not be indictable, for writings are both more deliberate and more injurious than words, and also *verba volant litera scripta manent*. The truth is no excuse for a libel, and being usually more provoking than falsehood, it has been even said "the greater the truth the greater the libel," but though in no case may the defendant justify or prove the truth on criminal process, yet an information will not be granted in the Queen's Bench for libel on a private individual, if in the country unless he negative it by oath, (this remedy has not been heretofore in use in Canada.) The origin of the word libel is *libellum* a little book, the offence of libel against individuals may be described as a malicious defamation of a person made public by printing, writtings, signs or pictures, to provoke him to wrath or expose him to public hatred, ridicule, infamy or contempt. The word signs, means some permanent mark as an effigy. It is a good rule that whenever an action will lie for libel without laying special damage, an indictment will lie also, and likewise wherever an action will lie for slander without special damage, an indictment (the words written) will lie for libel. A libel may be committed on the memory of the dead, but the indictment in such a case must charge the intent to have been to bring hatred or contempt on the family of the deceased, or stir them to wrath. Sending a letter containing libellous matter is indictable, as it is calculated to provoke a breach of the peace, though it be addressed privily to the party insulted by it, and not published, nor yet intended to provoke a breach of the peace. It suffices that it might have that effect, and needs no special allegation of that in the indictment. No words will make a libel on a private person if they be but spoken and not written. But knowingly and wilfully dictating a libel which another writes is composing and publishing it, and so in like manner reading it aloud is a publishing, but not if he who read was innocent of the foreknowledge of the matter, and will to circulate it. A publishing must be wilful, the handing for instance of a newspaper containing a libel to a man in ignorance of its contents, will not make the party who so hands it guilty of libel, but all willfully concerned in the circulation or publishing are guilty of libel. A libel may specially affect a man in his profession or calling, and may be so laid, as calling a physician a quack or the like. In like

way it may also affect a public functionary in his dignity, and should in such case be drawn specially according to circumstances. If the libel alleges the office or the prosecutor appear to have occupied it, it is proof enough of his office.

The libels more especially affecting the public are those which are seditious or blasphemous, or which reflect on the administration of justice. All libels on magistrates, judges and jurors, for any thing done in their office, are included under this title. It is libel to impute bad motives or question the probity or ridicule the conduct of those who administer the laws. For seditious libels couple what is here written of other libels, with what you will find under the head of sedition, and follow the same courses as to blasphemous libels, for which see blasphemy and profaneness. Obscene publications are punishable in the same manner as libels, and though it is a good defence to a charge of malicious libel, that it is a true report of proceedings in a court of law, and published for the public instruction, yet it is no defence for publishing indecent and scandalous, or blasphemous matter to the detriment of the public morals. Where ambiguity is used in a libel, it may be explained by innuendoes, it is not necessary that plain language or designations even generally understood should be used in a libel, if the intent may or can be made out and is libellous it is sufficient. Nicknames, abbreviations and indirect allusions may all be explained, and so may ironical compliments, suggestive questions, allegories, metaphors and all the other arts and disguises of satire. Where a foreign language is used the libel must be set out with a translation, and the accuracy of the translation must be proved. Other publications and other parts of the same publication it would appear may be given in evidence, (to explain the intent of the libel,) either for or against the defendant. There must be a publication else there is no libel. To publish to one person (even it is said to the person aggrieved) is a sufficient publishing. The libel must be set out correctly.

Where innuendoes are used they must be proved as laid. Extrinsic facts are to be stated in an inductive or introductory way and not as innuendoe. Whether the defendant published the libel or not, and whether the intendment and innuendoes are proved are questions of fact for the jury, but it is according to the majority of opinions for them to take the direction of the court, as to what is or is not a libel, the same being a question of law. Malice is to be presumed from the matter published and need be not specially proved by the prosecutor. Its absence is a good defence but must be proved and not presumed. In seditious libel however it is no defence that the intent of the writer was innocent, if the effect be to alienate the affections of the people from the government, or there be a likelihood of its doing so. Foreigners of consideration in their own country may be libelled, and to libel them is indictable as likely to disturb the relations of the country with foreign countries. Their residence abroad is not material. There can be no libel on all mankind or on orders of men so widely diffused as to deprive it of any particular direction. But such a libel on a body of men as may (seeing the ordinary frailty of humanity) incite them to a breach of the peace or others to break the peace towards them, is a libel. For instance a corporation may be libelled and so doubtless might a public company or its directors collectively. Slanderous words spoken to or before and of a magistrate in the execution of his office, are indictable as a misdemeanor, and punishable in the same manner as libel. It is sufficient to shew the magistrate acted as such his office will be presumed, and so will the office or profession, of any man assailed therein.

LOTTERIES. See Consolidated Statutes, Cap. 95.

LUNATICS. See Consolidated Statutes, Caps. 73, 108, 109.

MACHINERY. See Consolidated Statutes, Cap. 93, ss. 5 and 18.

MAILS. See Post Office.

MAIMING CATTLE. See Consolidated Statutes, Cap. 93, s. 16.

MAIMING OR MAYHEM. See Wounding.

MAINTENANCE.

Maintenance from (manu tenere) is an unlawful taking in hand or upholding of another person's quarrel or suit. The interference need not be corrupt it is sufficient if it be officious and the party has no personal interest in the matter. Both by statute and common law this is an indictable misdemeanor punished by fine. Maintenance is divided into maintenance in the country and in town. No private action lies for the first but a suit may be had for the second. Holding lands for another by force or subtilty is maintenance in the country. For one who has no personal interest to counsel advise or assist another in his suit or lend him money to carry it on is maintenance. A lawyer who does his best for his client according to his duty is no maintainer nor is he who counsels his kinsman or relative but it seems he may not lay out his own money unless he be father, son or heir apparent to the party. Nor is it a maintenance to lend a poor man money to carry on a suit out of charity some call this lending to his poor "neighbor". The word "neighbor" is here used in a scriptural sense and includes any body. Any self interest excuses any act of simple maintenance. A lawyer may be guilty of a simple maintenance if he wilfully and corruptly or maliciously induces a party to take out a suit as setting up a straw plaintiff to vex and harrass a man or entail a settlement unjustly but he is no maintainer if he was no party to the commencement of the suit. *

† *Champerty* is a maintenance in which the maintainer is to receive part of the thing in dispute for his services or assistance in getting it. Buying titles in dispute is also a misdemeanor in the same nature as the foregoing.

BARRATRY.—He who frequently and commonly commits maintenances is a common barrator, he may be punished as above and he may be also bound to the peace and good behaviour and if a lawyer he shall not practice again. Also he who commonly moves and excites quarrels between others by spreading calumnies false reports and inventions is a common barrator. More than one act must be proved to convict a man of barratry. The indictment against a barrator like the indictment against a common scold (now disused) may be general merely charging the defendant to be a common barrator but he will be entitled to a note of the particulars to be proved against him.

EAVES DROPPERS or such as watch under eaves or windows to overhear conversations and go about reporting them may be indicted and punished, the crime of these bears some resemblance to barratry and is therefore mentioned here. No man's own suits will make him a barrator nor can he be a barrator for contensions or quarrels in his own right, but only by stirring others to quarrel together.

MALICIOUS INJURIES TO PROPERTY. See Consolidated Statutes, Cap. 93.

MANSLAUGHTER. See Homicide.

MANUFACTURES. See Consolidated Statutes, Cap. 93, ss. 4, 17.

MENACES. See Threats.

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* Imperial Statutes, 1 Ed. 3, St. 2, c. 14,—20 Ed. 3, c. 4,—1 R. 3, c. 4,—1 R. 2, c. 4,—32 H. 8, c. 91,

† Imperial Statutes, 3 Ed. 1, c. 25,—28 Ed. 1, c. 11,—33 Ed. 1, St. 3,—1 R. 2 c. 9,—31 Ed. c. 5,—32 H. 8, c. 9,—38 Ed. 3, St. 1, c. 12.

MINISTERIAL OFFICERS. See Misprision.

MISPRISION OF TREASON AND OF FELONY ALSO OF OFFICE.

The two first consist in a person's barely concealing treason or felony though neither aiding nor abetting nor consenting in the felony or treason. Of misdemeanor there is no misprision. For misprision of treason a man should be imprisoned for life, for felony a year, if a sheriff or other officer of the law less less than a year if a private man. Except in theft whether a reward was taken or not is not essential to the offence. A wife cannot be guilty of misprision in concealing her husband or his crime (nor probably a husband his wife). Other relatives are not exempt from the obligation to disclose treason and even to disclose felony. These are misdemeanours.

MISPRISION OF OFFICE is the general name for almost any act of misconduct amounting to an indictable misdemeanor, which public officers more especially those of justice may commit in their offices, and where very great officers are concerned, their misprisions may be also described as high crimes and misdemeanors. These words are however sometimes used in connection with treason as on an impeachment for "high treason and other high crimes and misdemeanors," and so a *præmunire* might be included in this phrase, though a matter far above any mere misprision. It may therefore be taken as a good generic name for any official malfeasance or non feasance, or a misdemeanor, in office or otherwise, as involving a contempt of justice, though offences of the gravest kind an official can commit (officially) will generally include more then the mere misprision, or dereliction of duty, contempt of justice and abuse of power or office. It may be laid down as a good general rule that anything done to the public prejudice in the administration of a public trust or office howsoever high or low is an indictable misdemeanor, of the class we are now considering if it do not amount to more or has not been otherwise provided for, and though in the case of Peers and some other great officers of the realm the trial must be before Parliament or the Peers, yet in all other cases the court of Queen's Bench is the proper court for the trial of such cases, inasmuch as it takes special cognizance and purview of the administration of the law, and is the proper court to control its officers, and there are few official misdemeanors or misprisions which would not be brought into the Queen's Bench by *certiorari* if indicted for at sessions. I will now give some examples of what will or will not make ministerial or executive officers of the law answerable criminally for misconduct. Acts of oppression, extortion, partiality, corruption, negligence, bribery, (or bribe taking), and even illegal lenity are indictable, and still more so are refusals or neglects to discharge the duties of public office. A magistrate is excused for every act ignorantly done however grievous, and it is a general rule that gratuitous services rendered to the public are not to subject him who renders them by virtue of office to liability for mere errors of judgment, particularly where the acceptance or execution of office is compulsory. But all official acts of a wrong injurious kind done from an ill motive or bad heart, otherwise said to be done by malice or froward mind, if of public evil consequence, are indictable. Thus exacting excessive bail, refusing to admit to bail when the party was entitled to be bailed, taking bail where it ought to be refused, or taking insufficient bail (especially after the refusal of another magistrate to do so,) are all matters which may be dealt with criminally and so may the taking of extra judicial affidavits, or the administering of oaths (otherwise lawful) by persons not duly qualified. He who acts in an office to which he is not properly appointed or duly qualified, acts at his peril and must answer for his acts. He who executes a warrant must see it is sufficient on the face of it else he is answerable, if it be sufficient he who issued it is answerable, but not he who acted on it.

To BRIBE or attempt to bribe public officers (especially those of justice) is a misdemeanor. Acts of apparent corruption and extortion always carry a presumption of malice, and acts of omission carry a presumption of malice in some cases which do not attend acts of commission. For instance refusing or neglecting to execute the offices of Justice of the Peace or Constable are offences in which disobedience of duty is presumed to be malicious (of froward mind) or wilful. But where oppression is alleged against a justice of the peace, express malice must be proved, or circumstances must be so strong and peculiar as to carry an irresistible inference of it, for otherwise mistake will be presumed. Justices of the peace are particularly protected and the general rule favorable to office is much stronger in their case at common law as well as by statutes for their protection than in other men's cases. To an indictment for oppression it is usual to add a count for an assault and false imprisonment. No notice is required previous to preparing a bill of indictment against a magistrate. It is otherwise on informations and suits. To take insufficient bail wilfully in order to let a prisoner escape may be treated in very plain cases as an escape otherwise as a substantive misdemeanor. When a magistrate interferes with another in a case of which the other is seized, he ought to be able to justify his conduct as it will always be presumed the magistrate first seized of the case was right, and the interference will give ground to a suspicion of some other motive than duty should it appear unnecessary or uncalled for. Still where the first magistrate is clearly in error or worse, the mere interference will not make right wrong, and it is not because one magistrate improperly refuses to do a particular act (as to take bail) that another is to copy his example and the law in cases of a dispute or difference will fully protect the magistrate who is in the right if he act on a clear and plain occasion for his services, rightly and from honest motives, but it is to be borne in mind that no magistrate should needlessly intrude in a matter of which another is seized. The infliction of unlawful punishments is a serious misdemeanor. A sheriff or gaoler may be punished for cruel usage of prisoners. A sheriff or executioner may be hanged for murder if they change the mode of death or day of execution without full and lawful authority, and in respect of this or other ill usage, an attainted felon or traitor is as much under the protection of the law as any other man. Without doubt also it is a misdemeanor to add to, or needlessly and maliciously increase the pains of death by any act not directed by law. Acts done by magistrates are divided into acts done *virtute officii*, which may always be justified or at least excused and acts done *colore officii*, where there is a color of office only to cover some bad act done from improper motives. The same distinction will apply with less force and to some extent only to the conduct of all men entrusted with public office but the expression is not generally used in other cases than those of justices. A bailiff or other officer of the civil courts may be indicted for extortion, bribery (taking bribes) and other flagrant acts of misconduct of public consequence, as well as for assaults and false imprisonment and of larceny if he use his office as a color for theft. And the Provincial Statute which see does not remove these liabilities though in some cases of misconduct in these officers it gives a remedy which is peculiar to itself. To violate an act of parliament is indictable as a misdemeanor in the Queen's bench (though in some cases not at sessions) when the act does not provide a specific punishment and sometimes when it does provide penalties of pecuniary kinds. Note. It is said the crown may pardon treason and yet prosecute for misprision and doubted if the same rule does not apply in felony. It is clear however that misprision must be committed by concealment of another's guilt for *nemo tenetur se accusare*. Unlawfully selling and buying, public offices or attempting to do it, is an indictable offence. To offer money to a minister or other great officer for

preferment is indictable. Death from excessing punishment though lawfully commanded if willfully and maliciously inflicted or ordered is murder, as flogging a soldier to death with malice aforethought or keeping a prisoner so close as to stifle him with malice aforethought.

Misprision is a word taken from *mépris* (French for contempt) and it means a contempt for which an indictment may lie instead of or optionally with a commitment. Thus concealing great crimes are contempt of justice or more. A misprision is a misdemeanor but in the case of an assault in the face of the court of Queen's bench the contempt is aggravated to felony, though the offender may be punished for either. Striking within the verge of that Court being felony, anciently punished with death by common law and afterwards by statute with perpetual imprisonment, confiscation of goods and loss of the offending member, as for instance of the right hand, and so even for drawing a weapon to intimidate the judge. Refusing to aid the sheriff when he calls the *posse comitatus*, the party refusing, being over fifteen and under sixty years old, and able to travel, refusing to aid a constable when called on in the Queen's name knowing his office, (which may be inferred from his dress his staff and the like,) refusing to help to take a robber or other offender pursued by hue and cry, refusing to help to suppress a riot or affray, refusing to aid a constable in escorting and securing a prisoner if called on, or generally to refuse to join power raised in the Queen's name by sufficient officers for a lawful purpose, refusing to arrest one who gives a dangerous wound or strikes a deadly blow in the view or presence of him who refuses to arrest, refusing when bound by law so to do to aid the Queen in her wars,* all these are misprisions, he who commits them may be fined.

Murder. See Homicide.

Navigable River. See Larceny.

Newspapers. *Vide* 1 Vic. cap. 20.

Nuisance to be indictable must be common, that is to say, it must affect the general public. Carrying on an offensive trade in a populous neighborhood or near a highway, is a common nuisance. No length of time will legalise a nuisance, but it is a good defence that the trade was carried on in the same place before the houses or the road were made, or that other trades already established in the same neighborhood created the same nuisance to a degree not perceptibly increased by the defendant. To illustrate,—If a man erect and use a slaughter-house amongst the private habitations of his neighbors, it is a nuisance, not so if a man choose to go and inhabit near a slaughter-house. Accumulations of offal and filth, and keeping stinking substances in populous places, placing putrid carcases near the highway and the like are nuisances, and as such indictable misdemeanors, punishable by fine or imprisonment or both, and the nuisance to be abated if continuing, and so set forth and proved. Sports may be of such a nature and so carried on as to be a public nuisance, such as baiting a bull on the highway. Keeping ferocious or unclean animals in such a place or manner as to incommode the public, as keeping hogs and feeding them with offal near a public street, a dangerous bull in a field through which a footway passed and keeping a fierce dog unmuzzled, (but on this see 13 & 14 Vic. c. 14,) are all common law nuisances. So is a common scold, but such a person now a days generally gets disposed of under the Police Ordinance. The making and selling squibs and fireworks as well as throwing them about, is a nuisance by an imperial statute, and so are indecent plays, &c., and unsanctioned lotteries, &c., but to all these as well as other nuisances to be mentioned, this general rule holds good that the Provincial Statutes must be consulted as the old remedy is little used, and under different heads and various provisions many nuisances are dealt with in a manner and by names not

known to more ancient times. Keeping a bawdy-house, a gaming house, or a disorderly house. (See Consolidated Statutes, cap. 105,) are common nuisances, punishable by fine and imprisonment, or either, at common law, and a room or other part of a house suffices to sustain the indictment as much as the whole tenement. A disorderly house must be so noisy as to disturb the whole neighborhood, or at least several adjacent houses, or it will not be indictable. A bawdy-house must be more than a house kept by a woman for her own prostitution. Obstructing or failing to repair a highway or bridge if bound to do so, or obstructing a navigable river are indictable nuisances. Bodies of men as well as individuals can be indicted for this kind of nuisance. A whole parish or district if bound to repair a highway may be indicted and fined, with costs to the prosecutor, for not doing it. He who obstructs a road or highway, may be imprisoned with or without fine, or fine only. If a man's ship sinks by accident he is not indictable for not raising it, and where the impediment to the navigation is of slight importance, and the benefit to the public great, it has been questioned whether the indictment should be sustained, and the decisions appear somewhat discordant, or rather they go against this opinion. Furious driving is a sort of common nuisance for which, see 18 Vic. c. 100, s. 24, par. 17; 18 Vic. c. 113. Open and notorious lewdness is also indictable, keeping a bawdy-house, and obsene publications are descriptions of this offence already disposed of. Indecent exposure comes under the same head, but it is more often treated summarily than by indictment. Look to loose and disorderly persons or Police Ordinance. Still the offence is an indictable misdemeanor with fine and imprisonment, and may be so treated.

Oaths—Administering and taking unlawful oaths. *Vide* 2 Vic. c.

Orchards. *Vide* 18 Vic. c. 100.

Perjury is a misdemeanor of a particularly grave character, and which the law anciently marked with disgrace, by the punishment of the pillory, this is abolished, but the crime is still one of peculiar infamy, and may by force of the statute law be punished by the Penitentiary. To constitute perjury an oath or affirmation (allowed to certain sects) must be taken in a judicial proceeding before a competent jurisdiction. It must be material to the question depending and false. The false oath or affirmation must be taken deliberately and intentionally, mistake or inadvertance will not make perjury. It must be either wholly false or if true the witness must be ignorant of the truth he swears to. As if a man swear J. N. revoked his will in his presence, if J. N. actually revoked the will and the witness knew it not, it will be perjury (this is an English instance arising from their testamentary system.) A man may be indicted for perjury in swearing he believes a thing to be true which he must know to be false. The Queen's Bench alone can try perjury (cases triable at Sessions under the Act of Elizabeth never arise in Canada.) Perjury must be proved by two witnesses. False swearing as to the credit of a witness may be perjury and generally is so as it is usually material. A judge in England may direct a prosecution for perjury committed before him, if he think fit, and assign counsel to the prosecutor who must act gratuitously and exempt the prosecutor from all fees. It is provided by statute he must so act either instantly in Court or within 24 hours afterwards. It matters not whether the oath be that of a christian. If it is a lawful oath, the crime is the same. See Consolidated Statutes, Cap. 5, also Cap. 99, ss. 39, 40 and 71.

Subornation of Perjury is misdemeanor and consists in inducing any other to commit that crime. Prove the perjury, the mere previous conviction for it

will not suffice, then prove the subornation. The perjurer is no witness and after conviction can never be sworn except in answer to a rule against himself. To attempt to suborn is misdemeanor.

PERSONATING A CONSTABLE or other Officer in authority falsely and without lawful excuse, is a misdemeanor. For False Personation, see False Pretences.

PETTY LARCENY. See Larceny.

PETTY TREASON. See Murder.

PIRACY. See Ante Page 39.

POISON. See Murder, also Consolidated Statutes, Cap. 9, s. 5.

PRETENCES. See False Pretences.

PRINCIPAL AND ACCESSORY. See Accomplice.

PROVOCATION. See Challenge, Assault, Homicide.

QUAY. See Dock.

RAILWAYS. See Consolidated Statutes, Cap. 93, ss. 30, 31, 32.

RAPE.

If a man cause a woman to yield to his carnal desires through fear of death or duress, it is rape. So taking her by violence is rape, but the crime must be against her will else it is no rape. That the woman was a common strumpet or was the concubine of the ravisher is no defence, for the crime is rather the violence to her will than the injury to her chastity, and the law gives her leave to amend her life and will not suffer her to be forced to continue it, but in such cases it is for the jury to consider the character of the witness as going to the fact of the presence or absence of consent, and the defendant may give evidence of the woman's notoriously bad character for want of chastity, or common decency, or her connection with himself, but he cannot give evidence of other particular facts to impeach her chastity. So what she said herself so recently after the fact as to preclude the possibility of her being practiced on may be taken in evidence as part of the same transaction, though the particulars of her complaint are not evidence of the truth of her statement, and ought not to be asked in her examination in chief, and have been overruled when so asked, the soundness of which rule has been questioned. The woman is an adequate witness to prove the whole case, but her credibility is for the jury and they are to weigh every circumstance affecting it or tending to shew that her story is or is not probable. To constitute the offence there must be a penetration, there needs no emission. On the extent of the penetration decisions differ, though the authorities generally say the slightest penetration will suffice. A majority of the judges (in England) have decided that having a woman by deceit, she believing the party to be her husband is no rape but they are clear it is an assault, and that the prisoner may be sentenced to hard labour for it. To take advantage of a woman who is delirious or to drug and intoxicate her in order to know her and then do it is rape. The case of a female child under ten has been already disposed of. If a child above ten and under twelve consent to a man's wishes he will be guilty of misdemeanor, but under indictment for the same if acquitted thereof, cannot be convicted for assault, but if he did not complete the offence he may be indicted at common law for an

attempt to commit the statuable misdemeanor. If he have such a girl against her will it is rape, the same as on an adult. See Consolidated Statutes Cap. 91, s. 19, 20, 21, 23.

Rape is a capital felony. If the defendant be under fourteen he must be acquitted if charged as principal in the first degree, that is, as an actual ravisher, but he may be convicted of an assault, and have sentence of imprisonment with hard labor. A husband cannot be guilty of ravishing his wife, but he may be principal in the second degree, and so may a boy under fourteen, (having malice and it proved,) and both may be accessory. To convict a boy under fourteen in any of the above cases, guilty knowledge (or to express it differently malice above his years) must be shewn. If a woman yield through fear of death or duress, it is rape. See Consolidated Statutes, cap. 91, s. 19; cap. 99, s. 70.

Receiving Stolen Goods. See *Ante* Page 38.

Regrating. See Engrossing.

Rescue. See Escape.

RIOT, &c.

Riot, rout, unlawful assembly, tumult, affray, riding and going armed, and training to arms or drilling unlawfully, are offences which we shall now consider. When three or more persons assemble themselves together with an intent mutually to assist each other in an enterprise of a private nature with force and violence against the peace and to the manifest terror of the people, whether the act intended be legal or not, it is riot if they execute their purpose. If they move towards it but disperse without actually executing it, (by moving, any attempt or act towards the design is intended,) it is a rout. If they assemble only with an unlawful intent, but do not move (or commence) to complete their purpose, it is unlawful assembly with tumult or simply unlawful assembly, according as they use more or less noise and clamor. Being armed, using threatening speeches, turbulent gestures, or the like are circumstances sufficient to terrify the people and with the other ingredients of the offence support the indictment in riot and tumult, but no words will make an affray (though a shew of arms may, so will an attempt to use them,) nor will violence unless it be on a highway or other public place, for if not however great the assault it is not in affray of the peace or people (which latter word is the correct one though both are in the books). If there be a levying of war, the defendants on an indictment for riot, &c., must be acquitted for the misdemeanor merges in treason. If persons originally met together for innocent purposes, fall out and agree to stand by each other and form into parties and then fight, it is more than an affray for there is premeditation, it is riot. Rioters may act seditiously and an unlawful assembly may be also a seditious assembly. On this head see sedition. The indictment in such cases uses the word "seditiously" with unlawfully, &c. If persons to any number meet for an innocent or lawful purpose and then fall out and fight on a sudden, it is no riot but an affray. All these offences are indictable misdemeanours. Two men will suffice to make an affray. Riot and tumult are usually punished by indictment in the Queen's Bench and Sessions, and included together as above. So is riot and assault. Under this last indictment, a conviction may be had for the assault, but if proof of the assault fail the prisoner must be acquitted. Riot, affray and assault may all be joined in one indictment. However unlawful the acts of an assembly may be and however unlawful the assembly itself, if it be not accompanied by such circumstances either of actual force or violence, or at least of an apparent tendency thereto as are calculated to inspire

terror, it is no riot. In affrays it is only those who act unlawfully who are guilty of the affray. An affray may be committed by assembling or by fighting or by the shewing of deadly weapons as by drawing swords, levelling guns or the like. Riding or going unusually armed or attended is an offence nearly approaching an affray. The element of the offence in both cases is the terror with which it inspires the peaceable in public places. The word unusually is of great force in this offence. So much that when persons of quality usually wore arms and had large retinues, their usual arms and following put them in no fear of the law but only an extraordinary abuse of their ordinary privileges. Drilling, training to arms, &c., without the sanction of the proper public authority is a misdemeanor in the nature of the foregoing, and if with treasonable intent may be laid as an overt act of high treason and if not laid given in evidence of some act which is laid as shewing the intent of the prisoner. In riot the intent of the rioters must be to redress some particular or private grievance, as to pull down a particular building or inclosure; if it be for the redress of public grievances, or for so general an object as to effect the policy of the nation, as to pull down all inclosures, all bawdy houses and the like, it is treason. Particular statutes have provided for cases which we shall presently refer to. By common law a private person may resist and if he can suppress riots, and indeed it seems he is bound to do so, if able, far more so all officers of the Peace, but the latter may command others to assist them on pain of the law, and this a private man cannot do, it seems also that one may arm especially on a call for arms to suppress the riot. But this is to be done with great caution and is attended, it seems, with much hazard. By statute law one justice of the peace may bind rioters to their good behavior. He may arrest them or order them to be arrested by mere word of mouth without warrant and by force of that command the persons so commanded may pursue and arrest the rioters in his absence as in his presence. He has also a right to exercise all the same powers over this as over any other offence as to issuing his warrant and binding the rioters or suspected persons to appear at the Sessions or Term or committing them in default of sureties. On this head see the statutes.* By statute in cases of riots, routs and unlawful assemblies, two justices of the peace may come with the sheriff or the under sheriff and the power of the county, and compel the assistance of all the "liege people" able to travel on pain of fine and imprisonment and if the Justices overtake the rioters or meet them in a body or assembled they are under penalty to record the riot and commit the rioters to gaol as convict till they pay a fine by a record on their own view. But if they have no view they shall (under penalty) summon a jury within a month to try the rioters by an inquisition of 24 men, and if the inquisition or inquest fails to convict, then the justices within another month (under penalty) shall certify the matter to the King and his Council or Queen and her Council, and not only are they to certify the riotors but any unfair acts or practises by laboring jurors or the like, which may have caused the inquest or inquisition to fail in convicting the riotors, and this certificate has the effect of the presentment or indictment of a Grand jury. This statute however is not at present used the usual mode being to convict rioters for trial the same as all other accused persons. But the statute commonly called the Riot Act, is still frequently acted on. By this Act if the rioters are above the number of 12, one justice or officer with the same amount of power and dignity shall make proclamation or cause it to be made commanding the rioters to disperse, and if they remain together to the number of 12 or more over one hour or more after proclamation it is felony and so is it if they obstruct or

* Imperial Statutes, 3, 4 Ed. 3, c. 1,—13 H. 4, c. 7, s. 1,—1 G. 1, c. 5,—2 H. 5, c. 8, s. 2.

forcibly prevent or attempt to prevent proclamation being made. Persons riotously demolishing or beginning to demolish a house, a church, a dissenting chapel or other building within the Act whether to the number of twelve or not are guilty of felony. Felonious rioting must be presented for within twelve months of its commission. Actions may be maintained for injuries to property by rioters under certain circumstances. Unless the felonious intent be proved as laid the rioters must be acquitted however riotous their conduct.* It is to be observed that the old statutes as to riots and forcible entry, &c., are by no means repealed and that disuse abrogates no law. How far all could be acted on in Canada might be a question. Persons quelling riots by the riot Act as well it is said as at common law, are justified in killing the rioters in the preservation of the peace. Consolidated Statutes, Cap. 29,—*Idem*, Cap. 82,—*Idem*, Cap. 104,—*Idem*, Cap. 93, s. 5, 18,—Provincial Statutes, Cap. 100.

River, Bank or Wall. See Consolidated Statutes, Cap. 93, ss. 19, 20.

Robbery. See *Ante*,

Roots, plants, trees, fruits, vegetables, &c. See Consolidated Statutes, Cap. 93, ss. 24, 25, 26.

Road. Nuisance.

Sacrilege. See *Ante*.

Seal. See Forgery.

Security. See Larceny.

Sedition. See Treason.

Sending Explosive Substances. See Consolidated Statutes, Cap. 91, s. 14.

Ship. See Piracy, Larceny, Con. Statutes, Cap. 93, ss. 7, 8, 9, 10, 11, 13.

Shooting. See Murder and Consolidated Statutes, Cap. 91, ss. 6, 7.

Shop. See Larceny.

Shrub. See Roots.

Stabbing. See Wounding.

Starving. See Murder.

Stealing. See Larceny.

Steam Engine. See Railways.

Subornation of Perjury. See Perjury.

THREATS.

It is a misdemeanor at common law to send a threatening letter as directly tending to a breach of the peace, be the object and nature of the threat what it may. For Statute law, see Consolidated Statutes, Cap. 92, s. 7; see also Accusing.

TREASON.

The name of treason is applied to the highest crime against the faith and allegiance due by a subject which can be committed. Thus the murder of a

* Query. What effect has Cap. 99, s. 64 of the Consolidated Statutes, on such a case.

master or husband who is lord over his household was formerly petty treason, and the same crime of an utter casting off of duty to the sovereign received by reason of its "bad eminence" the prefix of high. Inasmuch as this crime of petty treason is now murder only, (Consolidated Statutes, Cap. 91, s. 1,) it is simply of high treason that we have to treat. At the common law this crime was very restricted being almost entirely confined to attempts against the person of the monarch, it appears also it might be proved by one witness and circumstances. It has been extended by the Legislature, and in remote times was subjected to some very arbitrary constructions. Coining was at one time treason, but the capital execution was milder in regard at least to male coiners than that of other traitors, they were drawn and hanged only. Forging the great seal is high treason with judgment accordingly, altering the great seal though treason is not capital being a matter for transportation. We now come to high treason as it is usually understood not as a crime against the mere prerogatives, appanages or impress of royalty as the above mentioned forgery or as (now repealed) in regard to coining but as directly or constructively, against the Queen herself, her person, state and government. Of this crime the chiefest guilt is compassing or imagining the Queen's death, and this includes levying war directly against her or conspiring to levy war against her or to dethrone her or oblige her to change the measures of the government or adhering to her enemies or inciting foreigners to invade the realm, all which are within the intent and compass of contriving her death and may be so laid or laid as distinct treasons at will. The intending and imaging that is desiring to bring about the Queen's death is itself treason, but inasmuch as the imagination of the heart cannot be known except by actions, and words alone are not such proof of a purpose as should deprive any man of life or member, it is law, that every treason must be proved by one or more overt acts and all under statute at least (and we shall say no more about common law treason, the mere mention of which is sufficient as for practical purposes it has been long superseded) must be proved by not less than two good witnesses of equal credit. It is a good ancient maxim that "bare words may make a heretic but never a traitor" but then they must be indeed *bare* words. For *qui facit per alium facit per se*, he who counsels, instigates or abets, acts, and in treason all are principals, and though no action follow the counsel yet the counsel itself sufficiently shews the purpose and imagination of the heart and is an overt act. So of writings, *scribere est agere*, and words which spoken are but sedition at the most, if written may be treason, and in this species of treason it is a good rule that all words persuading to an overt act of treason, are treason whether the act be committed or no. It is sufficient if the substance of the words whether written or spoken be set forth, if the same be laid as overt acts for the whole detail of the evidence need in no case be set forth, it is sufficient that the charge be reduced to a reasonable certainty so that the Defendant may know what he is called on to answer. If the treasonable character of the words or writings seem manifest it is for the defendant to explain (if he can and will) that the intent was different from that stated or that words seemingly treasonable may have been used in such a conjunction with other words as would explain the meaning and render it innocent, but he is not necessarily called on to do so, it is for the crown to prove its case. As for example a portion of a book might have been so selected that taken apart it would indeed seem treasonable but the argument being followed to the end of the book the intent of the author would appear on the whole other than traitorous. So words may be laid in the indictment to explain acts, as an act seemingly innocent in itself may be shewn to be traitorous by words used by the party at the time of the doing of it. Any number of overt acts may be set forth, but if one be proved it will maintain the indictment. The time at which the overt act is alleged to have been committed shall be at any

time within three years within the finding of the indictment. As to place, the act stated in the indictment must be proved to have been committed within the venue of the indictment but other acts of the treason tending to prove the overt act stated though committed out of the venue may be in evidence. Whether the overt act laid is a sufficient overt act of the treason laid in the indictment is matter of law for the court to determine. It is to be observed that no overt act amounting to a distinct independent charge is to be admitted in evidence if it be not laid in the indictment unless it tend directly to prove the overt act laid in the indictment. The proof of the treasonable intent of the act lies upon the Crown's part. If a conspiracy be the overt act laid, the acts of any conspirators may be given in evidence against all of them. In this case it is first necessary to prove the conspiracy next to connect the defendant with it, and then if any act done by another is to be proved against the defendant, you must shew that such person was a member of the same conspiracy and the act was done in furtherance of the common design. Writings are not an overt act unless published, yet if they tend to prove an overt act laid they may be given in evidence though never published, and though not found till after the apprehension of the defendant. Imprisoning or seeking to imprison is a direct compassing for it is said the " the prisons of princes are not far from their graves" and the same maxim seems to apply to every duress or force put upon the sovereign with intent to restrain her person or coerce her intentions, make her put away her ministers or the like but not to a mere assault or common assault and battery, which at common law seemed not to change its character and has been made punishable by seven years transportation, or imprisonment with whipping at the option of the court in the present reign. The prisoner is entitled to have a copy of the indictment with a list of the witnesses and of the jury with their names, occupations and places of abode delivered to him ten full days before the trial. Likewise his peremptory challenges are 35. If the delivery of the lists and copy has not been truly made according to law the prisoner may object *before pleading* and if the objection be found well grounded the trial shall be postponed and a proper delivery made. Levying war against the Queen is of two kinds. The one direct the other constructive. Of the first we have already treated as a compassing of the Queen's death and every act of hostility and in some cases acts of omission such as not defending a post against rebels, allowing a castle or fort which ought to have been defended to fall into the power of rebels on the like are overt acts of this kind of treason which may be laid either substantively as a specific treason or as a compassing; but in every case of treason the overt act or acts stated in the indictment must be proved and it is to this (or these) and not to the principal treason that the evidence must apply for it is to the overt act or acts that the prisoner must apply his defence. Constructive treason is war levied for the purpose of effecting innovations of a public and general nature by armed force as for the purpose of attempting by force to obtain the repeal of a statute or to obtain the redress of any public grievance real or pretended as an insurrection for the purpose of throwing down all inclosures, pulling down all bawdy houses, opening all prisons, expelling all strangers, enhancing the price of wages generally or the like. But if the objects be less general than these it will not amount to treason however criminal the conduct of the parties engaging in the riot or other disturbance may be. So in this kind of constructive treason, there must be a war actually levied to complete the offence, a mere conspiracy to do so will not be treason but a misdemeanor only; and only those persons who aid or assist in doing the acts which form the constructive treason are traitors, the others are rioters only. This is different from the law in cases of a direct war against the Queen, in that case all who assemble and march with the rebels are guilty of treason whether they knew the purpose of their assembly or no and whether they aided in other acts or no. Constructive levying of war is not a

compassing of the Queen's death and the indictment should charge the the defendant (or defendants) with it as a substantive, specific and distinct high treason. The number of traitors assembled is not material to the offence of levying war either directly or constructively, nor is the actual fighting necessary, enlisting and marching will be sufficient. After an action the war is said to be *bellum percussum*, before it *bellum levatum*, this distinction is not necessary to make out the treason, but there must be an insurrection for general objects accompanied by force, in fact an actual levying. In treason by adhering to the Queen's enemies, the proof must be as in other cases by an overt act. The Gazette containing the proclamation may be given in evidence to prove the persons adhered to were enemies, or public notoriety will be sufficient evidence of it, and whether they are enemies or not is a question of fact for the jury. An actual adherence must be proved in this as well as in levying war, a mere conspiracy to commit the treason will not support the count or indictment. Such conspiracy might be laid as compassing of the Queen's death, and under *that* description high treason. But if you can prove such a conspiracy and connect the defendant with it, and prove an act done by any one of the conspirators in furtherance of the general design, if it tend to prove any of the overt acts laid in the indictment, you may give it in evidence, for the act of one is the act of all. The punishment of high treason is that the traitor be drawn or dragged to the place of execution, (a sledge or hurdle is allowed by custom for the sake of humanity) to be hanged, but not until dead, to have his privates cut off and burned before his face, and be disembowelled while yet living, (which is still the sentence though modern enlightenment forbids its execution,) and to have his head cut off and his body divided into quarters to be at the Queen's disposal, and his blood is corrupted so that none can inherit from him, and all that he has is lost by him to the Crown.

These severities are excused or accounted for by several reasons. As that pride being the parent or forerunner of rebellion, the traitor is dragged through the mud that his pride may be brought low, that his body is divided in four to prove that this treason is scattered to the four winds, &c., &c. All these particulars or any of them may be remitted, and despite the acknowledged principle that the Queen cannot alter the death prescribed by the law, yet hanging to death has been inflicted without complaint or inconvenience,* and Peers and some other great persons have had all remitted save beheading. Formerly women were drawn and burnt for treason ; but the burning of women in all cases has been done away with, and it is not likely that any woman will suffer capital execution for this crime. I will conclude by remarking that in treason generally it is a good defence that the accused was compelled to join and continue with the rebels *pro timore mortis*, and it is probable that compulsion would be a good defence for any treason short of killing or attempting to kill the Queen, or even killing any loyal subject which I except as the fear of death will not excuse the breach of the duty of a neighbor in killing an innocent person still less could it excuse the breach of the duty of a subject in killing his Prince, or the perpetration of a murder aggravated by treason. Where words of inducement are laid as an act proof of the act intended may be given in evidence fully to explain the words. In adhering to the Queen's enemies, the sending of any intelligence likely to prove useful to them be it what it may is treason. Joining the enemy's forces is adhering to them though no act of hostility be done, and so is sending them arms or munitions, though they never reach them. Joining the enemy against the Queen's allies is treason to the Queen. The Queen's enemies are necessarily foreigners, the subjects of a state at war with Her Majesty.

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* This of course is technically meant, as I presume most men find hanging inconvenient.

The mere issue of letters of marque does not suffice to create this state of war, which may nevertheless exist without having been solemnly proclaimed. Pirates and rebels are not intended by the words the Queen's enemies. But inviting foreigners to invade the realm is treason as a compassing of the Queen's death, whether they be enemies or no, and if enemies it is also a sufficient adherence to them. Misprision of treason has been treated under its proper title.*

PRÆMUNIRE.

Præmunire, so called from some words used in the ancient writ for its punishment, is the highest of misdemeanors and occupies to other misdemeanors the position treason occupies to all felonies. It is a crime which lies peculiarly for offences against the independence of the English Crown, and many offences are *præmunire* which cannot be committed in Canada or are now wholly out of date and unlikely ever to be prosecuted for any where. It is however worth noticing that a discourse which unadvisedly or loosely uttered is sedition, openly and advisedly spoken may be *præmunire*. Such as denying the Queen's title in a set formal public speech. Punishment, perpetual imprisonment and the convict attainted.

SEDITION.—This crime is a misdemeanor. Words and writing not amounting to overt acts of treason but exceeding the temperate, decent and respectful discussion of public measures, and being calculated to lessen the Queen in the esteem of her subjects, or weaken the Government, or cause jealousies between herself and her people, are seditious. As for Seditious Writings, see Libel. Cursing the Queen, wishing her ill, and denying her right to the throne in common unadvised discourse, all these sorts of speech are sedition, and punishable by fine and imprisonment. To support an indictment, the words or such of them as will amount to sedition must be set out with certainty. Any variance in substance will be fatal.

For tumults and the like connected with politics they fall under the same head as the like offences disconnected from politics and so of conspiracy, combinations, unlawful oaths and assemblies, assuming disguises and the like, if not attended with circumstances amounting to treason, they are to be considered under their proper heads as their possible connection with politics, (if not traitorous,) will not materially affect their nature or the incidents belonging to their prosecution; however it might influence a judge, as to the amount of punishment to be dealt out to their perpetrators.

TREES. See Roots.

UNNATURAL OFFENCES.—In these crimes as in rape penetration is sufficient to complete the capital felony, and there is not a doubt that the slightest penetration will suffice. Assault with intent, &c., will be prosecuted and punished in the same way as in other cases of felonious crime. Attempts, &c., will be indictable. There is no need to pursue this subject further than to observe that it appears a woman may be a subject of it, that penetration by the mouth of a child is an assault only, that the patient if over fourteen and consenting is a capital felon equally with the agent, both are principals, that a bird does not appear to be a subject, and where the patient is not known there can be no conviction for assault. Further where violence is used, killing the unnatural ravisher is justifiable.

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* See Consolidated Statutes, Cap. 102, ss. 11 and 55; Cap. 90, s. 1. Imperial Statutes, 25 Ed. 3, c. 2,—35 H. 8, c. 2,—5 & 6 Ed. 6, c. 11,—1 & 2 Ph. & M. c. 10,—7 W. 3, c. 3. I think I may safely affirm these Statutes are the living law of Canada in all cases of High Treason, and under them should that crime be tried.

UNLAWFUL OATHS. See Oaths.

UTTERING. See Coin and Forgery.

VEGETABLES. See Roots.

WIFE.—A wife may harbor her husband in treason and felony. She cannot be a witness for him nor against him, except for a wrong to herself. In conspiracy she is no witness for or against his associates, and the same seems to apply generally to conjoint offences where the defendants are prosecuted collectively.

WOUNDING—Stabbing, Cutting and Wounding with intent to murder, to maim, to disfigure, disable, or to do some grievous bodily harm, or resist, or prevent a lawful apprehension, or detention or to rob with an instrument is felony by statute, but the wounding may be prosecuted as a misdemeanor under a particular statute. If prosecuted as an assault, assault and battery, or aggravated assault, the common law misdemeanor would merge into felony on proof of a wounding, and should be prosecuted as such. Under a late Act a wounding though serious may be tried summarily according to certain provisions laid down in the Act itself, *see* Consolidated Statutes, cap. 105. A felonious wound must be a complete severance of the continuity of the skin, it matters not by what description of weapon, except as evidence of the prisoners intent. Cutting and stabbing must mean incised wounds, "stab," imports a puncture with a pointed weapon, the word "cut," an incision with an edged weapon, but the word "wound," includes these and other injuries also; provided the outer and inner skin be entirely penetrated, severed or broken. If this be done with a weapon of war or slaughter, the intent may be presumed but if by another kind the mode of using it or some other circumstance will be needed to shew the intent. The fact of stabbing or cutting will shew an intent to do grievous bodily harm, and in general a wound with an instrument calculated to inflict great bodily injury may be presumed to have been given with the intent to do some grievous bodily harm even if the wound be not dangerous or severe. As to the other intents they are not so easily proved and though the locality of the wound is a strong presumption of the intent it may be rebutted by evidence and no kind or amount of injury even the completion of that supposed to be the intent laid if the intent be different will support the indictment. As killing may not be murder but manslaughter from the absence of the intent to murder in the fatal assault so an actual maiming if no maim were meant will not support an indictment for intent to maim. The locality of the wound is important but not conclusive as to the intent and so conversely a wounding in other parts of the body may suffice to support the intent laid as should one trying to disfigure miss the face and wound the hand of the prosecutor who is shielding his face with his hand it is a wounding with intent to disfigure. A maim or mayhem is such a hurt as makes a man less able to defend himself in fighting or annoy his adversary as to cut off a limb or a finger to put out an eye or to strike out a foretooth. Mayhem at common law or maiming which is a misdemeanor may be done without a weapon and any assault ending in mayhem is mayhem at common law, unlawful violence being a sufficient intent. Under the statute treating of wounds and grievous injuries to the person by indictment as misdemeanors the use of a weapon is not essential, and it is the usage to employ that statute in place of the common law for it may send the prisoner to Kingston which the other cannot, and is otherwise convenient. A disfiguring is such an act as cutting off or slitting a man's nose, ears or lips or otherwise destroying the appearance of his face. Cutting out a man's tongue is

felony by a very ancient Statute and castrating him is a maiming or mayhem formerly felony death, by common law, but at present not capital.

DISABLING is a word applied in the law to such an injury as inflicts a permanent not mere temporary disability. It may be taken for permanent hurt which may or may not be a mayhem a grievous bodily harm of a permanent character. A man may be acquitted for any of these felonies and found guilty of an assault. Should there be two intents one may be included in the other as to murder by means necessarily including a disfigurement, resist process by attempting to murder the officer to his grievous bodily hurt and in such cases the indictment may allege either intent, but one of the above intents must be proved as laid in the bill of indictment or it will not sustain a conviction for the felony. There are other aggravated outrages against the person and such attempts against life, poisoning victual, shooting &c., for which see the Statutes.* An assault with intent to murder is a misdemeanor at common law and may be so prosecuted where the statutes fail to reach the case.

NOTE.—In the foregoing work the writer has generally given a short condensed sketch of the maxims of the Common Law as stated by the best known essayists, and simply referred the reader to the Imperial and Provincial Statutes on the subject without much regard as to whether the latter concur with, modify or control the operation of the principles of the Common Law. It would be therefore well to treat this short work to some extent as a guide to the Consolidated Statutes and use the two together.

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* See Consolidated Statutes, Cap. 91, ss. 5, 6, 7, 8,—*Idem*, Cap. 105, ss. 1, 15.

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